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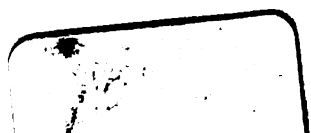
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# LAW TIMES REPORTS

OF

ALL THE CASES ARGUED AND DETERMINED

IN ALL THE

COURTS OF LAW AND EQUITY, IN BANKRUPTCY, INSOLVENCY,  
NISI PRIUS, THE CRIMINAL COURTS, AND IN IRELAND,

FROM APRIL TO OCTOBER, 1851.

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KNIGHT BRUCE'S COURT.

KNIGHT BRUCE'S COURT.

## THE REPORTS.

## Equity Courts.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.Reported by Gao. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

Friday, Feb. 14.

MORRISON v. HOPPE.

Will—Construction—Property—Real estate.

Real estate held to be included in the word "property," although the testator referred to the income arising from his property under the terms "dividends" and "interest."

Samuel Kirkman, by his will, dated the 19th day of April, 1820, after appointing executors and trustees of his will, proceeded as follows:—"It is my will that my dear wife have for her own use during her natural life 400l. per annum, arising from stock in the 5 and 4 per cents standing in my name, and at her death to cease, and the principal to be added to my other property, and to be divided equally, share and share alike, to each of my three daughters, Mrs. Martha King, Mrs. George Biggs, and Mrs. E. Toswill; and I give to each of them 60l. per annum, arising out of the stock in the funds, the interest arising out of all my property. Now, I wish it to be so understood, that the property so left to my daughters be secured to them, that their husbands shall have no power whatever to control, or constrain, or sell, or mortgage, any part of the property left to each of my daughters, or apply it to any other use; but that the executors see the dividends received by them and paid to my daughters regularly. And in case of the death of either of them, and at the death of each of their husbands, then to be left in trust for their children, and, at the age of twenty-one, to have share and share alike if more than one child be living. And I wish to give to the Missionary Society, for spreading the Gospel at home in the villages round about London, 10l.; and also 10l. to the Bible Society, and 5l. to the Society for the Relief of the Widows of Ministers, held at Spa-fields Chapel, and 5l. to the school of Spa-fields Chapel. As there will be a considerable residue, viz. canal shares, of the annuities of Mr. J. Lidley and Mr. Gascoigne, and the share stock from the Equitable and Amicable Society, which, and all other remaining property, to be consolidated and laid out in the public funds, or in the most secure and profitable way possible, to increase the property; and at the death of Mrs. Kirkman, to be divided, share and share alike, to each of my daughters, and at their death to each surviving child or children, share and share alike, to be so secured as they shall not be at liberty to dispose of it, or to alienate the property from them or their children. Mind this! that their husbands shall have no power to dispose of the property left to each of my daughters, Mrs. M. King, Mrs. Selina G. Biggs, and Mrs. Elizabeth Toswill, either by annuity, mortgage, or anything else; the interest to be received by them through their trustees."

The question arising in this suit was, whether some real estate, of which the testator was seized at the time of making his will, passed under the will, or descended to the testator's co-heiresses at law, as undisposed of by the will.

Wood, Cairns, Frith, Malins, and Toulmin, for parties interested under the will, contended that the real estate was included in the terms used by the testator, and cited *Doe dem. Wall v. Langlands*, 14 East, 378; *Doe dem. Morgan v. Morgan*, 6 Barn. & Cres. 512; *Saumarez v. Saumarez*, 4 Myl. & Cr. 331; *The Midland Counties Railway Company v. Owen*, 1 Coll. 74; *Ford v. Ford*, 6 Hare, 486; and *Warner v. Warner*, 16 Law. T. 320.

R. Palmer and Selwyn, for the co-heiresses of the testator, cited *Doe dem. Bunny v. Rout*, 7 Taunt. 79; and *Sanderson v. Dobson*, 1 Ex. 141.

The Attorney-General and Foote, for the trustees. Brett, for another party.

The VICE-CHANCELLOR said he should have sent this case to a court of law, if either of the parties had desired it. Neither of the parties, however, had desired it, but, on the contrary, they had all agreed in requesting him to decide it; and it was not necessary that he should decline doing so. The question was, whether the word "property," as it occurred no less than eight times in the will, or, as used in any one or more of those times, was to be construed in its ordinary, correct, and proper sense, or otherwise. The burden laid on those who said that it was not to be construed in the ordinary, correct, and proper sense, to shew that it was not. In his Honour's opinion those parties had not discharged themselves of that burden. The only argument he thought colourable, ably as the case had been argued on both sides, was, that the testator had expressed himself here and there in the words "dividends" and "interest," when he meant income. That, how-

ever, was not sufficient in his opinion to warrant the Court to depart from the ordinary meaning of the words used, and particularly when it was impossible for any person reading this will to suppose that the testator intended to die intestate as to any portion of his property.

LANE v. GREEN.

Will—Construction.

A testator gave 100l. apiece to the four sons of A. B. by her former husband. The only issue of A. B.'s former marriage was three sons and a daughter.

Held, that these three sons and a daughter took 400l.

Henry Wright, the testator in this cause, by his will dated the 30th of June, 1846, gave "100l. apiece to the four sons of Amy Hazell, wife of Hazell, of Chorley, near Warrington, by her former husband." The testator died on the 1st of July, 1846. From the Master's report in the cause it appeared that Amy Hazell was married but once before the marriage to Hazell, and that of the first marriage the issue was three sons and one daughter, and that these children were living at the date of the testator's will and death. The Master reported that these three sons and one daughter were the persons intended in the will of the testator by the description of "the four sons, &c." The cause now came on upon further directions.

Wilcock, for the plaintiff.

Headlam and E. G. White, for some of Mrs. Hazell's children, relied upon the case of *Lord Selkirk v. Lord Lake*, 1 Bea. 146.

Bagshawe, Winstanley, Bichner, and Riley appeared for other parties in the cause.

The VICE-CHANCELLOR said that he thought it impossible to say that the testator did not intend to give 400l.; and as there was no dispute as to the parties intended, he thought on this particular will the three sons and daughter of Mrs. Hazell should take the 400l.

Monday, March 24.

Ex parte HIRSCHER, re THE BRIGHTON, LEWES, AND TONBRIDGE WELLS RAILWAY COMPANY.

Joint-Stock Companies Winding-up Acts—

Contributory—Allottee.

An allottee of shares in a company, by the prospectus of which it was stated that power was given to the committee to apply the funds in payment of expenses incurred in its formation, &c., was held, not to be a contributory of the company.

This was a motion on behalf of Mr. Daniel Hirschel, by way of appeal from the decision of Master Horne, whereby Mr. Hirschel had been placed on the list of contributories of the above-named company, in respect of ten shares. The company was provisionally registered in September, 1845, and in the prospectus issued, the following passages occurred:—

"Until an Act of Parliament shall be obtained, the affairs of this company will be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to apply the funds of the company in payment of all the expenses incurred in its formation, and in the preparation of the plans and sections to be submitted to Parliament. Power will be applied for in the Act, and in the meantime is hereby given to the committee of management, as above, to raise any additional capital, to abandon any part of the line, to make branch lines, or enter into any arrangements with any other company or companies, and also to nominate the first directors of the company."

On the 7th of October, 1845, Mr. Hirschel wrote a letter of application for ten shares, in the form required by the company. On the 10th of October, 1845, the allotment committee was appointed, and they met on several occasions, and on the 17th of November ten shares were allotted to Mr. Hirschel, but no deposit was paid by him. It was contested in the Master's office whether Mr. Hirschel ever received the letter of allotment; but on the appeal the fact that he had received it was admitted.

Malins and Southgate appeared in support of the motion, and said that at the time of the allotment the scheme had been virtually abandoned.

The VICE-CHANCELLOR called upon the counsel for the official manager to distinguish the present case from those recently before Lord Cranworth.

Bacon and Daniel for the official manager.—The letter of application for shares was founded on the prospectus, and the latter, therefore, formed part of the contract. As by the terms of the prospectus authority was given to incur expenses, this gentleman, by his application, entered into a contract to bear his proportion of such expenses. He is not now at liberty to say that he is not liable. This case is distinguishable from *Capper's case*, *Maudslay's case*, and *Carmichael's case*. In *Capper's case* the letter of allotment was conditional, that condition was not agreed to, and there was, therefore, no accepted contract. Here there was an acceptance by the receipt of the letter of allotment, sent in pursuance of the

letter of application; and founded on the prospectus. Evidence is here that the applicant saw the prospectus, and he must be assumed to have applied on the footing of that document, which authorises the incurring of expenses of plans and other matters.

With respect to *Maudslay's case*, there was an order to wind up a formed company. It was a company incorporated, holding the certificate of the Board of Trade, and having a deed of settlement, and Messrs. Maudslay were allottees who did not accept shares. Here, however, there is not a formed company in any sense whatever. It was an abortive scheme, and in all other matters different from that of *Maudslay*. Nothing further need be said of *Carmichael's case*, than that it is one of a provincial committee, and not applicable on the present occasion. *Matthiessen's case* governed this, where he was held liable unless there was any fraud. The House of Lords have held that if there be no liability at law, the Winding-up Acts have not the effect of creating a liability, and that is the whole extent of the decision. Counsel also cited and observed on *Parbery's case*, and *Woolmer v. Toby*, 4 Railway Cases, 713.

The VICE-CHANCELLOR during the arguments asked whether the present case was governed by that mysterious case which every one who spoke of or alluded to, whether sincerely or insincerely he could not say, professed not to understand; and at the close observed that where Courts had been contradicting each other for years, this Court could do no otherwise than follow the last decision. As this case if decided in favour of the official manager must directly contravene the principle laid down by Lord Cranworth, a course which his Honour was not in any degree disposed to pursue, he should order the name of the appellant to be removed. The costs must be paid out of the estate.

Tuesday, March 25.

Ex parte CROXTON, re THE OUNDLE UNION BREWING COMPANY.

Joint-Stock Companies Winding-up Acts—Contributory.

The transferor of shares in a company had been placed by the Master on the list of contributories in respect of the shares up to the day of transfer; but, upon appeal, the Court

Held, upon the construction of the deed of settlement, that the transferor was not a contributory.

This was a motion on behalf of Mr. George Croxton, that the decision of the Master (Richards) charged with the winding up of the above-named company made on the 13th day of March instant, whereby the name of the said George Croxton was placed or directed to remain on the list or addenda to the list of proprietors or contributories of the said company, in respect of twenty-five shares of 25l. each, until the 21st day of October, 1842, might be reversed, and that the name of the said George Croxton might be struck out of the list of proprietors or contributories of the said company, or that the said decision might be varied.

The Master inserted the name of George Croxton on the list of contributories, class 1, as a shareholder who had signed the deed and paid on his shares in full in respect of twenty-five shares of 20l. each, as liable in respect of those shares to the 10th October, 1842; and on the same day the Master put the name of Charles Frederick Yorke on the list of contributories, class 4, as a transferee of the same shares as liable from the 10th day of October, 1842.

The company's deed of settlement, dated the 29th day of September, 1836, contained provisions for the transfer of shares and the registration of such transfers, which had been duly complied with upon Mr. Croxton's transferring the shares in question to Mr. Yorke on the 10th of October, 1842. The deed also contained the following clauses:—

"13. That no member of the said company, his, her, or their executors or administrators, shall in any case or event (as between himself, herself, and themselves, and the other members thereof) be answerable or liable for or in respect of any debts, calls, or demands upon the said company, after he, she, or they shall have ceased to be a member or members of, or to have a share or interest in the capital stock of the said company in his, her, or their own right or rights, or by representation, save only and except for and in respect of any sum or sums which he, she, or they shall or may be liable to pay by reason of any forfeiture, penalty, or misconduct under some clause or provision in these presents contained."

"34. That from and immediately after any such transfer or assignment, as last aforesaid, shall be made of any share or shares, the former or last proprietor thereof shall thenceforth be forever acquitted and discharged of and from all covenants, agreements, regulations, obligations, and liabilities whatsoever, under or by virtue of these presents, for or in respect of the share or shares which shall have been by him, or her, or them, so assigned or transferred, save only in respect of any penalty, forfeiture,

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or liability, which shall have been previously incurred by him, her, or them, in regard thereto."

*J. Parker and Hislop Clarke*, in support of the motion, cited *Ex parte Salter*, 14 Jur. 966; and *Sanderson's case*, 3 De G. & Sma. 66.

*Bacon and Rosburgh* for the official manager.

The VICE-CHANCELLOR said he thought, and probably the Master thought, that, independently of the 34th clause, there was no question at all in the case. The language of the deed was clear, independently of that clause. Then upon the construction of the 34th clause, if persons would use such language as was used here, it could not be matter of surprise that different minds should differ in their interpretation of it. It so happened that the interpretation his Honour put upon it was not that which the Master had put upon it. As his Honour read the deed, the 34th clause ought to be construed in accordance with the 13th, and so as not to contradict the 13th. The term "liability," in the 34th clause, he thought, ought to be construed with reference to the 13th clause, and with reference to the words "penalty" and "forfeiture" which preceded it in the 34th clause. He thought, therefore, this gentleman's name could not stand on the list. He did not wonder that there should be a difference of opinion upon words so expressed. The costs must come out of the estate.

Wednesday, March 26.

HOBBY v. COLLINS.

*Fines and Recoveries Act—Married woman—Reversionary interest.*

*Where a married woman is entitled to a portion to be raised out of real estate at a future period, a deed executed by her and her husband and the other parties entitled to the estate, and acknowledged by her under the 3 & 4 Wm. 4, c. 74, will not bar her interest.*

*Semble, that her interest could not have been barred by fine before the statute.*

By indentures dated respectively the 2nd and 3rd days of March, 1827, certain real estate in the parish of Byford, in the county of Hereford, and elsewhere, was settled and assured to the use of Thomas Eckley and William Hobby, their heirs and assigns, upon trust as to the premises situate at Byford, by sale, mortgage, demise, lease, or other disposition, of a sufficient part or parts thereof, or by all or any one or more of the said means, to raise any sum or sums of money, for the purpose of paying the costs, charges, and expenses, of and incident to preparing and executing the said indenture, and levying the fine therein mentioned, and the costs incident to the execution of the said trusts, and next the mortgage and interest thereon therein mentioned, and subject to the said trusts upon trust out of the rents, issues, and annual profits of the said premises in the parish of Byford, to pay and keep down the interest on the said mortgage, and the interest on any mortgage to be created under the trusts aforesaid, and subject thereto, to pay and permit Jane Hobby, the wife of Richard Hobby the elder, since deceased, to receive and take the rents, issues, and annual profits of the same premises during her natural life for her separate use, without power of anticipation; and after her decease, then by mortgage, sale, demise, lease, or other disposition of a sufficient part or parts of the same hereditaments and premises, or by all the said ways and means, to levy and raise, or borrow, and take up at interest, any sum or sums of money which the trustees or trustee might think proper for the purpose of paying, and accordingly to pay when and so soon as Thomas Bythell Hobby and Richard Hobby should both attain the age of twenty-one years, or die, or one of them should attain the said age and the other of them die under that age, the sum of 250*l.* to Mary Ann Hobby (afterwards Mary Ann Hughes), her executors or administrators, subject to a gift over to Sarah Ann Hobby in case the said Mary Ann Hughes should die under the age of twenty-one years without having been married, and the sum of 250*l.* to the said Sarah Ann Hobby, her executors or administrators, subject to a gift over to Mary Ann Hughes, &c., and in case there should thereafter be any children of the said Jane Hobby by her said husband, then also the sum of 200*l.* for such future child or children, &c. and subject to the trusts aforesaid, upon trust as to part of the said hereditaments in the parish of Byford, for the said Richard Hobby, his heirs and assigns, and as to the other parts of the said hereditaments, for Thomas Bythell Hobby. And by the said indenture, similar trusts were declared as to the other hereditaments, and the trustees were empowered to decrease the amount of the daughters' portions, and also, at the request of Jane Hobby, during her life, to sell or convey in exchange the said hereditaments, and they were directed to lay out the money to arise by such sale in the purchase of other lands to be vested in the trustees upon the trusts to which the lands sold were then subject. The trustees, on the 1st of February, 1832, sold a large portion of the lands for 3,050*l.* and after discharging the mortgage debt existing on the said

lands, the sum of 1,250*l.* the residue of the purchase-money was paid by the trustees to Francis Collins, the attorney of Richard Hobby, the elder, and Jane Hobby, upon his undertaking to place out the same on security. This sum was not invested by Collins, and by an order made in this cause on the 28th of February, 1837, Collins was ordered to pay into court 500*l.* admitted by him to be in his possession, and this sum having been paid in by him, was laid out in the purchase of 550*l.* 19*s.* 4*d.* Bank Three per Cent. Annuities. In February, 1840, Collins became bankrupt. By a decree made on the 23rd of November, 1841, Collins and the two trustees were declared jointly and severally liable for the 1,250*l.* and certain inquiries were directed to be made by the Master. Richard Hobby, the elder, died on the 28th of January, 1842, without having any child born subsequently to the date of the settlement. Richard Hobby, Thomas Bythell Hobby, Mary Ann Hughes, and Sarah Ann Hobby, the only children who lived to attain the age of twenty-one years, attained that age in or previously to 1843. Sarah Ann Hobby died in March, 1843, and her mother, Jane Hobby, took out letters of administration of her estate. The remainder of the hereditaments were sold in January 1845, and the proceeds were divided between Jane Hobby and her children in certain agreed proportions. On the 14th of June, 1845, Mary Ann Hughes was married to Edwin Hughes. There being no probability of obtaining any further sum from Collins's estate, or from either of the trustees, one of whom had taken the benefit of the Insolvent Debtors Act, Jane Hobby, Richard Hobby, Thomas Bythell Hobby, Edwin Hughes, and Mary Ann his wife, by an indenture dated the 12th day of February, 1851, and duly acknowledged by Mary Ann Hughes, in pursuance of the Act for the abolition of fines and recoveries, &c. respectively assigned, released, and disposed of the sum of 728*l.* 11*s.* 11*d.* Bank Three per Cent. Annuities (to which sum the 550*l.* 19*s.* 4*d.* had by subsequent investments been increased), and 95*l.* 9*s.* 6*d.* cash to Robert Higgins and John Philpotts, upon trust, after payment of costs, to divide the same in certain proportions. A petition was now presented by Jane Hobby, the tenant for life, Richard Hobby, Thomas Bythell Hobby, Edwin Hughes, and Mary Ann his wife, Robert Higgins and John Philpotts, praying that after taxation and payment of costs, the residue of the sum of 728*l.* 11*s.* 11*d.* stock might be paid to R. Higgins and J. Philpotts, as such trustees, and that all further proceedings in the causes might be stayed.

*Winstanley*, in support of the petition, said that Mrs. Hughes could dispose of her reversionary interest in this sum, it being subject to be laid out in land. He cited *Goodrich v. Shadbolt*, Prec. in Ch. 333; *May v. Roper*, 4 Sim. 360; *Forbes v. Adams*, 9 Sim. 462; and the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), ss. 1 and 77.

The VICE-CHANCELLOR said that it might be assumed that the statute did not narrow the right; that is, that a married woman might bar or convey in all cases in which she could bar or convey by fine before the statute.

*Winstanley* contended that by a fine a married woman could bar a reversionary interest in land, but if not, the statute of 3 & 4 Wm. 4, c. 74, had extended the power, for, by the 77th section, she was enabled to dispose of any estate in any lands, or any moneys subject to be invested in the purchase of lands. He referred also to the 8 & 9 Vict. c. 106, ss. 6 and 7.

The VICE-CHANCELLOR said, that as he understood it, this was a sum charged on land, in which the wife had a reversionary interest, and he considered that she was unable to deal with it. He must therefore refuse the prayer of the petition. His Honour added that the point was not new to him; he had often considered it, and was clearly of that opinion.

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Reported by W. H. BARNES, Esq. of Lincoln's Inn, Barrister-at-Law.

Jan. 31, Feb. 23, 25, 27, and March 22.

SOUTH STAFFORDSHIRE RAILWAY COMPANY

v. HALL.

*Injurious affected—Lands Clauses Consolidation Act, 1845—Injunction.*

*A railway company, after their works had been completed, received a notice from owners in fee of land in the neighbourhood of the railway, that by the execution of the works, certain lands were damaged and injuriously affected, and demanded compensation to the amount of 550*l.* and that unless such sum was paid by the company within twenty-one days (according to the terms of the 68th section of the Lands Clauses Consolidation Act), the company were required to summon a jury to assess the amount of compensation. The company immediately filed their bill for an injunction to restrain the landowners from further*

*proceedings under their notice—denying that such lands were injuriously affected. An ex parte injunction had been granted. On motion to dissolve the injunction, it was*

*Held, that whether the landowner was or was not entitled to compensation was a purely legal question, and that there was nothing in the notice of the landowners to preclude them from giving evidence before a jury of their right to compensation.*

This was a motion to dissolve an *ex parte* injunction which had been obtained by the railway company to restrain the defendants, Hall, Robinson, and Knight, from taking any proceedings against the company under a notice hereafter mentioned.

The bill was filed by the railway company, which, after setting forth the principal parts of the Act of Parliament under which the railway company was constituted and regulated, stated that, by the 68th section of the Lands Clauses Consolidation Act, it was enacted "that if any party shall be entitled to any compensation in respect of any lands or any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of the Act now stating, or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.* such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if the party entitled, as aforesaid, desire to have such compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice, issue their warrant to the sheriff, to summon a jury for settling same in manner in the now stating Act provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid, the amount of the compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." That they proceeded to make and construct the railway and works as by said Acts authorised to be made and constructed according to same Acts of Parliament and pursuant to the provisions in that behalf therein contained. That by the plans and sections so deposited by plaintiffs, as stated in said first Act of Parliament, it appeared that the railway thereby authorised to be made and constructed was intended to cross a certain road or way leading from the village of Streetbay, situate in the parishes of St. Michael, Lichfield, and Whittington, or one of them, in the county of Stafford, to a certain farm-house and lands called Hill Cottage Farm, situate in said several parishes of St. Michael, Lichfield, and Whittington, respectively in said county, on a level and nearly at right angles. That plaintiffs had made said railway across such road or way pursuant to said Act and within the limits of deviation shewn by the deposited plan therein referred to, and that said railway as actually made and constructed by plaintiffs and its situation with reference to said road or way and said village, and said farm-house and lands, called Hill Cottage Farm respectively, was shewn upon the plan to the bill annexed, and particularly described. That defendants, Hall, Robinson, and Knight, therein particularly described, were interested in, and they allege that they are the owners in fee according to the custom of the manor of London, in the county of Stafford aforesaid, of said farm-house and lands, called Hill Cottage Farm with their appurtenances aforesaid. That the distance from said Hill Cottage Farm-house to the boundary line on the south side of said railway as constructed at the nearest point was about 710 feet; and that no part of said farm-house and lands, called Hill Cottage Farm, or of the appurtenances thereto belonging, hath been taken or used, or was required for the purpose of the said railway and works by said first-mentioned Act, or by either of the other of plaintiffs' Acts of Parliament, authorised to be constructed, or for the execution of such works, or, in fact, and that no part of such farm-house and lands had been or was injuriously affected by the construction of the said railway and works, or by the execution of the said works, according to the true intent and meaning of said Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, or either of them; and said Hall, Robinson, and Knight were not, nor were or was any or either of them entitled to any compensation in respect of said farm-house and lands called Hill Cottage Farm, or of their or his interest therein. But nevertheless said Hall, Robinson, and Knight, on 12th December, 1850, served or caused to be served on plaintiffs a notice in writing dated the 2nd of same month, which notice was in the following words:—"To the South Staffordshire Railway Company.—Whereas, in exercise of the powers con-

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tained in the Acts of Parliament relating to the South Staffordshire Railway Company, you, the said company, have by execution of the works of and belonging to the said railway damaged and injuriously affected certain lands called Hill Cottage Farm, situate in the parishes of Whittington and St. Michael, both in the county of Stafford. Now we, the undersigned John Hall, William Robinson, and Joseph Knight, being the owners in fee, according to the custom of the manor of Longdon, in the county of Stafford, of the said lands (which are copyhold), do hereby, in pursuance of the statutes in that case made and provided, give you notice that we require you to pay us compensation in respect of the said lands, which you have damaged and injuriously affected as aforesaid, and in respect of our interest therein, and that the amount of our claim for compensation, by reason of the premises, is 550*l*. And, further, take notice, that unless you, the said company, are willing to pay to us the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt by you of this notice, then it is our desire that the amount of the compensation to be paid to us by you, by reason of your having damaged and injuriously affected the said lands as aforesaid, shall be settled by a special jury, according to the provisions contained in the Act or Acts of Parliament in that case made and provided; and if you, the said company, fail to pay the said sum of 550*l*. or to enter into such agreement as aforesaid, then and in that case we do hereby request and require you, within twenty-one days after the receipt of this notice, to issue your warrant to the sheriff of Staffordshire, or other proper officer, to summon a special jury for settling the amount of the said compensation as is in the said Act or Acts directed and provided. Witness our hands," &c. That said notice was accompanied by a letter, dated 12th December, 1850, and written and signed by George Birch, jun. the solicitor of said Hall, Robinson, and Knight, and addressed to the secretary of the South Staffordshire Railway Company as follows:—"Lichfield, 12th December, 1850. Sir—Booth's trustees and the South Staffordshire Railway Company—Herewith you will receive notice of the amount of my clients' claim for damage sustained by the South Staffordshire Railway Company having crossed the only approach to their farm on the level. This claim is made without prejudice to and independently of my clients' right to have the crossing made as convenient as a level crossing is capable of being made. The chief objections to the crossing in its present state are, that the cottage where the gatekeeper resides is too far distant from the gate, and commands a very indifferent view of the line and the approach of the trains, and that with the present gates, which, when opened, do not extend across the line, the driving of cattle and other stock to or from the farm is attended with great risk both to the occupier and the railway company. Your obedient servant (signed), George Birch, jun. To the Secretary of the South Staffordshire Railway Company."

The bill then expressly charged that no damage or injury whatever had been done by the construction of the railway and works to defendants' said lands or right or easement appurtenant thereto—and that a jury summoned as aforesaid would have no power or authority to determine or entertain the preliminary question, whether said defendants were or were not entitled to any compensation in respect of the premises. The bill then prayed for an injunction to restrain the defendants from further proceedings under the notice, or from taking any proceedings under the Lands Clauses Consolidation Act for settling the amount of compensation. Affidavits had been filed in support of these statements in the bill upon which the *ex parte* injunction had been obtained. Affidavits had also been filed on the part of the defendants, which raised the issue as to whether damage or injury to the defendants' land had been done, and as to the amount of compensation.

*Jas. Parker and Willcock*, in support of the motion to dissolve the injunction, contended that there was a remedy at law. If the defendants had received no damage, the jury might find that there was no damage. That the question ought by some means to be put in a course of adjudication before a Common Law tribunal, and that the order for the injunction ought to have been accompanied by some direction to that effect. That there was a Common Law right, and a Court of Equity had no power to take away a legal right, and that the common injunction to stay any execution on the judgment would have answered all the purposes of justice.

*Bethell and Speed*, in support of the injunction, contended that the principle on which equity interferes to restrain parties from improperly exercising a Common Law right was clearly laid down in *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 154, and that the Lord Chancellor Cottenham had decided *Smith's* case on that principle. They

observed that here the railway had been long completed, and that no application had been made by the defendants for compensation during the progress of the works. That they had stood by and not complained of the company till the railway was completed, and that thereby they had been guilty of *laches*. That the defendants had not attempted to shew that the company had done anything that was wrong or beyond the powers given them by their Act of Parliament. That this case was identical with *Smith's* case, and was distinguishable from *Gatlike's* case, in which the present Lord Chancellor had given a contrary decision, as that was a case where the works were in progress, and not like these, which had been completed.

*Parker*, in reply, said that the Railway Acts must be construed strictly against companies, and liberally in favour of an individual. That the sheriff was the party intrusted by the Legislature to determine the question at law as to compensation or not.

The cases cited and commented upon at great length were *Couling v. Great Northern Railway Company*, 14 Jur. 128; *Reg. v. The Eastern Counties Railway Company*, 2 Q.B. Rep. 347; *Reg. v. Lancaster Railway Company*, 6 Q.B. Rep. 159; *Cougil v. London and Blackwall Railway Company*, 5 Mann. & Gr. 219; *Smith v. London and North-Western Railway Company*, 1 Hall & Tw. 364; *S. C. 1 Macn. & G. 216*; *Harman v. Jones*, 1 Cr. & Ph. 299; *East and West India Dock Company v. Gatlike*, MS. judgment before Lord Truro; *Pimm v. Wilson*, 2 Ph. 653; *Thicknesse v. Lancaster Railway Company*, 4 Mees. & W. 472, 492; *Hutton v. South-Western Railway Company*, 7 Hare, 279; *East and West India Dock Company v. Patterson*, 14 Law T. 369; and the several clauses of the Lands Clauses Consolidation Act.

JUDGMENT.

*Saturday, March 22.*—The VICE-CHANCELLOR, after stating the general facts of the case and the nature of the motion, said,—The plaintiffs contended that the defendants' property was not injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act. The injunction had been granted on the authority of the decision of Lord Cottenham in the case of *The London and North-Western Railway Company v. Smith*. That was a decision of the late Lord Chancellor on appeal, and upon the application being made in this case, he (the Vice-Chancellor) had acted upon it without very attentively considering whether, if the question had been originally before him, he should have come to the same conclusion. In the old state of the law before the statute in question, a party claiming compensation for injuries or damage to his property from the exercise of the powers given by Parliament in such cases, applied for a *mandamus* to compel the company to take steps to summon a jury, and upon that application the right of the party to compensation under the Act was judicially determined, and the *mandamus* was issued or refused according to the circumstances. Under the Lands Clauses Consolidation Act, the order of proceeding was changed. A person claiming payment or compensation might fix his own amount, and the company must, in twenty-one days, either pay the amount so fixed, or summon a jury to assess the true amount. If the company summoned the jury, and the amount was assessed, they might leave the person to bring his action for that amount, when the question of his right to any compensation might be tried, or if they declined to summon a jury he might bring his action for the amount, according to his own estimate, and then the right was tried at once. There is no mistaking the grounds upon which Lord Cottenham proceeded in *Smith's* case. After mentioning the supposed inconvenience which might result in the old state of the law, Lord Cottenham proceeded thus:—"So stood the law. Then comes an Act of Parliament, which, for the purpose of correcting that supposed evil, creates a much greater one, by depriving the company of the means of ascertaining the question of right before they go to the sheriff's jury to assess the amount of compensation. That circumstance alone, if it were not within the general jurisdiction of the Court, would be quite sufficient to justify the interposition of this Court, because it would not be just to permit a party to be involved in that sort of litigation without first ascertaining whether the right claimed existed as between the party and the company against whom the claim is made." Now, with the most profound respect for everything that fell from that most eminent judge, he (the Vice-Chancellor) could not agree in that reasoning. The change in the state of the law might be unwise, but it was the Act of the Legislature. The Legislature pointed out the steps which should be taken, and what right had this Court to say that the party should not assert the legal right which the Act gave him. [The Vice-Chancellor then read at length the 68th section.] The case had been likened to the relief given by this Court against penalties; but the cases were not analogous. It was rather making than administering the law to restrain the legal proceeding

in such a case. In this view he was emboldened by the late case of *East and West India Railway Company v. Gatlike*, before the present Lord Chancellor, who had discharged an injunction granted by Vice-Chancellor Wigram, on the authority of the case before Lord Cottenham. He admitted the force of the reasoning in *Gatlike's* case; and the only thing he could venture to dissent from was the existence in principle of the distinction which the present Lord Chancellor had drawn in his judgment between that case and *Smith's* case. I think there is no distinction in the circumstances whether what has been done by a railway company is a public wrong or a private injury. However, whether there was any such distinction or not, there was nothing in the case now before him to exclude the authority of *Gatlike's* case. In that case the defendant made a claim against the company for the sum of 480*l*. as compensation due to him for damage and injury alleged to have been sustained in consequence of the dust and dirt occasioned by the company having damaged his goods, and by reason of his customers having been compelled, by the obstructions occasioned by the company's works, to quit the side of the road on which the defendant's shop was situated and to pass on the opposite side, by reason whereof he alleged, that during several weeks he had sustained great loss in his trade, and had been injuriously affected and injured by the company having stopped up a lane or passage, along which he was entitled to a right of way, to an entrance at the back of his premises. The present Lord Chancellor, in his judgment, says—"If the Legislature has made it the duty of the company to issue the precept to compel payment of the compensation in the event of the plaintiff being found entitled to the performance of that duty, that cannot operate as an admission on the part of the company, who have no discretion after the compensation jury shall have decided that he has sustained damage for which he is entitled to be compensated, the claimant is to enforce payment by a formal proceeding for that purpose,—which used to be by a *mandamus*; and if the jury had no jurisdiction to decide upon the right, it followed that that question of the right might be raised upon the return to the *mandamus*. But since the decision of *Couling v. The London and Blackwall Railway Company*, 5 Mann. and G. 219; and *Williams v. Jones*, 13 Mees. and W. 628, it seems the remedy of the claimant is by action upon the judgment," and he dissolved the injunction granted by Vice-Chancellor Wigram in that case. I think this decision completely in point, and I must dissolve the injunction which I granted upon the authority of *Smith's* case in the present one.

*Injunction dissolved, but without costs.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESON and PAUL FARNELL, Esqrs. Barristers-at-Law.

JAN. 31 and FEB. 22.

*RUMBLELOW v. WHALLEY.*

*Costs—Payment into Court—Rule T. T. 1 Vict.* In an action of debt for work and labour, the defendant pleaded except as to 10*l*. *nunquam indebitatus*; as to the excepted 10*l*. payment of 10*l*. 1*s*. into court; with a further plea of payment as to another and different 10*l*. parcel, &c. The plaintiff took out the 10*l*. paid into court, in satisfaction of the causes of action to which it was pleaded, and joined issue on the two other pleas. The defendant failed upon the plea of the general issue, but succeeded upon the plea of payment, and became entitled to the general costs of the cause: Held, that the plaintiff was entitled to all his costs as to such causes of action in respect of which the money was paid into court, up to the time of the replication to the plea of payment into court, including the costs of such replication.

This was a rule obtained by the plaintiff, calling upon the defendant to shew cause why the Master should not review his taxation of the costs herein. The action was in debt upon a surgeon's bill, with one count only for work and labour done, and goods sold and delivered. The defendant pleaded, 1. (except as to 10*l*. parcel, &c.) *nunquam indebitatus*; 2. As to 10*l*. (other and different parcel, &c. from that before excepted), payment; and, 3. As to the excepted 10*l*. payment into court of 10*l*. 1*s*. in satisfaction of all causes of action in respect of the said sum of 10*l*. and all damages sustained by its non-payment. The plaintiff took issue on the first plea, traversed the payment alleged in the second plea, upon which traverse the defendant joined issue, and, as to the third plea, the plaintiff replied that he accepted and took out of court the money so paid in, in satisfaction of the causes of action in the plea mentioned, and prayed judgment for his costs and charges in that behalf.

At the trial the matter was referred to an arbitrator, who found for the plaintiff as to the first



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issue, viz. that the defendant was indebted to a larger amount than 10*l.* that is to say, to the amount of 20*l.* and as to the second issue he found for the defendant. The Master taxed the defendant all his costs of the action except those incurred in respect of the first issue, and he taxed the plaintiff his costs upon the first issue only. The plaintiff claimed to have also the costs of the cause up to the time of the payment of the money into court; but this claim the Master disallowed, and thereupon the present rule was obtained.

G. R. Clarke shewed cause.

*Prentice* in support of the rule.

The matter is so fully discussed in the judgment of the Court that it is unnecessary to set out the arguments. The Rule T. T. 1 Vict.; *Harrison v. Watt*, 4 D. & L. 519; and *M'Lean v. Phillips*, 7 C.B. 817, were referred to.

## JUDGMENT.

Saturday, Feb. 22.—PATTESON, J. delivered the judgment of the Court.—This was an action for work and labour done, &c. The defendant pleaded, as to all but 10*l.* never indebted; secondly, as to another and different sum of 10*l.* payment; thirdly, as to the 10*l.* excepted in the first plea, payment into court of 10*l.* is. and that he never was indebted to the plaintiff in more than 10*l.* in respect of the said sum of 10*l.* and that the plaintiff had not sustained greater damages than 1*l.* In respect of the non-payment of that 10*l.* the plaintiff replied, joining issue on the plea of never indebted, and traversing the plea of payment; and as to the plea of payment into court, accepted the sum paid in, and prayed judgment for the costs in that respect. At the trial a verdict was found for the plaintiff on the plea of never indebted to the extent of 10*l.* beyond the sum paid into court, and for the defendant on the plea of payment. The Master, on taxation, has allowed the defendant all the costs of the suit, deducting only the plaintiff's costs as to the issue on the plea of never indebted. In so doing he has followed the last decision in this Court, though there have been one or two former decisions the other way. A rule nisi was obtained for reviewing this taxation by disallowing the defendant all his costs anterior to the plea of payment of money into court, so far as relate to the causes of action to which the plea was pleaded, and allowing the plaintiff all his costs as to such causes of action up to that time, including the costs of the replication to the plea of payment into court. The question turns on the rule of Trinity Term, 1 Vict. which is this: "The plaintiff, after the delivery of a plea of payment into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction, and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of nonpayment thereof within forty-eight hours, to sign judgment for the costs of suit so taxed, or the plaintiff may reply that he has sustained damages, or that the defendant was and is indebted to him to a greater amount than the said sum; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit." By the language of this rule, it is plain that it contemplates payment into court either in respect of the whole causes of action, or in respect of the amount directed by the Court; and in either case it gives the plaintiff his costs of suit, if he accept the money so paid into court in discharge. It is equally clear, it gives the defendant his costs of suit only where the plaintiff replies damages, or a debt to a greater amount, and there is an issue thereon, that is on such allegation of a greater amount of debt. In the present case there is no such issue; therefore it is not within the words of the latter part of the rule; but it is within the words of the earlier part of the rule, because the plaintiff has accepted the money in discharge of the cause of action in respect of which it was paid into court. To such a plea as the present the plaintiff could not reply a greater amount of debt, since it is impossible for a person to be indebted in more than 10*l.* in respect of 10*l.* The defendant by adopting this form of plea has insulated his defence to one part of the declaration from the rest, and so prevented the raising such an issue as would bring the case within the latter part of the rule if found for him, or give him the costs of the suit. If he had pleaded to the whole declaration payment into court of 10*l.* is. and no debt *ultra* that, he would have driven the plaintiff either to accept that sum in discharge of the causes of action, or to have replied a debt *ultra*, and to have incurred the risk of having to pay all the costs of suit if he had failed on that issue. Here the defendant could not so plead, because he was indebted at one time in a greater amount than the sum paid into court, and was obliged to plead as he did to get rid of that greater amount by a plea of payment, which could not be joined with a plea of payment into court upon the whole declaration. It comes to this, therefore, that whenever the only question intended to be raised by the pleadings is as to the amount of the original debt, the defendant can put

the plaintiff to the alternative of accepting in discharge of his whole demand whatever sum the defendant chooses to pay into court, or to proceed for more at the risk of the costs of the suit. If, however, the original debt is larger than the sum the defendant chooses to pay into court as the balance, and thus he is obliged to plead an affirmative plea, and he pleads to reduce the original debt, he necessarily insulates the sum so paid in from the residue of the declaration, and so entitles the plaintiff to accept that in discharge of the cause of action in respect of which it is paid into court, and to receive all the costs thereon. The authorities are quite in accordance with this view. *Harrison v. Watt*, 4 D. & L. 519, is identical with the present case in all points; *Goodee v. Goldsmith*, 2 M. & W. 202, is to the same effect. *M'Lean v. Phillips*, 7 C.B. 817, proceeds on the very distinction above pointed out, though it was not expressly noticed by the Court, for there the money was pleaded to the whole declaration, and the replication claimed damages *ultra*. Neither is the distinction so frivolous as one, in reference to the present rule of Court, as at first sight might, perhaps, be thought. Suppose to a declaration for goods sold and delivered, and for work and labour, the defendant pleads payment into court as to the goods sold and delivered, and never indebted as to the work and labour, the plaintiff accepts the money paid in discharge of the account for goods sold and proceeds to trial as to the work and labour and fails; it seems clear he would, under that rule of court, be entitled to the costs as to the goods sold and delivered. But suppose the defendant paid that sum into court as to the whole, and the plaintiff had gone on for the larger sum and failed, he would be within the meaning of the latter part of the rule. Whether it would be right or not to alter the rule, so as to give the plaintiff costs up to the time of payment into court, where it appears plain he was right in bringing the action, it is not for us to determine; but as the rule now stands, we are of opinion such a case as the present is not within the latter part of the rule, though it is within the former, and the taxation must be reviewed. It is not contended that the defendant is entitled to costs subsequent to the payment into court, independently of that rule. The rule must be made absolute.

Rule absolute.

Nov. 19 and Dec. 6.

*DOE dem. EVERS et Ux. v. CHALLIS and ANOTHER.*  
*Will—Remoteness—Executory devise.*

A testator devised his estate to his daughter E. for life, and after her decease to such of her children who should live to a prescribed age, their respective heirs and assigns, &c.; and in case all E.'s children should die within the prescribed age, or in case she had none, then the testator gave the estate to A., B., and C. for their respective lives, and upon their decease he gave the share of such of them so dying unto his children who should live to a prescribed age. And in case of the death of A., B., or C. without leaving a child who should live to attain the prescribed age, he gave the share of the one so dying to the child or children of the others who should live to attain the proscribed age, as taking in equal shares from their parents respectively, and if only one of A., B., and C. should leave issue that lived to the prescribed age, then he gave the whole to that issue: E., A., B. and C. all survived the testator. E. died never having had a child. A. survived E. and died never having had a child. B. died leaving seven children, all of whom attained the prescribed ages: C. had two children who attained the prescribed ages in his lifetime.

Held, that the limitation subsequent to the death of Elizabeth without issue took effect by way of contingent remainder supported by her life estate, and vesting immediately on its determination, and that upon the death of A. without issue, each of the children of C. took one-twelfth of the property originally devised to E.

This was a special verdict found upon an action of ejectment tried before Coleridge J. at the sittings for London after Michaelmas Term 1849. It is unnecessary to set out the facts, which appear fully in the judgment.

Malins argued for the plaintiff, Peacock for the defendants.

The following authorities were cited:—*Doe dem. Dolley v. Ward*, 9 A. & E. 582. *Doe dem. Herbert v. Selby*, 2 B. & C. 926; *Loddington v. Kirne*, 3 Lev. 431; *Ginger v. White*, Willes, 348; *Goodright v. Dunham*, Doug. 251; *Maintain v. Taylor*, 2 Russ. & M. 416; 2 Jarman on Wills, 702; *Gulliver v. Wickel*, 1 Wils. C. C. 105; *Meadows v. Parry*, 1 Ves. & B. 124; *Murray v. Jones*, 2 Ves. & B. 313; *Mackinnon v. Sewell*, 5 Sim. 78; *Wilson v. Mount*, 2 Beav. 397; *Cole v. Sewell*, 2 H. L. 186; *Festing v. Allen*, 12 M. & W. 279, Lewis on Perpetuities, 170; *Bull v. Pritchard*, 1 Russ. 213; *Duffield v. Duffield*, 1 Dow. & Cl. 268; *Newman v. Newman*, 10 Sim. 51; *Blagrove v. Hancock*, 16 Sim. 371; *Proctor v. The Bishop of Bath and Wells*, 2 H.

Bl. 358; *Goring v. Howard*, 16 Sim. 395; *Leake v. Robinson*, 2 Mer. 363.

*Cur. adv. vult.*

## JUDGMENT.

Friday, December 6.—LORD CAMPBELL, C.J., delivered the judgment of the Court. This was a special verdict upon the construction of a will, and we are of opinion that the lessors of the plaintiff are entitled to our judgment. First, we have to examine their claims to one-twelfth of the freehold property contained in the devise to Elizabeth Maria Dolley. This depends upon the limitation over, in case all the children of Elizabeth Maria Dolley should die under the ages specified, or if she should have none. If valid, in the events which have happened, this would vest one-third in Anne Dolley, and, on her death, the twelfth claimed in Mrs. Evers (late Mary Anne Dolley), one of the lessors of the plaintiff. On the part of the defendant who claims under the eldest son of the heir at law of the testator, it is first contended, that the limitation is void, because it could only take effect by way of executory devise, and that the executory devise would be bad, as being too remote. If Elizabeth Maria had died, leaving children, this objection would have been fatal; for upon her death the property would have vested in them as tenants in common in fee, according to the decision of this Court on this very will in *Doe dem. Dolley v. Ward*, 9 A. & E. 582. The subsequent limitation, therefore, could only have taken effect by way of executory devise; and as the gift over was upon the death of the children of Elizabeth Maria, if a son or sons under the age of twenty-three, or if a daughter or daughters under the age of twenty-one, this would have been contrary to the rules against perpetuities, and void. But in the event which happened, the contingent remainder to the children of Elizabeth Maria never took effect, she never having had a child; and the question is, whether in this event the subsequent limitation might not take effect as a contingent remainder, supported by the life estate of Elizabeth Maria, and vesting immediately on the determination of that life estate. Although, where a fee is given by a vested limitation, a remainder upon it must be an executory devise; and if it be too remote, this and all subsequent remainders are void, if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee; if the fee so limited never vests, the gift over takes effect as a contingent remainder. "The estate may be devised over in either of the two events, and in one event the devise may operate as a contingent remainder, in the other as an executory devise." This is the language of Bayley, J. in *Doe dem. Herbert v. Selby*, 2 B. & C. 926, a case which seems to us to govern the present. There, the testator devised freehold property "to my son George for life, and after his decease unto all and every the child and children of my son George, and their heirs for ever, as tenants in common; but if my son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one, or without lawful issue, then I devise the same estates to my son Thomas and my daughter Ann, and my son-in-law, William Duke, and their heirs for ever, as tenants in common." Now, if George had died leaving children, the fee would immediately have vested in them, and the limitation over to Thomas, Ann, and William Duke, could only have taken effect as an executory devise. But the Court of K. B. clearly held, that as George died without having had a child, the limitation over was to be construed as a contingent remainder. The question arose from George, in his lifetime, having suffered a recovery. In the event which happened, if the limitation in favour of Thomas, Ann, and William was to be taken as a contingent remainder, it was barred by the recovery; but if as an executory devise, it was not. Bayley, J. presiding in this court, in the absence of Abbott, C.J. said, "If George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise; but George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." Holroyd, J. and Littledale, J. fully concurred, and the consequence followed that the remainder over to Thomas, Ann, and William Duke, continued to be a contingent remainder, and was barred by the recovery, which destroyed the particular estate, and left it without support. It has been remarked, that in *Doe dem. Herbert v. Selby*, instead of saying the limitation was a contingent remainder in one event, and an executory devise in the other, it would be more accurate to say that there were two alternative remainders in fee, one of which was contingent, and was subject to an executory limitation in favour of the same person, who would have been the object of the alternative remainder. But, whatever may be the technical language in which the limitations should be described, it was decided that if the first contingent remainder never vested, the second limitation would take effect as a contingent remainder. This decision, which is founded on prior authorities,

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and has never been questioned, seems to us quite sufficient to shew that, in construing the will of Thomas Dolley, the limitation of the property left to Elizabeth Maria, after her children, is to be considered as taking effect as a contingent remainder. Another objection made was, upon the language of the remainder over, "unto the child or children, if any, of my said son and two daughters," which is only, in express words, "in case of the death of my son or either of my said two daughters, without leaving a child, if a son, that shall live to attain the age of twenty-three, or, if a daughter, who shall live to attain the age of twenty-one years," without saying, with respect to his daughter Ann Dolley, "if she has none," the argument being, that as Ann never had a child, the contingency has not arisen on which her share was devised to the children of John Dolley. But we consider it quite clear from the testator's language, that he intended this remainder to take effect upon his daughter Ann having no children, in like manner as upon her having children, and dying without leaving children who should live to the required age. There is a long string of cases in support of the doctrine, that if there be a gift over on a class dying within a particular age, it takes effect if that class never comes into existence. I consider it sufficient to mention the first of them, which has often been acted upon, *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245, where a testator bequeathed a term of years to his wife for life, and after her death to the child with which she was then enceinte, he believing she was then enceinte, and if such child should die before attaining the age of twenty-one, then one-third to his wife, and the other two-thirds to other persons; the wife was not enceinte, but Lord Hardwicke and the Court of K. B. held that the bequests over took effect. The lessors of the plaintiff likewise claiming one-twelfth of the freehold property devised by the testator to his daughter Ann Dolley, it was admitted that this claim was not liable to any objection which was not urged against the former. Therefore our judgment will be in favour of the lessors of the plaintiff, for both the twelfths which are claimed.

*Judgment for the plaintiff.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Friday, Nov. 15.

NEWHAM v. STEVENSON and WOOD.

Fraudulent preference—"Jus tertii"—

Misdirection.

*Goods, the property of S. a trader, were seized by the sheriff under fi. fa. and by him assigned to plaintiff, by a bill of sale, on the 21st of June, 1849, under a judgment founded on a warrant of attorney, given by S. to plaintiff in the preceding February. The goods remained on the premises occupied by S. till the 11th of September following, when plaintiff took possession of them, and S. quitted the house. On the 5th of October, whilst plaintiff was in possession of the goods, the defendants distrained. On the 8th S. filed a petition in bankruptcy, and on the 23rd assignees were duly appointed. The assignees never interfered with or demanded the goods, but they commenced an action of trover against plaintiff for the conversion of the goods.*

*In an action on the case brought by the plaintiff against the defendants for excessive distress, &c. the learned judge directed the jury that, "if the warrant of attorney was given voluntarily by S. to the plaintiff for the purpose of securing the plaintiff, while the rest of the creditors would be unsecured, it was a fraudulent transaction and void, and that in such case the bill of sale would convey no property to the plaintiff, who would not be the owner of the goods and could not maintain the action."*

*Held, a misdirection.*

*Held, also, that the defendants being wrong-doers could not, in such a state of facts, set up the title of the assignees as a defence to the action.*

The facts and arguments in this case are fully set out and reviewed in the judgment.

E. James, Q.C. Phipson, and Prentice, shewed cause.

Byles, Serjt. Gray, and Pashley, in reply.

The following authorities were cited in the course of the argument:—*Leake v. Loveday*, 4 M. & G. 972; *Tape v. Hockin*, 7 B. & Cr. 101; *Rowe v. Ames*, 6 M. & W. 747; *Horlock v. Tollemache*, 5 Scott, N. R. 329; *Docker v. Hasler*, 10 Moore, 210; *Boerett v. Wells*, 2 M. & Gr. 269; *Ex parte Philipott*, 1 De Gex, 346; *Oswald v. Thompson*, 17 L. J. 235, Ex.; *Ex parte Norton*, 1 De Gex, 504; *Ross v. Clifton*, 11 A. & E. 631; *Hall v. Wallace*, 7 M. & W. 353; *Butler v. Hobson*, 5 Scott, 798; *Hardman v. Wilcock*, 9 Bing. 382. *Contrà*:—11 Geo. 2, c. 9; *Marshall v. Barkworth*, 4 B. & Ad. 508; 7 & 8 Vict. c. 96, s. 41; *Webb v. Fox*, 7 T. R. 391; *Winterborn v. Morgan*,

11 East; *Fowler v. Down*, 1 B. & P. 44; *Nelson v. Cherry*, 8 Bing. 316; *Brancombe v. Bridges*, 1 B. & Cr. 145; *Smith v. Goodwin*, 4 B. & Ad. 418; *Fyren v. Chambers*, 9 M. & W. 465; *Giles v. Grover*, 6 Bligh. N. C. 453; *Story on Bailments*, 109; 2 Saunders, 47 E.; *The Bailiffs, &c. of Dunwich v. Sterry*, 1 B. & Ad. 831; *Savigny's Treatise*, 29.

Thursday, Feb. 20.—The Court this day delivered

## JUDGMENT.

JERVIS, C.J.—This was an action on the case, in which the declaration contained four counts—first, for distressing for more rent than was due; second, for excessive distress; third, for selling within five days; fourth, for selling the goods for less than they were reasonably worth. Then there was a count in trover. The defendants pleaded not guilty by statute, and to the count in trover pleaded not possessed. At the trial the plaintiff abandoned the two last counts. The goods distrained had been the property of Saunders, a trader, and were seized by the sheriff of Surrey, and by him assigned to the plaintiff by a bill of sale, on the 21st of June, 1849, under a judgment founded on a warrant of attorney given by Saunders to the plaintiff in the month of February preceding. After the assignment, the goods remained on the premises occupied by Saunders; but on the 11th of September the plaintiff took possession of the goods, and Saunders and his family left the house. On the 5th of October, while the plaintiff was in the possession of the goods, the distress was put in, and on the 8th of the same month Saunders filed a petition in bankruptcy, on which he was declared a bankrupt, and on the 23rd assignees were appointed. It was not proved at the trial that the assignees had interfered with or demanded the goods of the plaintiff; they had not ratified the act of the defendant, but they had commenced an action of trover against the plaintiff for the conversion of the goods. For the defendants, it was contended that the execution was a fraudulent preference and an act of bankruptcy; that the property passed to the assignees, and that the plaintiff could not recover. To this it was answered the *jus tertii* could not, under the circumstances, be set up; at all events, the plaintiff being in possession, might maintain the action. In the summing-up, the Lord Chief Justice told the jury, that if the warrant of attorney was given voluntarily on the part of Saunders for the purpose of securing the plaintiff in the event of a bankruptcy, while the rest of the creditors would be unsecured, it was a fraudulent transaction and void, and in such case the bill of sale would confer no property on the plaintiff, who would not be the owner of the goods, and could not maintain the action. The jury found the warrant of attorney was given by Saunders as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy. Upon this finding a verdict was entered for the defendants. In Michaelmas Term, my brother Byles obtained a rule nisi for a new trial on the ground of misdirection, which was discussed in the same Term, and we have taken time to consider our judgment that we might examine the authorities which were cited, and be enabled, by reference to the notes of the evidence, and summing up, to ascertain correctly the facts which raise the point, and the manner in which those facts were left to the jury. It is unnecessary to consider whether the direction of the learned judge was confined to the fraudulent preference strictly so called, or was intended also to comprehend a transaction intended only to protect the goods against the creditors, but to pass no property to the plaintiff; because the jury found the warrant of attorney was a fraudulent preference, and on that finding the verdict was entered. On the facts proved, and on this finding of the jury, we are of opinion the verdict ought not to have been entered for the defendants; that the learned judge misdirected the jury, and that the rule for a new trial must be made absolute. It is not necessary to determine whether the bare possession of a mere wrong-doer will, as against another mere wrong-doer, entitle the former to maintain trover or trespass, nor need we on the present occasion advert to the distinction in this respect between trespass and trover recognised by the civil law, and noticed in some cases. Here the finding of the jury imports that Saunders intended the property to pass, and the plaintiff to be preferred to others. The plaintiff must take the property in the goods, and, if no bankruptcy had intervened, he would have been an indefeasible owner in possession of the goods, and might have maintained an action. The effect of the bankruptcy, and the fraudulent preference, is not to put the goods in the same situation as if the goods and execution had passed to the assignees, so as to vest them at once by the bankruptcy in the assignees, independently of election on their part; but by the transfer, which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, and the title by that transfer is perfect, except so far as it is avoided by the assignees. The assignees in this case were not proved to

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have done anything to affect the plaintiff's title. They had not demanded the goods of the plaintiff, they had not even ratified the defendant's act before the commencement of the action of trover, which may be abandoned at any time, and which, as soon as the goods came into possession of the defendant, lawfully could not, without more, be taken to be the election on the part of the assignees to avoid the transfer. We need not, therefore, consider the question which might have arisen had the assignees interfered: until they do interfere the plaintiff, without doubt, was himself not only in possession, but the owner of the goods, and the defendants, being wrong-doers, cannot set up the title of the assignees. The plaintiff was in actual possession; that is, *prima facie* evidence of property. The case of the defendants is, that the plaintiff's property was acquired by a transfer from the bankrupt, which the assignees, and they only, had a right to question. They do not shew that they have questioned it. The plaintiff had the sole property, and ought to keep the goods against all others. The cases of *Leake v. Loveday*, 4 M. & G. 972, and *Hardman v. Wilcock*, 9 Bing. 382, in a note, were relied on in the argument for the defendant. In *Leake v. Loveday*, the plaintiff brought trover for goods not in his actual possession at the time of the conversion. It was therefore necessary for him to shew a title, which he did by shewing that at the time the goods were his. In answer to this case, the defendant proved that the goods, at the time of the conversion, were, with the consent of the plaintiff, the true owner thereof, in the order and disposition of a person who had committed an act of bankruptcy, and against whom a commission had issued; and that the title which the plaintiff once had was at an end; and the consent of the plaintiff, together with the bankruptcy, transferred the property and right of possession of the assignees as effectually as if the plaintiff had sold and delivered the goods to the bankrupt; in which case, whether the assignees claimed the goods or neglected to do so, the goods would be theirs, and not the plaintiff's. There the goods were in the order and disposition of the bankrupt; here they were transferred from the bankrupt by fraudulent preference. The distinction is obvious, and that case, when properly understood, ought not to govern the present case. In *Hall v. Wallace*, 7 M. & W. (supra), the plaintiff had no property in the goods, special or otherwise; they had been removed by collusion between him and the insolvent, to whom they had belonged; they had been sold by an auctioneer employed by the plaintiff, and on an action for money had and received, the assignees interfered. The jury found the plaintiff's possession arose out of fraud concocted between him and the insolvent to defeat the other creditors. The principal question was whether the auctioneer was bound to account to the plaintiff; but the Court held, inasmuch as the insolvent could not have brought the action against the auctioneer, so neither could the plaintiff, who got possession by fraud between him and the insolvent. It becomes unnecessary to express any opinion on the other point discussed during the argument, namely, whether the assignees could impeach the act of bankruptcy. For these reasons we are of opinion that the rule for a new trial should be made absolute.

*Rule absolute.*

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENTLEY, Esqrs. Barristers-at-Law.

Feb. 12 and 13.

DOE dem. JONES v. HUGHES.

*A will contained the following clause: "I subject and make liable all my real and personal estate, with the payment of my just debts, funeral, and testamentary expenses, and charges attendant thereon, the legacy hereinafter by me bequeathed, and subject thereto, and to the payment thereof; I give and devise the rents and profits of all and singular my messuages, tenements, farms, and lands (except my Bala houses) to my wife;" and it appointed her sole executrix and residuary legatee.*

*Held, that such charge on the real estate for payment of debts, &c. did not give the executrix an implied power of sale or mortgage.*

In this case an ejectment had been brought by the lessor of the plaintiff to recover from the defendant, who was the tenant in possession, certain houses at Bala. The action was tried at Dolgelly, at the last Summer Assizes, before Talfourd, J. when a verdict was returned for the lessor of the plaintiff, with leave to the defendant to move to enter a nonsuit. In Michaelmas term Beaman obtained a rule nisi to enter a nonsuit, or for a new trial.

*Welsby and V. Richards* now shewed cause. It appeared that the plaintiff claimed as heir-at-law of the testator, Evan Hughes. The defendant was the widow and executrix of Evan Hughes, and claimed in her character of executrix, not as devisee. The will was in the following terms: "I subject and

## EXCHEQUER.

make liable all my real and personal estate, with the payment of my just debts, funeral and testamentary expenses, and charges attendant thereon, the legacy hereafter by me bequeathed and subject thereto, and to the payment thereof; I give and devise the rents and profits of all and singular my messuages, tenements, farms, and lands (except my Bala houses), situate in the parish of Llanfyllin and Llanycil, unto my dear wife, Ann Hughes, for and during the term of her natural life, and that my said wife has a power to charge one-half of the value of my Llanfyllin property, and to be at her own disposal; and, after her decease, I give and devise my messuages called Brynmoer, Bryndn, and Bu Bach, unto my relation, Hugh Hughes, his heirs and assigns for ever. I give and devise, after my wife's decease, all and singular other the farms, tenements, messuages, and lands situate in the parish of Llanycil and Llanfyllin unto my friends and relations, Robert Jones and Cadwalader Jones, their heirs and assigns, for ever. I give and bequeath unto my friend Edward Rowlands 5l. for making this my will." The rest of his property he devised and bequeathed to his wife, to be at her disposal, and appointed her sole executrix of his will; and she, under legal advice, proceeded to mortgage the Bala property. The question was, whether the charge of debts, funeral and testamentary expenses, gave to the executrix a power of appointment for the purpose of meeting those charges, or, in other words, whether the executrix had a power which enabled her, for the purpose of paying the debts, &c. to pass the legal estate to her nominee, who would be in effect a devisee under the provisions of the will. The difficulty on the part of the executrix was, that no estate was given to her by the will. 2 Powell on Devises, 667; *Forbes v. Peacock*, 11 M. & W. 630 S. C.; 11 Sim. 152, and 12 Sim. 528, 541; *Ason*, 3 Dyer, 371 b, pl. 3; *Ason*, 2 Leonard, 220, pl. 276; *Viner's Abridg.* tit. "Devise;" *Tylden v. Hyde*, 2 Sim. & S. 236; *Ward v. Devon*, 11 Sim. 160; 1 Sug. on Powers, 133, 134, n. 7; *Carter v. Goslin*, 1 Coll. 644; 1 Wms. Exors. 511; *Bentham v. Wiltshire*, 4 Maddox, 44; *Patton v. Randall*, 1 Jac. & Wal. 189; *Shaw v. Borror*, 1 Keene, 559, were cited. In all these cases there was a devise and appointment, or an express direction and devise to sell. It will be found that, without exception, the words "to be sold" occur in all the cases cited; that in 3 Dyer is certainly the strongest. The legal estate descends to the heir-at-law, and there is no power to appoint arising from a mere charge. There may be a power by implication in the executor, because it is his duty to administer, but he can only do it through a Court of Equity.

*Tomlinson, Beeson, and M. Lloyd*, in support. If this rule is not absolute, real estate can only be made chargeable by a suit in equity. In effect, the defendant is a devisee under the will, and if in such cases it were necessary to resort to a Court of Equity, it would generally result that the whole estate would be exhausted in costs, whilst the debts, &c. remained unsatisfied. A charge of debts on the property is equivalent to a direction to sell the property for the payment of debts. The mode of expression is of no consequence, if it can be seen that the intention of the testator was that his debts should be paid. The stat. 3 & 4 Wm. 4, c. 104, renders freehold and copyhold estates assets for the payment of debts. The Legislature intended that enactment to operate as a devise for their payment, and in such a case as this there is no occasion for a suit in equity. [ALDERSON, B.—How can the jury ascertain if the personal estate has been exhausted without a suit in equity?] If the testator had fixed the mode of dealing with his estate, that is all that is requisite. The question is this, whether the testator is to make arrangements for liquidating his debts, or reluctant parties are to be compelled to do so by a suit in equity. [PARKER, B.—You mean, that if there is an express power to sell, the purchaser is not bound to inquire about the debts owing?] In the charge of debts, &c. the testator has placed the realty in the same category as the personality, shewing that he intended that they should both be subject to the same powers. When it appears on the face of a will that there is no trust commensurate with the power vested, that power may be executed by the executor. *Millward v. Moore*, Saville, 72, the same case as reported *Ason*, 3 Dyer, 371; *Blillot v. Merryman*, 3 Barnardiston, 78; *Ball v. Harris*, 4 Myl. & Cr. 264; *Dalton v. Hewes*, 6 Mad. 9; *Blagrove v. Blagrove*, 4 Ex.; *Curts v. Fulbrooke*, 19 Law J. 65, Ch.; *Williams v. Chitty*, 3 Ves. 545; *Manning v. Spooner*, S. V. 117; *Harwood v. Oglander*, 8 Ves. 124; *Newman v. Johnson*, 1 Ves. 44, were cited.

*Cur. adv. vult.*

## JUDGMENT.

Friday, Feb. 14.—PARKER, B. after going through the facts of the case and reading the will.—There is no doubt the Bala houses, not being devised by the will to any devisee, passed to the heir-at-law; whether there was a remainder of the Bala houses after the death of the wife,

Ann Hughes, it is unnecessary to determine. It appeared pretty clear that there was not, so that the Bala houses passed in fee to the lesser of the plaintiff. The question is whether the executrix to the will, who appears to have been in want of money for the purpose of paying the debts and pecuniary and testamentary expenses of the testator, had a right to sell or mortgage the Bala houses for the purpose of raising the money. She took advice upon the subject, and in order to save the expense of an equity suit, the property being very small, she took upon herself to mortgage the property to a third person, who advanced the money. The question is whether, under the will, she had any right to do so. In the course of the argument many of the cases upon this subject were brought before us, and it was contended on the part of the executrix that the effect of a charge on the real estate with debts was to give her an implied power of sale; but on looking through those cases, it is perfectly clear that there is no one case that goes to the extent of that proposition. There is a class of cases which shews that if the real estate were devised to trustees charged with the debts of the testator, that those charges impose on the trustees the trust of raising money to pay those debts, and the estate being given to them, they can, through the means of their estate, raise money for the payment of those debts. There is another class of cases, of which several were cited; the last is *Forbes v. Peacock*, 11 M. & W. 630, which decides that if it appear, from the whole purview of the will, that the testator means his real estate to be sold, and the proceeds of that real estate to be distributed for the purpose for which it is given, which the executors alone by law could perform, then, that there is an implied authority—an implied power—given by the will to sell the estate, and that the executor who is to distribute the money is the proper person to sell it. Several cases were cited which confirm that proposition. And, upon looking to these cases, there is not a single case or a single authority which says that the simple charge of the estate, with the payment of debts, does more than make a charge upon the estate in the hands of the devisee if the estate is devised, in the hands of the heir-at-law if the estate devolves by the law of inheritance upon the heir-at-law. The only authorities which had the aspect of constituting the executor, or giving the executor or executrix an implied power to sell, was the dictum of Vice-Chancellor Shadwell in the case of *Forbes v. Peacock*, twice before him, and also before the Court of Ex.; and in one of those cases, in 12 Simon's Cases in Chancery, the Vice-Chancellor of England is reported to have said, "If a testator charges his real estate with the payment of his debts, that, *prima facie*, gives his executor power to sell the estate, and to give a good discharge for the purchase-money; that was all that I decided on the argument of the demurrer." If that is correctly reported, it would imply that the Vice-Chancellor was of opinion that a simple charge of debts without more—without any terms in the will indicating such an intention on the part of the testator, was an implied authority given to the executor to sell, that would be a solitary authority, because there is none other to be found that goes to the same extent. But the Vice-Chancellor is merely stating what he had stated before. The first time the case of *Forbes v. Peacock* was before him, the proposition he is there reported to have stated, in the 11 Simons, is quite distinct from this: there it is perfectly clear that he gave his opinion upon the supposition that the will in that case authorised the sale of the property; that the testator meant it to be sold; and that the executor was the proper person to carry that intention into effect; and he cites, in giving his judgment, a case of *Ward v. Devon*, before him, which was to that effect. "Sell all off, both the real and personal property, and divide the produce between my wife, Mary Ann Ward, and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but it is my will to sell all. I appoint Mr. Robert Ward, my brother, and my wife, Mary Ann Ward, my executors." That was the whole of the will, and he held, in that case, there was clearly a power to sell, which must be executed by the executors; and so upon the purview of the whole will, in *Forbes v. Peacock*, he was of the same opinion, and that was the opinion which the Court of Ex. on the case sent to them, also entertained. That was the law on the subject. When the case was before Vice-Chancellor Bruce, he expressly guarded himself from saying that he decided the effect of a simple charge of the estate would amount to a power to sell: in fact, there is no case that goes to that extent. The only doubt that we entertained in our minds was, whether there was enough enabling us to say that the testator meant his estate should be sold for the same purpose—it was not that he subjected his real estate merely to the payment of his just debts, but his funeral and testamentary expenses, and charges attendant thereon, "and the legacies hereinafter by me bequeathed," subjecting it to a charge of legacies. He clearly gives no power of sale; but it was suggested, charging the estate

with funeral and testamentary expenses, which was an immediate purpose, which could not be long delayed, that it must be implied that he meant the executrix to sell. Now we have considered those cases, and we have found no authority for such a proposition. As to the exception in this also, "except my Bala houses," which he does not wish to devise, it might be said to be his intention that the Bala houses should be sold, although, perhaps, not the other property, for the purpose of paying the testamentary expenses and charges, just as if he had made an appointment of the Bala houses to be sold for that purpose, and as if he had given a power to the executor for that purpose. But we are of opinion that this really carries the case no further; it only subjects the estate in the hand of the heir-at-law to a charge for funeral and testamentary expenses, and the charges attending the proof of the will, which the executrix must enforce through the medium of a court of equity, and therefore we think in this case the executrix had no power to sell or mortgage that estate. She was led into a mistake by the advice she has received for the purpose of avoiding an equity suit. It is not within the principle of any of the cases, in which it has been held that there is an implied power of sale and an implied power of mortgage by the will. We have perfectly satisfied ourselves on that head, and therefore the result is the rule in this case must be discharged.

ALDERSON, B.—The strongest case was the case in Dyer, where the testator appointed lands for the payment of his debts; here he has only charged them, but he has not said for what purpose. In Dyer it was an appointment of a particular estate in general for payment of debts; in this case it is a general charge on all the lands with the exception of particular land,—for what purpose those lands were excepted nobody knows. Rule discharged.

## INSOLVENT COURT.

Reported by DAVID CAPT. MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Thursday, March 6.

(Before Mr. Commissioner PHILLIPS.)

Re RUBENS P. BRAINE.

Opposition—Adjourned hearing.

A creditor receiving due notice of the hearing of an insolvent, and not appearing to oppose until an adjourned hearing, is not entitled to oppose.

This was an adjourned hearing. Several of the creditors opposed, and amongst the rest one named Cooper, who had not appeared upon the first hearing. Cooke, for the insolvent, objected to his opposition.

Mr. Cooper said, that being unwell at the original hearing, and being informed that there could not be a final adjudication, as there were imperfect services, he had reserved his opposition for to-day.

Mr. Commissioner PHILLIPS disallowed the opposition.

Monday, March 17.

(Before Mr. Commissioner LAW.)

Re EDWARD HENRY TAYLOR.

Contracting debts without reasonable expectations of payment—Debts in Trade.

Debts for goods in trade may be contracted without reasonable or probable expectations of payment.

This insolvent was a paperhanger and glass-cutter, residing at Holloway. The aggregate amount of his debts was 234l. The debts, with consideration, were, 186l. His insolvency was occasioned by losses by contracts and illness. He was opposed by Mr. Alfred Goslett, glass merchant, Soho-square, upon the ground that his debt, amounting to 63l. 4s. 8d. for goods in trade supplied in 1869, was contracted without reasonable and probable expectations of payment. The insolvent took a place of business in Holloway, not being clear of debt at the time, and he carried on his trade for nine months, during which he had goods from the opposing creditor to the amount of 63l. which he sold for 75l. but did not pay him any thing.

The COURT remanded the insolvent for eight calendar months, for contracting the debt without reasonable or probable expectation of payment.

## PROTECTION CASE.

Re WILLIAM HILL POWELL.

Seem, that neglecting to make payments pursuant to the terms of the proposal made upon the granting of the final order, is a contempt of Court, of which the Court may always take notice.

When a proposal is made, the Court will be guided by circumstances in granting or withholding the final order, but it disapproves of withholding the final order.

This insolvent was a messenger of the court. He made a liberal proposal for the payment of his debts, which was acceded to by almost all the creditors. A point was mooted as to whether the final order should be granted at once, or the protection renewed from time to time, as the payments were made according to the ordinary practice.



## INSOLVENCY.

## MIS PRIS.

## MIS PRIS.

Mr. Geo. Lewis, the insolvent's attorney, mentioned to the Court the inconvenience resulting to an insolvent from withholding his final order in due course. The officers of the County Courts seized the property of the insolvent in execution, which went in due course, as the protecting order was no bar to an action for the recovery of a debt. This led to the practical absurdity of making a man pay particular debts in his schedule by instalments at the same time that they were making payments by instalments to the creditors generally inserted in their schedules. The creditors who resorted to proceedings in the County Courts for the recovery of their own debts in the schedule obtained a preference over those creditors who did not resort to legal proceedings. If all the creditors took proceedings under those circumstances, it was clear that the protection of the insolvent statutes would be a nullity, which he submitted the Court had the power to prevent, and was bound to prevent, by carrying out the provisions of the Act, and granting in due course the final order.

Mr. Commissioner LAW expressed his disapproval of the system into which they had fallen of not granting the final order, a system into which they had fallen in consequence of the defective state of the Act in reference to the enforcement of these proposals if they were not acted upon after the final order was obtained. His present impression was, that disobedience to the order of the Court for the payment of an instalment becoming due under a proposal after the granting of the final order conditional upon these payments being made, was a contempt of Court, and might be dealt with accordingly. In this case he did not see the usual reason for withholding the final order, for the insolvent being an officer of the court, if the payments were not made, his own income would vanish at once. The final order might therefore be granted, and the proposal will be part of the final order.

The final order was granted.

## MIS PRIS.

## COURT OF COMMON BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS IN LONDON AFTER MICHAELMAS TERM.

Saturday, Dec. 14, 1850.

(Before Chief-Justice JERVIS.)

FISHMONGERS' COMPANY v. DIMSDALE.

Subp. du. tecum.—Evidence.—Privilege.—Secondary evidence.—Proceedings in Parliament.—Agent.—Statements.—Admissibility.

If an attorney appears in obedience to a subpoena duces tecum, and objects that he holds the deed which he is subpoenaed to produce for a client, secondary evidence of the deed is admissible, though it is not proved that such client objects, or that he has had notice to produce.

A. and B. appeared in Parliament as the agents for the promoters of a Bill; the proceedings resulted in an Act being made:

Held, that statements made by A. and B. for the purposes of the Bill, were admissible against the promoters, without further proof of authority to act for such promoters.

On the trial of this cause, a deed was called for on behalf of the plaintiff, and an attorney appeared to a subpoena duces tecum, but objected to produce it on the ground that he was holding it for a client, and that he had not the authority of his client for the production. Secondary evidence was then tendered.

Crowder, Q.C. objected to its reception. It did not appear that the client had any objection to its production, or that he had received notice that it was wanted; the privilege was that of the client, not of the attorney, and the plaintiff should, therefore, have given the client notice, and should have shewn his dissent to its production.

Sir F. Theiger, contra. The refusal of the attorney to produce it is sufficient; he says that he holds it for the client, and he is not, therefore, entitled to produce it without the express authority of his client. A similar case occurred before Parke, B. and secondary evidence was admitted.

Jervis, C.J.—I think it must be sufficient to shew the refusal of the attorney. The attorney, when served with the subpoena, may not have mentioned his client to the plaintiff, and the plaintiff, supposing that the attorney holds for himself, may thus be turned round at the trial, because he had given no notice to a person of whom he probably never before heard. It would be very difficult to obviate the objection if valid. I think secondary evidence is admissible.

Evidence admitted.

It appeared that the defendants were the promoters of a Bill in Parliament, which was carried through and resulted in an Act. Statements made by Messrs. Dyson and Hall, the parliamentary agents, when appearing for the promoters, were now tendered in evidence for the plaintiffs.

Crowder, Q.C. objected. The statements of Dy-

son and Hall were not admissible against the defendants, without shewing that they were authorised to act for them.

Jervis, C.J.—Is it not like the attorney on the record in an action?

Sir F. Theiger and Hill, Q.C. contra.—From the beginning to the end of the proceedings in Parliament, Messrs. Dyson and Hall appeared as the agents for the promoters, they conducted all the proceedings, and the Act was made. Surely the promoters cannot now repudiate the authority of Messrs. Dyson and Hall to act for and to bind them.

Crowder, Q.C.—Supposing an attorney has carried on an action. If it afterwards becomes necessary to prove his acts or his declarations against his apparent client, it is not sufficient to shew that he is the attorney upon the record. It may have been a voluntary act on his part, without any retainer or authority from the party for whom he appears. Besides, some of the defendants may have become promoters at the last meeting, after the statements now tendered were made.

Jervis, C.J.—The statements being made in the course of proceedings which resulted in an Act of Parliament subsequently adopted by all the defendants, they are, in my opinion, admissible against them without further proof of authority. I understand the statements to be of such matters only as the agents would make for the purposes of the Bill; they must be clearly within the scope of their authority.

Evidence admitted.

Sir F. Theiger, M. D. Hill, Q.C., Channell, Serjt. and Bovill, for the plaintiffs.

Crowder, Q.C., E. James, Q.C., Allen, Serjt. Skinner, Bramwell, Hindmarsh, and J. Brown, for the defendants.

Friday, December 20, 1850.

DE GRUCHY v. BRUYERES.

Husband and wife.—Separation.—Liability.

If husband and wife are living apart, the husband is liable for necessities, unless he makes her an adequate allowance, considering his own means and circumstances.

Sembla, a letter to the wife directing her to get in and send a list of her debts, that some arrangement might be made respecting them, does not, if such allowance was adequate, render him liable.

And sembla, he is not liable, though, after such letter he did not, during the remaining three months, remit any further dividends of the property, which was settled to her separate use.

The action was in assumpsit on the common counts for goods sold, and on an account stated. The defendant pleaded the general issue.

The plaintiff was a tradesman living at St. Helier's, in Jersey, and the defendant was superintendent of the London and North-Western Railway. It appeared that the defendant, who was formerly an officer in the Engineers, married in 1822, 10,000*l.* Consols being settled to the separate use of his wife; that afterwards a further sum of 5,000*l.* stock was left by will to the separate use of his wife, with a remainder in a further sum of 1,000*l.* subject to a life estate; that in 1842 the defendant became embarrassed, and that it was then arranged that his wife and children should leave him in London and go to live in Jersey; they did so, and remained there till May 1847, they then came to London and stayed with the defendant till November 1847, the wife and three children then returned to Jersey, where they remained till June 1848, when they finally returned to England; the defendant was, during all this time, holding the situation of superintendent, at a salary of 800*l.* a year, and the duties of the place prevented him from living out of England; he had remitted to his wife at different times sums of money amounting in the whole to 600*l.* a year, being equal to the proceeds of her own property. Some letters were read from the defendant to his wife, in which he addressed her affectionately and urged her to rejoin him in London. One of those letters was dated March 1848, and pressed her to send him a list of the debts owing in Jersey and elsewhere, that he might see what arrangement could be made respecting them. After that letter no further dividend was sent to the defendant's wife. This action was brought for necessities supplied to the defendant's wife and children between January 1847 and May 1847, and between November 1847 and June 1848; the letter of March 1848, was not communicated to the plaintiff.

Jervis, C.J. in addressing the jury said,—This case presents some difficulties in law, though the facts are clearly ascertained. It is a question entirely of principal and agent. The general presumption is that the wife is the agent for the husband, but if you are of opinion that, at the time when the credit was given circumstances existed which rebut the presumption of agency, you will find a verdict for the defendant. You must consider whether, at the very time of the contract, there was any presumed agency existing, for nothing that happened after that period could in any way vary

the state of things. It is clear that at that time the wife was living apart from her husband. She would then, *prima facie*, be presumed to have authority to find him; but that presumption might be rebutted by the fact of his having given her an adequate allowance, taking into consideration his means and circumstances. Now she was living at Jersey, reported to be a cheap place, and had 600*l.* a year, which was remitted to her. He had 800*l.* a year salary, so incumbered that he could scarcely call 10*l.* a year his own. I shall leave to you these two questions:—First, were they living separately? Secondly, if they were, did the defendant make her an adequate allowance? If these questions are answered in the affirmative, I shall then direct a verdict for the defendant, with leave for the plaintiff to move to enter a verdict for himself, on the passage contained in the letter of March 1848, and on the fact of no dividends being sent to the wife after the date of that letter. It may turn out that that letter will alter the defendant's liability as to the whole or as to a part or not at all.

The jury found that they were living apart, and the allowance was sufficient.

Verdict for the defendant.

Channell, Serjt. and H. Hill, for the plaintiff.

Byles, Serjt. and Crompton, for the defendant.

## Circuit Reports.

## OXFORD CIRCUIT.

Reported by J. E. DAVIS, Esq. Barrister-at-Law.

## WORCESTER SPRING ASSIZES.

Monday, March 10.

(Before Mr. Justice TALFOURD.)

REG. v. GARDNER.

Costs of prosecution.—Indictment under statute 8 & 9 Vict. c. 109, s. 17.

An indictment under the statute 8 & 9 Vict. c. 109, which enacts that every person who, by fraud or unlawful device, or ill practice, in playing at cards, &c. "shall win from any other person any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly," is, within the meaning of the statute 7 Geo. 4, c. 64, s. 23, which empowers the Court to order the costs of prosecutions in indictments (inter alia) for "knowingly and designedly obtaining any property by false pretences."

The indictment contained eight counts. Of the first six, some alleged that the prisoner, with one James Briston, and another person unknown, conspired to cheat and defraud Robert Hopkins, and did actually cheat and defraud him of the sum of five pounds, setting out the overt acts in various ways, alleging them to be the inducing Hopkins to play at divers games of cards, and using packed cards. Others of the six counts alleged the conspiracy to be to defraud Charles Royston, and the actually cheating and defrauding him of twenty pounds, by similar means. The seventh and eighth counts were framed under the statute 8 & 9 Vict. c. 109, s. 17, and respectively charged the prisoner with having won from Hopkins the sum of five pounds, and from Royston the sum of twenty pounds, by means of unlawful devices, to wit, by packing and arranging the cards.

The jury having returned a general verdict of guilty,

Huddleston, for the prosecution, made an application to the learned judge that the costs of the prosecution should be taxed, and allowed by the officer of the Court.

TALFOURD, J. observed that the Court had no power to grant the costs of a prosecution for conspiracy.

Huddleston begged to call his lordship's attention to the language of the 17th section of the statute 8 & 9 Vict. c. 109. That section enacts "that every person who shall by any fraud or unlawful device, or ill practice in playing at or with cards, dice-tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." Now the statute 7 Geo. 4, c. 64, s. 23, which enumerated the particular description of misdemeanors in which power is conferred on the Court to allow the costs of prosecutions, expressly specified indictments for "knowingly and designedly obtaining any property by false pretences." He submitted that this indictment was in substance an

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indictment for obtaining property, namely, money, by false pretences, and was consequently a prosecution in which the prosecutor was entitled to costs.

TALFOURD, J. said he felt that this was a case in which he ought to allow costs, if he had the power. He would consult Mr. Justice Patteson (who had left Worcester) and intimate the result at Stafford.

At the sitting of the Court at Stafford on the 12th of March.

TALFOURD, J. said,—I have consulted my learned brother Mr. Justice Patteson with respect to the case of John Frederick Gardner, tried at Worcester on Saturday last, and he is of opinion with me that the two last counts of the indictment did in fact amount to a charge of obtaining money by false pretences, and that I have therefore power to order costs in this case, which I accordingly do. I should much regret if I had not had the power.

## STAFFORDSHIRE SPRING ASSIZES.

Thursday, March 13.

(Before Mr. Justice TALFOURD.)

REG. v. DUNNING and Another.

*Reward for diligence in the apprehension of offenders—Statute 7 Geo. 4, c. 64, s. 28.*

*A person residing in a house broken into by burglars, and who, by fastening them in a room, detains them there until assistance is obtained, and the capture of the offenders effected, is within the meaning of the statute 7 Geo. 4, c. 64, s. 28, which enables the Court to order payment, by way of compensation, to any person who appears to have been active in the apprehension of offenders.*

Thomas Dunning and Thomas Woolman, pleaded guilty to an indictment charging them with burglariously breaking and entering the dwelling-house of Elizabeth Holmes, on the 27th of January, 1851, at the parish of Bushall, and stealing therein one sovereign-balance and case, one jacket, and other articles, the property of William Holmes; and therein also assaulting, with intent to murder, the said William Holmes.

Vaughan, who appeared for the prosecution, applied to the Court to award William Holmes some recompense under the peculiar circumstances of the case. It appeared from the depositions that about two o'clock on the night of the above day the prisoners broke into the house of the prosecutrix, who is a farmer, living at a hamlet called the Butts, in the above parish, by cutting six panes of glass out of the kitchen window. When they had got in they collected into a bundle all the property they thought worth removing in the lower part of the house, and drank two or three bottles of elder wine and a quantity of beer. They then took up, the one a constable's staff, which belonged to William Holmes, the brother-in-law of the prosecutrix, and the other prisoner took the iron-bar of one of the windows, and proceeded up stairs to William Holmes's bed-room, and, in the dark, began to strike at him while he lay asleep, and then inflicted three severe wounds on the head. He got up, struggled with them, wrested his staff from the one, and struck about right and left, and got outside the door, and shut it, keeping the prisoners inside, and shouting aloud for assistance. One of his nieces ran out and brought in some of the neighbours, and they all then went into the room where the prisoners were detained, and there they were found lying on the ground quite drunk. They were, of course, secured. The wounds inflicted on William Holmes were so very severe that they produced concussion of the brain, and altogether so injured him that he was not able to leave his bed till yesterday, when he was brought here, and it was probable he would never recover. He had been obliged to have medical and surgical attendance ever since the event, and he could ill afford the expense.

TALFOURD, J.—The circumstances under which the statute (a) enabling the Court to order payment by way of compensation, are where any person shall

(a) 7 Geo. 4, c. 64, s. 28, which, "for the better remuneration of persons who have been active in the apprehension of certain offenders," enacts "That where any person shall appear to any Court of Oyer and Terminer, goal delivery, &c. to have been active in or toward the apprehension of any person charged with murder, or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person or with arson, or with horse stealing, bullock stealing, or sheep stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen: every such Court is hereby authorised and empowered in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension," &c.

appear to have been active in the apprehension of offenders. Is this a case within the statute?

Vaughan called attention to the fact that it was by the presence of mind and activity of Holmes in closing the door upon the prisoners, and keeping them there until assistance came, their apprehension was effected.

After referring to the Act of Parliament, the learned JUDGE said he was of opinion that by giving a liberal interpretation to the language of the statute the present case was brought within it, and he accordingly ordered the sum of 10l. to be handed to William Holmes.

## COURT OF PLEAS, DURHAM.

(Before Baron ROLFE.)

KEARNEY and ANOTHER v. THE SUNDERLAND MARINE INSURANCE COMPANY.

*Recognizances by a corporation—Practice.*

*Semble, that a corporation cannot appear by the directors to enter into recognizances, but should appoint an attorney, under the common seal, to appear and enter into recognizances for it.*

This was an action of debt on a policy of insurance, at the Durham Spring Assizes, 1850, before Rolfe, B. when a verdict was found for the plaintiffs, for 315l. the amount claimed. The declaration contained a special count on the policy, and a common count for money paid, and an account stated.

The defendants, who were a registered company, being dissatisfied with the verdict, resolved to apply to the Court of Ex. for a new trial, and pursuant to the requirements of the 23 & 24 secs. of 2 Vict. c. 16, "An Act for Improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham, and Sadberge," entered into a recognizance in 600l. with two sureties, the condition of which after stating the trial and verdict, and the intention of defendants to apply to the Court of Ex. for a rule to shew cause why a new trial should not be granted, or a verdict entered for the defendants, was in these words, "If, therefore, the Sunderland Marine Insurance Company do make and prosecute such application as aforesaid, or do satisfy and pay, if such application shall be refused, the debt, damages, and costs adjudged, and to be adjudged, in consequence of the verdict, and all costs and damages to be awarded for the delaying of execution, then this recognizance to be void, or else to remain in full force and virtue."

The directors, at a meeting, affixed the common seal of the company (which had the name of the company on it), and two of the directors signed their names opposite the seal, with the word, "Directors," and the two sureties signed under them. The two directors, and the sureties, then acknowledged the recognizance before a justice of the court, and the recognizance was filed in court, and notice thereof given to the plaintiffs.

At the next Court of Pleas the plaintiffs obtained a rule to set aside this recognizance, unless cause shewn before any of the judges at Westminster, pursuant to sec. 14 of the above-mentioned Act.

The grounds on which this rule was obtained were:—

1st. That the defendants were not empowered by any statute to appear by their directors before the justice who took the recognizance, and enter into the said recognizance; and that, consequently, such recognizance was not binding on the defendants as a company or individually.

2nd. That it did not appear from, neither was it alleged by, the recognizance, that J. C. and R. C. who signed the said recognizance as "directors" only, were at the time the said recognizance was entered into the duly appointed directors of the said company, and that they appeared for and entered into such recognizance by and with the authority and on behalf of the defendants.

3rd. That the recognizance being conditioned for the payment of money and under seal, it ought to have been impressed with the stamp duty impressed on bonds.

4th. On the argument a fourth objection was raised, viz. that the recognizance was so framed, that, obtaining a rule nisi on the 10th April, Atherton appeared at Chambers before Rolfe, B. to shew cause, when the learned baron adjourned the argument for fourteen days, observing, that it was proper the defendant should have an opportunity to apply for a new trial. On the 19th April Knowles applied to the Court of Ex. for, and obtained a rule, to shew cause why a new trial should not be had, or why judgment on the first count should not be arrested, and why the verdict on the second count should not be entered for the defendants.

On the 9th May Atherton shewed cause to the rule to set aside the recognizance, and argued—1st. That the judge could not set aside the recognizance, but the rule should have been for leave to sign judgment. 2nd. That the plaintiffs should have signed judgment at their peril. 3rd. That the joining of

the corporation was surplusage, the recognizance being good without their being parties. (*Dixon v. Dixon*, 2 B. & P. 443; and *Keene v. Deardon*, 8 East, 298.) 4th. That the corporation had executed the recognizance in the mode pointed out by their deed of settlement for their entering into contracts. 5. That no stamp is necessary. (*Lopez v. De Testat*, 8 Taunt. 712.) 6th. That the condition is in the words required by the Act of Parliament, and that obtaining a rule nisi satisfies the condition, and referred to *Haworth v. Omerod*, 6 Q. B. 300.

On the 18th May Rolfe, B. discharged the rule with costs, on the ground that if the recognizance was bad the plaintiffs should have signed judgment regardless of the recognizance, but intimated an opinion that the recognizance was improperly entered into, and that the company should have appointed an attorney, as suggested in *Curtis v. The Real Water Works Company*, 7 B. & C. 331, to appear and enter into the recognizance for them; for they, being a corporation, could not appear either in person or by their directors.

The defendants afterwards brought a writ of error in the Q. B. and, to stay execution on the judgment, to enter into another recognizance, which they did by appointing an attorney (by power of attorney under the common seal of the company, signed by two directors and duly stamped) to appear in the court or before a justice thereof, and for and on behalf of the company, with two sureties, to enter into a recognizance which was accordingly done in the following form, and no objection was taken to it:—

"The Sunderland Marine Insurance Company, by Thos. Burn, the solicitor, their attorney in that behalf, duly nominated and appointed under the common seal of the said Sunderland Marine Insurance Company, and you J. T. and R. F. in your own proper person, do severally acknowledge to owe unto Matthew Kearney and Robert Noonan, the sum of 794l. 2s. 4d. upon condition that the Sunderland Marine Insurance Company prosecute their writ of error with effect, and, if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs and damages as shall be awarded by occasion of the delay of execution; and if the said Sunderland Marine Insurance Company shall fail to do so, you J. T. and R. F. undertake to do it for them.

"Taken and acknowledged," &c. Not signed.

## Irish Reports.

## COURT OF QUEEN'S BENCH.

Reported by W. ST. LAGER HAMILTON, Esq. Barrister-at-Law.

## HILARY TERM.

Jan. 21, 24, and 25.

(Before the full Court.)

LITTLE, Clerk, v. LORD VISCOUNT CLEMENTS. *Libel—Protection of justice in the execution of his office—His acting bonâ fide, a question for the jury—Notice of action—Absence of malice—Privileged communication.*

A. T. a married woman, went before a justice of the peace, and charged L. who was a clerk in holy orders, and one of the curates of the parish in which the justice resided, with having committed an assault upon her, with intent, &c. The justice took down her statement in his own handwriting, in the form of a declaration, similar to, but not precisely in the form prescribed by the stat. 5 & 6 Wm. 4, c. 62, s. 18, and schedule, which, having been signed and acknowledged by A. T. he signed and inclosed in an envelope, and gave it to her to give to the rural dean, which she or her husband accordingly did. It was proved that the rural dean had told A. T. and her husband to go before the nearest magistrate and make her statement, and that before they had done so, he (the rural dean) had requested the justice to act as he had done, in order that a written statement of the charge might be submitted, if necessary, to the bishop. L. having brought an action of libel against the justice for the publication of this declaration, without having given him a month's notice of action, or laying the venue in the county in which the act was done, or proving the cause of action to have arisen within six months, the learned judge told the jury, that though the defendant might have had jurisdiction to take the declaration, the publication of it was a perfectly distinct matter, and that he had no right to publish it, and had acted illegally in that respect, and was responsible to the plaintiff in damages; and only left it to the jury to say whether the declaration was a libel, and whether the defendant had published it:

Held, upon a bill of exceptions, that he ought, under the circumstances, to have left it to the jury to say whether the defendant bonâ fide believed he was acting in his capacity and within his jurisdiction as a magistrate in the discharge of his duty; and, secondly, to have told them that

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if he did what he did *bonâ fide*, and without malice, he was protected from liability to the plaintiff.

**Exceptions.**—The declaration, which was in case, and contained five counts, stated, in the first count, that the plaintiff was a clerk in holy orders of the United Church of England and Ireland, and was employed and officiated as curate in the parish of Cloone, in the County of Leitrim, and that the defendant was a justice of the peace for the said county; that a charge was preferred before the defendant as such justice by one Anne Thompson against the plaintiff, charging the plaintiff with having assaulted her, with intent, &c. and that the said A. T. then and there made a deposition before the defendant in support of the charge, but that no indictment or other criminal proceedings had been instituted against the plaintiff in respect thereof, and that the same had still remained undecided; and that the defendant, maliciously intending to injure the plaintiff as such clerk, whilst the subject of said charge was undecided, falsely and maliciously, and not in the execution or discharge of the defendant's duty as justice of the peace, or of any official duty, and without any reasonable or probable cause, did publish, and of concerning the plaintiff as such clerk, &c. and of and concerning said charge, a certain false, scandalous, malicious, and defamatory libel, purporting to be the deposition of Anne Thompson, setting out, with insinuations, the charge made by Anne Thompson, which commenced as follows:—"County of Leitrim, to wit.—I, Anne Thompson, of Clooncumber, in said county, and in the parish of Cloone, do solemnly and sincerely declare," &c. and concluded in the following form:—"And I make the above declaration, conscientiously believing the same to be true. Taken and acknowledged before me at Lough Rynn, in said county, this 12th day of March, 1850." "CLEMENTS, J. P."

"ANNE THOMPSON."  
The count also averred special damage to the plaintiff. In the second count the document containing the alleged libel was described as a "declaration," and not as a deposition; the third count was similar, but omitting the averment of the absence of reasonable or probable cause; the fourth count averred that the defendant pretended and alleged that a charge was preferred before him as a justice of the peace, and that he published a certain libel, &c. purporting to be the declaration of Anne Thompson, &c. and of and concerning the said pretended charge. In the fifth count, which was similar to the preceding, it was alleged that defendant was in the habit of acting as a justice of the peace. The defendant having pleaded the general issue, the case was tried before the Lord Chief-Justice at the Nisi Prius sittings of this Court after last Michaelmas Term. The Rev. Arthur Hyde, the rural dean of the district in which the plaintiff officiated, proved that he had received the original document containing the alleged libel from either Anne Thompson or her husband James Thompson; that it was in the defendant's handwriting; that he had apprised the plaintiff of its contents through the Rev. Mr. Hogg, his brother curate. The witness also stated that it was in his capacity of rural dean that he had received the document, which was handed to him in an envelope, but whether sealed or not he could not recollect, and that if there was any address on it, it was in the defendant's handwriting; that he gave it to Mr. Hogg that he might shew it to the plaintiff's rector; that, in consequence of a written application from the plaintiff, he had given him the copy now produced; that the witness never gave a copy, except the one mentioned; that the charges contained in the declaration, were intended to have been made the subject of a complaint to the bishop of the diocese in which the plaintiff officiated, but were not, in consequence of the plaintiff having resigned his curacy; that, in consequence of what James Thompson, and his wife, Anne Thompson, had stated to him, he (witness) had suggested to them to go before the nearest magistrate, without naming one; that two days after that he received the document from them (the Thompsens); that previous to the taking the declaration he had a verbal communication on the subject with Lord Clements, in which he suggested to him (Lord C.) to take it himself—first, as the character of a clergyman was involved; and, secondly, as he did not wish to trespass on the bishop's time without having something stronger to go upon than a mere verbal statement; that the document was all in Lord Clements's handwriting, and none of it in that of his clerk; that the reason assigned by the plaintiff for wishing for a copy of it, was to shew it to the bishop. The witness also stated that he never knew of any misunderstanding between the plaintiff and the defendant, and that he shewed the document to another rural dean, and to the senior clergyman of the diocese, for their advice, and that he believed that the rural dean was the proper channel through which a complaint should be laid before the bishop. The Rev. Mr. Hogg, who was produced on the

part of the plaintiff, stated the defendant was a parishioner of Cloone; that he knew of no difference between him and the plaintiff; and that the latter expressed an anxiety to have the contents of the document submitted to the bishop. The defendant's counsel called on the Lord Chief Justice to nonsuit the plaintiff, or direct a verdict for the defendant, on the ground that no notice of action had been given to the defendant, though it appeared that he was a justice of the peace, and had done the act complained of in his capacity as such justice, and also that for the same reason the venue should have been laid in Leitrim. The learned Chief Justice refused to nonsuit the plaintiff, but, the defendant having closed his case without offering any evidence, told the jury that in his opinion the document was libellous and defamatory, and that the publication of it by the defendant was not on a justifiable occasion; and that, although the defendant might have had, as a magistrate, jurisdiction to take the declaration and to decide the case, or to take informations, yet that the act of publication was perfectly distinct from the taking of the declaration, and that the defendant had no right to publish it; and that, in so doing, he went plainly and distinctly beyond his province, and acted illegally; and that his conduct being illegal in that respect, he was responsible in damages to the plaintiff, and left to the jury to say, first, whether the declaration was a libel; and, secondly, whether it was published by the defendant.

The defendant's counsel excepted to his lordship, on the grounds that he ought to have nonsuited the plaintiff for the reasons above stated; that he ought to have told the jury that the act of the defendant was privileged, under the circumstances; and that, though the publication was the act of the defendant, yet that they ought to find against the plaintiff if they believed that it was done by the defendant *bonâ fide* in the execution of his duty as a magistrate. There having been a verdict for the plaintiff for 200*l.* damages, the case now (January 21st) came on for argument upon the above exceptions.

**Hayes** (with whom was **M<sup>r</sup> Donagh, Q.C.**) in support of the exceptions. The defendant was entitled to a month's notice of action, and to have had the venue laid in the county of Leitrim, and evidence ought to have been given by the plaintiff that the act complained of had been done within six months before the commencement of the action. (12 & 13 Vict. c. 16, ss. 8, 9, 10, & 12.) The defendant acted in the transaction as a magistrate in the discharge of his duty. It was part of the duty of the defendant, pursuant to the 5 & 6 Wm. 4, c. 62, which was passed to prevent the taking unnecessary oaths, to take "declarations," and it would have been a breach of duty to have refused. The 18th section of the 5 & 6 Wm. 4, c. 62, provides that "whereas it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments, or allegations, or proof of debts, or of the execution of deeds or other matters," it shall "and may be lawful for any justice of the peace, &c. to take the declaration of any person voluntarily making the same before him in the form of the schedule to this Act annexed." And it is enacted that any person wilfully making a false declaration shall be deemed guilty of a misdemeanour. It was also the duty of the defendant to deliver the declaration to the person making. If he had retained it, the purpose of the Act would have been defeated; for instance, it is the practice for vendors of property to make solemn declarations about incumbrances: of what use would these be if the magistrate had the power to detain them? The defendant in delivering the document to the party, however, used the utmost caution to prevent its contents being known to any one except the parties making the inquiry. [CRAMPTON, J.—But where was the defendant's jurisdiction to take the declaration at all?] The 18th section of the Act of 5 & 6 Wm. 4, empowered him, and where powers are intrusted to a public officer it is incumbent on him to act. The bishop might have objected to exhibit criminal articles against the plaintiff until something more than a mere verbal statement appeared. But a magistrate is within the protection of the statute if he *bonâ fide* believes himself to be acting in the exercise of his duty. [MOORE, J.—May not the words "other matters," in the 18th section, mean matters of a similar kind to those previously enumerated?] The enacting clause is sufficiently extensive. [PERRIN, J.—Has the justice a right to take a declaration in a case where he can institute a judicial proceeding; as, for example, where he might have taken the informations of this woman against the plaintiff for the criminal offence?] Assuming the offence to have been both an ecclesiastical and a civil one, the ecclesiastical remedy may have been selected; the case would have been different had it been a charge of felony. If the defendant acted *bonâ fide* on a mistaken view of the law, it proves it to be the very case in which notice of action ought to have been given. (*Bird v. Gunnston*, 2 Chitty, 459; *Beechey v. Sides*, 9 B. & C. 586, per Lord Tenterden; *Cooke v. Clarke*, 10

Bing. 19; *Ballinger v. Ferris*, 1 M. & W. 628, per Lord Abinger; *Rudd v. Scott*, 2 Scott's, N.R. 631; *Hughes v. Buckland*, per Rolfe, B. 15 M. & W. 346; in *Wedge v. Berkeley*, 6 Ad. & Ell. 667.) Lord Denman says—"If the plaintiff meant to say that the defendant acted in the execution of his office colourably, or to discharge an old grudge, or otherwise, in bad faith, he should have required the learned judge to have put the question of *bonâ fide* to the jury;" and in the same case Littledale, J. says, "Whether the defendant is entitled to a verdict on the merits, and whether he is entitled to notice, are very different inquiries. If he had notice, and the merits were against him, he might tender amends." (*Horn v. Thornborough*, 3 Ex. 346.) The Lord Chief Justice in this case told the jury in his charge, that the defendant might have been right in receiving the declaration, though answerable for the publication of it. [BLACKBURN, C. J.—What I told the jury was, that whatever might have been the jurisdiction of the magistrate in a criminal case, he certainly had no right to make himself ancillary to the publication of such.] The case of *Theobald v. Crickmore*, 1 B. & Ald. 227, shews that the whole proceedings must be taken as one transaction. [MOORE, J.—Suppose a complaint made before a magistrate in respect of an indictable offence, and an information is taken, would he be warranted in making this the medium of scandal against the party?] No; but the question for the jury here was, whether the defendant acted *bonâ fide*—and did he believe that he was acting in the execution of his duty. [MOORE, J.—I merely put a case where a magistrate is justified in taking informations, but makes no improper use of them.] [CRAMPTON, J.—Assuming the case to be one of privileged communication, there are certain acts which a man may do, such as making a speech in the House of Commons, but if he publish it he becomes responsible. Had the defendant sent this declaration to the editor of a newspaper, he could not possibly have justified the Act.] In this case the publication was a part of the original transaction, and therefore the question should be left to the jury as to the character in which it was done; the question of the publication having been privileged was likewise a question for the jury. (*Lake v. King*, 1 Saund. 131, a.) In *Fairman v. Joss*, 5 B. & Ald. 647, it was held that evidence was admissible to shew that the party believed the facts to be true. (*Weatherston v. Hawkins*, 1 T. R. 110; *Dunman v. Bigge*, 1 Camp. 269, in note; *Child v. Affleck*, 9 B. & C. 403; *Wyatt v. Gore*, Holt's N. P. 299.) [CRAMPTON, J.—This question was considered in *Black v. Holmes*, 1 Fox & Sm. 28, in this Court.]

**Carlston and Marley, Q.C.** in support of the verdict.—The fact of a justice of the peace being a wrong-doer does not entitle him to notice of action. For instance, if an action is brought against a magistrate for the fraudulent removal of property to avoid a distress, he is not entitled to notice. The question in every case is whether he is acting in the execution of his duty. In actions against a justice a dispute may arise as to the law or the facts. The cases cited for the defendant are of the latter class. They admit the existence of authority in the magistrate, while they dispute the facts on the assumed existence of which the exercise of that authority is based. (*Weller v. Tuke*, 9 E. 364.) In this case there are two parallel questions closely approximating, but never meeting, one for the Court, the other for the jury. The first is a question of law whether the act complained of bears such a legal resemblance to the line of the magistrate's duty as to afford a presumption that he *bonâ fide* believed he was acting within the scope of his duty. The second is a question of *bonâ fide* in fact; what Jeremy Bentham calls a psychological fact, and is a question for the jury. By the 20th section of the statute 12 & 13 Vict. c. 69, a magistrate is bound to return every information to the clerk of the Petty Sessions. [CRAMPTON, J.—If the defendant had transmitted the declaration to the Petty Sessions he would have taken a most effective way of giving it publicity.] It was not an information taken in the manner prescribed by the statute, and the magistrate not having pursued the course prescribed by law, cannot now rely on his being a magistrate to protect him. According to the interpretation of the words "other matters" in the 18 sec. of the 5 & 6 Wm. 4, c. 62, the defendant's counsel, or any person whatever, may tender to a magistrate any statement, whether it be a libel, a slander, or blasphemy, if he brings it to him as a declaration; but the statute only provides for the substitution of declarations where previously oaths might have been taken (*Maloney v. Bartley*, 3 Camp. 210), and also in cases of some proceedings of foreign courts. The words "other matters" mean other matters *quædam genericæ*, such as the execution of deeds, &c.; the defendant acted at the suggestion of a third person, who put him in motion, and who had no right to do so; to take it most strongly for the defendant, that to listen to the complaint, and to take it down in writing was within

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the scope of his duty—that does not give him protection; acting in the apparent scope of his duty he took this information, not in the shape of an information, but as a declaration. Now the *ex parte* publication of a charge, no matter how regularly taken, is libellous. (*Res v. Lee*, 5 Esp. 123; *Duncan v. Thwaites*, 3 B. and C. 556.) If a third person, as the proprietor of a newspaper, having received a copy could not justify the publication, how could a magistrate? Why should he be justified in doing that which no other member of the community could be justified in doing? Can, then, it be said that where a justice has proceeded irregularly his publication of the matter, of the character of which there can be no doubt, it having been found by the jury, can be justified? The result of the cases which have been cited on the question of notice is, that where the magistrate has acted in the scope of his jurisdiction, but has exceeded it in some circumstances of time and place, then it becomes a question of *bona fides* (*Hughes v. Buckland*, 15 M. & W. 353, per Pollock, C.B.); but no case is shown in which notice was required, where, as here, not one single step was taken in the direction of duty. Upon the question of privilege, *Fairman v. Jess*, 5 B. & Ald. 642, is distinguishable; the complaint there was made *bona fide* to a quarter who had the power of redressing it, though not by a judicial proceeding. [PERRIN, J.—Here the rural dean directs the parties to go before the magistrate, and he communicates with the magistrate, stating that he wishes the declaration to be taken, in order that he might act on it, if necessary, and then he inclosed it in an envelope to the rural dean; if he does that *bona fide*, is it not privileged? Can it be said that the defendant is divested of a personal interest in the good conduct of the minister of his parish? [CRAMPTON, J.—Or suppose the magistrate had received the declaration, and wishing that the charge against the party should be investigated, as, if the charge was true, the person would be very unfit indeed to continue as minister of the parish? There was not the slightest evidence of anything of the kind here; there was no evidence of Lord Clements having acted *qua* parishioner; he never sought to investigate the complaint; he never asked the bishop or rural dean to investigate it; the rural dean asked him to take the declaration, and, after he took it, he never made any investigation on the subject. *R. v. Beare*, 1 Ld. Ray. 416; *Wyatt v. Gore*, Holt's N.P. 299, are distinguishable. The true test of a privileged communication is, that it is a communication to be put to some use; but this communication was put to no use. *Blagg v. Sturt*, 10 Q.B. 899, and *ib.* in Ex. Ch. 906, and 1 Taylor on Evid. 39, 40, were also cited.]

*M'Donough, Q.C.* in reply.—In *Wedge v. Berkeley*, 6 A. & E. 669, Coleridge, J. says "The distinction is clear between that which amounts to a defence, and that which entitles to notice." Here the defendant was admittedly a justice of the peace for the county, and had jurisdiction, and it is conceded that he might have taken an information on oath; he was applied to as a magistrate, he did not volunteer, he plainly assumed to act as a justice of the peace, and believed he had jurisdiction to act as he was called on to do. Admitting that in the entire of that act his taking the declaration, and returning it in an envelope, he was not entirely warranted, that is precisely the state of things entitling him to notice of an action; the acts he did were not alien to his jurisdiction, nor done *diverso intuitu*. (*Wedge v. Berkeley*, 6 A. & E. 669; *Huseldine v. Grove*, 12 L. J., N.S. 10, M.C.) If a magistrate was a perfect lawyer he would not require notice at all. It is where a man acting *bona fide* transcends his authority, that he is entitled to notice, in order that he may have an opportunity of making amends. (*Cox v. Reid*, per Patteson, J., 13 Jur. 563.) If the plaintiff seek to rely on the ground that the magistrate acted so illegally as to disentitle him to notice, he ought to have caused this question to be put to the jury. The question of *bona fides* is for the jury. The case suggested of a magistrate rescuing his goods under a distress is not in point, for in such case he does not assume to act magisterially. *Prestige v. Woodman*, 9 B. & C. 12; and *Waller v. Toke*, 9 E. 363, are against the plaintiff. *Briggs v. Evelyn*, 2 H. Blacket. 114, shews that the presumption is in favour of the justice having acted magisterially; in the cases in which notice was held not to be requisite, the acts of the justice were destitute of authority, both in law and fact. (*Culverson v. Milton*, 2 M. & R. 200; *Briggs v. Evelyn*, 2 H. Blacket. 114, a; *Balling v. Ferris*, 1 M. & W. 629; *Hughes v. Buckland*, 15 M. & W. 351; *Bird v. Gunston*, 2 Chitty, 461; *Theobald v. Crickmore*, 1 B. & Ald. 227; *Maloney v. Bartley*, 3 Camp. 211.) Malice has been negatived by the only two witnesses who were produced. On the question of privilege, the rule as to privileged communications, as laid down by Parke, B. in *Too good v. Spyring*, 1 Cr. M. & R. 193, is now universally adopted; if it has been in any way modified, it has been extended, not limited. Parke, B.

there says,—"In general, an action lies for the malicious publication of statements, which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice; if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." Those abstract propositions are universally true. No one was produced to shew that the defendant ever spoke to any one on the subject, and he inclosed the declaration in an envelope to the person who requested him to take it. [BLACKBURN, C.J.—If you were justified in sending the communication to the rural dean, you are not answerable for what he afterwards did. CRAMPTON, J.—It is to be remarked that Lord Clements communicated the facts only to those who knew them before.] The case of *Re The Dean of York*, 2 A. & E. 35, and 1 Black. Com. by Steph, shew the authority of the bishop to act in such cases. The resident rural dean requested the defendant to act. In *Padmore v. Lawrence*, 11 A. & E. 382, the Court adopts the ruling in *Too good v. Spyring*, holding that persons who institute complaints on subjects in which they are interested are privileged. (*Wright v. Woodgate*, 2 Cr. M. & R. 373; *Ward v. Jolly*, 6 C. & P. 499; *Delaney v. Groves*, 4 Esp. 193; *Woodward v. Lander*, 6 C. & P. 548.) [MOORE, J.—In the case cited by Mr. Martley from 1 Q.B. Rep. (*Blagg v. Sturt*), Baron Parke left the question of *bona fides* to the jury.] In the present case Lord Clements was no volunteer. The only fault of which he has been guilty is, that he acted with the delicacy of a gentleman, and in a manner befitting his station. Cur. adv. vult.

JUDGMENT.  
Saturday, Jan. 25.—BLACKBURN, C.J.—As the time approaches for serving notice of a new trial, I take this opportunity of stating, that in the case of *Little v. Lord Clements*, the Court are unanimously of opinion that there ought to be a new trial; they think that I ought to have left it to the jury to say whether Lord Clements did *bona fide* believe that he was acting in his capacity, and within his jurisdiction as a magistrate, in the discharge of his duty; and, secondly, that I ought to have informed the jury that if he did, what he did *bona fide* and without malice was protected from liability. It is not necessary to enter more into detail, but if the case goes again to a jury, that is the direction in substance and in letter which I shall give.

Venire de novo.

## DOWN.

## CROWN COURT.

Chief Baron PIGOTT took his seat in the Crown Court at half-past nine o'clock.

## RIGHT OF THE COURT TO ASSIGN COUNSEL TO DEFEND A PRISONER.

## REG. v. ANDREW FOGARTY.

In this case the prisoner was charged with the murder of his wife, Margery Fogarty, by administering to her a dose of arsenic, at Kilkeel, on the 26th July, 1850.

PIGOTT, C.B. after conferring with the Crown Solicitor, addressed Mr. Macmeehan, and requested that he would undertake the defence of the prisoner, who was unable to employ attorney or counsel.

Macmeehan replied that he had no objection personally to act, but there was a feeling and opinion existing on the subject among the Bar which compelled him to beg that his lordship would excuse him for declining.

After some conference among the members of the Bar,

Sir Thomas Staples, Q.C. rose and addressed the Court.—He said that on the part of the Bar he thought it right to state that there was a feeling among them in which he quite concurred, that no counsel could, with propriety, undertake the defence of a prisoner without receiving instructions from an attorney. He also had to say, not on the part of Mr. Macmeehan, but on the part of the Bar, that in every case in which counsel was assigned, the Crown should pay him a fee; up to a very recent period it was a rule to do so.

PIGOTT, C.B. said he could make no rule upon the subject of payment of counsels' fee in such cases; but he would certainly recommend that it should be paid by the Crown, and it was his own opinion that the fee ought to be paid. With respect to the assignment of counsel and attorney for a prisoner, it was his opinion that a judge might with propriety call on a barrister to give his honorary services to a

prisoner who was unable to employ one; but he thought the case different as regarded an attorney. A case occurred at the Special Commission in Clermal, before himself and the Lord Chief Justice (*Reg. v. Cody*), in which an attorney had been paid in certain services, and refused to act further without receiving further remuneration; the Chief Justice and himself were of opinion that they had no power to compel him to do so, but they called upon Mr. Rolleston to defend the prisoners, and he consented to do so without the assistance of an attorney; and after as able a defence as ever he (the Chief Baron) had heard in a court of justice, the prisoners were convicted.

Macmeehan said he entertained a great respect for Mr. Rolleston, but he dissented from the propriety of the course taken by him. Perrin, J. had expressed a decided opinion that counsel ought not to act without an attorney.

PIGOTT, C.B. said he could not compel counsel to act; he could do no more than appeal to the sense of feeling of the Bar.

Murphy (solicitor) having consented to act as attorney for the prisoner, Macmeehan consented to act as counsel.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELPOLE, Esq. of the Inner Temple, Barrister-at-Law.

March 12 and 15.

ELLIS v. BOWMAN.

Imbecility—Marriage contract—Issue to try *fact* of a deceased lunatic to contract marriage.

Though a person was found lunatic from a point antecedent to a marriage contracted by him and a son, the issue of that marriage, had a child a son, the issue of that lunatic and his children, a legitimate child, the Court will not decide upon the validity of such marriage without an issue directed to try the fact.

This was an appeal from an order of the Master of the Rolls, directing an issue to try whether a Mr. Bailey Bird was, in the year 1818, at the time of his marriage, a person of sound mind. The order was made in July 1850, and the appeal was advised because the issue stands for trial at the present assizes for Norfolk. The father of Mr. Bird was architect and surveyor at Norwich. He died in 1813, and bequeathed considerable property to trustees for the benefit of his widow and their only son, and in the event of the son dying without issue, then for the benefit of his sister, the plaintiff, Mrs. Ellis. The son had been of weak intellect from an early age in consequence of improper treatment during an illness, and the testator in his will gave directions with respect to the allowances he was to receive for his maintenance. In 1818, with the consent and approbation of his mother, he married one Anne Fuller, and he had a son, the issue of that marriage, in 1819, but before the birth of the child the plaintiff obtained a commission of lunacy, and the jury found the said Bailey Bird to be of unsound mind for twenty years previous to the marriage. The finding of the jury was confirmed, and committees of the estate and person were duly appointed, but no proceedings were taken to annul the marriage because the Court refused to permit them to be undertaken at the expense of the lunatic's estate, and the plaintiff was not in a condition to undertake them at her own. In 1825 the wife of the lunatic died; in 1843 he died himself, and in 1845 his son died, after having made a will in which he disposed of all his property in favour of the family of William Bauldry. Under these circumstances the suit was instituted in 1847 against the trustees and against Bauldry, the plaintiff claiming under the will of her father, on the ground that Bailey Bird being an idiot and incapable of contracting marriage, and the issue of such marriage being illegitimate, she was entitled to the whole of the property bequeathed by the will of the father, and the son of Bailey Bird had no right to make any disposition in favour of Bauldry. The Master of the Rolls thought it was one of those cases that the Court never disposed of without the intervention of a jury, and he made the order, against which the plaintiff appealed, on the ground that there was abundant evidence to justify a decree without such intermediate proceeding.

James Parker, Miller, and Selwyn, for the appeal, cited *Evans v. Blood*, 3 Bro. P.C. 632; *Clark v. Clark*, 3 Vernon, 414; *Attorney-General v. Parfiter*, 3 Bro. C. C. 440; *Hall v. Warren*, 9 Ves. 605; *McAdam v. Walker*, 1 Dow. 177; *Pickering v. Higginson*, 27 Aug. 1807, Q.B.; *Browning v. Pearce*, 2 Phillim. 59; *Short v. Lee*, 4 E. 464.

Roll, Goodere, and Barrett, contra, cited 1 Roll's Abridgment, 340, c. 8 and 10, and 357, non. Bastard; Hargreave's Coke Littleton, 88; Statute of Merton; *Sargeant v. Sealey*, 2 Atk. 472; *Milnes v. Conyers*, 4 Ex. Rep. 18; the *Portsmouth* case;



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Haggard's Eccl. Cases; *Parker v. Parker*; *Lee's* cases, vol. 2, 382; *Leggat v. O'Brien*, Milward's Irish Eccl. Cases, 397.

**THE LORD CHANCELLOR.**—The bill is filed by Mrs. Ellis for the purpose of establishing the will of Bailey Bird the elder, under which (made in 1814) the plaintiff was entitled in remainder to the property thereby devised, the devise being first to Bailey Bird the younger, and to his children, he not having any child at the date of the will. He was married in 1819, and there was a son the undoubted issue of that marriage, who died in 1843, having made a will of this property in favour of William Bauldry. He and other parties interested were made defendants to the bill. The main question is, whether this last testator, the son of Bailey Bird the younger, was legitimate; for if he was not, his will was of no effect against the plaintiff's title; and that question again depends on the fact whether Bailey Bird, his father, was of sufficiently sound mind to contract marriage at the time at which the marriage *de facto* took place. The plaintiff alleges that he had not at that time capacity to contract marriage; and she relies on the fact that under a commission of lunacy issued soon after the alleged marriage the jury found Bailey Bird to have been of unsound mind then and for twenty years preceding. It was, however, argued on behalf of Bauldry, the appellant, that Mrs. Ellis could not be now heard to impeach the validity of the marriage, she having assented to it at the time, or at all events having acquiesced. I have made myself perfectly acquainted with every point in the affidavits, but I will not now state the impressions made by them on my mind, as the matter is to undergo further inquiry by my affirming the order of the Master of the Rolls. It was argued that the Court ought, if possible, to give effect to the marriage after so long a time, particularly after the alleged acquiescence of the person who now impeaches the validity of it. I cannot admit that there was any acquiescence on the part of the plaintiff. She had no notice of the intended marriage until the 27th of June, 1819, and it took place on the 7th July afterwards. She obtained, as soon as possible, a commission, and the party was found to be of unsound mind, and the care of him was taken from the wife, the natural person to be appointed committee. The only reason that can be assigned for that is, that the marriage was not considered valid. It further appears that the plaintiff was in poor circumstances, and unable to prosecute a suit to set the marriage aside. She applied to the Court, asking that the expenses of a suit for that purpose should be supplied out of Bailey Bird's estate; but the Master to whom that matter was referred reported that it was his opinion that it was not expedient to charge such expenses on the lunatic's estate. That report of the Master is not inconsistent with an opinion on his part that the marriage was invalid. The plaintiff had no funds and was not then able to question the validity of the marriage. She could not do more than she did at the time; and certainly there is no good ground to infer her acquiescence in the marriage; after the general finding of unsoundness the onus of proving a lucid interval at the time of the marriage lies on the party who now asserts such lucid interval. Another inference of acquiescence was that the plaintiff had written a letter to the son of Bailey Bird (Bauldry's testator), calling him her "Dear Cousin," and asking him for pecuniary assistance. That was very natural. There is no reason at all, nor was there ever any reason, to doubt that he was the offspring of Bailey Bird by the alleged marriage. There is no imputation of any impropriety on the mother, and no doubt this person was their child. There is no act of acquiescence on the part of the plaintiff to preclude her now from questioning the legitimacy of this person, by whose will the property to which she is entitled, if he was illegitimate, is given away from her. She has still a right to question the sanity of the father, and the validity of his marriage. After some observations in reference to arguments urged on him by Bauldry's counsel to the effect that even if the marriage was not valid, still he ought to construe the will of Bailey Bird the elder so as to give effect to his intention therein expressed in favour of the issue of his son whether legitimate or not, said that the law was opposed to such a construction, and would not give the property to illegitimate offspring unless distinctly designated.

Dec. 7 and 9, 1850.

HALL v. HALL.

**Partnership—Continuing trade—Receiver and manager—Costs.**

*The Court will not, by the appointment of a receiver or a receiver and manager, take the conduct of a continuing partnership trade into its own hands for the purpose of being carried on. A party who so conducts his opposition to a motion for a receiver (conducting it in person) that the questions involved in the application, and the authorities upon it have not been argued, through such party's neglect, to take the ordinary means*

*of having the case fully discussed, will not, on the discharge on appeal of the order made against him, be allowed his costs in the Court below.*

In this case an order had been made by the Master of the Rolls for an injunction restraining the defendant from restricting his copartner, the plaintiff, in the enjoyment of his partnership rights according to the terms of the partnership articles. The plaintiff and defendant are partners as brewers, maltsters, and wine and spirit merchants at Romsey, Hants; the defendant having brought the capital into the business, afterwards sought to exclude the plaintiff from participation in its management. The injunction granted by the Master of the Rolls having been systematically disregarded by the defendant, the plaintiff gave a notice of motion before the Master of the Rolls for the appointment of a receiver and manager of the copartnership business, and that the defendant might stand committed for breach of the injunction. That motion having stood over for some time at the defendant's request, and on his promise to act in strict regard to the partnership articles, but none of such promises having been kept, notice was given to the defendant that the motion would be brought on the 8th of May, 1850. Instead of instructing counsel, as he had done on the previous motion for an injunction, the defendant appeared in person, but without offering any affidavit in answer to the affidavits on which the plaintiff's motion was founded. The plaintiff's counsel then waived that part of the notice of motion which asked for the commitment of the defendant for breach of the injunction, and an order was made for the appointment of a receiver and manager of the partnership. The defendant moved by way of appeal to discharge that order.

*Lloyd and H. Clarke* supported the appeal motion, and contended that it was contrary to the practice of the Court to grant a manager of a partnership business except with a view to winding it up, and as incidental to a dissolution, and that in order to ground an application for a receiver in partnership matters there must be an absolute exclusion of the plaintiff from the partnership concern. They read the affidavits on which the order had been made, and cited *Oliver v. Hamilton*, 2 Anstruther, 453; *Waters v. Taylor*, 15 Ves. 13; *Harrison v. Armitage*, 4 Mad. 143; *Goodman v. Whitcomb*, 1 Jac. & Walk. 589; *Marshall v. Colman*, 2 Jac. & Walk. 266; *Smith v. James*, 4 Beav. 583; *Richards v. Davies*, 2 Russ. & Myl. 347.

*Bacon and Welford*, supported the order, and cited and referred to *Const v. Harris*, Turner & Russ. 496; *Goodman v. Whitcomb*, *supra*; *Wallworth v. Holt*, 4 Myl. & Cr. 635; *Wilson v. Greenwood*, 1 Swans. 471; *Richardson v. Hastings*, 2 Bea. 323; *Fairthorne v. Western*, 4 Hare, 329; *England v. Curling*, 8 Beav. 129; *Malcolm v. Montgomery*, 2 Molloy, 531; *Bouman v. Bell*, 14 Sim. 392; *Thomas v. Davies*, 11 Bea. 29; *Dani. Chan. Prac.* 1612, n.

*Lloyd*, in reply.

## JUDGMENT.

**THE LORD CHANCELLOR.**—Upon the best consideration I can give this case, I think the order that has been made cannot be supported. It does not appear to me to be consistent with the course of authority that has prevailed in the Courts, and I am not surprised at that when my attention is directed to the extreme difficulty which must result from the prosecution of such an order under circumstances like the present. It is extremely unfortunate for the Court, where applications are made which depend upon certain principles of law upon which the jurisdiction of the Court is found, that persons who are totally incompetent of bringing before the Court what has been the state of the authorities to shew how they apply to the circumstances of the case should attempt to conduct their own business, they are wholly incapable of doing justice to their own case, or of calling the attention of the Court to the material circumstances. In this case it appears there was a motion made for an injunction and receiver, or rather, in the first instance, for an injunction, and afterwards a motion, to commit for a breach of that injunction, and for the appointment of a receiver. It does not very distinctly appear as to what passed. I think, in reference to the granting of the injunction, beyond this, that the allegation on the part of the plaintiff was not satisfactorily answered, on the part of the defendant, to the satisfaction of the Master of the Rolls, that the defendant had not observed but had violated some of the articles of co-partnership, and he was enjoined against the continuance of that breach of the articles with which he was charged, so far as it was supposed to be made out. As to the propriety of that injunction, neither as to circumstances under which it was granted, nor as to its particular terms, I do not think the Court has at present anything to do. I do not think that question is at all before the Court. I will therefore assume for the purpose of the present motion that the injunction was properly granted, and that if it was disobeyed there was a known remedy which it was open to the parties to obtain against the party

so disobeying, but that could not give any power according to the practice of the Court, to abandon that remedy, and to substitute another remedy of a totally different nature. I therefore cannot conceive that if a party is not prepared to ask for a commitment for a breach of an injunction, he can then ask to substitute the appointment of a receiver and manager. The rights to those different remedies are essentially distinct, depending upon totally different grounds and circumstances. The motion, I consider, was made before the Master of the Rolls for a receiver and manager, and upon that occasion, in all probability, the case was opened on the part of the plaintiff, presenting to the mind of the Master of the Rolls certain breaches of the articles of co-partnership of such a nature as might, or might not, furnish a ground for the plaintiff to pray a dissolution. I think it is extremely probable (though not likely to be so intended) from the result, that the Master of the Rolls' attention was directed to those acts of alleged misconduct on the part of the defendant, and that it was assumed the plaintiff was seeking for a dissolution of the partnership upon those grounds, and that the distinction between the injunction for breach of the articles of co-partnership, and the appointment of a receiver and manager, with a view to dissolution, was not presented to the mind of the Master of the Rolls. The defendant was incompetent to do it, and the plaintiff's object, and the object of his counsel, was to call the attention of the Master of the Rolls to a totally different view of the case. I cannot conceive that if the attention of the Master of the Rolls had been called to the state of the record and to the application of the general principles which had prevailed in the appointment of receivers or managers, I cannot but conceive, from my knowledge of the extreme care and accuracy of that learned judge, that if he had intended to overrule any of the previous decisions, he would have stated distinctly his intention so to do, and have stated ample grounds to justify the conclusion to which he came; but nothing appears to have fallen from him tending to shew that his lordship at that time intended or contemplated introducing any decision in the slightest degree inconsistent with what had been the previous course of authority of the Court. It now stands that this is a bill, not brought for a dissolution of a partnership in which the plaintiff complains that the articles of the partnership have not been observed, he does not make that complaint the foundation of his prayer that he may be relieved from the partnership, but, on the contrary, his sole object is to establish the partnership and to enforce its being carried on according to its terms. It is, therefore, not a case which at all falls within that class of decisions where it is in the election of a party who complains of a breach of the articles of the partnership who does elect to make that complaint the foundation of the prayer for dissolution, and the general principle appears to be resulting from all the authorities, as far as I can collect, that the breaches of the articles of partnership are not necessarily the foundation of a dissolution; but when those breaches are of such a nature as to shew that a partnership cannot be carried on for the benefit of the parties according to the original intention as apparent from the articles, inasmuch as one side has put an end to the partnership according to the original agreement and articles in that case, the other party may be relieved from the partnership, although there is no express provision that the partnership should determine upon the breach of either of those complaints or of any others. It is, therefore, upon the ground that virtually the parties have determined the partnership, or at least that one has, as far as he is concerned, withdrawn himself from the partnership according to the articles, and that the other, by reason of such conduct, claims to be relieved or prays a dissolution, and, therefore, in every case it must be looked to to see when complaints are made of breaches of the articles, with what view the complaint is urged, whether it is urged with a view of making that complaint the foundation of dissolution, or the foundation of a decree enforcing or carrying on the partnership according to the original terms, and preventing by proper means those breaches recurring which have before happened by reason of the conduct of one of the parties. Now, in this case, the party prays the establishment of the partnership according to its terms, namely, specific performance of the articles of agreement. Well, in the course of that he finds it necessary to move for an interim injunction, and he shews reasonable grounds to influence the discretion of the Master of the Rolls that it is proper for his safety to secure, as far as can be secured under the authority of the Court, the partnership being carried on until the hearing according to the articles. We get an injunction; by-and-bye, he is dissatisfied with the then state of things, notwithstanding that injunction, and he then comes and prays for a receiver. Now, was his suit in such a form—had he presented his complaint in such a manner—as to entitle him to ask for that particular relief? Were the acts which

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he has made the foundation of his application of such a nature as to shew that when the hearing came on it would be nugatory for the Courts to decree a specific performance of the articles according to the prayer of the bill, which must be the foundation of that relief? Has he shewn that the acts that had occurred were of such a nature as that, although at the time he presented his bill, and framed the prayer of his bill, his object was to establish the partnership, yet by reason of the conduct of the defendant since the state of things had altered, the partnership no longer could be carried on with reasonable advantage to him, according to the original term? Why, he might have amended his bill, and adapted his prayer to any state of circumstances which would justify any variation he might be advised to make; but with the prayer standing for a specific performance, or, in other words, for the establishment and continuance of the partnership, he comes and asks for a receiver and manager to be appointed. Now, having attended to the various cases which have been cited, they appear to me to be all one way, down to the very last case that has been referred to, of *Smith v. James*, and I find but one case in which any expression is at all equivocal, as far as I can judge. I do not mean to say you may not extract a sentence from some of the cases, or more than a sentence, which, taken apart from the context, and considered in the abstract, and without reference to the subject matter to which they were addressed, it might be possible to found a doubt upon it; but taking the context in all the cases, and applying, as it is proper it should be, what falls from the Court, as construed and as made intelligible by that context, I do not see that there is any doubt running through the cases; and, without investigating the particular merits of Anstruther's Reports, you do find there that laid down by the Court which seems to me to be consistent with all the subsequent authority, and if you go through those cases, there is not one, as it appears to me, that at all impugns the general doctrine, which I conceive to be clear, that where it is not the object of the suit to obtain a dissolution of partnership, but, on the contrary, to continue it, that it is not according to the practice of the Court to grant in the course of that suit the appointment of the manager and receiver. The two cases that appeared to have some expressions in them which seem to be favourable to the plaintiff's view of the case, were *Goodman v. Whitecomb* and *Wilson v. Greenwood*. I have remarked upon both these, that with respect to the one, what falls from Lord Eldon in the earlier case, with reference to the subject matter, clearly meant that a party might so misconduct himself by excluding his fellow partner from a proper participation in the management of the business as might furnish a ground for dissolution; but that is stated in the course of observations all directed with reference to the principle that a receiver and manager was to be appointed in reference to dissolution, and then having the mind directed to the subject of dissolution. Amongst the causes of the dissolution is the exclusion by one partner of the other. *Goodman v. Whitecomb*, which is the last of the cases, is perfectly plain and intelligible. It shews that Lord Eldon had not at all altered his view upon the matter, and had abundantly removed any doubt or ambiguity as to the meaning of the expression to be found in *I Swan's Reports*. The case of *Walworth v. Holt* appears to be a peculiar case; but the point that there arose was of a very distinct nature. The partnership there had ceased to be carried on; it was quite obvious, from the fact that it could not be carried on, the concern was insolvent; the parties were undisposed to raise any capital, and the property of the partnership was likely to be lost, as appears upon the proceedings between the period of the motion and the hearing, lost to all parties, unless the Court had interfered to preserve it; and although the bill had not the word "dissolution" in it, yet it was plain that it was the object and necessary effect of that bill to put an end to the concern; and therefore it stood upon precisely the same basis as if the bill had been filed exclusively for the purpose of dissolution, and the winding up of the concern. In the case of *Conat v. Harris*, which is the only case that introduces any ambiguity, there is certainly an expression, in page 525 of the report, that would seem favourable to the plaintiff: it says, "The most prominent point on which the Court acts in appointing a receiver of a partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from his full share of the management of the partnership, as he who assumes that power himself enjoys." Now, the receiver that was asked for in that case was a receiver who, it is to be justly observed, was wholly unconnected with the management: he was to receive, either the rent under a lease if the parties thought fit to adopt that lease, or the admission money taken at the entrance of the theatre, supposing the lease was repudiated or not acted upon, and he was to apply it according to certain terms and provisions which the parties themselves had

provided. The case itself was a peculiar and extraordinary one, the receiver there had a simple duty to perform, you may consider him merely as ministerial; he was to receive all that the persons paid for their entrance to the theatre, and to apply it according to a certain specific arrangement that the parties had before directed that he was to do until the hearing of the case. The case appears to me to be very distinguishable in its circumstances, and taking the expression which is here used as applied to the receiver, and receiver only, it does not become applicable to this case. I can readily conceive a case where the mere question is of receipt, where, as in the case of *Conat v. Harris*, the allegations were, that of allowances to be received by the parties, without the interposition of a receiver that they would not be applied to their proper purposes, and that in truth at the hearing of the case there would be a failure of justice by the acts which took place in the mean time. It seems to me that that case is not to be taken as an authority at all inconsistent with the general course of decisions that had before prevailed. Then, if I am correct in the conclusion to which I have come, by the rule and practice of this Court, a receiver or manager is only granted where it is auxiliary to the object of dissolution. I do not go into any possible cases which might arise, but act according to the doctrine which has been laid down—a doctrine, I apprehend, that belongs to all Courts, namely, that you adhere to principle, and apply that principle to new cases, so as to give effect to it in the best possible way. It is possible that there might be a case arise where a party was so conducting himself as that, unless a manager was appointed in the meantime, the concern might be destroyed. Well, the Court would no doubt apply the principle that had before properly prevailed to such a case, but in the present case it appears that there is a partner against whom insolvency is not charged, who has brought in the whole of the capital, who, it is suggested, is not perfectly competent to answer for any money that may come to his hands, supposing he is in the habit of receiving money, as appears to be the case. It is said that he has applied a part to his own purposes. Well, how far had he a right so to do, whether he had advanced any sum of money on account of the partnership, and that he reimbursed himself out of those moneys does not appear. There may be a variety of circumstances that may account for that; but in the absence of all explanation, I simply have this case before me here of a person who is under the peril of an injunction against the misapplication of the funds, against whom there is no motion to commit for a breach of that injunction, who is not shewn to be so circumstanced as to make any such interference essential to the security of the parties pending the hearing of the cause until its hearing. It seems to me, therefore, that no circumstance in this case warrants a departure from what I conceive to be the established principle of the Court now, that the general jurisdiction is auxiliary in granting a receiver and manager to a dissolution, I conceive to be clear. In the present case it appears to me that what is said is correct, that by granting a manager in truth, instead of doing that which is the only object of granting a receiver or manager, it is destructive of it. It seems to me perfectly impossible that this concern could be carried on with that advantage which both parties have a right to expect; it should be carried on until the hearing, when it is expected that the partnership should continue. It seems to me impossible that the appointment of a receiver could be made with any substantial benefit. I certainly cannot adopt the view which one of the learned counsel has presented to me of that qualified sort of management which is to leave the parties in truth to manage for themselves under the supervision of a manager, I do not understand that. It appears to me that interference with the manager in any substantial degree would be a contempt of the Court, punishable just as much as a breach of the injunction. Now there are articles necessary to be purchased, and there is a trade to be carried on which requires skill. This gentleman, the manager—the conductor of the concern, it seems to me, cannot by possibility conduct it in such a manner as to preserve it entire and substantial for the benefit of the partners, after the hearing of the cause, supposing a decree shall be made to carry it on. It is that kind of business that I think cannot be so carried on, and it does not appear to me that anything has been done which will necessarily prevent the partnership being carried on if a decree be made for that purpose as prayed by the plaintiff at the hearing. I think, therefore, from the circumstance that the attention of the Master of the Rolls was not called to the state of the record, and to the prayer of the Bill being exclusively, or for the main part, directed to the establishment of the partnership, and to the carrying it on; and that the act imputed to the defendant is by no means destructive of the partnership in the sense that a decree would be available for carrying it on by reason of his intermediate acts, it does not appear to me there were any suffi-

cient grounds laid before the Master of the Rolls, if his attention had been called to them, to warrant the order that is now complained of. I think, therefore, that the appeal must be allowed, and the order of the Court below must be discharged.

*Lloyd*.—Your lordship will make the order that should have been made in the court below—refuse the motion with costs.

*Beeson*.—No; his lordship has not said that.

The LORD CHANCELLOR.—I have considered that point; and I do not think the defendant should have any costs. There is but one ground for it. I do not think the parties have a right, at the peril of their opponents, to come into court totally unprepared to occasion expense for want of the Court being put in possession of the proper materials. I think such parties must come at their peril. There are adequate means for their protection; and if they choose to rely upon their own efforts, be it so: the Court will aid them to the utmost of its power, but that, like all other speculations, is not to be made at other people's expense. I therefore think, if a party puts his opponent to expense for want of the Court having before it that assistance without which justice cannot be safely administered, he should do that at the peril of costs, and therefore the original motion should have been refused without costs.

## ROLLS COURT.

Reported by J. MACAVILLY, Esq. of the Inner Temple,  
Barrister-at-Law.

Tuesday, Jan. 14.

WILLES v. CHILDE.

*Charity—Removal of master—Exercise of discretion by trustees—Jurisdiction—Injunction.*

By charter of the 26th of April, in the sixth year of the reign of King Edward VI. certain lands were granted to support a grammar school in Ludlow, to be kept by one master and one usher. In 1838 a scheme was settled for the management of the trust, and new trustees were appointed; and it was provided "that the trustees should have authority from time to time, upon such grounds as they should, in their discretion, with the exercise and execution of the powers and trusts reposed in them, deem just to remove the master, &c. from office." The trustees, without affording the master (appointed in pursuance of the provisions for that purpose) an opportunity to defend himself or explain his conduct, and without instituting an inquiry in his presence, removed him by a resolution duly passed in the exercise, as they stated, of their discretion, and that resolution was duly confirmed:

*Held*, that the provision in the scheme as to removal did not confer on the trustees an arbitrary power to dismiss, free from the control of this Court, which had settled the scheme; and that the trustees were not the only and absolute judges of the sufficiency of the grounds of removal.

*Held*, also, that the word "trusts," being super-added to the word "powers," must have been so added for some purpose, and that was for the purpose of keeping in view that it was a trust for the execution of which the Court was providing; and that it had the effect of restricting the large meaning which might otherwise be given to the word "discretion." The trustees were restrained from enforcing the resolution for the removal of the master.

This was a motion made on behalf of the plaintiff that the defendants might be restrained from taking any proceedings for the purpose of enforcing a resolution by the trustees of the grammar-school of King Edward VI. in the borough of Ludlow, made on the 16th January, 1850, whereby it was resolved that the plaintiff should be removed from the office of the said master. The bill prayed for a declaration that the resolution was invalid, and that the plaintiff might be quieted in his possession of the office of master, to which he was appointed in the year 1838.

The school, which was originally founded and endowed by King Edward VI. and the management of it, and of the property held in trust for it, had, before the year 1848, become the subject of differences of opinion and litigation; but by an order dated the 2nd of August, 1848, and made by the Lord Chancellor, on an information filed by the Attorney-General against the corporation of Ludlow and others, a scheme for the regulation of the grammar-school in question, and certain other charities, was settled; and by the 14th regulation of that scheme, it was provided as follows:—"That the trustees shall have authority from time to time, upon such grounds as they shall, at their discretion, in the due exercise of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, or any additional master or masters, or either of them, from their or his offices or office in manner aforementioned, that is to say, that on the requisition in

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writing, signed by three of the trustees at least, the secretary of the trustees shall call a meeting of the trustees; a notice in writing to be given or sent to each of the trustees six days before the holding of such meeting; and in such notice shall be stated, that at the said meeting it is intended to propose the removal from the office of master, usher, or additional master or masters, persons whose names shall be in the said notice; and that at the same meeting there shall be present not less than two-thirds of the trustees for the time being; and that at the said meeting a resolution shall be proposed by one and seconded by another of the trustees, for the removal of such master, usher, or additional master or masters; and that if the same be carried by at least two-thirds of the trustees so present, the same shall be entered upon the minutes of the trustees and signed by such of them as vote for the said resolution; and that the resolution shall, at a subsequent meeting of the trustees called by such notice as last before-mentioned, and which notice set forth the former resolution, and with an interval of one calendar month at least, whereas the same proportion of trustees at least shall be present as is required to be present at the first meeting, be confirmed by two-thirds of the trustees then present, the said master, usher, or additional master or masters, shall be considered as if removed, as on the day of the second meeting; and his office shall be vacant on and from that day, provided that such resolution and confirmation thereof, as aforesaid, together with the grounds of such removal, shall be entered and preserved upon the minutes and proceedings of the said trustees."

On the 8th of January, 1850, three of the trustees signed a requisition addressed to the secretary of the trustees, requiring him to call a meeting for Wednesday, the 16th day of January then next, at which meeting it was intended to propose the removal of the Rev. Arthur Willis, the plaintiff in the cause, from his office of master of the school. On the same day the secretary gave notice of the intended meeting. Accordingly the meeting was held on the 16th day of January; fifteen trustees were present; and after reading the requisition and notice, reading an order of the 6th of August, 1849, and the report of the grammar-school committee, a resolution for the removal of Mr. Willis was moved by one trustee, and seconded by another, and then certain trustees, fourteen in number, acting, as they say, in their discretion, and in the due exercise and execution of the powers and trusts reposed in them, resolved that Mr. Willis be removed from his office; and they did remove him, and signed their name to such resolution; and they subjoined a statement of the grounds of such removal, which were in number; and it was ordered that a special meeting of trustees should be convened for Wednesday, the 20th of February then next, at eleven o'clock in the forenoon, for the purpose of submitting the foregoing resolution for confirmation. A meeting was accordingly held on that day. It was stated that the Rev. Arthur Willis, the master of the grammar-school, and Mr. John Williams, the usher of the grammar-school, severally attended and were heard,—that the resolution of the 16th of January was read, and then that, upon the motion of one trustee, seconded by another, the undersigned trustees, being not less than two-thirds of the trustees present at the meeting, and alleging that they had heard the Rev. Arthur Willis on the subject, and had duly considered the premises, did in their discretion and in the exercise and execution of the powers and trusts reposed in them, deem it just to adopt the resolution, and they accordingly resolved that the resolution be confirmed. The plaintiff feeling himself aggrieved by these proceedings on the part of the trustees, filed his bill to restrain them, and thereby alleged that some of the trustees were holders of removeable leases, and others were members of the corporation, and that the compromise which had been entered into (after an information had been filed respecting the charity lands which had become intermixed with those of the corporation), and which had been carried out by the 9 & 10 Vict. c. 18, and the scheme subsequently settled by the Court was less favourable to them and to the corporation than the terms originally proposed, and that the plaintiff having exerted himself in favour of the charity, had incurred the displeasure of the trustees, because the income of the property of the corporation had become exhausted in indemnifying the charity, and the expenses of the corporation had to be met by a borough-rate. The bill also stated that the trustees were further annoyed by the plaintiff's interfering to prevent the sale of a part of the charity property called Ashford estate, the plaintiff conceiving that it was about to be sold at an undervalue, and having written to the Bishop of Hereford to withhold his consent and allow the plaintiff, as an object of the charity, to be heard against the sale. The bill then alleged that the trustees had concocted a plan to remove the plaintiff from his office. The bill then stated certain resolutions of the trustees passed on the 6th of August, 1849, whereby it was resolved that every complaint

teaching the discipline, order, or conduct of the school from the master or usher to each other should in no case be made in the presence or hearing of any scholar; and that the play-ground attached to the school-room should be thrown open to all the boys half-an-hour before the school commenced in the morning and kept open till the school closed in the evening. A copy of these resolutions was sent to the plaintiff, who replied that they involved matters of discipline not within the scope of the rules and orders contemplated by the scheme, and preferred a complaint against the usher for incompetency and neglect of duty in absenting himself from the school. The bill then set out various matters and resolutions of the trustees, and particularly a reference by them to the grammar-school committee, of the whole question of the school, with instructions to report thereon, and the subsequent meetings and resolutions to remove the plaintiff, on the grounds, as entered on the minutes, of his excluding the town boys from the school-room and play-ground, his boarders having access thereto; secondly, compelling the town boys to remain in the street, by reason of the school doors not being open at a proper time before school hours, thereby exposing them to the weather; thirdly, punishing nevertheless the town boys if not in school at the proper time; fourthly, blaming the usher before the boys; fifthly, the continuance in office of the plaintiff would destroy the school; and, sixthly, because the refusal to comply with the rule and order was an infringement thereof and of the scheme; and as he had endeavoured to intimidate the trustees by a threat, they had no hope that the rules for the management of the school would be brought into operation under his mastership, if personally distasteful to himself or inconsistent with his interests. The bill denied the facts stated in the grounds to be true, and charged that certain of the trustees had said it was necessary to get rid of him, and that they had endeavoured to get up charges against him, and that some of them admitted that they were ignorant of the charges preferred against him, but had come to the meeting with a determination long previously formed to remove him; and it prayed an injunction to restrain the trustees from enforcing the resolution as to removal, and from taking any further steps in the action of ejectment which they had brought to obtain possession of the school-house and premises. The plaintiff moved for an injunction accordingly, which now came on to be argued.

Turner and Renshaw, for the motion, cited *Dummer v. The Corporation of Chippingham*, 14 Ves. 245; *Re Phillips's Charity*, 9 Jur. 959; *Re Fremington School*, 10 Jur. 512.

Lloyd and Lewis, contra, cited *Giles v. D'Eble*, 2 Y. & C. C. 542; *Glascott v. Long*, 2 Ph. 810; *Ferraley v. Hobson*, 2 Ph. 255; *The Attorney-General v. The Corporation of Ludlow*, 2 Ph. 606; *The Attorney-General v. Middleton*, 2 Ves. sen. 328; *Eden v. Foster*, 2 P. W. 325; *Phillips v. Bury*, 1 Ld. Raym. 5; *Reg. v. The Corporation of Ipswich*, 2 Ld. Raym. 1232; *St. John's College v. Tyddington*, 1 Barr. 158, 199; *Res. v. The Bishop of Ely*, 2 T. R. 290; *Reg. v. The Darlington School*, 6 Q. B. Rep. 682; *Whiston v. The Dean and Chapter of Rochester*, 7 Burr. 532; *Re Briston School*, 11 Jur. 561; *Bagg's case*, 11 Rep. 936, 936; *Re The Ludlow Charities*, 2 Myl. & C. 316; *Re Phillips's Charity*, 9 Jur. 959; *Res. v. Gaskin*, 8 T. R. 209; *Doe dem. Earl of Thanet v. Gartham*, 1 Bing. 357.

Turner, in reply, cited *Archbold v. The Commissioners of Charitable Bequests for Ireland*, 2 H. L. Cas. 460.

The MASTER of the ROLLS.—The plaintiff in this case complains of his removal from the office of schoolmaster; he admits that the trustees of the charity, if they act in the due exercise and discretion of the powers and trusts reposed in them, and in the manner authorised by the regulation, have a right to remove the schoolmaster, and that they have even a discretionary power, when it is exercised, after due consideration, and after making themselves duly acquainted with the facts upon which they act. But he denies that they have any right to remove the master arbitrarily and capriciously; and he insists that in this case they have acted irregularly, without proper inquiry, and unjustly, and that they have done him an injury, for which he is entitled to redress in this Court. The trustees, on the other hand, insist, that they have a right to remove the master for any reasons whatever which seem good to themselves; that they are not answerable to this Court for the mode in which they have thought fit to exercise their discretion; and they further contend, that if they are bound to answer, or are in any way accountable for the exercise of their discretion, they are ready to shew they have proceeded regularly and justly, and have removed the master for good and sufficient reasons. The first, and perhaps the only question material to be considered at this time is, whether under the scheme established in this case, the trustees have an arbitrary and uncontrollable

authority to dismiss the master for any cause which they may think fit to assign. It is contended on their behalf, that the decision is final and subject to no appeal. As an authority for this the *Darlington School* case, in the Court of Q. B. is relied upon. In that case there was power for the governors to remove the master, and appoint another according to their sound discretion, and upon those words it was held that the trustees might remove the master as they pleased, and that their discretion was not to be restricted by any opinion which the Court might form of the reasons on which they might have been induced to exert it. When the *Darlington School* case was brought under the notice of his Honour Vice-Chancellor Knight Bruce, [in the *Fremington School* case, he did not think that it applied. In that *Fremington School* case, by the will of the founder, the trustees were empowered to displace the master upon any neglect or misbehaviour of the master, or other just cause of which they, or the greater number of them, should agree upon and think fit to displace such master and place another there. His Honour did not think the principles on which the *Darlington School* case was decided were applicable to such a case as that, but held that the Court was to consider whether there was neglect, misbehaviour, or other just cause. It was not enough for them to say that there was some cause or some reason which they might agree upon, and think fit to displace the Master. In the case now under consideration the power of the trustees is not, as in the *Darlington School* case, "to remove according to their sound discretion;" or, as in the *Fremington* case, "for such just cause as they might agree upon and think fit to displace him," but the power has reference to "such grounds as they shall, in their discretion in the due exercise and execution of the powers and trusts reposed in them, deem just." If the grounds were to be "such as they, in their discretion, should deem just," without more, or if they were merely to exercise the power, it might be difficult to distinguish this from the *Darlington School* case; but here, that which is to be done is to be in the execution, not merely of the powers, but of the powers and trusts reposed in them. The powers which are given in such a case as this, like all powers to be exercised for the benefit of others, or for purposes which are more or less public, must in one sense be deemed to be held in trust. There are, indeed, very many powers in that sense held to be trusts which cannot be enforced or controlled in this Court; but here is a power defined by this Court itself for the purpose of carrying into execution a charitable trust; and it must, I think, be considered that the word "trusts" was added to the word "power" for some purpose; that is, for the purpose of keeping in view that it was a trust, for the execution of which the Court was providing; and the employment of the word "trusts," especially when considered with reference to the direction of the reserved statement of the grounds of removal appears to me to have the effect of restricting the large meaning which might otherwise be given to the word "discretion" contained in the ordering part of the clause. Considering that the trustees are not the only and absolute judges of the sufficiency of the grounds of removal upon which they have acted, and that they are subject to the jurisdiction and control of this Court, with execution of the trusts reposed in them, it becomes necessary to inquire into the manner in which they have acted in the present case. The plaintiff alleges that the power of the trustees has been corruptly exercised, or at least that there has been an undue exercise of the discretion which they had. A great many affidavits have been filed; they contain much inconsistent evidence, and it seems to me, that some, at least, of the trustees manifested an eager desire to find occasion to remove the plaintiff. If, upon a fair investigation of the facts, and after just means of explanation and defence had been afforded, it had appeared that the employment of the plaintiff had become prejudicial to the school, the trustees would have been fully justified in removing him. On the merits, however, I find it very difficult to form a conclusive opinion of the truth or falsehood of many of the allegations which are stated. But, after reading the affidavits, I observe that some differences have arisen between the master and the usher, the trustees not troubling themselves to promote any means of conciliation or adjustment, seem to have been disposed to impute the principal fault to the plaintiff; and, instead of instituting an inquiry in his presence, which might have afforded him the means of explanation and defence, they, without his knowledge, commenced proceedings against him by referring the matter to the school committee to consider the case. The school committee proceeded to investigate the case in his absence and without his knowledge, and reported against him. The report was not communicated to him, but the trustees met, as they say, considered the report, and in his absence, and without hearing him, they confirmed the report, and resolved to remove him; and stated the grounds and reasons for such his removal. The



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trustees having thus committed themselves without hearing the party affected by their resolution; having thus condemned the plaintiff unheard—ordered another meeting to be summoned for Wednesday, the 20th day of February then next, at eleven o'clock in the forenoon, for the purpose of submitting the foregoing resolutions for confirmation. The trustees did not even then think it necessary to communicate the proceedings to the plaintiff, but the plaintiff having by some means, not, I think, explained, become acquainted with the proceedings on the 28th of February, two days before the appointed meeting for the 20th, wrote to the trustees a letter, which, I think, to have induced them to pause, and to consider whether they were proceeding with due caution and justly. The only effect which it seems to have had upon them was to induce them at twelve o'clock on the day of the meeting to inform him that they had received his letter, and were ready to hear what he had to say on the subject of it. He did accordingly attend, and said what he could or thought of under such circumstances; and, after so hearing him, asking him, I think, whether he had anything further to say, and receiving an answer (which might well be) that he had not,—under those circumstances, and without any other hearing or inquiry in his presence, they confirmed the former resolution to remove him, and this confirmation was signed by the same fourteen trustees who had signed the resolution of January, and so previously committed themselves to the conclusions and to the reasons. Care was taken to observe the mere forms required by the 14th regulation about that. I own that it appears to me perfectly clear that Mr. Willis had no proper opportunity afforded him of defending himself—no sufficient means of explanation—no means of proving his defence if he had any. The evidence which is before me does not enable me to determine whether Mr. Willis had a good defence or not; and it is a most serious misfortune to the welfare of this school that a matter of such importance should remain in suspense. I think, upon their own shewing, the trustees have taken upon themselves to remove Mr. Willis without giving him a proper hearing, and the facts which are disclosed in the affidavits, though not such as to enable me to come to a satisfactory conclusion, are, at least, such as to make it not improbable that Mr. Willis may be able to shew that he ought not to have been removed. Therefore I am of opinion that the injunction must be granted to restrain the defendants from enforcing the resolution of the 16th of January, confirmed on the 20th of February. I wish only to add that I do not mean to say anything that can really determine the right or propriety of conduct between these parties; and although I think they are not entitled to proceed upon the footing of this resolution, I do not mean to insinuate in any way that they are not entitled to have a proper investigation into these or any other grounds of removal, and proceed in a just manner upon them.

### VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

March 24 and 29.

*Ex parte* ROBINSON, re THE ROYAL BANK OF  
AUSTRALIA.  
Joint-Stock Companies Winding-up Acts—  
Contributory.

A. B. the director of a banking company, took twenty shares as a qualification for his office, and signed the deed in respect of them: he afterwards, in pursuance of a resolution by the directors, signed a letter agreeing to take 100 shares more, and he gave a promissory note for 1,000*l.* in respect of these shares, payable within four years. The 100 shares were not allotted, nor was the deed executed by A. B. in respect of them. Entries were made in A. B.'s account in the bank books of the dividends, &c. on account of these 100 shares, but the promissory note when due was not discharged by A. B.:

Held, that A. B. was a contributory for 120 shares.

This was a motion on behalf of Mr. Anthony George Robinson, that the decision of Master Richards, dated the 25th of February last, whereby the name of the said A. G. Robinson was retained on the list of contributories of the above-named company for 120 shares, as executor of Joseph Phelps Robinson, deceased, might be reversed, or varied, and that the name of the said A. G. Robinson might be ordered to stand on the said list as such executor as aforesaid for twenty shares only. Mr. J. P. Robinson, who was a director of the company, took twenty shares as a qualification for the office, and in respect of these shares paid the deposit and signed the deed of settlement. At a meeting of the bank, held on the 7th of August, 1840, the question having been discussed whether the bank was upon a suffi-

ciently broad basis to carry on the extensive business which ought reasonably to be expected in the course of a few years, the directors agreed among themselves to fulfil their original promise at the formation of the bank, by rendering themselves responsible, to take either by themselves or through their friends a number of shares within a certain period. It was then agreed, for the security of the bank, that a letter to the following effect be taken from such directors as agreed to take this responsibility, and the following gentlemen signed the letter to the amount against such name:—

"To the Directors of the Royal Bank of Australia.

"Royal Bank of Australia,  
"London, 7th August, 1840,  
"2, Moorgate-street.

"Gentlemen,—In reference to the five hundred shares in the Royal Bank of Australia, which I agreed to take, in order to extend and secure the basis on which the establishment shall be placed, I hereby bind myself, at such time or times within four years from the date of the deed of settlement as shall be convenient to me, to pay the deposits and calls on the said shares, with interest thereon, at 5 per cent. from the time appointed for the payment of the same, until such calls and deposits shall be paid by me.

"I am, Gentlemen, your most obdt. servant."  
Thomas Meux . . . . . 500 John W. Sutherland 500  
Alexander Cockburn 100 William P. Crawford 200  
John Connell . . . . . 500 Joseph P. Robinson 100  
George Webster . . . . . 500

Another letter, addressed by Mr. J. P. Robinson to the directors, was as follows:—

"Royal Bank of Australia, 2, Moorgate-street,  
London, 7th August, 1840.

"Gentlemen,—In reference to the one hundred shares in the Royal Bank of Australia, which I agreed to take, in order to extend and secure the basis on which the establishment shall be placed, I hereby bind myself, at such time or times within four years from the date of the deed of settlement as shall be convenient to me, to pay the deposits and calls on the said shares, with interest thereon, at 5 per cent. from the time appointed for the payment of the same until such calls and deposits shall be paid by me.

"I am, &c.  
"JOS. ROBINSON.  
"To the Directors of the Royal Bank  
of Australia."

Mr. J. P. Robinson accordingly gave a promissory note for 1,000*l.* being 10*l.* a share on account of the 100 shares. In the beginning of the year 1842, Mr. J. P. Robinson, went to Sydney, where he remained until his death, which took place in 1848. In 1847 the promissory note was sent out to Mr. Boyd, the manager of the bank at Sydney, but Mr. J. P. Robinson was not in a position to discharge it. In the ledger of the bank, entries were made in Mr. J. P. Robinson's account of dividends on the 100 shares, and of the 1,000*l.* promissory note, and the interest thereon.

R. Palmer (with whom was Cairns) contended that Mr. J. P. Robinson's executors were not liable to be placed on the list in respect of the 100 shares, as these shares were not allotted, nor was the deed executed in respect of them. He cited *Gouthwaite's* case (before the Lord Chancellor).

The VICE-CHANCELLOR (without hearing *Melins* and *Daniel* for the official manager) said, that the Master had treated the 100 shares on the same footing as the twenty shares. His Honour could not see how he could have done otherwise. He thought it a very clear case, and must refuse the motion with costs.

Saturday, March 29.

*Ex parte* HOLME, re THE NORTH OF ENGLAND  
JOINT-STOCK BANKING COMPANY.  
Joint-Stock Companies Winding-up Acts—Contributory—Transferor of shares.

A. B. the holder of shares in a banking company, transferred them to C. D. in January, 1847. Previous to this the balance-sheets of the accounts up to the close of the years 1845 and 1846 shewed considerable profits for those years. On the 6th of March, 1847, the bank suspended payment, and the company was afterwards ordered to be wound up. The person who had prepared the balance-sheets stated in an affidavit that in fact there had been losses in the years 1845 and 1846. The Master refused to put A. B. on the list as a contributory in respect of losses up to the date of transfer; and on appeal, the Court affirmed this decision.

This motion was made on behalf of the official managers of the North of England Joint Stock Banking Company, and was, that the decision of Master Farrer, whereby he, on the 7th of March inst. excluded the name of Thomas Holme from the list of the contributories of the company as a contributory liable to contribute to the losses (if any) sustained by the said company up to the 21st day of January, 1847, or other the period of his ceasing to be the holder of forty-eight shares of 100*l.* each might be reversed, and that the name of the said

Thomas Holme might be inserted in the said list of contributories as a contributory liable to contribute to the losses (if any) sustained by the company up to the 21st of January, 1847, or other the period of his ceasing to be the holder of forty-eight shares of 100*l.* each in the said company.

The circumstances of the case will appear from the following judgment of the Master:—

"Application of the official managers to include Thomas Holme as liable to losses under the 26th article of the deed of settlement. Thomas Holme signed the deed of settlement in respect of shares amounting to thirty, and subsequently he acquired eighteen other shares. On the 21st of January, 1847, he transferred these forty-eight shares to Mary Aitchinson, having received dividends or profits which became payable up to that day. The sum of 255*l.* 14*s.* has been paid by Mrs. Aitchinson on account of the calls made under this reference, and Samuel Hedley, by his affidavit, swears 'that he has been informed and believes that Mary Aitchinson is totally unable to make any further payment on account of the said calls or either of them.' Under these circumstances the official manager applies to include the transferor, Thomas Holme, as liable to losses under the proviso in the 26th article of the deed, 'that nothing in this article contained shall extend or be construed to extend to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses, if any, sustained by the company, up to the period of his ceasing to be such holder as aforesaid.' In *Hawthorn's* case he was included in the list as liable in respect of losses, if any, sustained by the company up to the period of his ceasing to be a holder of shares, but in the present case Mr. Holme insists being included at all, upon the ground that at the time he ceased to be a shareholder the company had not incurred any losses; and in support of that proposition he relies upon the reports of the directors, and mainly upon two balance-sheets. One is for the year ending the 31st of December, 1845, by which it is made to appear that there was profit for that year amounting to 9,773*l.* 1*s.* 11*d.* out of which a half-year's dividend, amounting to 3,732*l.* 14*s.* 3*d.* was paid. The other is for the year ending the 31st of December, 1846, by which it is made to appear that there was a profit for that year amounting to 12,421*l.* 10*s.* 4*d.* out of which a half-year's dividend, amounting also to 3,732*l.* 14*s.* 3*d.* was paid. Messrs. Holme and Dees have filed a joint affidavit. It is argued on behalf of Mr. Holme that these balance-sheets are by the terms of the deed of settlement conclusive as to the state of the affairs of the bank at the conclusion of the years 1845 and 1846. The official manager insists that they are not conclusive, and that he has a right to shew that in fact the company on and prior to the 21st of January, 1847, had incurred very heavy losses, and for that purpose he has filed an affidavit, sworn by Samuel Hedley, who, at the opening of the bank, was appointed cashier, in March 1835 succeeded to the office of manager, and in May 1846 became managing director, and so continued until the stoppage of the bank, or till the order of reference to me, and is now employed by the official manager as a clerk in assisting them in winding up this company's affairs. This person, who, as I understand, prepared the two balance-sheets which I have referred to, now by his affidavit states that if the truth had been told in 1846 and 1847 it would have appeared that the bank had at that time incurred enormous losses, and that, therefore, the representations so made were in substance false. That may be so; but for the purpose of the present application I shall give so much weight to the balance-sheets which he prepared, as to consider that Mr. Holme has *prima facie* shewn that no losses had been sustained when he ceased to be a shareholder, and therefore I shall not include him in the list of contributories, subject of course to the right of the official managers to apply again when they may be in a situation to shew that losses in fact had been sustained on the 21st of January, 1847; but to establish that result it will be necessary to do much more than file an affidavit sworn by the aforesaid Samuel Hedley.—J. W. F.—28th January, 1851."

The 26th and 45th clauses of the deed of settlement, and to which reference was made in the argument, were as follow:—26. Whenever, by any means whatsoever, any shares shall become actually forfeited, or shall be duly and effectually transferred to a new holder, then, and in such case, and not before, the responsibility of the previous holder, as a member of the company in respect of such shares, shall (so far as the law will in that behalf allow) cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, and obligations, in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the deed of settlement, contained in respect of the same shares, provided, nevertheless, that nothing in this article contained shall extend, or be construed to



## V. C. KNIGHT BRUCE'S COURT.

## V. C. LORD CRANWORTH'S COURT.

## QUEEN'S BENCH.

extend, to release the previous holder of shares so forfeited or transferred, as aforesaid, from his proportion of the losses (if any) sustained by the company up to the period of his ceasing to be such holder, as aforesaid. 45. At every half-yearly general meeting of the company, the directors shall exhibit to the shareholders assembled such a balance-sheet as they are required to prepare by the 69th article of these presents, and such a statement of the probable amount of the losses to be apprehended from the subsisting accounts and engagements of, or with, the company, and generally of the state and progress of the affairs of the company up to the 30th day of June and the 31st day of December immediately preceding such meeting, as the directors shall deem expedient for the interest of the company to be made public; and every such balance-sheet shall be binding and conclusive on all the shareholders, their executors, administrators, and assignees, unless some error shall be discovered therein, respectively, before the next half-yearly general meeting, and, in that case, such error only shall be rectified.

*Bacon* and *J. V. Prior*, in support of the motion, referred to the definition of the word "contributory," in the Winding-up Act, 1848, and cited *Hawthorn's case*, 1 De G. & Sma. 571; 1 Mee. & Gard. 49; and *Gouthwaite's case* (before the Lord Chancellor).

The VICE-CHANCELLOR said that if he put Mr. Holme's name on the list, he should be saying that what the shareholders had done was not conclusive upon them as between themselves and Mr. Holme.

*Bacon*.—But Mr. Holme was a shareholder at the time those representations of the accounts were made, and, therefore, he should bear the consequences.

*J. V. Prior* said that if these balance-sheets were to be conclusive, it would appear that all the enormous losses of this bank had occurred between the last account and March, 1847. Notwithstanding the state of the bank's affairs, it was quite consistent that a profit might have been made in the particular years. (*Oldaker v. Lavender*, 6 Sim. 239.)

The VICE-CHANCELLOR (without hearing *R. Palmer* and *Bates* for Mr. Holme), said that this gentleman was not liable for any loss incurred after he ceased to be a shareholder, and his Honour conceived that the mere possibility that there might have been a loss sustained before he ceased to be a shareholder did not give a right to place his name on the list. He was of opinion that it must be proved of such persons and such circumstances, that there had been a loss sustained before the period in question. Mr. Prior had sensibly observed that it was almost an irresistible inference, from the nature of the evidence, that there must have been such losses at that period, by the stoppage which occurred and the lamentable wreck they appeared to have made of it. That there would be more force in that, his Honour thought, but for the circumstance he was about to mention: that between these disputants for the present purpose, the balance-sheet immediately before, and the balance-sheet immediately after, the time Mr. Holme ceased to be a proprietor, must be taken to be conclusive,—that was between these disputants for the present purpose. He could not say that in his opinion a case had been shewn for Mr. Holme's name being put on the list. He agreed with the Master in paying no attention to Mr. Hedley's affidavit. The motion must be refused with costs.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BRUNNEN, Esq. of Lincoln's Inn, Barrister-at-Law.

Friday, Jan. 10.

STAPLETON v. STAPLETON.

Practice—Special case under recent Act—Signature of Counsel.

The Signature of counsel to the draft of a special case intended to be argued under the Act 13 & 14 Vict. c. 35 (Mr. George Turner's Act), is sufficient.

*Fleming* applied to the Court that a special case which had been settled under Mr. George Turner's Act as above, might be filed with the Clerk of Records and Writs. He had signed the draft, as he would have done the draft of a bill, but the officers were desirous of ascertaining the opinion of the Court whether the engrossment also should not be signed by counsel. The section of the Act is as follows: Sec. 10. "And be it enacted that every such special case shall be signed by counsel for all parties, and shall be filed in the same manner as bills are filed, and that the defendants may appear thereto in the same manner as defendants appear to bills; and that no defendant shall be required to take an office copy of a special case, but an office copy thereof shall be taken by the plaintiff."

The VICE-CHANCELLOR considered that the signature of counsel to the draft, in the same way as to a draft bill, was sufficient, and ordered the engrossment of the special case to be filed by the proper officer.

Thursday, Feb. 20.

WALDRON v. SLOPER.

Practice—Short claim—Costs.

A claim which has been improperly certified as a short claim, will be ordered to be restored to its place in the general paper, if, when it comes on to be heard it appears that it will take time, and the party so setting it down as a short claim, will be ordered to pay the costs of the day.

*Bethell* (Rogers with him) appeared for the plaintiff on the hearing of a claim which had been set down as a short claim. It was filed by an equitable mortgagee by deposit of title deeds. It contained allegations that he had intrusted the defendant with a deed, which it was alleged was wanted to be inspected by a party who was disposed to pay off the plaintiff's mortgage—and alleged, that by his setting up a fraudulent representation, evidence of the mortgage deed had been lost to the plaintiff; and it raised other questions.

The claim had been set down as a short claim on the certificate of the plaintiff's counsel, in the usual way.

*Stuart* (Shapter with him), for the defendant, contended that the Court had heard quite sufficient of the nature of the case, as made by the claim, to know that the hearing of this claim must necessarily take time. The facts were contradicted, and much argument must necessarily be resorted to by all parties. He therefore urged that it should not now be heard as a short claim, and asked for the costs of the day.

*Giffard* and *T. Wood* for other parties.

The VICE-CHANCELLOR.—This evidently cannot be what is considered as a short claim or cause, and the course must be followed in this as in causes which are improperly set down as short causes. He therefore directed the claim to be restored to the general paper, and ordered the defendant to pay to the plaintiff the costs of the day.

See *Hills v. Treacher*, 16 Law T. 457.

## COMMON LAW COURTS.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL, Esqrs. Barristers-at-Law.

Nov. 22, 1850; Jan. 18, 1851.

REG. v. COTTLE AND ANOTHER.

Turnpike Acts—"Town"—Construction of statute. Under a Turnpike Act prohibiting the erection of a toll-house in any "town," the word "town" is rightly defined as an inhabited place where the dwelling-houses are contiguous, not necessarily touching each other, but so reasonably near that the inhabitants may be said to be living together. A local Act of Parliament, which was to remain in force for thirty-one years, prohibited turnpike trustees from "continuing or erecting any turnpike or toll-gate across the roads in the towns of T. and W. or in any other town through or into which the said roads might pass or be made."

Held, that these words were not to be limited to the "towns," as they were at the passing of the Act, but that it was unlawful for the trustees to erect a toll-house in any part of the road which, by the increase of buildings, had become part of the town of T. since the passing of the Act.

This was an indictment against two of the trustees of the Taunton roads, for obstructing a highway by the erection of a toll-house in the town of Taunton. The defendants pleaded "not guilty," and the question was, whether under the powers given to them by stat. 3 & 4 Vict. c. xxxvi. (an Act for more effectually repairing several roads leading from the town of Taunton, &c.) the defendants were justified in erecting the toll-house at the part of the road at which they had erected it. By sec. 27 of the statute, it is enacted "that it shall not be lawful for the said trustees to continue or erect any turnpike or toll-gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made; nor to apply, extend, or appropriate any of the tolls hereby granted, or any of the moneys raised by virtue of the said recited Acts, &c. or to be raised, &c. in repairing or amending any part of the said turnpike-roads in any town or place which is or shall be paved or repaired by any commissioners or trustees for executing any local Act of Parliament." It was admitted that at the time of the passing of the Act (1840), the spot at which the toll-house had been erected was not in the town of Taunton, but since that time there had been a large number of houses built in the outskirts of the old town, by reason of which, it was contended for the prosecution, that the spot in question was, at the time of the erection of the toll-house, within the "town" of Taunton, according to the meaning of that word in sec. 27 of the statute.

The indictment was tried before Mr. Gurney, Q.C. at the Lent Assizes, 1850, for the county of Somerset. The jury had had a view of the spot, and the ques-

tion was left to them whether it was within the "town" of Taunton. The learned judge directed them, that by the word "town" must be understood an inhabited place where the dwellings are contiguous, so that the occupants may be taken to be living together; that it was not necessary that the houses should touch each other; that it was sufficient if they were so reasonably near that the inhabitants might be said to dwell together. A verdict was found for the Crown, but leave reserved to the defendants to move to enter the verdict for themselves, if the prohibition in sec. 27 ought to be limited to roads which were in the town of Taunton at the time of the passing of the statute. In the ensuing term a rule nisi was obtained accordingly to enter the verdict for the defendants; or for a new trial upon the grounds of misdirection, and that the verdict was against the evidence.

The misdirection complained of was, that the learned judge did not sufficiently make it a part of the definition of the word "town," that there must be a continuous mass of buildings, and a continuous occupation. *Elliott v. The South Devon Railway Company*, 2 Exch. 725, was cited and commented on, but

Lord CAMPBELL, C.J. said,—Substantially the matter was left to the jury in the very way in which it is contended that it ought to have been left. There was certainly no misdirection.

*Crowder, Bull, and Fitzherbert* shewed cause.—The verdict ought to stand for the Crown. The words in sec. 27 shew that the future as well as the present state of things was contemplated. The trustees are forbidden to "continue" or "to erect," and that not only in the towns of Taunton and Wellington, but in any other town through or into which the said roads may pass or be made, there being at the time when the Act passed no other town through or into which the road in question passed, but the possibility of the formation of some new town being anticipated by the Legislature. The last words of the section speak of "any place which is or shall be paved" by local commissioners. The same rule of good policy is applicable to both present and future. The object of the statute was to provide for the varying wants of the inhabitants. If the place were actually to cease to be a town in one direction by the removal of houses, &c. there a toll-house might be erected; but if it grew extensively like a large manufacturing district in another, there an existing toll-house must not be continued. By sec. 32, the Act is to continue in force for thirty-one years, a period in which most extensive changes of occupation may take place. (*Hammond v. Brewer*, 1 Burr. 376; *Reg. v. Fisher*, 8 C. & P. 612.)

*Kinglake, Serjt. Moody, and M. Smith*, in support of the rule.—The word "town" must be taken to be used in the same sense throughout the Act. In sec. 14, it is recited, that there are several turnpike or toll-houses belonging to the said turnpike-roads, in and near the town of Taunton, which it may be convenient to discontinue as toll or collecting houses. There the word "town" must be limited to that which was the town of Taunton at the time of the passing of the Act. The same section gives power to sell the then existing toll-houses, but no power to dispose of any thereafter to be erected, which surely would have been given, if any thereafter to be erected could become unlawful by reason of the town being extended to them. The benefits and grievances as they existed at the time of the passing of the statute were before the eyes of the framers, and they were legislating for a state of things which they could see and know, not for matters of which they could then know nothing. If a growing town had been in their contemplation, words plainly future would have been used, and they would not have confined the operation of the Act to a period of thirty-one years, within which no very violent changes were likely to happen. The words in sec. 27, "any other town," may apply to Minehead, or Milverton, or other towns which are mentioned in sec. 2 of the Act, for there are other roads regulated by the Act which do extend to other then existing towns. The Act provides powers for borrowing money and for mortgaging the tolls: it would be unjust to the lenders to require them, in looking at their security, to consider any other state of things than that which existed when the Act was passed. [They cited many of the former local Acts of the town of Taunton, but as these are either repealed or relate to different matters, they really throw no light on the question.] *Curr. adv. vult.*

Saturday, Jan. 18.—Lord CAMPBELL, C.J. delivered the judgment of the Court.—In this case having expressed our approbation of the direction of the learned judge to the jury respecting what ought to be considered the limit of the town within the meaning of the Act of Parliament on which the indictment is founded, we took time to consider the point upon which leave was reserved to enter the verdict for the defendant, namely, whether the prohibition to continue any turnpike-gate across roads in the town of Taunton applies to the town as it was on the 19th of May, 1840, when the Act passed,

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or as it might be at any time during the thirty-one years for which the Act was to be in force. We have come to the conclusion that the latter is the just construction. Whatever inconvenience might arise from authorising the erection of a turnpike gate in a place which, when the Act passed, had been in the country, and before the Act expired had become nearly in the centre of a great town; if there had been a clear enactment to that effect we must have been bound by it. But looking to the language here employed, we think the Legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants as it increased should be exempt from the annoyance of a turnpike-gate cutting off the free intercourse between neighbours in the same street. The words are—"It shall not be lawful for the said trustees to continue or erect any turnpike-gate across the said roads in the towns of Taunton and Wellington, or in any other town through or into which the said roads may pass or be made." The whole structure of the clause is prospective. What is to be town must be the same as to the continuing as to the erecting of the gate; and if a new gate is to be erected in the year 1870, the trustees are surely directed to consider whether the road is then within the limits of the town of Taunton, not whether it was thirty years before. This construction is fortified by the reference to "any other town through or into which the said roads may pass," meant, probably, to protect the inhabitants of any new town which might spring up within the district while the Act should be in force. We are therefore of opinion that the learned judge was bound to leave the question to the jury whether, when the indictment was found, the gate stood across a road which was to be considered at that time in the town of Taunton. We have likewise to dispose of the application for a new trial, on the ground that the verdict in the affirmative was contrary to the evidence. Had the verdict been the other way, we should have, by no means, disapproved of it; but considering that, after the unexceptionable direction of the learned judge, it turned on a pure question of fact, to be decided by twelve gentlemen who had had a view of the locality, and that they may have come to the proper conclusion, we think the verdict ought not to be disturbed, and the rule for a new trial must be discharged.

Rule discharged.

Feb. 1 and 22.

ABRAHAM V. THE GREAT NORTHERN RAILWAY COMPANY.

Stat. 8 & 9 Vict. c. 20, s. 16.—Obstructing navigable river—Purchase of the soil.

To an action on the case by the owner of vessels navigating a navigable river against a railway company for filling up and obstructing part of the bed of the river, so as to prevent the water from flowing in its accustomed channel in as ample a manner as it otherwise would have done, and for consequent injury to the plaintiff, the defendants pleaded that they had done the things complained of under and by virtue of their Special Railway Act and the Lands Clauses and Railway Clauses Consolidation Acts, which were incorporated therewith; that the part of the river obstructed was among the lands delineated upon the plans and sections and books of reference deposited with the clerk of the peace; that they entered, &c. for the purpose of constructing the railway, and not otherwise; and that it was necessary to construct the railway in the manner complained of, &c.:

Held, that it was neither necessary for the defendants to allege in the plea, nor to prove at the trial that they had taken the requisite steps to vest in themselves the soil and bed of the river upon which the obstruction was erected.

Held, also, that under sec. 16 of stat. 8 & 9 Vict. c. 20, a railway may be constructed upon the bed of a navigable river, so as to interfere to some extent with the flow of the river and with the navigation, although under that section a railway company has no power wholly to alter the course of such a river.

This was an action upon the case for obstructing the navigation of the navigable river Ouse, whereby the plaintiff was damaged. The action had been directed by an order of the Vice-Chancellor of England, and special damage to the plaintiff was, by his order, admitted. At the trial before Alderson, B. at the Summer assizes, 1850, the defendants had a verdict. Subsequently a rule nisi was obtained for a new trial upon the ground of misdirection, or for judgment non obstante veredicto. The facts and pleadings sufficiently appear in the judgment of the Court.

Wells shewed cause.

O'Malley and Worledge in support of the rule.

Cur. adv. vult.

JUDGMENT.

Saturday, Feb. 22.—PATTESON, J. delivered the

judgment of the Court.—This was an action on the case, by the owners of certain vessels navigating the river Ouse, and the second count of the declaration charged the defendants with filling up and obstructing part of the bed of the river, penning back the water, and preventing it from flowing in its accustomed channel and course in so ample a manner as it otherwise would have done, and preventing the plaintiff from passing along and navigating that part of the river. The defendants pleaded that they had done the things complained of, under a special Act for making their railway, under the Lands Clauses (and the Railway Clauses Consolidation Acts); that the plans and books of reference were deposited with the clerk of the peace; that the part of the bed of the river which was obstructed was among the lands delineated in the plans and described in the books of reference; and that the defendants did, for the purpose of making and constructing the railway in the said Act mentioned, and under and by virtue of the provisions of the said Acts of Parliament therewith incorporated, and not otherwise, enter upon the said part of the bed of the river, and make and construct part of the said railway thereon, the same being necessary for the purpose of making the railway. The plaintiff replied *de injuria*, upon which issue was joined. Upon the trial, it was contended for the plaintiff, that the defendants, under this plea, were bound not only to shew that that part of the river obstructed was delineated and described in the plans and books of reference, and was used for the necessary construction of the railway, but also that all the notices required by the Act for the purchase of such part of the river from the owners of the bed of it had been given, and all other things done which were requisite to vest that part of the bed of the river in the company. The learned judge told the jury that the allegation in the plea did not make such proof necessary, and they found for the defendants. A rule nisi for a new trial has been obtained upon the ground of misdirection in this respect, and also for judgment non obstante veredicto, on the ground that if the judge was right in his construction of the plea, the plea is bad for the want of an allegation that those various acts had been done which it had been insisted ought to have been proved at the trial; and, further, upon the ground that none of the Acts of Parliament authorised the company to construct their railway upon the bed of the navigable part of a river. This rule has been argued before us, and, upon consideration, we are of opinion that the learned judge was right in the construction which he put upon the plea, and, therefore, that there is no ground for granting a new trial. With respect to the judgment non obstante veredicto, we are of opinion, that as against the plaintiff in this action, who had no interest in the soil of the bed of the river, but had only the right of passing along a navigable highway common to all the Queen's subjects, it was not necessary for the defendants to aver or prove that they had taken the proper steps to vest in them the ownership of the bed of the river. If they were entitled by Act of Parliament to convert a portion of a navigable river into a railway, and so to obstruct and do away with a portion of the navigable channel, it cannot be material to the public at large, or to those persons who were in the habit of navigating that portion, whether the ownership of the bed of the river in that portion has been effectually transferred, or whether any body is entitled to compensation in respect of such ownership, or has or has not been satisfied. The remaining question is, whether the defendants were authorised by any Act of Parliament to construct their railway upon the bed of the navigable part of the river. The Act on which the defendants rely is the stat. 8 & 9 Vict. c. 20, s. 16, the Railway Clauses Consolidation Act, which provides "That for the purpose of constructing the railway they may make or construct in, upon, across, under, or over, any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, stream, or other waters within the lands described in the said plans or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper." They have here constructed an embankment and a road in and upon the river described in the plan and mentioned in the books of reference. The word "rivers" is here used without any qualification; it would seem, therefore, to include navigable rivers as well as rivers not navigable, especially as the word "roads," here also used, plainly includes highways along which the public have as extensive a right of passage as they have along navigable rivers. Other provisions are introduced into the Act as to the mode of using roads, but none as to the mode of using navigable rivers. Whether such provisions were intentionally omitted, and if so, for what reason we cannot tell; but we cannot see that such omission justifies us in qualifying the meaning of the word

"river" in this clause, or, in effect, adding the word "not navigable," which are not to be found in the clause itself. The plans and books of reference would be before the Legislature when the special Act for constructing this railway was passed, and although it may be true, as was suggested, that no particular individual felt so much interest in opposing the Act by reason of the insertion of a portion of these navigable rivers in such plans and books as to make it a subject of controversy during the progress of the Act, yet we are not warranted in supposing that the Legislature overlooks such insertion, or in limiting the operation of the plain words which the Legislature has employed. A subsequent part of the clause in question was relied upon by the plaintiff which provides that the company "may alter the course of any rivers not navigable within such lands for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter as well temporarily as permanently the course of any such rivers," that is, "rivers not navigable," in order the more conveniently to carry the same over, or under, or by the side of the railway, as they may think proper." And it was argued that the Legislature manifestly intended to confine the power of diverting and altering the course of rivers to those which are not navigable, which would be entirely frustrated, if the word "rivers," in the prior part of the clause were held to include navigable rivers; since the language used in the prior part is so comprehensive as to include the power of diverting and altering the course of rivers there mentioned. But we think that this reasoning is not sound. The prior part of the clause gives only the power of constructing piers in or upon rivers within the lands described in the said plans or mentioned in the said books of reference; yet we think not so as to enable the company to divert or alter the entire course of such rivers, or to obstruct the whole navigation of them, being navigable; for we cannot suppose that the Legislature would permit such lands to be included in the plans and books of reference as would enable the company so to divert or alter the entire course of navigable rivers, or to obstruct the entire navigation of them. But the latter part of the clause, which does apply to such entire diversion or alteration in the course of a river, is expressly confined to those which are not navigable: the one contemplates the appropriation of part of a river to the uses of the railway, leaving the residue of it in its usual course, and the navigation of that residue unimpeded where it is a navigable river; the other contemplates the entire diversion of the whole course. The erecting anything in a navigable river or upon a highway which would be a nuisance if not authorised by the Act of Parliament, cannot by any reasonable construction of language be considered as a diverting or altering the course of such river or highway. No doubt such an erection in a navigable river by preventing the water from flowing at all along the site of the erection would "prevent the water of the river from flowing in its accustomed channel and course in so ample a manner as it otherwise would have done," which is the language used in this declaration, but which is a very different thing from diverting or altering the course of the river within the meaning of the stat. 8 & 9 Vict. c. 20. For these reasons we are of opinion that the plea objected to is sufficient, and that the rule which has been obtained must be discharged. There was a cross rule for a new trial obtained by the defendants, as regarded the grievances complained of in the first count of the declaration, which was for obstructing a road leading to the river. This rule was granted upon the ground of the verdict for the plaintiff being against the evidence. It has not been argued, but as the counsel for the defendants in arguing the other rule said that they did not object to a new trial generally, and as the counsel for the plaintiff wish for a new trial, we know not whether they intend to shew cause against the defendants' rule for a new trial or not.

It was intimated to the Court that neither party was now desirous of a new trial.

By the Court. Rule discharged.

Saturday, Feb. 15.

WOODCOCK V. PRITCHARD AND ANOTHER.

Execution—Distress for rent—Landlord's claim—Wearing apparel and implements of trade—County Courts Act.

The wearing apparel and implements of trade of a debtor to the value 5l. are protected from seizure under an execution issued out of a County Court, by s. 96 of the County Courts Act; but if the landlord gives to the bailiff a written notice claiming arrears of rent under sec. 107, the bailiff may distrain such wearing apparel or implements of trade to satisfy the rent.

This was an action of trespass. The declaration stated that the defendants, on the 11th of September, 1849, seized certain goods, to wit, a bedstead, sign-board, pillows, &c. of the value of 5l. the same being the bedding of the plaintiff and his family, and the

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implements of his trade, and converted and disposed of the same, &c.

The defendants pleaded, 1st, Not guilty; 2ndly, That the goods were not the goods of the plaintiff; 3rdly, That the goods were seized after the passing of the County Courts Act, and under that Act, and that no notice of action was given; 4thly, That before the seizure of the goods a plaint was levied by one Steward against Woodcock (the plaintiff) in the Whitechapel County Court for the sum of 11. 19s.; that Steward recovered judgment for that sum and costs; that the sum recovered was ordered by that Court to be paid at the rate of 8s. per month; that Woodcock did not pay according to the order of the Court, whereupon, after default made, the clerk of the court, at the request of Steward, issued a *f. fa.* and a warrant of execution directed to the bailiffs of the said court, forthwith to make and levy the amount upon the goods of the plaintiff, except the wearing apparel and bedding of the plaintiff and his family, and the tools and implements of his trade, if any, to the value of 5*l.*; that he had no goods in the Whitechapel district, whereupon a warrant issued into the district of Lambeth County Court, and was there executed; and under the said warrant the goods and chattels of the plaintiff found in his apartments were seized, for the purpose of levying the moneys so directed to be levied by the warrant of execution; that the landlady of the apartments gave notice to the bailiffs of her claim for 14s. as arrears of rent; and that they distrained as well the amount of rent as the debt and costs under the writ, and took the goods in the declaration mentioned, as a distress (specifying the goods exactly as they were specified in the declaration) for rent, and afterwards sold the same, as they were not replevied. The plaintiff took issues on the other pleas, and demurred to the last. The question raised on this demurrer was, whether a bailiff executing the process of a County Court for debt and costs, and on whom notice of a claim for rent by a landlord is served, can make a general levy on the bedding and implements of the trade of the debtor under the value of 5*l.* paying thereout the rent owing by the debtor to his landlord. The 96th section of the County Court Act (9 & 10 Vict. c. 95), provides "that every bailiff executing any process issuing out of the County Court against the goods and chattels of any person, may, by virtue thereof, seize any goods and chattels of such person, except the wearing apparel and bedding of such person and his family, and the tools and instruments of his trade to the value of 5*l.* which shall to that extent be protected from seizure." The 107th section authorises the landlord, by any writing under his hand, or the hand of his agent, to be delivered to the officer making the levy (the writing stating the terms of the holding and the rent payable for the same) to claim any rent then due to him, not exceeding the rent of four weeks, where the tenement is let by the week; and in case of the claim being so made, the officer making the levy shall distrain as well for the amount of the rent so claimed and the costs of such additional distress as for the amount of money and costs for which the warrant of execution issued under this Act, and the costs of the sale.

The case was argued before Patteson, Coleridge, Wightman, and Erie, JJ.

*Asks*, in support of the demurrer. Can the execution creditor and the bailiff of the County Court compel the landlord to take the debtor's wearing apparel and implements of trade? Was it the intention of the statute to give them any such power? Clearly not. Section 96 expressly protects those articles from seizure under an execution; and when section 107 gives power to the bailiff to distrain for the landlord's rent, the subject matter of the section is confined to the goods liable to be taken in execution; and that excludes the implements of trade and wearing apparel. [COLERIDGE, J.—But the tenant may replevy the goods seized as a distress for the rent; and he cannot replevy those taken in execution.] Both are in the nature of an execution, as appears by the use of the words "additional distress." If that were not so, the greatest confusion would follow; because all the other provisions of the Act relating to the sale and appraisal of the goods expressly apply to goods "taken in execution." [COLERIDGE, J.—The law had already provided for goods distrained.] Then there must be one appraisal under s. 106, of the County Courts Act, of goods taken in execution, and a separate appraisal under the statute of Anne, of goods distrained for rent. [WIGHTMAN, J.—If the tenant replevied, the bailiff would return the exempted articles, and sell the others.] [COLERIDGE, J.—How does the tenant suffer? If the landlord came in personally, he might take the exempted articles. The officer becomes the bailiff of the landlord for one purpose, but he is the officer of the Court for the other.] The statute 13 & 14 Vict. c. 61, s. 20, requires the landlord to be paid out of the moneys raised by the execution. [WIGHTMAN, J.—But that statute passed after this

seizure took place, and is not retrospective.] *Palgrave v. Windham*, 1 Stra. 214, was referred to.

*Hannen*, contra, was not called upon.

COLERIDGE, J. (a)—We are all of opinion that the plea is good, for the reasons indicated during the argument.

*Judgment for defendants.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Thursday, Feb. 20.

GERALDOPULO v. WIELER.

*Foreign bill—Evidence of protests.*

*Foreign bills were protested for non-payment (Dec. 10), and afterwards (Dec. 11), the plaintiff paid them, supra protest, for honour of the second indorsers. On the same day (Dec. 11) the protests for non-payment and acts of honour were drawn up from the notarial registry, and sent by post to Moscow:*

*Held, that duplicates (made after action brought) of the entries in the notarial registry of the protests for non-payment, and of the acts of honour, were admissible in evidence as originals, and equivalent in all respects to the duplicates sent to Moscow.*

*The case of Vandewall v. Tyrrell, Moo. & M. 87, examined, and the true ground of the decision stated.*

*Assumpsit*.—The first count stated that on the 7th of August, old style, one Jean Petcheniff, at Odessa, in Russia, drew a bill of exchange on the defendant for 260*l.* payable three months after date to the order of Messrs. Birba, Frères; that the defendant accepted the bill, and Fratelli Birba indorsed it to Signiori Fratelli Birba, of Moscow, who indorsed it to J. T. Fericks, who indorsed it to Giles Loder, who then by procuration indorsed it to the London and Westminster Bank, who presented it when due, on the 10th of December, 1849, for payment; that payment was refused, and the bill protested for nonpayment on the said 10th of December, 1849; that on the 11th of December, 1849, the plaintiff appeared before the notary public, and declared that he would pay the bill under protest for the honour of the second indorsers, and that he paid it accordingly.

The second plea denied that the bill was protested, and the third denied the payment under protest. On those pleas issue was joined.

The second count was on a bill for 220*l.* In other respects, that count and the pleadings on it were to the same effect as the first count and the pleadings on it.

At the trial before Maule, J. at the sittings after last Hilary Term, it appeared that the bills had been duly presented and protested for non-payment on the 10th of December; and that on the 11th they were respectively paid by the plaintiff through a notary under protest for the honour of the second indorsers. The protests were regularly drawn up, and were forwarded by post on the 11th of December, addressed to the second indorsers at Moscow. These protests were not produced at the trial, but secondary evidence was given of their contents, and also of the acts of honour for the bills; and duplicates of them, drawn up by the notaries from their books in March and April last, after the commencement of the action and before the trial. A verdict was found for the plaintiff for 495*l.* with general leave to the defendant to move for a nonsuit or verdict for the defendant.

A rule nisi was accordingly obtained.

Friday, Jan. 17.—Channell, Serjt. and Bovill, shewed cause; and Byles, Serjt. argued in support of the rule.

Authorities cited:—*Vandewall v. Tyrrell*, Moo. & M. 87; *Goostrey v. Mead*, Bull. N. P. 271; *Orr v. Maginnis*, 7 East, 359; 1 Selw. N. P. 380, 381, 11th edit.; *Chit. on Bills*, 464, 477, and cases there cited; *Bayley on Bills*, 262, last edit.; *Beawes Lex Merc. Bills*, pl. 34, 66; *Marius*, 87, 126; *Thompson on Bills*, 495 (Scotch). *Cur. adv. vult.*

## JUDGMENT.

MAULE, J. after stating the pleadings as above, proceeded as follows:—Two points were insisted on on behalf of the defendant: first, that there was no primary evidence of the protest; and, secondly, that secondary evidence was not admissible. As to the first point it was argued for the plaintiff on shewing cause that neither of the protests produced were original instruments, and that when the fact recorded in the protest had taken place, and had been duly entered by the notary in his book at the time of the transaction it was sufficient if the formal protest was drawn up afterwards, even although after action brought. For this several authorities were cited and the known course of practice relied on. On the part of the defendant it was not denied that such was the general rule, but it was contended that this rule was liable to exception in the case of payment

(a) Patteson, J. had gone to chambers.

*supra* protest for the honour of the drawer of the bill, in which case it was insisted that it was not sufficient that the facts recorded in the protest should have taken place, but that a formal instrument of protest must be drawn up or extended before the payment for honour, and consequently that the allegation that the bills were continued and paid under protest was not proved, inasmuch as the protest must be understood to mean such protest as would give a right of action to the person paying for honour. The authority on which the defendant relied in support of the necessity of extending the protest before payment was that of *Vandewall v. Tyrrell*, which has sometimes been considered as supporting the doctrine contended for by the defendant. That case as reported was an action of *assumpsit* for money paid by the plaintiffs to the use of the defendant; the defendant, who resided in Jamaica, drew four bills dated the 9th of September, 1824 for 1500*l.* on Willis and Company in London at nine months after sight; the bills were duly accepted, but were dishonoured and noted for non-payment, at the time they became due, the 30th of July, 1825; the plaintiffs at the request of the acceptors paid the bills for the honour of the drawer on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May, 1826, the notary public was instructed to protest the bill for non-payment, which he did; the protest purported to have been made before the payment, and in form stated, that the "plaintiffs were ready to pay for the honour of the drawer;" he stated that the custom was to protest formally before the payment. The chief justice said, "the plaintiffs must be nonsuited; they sue on the custom of merchants; that custom clearly is that a formal protest should be made before payment is made for the honour of any party to the bill."—Nonsuit. This report being short and somewhat obscure, the Court took time to consider its authority, and requested the parties to obtain further information respecting it. We have since been furnished with a brief, which one of the counsel in the cause held at the trial, and this has thrown much light on the question. It appears from the brief and the notes of counsel that the bills in question in that case were duly presented and noted on the 30th of July, 1825, the day they fell due; that the plaintiff paid the amount of the bills to the holder on the 8th of August. The payment was made by the clerk of the plaintiffs, no notary being present, and nothing as far as appeared being said by the clerk when he made the payment to the holder as to paying for the honour of any person. There was undoubtedly no intervention of a notary with regard to the payment until May, 1826, when the plaintiff applied to the notary, who had protested the bills for the holder, who then drew up acts of honour on the same papers as the original protests for non-payment: the protests for non-payment were in the usual form, and stated that the notary, on the 30th of July, 1825, presented the bills to the acceptor, who refused payment; the acts of honour were not dated, but followed the signature of the notary to the protests for non-payment, and were in these terms: "Afterwards, before me, the said notary and witnesses, appeared Messrs. Vandewall and Tippler, of London, merchants, and declared that they were ready and willing to pay the bill of exchange before protested, under protest for the honour and upon the account of Joseph Tyrrell, Esq., the drawer of the said bill; holding, nevertheless, the said Joseph Tyrrell and the acceptor of the said bill, and all others concerned, always bound and obliged to them, the said appearers, for the reimbursement in due form of law, and according to the custom of merchants, *quod attestor*, signed by the notary." The notary stated in evidence, according to the notes of counsel at the trial, that when a payment is made for the honour of the drawer, the protest is made before payment. The same note represents Lord Tenterden as saying—"You must recover by the custom of merchants; you have not complied with it by protesting your bills before payment," and, thereupon, the plaintiff was nonsuited. It appears, therefore, that in this case the plaintiff paid the bills on the 8th of August, 1825, without declaring to the notary, or otherwise, that he paid for the honour of the drawer, and attempted to remedy that omission by procuring an act of honour to be drawn up nine months after the fact recorded by the notary in that document; that is, the declaration by the plaintiffs, of their readiness and willingness to pay to the honour of the drawer, never having actually taken place. Now, it is a part of the mercantile law respecting payments for honour that they must be preceded or accompanied by a declaration, made in the presence of the notary for whose honour he pays the bill, which should be recorded by the notary, either on the protest, or on a separate instrument. *Beawes*, on Bills of Exchange, placit. 57; and *Marius*, 128. It would, indeed, be contrary to the general principle of law and justice if a person who made a payment, or did an act simply without limit or qualification, could afterwards, by a subsequent declaration, limiting or qualifying its effect, affect the rights of others: no person, therefore, paying money simply to the holder of a



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bill could, by the general rules of law, by a subsequent declaration cause a payment so made to assume the character of a payment for honour. The custom of merchants requires the declaration which is to qualify the payment to be made in the presence of a notary. In the case of *Vandewall v. Tyrrell* there was a substantial omission of the declaration in the presence of the notary, which is necessary to give the payment the quality of a payment for honour, and not merely an omission to draw up a formal statement of such declaration, and this substantial omission was a clear ground of nonsuit, and the decision may be sustained on that ground. But it also appears that it actually proceeded on that ground. The formal protest which Lord Tenterden, as reported in Moody and Malkin, says, should be made before payment for honour, and the protesting the bills before payment, mentioned in the note of counsel of what Lord Tenterden said, "you have not complied with it, by protesting your bill before payment," are to be understood not of the protest for non-payment, or not of that alone, but either of the protest and declaration before the notary that the payment is for honour together, or of that declaration alone. In the report in Moody and Malkin the reporters seem to have considered the protest for non-payment and the act of honour as one instrument, which they might naturally do, as they were on the same paper; and it was the plaintiff's interest to treat the protest and act of honour as one instrument. The language of the reporters is:—"The protest purported to have been made before the payment, and in form asserted that the plaintiffs were ready to pay for the honour of the drawer." Now, the protest for non-payment bore date the 30th of July, 1825, long before the payment, and it is in the act of honour, and not in the protest for non-payment, that the assertion of readiness and willingness to pay is contained. The reporters, therefore, in speaking of the protest, must mean either the instrument itself or the act of honour alone. In either case the word "protest," as used by them, must comprehend the instrument which contains the assertion of readiness and willingness to pay; and Lord Tenterden, in speaking of a formal protest, must be understood as speaking of such formal declaration before a notary as is before mentioned. Lord Tenterden is represented in the note of counsel to have said,—"You have not complied with the custom of merchants, by protesting your bill in time." This seems to point to an omission of something which, according to the usual course, the plaintiffs would have to do, and is more properly applicable to the omission of the notarial declaration which they ought to have made before payment, than to any omission of drawing up the protest for non-payment, supposing such omission to have taken place. Protesting the bill for non-payment was a thing to be done, not by the plaintiff on the 8th of August, but by the holder on the 30th of July. It is no where stated in express terms at what time the protest for non-payment in the case of *Vandewall v. Tyrrell* was drawn up or extended. There is no doubt the bills were protested for non-payment on the 30th of July, the day they became due, and probably the protest was drawn up before the payment, for it appears that the payment was made on the 8th of August, in order to prevent the bills being sent to Jamaica under protest by the packet which sailed on the 9th. The brief for the plaintiff states that the bills, on being dishonoured, were regularly protested by the holder and indorsee, Mr. Simon Taylor, of London, for non-payment, and the bills of exchange and protests were as follows: then it sets out the bills and protests for non-payment, and it afterwards states—"The parties applied to the notary who had originally protested the bills to prepare the extension of the act of honour, and he prepared it on the same sheet of paper as the original protest." There seems no doubt, from these circumstances, that the protests for non-payment had been extended before payment, and were, on the 8th of August, in the hands of the holder, Simon Taylor, who was about to send them to Jamaica the next day. We have minutely examined this case, because it has sometimes been referred to as affording the high authority of Lord Tenterden to a proposition which introduces an inconvenient and anomalous exception to the general rule with respect to notarial instruments—that a duplicate made out from the original or protocol in the notarial book is equivalent to the original made out at the time of the entry in the book. It appears on this examination that that case decides only, and in conformity with the general law, that a subsequent declaration cannot qualify a previous act, but that in order to have such effect the declaration must precede or accompany the act, in conformity with the law of merchants, and in cases of payment for honour the declaration must be formally made before the notary. There is, therefore, nothing in that decision which establishes any exception to the general rule, or prevents its application to the present case, and we are of opinion that the bills having been in fact duly protested, and

a declaration that payment was made for honour duly made before notaries, and these facts recorded in the usual way in the notarial registry before payment, the duplicates produced at the trial were originals, and equivalent in all respects to the duplicate which was sent to Moscow, and that it was not necessary to prove the contents of the last-mentioned duplicate. Taking this view of the question raised in argument, it becomes unnecessary to determine the second question, whether the contents of the protest forwarded to Moscow might be proved by secondary evidence, inasmuch as in whatever way that question would be decided, our determination of the first question would entitle the plaintiff to have the rule discharged.

Rule discharged.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HARTLEY, Esqrs. Barristers-at-Law.

Friday, Nov. 22, 1850.

REIMER AND AN OTHER v. RINGROVE.

*Insurance—Constructive total loss—New Trial. A cargo of corn consigned to persons at Hull was insured for the voyage. The vessel containing the corn was stranded on the coast of Norway, and the corn was consequently sold as damaged corn. In an action on the policy claiming for a total loss, the judge left it to the jury to say whether, with proper and reasonable care, the corn might not have been brought to Hull in the state of corn though damaged, and sold as such,—that if it might, there had not been a total loss: Held, that such direction was right.*

*Held also, that if the expense of bringing the corn to Hull had exceeded the amount it would fetch there, it amounted to a total loss.*

This was an action on a policy of insurance, claiming for total loss. It was tried at York at the last assizes, before Alderson, B. when a verdict was found for the defendant. A rule nisi for a new trial, on the ground of misdirection, was subsequently obtained, against which cause was now shewn by

Watson, Q.C. (Hoggins, Q.C. with him).—The question in this case is, whether there has been a partial loss or a total constructive loss. The vessel contained a cargo of corn, which was to be brought over to Hull, and she was insured for that voyage. The vessel, however, was stranded on the coast of Norway, where a survey was made of it at a small village. The cargo of corn was found greatly damaged, and could not, without being kiln-dried, be brought on to Hull. The captain therefore sold it for 582*l.* Witnesses were called, who stated that, in their opinion, a prudent uninsured owner would have sold there.

PARKE, B.—The rule was granted on the point whether the same principle applies to goods as to vessels.

Watson.—The vessel was perfectly capable of carrying the cargo to Hull. The question at the trial was, whether the corn could have been brought to Hull in the state of corn. The meaning of total loss is explained in *Labone v. Hatton*, 19 L. J. 161. C.B.; *Roux v. Salvador*, 1 N. C. 526; *Moss v. Smith*, 19 L. J. 228. C.B.

PARKE, B.—The meaning of total loss is "of no use or value to the plaintiff."

Watson.—The jury found that by application of reasonable means it would have arrived as a cargo of merchantable corn. There never was a total loss, and there could not, therefore, have been an abandonment. (*Thompson v. Royal Exchange Company*, 16 East.; *Arnold on Insurance*, p. 1121; *Freeman v. East-India Company*, 5 B. & Al. 617; *Anderson v. Wallace*, 2 M. & Sel. 240.) This was always a partial loss only.

Wilkes (Unthank with him) contra.—The question intended to be discussed on the rule was, whether the corn might have been brought as a merchantable article to England by the application of reasonable care, and at a reasonable cost. The question to be discussed is the difference between this case and *Laforce v. Haddon*. There was no notice of abandonment in this case, whereas in that there was. The plaintiff contends that he falls within the third point in *Roux v. Salvador*. The jury should have taken into their consideration all the expenses.

PARKE, B.—I do not see that a notice of abandonment makes any difference.

Wilkes, contra.—The question then is, whether this is a constructive total loss, and it should have been so left to the jury. Cur. adv. vult.

## JUDGMENT.

Wednesday, Feb. 26.—ALDERSON, B.—This was a new trial argued at considerable length before us. It was tried before me last Spring Assizes at York, and the question which was argued here was, whether or not I had omitted to leave the point to the jury which was material to the issue which ought to have been determined. It was an action on a policy of insurance, and the question before the Court was, whether the plaintiff made out that he was entitled to recover as for a total loss. It was an

insurance upon grain: and in the course of the voyage the vessel sustained considerable damage by sea, and in consequence thereof was obliged to put into a port in Norway, and the cargo of corn on board, being partially damaged, was taken out for the purpose of enabling the parties to repair the ship, and to continue the voyage. When the corn was taken out, it appeared that it had sustained considerable sea damage. The question before the Court at Nisi Prius, mainly, was, whether or not this loss was a total or average loss, because, in consequence of the memorandum usually contained in all policies of insurance with respect to corn, if there be only an average loss the parties cannot recover at all upon it, but if it be a total loss they can. The question, therefore, arose, whether this was or was not a total loss: if the damage sustained by the corn in the course of the sea voyage be such as to be properly left to the jury whether it was such as, if the voyage had been continued, the corn would have arrived in England, at the port of Hull, in a state in which it would have been corn or rubbish, so to speak. That point was left to the jury, and determined in favour of the defendant; that is to say, that it was in such a state of damage, but that with proper and reasonable care it might have been brought home and sold as damaged corn when it arrived at Hull; in short, that it was a mere average loss, if that was the point. But there was another point made at Nisi Prius, which was, whether or not it was a total loss in case a party, if uninsured, would exactly have conducted himself as a reasonable man in the way in which the plaintiffs have conducted themselves; that is to say, selling the corn and receiving the money, instead of putting themselves to the expense of bringing it home in a damaged state. Now, I at that time was of opinion, and am so still, and I believe the Court entirely concur with me in it, that that was not the proper view of the case to be left to the jury at all, but that the real question to be left must have been whether or not the corn was in that state, that, if brought home, it could not have been sold for an amount exceeding the expense of bringing it home. If that were a point which could properly have been made, and could have been properly determined in favour of the plaintiff, it would have been, in the opinion of myself and of the Court, a total loss, and that question, if it had been made at the trial, ought undoubtedly to have been left to the jury. I was anxious, therefore, that the Court should see whether or not it had been made a point at the trial before us, and for that purpose we asked Mr. Watson to furnish us with the shorthand-writer's notes of the trial that took place before me at York, in order that my brothers Parke and Platt might have an opportunity of seeing and reading all that took place at the trial, in order that they (not myself) might determine whether the point had been made at all. Undoubtedly, if it had been made it was not left to the jury, as it ought to have been; but I must say, if the point had been made at the trial, I should have determined it precisely in the same manner as the Court now propose to determine it, namely, by saying that it would have been a clear total loss in case the corn, if brought to England, would not have sold for the expense of bringing it from the port in Norway to Hull for the purpose of being sold. There is no doubt about that. It did so happen that in summing up that point occurred to my mind, and I suggested to the jury what my opinion was on that point. I did not leave it to the jury, but studiously subtracted it from them, and they did not pass any judgment on it, consequently, there ought to have been a new trial if the point had been made. But in truth it was not made at all, nor could it have been made consistently with the facts which were proved, for the expense of bringing the corn from Norway to Hull did not exceed 150*l.* and the selling price of the corn in Norway did amount to from 500*l.* to 600*l.* The fact was, in real truth the point was not made, because the facts did not warrant the learned counsel who led the cause in making it. My brothers, who have read the case, and looked at the shorthand-writer's notes of the trial, are of opinion that the point really was not made at all, and, consequently, though, in delivering judgment, we think it right to express what our opinion is upon the law of the subject, there must be no new trial, on the ground that the point was not made at all, and therefore it was not left to the jury, and the reason why it was not left was, that the facts of the case did not warrant the counsel in making it. Consequently, the rule will be discharged. Rule discharged.

## BANKRUPTCY.

## IRISH BANKRUPTCY COURT.

Reported by J. LAY, Esq. Barrister-at-Law.

(Before Mr. Commissioner MACAN.)

Tuesday, Jan. 28.

Ex parte KEARNEY, re KEARNEY.

Right of creditor to be remitted to his original debt.

## BANKRUPTCY.

## BANKRUPTCY.

## BANKRUPTCY.

in case of composition—Principal creditor becoming security for compounding debtor—Valuing pledge.

Although a creditor is not paid the amount of a composition entered into with his compounding debtor, he will not be remitted to his original debt, in case of the bankruptcy of his debtor, if he himself was security for payment of the composition to the other creditors, and if by his conduct in the transaction it may be fairly inferred that he induced the other creditors to enter into the composition; in such case his proof will be confined to the balance of the original debt, after deducting the amount of the composition. If he held a security, he will be allowed to place a value on it and deduct it from the sum for which he is entitled to prove; and if he held back any part of his debt at the time of the composition, which he is subsequently paid, it will be deducted from his proof.

This case was argued by Levy, for Kearney, a creditor, who sought to be remitted to his original debt, in consequence of not being paid a composition entered into with the bankrupt. He sought also to have a value put on a policy of insurance which he held, to have that value deducted from his debt, and to prove for the difference. In support of the right to revert to the original debt under such circumstances, *Ex parte Vere*, 1 Rose, 281; *Ex parte Wood*, 2 Dea. & C. 508; and *Ex parte Baleson*, 1 Mont. D. & D. were cited. As to the right of a creditor valuing his pledge, *De Gex's Bank. Prac.* 195, and cases there collected, were cited.

Waleh, for the assignee, opposed the proof, on the ground that the claimant had by his conduct induced the other creditors to enter into the composition; that he had not disclosed to them that he held a security; and that having himself become security for the composition of the compounding debtor, and having assumed her debt, his right to prove for the composition was gone. He also contended that the policy of insurance, which he held as a pledge, should be brought in, and sold for the benefit of the estate; and the claimant, if entitled to prove at all, it should only be for the balance, after deducting the composition. To sustain these propositions, *Richard v. Leers*, 6 Adol. & E. 469; *Cullingworth v. Lloyd*, 2 Beav. 385; *McKenzie v. McKenzie*, 16 Ves.; and *Cropper v. Green*, 7 Me. & W. were cited. The facts sufficiently appear in the able

## JUDGMENT.

Mr. Commissioner MACAN.—If the matter of Mary Kearney, who had been a widow lady, trading in Waterford, Mr. James Kearney has put forward a proof for 547l. which appears to have been founded upon a loan of 400l. originally advanced to the bankrupt in 1845, and a sum of 207l. composed of bills indorsed by Mr. Kearney for the bankrupt's use, and subsequently paid by him. These two sums, amounting to 607l. from which the claimant undertakes to deduct 60l. the value upon which he has put upon a policy of insurance for 600l. upon the bankrupt's life, which, it was stated, he holds as a security, constitute his present claim of 547l. The case has been argued before me by counsel for the claimant and counsel for the general creditors; and as it involves some very nice questions of law, I have taken the trouble of looking into various authorities besides those cited, before giving my judgment, and I was unable to find a case precisely analogous to the present. It appears that some time after the death of Mrs. Kearney's husband, Mr. James Kearney, her brother-in-law and the present claimant, advanced her a sum of 400l. to enable her to carry on her business; and in the month of October, 1845, he obtained a judgment for that amount against her. The balance, consisting of the bill of exchange referred to, has not been objected to by the assignee, and, therefore, no question arises with regard to their amount, as it appears that the indorsement and payment of them by Mr. James Kearney took place some time subsequent to the deed of composition, to which I am about to refer. The circumstances connected with the advance of the 400l. by Mr. Kearney to the bankrupt were highly creditable to him. The entry in his ledger stated that the money was advanced to loan to pay Messrs. Taylor, of Liverpool, a debt which no doubt they were pressing. And if subsequent events render it impossible, in my opinion, in point of law, to permit Mr. Kearney to prove for his original debt, I regret it, because I can duly appreciate the motives that induced him to come forward and aid the widow of his brother, and enable her, after her husband's death, to continue business, for the support of herself and her family. It appeared that the 400l. had been advanced in June, 1845, and that a policy of insurance for 600l. effected on the life of the bankrupt, was about the same time assigned to Mr. Kearney as a further security for the advance, besides a bond and warrant of attorney. But I think I am warranted in saying that the policy of insurance was effected originally for a purpose wholly irrespective of the advance of the money. It is now before me, and bears date in February; and the assignment was not until the end of June follow-

ing. The assignment does not appear on the face of it to be given as a collateral security, but purports to be a sale of the policy, accompanied by a condition, that the premiums were to be paid by the bankrupt herself, who, in point of fact, did pay them up to the time of bankruptcy, these payments amounting to a sum exceeding 120l. It appears that about the month of November, 1848, the bankrupt became embarrassed in her circumstances, and she proposed a composition of 10s. in the pound to her creditors, to be secured by composition bills in this way—her own bills for the first instalment of 2s. 6d. and her drafts on Mr. James Kearney for the remaining instalment of 7s. 6d. in the pound, at eight and twelve months; and the condition of the deed was, in consideration of such composition notes or bills, being handed to the creditors, they should take and receive the same in full payment of their respective debts; and that, upon payment of said bills and notes or cash, the bankrupt should be released from all claims on the part of said creditors; and, in point of fact, all the creditors were actually paid the composition in full, except Mr. James Kearney himself, who, it appeared, never was paid anything on foot of said composition in cash or otherwise, and never applied for payment. I have, as I stated, looked into many authorities; but I could not find a case in all respects similar to this. Here we have Mr. Kearney the principal creditor under the composition deed, and who was the first to sign it, actually securing the composition to all the other creditors by his own acceptances, whilst the condition of the deed was, that all the creditors, upon being handed up these composition bills, should receive them in full satisfaction of their respective debts. The arrangement, therefore, on the face of it, as far as regards Mr. James Kearney, is perfectly absurd. It enjoins an impossibility; and the law never requires the performance of things impossible. Here we have Mr. James Kearney assuming the debts of his compounding debtor by giving his acceptances to pay them, and how could he be handed up his own acceptances to pay himself the composition on his 400l. which was the sum set down opposite his name in the schedule of creditors, and which was the amount undoubtedly lent by him to the bankrupt in June 1845? He was not handed his own acceptances to pay himself,—the proceeding would have been too absurd,—nor was he made any payment on foot of the composition. It was then very strongly contended for by his counsel that inasmuch as no payment had been made on foot of the composition, he was now remitted to his original proof; that he had a right to prove for the whole of his 400l.; and that, by a well-known rule in bankruptcy, he had a right to put a value on the security held, deduct it from his debt, and then retain the security for his own benefit. As a general rule, these principles were, no doubt, well established in bankruptcy. If a debtor enter into a composition, and make default in the payment of it before bankruptcy ensues, the creditor is remitted to his original proof; and if a creditor hold a pledge, he is entitled to either put a value on it, deduct that value from his claim, and prove for the balance, or else have it brought in and sold for the benefit of the estate, and take his dividend on whatever it may produce. But it was powerfully urged by counsel for the assignee, that the circumstances of the present case and the conduct of the claimant were such as to disentitle him from the benefit of the application of those rules; that in the first place, when entering into the composition with the bankrupt along with the other creditors, he had not informed them that he held the policy of insurance as a pledge, and that upon a composition between a debtor and his creditors, a creditor could not ostensibly accept a composition and sign the deed which expressed his acceptance of the terms, and at the same time stipulate for and secure to himself a peculiar advantage which was not expressed in the deed; that a creditor holding a security for his debt might stipulate to have the benefit of it to the amount of the composition offered by a debtor to his creditors, but that he must hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject if he at all acts in concert with them. The case of *Chillingworth v. Lloyd*, in 2 Beav.—a most important one—has been cited in support of this doctrine; and it was argued that, inasmuch as Mr. Kearney had not communicated the fact to the other creditors of his holding the policy of insurance, he should deliver it up for the benefit of the general creditors, and be content to take his dividend on whatever it might produce; whilst on the part of Mr. Kearney it was contended that he had a right to put a value on it, deduct that value from his original debt, and prove for the balance. Whilst I admit to the fullest extent the principle laid down in *Chillingworth v. Lloyd*, I do not think it applies in this case. The case of *Cowper v. Green*, 7 Me. & W. was also relied on to shew that the creditor had a right to give up the pledge to be sold for the benefit of the creditors. The doctrine sustained by that case is to the effect that by the release of a debt by a composition deed,

the creditor also releases the pledge which he holds, that he loses his right to retain a written instrument deposited with him by the debtor as a security for the debt. Whilst I fully concur in this doctrine as a general rule, I do not think it applies to this case. The policy of insurance appears to have been something beyond a mere collateral security for the advance made to Mr. Kearney. The bankrupt's deposition, upon which the assignee relied, stated that she was to keep up the premium, the amount of which was equivalent to the interest of the 400l. at 5 per cent.; and that when Mr. Kearney was paid his debt, the insurance was to be a provision for her children after her death. The distinction between the present case and that of *Chillingworth v. Lloyd*, in 3 Beav., where the security was a mortgage, is quite apparent. The assignment of the policy of insurance is nothing more than a contract, from which the creditor is to derive a benefit if the security fail. It is clear, that if Mr. Kearney be now bound to give up the policy of insurance, he would have been bound to have given it up at the time of the composition. I do not think he was bound to give it up then, and that he is not bound to give it up now, but that he is entitled to put a value on it and deduct that value from the amount which he is entitled to prove for. With regard to the second point in the case, namely, the right to revert to his original debt, which had been contended for by claimant's counsel, I must take leave to dissent from it. I admit, as a general rule, that where a composition is entered into, and that default is made before the bankruptcy of the compounding debtor, the creditor is entitled to revert to his original debt, but that rule does not apply in the present case, and I think the arguments of the assignee's counsel on that point and the cases cited by him are unanswerable. The case of *McKenzie v. McKenzie*, 16 Ves. is perfectly applicable in my opinion. Here we find Mr. Kearney, who was by far the heaviest creditor, the first to sign the deed, thereby holding out an inducement to the other creditors to sign it; we have him next, as I have already observed, becoming security for payment of the composition, and putting himself in the place of the compounding debtor, and under these circumstances, although he has never been paid the composition, and indeed never sought payment of it, I do not think the general rule applies to him, but that, on the contrary, his right to prove for it has been lost. Besides the cases cited by counsel for the assignee, I have, in looking into the authorities, discovered another case, which completely sustains this view; it is that of *Good v. Cheeseman*, 2 Adol. & E. 328. There, a debtor being unable to meet the demands of his creditors, they signed an agreement, which was assented to by the debtor—to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as collateral security. The creditors never nominated a trustee, and the agreement was never acted on, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the engagement; and in that case it was held that the agreement, although not properly on record and satisfaction, was still a great defence on the general issue, as it constituted a valid new contract between the creditors and the debtor capable of being immediately enforced; and the consideration of which to each creditor was the forbearance of the rest; and that a creditor shall not bring an action where others have been induced to join him in a composition with the debtor, each party giving the rest reason to believe that in consequence of such engagement his demand will not be enforced. In such case there is in point of fact and in point of law a new agreement substituted for the original contract with the debtor, the consideration to each creditor being the engagement of the others not to press. I think, on the whole of this case, that the claimant having by his acts evidently induced the other creditors to enter into the composition, and having then become security for the payment of it himself, rendered it an impossibility, according to the very terms of the deed, that he should pay himself by his own acceptances, he is now precluded from proving for the amount of that composition, and that his proof must be restrained to the balance after deducting the composition. It was contended, on first opening the case, that his right to prove for any portion of the 400l. was gone, but that position was, I think, very properly given up. There is, however, another item which must go in reduction of his proof; it is this— and as there is an important principle involved in it, I could not pass it over, although it was not alluded to, or relied upon by counsel for the assignee. I found, on reading over the bankrupt's deposition, that, since the composition, she paid Mr. James Kearney a sum of 35l. in full, which was due to him at the time of the composition, but was not taken into account then. It cannot be permitted to any creditor to keep back a part of his demand when entering into a composition with his debtor, and



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afterwards he paid that demand in full. I cannot permit it to appear that there was a shilling more due to Mr. Kearney at the time of the composition than the sum set opposite to his name in the composition deed, and he must now deduct that 35*l.* from his proof. Let Mr. Kearney be at liberty to prove for the balance of his original debt after deducting the amount of the composition, and from this must be deducted the 35*l.* and the value set upon the policy of insurance which he is allowed to retain for his own benefit; he will of course prove also for the amount of the bills paid by him for the bankrupt's use long subsequent to the composition; either party is of course at liberty to appeal to the Lord Chancellor from this decision. It was intimated that no appeal would be taken.

## PREROGATIVE COURT.

Reported by Dr. WADDELOVE, of Doctors' Commons.

Monday, March 10.

In the goods of Rev. S. WELLS.

This case is again reported, because the learned Judge has come to a conclusion different to that when it was first before him.

On a former occasion (*supra*, p. 412), the Court was moved to grant administration, with the will annexed, of the goods left unadministered, to the next of kin of the widow, the executrix and residuary legatee (who had died, having left a will, but appointing no executor or residuary legatee) of the original testator, all the effects of such executrix being in the archdeaconry of Totnes; and the unadministered estate of the original testator, consisting of his equitable interest, as surviving trustee, of part of a sum of money, being in the Funds, and, therefore, *bona notabilia*.

The Court rejected the motion, saying it could not treat the next of kin, Mrs. W. (the widow), and the executrix and residuary legatee as representing the original testator through the Totnes grant.

Jenner now renewed the motion. The will of Mrs. W. having been rightly proved in the Archdeaconry Court at Totnes, cannot be transmitted to this Court; and the persons to whom administration, with the will annexed, has been granted, cannot therefore become her personal representatives by its authority. The other course open to the parties interested in the fund sought to be dealt with under this administration, is to join in nominating some person to take administration with the will annexed, limited to the fund in question. That course, however, would be very inconvenient and expensive. It is a rule in the Registry of the Court not to grant administration limited to a portion of a sum standing in the name of a trustee in the Bank of England. Almost all the persons beneficially entitled to share in the fund have consented to the grant as prayed. It appears that it has been the practice in the Registry to permit such grants under similar circumstances without objection. Several instances were mentioned.

Sir H. JENNER FUST.—I am disposed to make this grant, it being for the benefit of the parties interested, and in accordance with the ordinary practice in the Registry, as is shown by the cases adduced.

## NISI PRIUS.

## COURT OF QUEEN'S BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

SITTINGS IN LONDON AFTER HILARY TERM.

Friday, Feb. 21.

(Before Lord CAMPBELL, C.J.)

NEWHALL v. WILKINS.

Patent—Infringement—Costs.

An action was brought for infringing a patent, and a verdict passed for the plaintiff affirming the patent:

*Held*, that after such verdict the record of a former trial, in which the patent was affirmed, was admissible under 5 & 6 Wm. 4, c. 83, s. 3, in order to entitle the plaintiff to treble costs.

*Summa*.—The proper course is to produce such record after the trial, and not before verdict.

This was an action on the case for infringing a patent, and a verdict, affirming the validity of the patent, was given for the plaintiff.

Watson, Q.C. for the plaintiff, then tendered a record of a former trial, in which the patent was affirmed, in order to obtain for the plaintiff treble costs under 5 & 6 Wm. 4, c. 83, s. 3.

M. Chambers, Q.C. objected to its reception after verdict. It ought to have been given in evidence during the trial.

Sir F. THESSER, Q.C. for the plaintiff, said, that they did not wish to prejudice the defendant's case by proving during the trial that the question had been previously tried, and the validity of the patent

previously affirmed, and they had therefore postponed the proof of it till after verdict.

Lord CAMPBELL, C.J.—The defendant has had the advantage of not being prejudiced by proof of the previous trial, during the present trial, and it would now be most ungracious to object to its reception.

M. Chambers, Q.C. still pressed the objection, relying upon the words of the statute, which were as follow:—"That if any action at law, or any suit in equity for an account, shall be brought in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any *scire facias* to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried to certify on the record, or the judge who shall make such decree or order to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs." This clearly contemplated that the evidence should be given on the trial and before verdict.

Lord CAMPBELL, C.J.—I shall admit the evidence, and it appears to me that the proper course has been pursued. The defendant's case ought not to be prejudiced by the admission of the evidence upon the trial; but it ought to be proved subsequently, as this has been.

Evidence admitted.

Sir F. THESSER, Q.C., Watson, Q.C., Webster, and Denison, for the plaintiff.

The Solicitor-General, M. Chambers, Q.C. and Hindmarsh, for the defendant.

## COURT OF COMMON BENCH.

SITTINGS IN LONDON AFTER HILARY TERM.

Monday, Feb. 17.

(Before Jervis, C.J.)

SILVERLOCK v. IRVIN.

Evidence—Declarations.

*Declarations made by the plaintiff at the time of supplying goods are admissible for him, to prove that he then knew of the existence of a dormant partner in the business for which the goods were supplied, and that he was relying on his credit.*

*Entries in the plaintiff's shop-books were admitted for the same purpose.*

This was an action for goods sold, and for work and labour.

The plaintiff was a printer, and had for some time printed the *Literary Gazette* for its proprietors. He had made the contract with Jerdan, one of the proprietors; and a partnership between him and the present defendant was proved, the defendant having been a dormant partner.

Byles, Serjt. (for the plaintiff) asked a witness called by him, whether the plaintiff said anything to him as to the proprietors of the *Gazette*.

Channell, Serjt. objected. The plaintiff could not give evidence of his own statements. He could not make evidence for himself.

Byles, Serjt.—The gist of the action was, whether the plaintiff gave credit to Jerdan only, or to all the proprietors. For that purpose, it was necessary to show that the plaintiff knew that the defendant was then a partner. How could that be done but by shewing that the plaintiff said that he was a partner?

Jervis, C.J.—For that purpose the evidence is, I think, admissible; but for that purpose only. You cannot use it to shew the part of a partnership.

Evidence admitted.

Entries in the plaintiff's trade books were also admitted for the same purpose.

Byles, Serjt. and Maynard for the plaintiff.

Channell, Serjt. and Phipson for the defendant.

Thursday, Feb. 20.

(Before Jervis, C.J.)

STANSFIELD v. LAYTON.

Bankrupt—Trader.

A farmer had a room in his house for selling flour and pork:

*Held*, that if there was a continuing buying and selling otherwise than as a farmer, he was liable as a trader to the bankrupt laws.

*Aliter*, if he merely so traded in the produce of his farm.

This was a feigned issue to try the right to some property. The plaintiffs were the assignees of a bankrupt named Clark, and the defendant held under a bill of sale. Clark was a farmer, and kept also a shop or room in his house for the sale of flour and pork. The principal point in dispute was, whether Clark was a trader or not.

Knowles, Q.C. for the defendant, in addressing the jury, contended that to constitute him a trader within the bankrupt laws, he must get his living by trading. (*Ex parte Patterson, re Bryant*, 1 Rose, 405.) Where a man sold stone which was dug from his own land, it was held insufficient to make him a trader (*Ex parte Gallimore*, 2 Rose, 424.) In this case the farm was the chief source of profit, and was chiefly used to supply the farm-labourers.

Jervis, C.J. (to the jury).—To constitute a trading, there must be a buying and selling, not a single act, but a continuing buying and selling; even one act will do, if there is an intention to continue it. As a farmer he cannot be made a bankrupt, but as a dealer in goods he may; the dealing must not be with the farm produce only. If I feed pigs or cows by means of my farm, and then sell them, I do not thus become a trader; but if I buy milk and retail it, I do become a trader. If a person buys horses and sells them again, and has the intention of continuing to buy and sell, he is a trader. So here, if Clark bought and sold flour, and either continued or intended to continue to buy and sell it, he is a trader, whether he so retailed it in exchange for money or goods. But, on the other hand, if he merely sold his own flour, whether he received in exchange for it money or goods, it is not sufficient to make him a trader. Is there, then, in this case a buying and selling of goods by Clark otherwise than as a farmer? If so, Clark was a trader, and you will find a verdict for the plaintiff.

Verdict for the plaintiff.

Byles, Serjt. and H. Hill, for the plaintiff.

Knowles, Q.C. and Tomlinson, for the defendant.

## IRISH REPORTS.

## ROLLS COURT.

Reported by W. St. Leger BAKERMAN, Esq. Barrister-at-Law.

Monday, Dec. 2, 1850.

SWEETING v. COWAN.

*Injunction—Ploughing up rabbit warren waste. The ploughing up by a tenant of land stocked with rabbits, is not waste, where the land has neither been specifically demised as a rabbit warren, or is not a warren by charter or prescription.*

In this case it was sought by the plaintiff to continue, until the hearing of the case, an injunction which had been obtained to restrain the defendant from breaking up a certain portion of the premises in the bill mentioned, which had been known and used as a rabbit-warren. The peculiar facts of the case appear sufficiently from the judgment of the Court.

## JUDGMENT.

The MASTER of the ROLLS.—The injunction in this case was obtained to restrain the defendant and his workmen, &c. and each of them, from cutting up a portion of the demised premises, known as the rabbit-warren; and the case which has been made by the bill appears to be this:—Thomas Church being entitled to a lease of the lands under the ass of Derry, on the 29th July, 1835, made a sub-lease to the defendant for 18 years, at the rent of 60*l.* a year. There were 309 acres contained in the demised lands, lying along the shore of Lough Foyle, of which the bill alleges that 190 had never been broken up, but remained a rabbit warren, consisting of small holes and long grass. The value of rabbit warrens has materially decreased, and, since the potato failure, as sandy, unbroken ground, is considered the best to avoid the disease, although the ground of the defendant is light, it is alleged that persons were found who were disposed to pay 4*l.* an acre for it. The bill then charges that, exclusive of the cultivated ground, the tenant was about to plough up the rabbit warren, thus making it no longer available for the usual purposes to which this part of the land has been applied; and that the removing the rabbit holes would cause the sand to be loosened, and drift over on the arable ground. That is the short outline of the bill. The defendant, in his answer, denies that two-thirds of the lands have been used for the purposes of a rabbit warren; and he also states that he has used the farm under the eye of the plaintiff, bringing as much of it into cultivation as possible, and he denies that any portion of it has been let to him as a rabbit warren; and the lease supports this view of the case. The plaintiff's view of the case assumes the law to be, that the ploughing up of a rabbit warren constitutes waste at common law; and if this assumption is not warranted, then the plaintiff's whole case is at end. In 22 Vinor's Abridgment, 433, tit. "Waste," which, as far as Rolle goes, is a translation of that author, after stating what is waste, the ploughing up of a rabbit warren is considered not to be waste, unless it is a warren by charter or prescription. The same proposition is laid down in other abridgments, and Hargrave, in his note to Coke on Littleton, 53*a*, note 8, states, that unless there is a warren by charter or prescription, the ploughing up of land stocked with conies would not amount to waste. I do not mean

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to say that if a person leases a rabbit warren, as such, the lessee could divert it to any other purpose; but that is not the question before the Court. The case does not appear a plain one at law in favour of the plaintiff; and the rule laid down by Lord Cottenham, in *Stevens v. Keating*, 2 Phill. 333, ought to be followed, namely, that an injunction ought not to be continued until the hearing, if it is at all likely that the plaintiff's title is without foundation; for the adopting any other course might be inflicting an irreparable injury on a defendant. The injunction, therefore, must be refused.

## COURT OF EXCHEQUER.

SITTINGS AT NISI PRIUS AFTER HILARY TERM.

Saturday, Feb. 8.

(Before PIGOT, C.B.)

ORR and BAGGOT, Assignees of PURDY, v. MURDOCK.

*Stoppage in transitu—Bankruptcy—Trove.*  
M. and others, distillers, residing in Scotland, having sold twelve puncheons of whisky to P. who resided at Newry, in Ireland, they bonded the whisky in the Queen's stores at Newry, in their own names, giving to P. a delivery order to the excise storekeeper, and an invoice; P. from time to time, took eight of the puncheons out of the bonded warehouse, but his insolvency having become known to the distillers, they stopped the delivery of the other four puncheons and sold them to the defendant; P. having become a bankrupt:

*Held, on the authority of Haig v. Wallace (2 Hudson & Broderick's Rep. 671), that the right to stop in transitu was gone, and that trover by the assignees of P. lay to recover from the defendant the value of the four puncheons sold to him.*

This was an action of trover, brought by the assignees of one Purdy, a bankrupt, to recover the value of four puncheons of whisky, which had been sold to Purdy by certain Scotch distillers. It appeared from the evidence that the firms of Menzies and Co. of Edinburgh, and Stewart and Co. of Paisley, sold twelve puncheons of whisky to Purdy, who resided at Newry. This whisky was sent from Scotland, and bonded in Newry under the Bonded Warehousing Acts in the distillers' names, and a delivery order and invoice were given to Purdy, who, from time to time, drew out eight of the puncheons from the bonded stores; but upon his insolvency having become known to the distillers, they stopped the delivery of the other four puncheons, and sold them to the defendant, and now the assignees of Purdy, who had become a bankrupt, brought the present action to recover the value of the four puncheons which had been so sold to the defendant. Upon this state of facts,

M'Donough, Q.C. and Lery called on the Lord Chief Baron to direct a verdict for the defendant, contending that, inasmuch as the whisky was bonded in the distiller's name, he therefore was still liable to the Crown for the duty. A clear distinction existed between a bonded store, and the store of a wharfinger used by a vendee, and the right to stop the whisky in transitu upon the insolvency of the purchaser existed at any time up to the moment that he paid the duty, and the whisky came to his hands. (M'Ewan v. Smith, 13 Jur. 265.)

Fitzgibbon, Q.C. and S. D. Fitzgerald, Q.C. for the plaintiffs, argued that the delivery order to the Excise Storekeeper so changed the possession and ownership, that the right to stop in transitu was gone; and that upon the bankruptcy of Purdy the right to the whisky became vested in the plaintiffs as his assignees. (Croker v. Lawder, 9 J. L. R. 21; Haig v. Wallace, 5 Hud. & Br. 671.)

Pigot, C.B. said, that though at first he had inclined to the opinion that the right to stop in transitu existed, yet, on the authority of *Haig v. Wallace*, 2 Hud. & Br. 671, he was bound to tell the jury to find for the plaintiffs, leaving it to the defendant to raise the question before a Court of Error.

The defendant's counsel then tendered a bill of exceptions to his lordship's charge.

Verdict for the plaintiffs.

## COURT OF CHANCERY.

Reported by J. R. O'FLANAGAN, Esq. Barrister-at-Law.

Nov. 5 and 6, 1850.

HARE and OTHERS v. CORK AND BANDON RAILWAY COMPANY.

*Railway company taking possession of land irregularly—No injunction where the circumstances allow justice to be done without public detriment.*  
Where a railway company, instead of observing the mode prescribed by the Lands Clauses Consolidation Act (8 Vict. c. 18), to obtain possession of land, the amount of compensation for which is disputed, enter into possession, and say they had the consent of the owners' solicitor, on bill filed for an injunction, to restrain the progress of the works, the defendants file an answer, which

is verified by an affidavit of the solicitor for the company, stating various negotiations and conversations with the owners' solicitor, who filed an affidavit in reply, contradicting these statements. On the injunction being moved for, *Held, the affidavit verifying the answer being unnecessary, authorised the affidavit in reply to be used, but the costs of neither should be allowed on taxation. And, although in strictness the injunction should go, yet as great public injury would result from stopping the works, without corresponding benefit to the plaintiffs, the better course was, to say, no rule, the company at once to obtain the finding of a jury, and to pay all the costs fairly incurred.*

This was a motion to restrain the defendants from proceeding with the Cork and Bandon Railway under the following circumstances.

Certain land, suitable for building-ground, in the neighbourhood of Cork city, was the subject of negotiation between the plaintiffs and the Cork and Bandon Railway Company. The company did not proceed under the Act to have the amount of compensation, which was disputed, duly assessed by a jury, but relied upon some negotiation between the solicitor of the plaintiffs and of the company, which the company treated as giving a consent to enter the land, and accordingly they made cuttings, which the bill was now filed to prevent being proceeded with. On the 8th of March, 1850, the plaintiffs' solicitor furnished an abstract of the title, but no steps were taken by the company until the 8th of July, when a notice was served, offering 64l. as the value of the land. The plaintiffs claimed 1,600l. and the company having entered on the land on the 22nd of July, the bill for injunction was filed on the 7th of September. The defendants, by their answer, relied on consent and acquiescence, and the defendants' solicitor made an affidavit verifying the answer, stating that the solicitor for the plaintiffs consented to allow the company into possession, in consideration of the solicitor for the company expediting proceedings, to ascertain the amount to be paid to the plaintiffs. This affidavit was replied to by the solicitor for the plaintiffs, who contradicted the details of conversations in the affidavit of the company's solicitor.

The motion being opened by J. D. Fitzgerald, Q.C. with whom was Morrison, for the plaintiffs, and on proceeding to state the answering affidavit,

Coppinger, Q.C. with Green, Q.C. for the railway company, contended, no answering affidavit could be used. (Rock v. Mathews, 2 De Gex & S. 227; Norway v. Rowe, 19 Ves. 144.) They did not seek to rely on the affidavit filed with the answer, which was filed because the defendants' answer, being that of a corporation, and not on oath, appeared to require verification.

Fitzgerald, Q.C.—The defendants do not rely on their affidavit, because it is displaced by our answering affidavit. That such an affidavit might be used when no title is disputed appears from *Gibson v. Nichol*, 6 Beav. 422; *Mador v. Vevers*, 5 Beav. 503. It is where title is in dispute the rule applies that affidavits filed after answer cannot be used. (Manson v. Jennings, 2 Hare, 630.)

The LORD CHANCELLOR.—When an affidavit is filed to verify an answer, is it not an admission of the party's willingness to allow the case to be disposed of on affidavits? I do not know any case like this. I think the affidavit may be used.

Fitzgerald, Q.C.—We are clearly entitled to this injunction. This case is within the Lands Clauses Consolidation Act, section 21. There should have been the verdict of the jury as pointed out by secs. 38 and 39. Another course may have been open to the company, viz. power to enter on the land before the amount of compensation is decided by lodging money in the bank, and giving the bond prescribed by the 85th sec.; but then the full amount claimed should be lodged. (Willey v. The South Eastern Railway Company, 6 Railway Cases, 100; The River Dun Navigation Company v. The North Midland Railway Company, 1 Railway Cases, 153; *Frewin v. Lewis*, 4 Myl. & Cr. 254; *Lee v. Milner*, 2 Y. & Col. 618; *Gray v. The Liverpool and Bury Railway Company*, 10 Jurist, 364.)

Green, Q.C. and Coppinger, Q.C. contra.—The company have availed themselves of one of the modes pointed out by the Act. There is a provision in the Act that arbitration may be resorted to. Here it would be impossible to comply with the 85th section, as the plaintiffs never informed us how much they claimed, and we had the lands valued by a magistrate conversant with valuing land, who valued them to 64l. There has been acquiescence on the part of the plaintiffs; and the defendants went into possession with the consent of the plaintiffs, through their solicitor.

Morrison, for the plaintiffs, replied.—It has been truly observed in one of the cases on this subject—"There are two arguments invariably adduced by these companies: if the plaintiff comes to the Court complaining of an injury at the commencement, it is said that the damage is trifling, and the action frivo-

lous and vexatious; if he waits until it assumes a graver shape, it is said he has acquiesced, and is therefore precluded from complaining." In the present case there is no continued acquiescence. (Innocent v. The North Midland Railway Company, 1 Railway Cases, 242; The Proprietors of the Northern Bridge v. The London and Southampton Railway Company, 1 Railway Cases, 653; *Barnard v. Wallis*, 2 Railway Cases, 186.) Express authority to consent should appear. (Wood v. Led-bitter, 13 Mee. & Wels. 838.)

The LORD CHANCELLOR.—In this case the owners of the land taken by the railway company are entitled to compensation, and the company having failed to comply with the provisions of the Act, and entered into possession, stand at present in the condition of persons dealing with the property of others without any title, and the plaintiffs have a right to the interposition of this Court, to say they should not proceed farther without making compensation. In strictness, therefore, the injunction should go. I do not consider there has existed such delay on the part of the plaintiffs as amounts to acquiescence; but the defendants also rely on the consent which has been given. No doubt, if this was established, there might be considered enough to prevent the injunction issuing; but it lay upon the parties relying on consent in this case, when some of the parties are abroad, to shew a clear and definite consent. I do not think the company have taken the proper steps presented by the Act to get possession of this land. The valuation was not in compliance with the Act; I must therefore treat it as made for their own information merely. It appears pretty plain that the company were not disposed to go before a jury if they could possibly avoid doing so. The solicitor of the company seemed to think he should be required by the plaintiffs to go before a jury; but this is not so. There is considerable discrepancy in the details of conversation given by the respective solicitors, and when this is so, the Court will not act on them. If I granted this injunction, I should be doing great mischief to the company without any corresponding benefit to the plaintiffs, by stopping great public works. All the plaintiffs seek is compensation for the injury to their ground. They do not suffer any loss by the works going forward. The land is valuable for building-ground, and the evidence can be given of this, although the railway is made. I therefore do not think I ought to grant the injunction under the circumstances of this case, when a great public injury would result on the one hand, without any corresponding benefit on the other. I shall therefore adopt a middle course, and say,—no rule in this motion; the railway company undertaking at once to issue their warrant for a jury to assess damages; plaintiffs accepting notices, and the company, having been in the wrong, to pay the costs which have been incurred, but not the costs of the conversations between the respective solicitors, or their affidavits, which have been irregular on both sides, and neither party ought to be visited with them.

Friday, Feb. 7.

WOMALL and WIFE v. WHITE.

*Practice—New solicitor—Right of former solicitor to have the papers in the cause produced at the taxation of his costs.*

The solicitor in a cause gave the papers to a third party to draw the bill of costs; the solicitor died, and the solicitor to whom the conduct of the cause was then given obtained the papers from the third party, without paying the costs due to the first solicitor, or making any agreement with his personal representative:

*Held, that by cause petition or bill was the proper mode of proceeding against the new solicitor to compel him to produce the deeds and papers for the purpose of allowing the costs of the first solicitor to be taxed, and that he was bound to produce them.*

Seemle, the same result might have been effected by a motion in the cause.

This was a cause petition, and prayed that the respondent should deliver to the petitioners all the documents and papers he had received from a person named John Kelly, in order to enable the petitioners to have such costs prepared for taxation, the petitioners undertaking to return them within a week after taxation, and the petitioners undertaking to pay the sum of 7l. 10s. paid by the respondent to Kelly. It appeared that the wife of the petitioner had been the widow and administratrix of a solicitor named Bevan, who died in the year 1848, and to whom in his lifetime a sum of 1,511l. 12s. 11d. had become due for costs and advances in his capacity as solicitor for the plaintiff in a cause of *Tutill v. Russell*, and that the estate about which that suit was conversant was the sole fund for the payment of the petitioner's demand. It also appeared that Bevan, previously to his death, had given the principal portion of his papers in that cause to a person named Kelly to draw a bill of the costs incurred in carrying on the cause; that at the death

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of Bevan a solicitor named Carte was appointed solicitor; that the respondent White, acting as his agent, had got the papers from Kelly and paid him a sum of 7l. 10s. which the latter claimed as being due to him for drawing the bill of costs; that Carte was only continued one month as the solicitor of Tuthill, when he was changed, and the respondent appointed. The petition stated the delivery of the papers by Kelly to White to have been made without the knowledge or authority of Mrs. Bevan (now Mrs. Worrall). That on the 9th of December, 1850, the petitioners tendered to White the 7l. 10s. and served a notice, requiring him to produce the papers for the use of the petitioners in the preparation and on the taxation of the costs, and undertaking to pay such other costs as should be legally due. To this notice no reply was given. The affidavit in reply stated that the papers were got from the plaintiff in the exchequer suit, and not from Mrs. Bevan.

*Christian, Q. C. with W. Smith*, for the petitioners.—The respondent holds these papers in trust for the petitioner, whose agent Kelly was; he had no authority to give them up.

*Joshua Clarke and W. Brereton*, contra.—A petition cannot be sustained except in cases in which a bill would lie, and if a plaintiff in a cause hand over the papers to a second solicitor there is no foundation for contending that the first solicitor could maintain a bill for the purpose of getting the papers for the taxation of his costs. [THE LORD CHANCELLOR.—Is there any case to show that the solicitor can withhold deeds and not produce them on the taxation? I admit he need not part with the possession of them.] They cited *Molesworth v. Robins*, 2 Jon. & C. 370, per Sugden; *Keslop v. Metcalf*, 3 Myl. & Cr. 159; *Rutledge v. Rutledge*, 2 Ir. Ex. Rep. 290; *Beaves on Costs*, 213.

THE LORD CHANCELLOR.—If Bevan had even given up the papers to Tuthill I apprehend the latter could not keep them as against his solicitor requiring them for the purpose of taxation; and if Tuthill had given them to the respondent, the latter could not be placed in a better position than Tuthill himself had been. (*Furlong v. Howard*, 2 Sch. and Lef. 115.) His lien as a solicitor, and his right to oppose the introduction of them for taxation, are different things.

*W. Smith* replied.

THE LORD CHANCELLOR.—I do not know if a bill was ever filed in such a case as this; but I see no objection resting on any sufficient ground. It is substantially for the security of a specific chattel. There is not in this case any remedy arising from the relation of solicitor and client, nor could any relief be had at law; whether relief might not be had upon motion in the cause is another question. It appears that Bevan was the solicitor of a person named Tuthill in a cause in the Equity Ex. (a) when the costs were incurred; it is the right of the solicitor to secure to himself the payment of his demand, and here is a fund against which he had a lien, and which was available to him; he dies, and the right of the personal representative is identical with the rights of his intestate. Tuthill, the plaintiff, then employs the respondent, a person named Kelly being then in possession of the papers connected with the cause, and which were the papers of the first solicitor and his special property; these papers were transferred to White; it is not clear through what means he got possession of them, but it is plain, as has been alleged, they were in the hands of Kelly, and that they were got from him on payment of 7l. 10s.; but there is no authority for asserting there was anything like *mala fides*. Kelly, at the time he handed the papers to Carte and White, was the agent of Bevan, and he held them subject to the same lien Bevan had upon them at the time of his death. The question then is, what is the position of a solicitor parting with the papers in a cause in the absence of any special agreement? I asked for such, but no evidence of any agreement was shewn between Mrs. Bevan and Carte and White. It is the case of a solicitor in a cause, having costs due to him in it, and being changed he abandons his lien upon the papers; but it is a different thing whether he thereby loses his right to have those papers produced for the purpose of taxation. If Tuthill would be bound at the instance of Mrs. Bevan to produce these papers, and if that right also existed in Mrs. Bevan, it cannot be taken away by any transfer, and that right still remains binding on the papers in the hands of Carte or of White, and the petitioners have no means of making these costs available but by the production of the deeds and papers. The rule appears to me to be, that in the absence of any agreement, there is an implied understanding on the part of the person obtaining possession of the papers to produce them for taxation. It is not pretended that Mr. White was employed to carry on the suit, or to realize these costs, nor is it said that he has any lien; but he says he has no security for the costs due to him. Mr. White's rights are not disturbed by anything that has taken place here. Let Edmund White within

(a) This branch of the Court has been abolished, 1 & 14 Viet.

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ten days deliver to the petitioners all documents and papers, &c. which he received from John Kelly, to enable the petitioners to have their costs prepared for taxation, and to vouch the same on taxation. The petitioners' solicitor undertaking to return the same within ten days after the same shall be taxed. The 7l. 10s. to be set off against the costs of this petition, and let there be no further costs.

## Equity Courts.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Monday, Feb. 25.

POTTER v. BAKER.

*Annuity for life, or perpetual—Construction.*  
A testator gave A.B. an annuity of 50l. a year, "for her and her three children," and after her decease, directed "the money to be paid to each of them as they attained the age of 21 years, but if either of them should die, to be paid to the survivor." The annuity having been held to be a charge on the testator's real estate, a question afterwards arose as to its duration as regarded the three children:

Held, that the gift was a gift of so much money, as would, if invested, produce an annuity of 50l. a year, and not a mere annuity of 50l. a year during the lives of the children, and a sum sufficient to produce such an annuity was directed to be raised out of the real estate.

The question in this case arose upon the construction of the will of the late William Hawkins, dated the 11th of April, 1822, whereby he directed his executors, as soon as possible after his decease, to let his freehold house, called the Red Lion, in Parliament-street, Westminster, at their option for 21 or 31 years, "which they might be able in proportion to get the most money for." He then left to his executors "all the money arising from good-will, fixtures, plate, china, glass, and all other effects producing from his said freehold, and after all his just debts were paid, then his executors to put the money into the funds at the best advantage for those whom he should hereafter name." After making several dispositions, the testator then gave "to Elizabeth Luckhurst, of No. 20, Brook-street, Lambeth, 50l. per year, for she and her three children, and after her decease the money shall be paid to each of them as they attain the age of one-and-twenty; but if either of them die, to be paid to the survivor. In the next place I give all my remaining property to Mary Ann Ballard, whatever it might produce either from the rent of the house or money in the funds; and she shall remain in the house till it is let, and after one year I wish the house to be sold to the best bidder, and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money after her decease to be divided among her four children, or any more she may have in my lifetime, share and share alike as they come to the age of twenty-one." The testator died on the 10th January, 1823, leaving Elizabeth Luckhurst and her three children then surviving. Elizabeth Luckhurst afterwards married the plaintiff John Potter, and on the 6th of August, 1848, by indentures of assignment, of May, 1844, and November, 1849, Henry Searth became entitled to the interest of the three children under the will of the testator. A suit had been instituted for the administration of the testator's estate, and it was declared on appeal reversing the decision below that the annuities, &c., were, by the terms of the will, charged on the testator's freehold estate. A petition was now presented by Henry Searth, the purchaser of the shares of the three children, praying that a sum sufficient to produce an annuity of 50l. a-year might be raised and paid to him out of the real estate, or secured to him as directed by the will, and insisting that the annuity was a perpetual annuity, and not merely an annuity for the lives of the three children.

Turner, Selwyn, and Wakefield, for the petitioner, contended that the annuity was perpetual, and that when the testator had wished to give a mere annuity for life, as in the case of his daughter Mary Ann Wiseheart, he had done so in proper terms. Then the word "money" was used all through the will to designate corpus and not income; and there was no reason why it should not do so here. They cited *Robinson v. Hunt*, 4 Beav. 450; *Stokes v. Heron*, 12 Cl. and Fin. 161, 3 Ir. Eq. Rep. 163; *Yates v. Madden*, 16 Sim. 613; *Blewitt v. Roberts*, 10 Sim. 491; 1 Cr. and Ph. 274; *Rawlings v. Jennings*, 13 Ves. 45; *Ridgway v. Mankittrick*, 1 Dr. & War. 84; *Phillips v. Chamberlaine*, 4 Ves. 51.

S. Atkinson for the plaintiff, John Potter.

Lloyd for the trustees of the will.

Royall and Follett for the residuary legatees, insisted that in the clause giving the annuity of 50l. to Elizabeth Luckhurst and her three children, and

## ROLLS COURT.

after her decease directing "the money" to be paid to each of them as they attained twenty-one. The word "money" meant merely the 50l. a-year; that is, the income, not the corpus, out of which it is paid; and that it was merely a life annuity of 50l. They cited *Wilson v. Maddison*, 2 Y. and C. C. C. 372; *Hedges v. Harpur*, 9 Beav. 479.

The MASTER of the ROLLS said the case was one in which different persons would probably come to different conclusions, and even those who might come to the same conclusion might do so for different reasons. The testator had made his will in a very informal manner, and though it was not very easy to construe, what he intended was clear. His lordship then commented on the different clauses of the will, and said the whole question here turns on the meaning of the word "money," which it was argued on the one hand was only 50l. a year for life, and on the other that it must be held to mean the corpus, or the fund producing the annuity. Now the money was money arising from the sale of the property, and to be invested according to the directions of the will; and, on the whole, his lordship was of opinion that the testator meant the money which he had intended to be invested to produce the annuity.

Monday, March 10.

FRY v. FRY.

Receiver—Action at law—Sheriff—Writ of *f. fa.*—Injunction—Application in a cause by a person not a party to it.

A receiver was appointed on the application of the plaintiff over some property, after which a *f. fa.* was issued against one of the tenants. The sheriff levied and sold, and out of the proceeds retained six months' rent for the landlord only, a larger sum being alleged to be due. This sum was claimed by the receiver. The plaintiff claiming to be the landlord, demanded payment of the rent from the sheriff, and on the sheriff not paying it, brought his action on the case against the sheriff to recover it. The sheriff applied to the Court in the above cause, though no party to it, to compel the plaintiff to discontinue the action, he, the sheriff, consenting to pay the money into court. Motion refused with costs.

This was a motion to stay an action at law on payment into court of the money sought to be recovered in the action. It appeared that in the case of *Newman v. Taylor*, which was an action at law, judgment was obtained against James Taylor, a tenant of certain property to which John Fry, the plaintiff in this cause, claims to be entitled; and on the 26th of August, 1850, a *f. fa.* was issued and lodged with the sheriff of Surrey. The sheriff made a levy under the writ, and after providing for the expenses incurred, paid over the sum of 45l. 9s. 6d. to Newman, the plaintiff at law, retaining 35s. the amount of six months' rent due to the landlord. On the 26th of October, John Stokes, the receiver in the cause, who had been appointed on an application to the Court by the plaintiff, John Fry, gave the sheriff notice that he claimed the money as receiver. The plaintiff having also demanded the rent from the sheriff, and the sheriff not complying, brought an action at law against the sheriff to compel payment; whereupon the sheriff applied to this Court in the above cause, to which he was no party, to compel the plaintiff to discontinue the action, he, the sheriff, offering to pay the money into court.

Elderton, for the motion.

Turner and Hall, contra, said the action was brought against the sheriff because he had paid over 45l. 9s. 6d. to Newman, though he had notice from the plaintiff, Mr. Fry, who had got a receiver over the property, that the sum of 115s. was due for rent, and, moreover, the sheriff had sold valuable manure (which, by the custom of the country, went with the farm) for a few shillings. The action against the sheriff was, then, for unduly and illegally executing the writ. The plaintiff took possession in January, 1850, of the farm, and paid the tenant for the manure, which, therefore, would be his own property, and now a stranger, not a party to the cause, comes and applies to the Court in the cause to restrain the plaintiff from bringing his action. They cited *Rock v. Cook*, 2 Ph. 691, as applying to the present case.

Elderton, in reply, said the case of *Rock v. Cook* did not apply to this case. If the receiver would withdraw his notice his client was willing to defend the action at law. It was a hard case, for Mr. Fry, having got a receiver, then brings an action to compel the sheriff to do that which, by obtaining the receiver, he had deprived the sheriff of doing without a contempt of court.

The MASTER of the ROLLS.—The sheriff is a stranger to the cause, and asks to be protected against the receiver, who, being served, does not appear here. It appears the sheriff has not served any body in the cause, but asks to be protected against the receiver, to whom he must pay the money or be guilty of a contempt. I cannot grant the motion, but must refuse it with costs.

## ROLLS COURT.

Thursday, Dec. 5.

Re THE NORWICH YARN COMPANY.

*Jurisdiction under the Winding-up Acts.*

*A claim carried on by a creditor before the Master under an order for winding up a company was by him disallowed, and on appeal, the validity of the debt being questioned, it was held, that the Court had jurisdiction to direct an action at law to try the validity, notwithstanding the powers given to the Court and to the Masters under the Winding-up Act.*

In this case the East of England Bank were creditors of the Norwich Yarn Company to the amount of 35,755l. 2s. 5d. The Company was established in 1833, and in 1847 ceased to trade. They had kept their accounts first with the Norfolk and Norwich Joint-Stock Bank, and afterwards with the East of England, into which the former had merged. In 1847, they had overdrawn their account to the above amount, and as they had drawn upon the bank in an informal manner, and not strictly in accordance with their partnership deed, an objection was raised as to the validity of the debt before the Master to whom the case had been referred under an order to wind up made in 1849, and the Master was of opinion that the debt ought to be established at law, and he disallowed the claim. From this decision the bank appealed, and the point raised was as to the jurisdiction of the Court under the Winding-up Acts to send a case to law, it being contended that the Court was itself bound to decide on the validity of the claim.

*Besbell, R. Palmer, and Cole*, for the official manager, contended that the Masters had full powers, and were bound to decide on all matters coming before them under the Winding-up Act, which gave them powers that a court of law did not possess. Moreover, the common law right to bring an action was taken away by the 78th section of the 12 & 13 Vict. c. 108, which enacts that no action or suit shall be commenced or proceeded with against the company, but after proof of debt. It was therefore necessary to have a decision in this court first. They cited *Thompson v. The Universal Salvage Company*, 3 Ex. 10.

*Russell and Burk* for the official managers of the Yarn Company.

*Walpole* for certain shareholders of the company.

*Turner*, for the directors of the company, referred to *The German Mining Company*, 14 Jur. 874.

THE MASTER OF THE ROLLS.—If it was my bounden duty, as is alleged, to give my opinion on the question of law raised in this case, I must take some time to consider of it; but if, as I think, and my opinion is not altered by the very ingenious argument put to me—it is my duty, and it is within my province to obtain the assistance of a court of law for the determination of the legal question which is in issue between these parties, there is no reason why I should now abstain from giving my opinion. In the administration of assets by this Court among legal creditors where the debt appears to the Court to be clearly due, to be founded on fact satisfactorily proved, and upon legal principles fully recognised and established, it is by no means necessary, nor is it the practice or duty of this Court, to send the creditor to prove his debt at law. The Court, having the case properly before it, properly under its consideration in the administration of assets, and having, as I think there can be no doubt, jurisdiction to determine the question of debt or no debt, does so without unnecessarily putting the parties to the additional expense of a trial at law, and in this way debts to a vast amount, far exceeding the notion entertained on the subject by those who have not given themselves the trouble to obtain the necessary information, are constantly being proved, and being satisfied without the parties ever being sent to a court of law on the subject. But if the suit in which the proceedings take place depends wholly for its validity on the legal question of debt or no debt, and the parties interested to resist the claim desire that the matter should be tried at law, I think I scarcely recollect an instance in which the Court has refused it; and if the question of debt or no debt against the estate or party sought to be charged depends upon a number of circumstances, some of them of a complicated nature, and affected by the usages of trade—affected by the powers which may or may not be legally incident to trading partnerships particularly or peculiarly constituted; and, moreover, if the ultimate result depends upon the decision of several questions involving points of law, some of them not well settled, I conceive that although the validity of the whole proceeding does not depend on the particular claim, yet if those interested in resisting the claim desire to have the question tried at law, this Court ought not to deprive them of their *prima facie* right to have the question so decided. Now, upon the consideration of the present case, I am clearly of opinion that there are points of intricacy, questions of nicety in point of law, questions which to me, at least, on the consideration of the questions that have been decided, do not appear to have been

## ROLLS COURT.

perfectly decided. There are circumstances which induce me to think I ought not to deprive those who resist the claim of that which I conceive to be their right, viz. to have the legal question decided by a legal tribunal. It appears to me, to use the words of Vice-Chancellor Knight Bruce, more proper to be tried at law than it is to be decided here. But no doubt, if the jurisdiction of the Court is ousted by the particular provisions of this Act of Parliament, then, however inconvenient, however likely to lead to some mistake or some misunderstanding, however hard on the party to be deprived of that jurisdiction to which the subject properly belongs, it would be for me to perform, to the best of my ability, the duty cast upon me; and I ought to do so. Now, I have considered the Act of Parliament with this view; but it is nothing more than a proceeding for the administration of assets under particular circumstances, and I am most clearly of opinion that there is nothing in this Act of Parliament to deprive the Court of availing itself of any means by which it can get the assistance necessary to lead to a just and satisfactory conclusion of the case. I think I had it once pressed on me, that the Solicitors' Act was an Act of such a nature that I could not get assistance from a Court of Law; but the Court is not to be deprived of any means which the law allows it to get the best assistance it can have. I say nothing about the argument which was urged warmly respecting the inconvenience of handing a thing from one court to another; it is for the Legislature to consider that. I say nothing about that part of the argument, well and warmly urged too, as to sending the suitor from one jurisdiction to another, and there not being a jurisdiction in any one place to have a complete decision of the question, that is also for the Legislature. I believe, if I may be allowed to express a private opinion, that much may be done to lessen the inconvenience on that subject. Those who have to deal with it will find not so much difficulty in the court as in the habit of the country in having particular jurisdictions allotted to particular cases, which arise between parties. That we have nothing to do with here. I have only my duty perform, which is to consider whether under the consideration of this Act of Parliament, though the legislature has given to the Master jurisdiction and power which he had not before, and in this particular case has limited him to the consent of the parties, it has tied down the Court in the manner contended for; and I cannot agree with the argument as to the Master's acting under the order of reference which proceeds from the Court. I beg leave to say it is a great satisfaction to the Master that the order of reference does proceed from the Court, and that it is the jurisdiction of the Court which is exercised; and when the Master acts on this he acts as assistant to, and in aid of, the Court, and leaves the matter altogether in the discretion of the Court in the proper exercise of its jurisdiction; and I am of opinion that in the exercise of its jurisdiction I have a right to concede to the parties that which they ask, and that which I want for my own assistance, the determination of a Court of Law on the question of debt or no debt in this case. I wish to do it in a way most likely to contribute to complete justice being done between the parties here. If they desire to appeal from the opinion I have now expressed I must do it adversely, that they may not be prevented from having an appeal.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALFORD, Esq. of the Middle Temple,  
Barrister-at-Law.

Tuesday, Nov. 12, 1850.

GORE v. HARRIS.

Parties—Creditors.

*An assignment was made by W. S. for the benefit of his creditors, but by the deed provision was made for the payment of a lien of H. One trustee died, and the other (J. B.) became bankrupt. A creditor of W. S. filed a bill against J. B. his assignee, and H. to set aside the deed: Held, that it was necessary that one or more of the creditors who had executed the deed was or were a necessary party or necessary parties to the suit.*

By a deed dated the 20th of April, 1841, and made between William Saunders, of the first part, Charles Gore and John Bowser, stated to be two of the creditors of William Saunders, of the second part, and all the other creditors of William Saunders who should execute the deed, of the third part, William Saunders assigned and conveyed all his property to Charles Gore and John Bowser, upon trust to convert the same into money, and then first to pay Mr. Harris a sum of money in respect of a lien on some part of the property, and afterwards to divide the residue rateably among the creditors. The said Charles Gore, who was a creditor, never executed the deed, and died on the 21st of April, 1841. John

## V. C. KNIGHT BRUCE'S COURT.

Bowser became bankrupt. A bill was filed by the executors of Charles Gore against Bowser, and his assignees, and afterwards a supplemental bill was filed against Harris, and it was charged, among other things, that the sum proposed to be paid to Mr. Harris would very nearly exhaust the produce of the property; that Harris had no lien, and that he had acted improperly with reference to the preparation of the deed; and the bill prayed that the deed might be declared void, and that Mr. Harris might pay the costs of the suit. By his answer, Mr. Harris submitted that the creditors who had executed the deed ought to be made parties; and upon this objection the cause was set down.

*Russell and Speed*, for Mr. Harris, cited, in support of the objection, *Newton v. Lord Egmont*, 4 Sim. 585; 5 Sim. 130; *Powell v. Wright*, 7 Bea. 444; and *Smart v. Bradstock*, 7 Bea. 500.

*Swanston and Moson*, for the plaintiffs, contended that the creditors were sufficiently represented by Bowser and his assignees, and that Harris, though not strictly a creditor, was interested in supporting the deed. Besides this, the large interest which Harris took under the deed rendered it to be the interest of the creditors that the deed should be set aside.

THE VICE-CHANCELLOR said that this was a bill to set aside a deed made for the benefit of creditors. One of the trustees was dead, and the other was bankrupt. Mr. Harris could not, he thought, be taken into consideration in this respect, as he had not executed the deed as a creditor. He thought that the creditors, or some or one of them, ought to be parties or a party to the suit, though he did not say how many. He could conceive a case in which one creditor would be better than any other number. The creditors must, however, be substantially represented. On principle, and on authority, he considered that in a case like the present the creditors should be represented. He should, therefore, declare that one or more creditor or creditors was or were a necessary party or necessary parties, and reserve the costs.

Nov. 12 and 13, 1850.

ATTORNEY-GENERAL v. THE GREAT NORTHERN RAILWAY COMPANY.

Injunction—Sequestration.

*An injunction was granted against a railway company when their railway was in course of formation to restrain them from further interfering with a certain road, and from constructing the works of their railway, whereby the road should be obstructed, impeded, or rendered less secure, &c. or whereby carriages or passengers should be hindered or prevented from passing, &c. The company afterwards laid their permanent rails over this road on the level, and by the direction of the Railway Commissioners erected gates across the road for greater security, and with the sanction of the Commissioners opened the line for public traffic:*

*Held, that the company had broken the injunction; and the Court directed a sequestration to issue against them, and refused to suspend the issuing of the process until an appeal from the order for a sequestration had been heard.*

This suit was instituted upon the relation of Mr. Chapman, a solicitor at Biggleswade (see ante, 15 Law T. 362), and an injunction was granted on the 2nd of May, to restrain the company, "their agents, workmen, and servants, from further interfering with the turnpike road leading from the entrance of the London road, at the south-eastern side of the town of Biggleswade, along a road called Crab-lane, to the end of Sun-street, in the same town, being part of the high road from London to York, and from constructing the works of the Great Northern Railway whereby the same road should be obstructed, impeded, or rendered less secure or safe for the passing and repassing of carriages and passengers thereon than the same was when first interfered with by the company, or whereby carriages or passengers should be hindered or prevented from passing and repassing in the same way as they had been able to do theretofore."

*Bacon and J. T. Hamilton Humphreys* moved for a sequestration against the company for a breach of this injunction, the company having laid their permanent rails over the road on the level, erected gates across the road, and opened their railway for public traffic.

*Wigram, Malins, and Denison* appeared for the company, and contended that there had been no breach of the injunction. The company had applied to the railway commissioners for their certificate as required by the Act of Parliament, and in the meantime they had taken the best steps in their power to prevent the danger apprehended from the railway crossing this road on the level. The injunction referred only to such an obstruction as would render the road impassable or dangerous to the public. The railway commissioners had required, for the safety of the public, the erection of the gates across the road which were now complained of. The com-



## V. C. KNIGHT BRUCE'S COURT.

missioners of the roads had concurred in the acts of the company, and Mr. Chapman was almost the only person who complained of what had been done.

**Tuesday, Nov. 12.**—The VICE-CHANCELLOR said that the motion on the part of the informant and plaintiff which he had to dispose of in the present case was made on two notices, one dated the 31st of July last, and the other dated on the 29th of October following, and asked that a sequestration might issue against the company on the ground of alleged contempt. The first question raised by it was, whether a breach of the injunction granted in the cause in May last had been wilfully committed by them; as to which it might be at once stated to be perfectly clear that, if the injunction had been broken by them, it had been broken wilfully—that is to say, with direct and full notice of it and in disregard—perhaps it might be said in defiance—of the plaintiff's warnings and remonstrances. That both on the 29th of October and on the 31st of July last the company by their agents or servants were obstructing or impeding the turnpike-road called Crab-lane, and if not rendering it less secure or safe for the passing and repassing of carriages and passengers on it than it was when first interfered with by the company, were at least hindering or preventing carriages or passengers from passing and repassing in the same manner as they had theretofore been able to pass and repass was a matter free from doubt, and a continuance of the same course ever since might be inferred. But, nevertheless, the defendants had contended that the injunction had not been broken, their grounds for that contention being, that, as they said, the injunction was not mandatory, as distinguished from what was merely prohibitory,—that their rails, laid, in fact, on the turnpike road in question, and crossing it, were so laid, and did cross it when the injunction was granted, and before that, whatever might be the state of things when notice of the motion on which the injunction was granted was given; and that the actual interference and intended dealing with the turnpike road, which the information and bill attributed to the company, were different in purpose, different in object, different in manner, from any actual or intended dealing with it, which the informant and plaintiff alleged to be in breach of the injunction. The defendants relied also on certain proceedings by and before the Railway Commissioners, who were represented to have directed or sanctioned the erection of certain gates complained of, which gates, it had been said, were essential or material for the protection of the lives and limbs of men and cattle, as the railway in its actual state, whether by right or wrong, crossed the turnpike-road on a level. Whether the injunction in substance and effect contained anything mandatory as distinguished from what was prohibitory merely, he did not think it necessary to decide, and he declined stating any opinion; nor need he say whether the informant and plaintiff was entitled, on this motion, to refer to the state of things which existed when the notice of motion was given upon which the injunction was granted, as distinguished from the state of things existing when it was actually granted; for when it was granted the rails were, as his Honour understood the facts, used only for purposes connected with the construction of the railway and not for the conveyance of passengers or goods,—not for what, in the language of the business, was called "traffic;" but the railway having been opened for public use in August of the present year, the company had since employed the rails in question for purposes exceeding, and in a sense differing from, those for which they previously employed them; and it was, he thought, clear that obstruction or impediment to the free use of the turnpike-road was thus caused to a greater extent—an extent materially greater than at the time of granting the injunction, and, in a sense, differently, and this independently of the gates,—that was to say, as the case would be, even if those gates were removed. But the gates, however necessary or valuable they might be—and very likely they were—for the purpose of protecting life and limb against the proceedings and conduct of the company and their agents, did, as it appeared to him, in the sense in which plainly the words "obstructed," "impeded," and "hindered," were used in the injunction, obstruct the turnpike road in question,—did create, in the clearest and most direct manner, such an impediment and hindrance as the injunction, whichever way considered, had plainly forbidden; and those gates, at least, were certainly within the cognizance of the Court on the present occasion, and would be so were the motion of the 29th of October out of the case. If it were said, as it had been, that the effect of removing the gates would be to create a state of general danger, the answer was that the railway ought to be stopped, inasmuch as it was passing illegally across a road, the rights over which it was the office of this suit to protect. With respect to the argument grounded on the language of the information and bill, it might possibly, though it did not in his opinion, furnish a reason for varying the injunction; but upon the question whether the injunction had been broken, it

seemed to him to have no place. The injunction prohibited not merely obstruction of any particular kind, not obstruction with any particular object merely, but obstruction and impediment. A man had a right of way; his neighbour obstructed it wrongfully, and this for a purpose declared, and in a particular manner, the purpose and manner being as to the person entitled to the right of way of secondary or immaterial consideration, the mere obstruction being that about which he cared, and was concerned, not because it was with this view or that, or in one form or another, but because it was an obstruction. Thereupon he obtained an injunction, not against an obstruction actuated or shaped thus or thus, but against obstruction. Upon this the aggressor, finding it convenient to interfere illegally with the right of way for some other purposes, to obstruct it wrongfully for some other object, and to create a wrongful obstruction in a new shape, did it, and then insisted that, by the change of shape and purpose, he was clear of the injunction. This was an attempted view of the law which was not wholly perhaps new; but whether new or old, was one which certainly his Honour must decline adopting. With respect to the Railway Commissioners, he assumed that they sanctioned the opening of the railway in August for public use, and did so upon the condition that the defendants should erect the gates already mentioned. But if the Commissioners could, by any order or act of theirs, have rendered the defendants' present use of the turnpike road, or mode of dealing with it, lawful, against the rights or interests which it was the object of this suit to protect, they had not been proved to have done so, or to have professed or intended to do so. His impression was, that the case before him was not in the least degree affected by anything that they appeared to have done. Giving no opinion, therefore, as to the extent of their powers, he thought that the part of the case concerning them might be dismissed from consideration. It appeared plain to him that the company had broken the injunction in letter and in spirit; that they had done so contemptuously, and that they must be taken as still pursuing the same course. Then came the question what, if any thing, the Court ought to do in consequence, because it did not necessarily follow that the process asked must issue. It was upon the defendants, however, to make a case to exempt them from it; and, perhaps, if they had shewn their proceedings not to be plainly and clearly illegal—he meant illegal, independently of any question of contempt—or had satisfied the Court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favourable to them than it was, or had stated that they had appealed from it, or from the order granting it, or intended to do so, he might have declined or delayed allowing the process to go. But none of these things had they done. On the contrary, his belief was strengthened of the utter impropriety, without any reference to the injunction or this suit, of the acts alleged to be also a contempt of this Court. His opinion was more fixed that the injunction, instead of going too far, did not go far enough, and that it was one of which the company could not justly complain. Considering their conduct to be at once contemptuous and otherwise illegal—to be wrongful as against the plaintiff individually—wrongful as against her Majesty's subjects at large, and, indeed, a bad—he had almost said scandalous—example, whatever amount of inconvenience might result from acting against the company on this occasion, he thought it right to deal with them according to their merits. The consequence might possibly be to stop the railway. He answered again, that it ought to be stopped, for it passed where it did, by wrong. The directors of the company, their agents and servants, could not on this motion be committed to prison; but what could be done, should by him be done, to repress this daring invasion of public and private rights—an invasion maintained, moreover, in open defiance of all law, authority, and order. The sequestration must issue.

**Wednesday, Nov. 13.**—*Wigram, Malins, and Denison*, on behalf of the company, moved that the proceedings under the order of sequestration might be suspended until the appeal from that order, notice of which had been given, should be disposed of. The issuing of the sequestration would be attended by very great inconvenience to the public, and possibly the Court of Appeal might take a different view from that of his Honour. They referred to the 53rd section of the Lands Clauses Consolidation Act, and cited the case of the *Manchester and Sheffield Railway Company*, where an order for a sequestration had been suspended.

The VICE-CHANCELLOR (without calling on *Walker, Bacon, and J. T. H. Humphreys*, who appeared for the informant and plaintiff) said that the injunction in question was granted after argument in May last, and had never been sought to be discharged or varied until after the making of an order in November for process of contempt in conse-

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quence of a breach of that injunction. He had not heard any arguments that induced him, as far as his judgment was concerned, to doubt the propriety of that injunction. The real question appeared to him to be one to which he addressed himself in disposing of the matter as to the breach of the injunction; and the argument to which he had adverted was this: a right of way was the subject of wrongful interference and unlawful obstruction, and thereupon a Court of Equity interfered by injunction to restrain obstruction, not obstruction of any particular kind, for that would make aggression and litigation endless; but obstruction, upon which the aggressor changed his course, and addressed himself to an obstruction equally wrong, equally lawless, and said that he was entitled to do what he had done, and that the injunction ought to be varied in order to be placed in a shape which should protect the plaintiff only from one mode of obstruction, leaving the defendants at liberty to exercise an endless variety of oppression. To that argument his Honour declined to accede. He was of opinion that the injunction had most plainly been broken. He had heard everything that ability could urge, he believed, in support of the present motion for delaying the issue of the process of sequestration; he had heard nothing in favour of it. If it was done it must be done by some other jurisdiction than his. He thought this a case in which not merely the public interest, represented by the Attorney-General on this record, not merely the private interest of the plaintiff, but the interests of all the Queen's subjects at large, were concerned. It was a matter in which, in his opinion, the open course of justice was defiled. There was no reason for the Court's interference, in his judgment, whatever might be the amount of inconvenience sustained by the company. As the informant and plaintiff was willing to undertake that the process should not be executed for ten days, he should refuse this motion with costs.

**Tuesday, April 1.**

*Ex parte Hamer, re The St. George's Steam Packet Company.*

*Joint-stock Companies Winding-up Act—Contributory.*

*A., the holder of some shares in a joint stock company, by his will, devised his real estate in B., and made C. his executor, and died in 1838. C., for some years after A.'s death, received the dividends on the shares. The company was ordered to be wound up, and C.'s name was put in the list of contributories. It having been represented by C. that A.'s personal estate had been duly administered, the Master put B.'s name in the list of contributories as the devisee of A. B. was admitted that all the debts due from the company at the time of A.'s death had been duly paid in a regular manner out of the assets of the company.*

*Held, that B., as devisee, was not liable as a contributory.*

James Hamer was a holder of twenty-five shares in the above-mentioned company. By the deed of settlement of the company, dated December 29, 1833, it was declared that the company should continue for ninety-nine years, and that the shareholders should be entitled to the profits, and liable to the losses, in proportion to their shares. James Hamer, by his will, gave and devised all his real estate to his wife for her life, and, after her death, unto his daughter, the wife of Joshua Rawdon, her heirs, and assigns for ever; with a direction that his daughter, her heirs, and assigns, should, after the decease of his wife, pay one-half of the profits thereof to his son James Hamer during his life. The testator appointed his wife and daughter his executrices. The testator died in October, 1838, and his will was proved by his executrices. For some years after the death of the testator Mrs. Hamer received the dividends declared on the shares. The names of Mrs. Hamer and Mr. and Mrs. Rawdon were put on the list of contributories by the Master charged with the winding up of the company as the personal representatives of Mr. Hamer, the testator. Mrs. Hamer died in April 1850, and in August in that year an affidavit was filed by Mr. and Mrs. Rawdon, shewing that the personal estate of the testator, Mr. Hamer, had been exhausted. The Master having placed the names of Mr. and Mrs. Rawdon and Mr. James Hamer, the son, on the list of contributories as the devisees of the testator, this was a motion by way of appeal from his decision. It was admitted by the official manager that there was not then due any debt of the company which was due at the death of the testator, and that all the liabilities, in respect whereof contributions were then sought, had been incurred by the company after the decease of the testator.

*Malins and Humphreys*, in support of the motion, referred to 3 Wm. & Mary, c. 14, and cited *Wilson v. Hubley*, 7 East, 128; and *Farley v. Bryant*, 3 Ad. & Ell. 839, which were cases under that statute, and also referred to the statutes 1 Wm. 4, c. 47, and the 3 & 4 Wm. 4, c. 104.

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*Bacon and J. V. Prior*, for the company, cited *Morse v. Tucker*, 5 Hare, 79.

The VICE-CHANCELLOR (without calling for a reply) said he thought it right to assume that neither the debts nor the liabilities which subsisted at the time of the testator's death, now existed, and also that they had been discharged, not by payments made by any person in the character of surety (for if that were so they might be considered as in a sense still alive), but that they had been discharged in the regular and ordinary way out of the funds which were regularly, properly, and primarily applicable to their payment. The liability now in question could not have been established in an action. The whole question arose upon the statute law—the 1 & 2 Wm. 4, c. 47, the 3 & 4 Wm. 4, c. 164, and the Joint-Stock Companies Winding-up Acts—which alone gave rise to the equity which might arise. He gave no opinion how the case would have stood if the liability in question could have been established in a court of law, or could have been properly made the subject of an action. The question was one of internal liability, that was, of contribution. It was not a question whether the devisees were or were not liable to any proceedings by a creditor of the company as such creditor. The testator died so long ago as 1838, since which the executrix for the time being had been admitted as holders or proprietors of the shares in question, probably in their representative character, but still as proprietors. Besides this, for years afterwards the company was treated as solvent—that was, as having more than sufficient assets for the payment of their debts; for profits had been received by the executrix for the time being from time to time for years after the testator's death. It was after this length of time, and this course of proceeding, that the members of the company who thus dealt with the executrix, came forward and stated that the devisees (who had no control over the shares, and had received no benefit whatever arising from them, as they were personal estate), were liable. His Honour was of opinion that it was not for a court of equity, at their instance, to establish such a liability. It was only upon equitable considerations, properly belonging to such a case, that a bill could have been filed, and, if it had been, it would probably have been dismissed. He was of opinion that the appellants could not be placed, in their character of devisees, on the list as contributors. All parties must have their costs out of the estate. His Honour added that he doubted very much whether the ground upon which he put his judgment had been submitted to the attention of the Master.

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Reported by W. H. BAKER, Esq. of Lincoln's Inn, Barrister-at-Law.

March 17, 18, and 29.

MITCHELL and UX. v. COBB.

Trustee Act (11 & 12 Vict. c. 96)—Payment into court under.

*A surviving trustee of a settlement paid into court under the Trustee Act, a sum of 166l. 19s. 11d. which was the produce of one-eighth part of a sum of stock, which stock, on the death of A. B. was divisible amongst certain parties, to one-eighth of which the plaintiff's wife was entitled. Semble, that this would have been a breach of trust on the part of the trustee if the parties had not given him an authority, express or implied, to sell the stock. The trustee had not paid into court a small sum of 11. 7s. being the one-eighth of a dividend in the stock to which plaintiff was also entitled.*

*Held, that although trustees were bound to pay into court the whole of the trust fund, yet, as the retention of this small sum was not made the ground of complaint against the trustee, nor was the question raised by the bill, the plaintiff's bill must be dismissed.*

This was a bill filed to have it declared that the defendant Cobb, the surviving trustee of a marriage settlement, was bound to replace a sum of 187l. 10s. 3d. per cents. (being the plaintiff's wife's one-eighth share of a sum of 1,800l. like stock) sold out by him, and to pay the share of the dividends due; that it might be decreed that he should replace that amount of stock, and transfer that stock when purchased to the plaintiffs, and that the trustee might pay the costs. On the death of one Charles Dixon, in October 1848, the sum of 1,800l. stock became divisible and transferable in one-eighth shares, to one of which the plaintiff and his wife were entitled. This sum of stock was a portion of a still larger sum subject to the trusts of the settlement. A good deal of correspondence took place after the death of Dixon as to the best mode of satisfying all parties interested under the settlement, and a letter was written by the plaintiff's solicitor (who was also beneficially interested in the trust funds) to one of the defendants, a surviving executor of Mrs.

Dixon, in the following terms:—"5 Dec. 1848. Sir,—I am surprised that I have not heard from you respecting the distribution of the fund under Mr. Charles Dixon's will. As the transfer books close on the 13th instant, I hope no further delay may occur in selling out the stock, and I shall be glad to hear from you in a day or two." All the other parties entitled, were willing that the stock should be sold out, and the proceeds divided amongst them. In January 1849, the defendant Cobb accordingly sold out the stock, which produced 1,335l. 19s. cash, and received a sum 26l. 16s. 10d. as a dividend due thereon. All the parties entitled to the other seven-eighths had been paid their respective shares, and had accepted the proceeds of the stock in satisfaction of their claims. As difficulties had arisen as to the title of the plaintiff's wife to the one-eighth share, who derived it under a power in a will made by a married woman, the defendant, on the 22nd of January, 1849, paid to the Accountant-General, under the provisions of the Trustee Act (as above), the sum of 166l. 19s. 11d. being one-eighth of the stock to which the plaintiffs claimed to be entitled; and therefore, the defendant's solicitor wrote to the plaintiff's solicitor informing him of that fact. The trustee did not deduct some legacy-duty which he alleged by his answer was payable in respect of this fund, nor did he deduct anything in respect of costs or expenses, but he retained in his hands 11. 7s. 4d. the one-eighth of the dividend which he admitted he held in his hands in trust for the plaintiffs if entitled.

The cause now came on to be heard.

*Bethell and Cole* for the plaintiffs, contended that the plaintiffs being clearly entitled to receive the one-eighth share of the trust fund, it should have been transferred to them at once, without any sale or payment into court; that the realization of the stock without the plaintiffs' express consent was clearly improper; and also that the trustee was not discharged, as he had not in fact paid in the whole of the trust fund, but had retained a part.

*Roll and Willcock* for the defendant, urged that the trustee had a clear right to pay into Court, under the Trustee Act, any trust fund, whether there was a doubtful title to it or not, and thus relieve himself of all responsibility; that what had been done by the trustee in the present case, had been done with the consent, expressed or implied, of the plaintiffs, and they could not now be heard against that arrangement.

*Bethell*, in reply.—As to the fact of a bill being filed, and not a petition under the Trustee Act, said that if it had been by petition, all parties interested in the whole fund must have been served, and thus created unnecessary expense; that it could not be said the fund had been paid into Court under the Act, when it truth it was no part of the fund itself, but its proceeds which had been paid in, and which was not warranted by the Act; and that what was paid in was so paid in in a wanton way, and not the whole amount to which the plaintiffs were entitled; that although small the amount, the principle that a trustee must not deal with a trust fund as he likes, must prevail. The fund now in Court being lost, is unproductive, whereas if it had been the share of stock it would have produced its dividend.

Several cases were cited; the principal ones were *Knight v. Cawthorn*, 1 De Gax & Sm. 714; *Davis v. Davis*, 4 Hare, 369; *Wilson v. Wilson*, 15 Sim. 487; *Exo v. Exo*, 6 Hare, 171.

At the close of the argument,

The VICE-CHANCELLOR said, he thought with Lord Langdale that although much mischief might possibly ensue from the Act, yet that a trustee was entitled to come in under the Act, and pay any trust fund into Court. He said, in the present case, no doubt the plaintiffs were entitled, unless the surviving trustee had done some act to discharge himself. The defendant says he discharged himself by selling out the stock and paying in the share of the proceeds under the Act of Parliament, but he was clearly not justified in converting the stock into money, unless he was authorised by the correspondence. Now, if in the correspondence there is such authority, the plaintiff must fail in his claim; and if no authority there was great force in the argument that a trustee must pay in the fund itself, and not a part. He said he would read the pleadings and correspondence, and defer his judgment.

## JUDGMENT.

*Saturday, March 29.*—The VICE-CHANCELLOR.—The question is, whether a trustee was justified in paying into Court under the Trustee Relief Act, 10 & 11 Vict. c. 96, a sum of money the produce of 187l. 10s. Consols. The grounds upon which it was contended that such payment was improper were three: first, that there was no difficulty in the case, the plaintiff being plainly and simply entitled to the fund, and in a condition to receive it; secondly, that the Consols ought to have been transferred and not sold, the plaintiff being entitled to the fund in specie; and lastly, that the trustee was not discharged, inasmuch as he had not in fact paid in the whole trust fund, but had omitted to pay in a sum

of 11. 7s. a proportion of the dividend he had received before the sale of the stock, which was a part of a larger sum in which other persons were interested. Now he, the Vice-Chancellor, must hold, upon the construction of the Act, that the question whether there was or was not any difficulty in the execution of the trust, was not a point open to any *casus que trust* to take, and that a trustee having funds in his hands was at liberty to pay them into court if he were so minded. Upon the second point, which was a question of fact, whether the trustee was authorised to sell the stock or not, he was of opinion, upon the evidence, that the trustee had an implied authority to do so, upon which he was fairly justified in acting; and upon the third point, whether the payment was defective by the omission of the dividend, his lordship said that that might be so if that had been the ground of the dispute between the parties on the subject of the dispute. A trustee paying funds into court was bound to pay in the whole, and not retain a small sum which the parties might have no means of recovering; but in the present case the attention of the defendant had not been called to this point, and it was not a point raised by the bill. If this complaint had been made, the trustee would have been bound to remove the objection by paying in the remainder of the fund at his own expense; but the litigation had arisen on a different ground. He was of opinion that the omission of the 11. 7s. was not a circumstance for which the trustee should be chargeable in this suit, and he must

Dismiss the bill with costs.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL PARKER, Esqrs. Barristers-at-Law.

Tuesday, Jan. 21.

HALFORD v. CAMERON'S COALBROOK, &c. RAILWAY COMPANY.

*Liability of Joint Stock Company upon a bill of exchange accepted by directors—Form of acceptance—Stat. 7 & 8 Vict. c. 110, s. 45.*

*A bill of exchange drawn upon a Joint Stock Company in its corporate name, accepted by two directors as "directors of the company appointed to accept this bill," and bearing upon it the corporate seal and also the countersignature of the secretary, is sufficiently accepted under 7 & 8 Vict. c. 110, s. 45, to bind the company.*

*Assumpsit* on a bill of exchange for 203l. drawn by the plaintiff upon and accepted by the defendants, payable three months after date.

*Plea*—That the defendants did not accept. Issue thereon.

The defendants were a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, and the bill of exchange upon which the action was brought was drawn upon the company by its corporate name, and was thus accepted:—"Accepted, John Barham and Edmund Norcott, directors of Cameron's Steam Coal and Swansea and Loughor Railway Company, appointed to accept this bill." The common seal of the company, having its corporate name inscribed upon it, was also affixed to the bill, and the name of the secretary was countersigned. Mr. Barham and Mr. Norcott were two of the directors of the company.

At the trial before Erle, J. it was objected that this acceptance was not binding upon the company under 7 & 8 Vict. c. 110, s. 45, which requires that all bills of exchange shall be accepted by and in the names of two of the directors of the company on whose behalf they are accepted, and shall by such directors be expressed to be accepted by them on behalf of such company. The learned judge reserved leave to the defendants to move to enter a nonsuit on this objection, and the plaintiff had a verdict for 203l.

*Thursday, Jan. 16.*—*M. Smith* moved accordingly. The acceptance does not express that it is on behalf of the company, although that may be inferred. A rule on the same point has been granted in the Court of Ex. in a case of *Edwards v. The same Company* (a); and the cases which have required so much strictness in the form of attestation to a warrant of attorney also apply to the present case. The bill is properly witnessed by the secretary; but that is in compliance with a provision of the statute, which is cumulative.

*Cur. adv. vult.*

## JUDGMENT.

LORD CAMPBELL, C.J.—We have taken time to consider the motion for a new trial to set aside the verdict for the plaintiff in this case. Having had an opportunity of inspecting the bill of exchange, on which the action is brought, and having attentively compared the form of the acceptances with the requisitions of the Act of Parliament upon which the

(a) Since discharged.



## QUEEN'S BENCH.

objection is founded, we are of opinion that no rule ought to be granted. However unreasonable the objection may be, and whatever facility to fraud might arise from giving effect to it, still it must prevail if the bill be not accepted substantially as the Legislature has directed. Although there are no words of nullification, the meaning of the enactment must be taken to be that companies of the description therein mentioned shall only be liable as acceptors of a bill of exchange where the bill has been accepted by and in the names of two directors of the company on whose behalf it is accepted, and expressing that it is accepted by them on behalf of such company. But we think there is no necessity for the very words and syllables here mentioned to be written by the two directors on the face of the bill. According to Dr. Johnson, the meaning of the words "to express" is, "to represent in words; to exhibit by language; to shew or make known in any manner." Now, do not the two directors who have accepted these bills represent in words, exhibit by language, shew and make known that the bills are accepted by them as directors on behalf of the company? The bills are drawn on the company by its corporate name; they are sealed with the corporate seal, having the corporate name of the company circumscribed; and they are countersigned by the secretary of the company, who so describes himself. Then the two directors write on the bill "accepted," sign their names under that word, and add "Directors of Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company, appointed to accept this bill. Can there be any reasonable doubt that this bill is by such directors expressed to be accepted by them on behalf of that company? By whom are they represented to be appointed to accept the bill? Unquestionably by the company who are the drawers. Do not the directors represent that they act under that appointment? Is not this a representation by them that the bill is accepted by them on behalf of the company? We should not have considered it necessary to say so much on this subject had we not been informed that another Court, in a similar case, had granted a rule to shew cause why the verdict should not be set aside. We entertain the most sincere respect for the doubts of that Court, but none of us entertaining any doubt ourselves, we think we cannot with propriety grant a rule which might, for a considerable time, prevent the plaintiff from enforcing payment of a just demand.

Rule refused.

HAY v. ATLING.

Bill of exchange—Illegal consideration—Pleading—Evidence.

To a count on a bill of exchange in an action by maker against acceptor, the defendant pleaded in substance that he had lost 100*l.* to A. by betting on a horse-race, and that the bill of exchange declared on was afterwards, at the request of A. given and accepted by the defendant in consideration of the said sum of 100*l.* so won, and to secure the payment thereof, and that the plaintiff lost the bill with notice. The evidence was that the bill was given in renewal of a former one, dishonoured at maturity, which had been given in consideration of the lost bet:

Held, that there was no variance, and that, notwithstanding the omission from the plea of any mention of the intermediate bill, the defendant was entitled to a verdict if the jury thought that the bet was a consideration that moved the defendant to accept the bill declared on.

Assumpsit.—The declaration contained three counts: the first on a bill of exchange for 50*l.* at four months after date, drawn by the plaintiff and accepted by the defendant; the second, on a like bill for 50*l.* at six months; the third, on an account stated.

Third plea.—That before the acceptance of the several bills in the first and second counts mentioned, or either of them, and before stating the account in the last count mentioned, to wit, certain persons whose names respectively are to the defendant wholly unknown, were about to game at a certain game, to wit, a game of horse-racing, that is to say, by racing divers horses, to wit, a horse named Surplice, and divers other horses, and the defendant then betted 100*l.* against 10*l.* with J. D. M. A. that one of the persons, C. who was about to game the said game with the said horse named Surplice, would not win the said game with the said horse; and the said J. D. M. A. then betted 10*l.* against 100*l.* with the said defendant, that the said person would win the said game with the said horse named Surplice, and the said game was afterwards and before, &c. to wit, &c. gamed, and the said person then won the said game with the said horse named Surplice, and the said J. D. M. A. then, by betting on the side of the said person, then won of the defendant the said sum of 100*l.* so betted as aforesaid; and the said bills of exchange, in the first and second counts respectively mentioned, were afterwards, to wit, on, &c. at the request of the said J. D. M. A. given and accepted

by the defendant in consideration of the said sum of 100*l.* so won by betting as aforesaid, and to secure the payment thereof, contrary to the form of the statute in such case made, and there never was any other value or consideration for the acceptance of the said bills, or of either of them, &c.; and the plaintiff, before and at the several times when he made the said several bills, and when the defendant accepted the same, had notice of the premises in this plea aforesaid, and took the said bills of the defendant with such notice; and the defendant further says, that the account in the last count mentioned was afterwards, to wit, &c. stated of and concerning the moneys alleged to be due on the said bills of exchange in the said first and second counts respectively mentioned, and of or concerning no other money or cause; and the said sum of money in the last count mentioned was and is the amount of the said several bills, and no other money.—Verification.

Replication.—De injuria.

At the trial, before Erie, J. in Hilary Term, 1850, it was proved for the defendant that the defendant lost 100*l.* to J. D. M. A. by betting against the horse called Surplice, at the Derby Stakes, in the year 1848; that at the request of J. D. M. A. and in payment of the bet of 100*l.* so lost, the defendant accepted a bill of 100*l.* at a month, drawn upon him by the plaintiff; that the bill was dishonoured; and that afterwards the plaintiff drew upon the defendant, and the defendant accepted the bills declared as in renewal of the dishonoured bill. Thereupon it was objected, on behalf of the plaintiff, that the plea was not proved, inasmuch as the bills appeared to have been given, not in consideration of the bet lost, but of the bill that had not been honoured; and that, to admit the defence, the plea should have set out the facts relative to the intermediate bill (*Boulter v. Coghlan*, 1 Bin. N. C. 696). The learned judge overruled the objections, reserving leave to the plaintiff to move, if necessary, that a verdict be entered for him; and to the defendant to amend, if necessary; and he left it to the jury to say whether the bills declared on had been made in consideration of the bet. Verdict was found for the defendant; and, subsequently, a rule nisi was obtained for entering a verdict for the defendant, pursuant to leave, or, if necessary, for judgment *non obstante veredicto*, on the ground that the 8 & 9 Vict. c. 109, does not expressly avoid securities given for a gaming debt. Against the rule cause was now shown by

M. Chambers, Q.C. and Keene.—The plea was proved. The question was one of fact for the jury, and their finding will not be disturbed. It is assumed on the other side that, because the bills declared on were given after the 100*l.* bill had been dishonoured, they were given in consideration of that bill only; but if they were given in consideration of the bet and of that bill, and that was shewn, the plea was proved. It is clear, on the evidence, that they may have been so given; the verdict shews that in the opinion of the jury they were so given. The case of *Boulter v. Coghlan* does not apply. The issue there was whether the note had been given in pursuance of a certain specific agreement, and it was clear that it was not. The question in this case was whether the lost bet was a consideration that moved the defendant to accept these bills. That case was before the 5 & 6 Wm. 4. c. 41; and under the statute of Anne a note given for a gaming consideration was absolutely void, even in the hands of an innocent holder. At present notice of the tainted origin must concur with the taint to avoid a bill given for a gaming consideration; and, therefore, the Court will not either require that intermediate transactions be fully set out, or be liberal in allowing amendment. [The rest of the argument is rendered unnecessary by the judgment.]

Watson, Q.C. and James, Q.C. contra.—The case of *Boulter v. Coghlan* was well decided, and applies to this. The illegality relied on must be traced in the plea from its origin to the title of the plaintiff. That the transaction set out in the plea, and proved in evidence, is practically one and the same, is not enough. (*David v. Preece*, 13 L. J. Q.B. 88.) The plaintiff ought not to be called on to defend the purity of a bill which the plea does not mention. [The rest of the argument is unnecessary.]

## JUDGMENT.

Lord CAMPBELL, C.J.—We are of opinion the verdict for the defendant on the last plea ought not to be disturbed, as all the material allegations in this plea were proved. The plaintiff's counsel rested their objection on the authority of *Boulter v. Coghlan*, 1 Scott, 588. We entirely approve of that decision. There the plea, after stating the loss of the money at play, went on to allege, "the said money being so lost it was agreed between the parties the payment thereof should be secured by the promissory note of the defendant, to be by him made;" and in pursuance of that agreement the defendant made the promissory note on which the action was brought. The replication denied that the promissory note was made by the defendant in pursuance of the

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alleged agreement, and the evidence was, that the defendant having lost the money at hazard, accepted and gave him a bill of exchange for the amount on the 23rd of July, 1833, and alleged that he indorsed the bill to Knight; that in the month of December following, the defendant requested him to take a promissory note at six months' date as a satisfaction for and in substitution of the bill. The promissory note on which the action was brought was made and delivered to him, and Knight indorsed the note to the plaintiff. Lord Chief Justice Tindal, with the other judges of the C.P. very properly held the plea not proved, for the note had not been made in pursuance of the agreement stated in the plea, but in pursuance of another agreement between the parties. In the present case, however, the plea, after stating the loss of 100*l.* goes on to allege that the two bills of exchange on which the action is brought were given and accepted by the defendant in consideration of the said sum of 100*l.* so lost by betting as aforesaid, and to secure the payment thereof; the replication *de injuria* puts that in issue, but this allegation was proved; the bills were given in consideration of the 100*l.* so lost by betting, and secured to the plaintiff by them. This was, at all events, part of the consideration. The plea adds that there was no other consideration for the acceptance; but this is an unnecessary allegation, not requiring to be proved; and if we were to understand they were given on the first bill of 100*l.* likewise as a consideration for the acceptance, the plea is not disproved, and becomes a bar to the action, as the bills on which the action is brought are nullified if any part of the consideration was illegal. As the law now stands, the illegality of the consideration would be no answer to a holder for a *bona fide* consideration, but the plea goes on to allege, what was distinctly proved, that the plaintiff, before and at the several times when the payments were made and accepted, had notice of the premises aforesaid, and took the said bills from the defendant with the said notice. We have therefore come to the conclusion, that in this case there is neither deficiency of proof nor variance, and the application to amend the plea is unnecessary. An exception was taken to the validity of the plea, on the ground that the statute 8 & 9 Vict. c. 109, does not expressly avoid securities given for gaming debts. But the statute 5 & 6 Wm. 4. c. 41. s. 1, does enact such security shall be deemed to have been made for an illegal consideration, and thereupon void, except in the hands of a *bona fide* holder for value. Therefore, the rule must be discharged.

Rule discharged.

Saturday, Feb. 22.

ELLIOTT v. CLAYTON.

Uncertificated Bankrupt—Personal labour of a medical practitioner.

A general medical practitioner, being an uncertificated bankrupt, but, by the assistance of friends, enabled to obtain medicines on credit, and so to continue carrying on his business, cannot recover for his attendances and medicines, if his assignees interfere, and require payment to be made to them.

Debt.—The declaration stated, that the defendant, on the 28th day of January, A.D. 1850, was indebted to the plaintiff in 23*l.* 3*s.* 6*d.* for the work, care, diligence, and attendance of the plaintiff by him before that time performed and bestowed as a surgeon and apothecary for the said defendant, and at his request, in and about the healing and curing the defendant and divers other persons of divers diseases, &c.; and also for divers medicines and other necessary things by the plaintiff before that time found and provided, administered, delivered, and applied on those occasions for the defendant, and at his request; and for money found to be due from the defendant to the plaintiff on an account then stated between them.

4th Plea.—As to the residue of the debt in the declaration mentioned, that heretofore and after the passing of the said Act of Parliament hereinbefore in the second plea mentioned, to wit, on the said 31st day of November, A.D. 1845, hereinbefore in the second plea mentioned, the plaintiff was a surgeon and apothecary, trader, dealer, and chapman, and a trader within and subject to the statutes then in force concerning bankrupts; and that the plaintiff, before the accruing of the said residue of the debt in the declaration mentioned, duly filed the said declaration in writing hereinbefore in the second plea mentioned in manner and form as in the said second plea is alleged; and that thereupon, and before the accruing of the said residue of the debt in the declaration mentioned, the plaintiff became and was a bankrupt [setting out the proceedings, &c. in bankruptcy]; and that after the commencement of the said suit, and after the accruing of the said residue of the debt in the declaration mentioned, to wit, on, &c. the said Joseph Callow, as such surviving assignee as aforesaid, required the defendant to pay to him the said residue of the debt in the declaration mentioned.

Replication to the fourth plea.—That the

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said work, care, diligence, and attendance of the plaintiff by him performed and bestowed as a surgeon and apothecary for the defendant, as in the declaration mentioned, so far as the same relate to the said residue of the said debt, were, and every part of the same was, merely the personal labour of the plaintiff in that behalf performed and bestowed after the filing by the plaintiff of the said declaration that he was unable to meet his engagements, and after he had become and was a bankrupt as in the said fourth plea mentioned, and were and every part of the same was then done, performed, given, and bestowed in and for the necessary present maintenance, support, and livelihood of the plaintiff and his family. That the said medicines and other necessary things by the plaintiff found, provided, administered, delivered, and applied for the defendant as in the said declaration mentioned, &c. were and every part of the same was found, provided, administered, delivered, and applied by the plaintiff as such surgeon and apothecary as aforesaid after he had become and was a bankrupt, and then were and every part of the same was purchased and obtained by the plaintiff from, by, and out of the earnings and profits of his professional labour done and performed after he had become and was a bankrupt, and not otherwise, and that the said medicines and other necessary things were and every part of the same was then greatly increased in value and price by the personal labour of the plaintiff in preparing, mixing, compounding, and administering the same, and that the said medicines and other necessary things were, and every part of the same, was then found, provided, administered, delivered, and applied by the plaintiff in and for the necessary present maintenance, support, and livelihood of the plaintiff and his family, and as a part of and incidental and necessary to his said personal labour, and in order that he might perform the said personal labour in the most advantageous manner for the necessary present maintenance, support, and livelihood of the plaintiff and his family, &c. And that the said residue of the said debt due and payable from the defendant to the plaintiff in respect of the said work, care, diligence, and attendance of the plaintiff, and in respect of the said medicines and other necessary things by the plaintiff found, provided, administered, delivered, and applied for the defendant, and in respect of the said account stated by and between the plaintiff and defendant, was not more than sufficient for the necessary maintenance, support, and livelihood of the plaintiff and his family.

*Rejoinder.*—That the said work, care, diligence, and attendance of the plaintiff in the said replication mentioned, were not, nor was any part of the same, merely the personal labour of the plaintiff performed or bestowed in manner and form as in the said replication is alleged, nor were nor was any part of the same done, performed, given, or bestowed in or for the necessary present maintenance, support, or livelihood of the plaintiff or his family, nor were the said medicines and other necessary things in the said replication mentioned, nor was any part of the same purchased or obtained by the plaintiff from, by, or out of the earnings or profits of his personal labour done or performed in manner and form as in the said replication is alleged, nor were the said medicines and other necessary things, nor was any part of the same, found, provided, administered, delivered, or applied by the plaintiff in or for the necessary present maintenance, support, or livelihood of the plaintiff or his family, or as a part of, or incidental, or necessary to his said personal labour, or in order that he might perform the said personal labour in the most advantageous manner, &c.

At the trial it appeared that the plaintiff, though an uncertificated bankrupt, had been enabled to continue the practice of his profession by the aid of friends, one of whom had bought in for him his stock of medicines. He had attended the defendant as a general medical practitioner, and supplied him with the necessary medicines. The greatest part of the plaintiff's bill was for medicines; but it was proved that the intrinsic value of the drugs was very trifling, their value depending principally upon the personal skill of him who administered them. It was objected, first, that the replication was not proved; secondly, that it was bad in arrest of judgment. A verdict was found for the plaintiff, damages 22l. 17s. subject to a motion upon those points. A rule nisi had accordingly been obtained to enter the verdict for the defendant, or arrest the judgment.

*Thursday, Dec. 5.*—*Francis* shewed cause.—The replication is proved. The sale of the medicines is so blended with the mere personal skill and labour, that they cannot be severed, and the plaintiff is entitled to recover for both. [ERLE, J.—An uncertificated bankrupt is entitled to his personal earnings; and that does not mean personal labour merely; because a painter who produced a picture worth 100 guineas, though the materials might be worth only a shilling, would be entitled to receive that money. PATTESON, J.—I see no evidence that the medicines were purchased out of his personal earnings.] They could not be purchased in any other way. It cannot be said that the earnings were obtained by a resale of the medicines at a profit. In truth, the charge for

medicines is only a mode of charging for the personal attendance. Because one-twentieth part of the value arises from the drugs themselves, the assignees claim the whole, although nineteen-twentieths arise exclusively from the personal labour. That they are not entitled to do, and the replication is proved, and affords an answer to the plea of bankruptcy. (*Silk v. Osborne*, 1 Esp. 140; *Evans v. Brown*, 1 Esp. 169; *Beckham v. Drake*, 13 Jurist, 928.) In *Crofton v. Poole*, 1 B. & Ad. 568, the work for which the plaintiff sought to recover was not his personal labour at all; it was done by others whom he employed.

*Bramwell*, contra.—The Court will not extend this privilege of an uncertificated bankrupt further than the cases have already carried it. [ERLE, J.—I do not think that the inclination of the House of Lords in *Beckham v. Drake* was to limit it.] It was not favoured in *Williams v. Chambers*, 10 Q.B. Rep. 337; and in *Crofton v. Poole*, the plaintiff was nonsuited. [WIGHTMAN, J.—What would be the declaration by the assignees?] For work and labour and materials. [ERLE, J.—Then, upon general demurrer, would there not be judgment for the defendant?] Not so; it would be good, at all events, as to the materials; and if the bankrupt chooses to mix up the sale of goods with his personal labour, he loses the right to all. [WIGHTMAN, J.—Then a carpenter cannot recover, because he uses nails in his work.] Not if he buys and sells. [ERLE, J.—But the sculptor who buys a shilling's worth of marble, and makes a valuable statue, would be able to recover, at all events, if he made it to order; perhaps, if he made it to sell, and sold it, the proceeds would pass to the assignees.] Can it depend upon whether the thing is made to order or upon speculation? The only definite and intelligible rule is to confine the privilege to mere personal labour. This, therefore, is a bad replication, and every allegation ought to be proved. It is not proved that the medicines were purchased out of the plaintiff's personal earnings, nor that the account stated was in respect of the personal labour, for no account stated was proved. (He also referred to *Heesey v. Stevens*, 3 Bos. & P. 565.)

## JUDGMENT.

COLERIDGE, J.—This was argued before my brothers Wightman and Erle, and myself. (a) It was a motion to enter the verdict for the defendant, or to arrest the judgment. The action was for work and labour as a surgeon and apothecary, and for goods sold and delivered, and on an account stated. The plea was the bankruptcy of the plaintiff, and that the goods were claimed by the assignees: replication, in effect, that the labour was the personal labour of the plaintiff bestowed after the bankruptcy, and done for the necessary support of the plaintiff and his family, and the goods and medicines were purchased out of the proceeds of the plaintiff's personal labour, and increased in value by the plaintiff's personal labour and skill. The rejoinder traversed that the labour was the personal labour of plaintiff bestowed after the bankruptcy, and that the goods and medicines were purchased out of the proceeds of the personal labour as alleged in the replication. It was proved that the plaintiff was a general medical practitioner, and had failed and become insolvent, and was an uncertificated bankrupt, but by some arrangement with a friend, who had purchased his stock of medicines, he continued in possession of credit, carrying on his business as before, and was supplied with fresh medicines and credit from occasional sources. Under these circumstances the debt was contracted. The plaintiff attended the defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary. We have considered this case, and are of opinion that the replication was not proved. In *Crofton v. Poole*, 1 B. & Ad. 568, the plaintiff was an uncertificated bankrupt. His business was that of a furniture broker: the debt was contracted in the removal of the defendant's goods, and to do this, the plaintiff had procured vans, supplied bottle cases and crates, and employed assistants in packing, unpacking, and removing the goods. Some furniture he cleaned and repaired, and found the necessary materials for those purposes. The Court held this was not a demand for mere personal labour. The plaintiff was, in substance, carrying on his business, and the proceeds passed to the assignees. So it appears to us here: in substance the plaintiff was carrying on his business as a medical practitioner; he is in possession of his original stock of medicines on credit, and he procures more upon credit, and with these and his personal skill he is pursuing his occupation for profit. It would be to carry the principle laid down in *Silk v. Osborne*, far beyond what is reasonable to apply it to a case like the present.

*Rule absolute to enter the verdict for the defendant.*

*Saturday, Feb. 22.*

SCHMALZ v. AVERY.

*Principal and agent—Charter-party—Identity of agent and undisclosed principal—Variance.*

(a) Patteson, J. heard part of the argument only.

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*A person contracting as agent for an unknown and unnamed principal is not precluded from suing as principal himself, unless it appear that the other party to the contract relied on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be.*

*By the terms of a charter-party made between the defendant as owner of a ship, and the plaintiff as agent for an unknown and unnamed principal, it was agreed that the defendant should take on board a certain cargo, &c. One of the stipulations was in these words:—"This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of S. the plaintiff, cease as soon as the cargo is shipped." In an action on the charter-party by the plaintiff as principal for not taking the cargo on board, it was proved that the plaintiff was the real principal:*

*Held, that the defendant was entitled to sue as principal.*

*Assumpsit on a charter-party.*

The declaration stated the instrument as "a certain charter-party of affreightment then made between the defendant, therein described as the owner of the good ship or vessel called, &c. of the one part, and the plaintiff, merchant, and freighter, of the other part." Breach, "that although the plaintiff had always, from the time of making the said agreement, been ready and willing to load, according to the terms of and in the manner specified by the said charter-party, a complete cargo of large steam coals, not exceeding what the said ship could reasonably stow and carry, over and above her tackle, &c. at any spout not above Howden, or from so near to any safe spout not above Howden as the said ship could safely get, of which the defendant had notice; yet the defendant did not sail or proceed with all convenient speed, or at anytime after the making of the said agreement and charter-party as aforesaid to any safe spout not above, at, or near Howden, as aforesaid, &c."

*1st Plea.—Non assumpsit.*

On the trial, before Wightman, J. at the Newcastle Summer Assizes in 1850, the following "memorandum for charter," signed by the defendant, was put in:—"Newcastle-upon-Tyne, 23rd day of July, 1849. It is this day mutually agreed between Mr. G. Avery, owner of the good ship or vessel called, &c. now in the Tyne, on the one part, and G. Schmalz and Co. merchants, as agents of the freighter, of the other part, that the said ship being tight, &c. shall, with all convenient speed, sail and proceed to a safe spout not above Howden, or so near thereunto as she may safely get, and there load from the agents of the said freighter, in regular turn, a complete cargo of large steam-coal, not exceeding what she can reasonably stow and carry, over and above her tackle, &c.; and being so loaded, shall therewith proceed to Swinemunde, and deliver the same to the said freighter, or his assigns, on being paid freight at and after the rate of, &c. Among other stipulations, it contained the following:—"This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmalz and Co. cease as soon as the cargo is shipped." The clause in italics appeared in a printed form of charter, which was used by the plaintiff and his partners, and, it was said, was, in the present instance, inadvertently omitted to be struck out; and evidence was given, that in a conversation between the defendant and the partner of the plaintiff, the latter had stated that the plaintiff was really interested, and that it was a speculation of his own. It was objected, for the defendant, that there was a variance between the charter-party as declared upon and as given in evidence. The learned judge inclined to the opinion that the plaintiff was concluded by the terms of the charter-party from saying that he was not agent, and that the evidence altered the written contract. A verdict was entered for the defendant on the first issue, and for the plaintiff on the second and third issues, leave being reserved to move to enter a verdict for the plaintiff for 5l. 10s. damages. In the following Michaelmas Term a rule nisi was granted accordingly, against which cause was shewn (Nov. 6) by

*Watson, Q.C. and Unkenh.* The contract in this case remained executory at the time of action brought; and therefore the plaintiff, who had entered into it as agent, was not entitled to sue as principal. *Humble v. Hunter*, 12 Q.B. 310; *Bickerton v. Burrell*, 5 M. & S. 286. It may be that the defendant would have refused to deal with the plaintiff as principal,—that he was willing to deal with any one whom he did not know, but absolutely unwilling to deal with the plaintiff whom he did know. Further, there was no mutuality between the plaintiff and the defendant; for an action for not loading a cargo would not have lain against the plaintiff; and, if the cargo had been shipped, the liability of Schmalz & Co. would have been excluded. [WIGHTMAN, J.—Schmalz was the principal.] His written statement in the contract is, that he was not the principal; and he cannot be permitted to contradict this. This case is governed by *Jenkins*

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*v. Hutchinson*, 18 L. J. Q.B. 274. [PATTERSON, J.—In that case there was not any binding contract; in this there was a contract, at all events binding on the defendant until the ship was loaded. It cannot have been meant that, after the loading of the ship, there should be no contract with any one.] The contract was with the unknown principal, who was not to be Schmalz; the latter was only bound to disclose him if he did not come forward.

*Knowles, Q.C. and Udell, contra.* This objection ought to have been taken to the reception of the evidence that the plaintiff was the principal; as was done in *Humble v. Hunter*, 12 Q.B. 310; but in fact parole evidence is always necessary for showing that the party sued is the party who made the contract, and is bound by it. *Trueman v. Leder*, 11 A. & E. 589.

In the case of *Bickerton v. Burrell*, the contract had been signed by the agent, the plaintiff, for the principal by name, and so is distinguishable; besides, in *Rayner v. Grote*, the agent was held entitled to sue in his own name for non-acceptance of goods on a contract which contained the name of the principal. If a man state himself to be an agent, but has not in fact a principal, he is in law himself the principal, both in respect of liability to be sued and ability to sue. *Railton v. Hodgson*, 4 Taun. 575; *Addison v. Gandasqui*; *Atkins v. Ambler*, 2 Esp. 493; *Thomson v. Davenport*, 2 Smith, L. C. 223; *They also cited Higgins v. Senior*, 8 M. & W. 634; *Seares v. Bond*, 5 B. & Ad. 389; and *Jenkins v. Hutchinson*. *Cur. adv. vult.*

A cross rule had been obtained for entering the verdict for the defendant on the second issue, on the ground that the averment of the plaintiff's readiness to load at any spout not above Howden, &c. had not been proved, inasmuch as no particular spout within the limits fixed by the charter-party had been therein named for the defendant to proceed to and load, and it was not shewn that the plaintiff was ready to load at any safe spout. It had, however, appeared that the plaintiff had named to the defendant, and had been ready to load at the B. spout within these limits, which was a safe one. Against the rule cause was shewn by

*Knowles, Q.C. and Udell.*—The plaintiff was ready to load at a safe spout within the terms of the charter. He was not bound to be ready at every safe spout within the limits.

*Unthank, contra*, cited *Matthews v. Lowther*, 19 L. J. Ex. 364.

*WIGHTMAN, J.*—The evidence is that he was ready to load at one spout, and that meets your traverse. How many spouts was he to name? Not ready to load at any, means ready to load at none. Must he shew an offer to load at every one.

*PATTERSON, J.*—You read "any" as if it were "every."

*WIGHTMAN, J.*—Or "all."

*By the Court.*—Rule discharged.

*Wednesday, Feb. 26.*—The judgment of the Court was now delivered on the first rule by

*PATTERSON, J.*—This was an action of *assumpsit* on a charter-party, not under seal, against the defendant, a ship owner, for not taking a cargo on board according to the charter-party. The question raised on the plea of *non assumpsit* is, whether the action will lie at the suit of the present plaintiff. The charter-party in terms states that it is made by Schmalz and Co. the plaintiffs, as agents for the freighter, and then states the terms of the contract, and concludes with these words, "this charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of Schmalz and Co. ceases as soon as the cargo is shipped." The declaration treats the charter-party as made between the plaintiffs and the defendant without mentioning the character of the plaintiffs as agents, and without any reference to the concluding clause, thereby treating the plaintiffs as principals in the contract. At the trial it was proved that the plaintiffs were, in point of fact, the real freighters. No objection was taken to the admissibility of the evidence by which that fact was established, but at the close of the plaintiffs' case it was objected that they were concluded by the terms of the charter-party, and fixed with the character of agents, so that they could sue only in that character, and consequently that there was a variance between the declaration and the proof. A verdict was found for the defendant, with liberty to enter the verdict for the plaintiff for 5s. 2s. 6d. which was the agreed damage, if the Court should be of opinion that he was entitled to sue as principal, notwithstanding the terms of the charter-party, and a rule nisi was obtained so to enter it. We are of opinion that the rule must be made absolute. It is conceded if there had been a third party, who was the real freighter, such third party might have sued, although his name was not disclosed in the charter-party; but the question is, whether the plaintiff can fill both characters of agent and principal, or rather, whether he can repudiate that of agent and adopt that of principal, both characters being referred to in the charter-party, but the name of the principal not being therein mentioned. The cases principally relied upon for the defendant were *Bickerton v. Burrell*, 5 M. & S. 383, and *Rayner v.*

*Grote*, 15 M. & W. 359, in both which cases the supposed principal was named in the instrument of contract; also the case of *Humble v. Hunter*, 12 Q.B. 310. In the case of *Bickerton v. Burrell*, the plaintiff, on the face of the contract, professed to enter into it as agent for C. Richardson; at the trial C. Richardson was called to prove that her name was used without her knowledge, and that she had nothing to do with the contract. Lord Ellenborough refused to receive the evidence, and nonsuited the plaintiff. A rule nisi to set aside the nonsuit was obtained, but on argument was discharged, on the ground that a person who has exhibited himself as agent for another whom he names, cannot at once throw off that character and put himself forward as principal without any communication or notice to the other party. All the judges relied on the want of such notice, which seems to have been the chief ground of the decision, for they considered that the defendant was thereby placed in great difficulty, as he had contracted in point of law with C. Richardson, and not with the plaintiff, and might have no means of ascertaining or even conjecturing that she was not the real party. The soundness of that ground of decision was somewhat doubted in the late case of *Rayner v. Grote*. There the plaintiff contracted as agent for Johnson, but was, in truth, himself the principal. He sued the defendant for not accepting and paying for the goods: the defendant had accepted and paid for a great part of the goods sold, and knew before he refused the residue that the plaintiff was the real principal; and so the case was distinguishable from that of *Bickerton v. Burrell*, on the very ground on which the decision proceeded, and the plaintiff was held to be entitled to sue. The case of *Humble v. Hunter* was an action by Grace Humble on a charter-party, signed by her son J. C. Humble, in which he was described as the "owner of the good ship or vessel called the *Ann*;" then the son was called at the trial, and after objection taken to his admissibility, proved that he executed as agent for the plaintiff, and the plaintiff had a verdict. The Court, however, granted a new trial on the ground that it was not competent for a third party to come in and claim to be the principal, and so contradict the express statement of the contract itself. The case turned upon the form of the contract, for it was conceded that if the words "owner of the good ship," &c. had been omitted, the plaintiff might have sued on shewing that she was the real owner, and that the son was her agent only. Such evidence would not have contradicted the contract, but would only have let in a third party who was really interested, in conformity with the current of authorities in cases of contracts executed by agents in their own names. The case of *Jenkins v. Hutchinson*, 18 L. J. 274, Q.B. was also cited for the defendant; but it proceeded on a different ground, and is not applicable to the present question. Then the defendant was sought to be charged as principal on a charter-party executed by him, on the face of it, as agent for Barnes; he had, in truth, no authority from Barnes, nor was he himself interested at all, and the Court held that he should not be sued as principal without shewing that he really was so. A distinction was taken on the argument in the present case by the defendant's counsel between an executed and an executory contract, and it was stated that, whatever be the rule in the former class of cases, where the defendant has received the benefit of the contract, as it is probably immaterial to him whom he pays, yet that in the latter class the defendant cannot properly be held answerable to B. having expressly contracted with A. and a passage in the judgment of the Court in *Rayner v. Grote*, was much relied on, which is this: "If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many cases, such as, for instance, the case of contracts in which the skill or the solvency of the person who is named as the principal may be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name; and it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, may be the general rule." With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract; if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested. In the present case, the name of the supposed freighter not being inserted, no inducement to enter into the contract from the supposed solvency of the freighter can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might, most unquestionably, have been sued on this charter-party. The defendant cannot have been in any way prejudiced in respect of any supposed reliance upon the solvency of the freighter, since the freighter is admitted to have

been unknown to him, and he did not think it necessary to inquire who he was. It is, indeed, possible that he might have been contented to take as freighter as principal, provided it was not the present plaintiff, and he may have relied on the terms of the charter-party indicating that the plaintiff was an agent only, being willing to accept of no one else, be he who he might, as principal. After all, therefore, the question is reduced to this, whether we are to assume that the defendant did rely on the character of the plaintiff as agent only, and would not have contracted with him as principal, if he had known him to be so, and set it down as a broad rule that a person continuing as agent for a known and unnamed principal is precluded from saying, "I am myself the principal." Doubtless his saying so does in some measure contradict the written contract, especially the concluding clause, which says, "this charter-party being concluded on behalf of another party, &c." for there was no such other party. It may be that the plaintiff entered into the charter-party for some other party who had not absolutely authorised him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal. In either case, the charter-party would be, strictly speaking, contradicted, yet the defendant does not appear to be prejudiced, for as he was regardless of who the real freighter was, it should seem that he trusted for his freighter's lien on the cargo. But there is no contradiction of the charter-party if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot, in strict propriety of speech, be said to be an agent to himself; but in a contract of this description we see no absurdity in saying he might fill both characters; that he might contract, as agent for the freighter, whoever that freighter might turn out to be, and might still adopt the character of freighter himself if he chose. There is nothing in the argument that the party's responsibility is expressly made to cease "as soon as the cargo is shipped," for that limitation plainly applies only to the character of agent, and being the real principal, his responsibility would unquestionably continue after the cargo was shipped. On the whole, we are of opinion that this rule must be made absolute.

## COURT OF REVENUE.

Reported by FREDERICK BAILEY and C. J. B. HENNER, Esqrs. Barristers-at-Law.

Saturday, Feb. 15.

THE ATTORNEY-GENERAL v. NATHAN.

Legacy duty—Domicile of officer in the East-India Company's service.

A captain serving in one of her Majesty's regiments in the East Indies died there intestate, leaving his personal estate situate there. His widow, who was also resident in the East Indies, took out letters of administration to his estate in the proper Indian court, collected and administered it there, and invested the residue in India for the benefit of herself and the next of kin. On her return to England she took out letters of administration in the Prerogative Court of Canterbury, in order to recover 92l. arrears of pay due to the intestate's estate by the War Office.

Held, by PARKER and ALDERSON, JJ. that the administratrix must account for and pay legacy duty upon the estate administered in the East Indies, as well as upon that portion administered in this country. (a)

In this case the usual rule had been obtained by Crompton, calling on the administratrix to account.

J. B. Alcock now shewed cause.—The estate of the intestate was administered and appropriated in the East Indies. [Crompton.—He was not in the service of the East-India Company. PARKER, B.—No. That makes the difference. ALDERSON, B.—He was serving in the East Indies, and died within the territory of the East-India Company.] Yes. The administration was taken out here for the sole purpose of obtaining the arrears from the War Office. [PARKER, B.—It is immaterial where she took out administration. The question is, where the husband was domiciled at the time of his death. I suppose that must be now considered as settled since the case of *Thomson*.] We contend that this estate being the estate of a person dying in India, and which was situate in that country, administered and completely appropriated there, and brought to this country not by the administratrix *qua* administratrix, but as one of persons beneficially entitled, is not liable to the duties imposed upon legacies and shares of residue under the 36 Geo. 3. c. 52. [PARKER, B.—Was not the rule finally settled in a case in the House of Lords that was twice argued—the case of *Thomson v. The Advocate-General*?] There is a case exactly similar to this. [PARKER, B.—Then it must have one of the earlier cases.] I shall come to that presently. [PARKER, B.—Of course

(a) The decision, it will be observed, differs from that of the House of Lords, in *Attorney-General v. Nathan*, 8 Bligh, N.S. 15.



EXCHEQUER.

EXCHEQUER.

EXCHEQUER.

the earlier cases have been overruled.] The first case is the case of *Logan v. Fairlie*, 1 My. & Cr. 59. [PARKE, B.—Surely all those cases are overruled.] I do not believe there is one of them overruled. [ALDERSON, B.—If the case in the House of Lords is to be regarded as the ruling case, you must distinguish this from that. PARKE, B.—The House of Lords took the advice of the judges, and the judges gave their unanimous opinions.] I am aware of that, but I do not consider that it was decided in that case that the question of domicile was to be the rule in all cases. [PARKE, B.—I think nothing was more settled than that point.] A case approved by Lord Cottenham is on all fours with this—*Jackson v. Forbes*, 2 Tyr. 354; 2 Cr. & Jer. 282. [PARKE, B.—You do not contend that in this case an officer in her Majesty's service going to the East Indies in his character of officer acquires a domicile there?] I believe it has been decided that a Queen's officer cannot acquire a domicile in India for the distribution of an estate [PARKE, B.—And a Company's officer does.], but I do not know that it follows that the same domicile applies for the payment of legacy duty? [ALDERSON, B.—Yes. How do you distinguish it from *Thomson's* case? There the rule laid down distinctly is, that if a party be domiciled in England, the accounting is to take place in England as to property even in Russia or Austria, or any other country, provided it be personal property.] That case is merely the converse of *Re Ewin*. [ALDERSON, B.—The question is, where is the domicile now of this person? If you make this person out to be domiciled in England, *Thomson's* case does apply. PARKE, B.—It is the converse of the proposition in *Thomson's* case. It was there held that if he was domiciled abroad, his personal property is not liable. Does it not follow that the converse of the proposition is true? In the case of *Re Ewin* there was domicile in England and property abroad.] In *Jackson v. Forbes*, the testator was a native of Scotland, and was at the time of his death seized and possessed of some real estate in the East Indies, and was also possessed of considerable personal estate and effects, all of which, at the time of his death, were also in India. His executors were also there, proved the will there, and remitted home the estate. [PARKE, B.—The case of *Jackson v. Forbes* came before the Court of Ex. but before they had got the correct rule.] But they do not overrule it. In that case there was no dispute as to the domicile. It was perfectly well known there that the testator was a Queen's officer. In the argument it is stated, "There is here no dispute about an Indian domicile, or an English domicile, acquired by a residence in India. *Munro v. Douglas*, 5 Madd. 379, shews that a Scotchman may acquire a domicile by a local residence in the East-India Company's service so as to make the English law of distributions prevail over the Scotch law, but that is because India is subject to English law. In this case there can be no Indian domicile, but the *domicilium originis* only." The note says, "the testator was in the King's service." This extract shews that the question of domicile was clearly brought before the Court there, and that the testator was a King's officer, and the Court of Ex. held that legacy duty was not payable. "This case has been argued before us by counsel; we have considered it, and are of opinion that the duties, &c. were not chargeable in respect of any of the legacies, annuities, and shares of residue bequeathed by the testator's will and codicil." Per Lyndhurst, J. Bayley, J. Vaughan, J. Bolland. [PARKE, B.—The judges give it as their opinion that the question entirely turns upon the domicile. ALDERSON, B.—Wherever the domicile is at the time, there the duty is payable if there be a duty. PARKE, B.—Lord Tindal, C. J. in delivering the opinion of the judges, says, "and as to the arguments at your lordship's bar on the part of the Crown, that the proper distinction was, whether the estate was administered by a person in a representative character in this country, and that in case of such administering the legacy duty was payable, we think it is a sufficient answer thereto that the liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here; the question, as it appears to us, not being whether there be administration in England or not, but whether the will and legacy are a will and legacy within the meaning of the statute imposing the duty." ALDERSON, B.—The Lord Chancellor, in the course of the arguments in the case of *Thomson v. The Advocate-General*, says: "I consider that in all these cases domicile was the basis of the whole judgment; the only question was the effect of the other circumstances upon the rule of domicile." We had better consider where the domicile was. Do you dispute that it was in England? Then shew us any other circumstances which are to take this case out of the rule of domicile.] The death, administration, and appropriation abroad are the circumstances which take it out of the rule. [ALDERSON, B.—See what he says in the judgment. The Lord

Chancellor: "I apprehend that that is an entire mistake; that personal property in England follows the law of the domicile, and that it is precisely the same as if the personal property had been in India at the time of testator's death." Now, take the converse of that. If the domicile is in England and the property in India, and if the property goes to the domicile, and not the domicile to the property, then the Indian property comes to England with the English domicile, as the English property would go to India with an Indian domicile.] In the appeal in *Jackson v. Forbes*, nom. *Attorney-General v. Jackson*, 8 Bligh, N.S. 15; 2 Cl. & Fin. 49, the case was fully argued again by the Solicitor-General (afterwards Lord Cottenham) on the part of the Crown. The Crown pressed it on the ground of administration, and said the estate had been administered in England, and, therefore, the duty was payable. But the Lord Chancellor recommended the House to affirm the decision of the Court of Ex. which was done. Therefore the case of the *Attorney-General v. Jackson* comes as the decision of the House of Lords; and in that case the domicile was clearly British, the testator being a Queen's officer. He was in precisely the same position as this intestate; and unless the decision of the House of Lords be overruled by this Court, that case is binding. The only distinction between that case and the present is, that there all the property was in India, whilst in this portion was in this country. There is no other distinction between them. The next case is *Arnold v. Arnold*, 2 M. & C. 256. [ALDERSON, B.—Lord Cottenham says: "When the Act speaks of 'any will of any person,' and of the legacies being payable out of the personal estate, it must, I think, be considered as speaking of persons and wills, and personal estates in this country."] Precisely; and in this case neither one nor the other is here. [ALDERSON, B.—Then you must add to that the number of opinions delivered by noble lords in the House of Lords, shewing that the personal estate is always where a person is domiciled in point of law. If a man is domiciled in this country, the estate is in this country in point of law, though in fact it is a debt due from a person in India. Take the two cases together, the dicta together, that seems to be the decision at which the House of Lords arrived; and what Lord Campbell says is: "The truth is, my lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the judges, until within a few years, thought much of it; but it is a very convenient doctrine. It is now well understood, and I think that it solves the difficulty with which this case was surrounded." In the same case, Lord Lyndhurst, speaking of the same doctrine of domicile, says that it has never been quarrelled with, and is a known principle of our law. [PARKE, B.—Unluckily we have not, in *Jackson v. Forbes*, the reasons of the Court. I have always understood, since that last case in the House of Lords, that domicile was the rule.] It may be, where the other facts and circumstances do not take it out of the rule, as Lord Lyndhurst observed in *Thomson v. The Advocate-General*; but here the death, administration, and appropriation abroad take this case out of the rule of domicile. In *Arnold v. Arnold*, which was decided subsequently to *Jackson v. Forbes*, it is stated,—"George Arnold, a lieutenant-colonel in the East-India Company's service, being possessed of a large personal estate, situate partly in England, but principally in the East Indies, where he and his family then resided, by his will bequeathed legacies to a large amount. The estate was administered and appropriated in India by executors resident there. A bill was filed here for the administration of the estate, and the Stamp Office, as usual, claimed the duty. The point was decided on petition, the petitioners being the plaintiffs to the bill, and their argument was, that the question must be decided by domicile. The Solicitor-General (Sir R. Rolfe) said: "The proposition that the domicile of the party from whom the property comes determines whether the legacy-duty shall be payable or not is entirely new, and not only unsupported by authority, but directly opposed to it. There is no foundation in law for holding what has been assumed throughout the argument on the other side, that a native Englishman may have a domicile in the East Indies distinct from and adverse to a domicile in England." [PARKE, B.—In the case of *Jackson v. Forbes*, where did the Court assume the domicile to be? Crompton.—In the one set of reports domicile was not mentioned; it is stated that he was a King's officer in both, and in that case and in the other case of *Arnold v. Arnold*, it was said expressly by the Solicitor-General that the Crown did not put it on the question of domicile. PARKE, B.—They assumed that he had a foreign domicile.] No. They knew that he had a British domicile. [PARKE, B.—In Mr. Justice Williams's book he considers that, in *Jackson v. Forbes*, the testator having been born in Scotland, and having resided and died in India, therefore the domicile was in India.] He being a King's officer. [PARKE, B.—

That is true; but they did not advert to that circumstance, or else they would have overruled the case of *Re Ewin*.] That case was decided on the ground that everything was in England except the situation of the property. Lord Brougham, in giving judgment in *The Attorney-General v. Jackson*, refers the house to Tyrwhitt's Report. [ALDERSON, B.—It is clear that the judges assumed, in *The Attorney-General v. Forbes*, that the testator was domiciled in India. When you ask what the decision in point of law is, you must stand up on the same facts upon which the decision was supposed to be founded. PARKE, B.—You must look to the *ratio decidendi*. ALDERSON, B.—If they made a mistake in the case of *The Attorney-General v. Forbes*, in supposing that the domicile was in India, that has nothing to do with the question.] Lord Lyndhurst, who was Chancellor, in the case of *Advocate-General v. Thomson*, was Chief Baron of the Court of Ex. when *Jackson v. Forbes* came before him with a British domicile, and it cannot now be said that he did not know in the House of Lords that the case of *Jackson v. Forbes* was one of a British domicile. He was Chief Baron of the Ex. in the decision. [ALDERSON, B.—I am not sure that it necessarily follows that he knew that Colin Anderson's domicile was not in India.] It was stated in the argument, and both sides agreed, that there was no dispute as to the domicile being British. This was clearly understood; and Lord Brougham, in moving the judgment of the House in the appeal, refers their lordships to Tyrwhitt's Reports, which fully report the fact of the testator being a King's officer, and therefore having the *domicilium originis*. In *Arnold v. Arnold* Lord Cottenham says: "The fact relied upon as subjecting the legacies to the duty is, that the property was remitted from India to England, and administered by the executors in this country. This was an unnecessary proceeding. It may be said, indeed, to be by mere accident that such a course was adopted; for it is obvious that the executor in India having paid all the debts in India, and the executors in England having paid all the debts in this country, the former might, according to all the authorities, have avoided the question by remitting the legacies direct to each legatee, or, instead of allowing them to pass through the hands of the personal representative in this country, might have remitted them to an agent of his own, with directions to pay over the money to the persons entitled. When the Act speaks of any will of any person, and of the legacies being payable out of the personal estate, it must, I think, be considered as speaking of persons, and wills, and personal estates in this country, that being the limit of the sphere of the enactment. It is clearly not applicable to the East Indies. It is applicable to this country." [ALDERSON, B.—Where does it appear in the report of the appeal in *The Attorney-General v. Forbes*, that he was an officer in the King's service?] In 8 Bligh, N.S. 51. [ALDERSON, B.—Not in *Clarke v. Finley*.] It does not appear to have been observed.] No, but Lord Lyndhurst was present in both cases, and it must have been well known. [ALDERSON, B.—They must have imagined that all the cases were Indian domiciles. Then, in putting the case of a foreigner with property in England, it implies that they thought Colin Anderson was, for the purpose of the argument, a foreigner, and the only question was, whether his property being in England made a difference.] But the fact of his being in the King's service was well known. [PARKE, B.—I do not think they adverted to that circumstance.] Not in the decision in *The Advocate-General v. Thomson*, I admit, because in Cl. & Fin. they did not mention it. [PARKE, B.—They seemed to have supposed that as he resided in India at the time, he was domiciled in India, not advertent to the circumstance that mere residence does not give a domicile. They do not appear to have adverted to the circumstance that he was a King's officer; they assumed, that, as he resided abroad, he was domiciled. If you assume thus much, that is clearly the ground on which it is to be reconciled with the judgment in the House of Lords, in *Thomson v. The Advocate-General*, and the approbation given to that case is upon the supposition that residence and domicile were the same thing.] The approbation of Lord Cottenham in *Arnold v. Arnold*, is not given on that ground. [ALDERSON, B.—I think it is so.] No; for Lord Cottenham was himself present in the case, arguing it for the Crown. [PARKE, B.—They never appear to have argued that he was still domiciled in India, though living in England. ALDERSON, B.—In *Arnold v. Arnold*, Lord Cottenham put the case of a British-born subject in the service of the East-India Company's service, dying in India, as equivalent to the case of Colin Anderson, in the *Attorney-General v. Forbes*, and, putting them together, how can you doubt the Lord Cottenham thought Colin Anderson was a Company's officer?] All the reports of the case of *Jackson v. Forbes*, and Bligh's report of the *Attorney-General v. Jackson*, state distinctly that the testator was a King's officer.

## EXCHEQUER.

[PARKE, B.—They did not advert to the circumstance that there is a distinction between a Company's officer and a King's officer, residing and dying in the East Indies. They did not advert to it. They took it for granted that there was no distinction. They assumed that because he resided he was domiciled. ALDERSON, B.—Supposing the judges were to give their opinion upon a supposed state of the law as not altered by a general or specific statute, and had not adverted to that statute at all, and had given their judgment establishing a given principle, the *ratio decidendi* being clear, if you point out afterwards that if they had adverted to that statute they would have decided otherwise, does that make their decision on the grounds upon which they put it, wrong in principle? Would it not be quotable in a case if the statute did not apply, just as well, even though it were a wrong decision? Lord Chief Barons are not infallible on a subject of fact. All the judges are supposed to know the statute law, which they do not.] But it is clear that Lord Cottenham was perfectly conversant with every fact. [ALDERSON, B.—He supposed that *The Attorney-General v. Jackson* was like in all respects to the case of *Arnold v. Arnold*. That was the case of a Company's officer. He does not say that the distinction between a Company's officer and an officer in the Queen's service, is utterly unimportant. If he had, it would have been very much in your favour.] It is quite evident that he considered it so. [ALDERSON, B.—Both those cases proceeded on the ground of domicile, and that alone.] The Reports state otherwise. [ALDERSON, B.—Do you suppose everybody reads every report? I have Cl. & Fin.'s Report, where it is not mentioned. PARKE, B.—It is clear that Lord Lyndhurst, when referring to those cases, supposes that the persons were domiciled in the East Indies. He says "it has been decided in the case of British subjects domiciled in India." They have assumed that, because he was residing there, he was domiciled there]. They have not adverted to the circumstance that he went there for a temporary purpose. [PARKE, B.—After several conflicting cases they have laid down a principle which is very intelligible, and that is the principle adopted in the case of *Thomson v. The Advocate-General*, namely, that personal property must be administered according to the law of the country where the possessor dies domiciled (the old rule was, that it was governed by the law of succession), and goes to the person who would be entitled. His will must be made according to the law of the country where he was domiciled; and, therefore, in that case of Barnett; which was before the delegates, of whom I was one, it was held that a will made in Lisbon, in the English form, though intended to pass property in the English funds, must be made before five witnesses, according to the law in Lisbon, where he had been domiciled, and had abjured the Protestant religion, and being domiciled in Lisbon, though he fully intended to return to England, he made his will, and the delegates held that that will was void, not being made according to the law of the domicile, and that all questions respecting the personal property of the deceased were governed by the law of the domicile. Now, after some conflicting decisions, the Courts have arrived at the same conclusion with regard to the construction of this statute. As to the personal estate of a person deceased, it follows his domicile. Here you have the unanimous opinion of the judges in the case of *Thomson v. The Advocate-General*.] I agree it is in the converse of the case, not in this particular case. [PARKE, B.—The principle laid down there and adopted by all the judges, and all the learned lords—Lord Lyndhurst, Lord Brougham, and Lord Campbell—is, that the law of domicile governs the question as to whether personal property is or is not subject to legacy duty. If it is the personal property of a person who dies domiciled in England it is liable to duty.] You cannot leave *The Attorney-General v. Jackson* out of your consideration. [PARKE, B.—It is evident that the judges never adverted to the distinction between a person residing in India at the time of his death, and domiciled in India. Afterwards, when the subject was more fully considered, the House of Lords gave judgment upon that with the assistance of the judges all concurring, and you will see that it lays down the great principle that personal property follows the domicile. Consequently it affects all the personal property of a person domiciled in England at the time of his death, wherever that property is. It has never been applied to the case of an alien domiciled in England. In Mr. Justice Williams's book he considers that the last case in the House of Lords settles the point. ALDERSON, B.—We should have no fixed law at all if we were to adopt your principle of deciding cases.]

## JUDGMENT.

PARKE, B. (without calling on the other side).—I consider the principle has been settled, and I think definitively settled by the House of Lords in the case of *Thomson v. The Advocate-General*. There had been several cases conflicting before. There were some cases before the case of *re Ewin*, which made

the duty depend upon the assets being received in England. In *re Ewin* the doctrine was first broached that the true criterion whether the parties were liable to legacy-duty was, whether the testator was domiciled in England, and that is the rule adopted by the judges in giving their opinion upon the case, and all their lordships, Lord Lyndhurst, Lord Brougham, and Lord Campbell, put it upon that great principle, that personal property is considered as being in the place where the owner of it is domiciled at the time of his death. It is said that if we act upon this decision in the House of Lords we overrule another decision in the House of Lords in the case of *The Attorney-General v. Jackson*, or the case of *The Attorney-General v. Forbes*. It is quite true that if in the case of *The Attorney-General v. Jackson* it had been held that at the time of the death of the testator he was domiciled in England those cases would be overruled. But it is perfectly clear that they proceeded in that case without advertent to the distinction between residence and domicile. If you look at the reports of those cases, and the opinions afterwards given on those cases in the House of Lords, it is clear that they proceeded upon the assumption that because the testator resided in India at the time of his death, he was there domiciled. The difference between a person residing abroad as an officer in her Majesty's forces, and residing abroad as an officer in the East India Company's service, was never pointed out. The case of *The Attorney-General v. Jackson* is in truth so considered, and is but another case falling within the same rule, and you must treat it as being domiciled in India. The English statute not extending to property in India, his property was exempt from legacy duty. Treat the case of *The Attorney-General v. Jackson* as it was treated by the House of Lords in giving judgment in the case of *The Advocate-General v. Thomson*, and it is exactly within the same principle. The distinction pressed upon us was never presented. The *ratio decidendi* falls exactly within the same principle as *Thomson v. The Advocate-General*. This gives a very intelligible rule, though no doubt there seems a difficulty in applying it, because it is rather difficult to determine in some cases where a person's domicile was at the time of his death. There are no means of determining in every case, but sometimes it is perfectly clear. This is a case which Mr. Alcock has very properly not argued, that the intestate's domicile was in the East Indies. If a natural-born subject, domiciled in England before he goes abroad, enters into the service of the Queen, and goes abroad at the Queen's command into foreign service, it is clear that his original domicile has not parted with him. He goes for a temporary purpose, and is supposed to be there for a time, not to fix his permanent abode abroad. This officer was no doubt domiciled in England, and that being so, according to the plain, intelligible rule of law laid down by the House of Lords, this is a case in which the Crown is entitled to the duties.

ALDERSON, B.—I am entirely of the same opinion. It is quite clear that the case of *The Attorney-General v. Forbes*, and the case of *Arnold v. Arnold*, were supposed to be by Lord Cottenham identical cases in their circumstances. It is now said, that in the case of *The Attorney-General v. Forbes*, the party was a British subject, one of the Queen's officers, residing in India at the time of his death. If so, he was certainly not domiciled. *The Attorney-General v. Forbes* upon the facts was decided wrong; but the rule of law laid down in the case of *The Attorney-General v. Forbes* was right, because the rule of law laid down was upon the supposition that the party was domiciled in India, and that the legacy duty in that case could not attach upon property, which was situated in England at the time, because they said there that the property in England followed the domicile, or the residence of the party in India. At that time it was supposed to be in India, and though it was in fact in England legacy duty was not payable. In the case of *Arnold v. Arnold* in like manner, legacy duty was not payable, and that was a right decision both in point of law and fact. There the domicile was in India, he being a company's officer at the time of his residence there. Therefore, when Lord Cottenham determined the case of the *Attorney-General v. Jackson*, and the case of *Arnold v. Arnold* to be the same, it is quite clear he proceeded on the supposition that in both cases the domicile was in India, and not in England. Then we have the authority of the House of Lords in the case of *Thomson v. The Advocate-General*, and all the judges first and their lordships unanimously afterwards in so many words say that the domicile governs. That is the principle that where a man is domiciled there is the personal property also. Now apply that case. This person was domiciled in England; his personal property it is true, his local debts are debts paid in India, but the personal property following his domicile is to be treated as being in England at the time of his death. He was in England in point of law, though he was in India in point of fact, because his domicile was in England, though his per-

son was in India. His personal property, though in India, was legally in England also. Then the law of legacy duty applies to the property of all persons being English people, and the legacy duty must be paid. It seems to me therefore that the principle in the case of *Thomson v. The Advocate-General* clearly governs the case. I cannot distinguish them.

Rule absolute.

## BANKRUPTCY.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FONBLANQUE, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

## COURT OF BANKRUPTCY, BASINGHALL-STREET.

Wednesday, April 2.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte BYFUS, re BYFUS.

Conditional certificate.

Where the bankrupt, immediately previous to the fiat, disposed of goods for bills which appeared to be fraudulent, but it was not established that the bankrupt was a party to the fraud, the certificate was suspended for two years; but the condition was annexed, "that if the bankrupt should pay to his estate the value of the bills previous to the certificate becoming due, he might then apply for an immediate certificate."

The fiat issued in 1843; immediately previous to that date the bankrupt disposed of goods to a considerable amount to one Edwards, and in payment for the same he took bills of exchange drawn by one Hart on Edwards. The bills were dishonoured. It appeared that, at the time of this transaction, Hart was an uncertificated bankrupt, and Edwards has never been heard of.

The bankrupt now applied for his certificate.

Lucas (counsel) for the assignees, and Parry (counsel) for certain creditors residing in the country. This has been a fraudulent disposition of the estate in contemplation of bankruptcy. The bills appear to be merely concocted by the bankrupt and others for the purpose of defrauding the creditors. It has not been shown that such a person as Edwards ever existed.

Lewis (solicitor) for the bankrupt.—It has not been shown that the bankrupt was privy to any fraud in the making of the bills; he may have been deceived himself in the transaction complained of.

The Commissioner, in giving judgment, among other remarks, said, a gross fraud has evidently been committed in the concoction of these bills; but though it is not proved that the bankrupt was a party to it, yet it is quite clear that at a time when he ought to have been particularly vigilant, and dealing with a person whom he had good reason to distrust, he was guilty of such gross and culpable negligence in parting with goods virtually the property of his creditors, as amounts as nearly as possible to a fraudulent making away with property; on that ground I shall require him to make reparation. That which has been afforded by his brother, the other bankrupt,—the payment of a hundred pounds,—is by no means sufficient. I shall suspend Solomon Byfus's certificate for two years, unless in the meantime he restores to his creditors that which has been so improperly abstracted from them, the amount of the two bills drawn by Hart and purporting to have been accepted by Edwards or Edwards. In the event of such payment he may apply for an immediate certificate.

Tuesday, April 8.

(Before Mr. Commissioner HOLROYD.)

Re ROBINSON.

Discharge of bankrupt from custody—Practice. The proper time for the bankrupt's application for his discharge from custody is after the choice, unless all parties consent.

The bankrupt, who was in custody under an execution, applied for his release. Assignees were not yet chosen.

Hilleary (solicitor) for bankrupt.

Lucas, contra.

Mr. Commissioner HOLROYD.—The object of the statute in giving the Court power to discharge a bankrupt from custody is to enable him to assist his assignees in discovering and getting in the estate. The Court is, therefore, not in a position to decide as to the discharge till after the choice, unless all parties consent. Let the application stand over till assignees have been chosen.

## LIVERPOOL BANKRUPTCY COURT.

Wednesday, March 26.

(Before Mr. Commissioner STEVENSON.)

Re HIGGINSON.

Practice—Jurisdiction of Commissioner—Sec. 307.—Renewed application for certificate. A commissioner appointed in the place of a former

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commissioner has jurisdiction to entertain all applications over which his predecessors had any authority; and, therefore, where a certificate had been refused after hearing by the former commissioner, the new commissioner is competent to hear a renewed application for a certificate.

But held, also, that the 207th section of the Bankruptcy Law Consolidation Act, specifying the cases in which such renewed application might be made, has repealed the provisions of 5 & 6 Vict. c. 122, relating to such renewed applications, and consequently that the Court has no jurisdiction to entertain any such application under circumstances not specified in the Bankruptcy Law Consolidation Act.

This was an application for a rehearing in the case of Mr. Jonathan Higginson, whose certificate was altogether refused some time ago by Mr. Serjeant Ludlow.

The application for a rehearing of the question of certificate was made on the ground that the certificate had been refused in consequence of the absence of certain evidence which the bankrupt at that time could not bring forward, but which he was now in a position to adduce. His Honour having heard the arguments, took time to consider, and this day delivered

## JUDGMENT.

Mr. Commissioner STEVENSON.—This is a petition by the bankrupt, praying that a sitting may be appointed for the allowance of his certificate. This allowance has already been refused by my predecessor, Mr. Serjt. Ludlow, and it is to be observed that a memorandum of such refusal, under his hand, is on the file of the proceedings in this Court. The grounds of such refusal are not mentioned in the memorandum, but in this petition certain grounds are stated, which, it is alleged, are those upon which this certificate was refused. The petition also states that certain facts, which were not in evidence before my predecessor, and which in consequence thereof he refused to take into consideration, were material and generally in favour of the petitioner's application, and if they had been fully before and explained to my predecessor, the petitioner believes that he would not have refused the certificate, and that these facts are such as to warrant his renewing his application for his certificate. The circumstances of the original application for this certificate having been heard before my predecessor seemed to me at first to involve some difficulty as to my power of entertaining this application, for want of jurisdiction on that ground alone, conceiving that it was open to the objection that, by so doing, I should be sitting, as it were, on appeal from his judgment. It has, however, been urged, that the fact of my appointment to this district in the room of my predecessor would be to give me jurisdiction to entertain this, as well as every other application over which he had any authority, and to as full an extent as he could have done had he remained the commissioner of this district, and, in fact, to deal with this case as if I were personally representing him; and after consideration I am inclined to take this view of the case, although I cannot but feel that it is subject to great doubt. But supposing this view to be correct, the application is still open to the question of want of jurisdiction upon other grounds, which have been raised in opposition to this petition. These grounds are, that application can only be made under the recent Bankruptcy Law Consolidation Act, and in cases provided for by the 207th section—that is, when the Court shall see good and sufficient cause to believe that the refusal of a certificate has been obtained by false evidence, or by reason of any improper suppression of evidence, or otherwise fraudulently obtained, none of which cases, it is contended, occur in the present instance, and of which there can be no doubt, nor, indeed, was any pressed on behalf of the petitioner; but it is contended on his behalf that the original hearing of the certificate having been under a former Act (5 & 6 Vict. c. 122), then in force, the authority to deal with this application would be under the jurisdiction conferred by that Act, and which still remains for this purpose. In the first place, with regard to such jurisdiction giving authority to rehear a matter of this description, very great doubts have always been entertained whether the Commissioners of Bankruptcy have any such authority, and I am under the impression that it is the general opinion of the Commissioners that they have no such power. In the case of *Es parte Harris*, mentioned in the argument, and reported in the sixth volume of the *LAW TIMES*, it appears that Serjeant Goulburn considered he had no such authority, although he referred to a case in which, under very special circumstances, a rehearing was granted. But it has been shewn that my predecessor in one instance where he has refused a certificate has granted a rehearing, and subsequently allowed the certificate, and that was stated in the course of the argument; and even in this case he considered that he was not precluded at some future time from rehearing the case. Admitting that this application might have been entertained under the

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former Act, the question still remains whether the former jurisdiction of the Court can now be exercised in this instance. Now, unless there are any words in the Consolidation Act by which this jurisdiction has been expressly reserved, I apprehend it is quite clear that all such jurisdiction has been repealed by that Act. The first section, which repeals the former Acts, and which has been referred to on this subject, contains only this exception, which comes home as bearing on this point, viz. "except so far as may be necessary for the purpose of supporting any proceedings taken, or to be taken, under and after the commencement of this Act by any trading, &c. or other proceeding in bankruptcy before the commencement of this Act." Now, it appears to me quite impossible to hold that this word "proceeding," used in either part of the sentence, can have any reference to an application of the present description; and, besides, it would not be a proceeding taken, or to be taken, under the Consolidation Act, which directs that all proceedings in bankruptcy depending at the commencement of the Act should be proceeded with and brought to a conclusion under the provisions of that Act, and which shews, I apprehend, the intention of the Legislature to be clearly, that any application of any kind whatever can only be made under the jurisdiction conferred by this consolidated Act. Therefore, in whatever view the question of jurisdiction may be taken, in this case it appears to me that I have no authority to entertain this application, and I am bound, therefore, to dismiss this petition, which I do quite irrespective of any merits of the case, and solely for want of jurisdiction.

## Nisi Prius.

## COURT OF QUEEN'S BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS AT WESTMINSTER AFTER HILARY TERM.

Friday, Feb. 7.

(Before Lord CAMPBELL, C.J.)  
REG. v. HEWITT AND OTHERS.

## Conspiracy—Combination—Workmen.

*The Philanthropic Society of Coopers was formed in order to relieve its members when sick, and to provide for their funerals. One of their members was fined by them for working in a yard where steam machinery was used, and upon nonpayment of the fine they acted in such a way as to prevent him from obtaining work:*

*Held, an illegal combination and conspiracy.*

This was an indictment for a combination by workmen, contrary to 6 Geo. 4, c. 129, and for a conspiracy.

It appeared that all the defendants were members of a club or society, called "The Philanthropic Society of Coopers." It was a benefit society. Hewitt was the president, and Jack was the secretary. The society had an acting member in every cooper's yard. A man named Charles Evans was a member of the society. He was working in Mr. Turner's yard, but, with the permission of Mr. Turner, he did four days' work at the steam mills of Messrs. Rosenberg and Montgomery, where steam machinery was extensively employed for making casks. When this came to the knowledge of the committee of the society, they inflicted a fine of 10l. payable by instalments, upon Evans, for working in a yard where steam machinery was employed. Evans refused to pay, and the other men in Mr. Turner's yard then left their work and refused to return while Evans was employed. Evans was, in consequence, thrown out of work. Each man who left Turner's yard on account of Evans was paid nine shillings for his loss of time, by the committee. The fine was imposed in accordance with the rules of the society.

Wilkins, Serjt. in addressing the jury for the defendants, contended that the defendants were members of a society which they believed to be for their benefit. They made certain rules and imposed fines for the breach of them. The offence charged was conspiring to do an unlawful act, but it was not an unlawful act to impose a fine upon a member of the society for breach of one of the rules of the society, unless the rules were unlawful in themselves, or were made for an unlawful purpose. The object of the defendants was to teach Evans that he had departed from his duty to the society, and that he had broken its rules. The object of the Act of Parliament was to protect the masters from the combinations of the men; but here the masters did not complain, and it was, therefore, difficult to imagine that the statute had been violated.

Lord CAMPBELL, C.J. (to the jury).—It appears to me that this is one of the most important cases ever brought before a British jury, and upon its result must depend very much the prosperity of the manufacturers and the good of the operatives. But let it be clearly understood that, whatever may be the result of this case, such societies as the present

are not in any way illegal. The Philanthropic Society is, according to its rules, a most lawful and a most beneficial institution; the object of it is to take care of its members when sick, and to provide a decent funeral for them when they are called away, but it cannot be permitted that, under the guise of such laudable objects, the members shall enter into a combination or conspiracy to injure others. By law every man's labour is his own property, and he may make what bargain he pleases for his own employment; not only so—masters or men may associate together; but they must not, by their association, violate the law; they must not injure their neighbour; they must not do that which may prejudice another man. The men may take care not to enter into engagements of which they do not approve, but they must not prevent another from doing so. If this were permitted, not only would the manufacturers of the land be injured, but it would lead to the most melancholy consequences to the working classes. No doubt the defendants may have been under a delusion that they were doing what they were entitled to do, but they must be instructed that the law must be obeyed, and that they cannot be permitted to injure their neighbours in carrying out that which they may consider to be a protection to themselves. It has been stated by the witnesses, that a fine follows a man all over London and all over England. This shews the powers of the society. Let them have their rules, and let them act under them; but if they are to fine for some nondescript offence, and that fine is to follow a man all over England,—if the man is always to go about with that brand upon him, it becomes the more important that judges and juries should see that such societies do not infringe the law. The payment to the men of the 9s. each for their loss of time was taken from the funds of the society, and was a clear perversion of its objects.

## Verdict—Guilty.

Lord CAMPBELL, C.J.—This is a case in which it is right to pass judgment at once. The offence is a most serious one, and, if allowed to pass with impunity, would bring ruin upon the trade and manufactures of this country, and would involve in its ruin the workmen, upon whom the prosperity of this country mainly depends. It clearly appears that this charitable institution, departing from its laudable purpose, was applied to, to prevent one of its members from exercising his free will, and employing his industry in a way which he thought most to his advantage. It is clear that the president, secretary, and committee resolved that Evans should be punished for having gone to work at the steam mills; that they unlawfully imposed on him a fine for so doing, and that they proceeded by unlawful means to induce him to pay that fine. This is an offence which the law must punish, and I hope it will be known to all these societies, that while they will be protected by the law when acting lawfully, the law will punish them when they interfere with the free will and the exercise of the industry of their members. It is an offence for which they must be severely punished.

The defendants were then sentenced to various terms of imprisonment.

The Solicitor-General, E. James, Q.C. and Huddleston, for the prosecution.

M. Chambers, Q.C. Wilkins, Serjt. and Warren, for the several defendants.

## COURT OF COMMON BENCH.

## SITTINGS IN LONDON AFTER HILARY TERM.

Monday, Feb. 24.

(Before Jervis, C.J.)

THE WEST LONDON RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

*Evidence—Agreements—Copy—Admissions—Admissibility—Covenant—Construction.*

*By agreement the West London Railway was to cross the Great Western Railway on certain terms: the West London Company demised their railway, with "all their rights, powers, and privileges in relation thereto," to the North-Western Railway Company. In covenant against the last-mentioned company on the lease for not efficiently working the line:*

*Held, that the agreement was admissible against the defendants.*

*Quere, whether a copy of such agreement, admitted to be a correct copy, is admissible without accounting for the non-production of the original.*

*Semble, a covenant in a lease of a railway, that the lessees would, "at their own expense, during the continuance of the lease, efficiently work" the railway, and that they would account to the lessors for one-fourth of the gross receipts in respect of "passengers, goods," &c. is a covenant to work the line for passengers as well as goods: Quere, as to the proper measure of damages for breach of such covenant.*

This was an action of covenant on a lease. The lease was put in, and the copy of an agreement between the West London Railway Company and the



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Great Western Railway Company was then tendered.

*Byles*, Serjt. for the plaintiffs, contended that it was admissible without producing or giving notice to produce the original agreement. The defendants had admitted that it was a correct copy of the original, which was sufficient to make it evidence in *Slattery v. Pooley*. The defendant had verbally admitted the contents of a deed, and such verbal admissions were held sufficient to prove the contents of the deed, as primary evidence; here the defendants, in writing, admit the contents of the deed. They admit that this is a correct copy of the contents; surely, it must be equally admissible with the verbal admission.

*Jervis*, C.J.—It is a very doubtful point; you had better produce the original, if possible.

The original was then produced and tendered in evidence; it contained the terms and conditions on which the West London Railway was to cross the Great Western Railway.

*Sir F. Theiger* objected to its reception. The defendants have no notice of the agreement. It cannot be evidence against them.

*Byles*, Serjt.—The railway is by the lease demised to the defendants, with "all their rights, powers, and privileges in relation thereto;" the defendants are therefore assignees of the agreement.

*Jervis*, C.J.—There must be in this case a question of damage, and for that purpose it will be important to ascertain what were the rights of the defendants in passing over the Great Western Railway.

*Evidence admitted.*

The covenant on which the action was brought ran as follows:—"That the London and Birmingham Railway Company" (called subsequently the London and North-Western Railway Company) "shall, at their own expense, during the continuance of this lease, efficiently work and repair the railway and works hereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works;" and it was also agreed to carry to the credit of the West London Railway Company one-fourth of the gross receipts in respect of "passengers, goods," &c.

*Byles*, Serjt. contended that the proper construction of this covenant was, that the defendants should fully work the line for passengers as well as goods, whereas it was not now open for the conveyance of passengers.

*Sir F. Theiger*, Q.C. contra, urged that as there was no passenger traffic before the lease, the defendants were not bound to carry passengers now. The covenant required them to do no more than was done by the plaintiffs before granting the lease. It was like a lease between landlord and tenant. The lessees were bound only to keep in repair, not to make improvements. Here the defendants were at liberty to carry passengers; but were not bound to do so. If they elected to carry passengers they must pay one-fourth of the proceeds to the plaintiffs. The definition of the word "efficiently," was the point upon which the construction of the covenant would turn. What was the definition?

*Jervis*, C.J.—"With effect."

*Sir F. Theiger*, Q.C.—No doubt, the defendants must work the line with effect, or, in other words, with profit and advantage.

*Jervis*, C.J.—I shall tell the jury, that as the railway is constructed for both passengers and goods, both passengers and goods ought to be carried. It is like a lease of two businesses, one of them cannot be given up.

*Sir F. Theiger*, Q.C.—The defendants cannot conveniently carry both passengers and goods. It is a single line.

*Jervis*, C.J.—I must still hold that they are bound by the covenant to do so, and they cannot otherwise "efficiently work" the line.

It was subsequently arranged that a verdict should be taken by consent, and that the construction of the covenant and the assessment of damages should be left to the Court.

*Byles*, Serjt., *E. James*, Q.C. and *Aspland*, for the plaintiffs.

*Sir F. Theiger*, *Channell*, Serjt. and *Bovill*, for the defendants.

## HOUSE OF LORDS.

Reported by W. H. BENTLEY, Esq. Barrister-at-Law.

July and Aug. 1, 1850.

ELIZABETH IRVINE, or DOUGLAS, and OTHERS, Appellants; KIRKPATRICK, Respondent.

*Fraud—Pleading—Setting aside deeds for misrepresentation and concealment.*

*Deeds will not be set aside after thirty-seven and thirty-nine years from their dates, on the grounds of misrepresentation and concealment, unless the averments in the pleadings and proof of fraudu-*

*lent representation and concealment are precise in their character.*

*Although length of time be no bar to fraud, yet it is a circumstance to be taken into consideration by the Court in forming its judgment; and this is consonant both to the law of England and Scotland.*

*Semble.—That where a party communicates the effect of one of two opinions given by separate counsel—withholding the one which is opposed to his own interest in the subject matter of the case, it is both misrepresentation and concealment.*

*A conjectural estimate of what may be the value of an estate is not a misrepresentation.*

*Concealment, to be fraudulent and material, must be a concealment of something that the party concealing was bound to disclose.*

*The reasons and arguments of a peer on advising the House to a particular judgment to be given, may be continued from one day to another.*

This appeal was against several interlocutors of the Lord Ordinary and first division of the Court of Session in Scotland; by one of which the Court had reduced, or set aside, two several deeds of assignation executed so far back as the years 1798 and 1800, in favour of the late Walter Irvine, esq. the one thereof by his sister, Mrs. Ann Burn, and her husband, and the other by three other sisters, viz. Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick. No objection had ever been taken by any of the parties to the deeds, although they lived for many years after the deeds were executed. But the respondent alleging himself to be the representative of Mrs. Burn, Miss Irvine, and Mrs. Kirkpatrick long after their deaths and after the death of Mrs. Wardrobe, the other sister, and of Mr. Walter Irvine himself, in whose favour the deeds were granted, and also long after all persons who could have given evidence as to the transaction were dead, proceeded to bring his action in the Court of Session in the month of October, 1837, just then forty years—the period when the long prescription of the law of Scotland was on the point of expiring.

The case was argued at great length by *Sir Fitzroy Kelly* and *Anderson* for the appellants.

*The Lord Advocate*, *James Parker*, and *Rolt* for the respondents.

[The length of the judgment precludes any note of the arguments being given, but the facts of the case, and the general effect of the arguments are so fully stated in the most elaborate speech of Lord Brougham, in moving the reversal of the orders of the Courts below, setting aside the deeds, that it is the less necessary to give them in detail.]

## JUDGMENT.

LORD BROUGHAM.—This case, my lords, brings before your lordships for decision the merits of an interlocutor of the Court of Session in Scotland reducing two deeds of assignment, or, as it is called in Scotland, "assignation," one made in 1798 and the other in 1800, between two parties, one of whom is Walter Irvine, the father of the present appellant, Lady William Douglas, and the others of whom are the four sisters of Walter Irvine—Mrs. Burn, Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick, formerly the Misses Irvine, and their representatives. And it is painful in the very outset of the remarks which I am about to submit to your lordships to observe, that we are here deciding upon the validity of two deeds, made by and in favour of parties none of whom are here present, their interests being only represented by their heirs and representatives, for the parties themselves have long since gone to their graves. The last of them died in 1829, others of them in 1824, 1825, or 1826, I think; and the first observation which I have to make to your lordships will rest upon that circumstance. My lords, the deeds were sought to be reduced by proceedings commenced at periods of thirty-seven years and thirty-nine years respectively, from the dates of those instruments brought under reduction. Those two instruments or assignations consisted of a family arrangement (upon which I shall say a word presently) between Walter Irvine, the brother, he and Christopher being the survivors of three brothers, Charles being dead; and his four sisters (three of whom were then the unmarried sisters, the Misses Irvine), of whom Mrs. Burn was one, Miss Irvine another, Mrs. Wardrobe the third, and Mrs. Kirkpatrick the fourth. My lords, a large estate in Tobago had belonged to one of the brothers, Charles Irvine, who died long before the commencement of the suit, a considerable time before the execution of the second, and a little while before the execution of the first of these deeds. He died in 1798; and questions of a complicated nature arose immediately after the death of Charles Irvine respecting the succession to his property, for there were mortgages upon it to a considerable amount with other claims. There was a lunatic, a Miss Leith, who had interests or a claim, as it is called, on the estate, and there was Walter Irvine, the heir-at-law to the real estate, and who, by the law of Tobago, if Charles was understood to be there domiciled, had a claim also to

a share of the personality. There was likewise Christopher, who had a claim past all doubt to his share, being the agent of the estate living in the island, and, I believe, domiciled there, though that is immaterial. Charles Irvine, the deceased, to whom Walter succeeded as heir-at-law, was domiciled, as it appears, though that is not admitted, but he rather appears to have been for six years, namely, from 1792 to 1798, resident in Scotland, being a native of that country, whither he had returned from Tobago, and where, without ever returning to Tobago, he died. At the late period to which I have alluded, namely, thirty-seven years after the last of the deeds, and thirty-nine years after the first had been executed, proceedings were commenced in the court in Scotland, out of which the judgment arose, which is the subject of the present consideration. Proceedings were commenced by an action of reduction of these two deeds, upon the ground of misrepresentation by Walter to his sisters, the Misses Irvine, or of fraudulent concealment of facts within his knowledge from their knowledge, or both fraudulent misrepresentation and fraudulent concealment, which past all doubt if sufficiently averred on the pleadings, and if sufficiently proved in evidence would have been enough to have called upon the Court to reduce or set aside the deeds. The object of this arrangement was, on the part of Walter, to obtain from his sisters the surrender of their right to their share of the personality of Charles their deceased brother, and the question, and the only question, is, as I have stated, whether in order to obtain this benefit for himself he fraudulently misrepresented or fraudulently concealed matters to induce his sisters to enter into that arrangement, and whether such misrepresentation or concealment, or both, operated upon them and gave rise to their executing the two deeds in question. And here I must stop to remove out of the cause that which has not been dwelt upon except as a topic in argument occasionally, but which I consider, in the circumstances of the case, to have little or no place, namely, that this is in the nature of a family arrangement—for I conceive that a family arrangement between parties who were treating really at arms' length as these were, who were not upon good terms, at least two of the sisters were not upon good terms with their brother Walter, has little or no place, and above all where fraud is alleged. That, therefore, I remove out of the cause. But, my lords, I now come to a consideration of the manner in which the Court dealt with the case upon the pleadings. It appeared to their lordships, after argument, that there was sufficient ground for directing an issue and sending it to be tried by a jury, and from that decision, or from the decision and the shape of the verdict no appeal lies any more than the motion for a new trial which was subsequently made and refused, therefore we have nothing judicially to do with that. Nevertheless it is difficult for me in considering this case, and casting my eye back upon the course of the discussion on either side at the bar, it is difficult for me so regarding what has passed, and regarding the evidence, the mass of which I now have under my hand to avoid expressing one word of regret that such a course was taken; for here are between nine and ten hundred closely printed quarto pages of correspondence submitted to a jury, who through that maze were to find their way, who by examining the pieces whereof that mass consisted were to make up their minds, and who, as the result of that painful and hardly practicable examination, that laborious and hardly possible inquiry, were to give their opinion upon the matter of fact submitted to their consideration by the issues sent to them to try. I had much rather that the opinion of the Court itself had been taken upon the subject than that it should have been sent to be tried by a jury. It is now too late to wish for that which did not take place. That which we are now dealing with is not how the Court thought fit to deal with the case first at the trial, and next on motion for a new trial, as with neither the trial nor the motion for a new trial, have your lordships anything to do, but the judgment which they finally pronounced setting the deeds aside,—and first, having a word to say with respect to the time which has elapsed; I know not, however, that it may not be more convenient that I should commence with what I have to offer upon the frame of the issues, and upon the forms of the pleadings. There were two deeds numbered 54 and 55 in the process, or, as I see, they are called Nos. 57 and 58 in my copy of the pleadings. I know not why, but in this they are called 54 and 55, being Mrs. Burns' deed, and Miss Irvine's, Mrs. Wardrobe's, and Mrs. Kirkpatrick's deed respectively. These deeds were the subject matter of the two issues, and the issues are conceived in the same terms, the material thing to consider being whether Walter Irvine did obtain (it is not even said "did or did not," so as to make it grammatical), the deeds in question, Nos. 54 and 55, by fraudulent misrepresentation, or fraudulent concealment, from his sisters. Beyond all manner of doubt this is an improper form of issue. It is improper for more reasons than one, each of which

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would be enough to support its condemnation. It is improper to couple together two not necessarily connected or even dependent issues. It is highly improper, illogical, and in every respect mischievous to put a question on two separate matters, to one of which an affirmative answer might be returned, and to the other a negative. It is asking a jury to answer a double question, to one parcel of which they might say "yes," and to another, "nay," contrary to every rule either of examining a witness or of interrogating a jury. But it is improper on another account, and most essentially and for paramount reason improper, when you consider that you are not asking the question, as in the case of a witness of one individual but of twelve, six of whom might say that the deed was obtained by fraudulent misrepresentation, and the other six that it was obtained by fraudulent concealment. They altogether, the whole twelve, might join in giving that verdict which alone they gave, making no distinction, effecting no separation, referring to no diversity between the two matters, but a general verdict for the pursuer—meaning against the deed—not even answering the question put, not even saying that it was fraudulently obtained, and without saying in what way, but a general verdict for the pursuer, leaving the Court to gather, and I believe this is not inconsistent with the loose and slovenly practice of that Court, that it was meant to answer the question put to the jury in the affirmative generally. How, then, can we say that we have a verdict at all upon such an issue sent to a jury, and such a general verdict returned? I have no security. I cannot tell; I do not mean to say that the fault of the issue might not have been cured by the verdict of the jury. I do not mean to say that if the jury had returned a verdict in answer to these two questions they might not have got rid of the evil of the duplicity of these two questions, for they might have said if they had chosen, "we specially find" so and so; then it must have been unanimous, and that would have taken away all risk of there being no verdict at all which exists in the present case. They might have said, "we find that there was fraudulent misrepresentation, and that the deed was obtained by that, but we do not find that there was fraudulent concealment;" or they might have said, "there was fraudulent concealment, but we do not say there was fraudulent misrepresentation;" or they might have said, "there was both fraudulent misrepresentation and fraudulent concealment," or they might have said there was neither. Therefore they might, by a special finding, have cured the radical defect of the question put to them; and why, let me ask, did the most able and learned judge who tried the cause not give his direction to the jury so to find? If he had done so, I am far from meaning to say that he would have taken away all difficulty in the present case, but at least he would have taken away from the court below, and from your lordships' dealing with what was done in the court below, the first of the great difficulties which meets us and obstructs our progress in endeavouring to see our way through this case. He did not so think fit to do, and a general verdict was thus returned. A motion for a new trial was made; it was refused, and that could not be appealed from. Judgment was then passed for the pursuer according to the verdict, as the Court deemed it and construed it; that judgment was to reduce the deeds, and that is the judgment and decree now under appeal. My lords, the next observation which I have to make is perhaps still more material with a view to the ultimate decision of the case. The verdict being general, not finding whether it was misrepresentation or concealment, or both; but only negating that it was neither (it was for one or other of those reasons, or both, I cannot tell which, and cannot pretend to say which, that the jury found for the pursuer), what position do we now find ourselves in? And what position were the Court in, though they do not seem to have been aware of it? Notwithstanding the trial ordered, notwithstanding the trial had, notwithstanding the verdict pronounced, and notwithstanding the refusal to have a new investigation, no valid judgment could pass upon this record unless there was in the record enough to support the judgment. The verdict is only ancillary to the working out, as it were, of the purpose of the record. Then we are referred to the summons and condensation, and whatever else on the part of the pursuer is said to be his recorded statement of his own case. Well, but suppose this, which is possible, which might have happened in this case, and may happen in any other case of the same sort in which this double mode of framing issues is adopted, suppose one of the two matters were well and validly alleged upon the record, so that if the finding had been upon that there would have been no doubt that judgment would have passed upon it. Suppose the other matter were so set forth upon the record that if a verdict had passed upon it, no judgment could validly have been supported by that finding: here is a position we are in. I will suppose misrepresentation to have been duly alleged with sufficient specification. I will suppose concealment to have been not duly alleged with

sufficient specification, or, which comes to the same thing, that it was concealment of that which the party had no obligation of any sort, either in law or equity, to reveal, and suppose the jury had found upon the misrepresentation in the affirmative, judgment, beyond all doubt, would have passed upon that finding. But then suppose they had found only upon the record, which was invalidly set forth, it is equally clear that no judgment could have passed validly upon it. Well, then, where are we? We have a verdict, and we cannot say whether it was upon the misrepresentation, which verdict, if it had been upon that, would have supported the judgment; or whether it was for concealment, which, by the case I am putting, the hypothesis I am making, would not have supported the judgment. Then how is the Court validly or safely to pronounce a judgment? It is contended by the appellants that in that case the only judgment fit to be pronounced would be of an *abolivitor* to assail the defenders, called into court upon such a record, and charged only upon such a verdict from the conclusions of the summons. I have considered this point with great attention, and I have been referred to a great number of cases to shew that this is the common mode of pleading in Scotland. But upon looking into those cases, which I have attentively considered, one difficulty occurred to me in all of them. For aught I know the difficulty was cured in the mode which I have described as that which might have been adopted here, namely, by finding specially; I cannot tell, and I have asked in vain for a copy of any book in which any of those cases could be traced. Mr. Lefevre was kind enough to look this morning, at my desire, after I had read the cases yesterday morning, and he can find no book whatever in which we see the result of such trials. At all events, those cases (putting that circumstance entirely aside) were given to me with another view, not with a view to the ultimate effect of those cases, but with a view to shew that here the ordinary course of pleading had been pursued, and that it is the ordinary course of pleading I think is sufficiently proved. I think it is *mala praxis*. I hope and trust that it is a *mala praxis* which will be no longer followed, and I take leave most respectfully, but most earnestly, to press upon the attention of your lordships in the court below the propriety of turning over a new leaf, and adopting a new and a more sensible, and rational, and logical practice. I should have been in very great difficulty indeed upon this subject, if I had been of opinion that misrepresentation was validly set forth, and concealment not competently set forth, or that misrepresentation was incompetently set forth, and that concealment was validly set forth. I should have been, upon the shape of this record, and its posture, in a most painful predicament. I should then have had to go into the learning of those cases which were so much discussed here some six years ago, I mean in Mr. O'Connell's case in the case of the writ of error, in which your lordships decided contrary to my opinion, contrary to the opinion of the great majority of the judges, contrary to the opinion of my noble and learned friend, Lord Lyndhurst, with whom, by the way, I have consulted and considered those points in the present case, and who entirely agrees with me in opinion upon them. We were clearly of opinion that that case was wrongly decided, but we bowed, as we were bound to do, to the majority of your lordships, who decided in favour of the writ of error of the plaintiff in error, and that decision was only disputed by me on the ground of precedent and practice. Your lordships, admitting the precedent and practice, held it to be *mala praxis*, and that it was fit to be reformed. But the rule to be collected in that case is that in criminal cases, contrary to the opinion of Lord Mansfield, *obiter*, more or less certainly, but a *dictum* deserving of the greatest consideration, and entitled to the most profound respect, still only a *dictum*, not a decision of his lordship, that the rule is the same in criminal as in civil cases; I never doubted, Lord Lyndhurst never doubted, the majority of the judges never doubted that it was so in a civil suit. If there are several counts, one of which is bad, and the others are good, and there is a general finding for the plaintiff upon the whole, you cannot apportion the damages between the two; you cannot say how much is meant to apply to the good and how much to the bad; and therefore the whole is bad, and there is judgment *non obstante verdicto*. But now that is the rule applied to criminal cases as well as civil. The rule, therefore, is general that there can be no judgment upon a verdict so taken, either in a civil case or in a criminal case, for the reason which applies to this case. I have said that it gives me great satisfaction, after the most anxious attention which I have given to this cause, and to all the particulars of it, which I shall now shortly go into, that I am not reduced to the necessity of deciding upon that ground, which might probably be enough to support the judgment of reversal which I am about to move your lordships to pronounce, but there are, in my opinion, other grounds on which that judgment will be supported; and, first, my lords, I will again advert to the time which has here elapsed.

Thirty-seven years after the one deed was made, and thirty-nine years after the other, an impeachment by this action upon the allegation of fraud, is brought against those instruments, and that fraud is imputed to a gentleman hitherto always supposed, as is said (but it is immaterial, I must assume it to be so), to be of fair and respectable character, and his nearest relations are now to defend his memory, and defend their own rights against that foul imputation of fraud, of the worst description, for it was taking an unfair and fraudulent advantage of his nearest relations, whom he was rather bound in honour to protect than entitled to deceive. My lords, no time will run as a Common Law limitation against fraud; that must be on all hands admitted. No time, say the Scotch lawyers, can be taken as a bar to an action of reduction like this, unless time and acquiescence be specially pleaded. A party meaning, say they, to avail himself of the topic of time, must do it by a plea, and must either succeed altogether, or, I suppose, they mean to add, fail altogether. I cannot go so far as that; I too say, that no time will run to protect and screen fraud. I too say, that a Court of Equity will overleap the barrier of time to get at the fraudulent parties and their deeds, and to undo those deeds, and to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud. I too say, therefore, that the length of time which has elapsed is not a bar to this suit. But that it should not enter into our consideration, that it is to be wholly dismissed; that as a suggestion, it is to have no effect upon us in moulding, as it were, in influencing the frame of mind in which we shall be when we are to consider the rest of the case, either as a jury upon the facts, or as judges upon the law; to that proposition I cannot assent. The parties are all dead long and long ago. The party accused, Walter Irvine, died nine years before the action was commenced; of the other parties who survived, the latest died four years before the action was commenced, and all their agents and men of business are in their graves. Every one who, by parol testimony, could have shed any light upon this transaction, has gone. The action is brought thirty-seven and thirty-nine years after the fraud is alleged to have been committed, and forty-six and forty-eight years after that fraud is alleged to have been committed, the first trial by a jury takes place, and the matter of fact of the fraud is to be submitted to that jury: am I not to take into account this grievous injury to the party charged? I do not mean to the memory of Walter Irvine, and the feelings of his surviving family, but to the parties charged, and sought to be ousted of their property under those deeds. Am I to dismiss that entirely from my consideration, and to deal drily with all the facts and all the law of this case exactly as if it had happened three or four years before the action was brought, or perhaps as many months? I cannot go that length; on the contrary, I hold that it is most material—and I fearlessly lay down this to be the law of Scotland, as well as of England—that in such circumstances of lying by, if there be no explanation, if there be no satisfactory account of it, and that the party here and his advisors are well aware of that topic is clear, for they, in their summons, set forth a reason to excuse it, which is no reason at all, that, until the Chancery suit was decided, which I did not dispose of finally till 1833, they could not bring the action. Why could not they? They did not choose, because they did not know exactly whether it would be worth their while; but that is not a reason to excuse the delay; it is not even a topic of argument. I say I lay down this fearlessly as the law of this country and of Scotland, and of every country having an enlightened and rational, and I may say a civilized, system of jurisprudence, that in such a case as this the party must be held to the very stunted proof in regard to the facts; but that is not all, but that also in regard to the pleading, to the shaping of the action, which is his own choice, though he cannot choose the facts, he shall be held most rigorously to the principles of strict logical pleading. It is a case in which I would hold him as tight as if it were a question of an indictment for perjury, and assignments of perjury were required that A. B. did falsely swear, whereas, in truth and in fact, so and so. It is a case in which, as Lord Mansfield once said when similarly circumstanced, though not in respect of time or of fraud, "I would hold the party to the ticking of a clock and the dotting of an *i* in his pleadings." Unfortunately, my lords, this does not appear to have been the view taken of it by the learned judges in the Court below. The Lord President, who entirely disapproved of the verdict, and who alone of the four judges pronounced a very positive, clear, and unhesitating opinion one way, relies very much and largely upon the point of time. Lord Mackenzie alone of the other three, makes any allusion to it, and he says, "delay is less material in this case, because the evidence is documentary, and *Mere scripta manet*, and therefore this objection is of no great force." It might have occurred to his lordship, as it does to me, that it might have been not

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wholly documentary, if the action had been brought three or four years after the alleged fraud was committed. Lord Fullerton says nothing of time at all, though the Lord President seems to have thought it to be entirely decisive; at least the Lord President says it is such that it would be nothing but a severe criminal infiction, and it is a point which Lord Mackenzie himself thinks it right to deal with. This is what they say upon the time, then; upon the case itself, Lord Jeffrey says there is a great hardship. But of what kind? On account of the magnitude of the sums and the reputation and character involved? But he does not make the least mention of the greatest hardship of all, namely, the lapse of seven or eight and thirty years. These learned judges, I must say, though it is not now material, it is comfortable to think of it in the conclusion at which I have arrived, and to which I wish your lordships to come,—one of them, Lord Mackenzie, says, "Looking at it altogether, I cannot say the verdict is grossly wrong: I do not say if I had been on the jury I would have given the same verdict, but I cannot say they are grossly wrong." He adds, Lord Fullerton says, "There is no doubt that the case in evidence is much weaker than the case averred upon the record, and he goes chiefly on the concealment, making little reference to the other point." Lord Jeffrey says, "on all grounds there is great room for diversity of opinion. The Court might differ from the jury, but that is not enough." Then he sums up: "I rather think that the impression on my mind is, that the arrangements were not fairly obtained." These things go entirely to the merits of the case. In point of fact we are only upon the record; at the same time I feel great comfort and satisfaction in looking over the mass of evidence, and looking at these opinions of the judges in feeling perfectly clear, that if I had been in the Court below I should have agreed with the clear opinion of the learned Lord President differing. I will not say from the very clear opinion, but from the very hesitating and hardly perfectly formed opinion of the other three judges, who dissent, and only dissent so far, without pledging themselves to any difference upon the merits, as to say that they do not think the jury were so clearly what they call grossly wrong as would justify sending it again for trial. We now therefore come, my lords, to the record, upon which every thing turns, and as your lordships sit upon some very important business at five o'clock, and I shall not be able by that time to finish what I have to add to my statement, which I thought it very material to make fully upon the law of the case before proceeding to what must be the ground of the motion, with which I am about to conclude for a reversal, I think that the more convenient course would be that I should finish any observations to-morrow rather than to-day. Therefore, if it is your lordships' pleasure, we will conclude the consideration of this case to-morrow; the case is one of great anxiety, and it is very fitting therefore that I should state the conclusion at which I have arrived. If I should not to-morrow be able to move the judgment, I have, in case of accident, announced the conclusion to which I have come, as I did in that very case of *Leith v. Irvine*, the inquiry having lasted twenty-five days before me. I would not expose the parties to the expense and delay of a rehearing when it had arrived at the last stage. I shall therefore conclude my observations to-morrow, either at the sitting of the Court or at the close of the Court, whichever is most convenient to the parties, taking a course of which we have many examples. Lord Eldon in the *Rosburgh* case and others. Lord Eldon has repeatedly broken off in the middle of a judgment.

## Further consideration postponed.

**Friday, Aug. 2, 1850.**—Lord BROUGHAM.—I had yesterday gone through the two important points of the lapse of time, and the state of the pleadings, and it remains for me to apply the principle which I then laid down to this particular case, and to this particular record. When I stated my opinion with respect to the record, the double question involved in the issue, and the single finding for the pursuer upon the whole matter, I might have illustrated it, as one or two special pleaders with whom I have had communication upon the subject have illustrated it, by applying to it the rules of pleading here. Suppose an action is brought upon a bond, and the defendant, in order to escape from the obligation of his bond, specially pleads this, that it was obtained from him by the obligee, the plaintiff, by means of fraudulent misrepresentation or fraudulent concealment. Suppose fraudulent misrepresentation is the ground of one special plea, and fraudulent concealment of another; and suppose the fraudulent misrepresentation is stated validly and unobjectionably—fraudulent misrepresentation inasmuch as so and so was said or represented by the obligee contrary to the truth, and contrary to his knowledge of what the truth was,—if the verdict were upon that count, no question it would stand for the defendant. But suppose there were another count setting forth, as an excuse for the nonpayment, fraudulent concealment, inasmuch as

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so and so, and then something were set forth which amounted to no fraudulent concealment, either because there was no duty to disclose it, or because the statement was *felo de se*, and shewed in itself that there was no fraudulent concealment,—past all doubt, no verdict could stand on that count. Then, suppose a verdict were given upon both counts, without distinction, and the judgment were entered up upon that verdict generally, without distinguishing on which of the two, or whether upon both, only negating that it was upon neither, that would be this case. Well, then, past all doubt, upon a writ of error that could not stand. Then the question would be, whether to give judgment for the plaintiff in consequence of the badness of the verdict and the judgment, or to award a repleader, or to award a *venire de novo*. A repleader could not be awarded, because it would be in favour of the party who had made the first fault in the pleading, and it would be contrary to all rules of pleading to award a repleader. A repleader is excluded. *Venire de novo* could not be awarded, because it must be upon the same record and the same issue, and *non constat* that the jury would not return the same verdict, for you have no means of compelling the jury to separate the one from the other of the issues and to return a special verdict. Consequently there must be in that case judgment for the plaintiff, that is to say, judgment against the plea—that is to say, judgment against the defence resting upon the ground of fraudulent misrepresentation or fraudulent concealment. Now that is just the case here, except that here it is the defendant, there it is the plaintiff; because here it is the defendant who is claiming the benefit of that rule, there it would be the plaintiff claiming the benefit of that rule as against the plea in justification of nonpayment. However, I have stated already that it is most satisfactory to me not to find that it is necessary to decide the cause upon that point also. I have stated enough with respect to the time. I have stated the principle to be, of which there is no question, that the mere lapse of time is no bar in case of fraud. That time, for aught I know, may, according to the Scotch rules, have been necessary to be pleaded and it is not pleaded. That it is in the nature of a plea of acquiescence, or homologation, as it is called, with acquiescence, that is not pleaded. But although no bar, either here or in Scotland, although it may by the Scotch rules be necessary for the party to plead it in order to avail himself of it as an answer to the action, it is still most material, not only for the jury, and, upon the new trial, for the judges, with which we have nothing to do, upon the question of fact, but it is most material upon the question of pleading also; and, as Lord Mansfield said, in the case that I referred to yesterday, using the expression, it is a case in which, upon the record I would hold the party to the ticking of a clock or the dotting of an i. With these views let us now look at this case, and I must say that it does not, upon the best consideration which I have been able to give to it, appear to me to be at all necessary to hold the party to that rigorous closeness; it does not appear to me to be at all necessary, in order to support the judgment which I am about to move your lordships to pronounce, to appeal to the length of time which has elapsed, the decease of all the parties, the decease of all their agents, and of all persons connected with it, for even that *de recenti*, this record would not have been sufficient, according to any closeness and strictness of procedure to which the party might have been held. What I have to state resolves itself into five heads: first, the general allegations contained in the fifth, sixth, and seventh articles of the Condescendence, but into which I need not enter so much at large, because I shall afterwards have to deal with the same subject matter under the other heads; secondly, with respect to the mortgage debt on this estate; thirdly, with respect to the misrepresentation,—and hitherto I am upon fraudulent misrepresentation,—the charge that Walter Irvine represented himself as having given 1,200*l.* to Christopher, whereas he gave also a bond releasing a debt; fourthly, the correspondence which took place with one of his sisters with respect to the opinion of Sir Arthur Pigot (then Mr. Pigot) and of Mr. Brown, an attorney, also stated as a misrepresentation, partly a misrepresentation and partly a concealment—a concealment of the 27th of April, when he wrote after having had Mr. Pigot's opinion, which differed from Mr. Brown's, and he gave Mr. Brown's and not Mr. Pigot's—a misrepresentation, therefore, but a concealment, in as far as having set Mr. Brown right upon the point of there being sisters as well as brothers, he did not, when he had set him right, communicate that fact. Also the concealment that took place with respect to the transaction between Christopher and himself. That transaction gives rise to the two statements,—first, the allegation of misrepresentation, as if he had said he had given 1,200*l.* whereas he gave 1,200*l.* plus the release of the debt due; and, secondly, the concealment of what he actually did give to Christopher for his share of the personality. Lastly, in the fifth place, we come to the deed of assignment to Mrs.

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Burn, which stands upon a separate ground. What I have gone through those different heads, I shall have exhausted the case. Now, with respect to the statements in the fifth, sixth, and seventh articles of the condescendence, if you take the memorial which is given in page 41 of the appellant's case, it is found that the statement in article 5 of the condescendence is not contrary to the fact, when coupled with what the memorial discloses, which is to be taken as a communication made by Walter Irvine, and as only as a communication in point of fact made, but as a communication set forth upon the pleadings have been made, and forming part and parcel, therefore, of the alleged misrepresentation. Then comes the condescendence article 6, wherein it is said that Walter Irvine stated himself on oath in the Court of Chancery in a proceeding in Chancery, the mortgage debt, as in 1797, amounting to 30,000*l.* or thereabouts, and that by the final report by the Master of Chancery, it was subsequently ascertained "that it was 22,000*l.* with interest on 20,000*l.*" Now, I shall afterwards have occasion to refer to the memorial in page 42 of this case, which is part of the statement for the pursuer and against the defender; I shall have to deal with it separately immediately, therefore I need not enter further into it now than to state, upon the whole these, two articles (the fifth and sixth). When you take the statement in page 41 and the statement on page 42 together, they do not set forth, in my opinion, with any distinctness whatever, if at all, the charge of misrepresentation. Then we come to the seventh article, which I must say is a very extraordinary one, and calls for an expression at least of astonishment on the part of the judge who considers it, reflecting the importance of the matter with which we are dealing, and the absolute necessity of some clear and intelligible and consistent specification. "The said Walter Irvine as having, or pretending, right to the said mortgage debt, was found by the said Master to have received payment of the whole of this debt, both the principal and interest out of the estates of the said John Leith, being the produce of the old and new Grange plantation prior to 1819." Nineteen years after the deed in question, and he is to be charged with prescience, he is to be charged with a foreknowledge, forsooth in the year 1798 with respect to one, and in the year 1800 with respect to the other—21 years and 19 years respectively—of what was to be the produce of the crops of that very regular established and uniform cultivation, namely that of a West Indian estate, where there are no turnips, where there are no earthquakes, where there are no changes of weather, where everything is as regular and mechanical as clock-work, as if it were a farm in Norfolk, or a farm in the East Lothians. That is what he is expected to have had a foreknowledge of in the year 1798, when he obtained the one deed, and in the year 1800 when he obtained the other. However, I dwell not upon that, because of course the present respondent does not mean to say that it is upon that extraordinary statement he depends. And let me add another thing with respect to the carelessness with which these pleadings are framed. One would have thought that if you wanted to charge parties with a gross fraud, you ought to have been a little more careful. What do you think of people who actually aver in their summons that the cause of *Leith v. Irvine* was carried by appeal to the House of Lords, and decided by the House of Lords on the 30th of March, 1833? Nothing of the kind. No appeal was made, they ought to have known that; they ought to have informed themselves of that; when they charged their fellow Christians, their fellow men, with gross frauds, they ought to take a little trouble to see what they are about, and especially when they rely upon the Chancery proceedings as their excuse, and say that until the Chancery case was over, they did not choose to bring this action, it could not bring it, or were prevented, which is not true; they were not prevented, they did not choose to bring it till it was all over; they wanted to see what they were to gain by it, and how much. There was an appeal, no doubt, in the Chancery Court. I suffered under that appeal for twenty-five days. That was an appeal, but not an appeal carried, as the summons indistinctly sets forth, in so many words from the Court of Chancery to the House of Lords, and decided in the House of Lords on the 30th of March, 1833. No such thing; it never came near us; there was no appeal; it was an appeal from Sir John Leach, as Master of the Rolls, to me, as Lord Chancellor, and I decided it on the 30th of March, 1833. No doubt about that; and that is the knowledge I have of this case, and which has helped me not a little in going through it. My lords, I do not mean to say that goes to the question with which we are now dealing, but I give it in passing, to shew the great and culpable carelessness and remissness which seems to have presided over the whole of this extraordinary case,—a case, of all others, where time is material,—a case, of all others, requiring the greatest care and the most deliberate and cautious circumspection. I now come to the



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second head, which is the main ground of the charge of misrepresentation. That is in article 6 of the concordance, to which I have already referred, where Walter Irvine is said, in certain proceedings in the Court of Chancery, no doubt it was his business, to have stated, as representing Charles Irvine, his brother, deceased, the mortgaged debt due at 30,000*l.* or thereby. Now, upon this I would remark, that if it was intended to charge, as it is, wilful misrepresentation of the mortgage debt, the obvious course was not to insinuate or leave room for inference, from circumstances merely, but directly to aver that he, Walter Irvine, represented one thing, when he at that time, and so representing, knew another thing to be the fact; that he knew the value to be this when he represented it to be that; or that he represented it as one thing while he knew it to be another thing. This is not done, but things are stated from which it may be gathered inferentially that his representation was incorrect. Now, this is the very highest that we can put the averments at, namely, that things are stated from which it may be gathered that Walter Irvine's representations were incorrect, and incorrect to his own knowledge. But when we take all these accounts together they do not even amount to this, for they end in averments which are quite destructive of the allegation of misrepresentation. The allegation, taken altogether, is self-destructive as an allegation of misrepresentation, just as if one were to say, "You pretend to rate the value at 1,000*l.* when it is in fact twice 500*l.* and so you deceive." But a statement that a thing is 1,000*l.* does not deceive persons when you aver, as the ground of that deception and misrepresentation, when instead of 1,000*l.* it is twice 500*l.* That is self-destructive as an averment of misrepresentation. Nay, in most cases there was no representation, but only an estimate, conjectural, which of necessity and *ex vi termini* was conjectural. Now look at article 6, and compare that article with the memorial; there the mortgage debt is attested to have been stated at 30,000*l.* whereas the report of the Master found it to be 22,841*l.* Compare that with the memorial at page 42. "It may be further necessary to observe,"—now this is just as much parcel of the alleged misrepresentation as if it had been contained in the summons or the concordance, because it is imported into it by way of reference. Walter Irvine is condescended upon as having made a representation by means of this memorial,—"It may be further necessary to observe in regard to the debt due from the estate of Mr. Leith to Mr. Irvine, that the accounts of his intramissions are not yet finally settled, nor is it expected they will but in the Court of Chancery;" which proved too true, and they were not finally settled till the 30th of March, 1833. The balance due to Mr. Irvine was supposed by himself to be 37,000*l.* or 38,000*l.*; and from the before-mentioned transaction entered into between Mr. Christopher Irvine and the attorney of General Leith, it will have been observed the appraisal of the estate of Old Grange amounted to 31,026*l.* 1*s.* 4*d.* and that estate was delivered over in due form to Mr. Irvine in part of his debt. Now let us look at article 28, in page 18. These affairs having not been accepted, Walter Irvine, on the 29th day of January, 1800, wrote a letter to his sisters, Mrs. Kirkpatrick and Miss Irvine. This is the letter on which reliance is placed, as shewing misrepresentation, in which he thus mentions the settlement he had made with his sister, Mrs. Burn, and his brother, Christopher. I do not go upon that, because that comes under the other head—under the head of concealment—at which I have not yet arrived; but the following is stated as the representation. In this letter, says the concordance, he, Walter, mentioned the mortgage upon the property in these terms. Now here is the representation, the inconsistency of which, with the fact to his knowledge, is to be the ground of impeachment. We will suppose the Grange debt still to be from 15,000*l.* to 20,000*l.*; call it 18,000*l.* Can any man who knows the meaning of words, who is ever so little acquainted with the force of language, whether technical or in common parlance, fancy for a moment that this is a representation? It is an estimate, and a very conjectural estimate, and an estimate which leaves a large margin for conjecture. He does not say it is 15,000*l.*; he does not say it is 18,000*l.*; he does not say it is 20,000*l.*; but he says it is from 15,000*l.* to 20,000*l.* Call it splitting the difference, and inaccurately splitting the difference, 18,000*l.*; and how does he preface it? Not, it is so; not, I tell you it is so; not, I represent it as being so. We will suppose the Grange debt. Can any thing be more manifest than that that is any thing rather than a misrepresentation? It is actually saying, "Put it at so much: I do not know what it is, but I will take it to be so much; it is from 15,000*l.* to 20,000*l.*; suppose it to be 18,000*l.*" Then it goes on in article 29, which also refers to it—"And in regard to the Grange debt." The first part of this article relates to the transaction with Christopher, which I reserve for the next head of my argument; but this is the part that refers to this representation: "And in re-

gard to the Grange debt, instead of 18,000*l.* it was estimated by Walter Irvine himself, judicially on oath, within eighteen months of the time when he wrote this letter, at 30,000*l.*" Well, he might have been quite right at the one time in estimating it at 18,000*l.* and at the other at 30,000*l.* and a man's estimate at different times, varying from the one to the other date, is not proof that he made a *de facto* representation at the one time, and that he *de facto* knew it at that time, for he may have known it quite differently when in the Court of Chancery he came to swear to it. The result, then, by these statements, so taken together, and which are made as averments of misrepresentation, is this:—Walter Irvine estimated the debt at 18,000*l.*; he claimed 30,000*l.*: he fully and distinctly stated to his sisters that Mr. Leith or his agent, set it at 17,622*l.* in the year 1792: he as fully stated to them that Charles Irvine believed it to be between 37,000*l.* and 38,000*l.*; that is in the statement of the pursuer that he said so; he himself, in his answer in Chancery, set it at 30,000*l.* and claimed that sum, but in that Chancery suit nearly forty years after the arrangement with his sisters, the amount was found to be 22,841*l.* at which sum on the final hearing of the appeal, I, and not the House of Lords, determined it, and decreed accordingly. This is somewhat less of a misrepresentation, therefore, than the case which I put of the 1,000*l.* and twice 500*l.*; it is rather as if the charge of misrepresentation were stating the 1,000*l.* when the real value was 500*l.*: for it is an allegation that Walter Irvine had given in the sum of 37,000*l.* or 38,000*l.* instead of 22,841*l.* or some 14,000*l.* or 15,000*l.* more against himself than it really was, or than he could know it to be, unless he were gifted with a foreknowledge of my decree, made nearly forty years after his alleged misrepresentation, and nine years after he had gone to his grave. As to what he is averred in article 28 to have said in his letter of the 29th of January, 1800, it is plainly not an averment that he made any representation at all for the reasons I have already given in dealing with that conjectural statement, that conjectural estimate, and nothing else. Thirdly, the other charge of misrepresentation is, that Walter Irvine represented himself as having given 1,200*l.* to Christopher in his transaction or accounts with that brother, and this is to be found in article 28, at p. 18. Now let us see how that is set forth. It signifies nothing; what was the fact? but let us see how it is set forth:—"I think it necessary to inform you,"—now this is a letter giving an account after these events of their having happened—"I think it necessary to inform you, the settlement I made with Mrs. Burn stands thus: 100*l.* a year annuity to be paid on the joint lives of her and her husband in lieu of her rights; to our brother Christopher I paid"—not I have bargained for or bought it, but—"I paid 12,000*l.* twelve months after he made the assignment. As for Mrs. Wardrobe, I never gave her a farthing." But ought not this to have been set forth thus: that he had said—"To our brother Christopher I paid 12,000*l.* and no more, as a consideration for his share?" It is not so set forth; it is set forth—"To our brother Christopher I paid 12,000*l.* twelve months after he made the assignment." He is not there alleged to have given the terms of his bargain with Christopher; he is not talking of the terms of the bargain; he is saying nothing about the terms of the bargain; he is stating the facts, that twelve months after that bargain, whatever that bargain was, which he does not say a word of, he paid 12,000*l.* to this brother, which is not denied to have been the truth; but in the other parts of the summons and concordance, it is, in fact, stated to have been the truth: therefore that really and truly goes for nothing. Next come we to the grave and greater charge of concealment. Now, the case stands thus:—Christopher owed Walter money; it is not ascertained how much; it is called 5,000*l.* or 6,000*l.* but that clearly means currency; it is 2,000*l.* or 3,000*l.* cash. Christopher and he appear to have been, and they are stated—I am taking it only from the pleadings; of course, I cannot travel out of them—to have been upon very cordial and amicable terms, to have lived upon the footing of affection in which brothers ought and generally do live; there seems to have been little or none of that affection towards the sisters. Christopher having claims upon the personalty, he, Walter, bargains with him for giving up those claims to him, Walter; and as to the bargain there is some little doubt upon even the pleadings, and I cannot go into the evidence, whether that debt was ever meant to have been exacted from his brother Christopher; but be that as it may, assume that on the pleadings it is stated that he did owe him money, though that, like everything else, is set forth rather inferentially than *de facto*, as it ought to be in such a case,—assuming that he owed Walter money, and that Walter released that debt, and gave him 1,200*l.* besides, and that there was added—for that is also stated in the pleadings—that he pressed upon him delicately, calling it a condition of the bargain, 200*l.* a-year for his life, and 100*l.* a-year for his surviving widow should he pre-decease her, that that was

added *ex mera gratia*; there was possibly a little pressure, but at all events there is the transaction as it stands between them. Now the charge of concealment is this (and we are now upon concealment), that he did not tell the whole of this transaction with his brother Christopher to his sisters, that he kept them in ignorance of it; and it is also set forth that Christopher, what is called, aided him in that concealment; it is distinctly stated that they arranged to conceal the transaction from the sisters, and the two brothers acted upon this arrangement. Christopher aided his brother Walter in misrepresenting the nature of the settlement between them, and advised his sisters to trust themselves in Walter's hands, and to confide in his generosity. Now, when a person is set forth as an accomplice in a fraud as accessory to, and sharing in, the commission of a fraud against his sisters, one expects to see it set forth how he shared. The concealment of a transaction is intelligible, but that the other party aids in the concealment is a most vague and indefinite and unsatisfactory averment. It is not said how or in what way, but at all events this is the averment, that the transaction with Christopher by which Walter became entitled to Christopher's share upon the payment of 1,200*l.* and releasing a debt, was not communicated by him, Walter, to his sister, Mrs. Burn, or to his sister, Miss Irvine, or to the other two sisters, Mrs. Wardrobe and Mrs. Kirkpatrick, at the time or before the time when he obtained from them the two deeds, from Mrs. Burn the one, and from the other sisters the other; and it is said that keeping them in ignorance of the value of what he was getting from them, for the argument is by way of inference only that Christopher's share was worth no more than theirs, and that if Christopher's share was worth the debt and the 1,200*l.* their share must have been worth the debt and 1,200*l.* It is not denied that he told them of the 1,200*l.*—that is admitted,—but it is said as one of the charges that he did not tell them of the release of the debt, that he concealed therefore a part of the transaction. A concealment to be material must be a concealment of something that the party concealing was bound to tell. It is perfectly evident that if I go and bargain to buy a property with A. B. and if the person with whom I bargain, the owner of the property, has before that had an offer of 1,000*l.* when he asks me 1,500*l.* and, to put it stronger, if he had hawked it in every part of the land-market into which he could find access, and has found no person to offer him more than 1,500*l.* and he asks me 2,000*l.* I have no right, if I give him the 2,000*l.* to bring him into a Court of Equity as having deceived me on the value of that property by having failed to inform me that others had only offered him for it 1,500*l.*; that he had tried to get a better price for it and had failed to get a better price for it; and that yet he made me pay 2,000*l.* for what he himself ought to have known he had never been able to get above 1,500*l.* for. It is a mode of estimating the value of the property which he has taken himself; it is a mode of estimating the value of the property which does not bind him and does not benefit me. It might be his perfect right to make me pay 2,000*l.* for what he had not been able to get 1,500*l.* He had no duty whatever either at law or morally to tell me what he had done. His concealment of what he had done—his withholding from me the knowledge of what he had done—is no argument, even much less, is no ground, of equitable relief against him for a fraudulent concealment. It must be a concealment of something which he was bound to disclose. And Walter Irvine, past all possibility of doubt, was not bound to disclose what had taken place between him and his brother Christopher. But observe I am putting the case lower than the fact, because the fact, as set forth in the record, is this: that the brother did not stand in the same relation towards Walter Irvine in which the sisters stood. The brother's bargain with Walter was made up partly of a claim of right, and partly of the favour and bounty of Walter. Walter was so fond of his brother that he not only at once released the debt, and gave him 1,200*l.* whether it was worth that or not; but he pressed upon him; he insisted upon it, says the averment in the concordance; he insisted upon his taking 200*l.* a year for himself, and 100*l.* for his widow, should his wife survive him—all owing to kindness and favour towards that brother Christopher. Did the sisters stand in the same position? Was what passed between Walter and Christopher any rule for what should pass between Walter and them? No such thing. What passed between Walter and Christopher stands upon its own footing, and is totally independent of, and necessarily unconnected with, what was passing between Walter and his sisters. Therefore, I say that this is a concealment of that which the party was not bound to tell, it amounts to absolutely nothing whatever material that is alleged thus to have been concealed. I should say that it ought to have been set forth a great deal more particularly, even if it had been so, than it is in the 13th, 14th, 15th, 16th, and 17th articles. But not a word of

## HOUSE OF LORDS.

all this, observe, appears upon the summons. Now the summons ought to contain that which the concealment specifies more minutely, but here there is no generality whatever under which this can come except the general charge of fraudulent concealment. It should have been set forth that certain things passed between Walter and Christopher, which he was bound to communicate to his sisters, and did not communicate to them, and the not communicating of which was fraudulent. The statement is not by any means so, but it is far more precise than that of misrepresentation, with which I have dealt. Let us take that statement, therefore; let us put it as high as we can; and, admitting it to be validly alleged, let us see whether, when taken altogether, it amounts to a concealment not only of that which was material as tending to the price of the deeds, the making of the deeds with his sisters, but whether it is a concealment of something which they had a right from him to know, and his withholding of which amounted to concealment fraudulently done. In the fourth place, I come to article 23, on page 17, and which amounts to this, that Walter had been consulting with Mr. Pigot, afterwards Sir Arthur Pigot, who "advised him that the personal property descended to the nearest of kin, brothers and sisters," that is, not to Walter himself, provided the party was domiciled in Scotland. Miss Margaret Irvine had applied to Walter for some information as to Charles's succession, in which she and her sisters thought they must have an interest, and requested leave to wait on her brother respecting this business. Walter, on the 27th of April, returned the following answer:—"Mr. Irvine begs leave to acquaint Miss Irvine that all persons who had claims on the estate of the late Charles Irvine, were by public advertisement directed to lodge them with Mr. Charles Stewart, W. S. which he deemed sufficient notification, but for her more immediate satisfaction he begs leave to transmit a paragraph of an opinion he only received yesterday from an eminent solicitor in London. 'The whole of the real estate descends to the heir-at-law, who is his next eldest brother, if he died without issue, and no will and the personal estate equally divided amongst his brothers.'" I have yet to learn that a person receiving an opinion from an attorney or counsel is bound to give that opinion, and to give the case upon which that opinion was taken; for that is applied here by the usual mode of pleading followed in this extraordinary case by inference and insinuation, and not directly; it is implied that he ought to have given the case, as well as the opinion. Mr. Irvine, that is Walter, does not vouch for this opinion being the law. There is no very great misrepresentation even of the law. Those who think themselves aggrieved may have their recourse how they may. "If you are dissatisfied with Mr. Brown's opinion, whom I have consulted, you who have not seen my case, and which case I do not choose to shew you, and which I am not bound to shew you; if you choose to do so, get another opinion—a better opinion; do not take mine, for I do not vouch for its being the law, and I tell you nothing of the facts upon which it is given." The opinion without the case certainly, or the case without the opinion is not worth much, but a man is not bound to tell his case any more than he is bound to give the opinion. He says "I will not tell you. I will not vouch for its being law, and the case I will not shew you at all. Those who think themselves aggrieved may have their recourse how they may." That is to say, "You know there are sisters as well as brothers; go and tell the facts, and get as many more opinions as you choose of the counsel you like best. In the mean time Mr. Irvine," that is Walter, "does not consider himself answerable in any shape further than to secure his own rights." Really I think any thing less like a precise averment of misrepresentation, even as far as we have gone, I have hardly ever seen. But now the charges partly insinuated and partly stated, and it is this, that he had consulted Mr. Pigot, and told Mr. Pigot there were sisters as well as brothers; that he had consulted Mr. Brown, or got an opinion from Mr. Brown, who only knew of the brothers, and not that there were sisters; and therefore it is inferred (this is only inferential, it is not stated) that Mr. Brown had been told by him that there were no sisters, but only brothers; and it is inferred that he tells the opinion of Mr. Brown, which does not mention sisters, and that he does not tell the opinion of Mr. Pigot, which mentions brothers and sisters. That is the charge. Therefore the gist of this charge is, that he represented the law to be beneficial, a division to brothers and not to sisters, having got that law from a lawyer who did not know that there were any sisters, and who, if he had known that there were sisters, would have said, as Mr. Pigot did, that it must be divided between brothers and sisters, and that he did not tell the whole of Mr. Pigot's opinion, but only Mr. Brown's. Now as it stands, and without more, I do not think there is sufficient to warrant the charge. But be that as it may, it is completely contradicted, because we are to couple

with the averments in article 23 the statement in the memorial to which we are referred at page 42, namely, the second page of the memorial. "If Mr. Charles Irvine," now this is Walter's representations to the ladies, "If Mr. Charles Irvine is considered to have died domiciled in Scotland, then his personal estate will divide betwixt his youngest brother, the said Christopher Irvine, and Margaret, Eleonora, Isabella, and Ann Irvine, his four sisters; but should Mr. Irvine be considered a West Indian, or not to have been domiciled in Scotland, then Mr. Walter Irvine, the heir, will also come in for a share of the personal estate, and which, so far as had been learned, will consist of all crops off the ground in Tobago, in the storehouses there, or on its way to Britain, all debts due in the said island or elsewhere, by bond, mortgage, or otherwise, to the estate," together with all the other circumstances; and he sets forth a great number of particulars of very valuable property. Is that concealing what the law was, that the sisters were entitled as well as the brothers? On the contrary, it states it most fully and most correctly. It states it upon the supposition of Charles having died domiciled in Tobago, which Walter, for his own interest, always contended he had; it also states it upon the supposition of the fact, in my opinion, contrary to Walter's opinion, that he had died domiciled for the last six years, from 1792 to 1798, in his own country, Scotland; and it states that in the one case he, Walter, would share in the personality as heir-at-law, and that in the other case he would be excluded, and the sisters, with the younger brother, would take. That is just the very thing which Mr. Pigot's opinion told him, which he is charged with concealing, and which Mr. Brown's opinion did not tell him, and which he is charged with giving them as a misrepresentation. The memorial to which we are referred, as parcel of the representation, states the very thing which they say he ought to have stated. But that is not all, nor nearly all, for there is what puts this part of the case out of court more signally than the rest. In order that the misrepresentation or the concealment (I care not which, this charge is made up of both), may be of any avail whatever, it must be *dolus clausus locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly, to another with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, notwithstanding the concealment, gets at the fact concealed before he signs the contract, the misrepresentation and the concealment go for just absolutely nothing, because it must be *dolus clausus locum contractui*. It is of no avail if the party has, in whatever way, become acquainted with the truth at the time, but much more so if he shews that he has become acquainted with it in the very deed which is said to have been obtained from him by the party misrepresenting or concealing. Now, this very deed (I need not read it) contains a distinct statement both of the one and the other of the sisters having claimed *quasi executors dativæ*, and next of kin to Charles Irvine, in Scotland, at Edinburgh, on the supposition of his having died domiciled in Scotland. There is an end, therefore, entirely of this head of misrepresentation or concealment. Hitherto I have been dealing with the deed No. 55; it is called 58 in one case and 55 in the other. I have been dealing with the question as regards the Misses Irvine. We now come to that with respect to Mrs. Burns, which need not detain us so long. The misrepresentation there is in article 19. "The first of his sisters with whom Walter Irvine affected a settlement was Mrs. Burns, who had married a clergyman. These people appear to have placed implicit confidence in Walter Irvine and his agent Mr. Stewart. Mrs. Burns"—here is the allegation of Walter's fraudulent misrepresentation to Mrs. Burns, and concealment partly. "Mrs. Burns having applied to Mr. Stewart for information as to the personal succession, Mr. Stewart, on the 6th of June, 1798, wrote to her a letter, in which he represented it as uncertain whether the personal estate would be equal to pay the debts affecting it. This appears to have been the only information furnished to these simple-hearted people before they agreed to assign over their rights to Walter Irvine." Then comes the offer made by Walter. Is this a misrepresentation of Walter Irvine, or a concealment of Walter Irvine? It is a concealment of Mr. Stewart, and they attempt to bolster up that by the immediately preceding article 18, saying, that he did not tell Mr. Stewart the whole. He was not bound to tell Mr. Stewart the whole, if he did not choose. But it ought to have been alleged that Walter Irvine had by his agent misrepresented, and that he had told his agent so to misrepresent; for as fraud is never to be presumed against a man, much less is the misrepresentation of his agent to be set down to the debit of his account as fraudulently misrepresenting himself. Nothing can be more clear than that that fifth and last head of this case is quite unsupported.

My lords, I come, therefore, to the conclusion that, upon this record, no judgment can pass to sustain these charges. I come to this other conclusion, that judgment of *absolute* must be immediately passed, assailing the defenders from the conclusions of the summons; and I have great satisfaction in thinking that, besides the argument which I have held upon the lapse of time, that besides the topics to which I have had recourse upon the frame of the record, and upon the frame of the issue, it being unnecessary to decide the question of the conjunct verdict, that is, the conjunct issue and the verdict for the pursuer, without specifying whether concealment or misrepresentation, because I am of opinion that there is neither an allegation of misrepresentation nor of concealment, and that question could only have arisen if there had been a valid allegation of the one, and an insufficient allegation of the other, but there being neither an allegation of the one nor of the other, of course in that case the question of the pleading it is now unnecessary to deal with or dispose of, it gives me great satisfaction, upon looking anxiously into the opinions of the learned judges, three of whom expressed a very doubting and hesitating opinion in favour of the verdict of the jury, the fourth of whom expressed a clear, deliberate, and, in my opinion, a well-considered and a well-reasoned opinion against the verdict of the jury. It gives me unspeakable satisfaction that I do not dispose of this case without having not only well weighed those learned and elaborate opinions, but having gone into the mass of the evidence itself. If I had been sitting in the Court below I should have differed from the majority of the lordships, and have agreed with the learned presides in being utterly dissatisfied with the verdict. But that it is not now for you or for me to consider; I go upon the grounds which I have already stated, and it is for me to add that, in my opinion, the far fame and reputation as an honest man of Walter Irvine has passed through this ordeal, and is in my deliberate and unhesitating opinion wholly unimpaired.

*Interlocutors reversed. Defenders held assailed from the conclusion of the summons, with costs below, except as to certain of the proceedings.*

## Equity Courts.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLSTON, Esq. of the Middle Temple,  
Barrister-at-Law.

Saturday, Dec. 14.

Re THE GODMANCHESTER FREE GRAMMAR  
SCHOOL.

*Sir Samuel Romilly's Act—3 & 4 Vict. c. 77. Where orders have been made on a petition under Sir Samuel Romilly's Act for the management of a school, Semble, that the jurisdiction of the Court has been sufficiently fixed to allow of a petition under that Act and the 3 & 4 Vict. c. 77, as to the dismissal of a master of the school, without obtaining the Attorney-General's certificate. The Court has not any discretion under the 3 & 4 Vict. c. 77, sec. 19 to refuse a declaration, where the dismissal of the master is regular.*

This was the petition of the Vicar of Godmanchester, in the county of Huntingdon, praying a declaration by the Court that Mr. Richard Gaunt had been duly dismissed and removed from the mastership of the Godmanchester Free Grammar School, and had ceased to be the master thereof. The petition was presented under the 3 & 4 Vict. c. 77, by the 19th section of which provision was made for recovering in a summary way before justice of the peace, premises, &c. belonging to grammar schools, on the production of an order of the Court of Chancery declaring such master to have been duly dismissed, or to have ceased to be master. The school was established by charter of Queen Elizabeth. Mr. Gaunt was appointed the headmaster of the school in the month of January, 1888, and he held the office until the 31st of July last. On the 21st of March last the governors resolved to remove Mr. Gaunt from the mastership of the school, in consequence of his permanent incapacity to discharge the duties of master, and directed that three months' notice to vacate the mastership and leave the school-house and premises. Mr. Gaunt having refused to vacate the mastership or to give up possession of the school-house and premises, the present petition was presented. The petition was headed "In the matter of the school, Sir Samuel Romilly's Act and 3 & 4 Vict. c. 77," but the Attorney-General's sanction had not been obtained, and there was only one petitioner.

*Reason, in support of the petition, said that the*



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funds of the school allowed of a salary of 24l. only to the master, which was increased by voluntary subscriptions. The matter had formerly been before the Court under Sir Samuel Romilly's Act, and orders had been made for the management of it. The Lord Chancellor's secretary had, under these circumstances, considered that the Attorney-General's certificate was not now necessary to bring the case under that Act.

The VICE-CHANCELLOR said that he supposed that the jurisdiction of the Court had been sufficiently fixed by the former orders.

Terrell, for Mr. Gaunt, stated that all that was asked was, that a retiring pension should be given on account of his long services. The 18th section of the 3 & 4 Vict. c. 77, gave the power in certain cases to assign a retiring pension.

Kenny, in reply, said that the retiring pension was, under that section, to be given, "provided that there shall remain sufficient means to provide for the efficient performance of the duties which belong to the office from which such master shall be removed." No retiring pension could be given in the present case, as the funds were so small.

The VICE-CHANCELLOR considered that he had no discretion in the case, but that he must make the declaration asked.

#### ANDERTON v. YATES.

Counsel's notes—Filing affidavits.

Where notes of an arrangement appear on counsel's briefs, which all agree, the Court will act upon them, although no minute of the arrangement was made in the registrar's book.

Where a time has been appointed for filing affidavits, prima facie those filed after the time must be rejected, though the Court has a discretion to admit them in case failure of justice or great inconvenience would be occasioned by their rejection.

A petition in this cause for the appointment of a guardian of infants, and of a receiver of their property, came on to be heard on Monday, the 18th of November, when it was arranged that all the affidavits should be filed on or before the following Thursday, Nov. 21, and that the petition should stand over. Of this arrangement as to affidavits no minute appeared in the registrar's book, but the notes on the briefs of the counsel on both sides agreed in showing that this arrangement had been made. Affidavits on both sides were filed after the 21st, and on the petition coming on again to be heard, the question was discussed whether these affidavits might be used.

Makin and C. M. Russell, for the petitioners, contended in favour of the affidavits being used.

Wigram and Selwyn, for the respondents, argued against the admissibility.

Surveys for another party.

The VICE-CHANCELLOR said that he had communicated with Lord Cranworth, who was of opinion with him that he should act upon the notes of counsel, which all agreed, notwithstanding the omission in the registrar's book. As to the admission of the affidavits, *prima facie* affidavits filed after the appointed time must be rejected. That was consistent with the rule and practice of the Court. If it was desired to file affidavits after the time appointed, application should have been made to the Court for leave to do so. Lord Cranworth also agreed with his Honour, that the Court had a discretion to admit the affidavits, in case a failure of justice were likely to occur by reason of their rejection, or great inconvenience would ensue. He should have pursued that course if such a case were shown, but he considered that it would be well for justice that these affidavits should be rejected, and, accordingly, he rejected all the affidavits filed after the 21st of November. He would not direct them to be taken off the file, as they might be useful hereafter.

Wigram asked for his costs, but

The VICE-CHANCELLOR said that he should reserve them.

An order referring it to the Master to appoint a guardian was then made.

Monday, Dec. 16, 1850.

GROVE v. YOUNG.

Establishing will.

The heir-at-law is entitled to elect whether the validity of the will shall be tried by means of an action of ejectment, or an issue *deviseavit vel non*.

In this case an action had been brought by the heir-at-law against the surviving devisee in trust, for sale under the will, for the purpose of trying the validity of a will, the same being disputed by the heir-at-law. The form of the action was for money had and received. A verdict was found in favour of the devisee, and an application by the heir-at-law for a new trial of the action was refused by the Court of C. P.

Beardell Palmer and Bonlee, for the heir-at-law, asked that an adjournment might be directed to be brought, accompanied by admissions, the heir-at-law requesting further investigation at law, and desiring

that it should not be obtained under an issue *deviseavit vel non*.

Makin and Rasch, for the devisee, objected to the point being tried in an action, contending that the heir-at-law was only entitled to have an issue *deviseavit vel non*, if he were entitled at all to any further investigation after a verdict found against him.

The VICE-CHANCELLOR.—It must appear in the decree that the heir-at-law elects to bring an ejectment rather than an issue *deviseavit vel non*. I am of opinion that he is entitled to have such an action rather than an issue, especially according to the modern course of decision.

#### Common Law Courts.

#### COURT OF QUEEN'S BENCH.

Reported by ADAM BENTLEY and PAUL PARNELL, Esqrs. Barristers-at-Law.

June 21, and 22, 1850, and Feb. 22, 1851.

MALALIEU v. HODGSON.

Composition deed—Pleading—Release—Fraud.

To an action of indebitatus assumpsit the defendants pleaded a release, to which the plaintiff replied that it was obtained from him by fraud, covin, &c. of the defendants and others in collusion with them. It appeared that the plaintiff had made it a condition of his executing a composition deed between the defendants and their creditors, that he should have a fraudulent preference over the other creditors, and the fraud relied upon, as that under the inducement of which he executed the deed, was a false representation by the defendants, that he was the only favoured creditor, whereas some others had also been improperly preferred.

Held, by Coleridge and Erle, JJ. (Wightman, J. dissenting), that the defendants upon this issue were entitled to the verdict.

In an action against the maker of a promissory note the defendants pleaded that they had accepted certain bills drawn by the plaintiff, payable to his order, that the defendants compounded with their creditors by deed, giving to the plaintiff a fraudulent preference; that the plaintiff executed the release, that it became his duty to take up the bills, that he neglected to do so, and that the holders then threatened to sue the defendants, and that, in consideration of the plaintiff's taking up the bills, the defendants made the promissory note, and that there was no other consideration for their making it. The plaintiff replied *de injuria*.

Held, that the other allegations in the plea being proved, the averment of the plaintiff's duty to provide for the bill was also proved, and that the plaintiff could not set up his own fraud which accompanied his execution of the release, to prove its invalidity, or to exonerate himself from the obligation of taking up the bills.

This was an action of *assumpsit*. The declaration contained five counts; the first, second, third, and fourth upon promissory notes made by the defendants; the fifth, a common count for goods sold and delivered. There were several pleas to the various counts. At the trial before Wightman, J. at Liverpool, at the Summer Assizes 1849, the verdict was found for the plaintiff, leave being reserved to the defendants to move to enter the verdict for themselves upon the fifth plea, which was pleaded to the last count of the declaration, and also upon the seventh plea, which was pleaded to the first four counts.

In the following Term a rule nisi was obtained accordingly, against which

June 22nd and 23rd, 1850.—Martin, Cowling, and Atherton, shewed cause.

Knowles, Addison, and H. Hill, argued in support of the rule.

The facts and arguments sufficiently appear from the judgments.

The following authorities were cited: *Watson v. Earl of Charlemont*, 18 L.J. Q.B. 65; *Chapman v. Black*, 2 B. & A. 588; *Hawley v. Beerley*, 6 M. & Gr. 221; *Howden v. Haigh*, 11 A. & E. 1033; *Pendlebury v. Walker*, 4 You. & C. 424; *Higgins v. Pitts*, 18 L.J. Ex. 488; *Longridge v. Dorville*, 5 B. & A. 117; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Jones v. Jones*, 6 M. & W. 88; *Ex parte Hall*, 1 Deac. Bank. Ca. 171; *Britten v. Hughes*, 5 Bing. 460; *Seager v. Billington*, 5 Car. & P. 456; *Holmer v. Viner*, 1 Esp. 132; *Shilt v. Myrick*, 2 Camp. 317; *Davidson v. McGregor*, 8 M. & W. 755; *Doe v. Roberts*, 2 B. & A. 367; *Mason v. Ditchburn*, 2 C. M. & R. 720, n; *Spencer v. Handley*, 4 M. & Gr. 420; *Stone v. Compton*, 5 Bing. N.C. 142; *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 5 C. B. 449; *Murray v. Mann*, 17 L.J. Ex. 256; *Reillon v. Mathews*, 10 Clk. & Fin. 934. Cur. adv. vult.

(a) See the earlier proceedings in this matter, *Grove v. Beadon*, 2 Phill. 619.

Saturday, Feb. 22.—The Court (a) being divided in opinion upon one point, delivered their judgments *seriatim*.

WIGHTMAN, J. This was an application by the defendants, pursuant to leave reserved at the trial, to enter a verdict for them upon the issues taken on the fifth and seventh pleas. The fifth plea was pleaded to the last count of the declaration, which was *indebitatus assumpsit* for goods sold and delivered, money lent, money paid, interest, and on an account stated. The plea stated a release after the accruing of the cause of action. The plaintiff replied to the fifth plea that the release was had and obtained from him the plaintiff by the fraud, covin, and misrepresentation of the defendants and others in collusion with him; to which the defendants rejoined a denial that the release was obtained by fraud, covin, and misrepresentation, as alleged. It appeared by the evidence that the defendants, being indebted to several persons, and amongst others to the plaintiff, whose debt amounted to 987l. 7s. proposed a composition of 6s. 8d. in the pound, which was agreed to by the majority of the creditors, in company, but the plaintiff, who was not present when the 6s. 8d. was agreed to at that meeting, refused to concur unless he was paid 13s. 4d. in the pound, on part of his debt, and the other part was paid in full; and on receiving notes for the amount agreed on, and the positive assurance of the defendant that no other creditor than himself was preferred, and that no one else was to have a farthing beyond 6s. 8d. in the pound, he signed the release for his whole debt. The assurance by the defendant that no other creditor was preferred was untrue, as there was no doubt but that he preferred other persons besides the plaintiff. It was contended for the defendants that although the plaintiff was induced to accept a composition of 13s. 4d. in part of his debt, and to sign a release upon the credit, he gave to the representation and assurance of the defendants that no other creditors had any preference, and this representation and assurance were false, still, that as he himself, by taking more than 6s. 8d. in the pound, had been guilty of a fraud on the other creditors, he was not at liberty to set up the fraud of the defendants practised on him, as an answer to the release which he had given to him, relying on such false representation. There is no doubt but that the plaintiff was induced by this false representation of the defendants to execute the release; and it appears to me that it is no answer upon this issue to shew that the plaintiff himself had also contracted for preference, in fraud, not of the defendants, but of the other creditors. It must not be forgotten that in this case the defendants are seeking to take the benefit of a deed obtained from the plaintiff by their own falsehood and misrepresentation. There is no doubt of the *bona fides* of the original debts, and the preferences are not frauds on the defendants, but on the creditors; and it would be too much, as it seems to me, to allow the defendants to set up a counter-fraud by them and the plaintiff, by which they deceived other persons, as an answer to the charge of fraud practised by the defendants on the plaintiff, or rather as an estoppel on him on this issue from setting up that fraudulent representation, which would have the effect of depriving him of part of his original right. Suppose the defendants had rejoined, specially, admitting that the release was obtained from the plaintiff by falsehood and misrepresentation, but alleging, as an answer, that they and the others in the same transaction had committed another fraud on other persons, creditors of the defendants, would such a rejoinder have been good? I think not; and no one can, if he has obtained the deed by falsehood and misrepresentation, take any benefit under it, because he and the person upon whom he practised the falsehood and misrepresentation were also engaged together at the same time in another fraud upon other persons. I regret that I differ on this occasion in opinion from my brothers Coleridge and Erle; but I am of opinion, in the present case, that the release is wholly void for fraud as to both or either of the parties to it who were cognizant of this fraud; and that upon this evidence all the creditors were remitted to their original rights, notwithstanding the agreement, and that the defendants can take no benefit under it, but that the present verdict on the fifth plea ought to stand. With respect to the seventh plea, that was pleaded to the second, third, and fourth counts of the declaration on three promissory notes, dated respectively the 1st of October, 1847; the plea, in substance, stated that the defendants were indebted to the plaintiff in 989l. 7s. and had accepted four bills of exchange for the amount thereof, drawn by the plaintiff, and which were payable to his order; that the defendants compounded with their creditors, and the plaintiff agreed to a composition, receiving a preference over other creditors and executed the release: that it was his duty to take up the four bills of exchange, and he neglected to do so, and the holders of the bills threatened to sue the defend-

(a) Which had consisted of Coleridge, Erle, and Wightman, JJ.

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ants, who, in order to induce the plaintiff to take up the bills, gave the other promissory notes in the second, third, and fourth counts mentioned, and on no other consideration whatsoever. The plaintiff replied *de injuriâ, abque tali causâ*, and the question is, whether the plea was proved. There can be no doubt that the plaintiff ought to have provided for the four bills, and that, as between him and the defendants, it was his duty to take them up; that the only consideration for the promissory notes mentioned in the second, third, and fourth counts, was the performance of that which had been previously agreed upon, namely, the acceptance of the composition and the execution of the deed. This he was bound to do. Upon this part of the case the question that arose on the other plea does not arise. It was said there was no strict legal duty cast on him to take up the four bills if there was a fraudulent preference, which made the composition void; but there is nothing in the plea which shews that the composition was void as between the plaintiff and the defendants, the only fraud shewn being the plaintiff's own insisting on the preference of himself. If it is not void as against him, it appears to us to be clear there was no sufficient consideration for the giving of the notes, and that he ought to have protected the defendants from the consequences of liability on those bills. On this part of the case my brothers Coleridge and Erle agree with me, though I have the misfortune to differ from them on the other. On this part of the case, therefore, I think that the rule should be absolute for entering the verdict for the defendants on the issue on the seventh plea, but my opinion is it should be discharged as to entering the verdict for the defendants on the issues on the fifth plea; although, in consequence of the opinion of my brothers being in opposition to mine, the rule will be absolute for entering the verdict on the fifth plea also.

ERLE, J.—With respect to the fifth plea, I take the facts to be as stated by my brother Wightman, who tried the cause, and have come to the conclusion that the verdict ought to be entered for the defendant. The plaintiff, by entering into the composition deed with the other creditors, contracted a duty towards them to release the defendant from his debt. Each creditor consents to lose part of his debt in consideration of the others doing the same; and each may be considered to stipulate with the others for a release from them to the defendants in consideration of the release by him. Where any creditor, in fraud of an agreement to accept a composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is also to lose the benefit of the composition. The requirement of good faith amongst the creditors, and the preventing of gain by agreements in fraud for preference, have been uniformly maintained by a series of cases from *Leicester v. Rose*, 4 East, 372, to *Houlden v. Haigh*, 11 A. & E. 1033; and *Bradshaw v. Bradshaw*, 9 M. & W. 29. Here, the plaintiff received a composition, and the value of the preference, which was a fraud upon the other creditors, is seeking to gain a further exclusive advantage to himself, also in fraud of them, by suing for the balance of his original debt, after allowing for the composition as the value of the preference, but claims to avoid his release, on the ground that he was induced by the defendant to believe he alone was fraudulently preferred, whereas some other creditors have also obtained some unjust advantage. Those are the facts on which he relies to support the replication, that the release was obtained by the fraud of the defendant; but the deed is not to be avoided on the ground of fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed,—in other words, where the matter was really such as, in the case of a simple contract, would be a substantial consideration for the contract. Here the misrepresentation relied on is not of this nature. The exclusion of others from the preference is no direct advantage to the plaintiff; the whole stipulation for preference being fraud on the part of the plaintiff towards the other creditors, no part can be legally relied on by him as forming a material inducement for his stipulation, it could not form any part of the legal consideration. Also as in a composition deed, the principal parties to the stipulation for the release are the creditors who mutually contract each with the rest of the body, any misrepresentation of the debtor to any one of the creditors cannot be relied on by that one as a material inducement for the stipulation with the others. The debtor only receives the advantage which the creditors contract with each other to grant to him; the rest of the creditors have made the grant which the plaintiff contracted for; they have been no parties to any fraud, and the plaintiff does not prove the issue, that the deed which operates between him and them, as well as between him and the debtor, was obtained by fraud, by shewing he was deceived by the debtor, and would not have executed the deed if he had not been so deceived. I take it to be clear that he could not have avoided the release if

the defendants had not paid him the additional sum agreed on by way of preference, and there is stronger reason for holding that the release could not be invalidated by reason of the disappointment in the belief that no other creditor had been equally successful in defrauding the rest. With respect to the pleadings on the seventh issue, I agree with my brothers Wightman and Coleridge, that the verdict should be entered for the defendant.

COLERIDGE, J.—The first question arises on the rejoinder to the replication to the fifth plea. To that plea, which is of a release by the plaintiff, he replied, that the release was obtained from him by fraud, covin, and misrepresentation of the defendant and others in collusion with him, and the rejoinder traverses this. On the part of the plaintiff it is contended that the simple issue is, whether the defendant and others in fact procured the execution of the release entirely or in part by means of any fraud or misrepresentation as alleged. If he is right in so construing the issue, the facts certainly warrant his applying to have the verdict entered for him; for it is clear the defendant induced the plaintiff to execute the release, merely by assuring him that the other creditors had no preference given to them; and whatever concurring motives there may have been, he would not but for this assurance have executed the release. His assurance related to a fact which was entirely within his knowledge, and it was untrue. But on the part of the defendant it is contended that this is too narrow a view of the issue, or rather that as the plaintiff was himself, in the transaction of the composition and the release, guilty of fraud in respect of the other compounding creditors by stipulating for a preference to himself, he is not at liberty to insist on fraud at the same time practised on himself, nor, indeed, to say it is any fraud which induced him to enter into the composition; and, after a good deal of hesitation, I have arrived at this conclusion. The plaintiff in this case had entered into an arrangement for compounding his claim on the defendant, which is fraudulent as respects the other creditors. He has received the composition notes, and has executed the release, but he now resorts to his original demand, and is thereupon met by a plea of the release. *Prima facie* the release is an answer to the action, because, to allow the plaintiff now to recover for the whole original demand, would be a fraud on the other creditors who had come into the composition on the faith of the plaintiff being a party to it. But the plaintiff replies that the release was obtained from him by the misrepresentation of the defendant, and others in collusion with him; and this being denied by the rejoinder, the only question seems to be, whether he is estopped from proving his allegation, if true in fact, because he and the defendant have, in the same transaction, concurred in a fraud on the other creditors. As far as regards the particular misrepresentation, the plaintiff was innocent. If he had stipulated for no preference to himself, it would have been perfectly innocent in him, laudable indeed, to stipulate that no other creditors should have a preference, and a breach by the defendant of such stipulation would clearly have avoided the release, and remitted the plaintiff to his original rights. But he has stipulated for and has obtained a preference for himself, which, for the reason I have stated, will not vitiate the release as against himself, as it appears to me that the having given a preference to others also was no fraud on the plaintiff. The mere misrepresentation by the defendant of a fact not material to the plaintiff would not sustain the issue, and the only way in which the misrepresentation could be material to the plaintiff would be, inasmuch as the defendants must be rendered less able to carry into execution the fraudulent preference to himself, by having bound themselves to act similarly to others; but he had no right to have the preference carried into execution, and therefore he is not in law prejudiced by the failure in regard to it. The whole consideration for the release is the fraudulent preference promised to himself and withholden from the other creditors. He cannot allege the former as a fraud on himself to vitiate the release, for in that he is *particeps criminis*, and the latter is so mixed up with it, deriving all the materiality from it, that the same disability seems to exist as to him. If I am right in this, the defendants might avail themselves of the answer by a simple traverse, and there need be no special rejoinder. I have come to the conclusion, therefore, that the rule for entering the verdict on the fifth plea must be made absolute. On the other point, on the issue raised on the seventh plea, we are all agreed. I do not think it necessary to add anything to the reasons assigned by my brother Wightman.

Rule absolute.

Saturday, Feb. 22.

REG. v. THE POOR LAW BOARD.

Orders of Poor-Law Board—Regulation of workhouse—Local Act—Jurisdiction of board—St. Giles and St. George Bloomsbury Local Act. The Poor-Law Board has authority by law to

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issue orders for regulating or controlling the relief or management of the poor, or the government of workhouses, or for guiding and controlling vestrymen or parish officers in the discharge of their duties as such; and such orders, when issued, supersede all rules conflicting with them previously made by local authorities under particular Acts, and annul any rules conflicting with them afterwards made by those authorities, in pursuance of such Acts. The Poor-Law Board has not, however, authority to change, set aside, or put an end to the statutory relation in which the authorities and officers constituted by a particular Act stand to one another, nor to make any substantial alteration of the machinery which the local Act created for the administration of the law.

A local Act for the government of the poor and management of the workhouse of a parish, conferred on the vestry the superior controlling power, and provided for the execution of the Act by a body of directors in subordination to the vestry. The Act also conferred on the vestry the power of appointment, of suspension, and of removal of certain officers by name, together with such, and so many other officers, agents, servants, and persons as they should think proper. The poor-law board, by an order addressed to the directors, vestrymen, and churchwardens and overseers ordered, by article 66, the vestry to appoint to the several officers named in article 66 of the order, being for the greater part the same with those mentioned in the local act, and also such assistants and servants as the directors, with the consent of the poor-law board, might deem necessary for the efficient performance of the duties of any of the said officers. The order also, by article 88, empowered the directors, at their discretion, to suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer, and in case of any such suspension to forthwith report the same, together with the cause thereof, to the poor-law board.

Held, that articles 66 and 88 operated to transfer to the directors powers conferred by the local Act on the vestry, and that to the extent of those articles the order of the poor-law board was bad, and must be quashed.

The order also contained orders and regulations for the management of the poor, the government of the workhouse, and the guidance and control of the vestrymen and parish officers in conflict with provisions of the local Act:

Held, that in respect of all such orders and regulations the order was good.

This was a rule calling on the Poor-law Board to shew cause why a writ of *certiorari* should not issue to remove into this court an order made by them on the 21st of November, 1850, relating to the management of the workhouse of St. Giles and St. George, Bloomsbury.

The order contained very many articles relating to the management of the poor; but those upon which the decision turned are set out in the judgment. The objection to the order was, that it was inconsistent with a local Act of Parliament, 11 Geo. 4, c. 10, and consequently an excess of authority on the part of the Poor-law Board.

Thursday, Jan. 30.—The Solicitor-General, (Sir A. Cockburn), Crompton, and Tomlinson, shewed cause.

Sir F. Kelly and Cowling, contra.

The following authorities were referred to:—*R. v. Allstonefield Union*, 11 Ad. & E. 565; *R. v. Holborn Union*, 6 Q.B. 78; *Re St. Pancras*, 6 Ad. & E. 1; *Re Whitechapel Union*, ib. 34; *R. v. Brighton*, 3 Q.B. 342. Cur. adv. vult.

## JUDGMENT.

COLERIDGE, J.—This was a rule for a *certiorari* to remove into this court an order of the Poor-law Commissioners of the 21st of November, 1850, directed to the governors and directors of the poor of the united parishes of St. Giles-in-the-fields and St. George, Bloomsbury, and the churchwardens and the overseers of the said united parishes. We have considered the case, and are of opinion that in one respect the order, which embraces a great number of particulars, transcends the powers vested in the commissioners, and therefore that the rule must be made absolute. These parishes were governed, as regards the relief of the poor, by the local Act, the 11 Geo. 4, c. 10, until the passing of the Poor Law Amendment Act, the 4 & 5 Wm. 4, c. 76. Soon after the passing of that statute, this Court had occasion to consider whether it applied, and to what extent, to parishes which were previously under the government of local Acts. The decision then come to will be found to furnish the principle which is to govern the present case. That principle is this,—that the Legislature intends to provide for uniformity in the mode of governing and relieving the poor throughout the kingdom. For this purpose the commissioners have a jurisdiction

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which attaches everywhere, and is not ousted by the operation of any local statute. The authorities constituted by such statute must act in future in subordination to the commissioners, and the rules made from time to time by the latter would overrule any conflicting rules previously made by the former; nor can the former make any binding rules for the future, but under the sanction of the latter. The commissioners, however, cannot put an end to, set aside, or alter the relations *inter se* of the local authorities, to adopt the words of the judgment pronounced in the case of *R. v. St. Pancras*, 6 A. & E. 9, which has ever since been considered a leading case on this point. The local authorities may be "guided and controlled," but the management of the poor cannot be taken from them. This conclusion was arrived at by a careful examination of the clauses of the Act, and may be considered settled law. Such being the law, we have now to apply the principle to the different particulars of the present order, which are objected to. Whatever merely regulates or controls the relief or management of the poor or the government of the workhouse, or merely guides or controls the vestry and parish officers, will be within the power of the commissioners; but any particulars which substantially alter the machinery provided by the local Act for its administration will be beyond it. We think the articles 66 and 88 of this order fall within the latter predicament. The former commences a section which is entitled "appointment of officers," and by it "the vestrymen of the joint vestry shall appoint" to certain offices named, "and also such assistants and servants as they or the directors, with the consent of the Poor-Law Board, may deem necessary for the efficient performance of the duties of any of the said officers." By the latter "the directors may at their discretion suspend from the discharge of his or her duties any master, matron, schoolmaster, or schoolmistress, or medical officer, and shall in case of every such suspension forthwith report the same, together with the cause thereof, to the poor-law board." The effect of this is, with regard to the appointments, to make the directors at least co-ordinate with, if not to place them over, the vestrymen: for the vestrymen must appoint, even against their own judgment, if the directors, with the consent of the poor-law board, require it. With regard to suspension from the discharge of duties, a general discretion is placed in the directors, and the vestrymen have no voice in the matter. Now, by section 51 of the Local Act the power of appointment, suspension, and removal of the officers named in article 66 of the order "together with such and so many other officers, agents, servants, and persons, as they think proper," is placed in the vestrymen: the directors themselves are a body, which, by section 63, the vestrymen are to elect annually; and by section 72 they are to exercise all the powers and authorities relating to the relief, maintenance, and employment of the poor which the churchwardens and overseers, or guardians of the poor, are or shall be by law authorised to exercise. The vestrymen, then, were to be the superior controlling power, and under them the directors were the executive body. We have not to consider whether it would be expedient to vest in this body such powers as are sought to be given to them by the articles in question. But it is clear the Act has not been lawfully obeyed by a transfer of the ordinary powers of the vestrymen to the directors. This disposes of the present rule. With regard to the other articles objected to, we have considered them and are of opinion some of them do not conflict with the provisions of the Local Act, and some do, but only on such matters as the 4 and 5 William 4 has placed in them the power of the commissioners by the 15th section, that is, orders or regulations for the management of the poor, or the government of the workhouse, or the guidance and control of guardians, vestrymen, and parish officers. These are matters in which the commissioners are authorised to act, even if in so doing they interfere with the provisions of the existing law. The rule, therefore, will be made absolute to the extent named.

Rule absolute accordingly.

## LAWRENCE v. THE GREAT NORTHERN RAILWAY COMPANY.

## Consequential damage—Construction of Railway—Damning up flood waters—Award.

A railway company for the purpose of constructing their line agreed to purchase certain land of A. and it was referred to an arbitrator to determine the price to be paid by the company for the land purchased, and also the amount of compensation to be paid for injury done to the remainder of A.'s estate by severance or otherwise, and also to direct what bridges, arches, culverts, &c. should be made over or under the railway on the premises. The arbitrator awarded a large sum of money to be paid to A. Afterwards some of the lands of A. in the occupation of a tenant, were injured by an overflow of flood waters, occasioned by the construction of the railway without leaving sufficient openings for the passage of the

water under a part of the line which passed over land adjoining the land of A.

*Held*, 1. That the tenant's cause of action was not barred by the award. 2. That although the railway was constructed according to the requirements of the Act of Parliament, so that the company could not have been compelled by mandamus to construct any other passages for the water than had been constructed, yet that circumstance was not enough to deprive the plaintiff of a right of action for the injury which he had sustained.

Case for consequential damage. The first count charged that the plaintiff was possessed of three closes adjoining to certain low lands, over which the flood waters of the river Don had been accustomed to flow; and that the defendants had constructed a certain bank without sufficient water way, whereby the plaintiff's land was flooded.

The second count charged that the plaintiff's land had been protected from the flood waters, which spread themselves over the low lands by a flood-bank erected by drainage commissioners for that purpose; that the defendants by the construction of the railway prevented the waters from flowing over the low lands, and cut the flood-bank, whereby the water flowed upon the plaintiff's land.

To this declaration there were numerous pleas, four of which were added at the assizes, and set up an agreement of reference between the company and Sir W. B. Cooke, the owner of the land now occupied by the plaintiff, and other land adjoining thereto, and an award in pursuance thereof, as an answer to the present action. It appeared that the company had given notice to Sir W. B. Cooke of their intention to purchase a portion of his lands; and it was referred to the arbitrator to determine not only the price to be paid by the company for the land purchased, but also the amount to be paid for injury done to the remainder of his estate by severance or otherwise. The arbitrator was also to determine the description and dimensions, &c. of the bridges, culverts, and arches to be made over or under the railway upon the premises. The award was made, the amount awarded paid, and the directions of the award as to the construction of the railway obeyed. The district in which the plaintiff's land was situate, was placed under drainage commissioners by a local Act, 7 & 8 Geo. 4, c. xciv.; and they had constructed a bank, called Bentley Flood-bank, which protected the plaintiff's land from the flood-waters of the river Don, which spread themselves over the low lands of the district. The defendant's railway between Doncaster and Ferry-bridge was made over those low lands, and crossed the Bentley-bank; and it appeared that the effect of making the railway had been to dam up the flood-waters on one side of it, so that they had forced their way through and over the Bentley-bank, and so flowed over the plaintiff's land. The plaintiff's complaint, therefore, was, that sufficient water-way had not been left under the railway on the opposite side of the Bentley-bank to that upon which Sir W. B. Cooke's land was situate.

The substantial defence was, first, that the company had left as much water-way as they were required to leave by their Act of Parliament, and the plans which had received the sanction of the Legislature; and secondly, that, at all events, the injury sustained by the plaintiff was one of the matters previously referred to arbitration, and that the plaintiff's claim was barred by the award.

At the trial, a verdict was found for the plaintiff on all the issues, with 60l. damages on the first, and 10l. on the second count; but leave was reserved to the defendants to move to enter the verdict for them. A rule having been obtained accordingly,

*Hugh Hill and Farrer* shewed cause on Friday, Feb. 7.

*Knowles, Watson, and Hall*, contra.

The following authorities were referred to: *Skerrett v. The North Staffordshire Railway Company*, 2 Ph. 475; 5 Railw. Cas. 165; *Lee v. Mither*, 2 M. & W. 824; 2 You. & C. 611; *Thickness v. The Lancaster Canal Company*, 4 M. & W. 472; *Clegg v. Dearden*, 17 L. J. 223, Q.B.; *Reg. v. The Leeds and Selby Railway Company*, 3 Ad. & Ell. 683; *Dunn v. Murray*, 9 B. & C. 780; *Hodsoll v. Stallebrass*, 11 Ad. & Ell. 301.

## JUDGMENT.

*PATTERSON, J.*—The plaintiff has a lease of certain lands under Sir Wm. B. Cooke, and he brings the action for injury done to his lands by their being flooded, as he alleges, by the fault of the defendants, in constructing their railway across the lands of other persons, without leaving sufficient openings for the passage of the flood-waters of the river Don. The defendants pleaded, that before the plaintiff had any of the lands now in his occupation, they gave notice to Sir Wm. B. Cooke to purchase certain lands, and, amongst them, those of the plaintiff; and it was referred to an arbitrator to fix the amount of the purchase-money and compensation for injury to the remainder of the estate of

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Sir Wm. Cooke by severance or otherwise, and to determine what bridges, arches, culverts, &c. should be made; that he awarded 7,990l. and directed what should be constructed; that the money was paid, and the works directed were done. The main point in the case is, whether that compensation relates only to all damage known or contingent at the time of the award, by reason of the construction of the railway on the lands purchased of Sir Wm. Cooke and to other damage arising from the construction of the railway at other places, which was, apparently, capable of being estimated, and some of which was estimated; or whether it embraces also all contingent and possible damages which may arise afterwards by the works of the company, at other places, and which could neither be foreseen nor be guessed at by the arbitrator? a proposition so startling, that we should expect some provision to be pointed out to that effect either in the general Acts relating to railways, or the special Act under which the particular railway was made; or in the instrument of reference. We have examined all these, and are not only unable to find any such express provision, but any clause whatever which can fairly have any such interpretation put on it. We are therefore clearly of opinion, that the compensation must be taken in the restricted sense which is contended for by the plaintiff. But it is contended by the defendants, that they have constructed their railway according to the provisions in their special Act, the 9 & 10 Vict. c. xvii. (local and personal), and are not liable for any consequences that may follow, producing damage to the plaintiff. The railway passes across the low lands adjoining the river Don, over which the flood-waters of that river used to spread themselves. Those lowlands were separated from the plaintiff's lands by a bank constructed under certain drainage Acts, and which protected the plaintiff's land from flood. By the construction of the defendant's railway without sufficient openings, those flood-waters could not spread themselves as formerly, and were penned up and flowed over the banks, and on to the plaintiff's land. *Prima facie*, this would give the plaintiff a cause of action. The question is, whether the company were protected by their Act? Now, the 162nd section obliges them to make openings where the railway crosses any public drain, embankment or works made in any drainage district, but is silent as to flood-waters. The 163rd section obliges them to make openings for flood-waters in another district in another county, where the railway company have bought land. On the principle, therefore, that *expressio unius est exclusio alterius*, it should seem, certainly, that so far as any remedy, by *mandamus* or otherwise, to compel them to make openings for the flood-waters in the Don district should be attempted to be enforced, the Act would not warrant it. The company may have been at liberty under the Act to construct their railway across the low lands in the manner they have done, but it does not follow, in case an unforeseen injury arises to any one from the mode in which they construct it, that they are not liable to an action. It was, indeed, held, in the case in 4 B. & Adol. 30 (*Res. v. Pease*), that where an Act of Parliament authorised the making of a railway, parallel and very near to a highway, the company were not answerable for injury sustained in consequence of horses passing along the highway being frightened. But there the proximity to the highway being expressly authorised by the Act, and the railway being used in a proper and ordinary manner, it was impossible to hold the company responsible without, in effect, repealing the Act of Parliament. Here, the company might, by executing their works with proper caution, have avoided the injury which the plaintiff sustained, and we think the want of such caution is sufficient to sustain the action. The injury in the second count is expressly found by the jury, therefore the rule to enter the verdict for the defendant must be discharged.

Rule discharged.

Tuesday, April 15.

REG. v. GARLAND.

## Indictment for nuisance—Evidence.

Indictment for burning arsenic, whereby noisome and unwholesome smells did arise, so that the air was greatly corrupted. Evidence that cattle and trees in the neighbourhood were poisoned by the particles of white arsenic which fell on the ground from the noisome vapour:

*Held*, admissible, though the white arsenic itself was free from smell.

Indictment for nuisance, charging that the defendant did burn and melt crude arsenic for the purpose of making arsenic, whereby divers noisome and unwholesome smells did thence arise, so that the air was greatly corrupted and infected *ad commune nocumentum*.

At the trial, which took place before Martin, B. at the last Cornwall Assizes, it appeared that the defendant was the proprietor of an arsenic manufactory; that the vapour produced by burning metallic arsenic was offensive to the smell; and that particles

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of the white arsenic were carried off in the vapour, and deposited on the adjoining lands. The effect was to poison the cattle and the trees, and evidence was offered and received, after objection made, that several of the cattle of the prosecutor, which had been turned upon the adjoining pasture, had actually died.

A verdict was found for the Crown.

Crowder now moved for a new trial, on the ground that the evidence of injury to the prosecutor's cattle and trees was inadmissible, because irrelevant. That injury proceeded from the deposited particles of white arsenic, and had no tendency to prove that the air was corrupted by unwholesome smells, which was the only charge in the indictment.

LORD CAMPBELL, C.J.—Even giving to the indictment the limited construction contended for, it is impossible to say that evidence of the particular effect in the death of the cattle and the trees was not admissible for the purpose of shewing what was the quality of the vapours, which emitted the offensive odours, proved by the witnesses.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred. Rule refused.

Wednesday, April 16.

PAUL v. COX.

Pleading—Variance—Evidence.

In an action on the case for diverting a stream of water the plaintiff alleged that he was possessed of a garden near to a stream of water, and that a great part of the water of the stream ought of right to run and flow unto, into, and through a certain gutter-hole unto and into the garden of the plaintiff for the purpose of irrigating the soil thereof. Upon a general traverse of the right alleged, it appeared that the plaintiff was entitled twice a-year at the proper times for irrigating his garden, to erect a dam by means of which the water of the natural stream, referred to in the declaration, was forced artificially through a gutter hole, into and over the plaintiff's garden.

Held, that the plaintiff proved the right as alleged in the declaration.

In the same declaration it was charged that the defendant had wrongfully pulled down a certain dam, stones, and soil which had been put and fixed in the said stream for the purpose of diverting the water thereof into the said gutter-hole, &c.:

Held, in arrest of judgment, that this was sufficient and that it was unnecessary to show by whom the dam, &c. were erected.

This was an action upon the case for injuring the plaintiff's enjoyment of certain water by diverting it. The declaration alleged that the plaintiff was possessed of a garden and close, with the appurtenances, near to a certain stream of water running and flowing by the side of the said garden and close, and that long before and until the committing of the grievances, &c., a great part of the water, &c., was accustomed of right to run and flow, and still of right ought to run and flow unto, into, and through a certain gutter-hole on, to, unto, into, and over the garden and close of the plaintiff for the purpose of irrigating the soil thereof, &c. The declaration alleged as the wrongful act complained of that the defendant wrongfully pulled down and destroyed a certain dam, stones, and soil, &c., which had been placed in, and were then standing, and being across, the said stream for the purpose of diverting the water therefrom unto and into the said gutter-hole, &c., by means of which the plaintiff lost the enjoyment of the water, &c.

The third plea was a general traverse of the right claimed, being in substance that the water ought not of right to have run and flowed unto, into, and through the said gutter-hole, over the said garden, &c. in manner and form, &c.

At the trial before the Lord Chief Baron, at the last assizes for the county of Devon, it was proved that the plaintiff had a right twice a year—at the proper times for such irrigation,—to erect a dam, &c. and by that means to force the water of the natural stream through the gutter-hole on to his garden, &c. for the purpose of irrigating the same. It was, thereupon, objected by the defendant that there was a variance between the right claimed and the right proved, and that therefore the defendant was entitled to the verdict. The learned judge reserved to the defendant leave to move to enter the verdict on this plea, and the plaintiff had a verdict upon the whole case.

But now moved to enter the verdict for the defendant accordingly upon the third plea. The right claimed should have been a right to divert the water and irrigate the land. The right claimed in this plea is a right to the natural flow of the water at all times, and was disproved by the evidence that the plaintiff was only entitled to an artificial diversion, and to that only at stated times.

LORD CAMPBELL, C.J.—The plaintiff only claims a right to a great part of the water. He says nothing about either a natural or an artificial course.

It is certainly not stated as a claim to the natural flow of the water, nor can it substantially mean any such thing. In nearly all cases of a claim to the enjoyment of water, the water in respect of which the claim is made is got by artificial means, yet neither principle nor precedent require that the means of getting the water should be stated. The right is to the water; the rest is all evidence. The second objection is, that the right is improperly claimed for all times in the year, but I think that is not so. The real meaning of the declaration is that the plaintiff was entitled at the times at which the water was wanted for the purposes of irrigation, and the right at such times was proved.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred. But, then moved to arrest the judgment, upon the ground that the declaration charging an obstruction to the plaintiff's right, by pulling down and removing "a dam, &c. standing and being across the stream," &c. did not shew by whom the dam, &c. had been erected, whether by the plaintiff, by the defendant himself, or by a stranger. If the dam, &c. were put there by the defendant, he might remove them; if by a stranger, the plaintiff could not complain of their removal.

LORD CAMPBELL, C.J.—By whomsoever they were placed there, if they were there for the purpose of the plaintiff enjoying his right, and the removal of them hindered the enjoyment of his rights by the plaintiff, the defendant is shewn to be liable to this action.

By the Court,

Rule refused.

## BUSINESS OF THE WEEK.

Tuesday, April 15.

WADSWORTH v. THE QUEEN OF SPAIN.—Chambers moved for a rule for a prohibition to the Lord Mayor's Court, to prevent any further proceedings in that Court in the above-mentioned cause. 1st. That Court had no jurisdiction over a foreign potentate for an act done in her sovereign capacity. 2nd. The money attached was the public money of the Government of Spain. Rule nisi.

GILL v. FLETCHER.—Russell moved to set aside a certiorari which had issued for the removal of the cause out of a County Court, and that the plaintiff should pay the costs incurred in the County Court. (Jones v. Davies, B. & O. 148.) Cur. adv. vult.

EVANS v. GEORGE.—Davison moved to enter the verdict for the defendant. It was an action on the case for dilapidations; and the question was whether the person who had appointed the plaintiff was at the time of the appointment the lawful patron of the perpetual curacy, in respect of which the claim arose. Rule nisi.

WIGGINGTON v. HARDS.—Macnamara shewed cause against a rule to rescind an order of Maule, J. ordering a writ of restitution to issue.—Gray contra. Cur. adv. vult.

Wednesday, April 16.

Re MAURICE DE HANER v. THE QUEEN OF PORTUGAL.—Sir F. Thesiger moved for a prohibition to the Lord Mayor to restrain him from proceeding in this cause in the Lord Mayor's Court, upon the ground that the defendant, in her sovereign capacity, was not amenable to the jurisdiction of that Court. Rule nisi.

Doe dem. PALMER v. EYRE.—Knowles moved, pursuant to leave reserved, to enter the verdict for the plaintiff. The question was, whether payment of interest by a mortgagee to a mortgagee would prevent the operation of the Statute of Limitations in favour of a tenant (the defendant) who has occupied for more than twenty years without paying rent, having been let into possession shortly before the mortgage by the mortgagee. (Stats. 3 & 4 Wm. 4, c. 27, s. 3; 7 Wm. 4; and 1 Vict. c. 28; Doe v. Williams, 5 A. & E. 291; Doe dem. Gooday v. Carter, 9 Q.B. 863.) Rule nisi.

COWLES v. CARMAN.—H. Jones (who was to support the rule) consenting. Rule discharged.

RES. v. CURRIE.—The Attorney-General (who was to shew cause) consenting. Rule absolute for a new trial upon payment of costs.

DYSON v. WILLIS.—Humphry moved for a new trial upon affidavits. Rule nisi.

LOCK and OTHERS v. BICKETT.—Shaw, Serjt. moved for a new trial upon the ground that the verdict was against the evidence. Rule nisi.

SHREVEWRIGHT v. ARCHIBALD.—Bovill shewed cause. Watson and Hawkins in support of the rule. Cur. adv. vult.

Doe dem. SLADDEN v. BRALL.—Chennell, Serjt. moved for a new trial upon the ground of misdirection. The Court thought that the case was not distinguishable from Doe v. Clifton, 4 A. & E. 800, and there was therefore No rule.

BLAIR v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.—M. Chambers, Henderson, and Drumwell shewed cause. The Attorney-General, Lush, and Cockle in support of the rule. Argument adjourned.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

EASTER TERM.

Tuesday, April 15.

(Before JERVIS, C.J., CRESSWELL, WILLIAMS, and TALFOURD, JJ.)

LUCAS v. BEALE.

Contract, joint or several—Nonsuit—Amendment.

L. contracted with B. in consideration of payment of 1,280*l.* arrears of salary due to L. and others composing the orchestra of the Royal Italian Opera, that he and they would perform to the end of the season, and he signed an undertaking to

that effect "in the name of the gentlemen of the orchestra." Subsequently L. brought an action on the undertaking he had given (which had been "approved" and signed by the defendant), a which he sought to recover the 1,280*l.* and at the trial was nonsuited:

Held, on motion to set aside the nonsuit, that the contract being made by L. on behalf of others whilst he sued alone, the nonsuit was right.

Where a plaintiff declines leave to amend at the trial, because the judge had expressed a strong opinion that he should be nonsuited, the Court will not grant a new trial on that ground.

This cause was tried before Jervis, C.J. in Westminster, at the sittings after last Term, when the plaintiff was nonsuited.

Keating, Q.C. now moved for a rule calling on the plaintiff to shew cause why the nonsuit should not be set aside, and a new trial had, on the ground that the plaintiff ought not to have been nonsuited. It was an action of *assumpsit* brought by the plaintiff on behalf of himself and the other members of the orchestra of the Royal Italian Opera, Covent-garden, against the defendant, formerly lessee of that theatre, and afterwards manager under De-la-field, who since became bankrupt, to recover arrears of salary due to the orchestra, and for which, it was contended, the defendant had made himself responsible. The following were the facts under which the claim arose:—The plaintiff and other members of the orchestra not having their salaries regularly paid, became desirous of securing some guarantee for the payment of the arrears due to them; and on the 9th July, 1849, Madame Grial, Mr. Costa, Signor Mario, and the other principal artists of the establishment, having consented to forego their claims until the end of the season, in order that the members of the orchestra might have the benefit of such sacrifice; the members of the orchestra thereupon pledged themselves to continue their services, provided the defendant would guarantee payment of 1,280*l.* 12*s.* the arrears of salary then due. An agreement to this effect was drawn up and signed by the plaintiff "in the name of the gentlemen of the orchestra," and thereupon another paper was drawn up by one Fenn, the treasurer of the establishment, in which the above proposition was ratified, and signed by him. This not satisfying the plaintiff and the other members of the orchestra, the defendant was required to signify his acceptance of the proposal, which he did by writing his name across the paper, as follows, "Approved by me, T. F. Beale." Those two papers formed the agreement on which the plaintiff sued. The orchestra having complied with their undertaking by performing their duties to the end of the season, called on the defendant to fulfil his part of the contract, but he replied that he had only contracted as the agent of De-la-field, and that he had publicly notified by placards posted in the theatre that he would not make himself personally liable. The plaintiff, on behalf of the whole body of performers in the orchestra, then brought this present action. At the trial the jury found that this was not a mere proposal but an agreement; and the Lord Chief Justice nonsuited the plaintiff, on the ground that this was a joint and not a several contract, and that being so the plaintiff was not entitled to sue on behalf of the other members of the orchestra. This was a misdirection. It was contended for the plaintiff at the trial, that Lucas being the agent of the entire orchestra could sue alone for the benefit of the whole. Also that Lucas really being the contracting party, it did not signify for whose use he contracted; he was entitled to sue because he was the party contracting. Clearly if the contract were under seal he would be the proper party to sue. [JERVIS, C.J.—Would an action lie against Lucas if any of the orchestra should refuse to play? You must go that length or your argument has no force.] I submit this is a case like *Metcalf v. Ryecroft*, 6 M. & Selw. 75. [JERVIS, C.J.—You must not forget that here the plaintiff signed on behalf of the gentlemen of the orchestra.] He signed as their trustee. [CRESSWELL, J.—Of what?] Of the fund. [CRESSWELL, J.—Is that so? Was there any agreement to pay to him?] No. A question also arises whether Lucas was not, at all events, entitled to sue for his own particular share. [JERVIS, C.J.—You were offered to amend when that point was raised at the trial.] We thought it unnecessary to amend after the Court had expressed so strong an opinion that this was not a several contract. [JERVIS, C.J.—You said you could not proceed in Chancery till you had tried a Common Law Court; and that you came to this court expressly to try the question whether one party could sue on such a contract on behalf of the whole.] It is necessary in determining this point to consider the nature of interest which the parties have. Here clearly the interest is several. [CRESSWELL, J.—You are nonsuited; and you produce a record in which your evidence does not prove your case. What ground then can there be for coming here?] I submit if this cannot be construed a contract by Lucas as trustee for the others, it is, at all events, such a



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contract as entitles the plaintiff to sue for the amount due to himself personally for services in the orchestra.

**CRESSWELL, J.**—There seems to us no ground whatever for disturbing this nonsuit. The contract was clearly made by the plaintiff on behalf of others. I think, therefore, he was rightly nonsuited.

**WILLIAMS, J.**—I am of the same opinion.—There is no doubt the nonsuit was right. It would be a source of great inconvenience if we granted a new trial in cases where a party declined to amend, because the judge entertained a strong opinion that the plaintiff ought to be nonsuited.

**TALFOURD, J.**—I entirely agree with my learned brother.

**JERVIS, C.J.** having tried the cause, gave no judgment in the matter. *Rule refused.*

Wednesday, April 16.  
**AMBROSE v. KERRISON.**

*Husband and wife.*

*The plaintiff paid for the funeral of the defendant's wife, the defendant and his wife by consent lived separate for many years before her death, and it did not appear that the defendant could have communicated with the husband before the funeral.*

*Held, that he was entitled to recover the expenses paid for a decent funeral from the husband.*

*Debt, for money paid by the plaintiff for the use of the defendant. The defendant paid 12l. into court.*

At the trial, before Parke, B. at the Essex Assizes, it appeared that the plaintiff sought to recover the money paid by him for the funeral of the defendant's wife; that the defendant and his wife had lived separate by consent for many years before her death; that she had a separate estate vested in trustees for her benefit; and that the plaintiff was acquainted and distantly connected by marriage with the defendant's wife. The wife, during the separation, lived principally in Essex, but, in January 1850, had removed to Camberwell, where she died. During her lifetime she had expressed a wish to be buried in Essex. After her death a Mr. Gale, her solicitor, wrote to the plaintiff and informed him of it, whereupon the plaintiff came to London and employed an undertaker to provide a coffin and take the body to the Eastern Counties Railway station, from whence it was conveyed to the place where the deceased had expressed her desire to be buried, and interred. The defendant resided at the time of his wife's death in Norfolk; and as the plaintiff was not aware of his address, the defendant was not informed of the funeral until it had taken place. When the plaintiff applied to the defendant for payment of the expenses, the defendant agreed to pay those incurred in London, but objected to pay the further expense of interring the body in Essex. Verdict for the plaintiff for 12l. 12s.

**M. Chambers** moved for a new trial on the ground of misdirection. The plaintiff might have communicated with the defendant through the medium of the wife's trustees, and he was bound to do so before incurring the expenses. The utmost that the defendant was bound to provide was a decent funeral, and the payment into Court was sufficient for that purpose. The extra charges consequent upon conveying the body into Essex were not properly chargeable upon the defendant. The judge told the jury that the burial in Essex was suitable and proper, considering the situation of the parties and the wife's wishes. If that direction is correct, the defendant does not object to the charges. The present case differs from *Jenkins v. Tucker*, 1 H. Bl. 90, as there the husband went abroad leaving his wife behind him with the usual authority to contract necessary expenses, and she died during his absence; here there was a separation by consent, with a separate estate of the wife.

**JERVIS, C.J.**—I am of opinion that there should be no rule in this case. It is admitted that if there is a legal liability on the defendant, no question arises as to the amount for which he is liable. We are not discussing, therefore, whether the defendant is liable for more than the mere decent funeral of his wife. If so, the simple question is whether a husband is liable for the decent funeral of his wife. There can be no question that if an undertaker had voluntarily buried a deceased person, that person's executor with assets is primarily liable to the undertaker for the expenses without any specific contract, and that the undertaker may recover them from him. How is that obligation founded? Because there is a duty imposed on the executor, having regard to common decency and the public health, to perform the last offices for the deceased. For the same reason that the law casts this duty upon an executor, I think, the same duty is imposed upon the husband of a deceased wife to pay the expenses of her funeral without any specific contract with the person who provides it. If, then, an undertaker is entitled to recover such expenses, I can see no difference between the man who has undertaken this

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duty on behalf of the husband and employed another person to conduct the funeral and an undertaker who incurs the expenses by virtue of his own original employment, because the undertaker does not do all the duty himself; he has to employ different men, and he pays one for doing this thing and another for doing that. I therefore think, on reason supported by the decision of *Jenkins v. Tucker*, that a rule should be refused.

The rest of the Court concurred, and adopted the authority of *Jenkins v. Tucker*, although, as **Cresswell, J.** said, there are one or two observations in that case that might be objected to.

*Rule refused.*

## BUSINESS OF THE WEEK.

Tuesday, April 15.

The judges who sit this term are **Jervis, C.J.** **Cresswell, Williams,** and **Talfourd, J.J.**

**THE WEST LONDON RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.**—**Byles, Serjt.** (Appld with him) moved for a rule nisi why a writ of inquiry should not issue to assess the damages on the 6th issue in this case. The cause was tried before **Jervis, C.J.** in London. Verdict for the plaintiff on the 6th issue. The action was brought by the plaintiffs to recover damages for the alleged breach of a covenant in the lease of the West London line to the London and North-Western line, whereby the defendants bound themselves "efficiently to work and repair the railway and the works thereby demised, and to indemnify the West London Railway Company against any liability for want of the efficient working and repairing of their railway, pursuant to the covenant." It appeared that the West London Railway was formed for conveying passengers and goods from Kensington to a station on the London and North-Western line, called Harlington-green, before the Great Western Company had obtained their Act, and the West London Company being thereby entitled to priority, the Great Western Company were obliged to bind themselves to wait for the trains of the West London Company, when required to do so. Afterwards the West London Company demised their line, with all their rights and privileges, including the right to stop the trains of the Great Western Company, to the London and North-Western Company, upon receiving 60,000l. in cash, and security for the payment of 120,000l. and also of one-quarter of the gross receipts of the London and North-Western Company, in respect of passengers, goods, and other things conveyed by the former railway. The plaintiffs, however, complained that no sooner was this agreement effected than the defendants, instead of efficiently working the West London line pursuant to their agreement, ceased altogether to run passenger trains, and that even with respect to the carriage of goods, instead of stopping and depositing the goods at Harlington-green, they took them first to London, and then sent them back and deposited them there at their leisure. The jury, under the direction of the Lord Chief Justice, decided at the trial that this was not an efficient working of the line, within the terms of the agreement, and the question then arose what amount of damages the plaintiffs were entitled to. It was thereupon suggested that this question should be referred to some indifferent person, but as the parties could not agree on the terms of the reference, the present motion became necessary. When the lease was entered into the West London Railway was being worked at considerable profit. **Jervis, C.J.**—Then it is a very remarkable thing that not one of the witnesses called had ever travelled by the railway. It is true that upon circuit I accidentally met a gentleman who had done so, but he was the only passenger I ever heard of. **Byles, Serjt.**—Let that be as it might, the contract was that passenger trains were to run as well as goods trains. Otherwise, what was the meaning of working the line "in connection with the London and North-Western Railway," as specified in the contract? **JERVIS, C.J.**—I think it means that there was a contract for a lease if Parliament would allow it, and then that the terms of the contract were to be gathered from the lease. **Byles, Serjt.**—I apprehend the true meaning of the contract is not that the railway was to be worked as a separate and independent railway, but as a branch of the London and North-Western Railway. **JERVIS, C.J.**—We will decide upon your motion when we have heard the cross motion of **Sir F. Theagar, Serjt.** on behalf of the defendants, then moved for a rule nisi for a new trial, on the ground that the jury had been misdirected as to the proper meaning of the term "efficiently" in the contract for working the plaintiffs' line of railway. He contended that the West London Railway Company, being at the time of the lease in a state of hopeless insolvency, as appeared by their own reports, their gross receipts having never exceeded 2l. per week, the proper construction of the covenant was, that the line was to be worked in such a manner as would make the best return to the proprietors; and this being so, that the defendants, by ceasing to run passenger trains, and by carrying goods only, had well performed their covenant. **JERVIS, C.J.**—The Court grants a rule for a new trial on the ground of misdirection; also a rule for a writ of inquiry on brother **Byles's** motion. *Rule nisi in both cases.*

**REG. v. THE SHERIFF OF GLAMORGAN.**—**RO SIMMONS** and **DAVIS.**—**Channell, Serjt.** moved for a rule calling on **Simpson** to shew cause why a writ of attachment should not be set aside on the ground that before the writ issued both the debt and the costs were paid. On the 30th of November a writ of *fi. fa.* indorsed for 39l. debt, with an average sum for costs, was issued to the sheriff. On the 9th of December an order was made by **Maule, J.** for the return of the writ, which order would expire in eight days, that is to say, on the 17th of that month. The return, however, it is admitted, was not made in time. The undersheriff paid the amount to one **Charles Thomas Jones**, the plaintiff's attorney, and took a receipt for; and he heard no more of the matter till the 3rd of February, when the writ of attachment issued. **JERVIS, C.J.**—There seems to have been in this case no wilful default; the sheriff therefore is entitled to have his rule on payment of costs. *Rule nisi.*

**RO.**—**Tomlinson** asked leave to set down a special case to-morrow. It was necessary to mention it to-day. *Leave granted.*

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Wednesday, April 16.

**PARAVAGNA v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.**—Tried in London before **Jervis, C.J.** Verdict for the plaintiff, damages ten guineas. The action was brought to recover the value of certain coral beads sent to Liverpool by the defendants' railway. The point in the case narrowed itself to this, whether the plaintiff's witness, who was called to prove the quantity of beads sent, was mistaken as to the exact quantity, or whether the box containing the beads had been broken open and some of the beads abstracted during its transit. Witnesses were called for the defendants, and the summing up of the learned judge was favourable, rather than otherwise, to the defendants. **Huntley** now moved for a new trial on the ground of the verdict being against the weight of the evidence, and urged that as the object was to vindicate the character of the servants of the company, the rule that a new trial as against evidence would not be granted where the verdict is for less than 20l. would not apply. *Rule refused.*

**PEACOCK v. JENKIN.**—**Kinglake, Serjt.** (Couch with him), moved for a rule nisi to set aside the judgment and *postea*, on the ground of irregularity. At Nisi Prius the cause and all matters in difference were referred, a verdict being taken by consent for 800l. debt, damages 1s. Afterwards, by a judge's order, the reference was limited to all matters in difference in the cause, and an award was made on the 14th of February. The plaintiff signed judgment on the 11th of March. By the award the arbitrator found that the defendant was indebted to the plaintiff in 38l. 12s. 9d. and the plaintiff then drew up the *postea* "as to the first issue that the defendant was indebted to the plaintiff in 38l. 12s. 9d." &c. and "they assess the damages of the plaintiff at 1s." It was urged that the plaintiff had signed judgment too soon. (*Jones v. Ives*, 20 L. J. 69, C.P.) and that the *postea* was not in conformity with the award, as the arbitrator did not specify any issue upon which he awarded the 38l. 12s. 9d. or find 1s. damages. *Rule nisi upon the first point; rule refused on the second.*

**SILVERLOCK v. IRWIN.**—Tried in London before **Jervis, C.J.** Verdict for the defendant. The question was, whether the defendant, by holding himself out as a partner, had induced the plaintiff to give credit. It appeared that the plaintiff and two others were partners in the *Literary Gazette*, and that, in November, 1847, between the 20th and 27th, the plaintiff's cashier called upon the defendant for payment of the account for printing due in the August preceding, when the defendant told him that he was no longer connected with the partnership. The deed of dissolution was dated December 1, 1847, and was to operate from the 23rd day of November then last. The claim in the action was for work done subsequently to this period. **Byles, Serjt.** moved for a new trial, on the ground of misdirection, contending that there was no notice of the dissolution. *Rule refused.*

**PREW v. SQUIRE.**—**Prentice** moved for a rule nisi to set aside the judgment so far as related to the costs. *De-murrer* to a declaration in covenant, and judgment for the plaintiff. On the execution of the writ of inquiry, the jury gave a farthing damages. The plaintiff had taxed his costs, and signed judgment for them. 13 & 14 Vict. c. 61, ss. 11, 12, 13. *Rule nisi.*

**BELL v. DOMINIE.**—Tried at the Surrey Assizes before **Lord Campbell, C.J.** Verdict for the plaintiff. **Bramwell** moved for a new trial, on the ground of misdirection. *Consult the judge.*

**MARSH v. JONES.**—**Channell, Serjt.** moved to amend a rule of Court hercin. *Rule refused.*

**WHITE v. GARDEN** and **ANOTHER.**—Tried in London, before **Jervis, C.J.** and a verdict for the plaintiff. *Trover* for iron. It appeared that the iron was obtained from the defendants by one **Parker** under pretence of a contract of purchase, and the jury found that he obtained it by fraud and misrepresentation, never intending to pay for it, and that it had been in fact delivered to him. **Parker** sold it to the plaintiff, who purchased it of him *bona fide*, and received possession of it. The defendants discovering the fraud sent and took it away from the plaintiff against his will, whereupon he brought this action. The question was whether any property passed to the plaintiff. Cases cited, *Earl of Bristol v. Wilmore*, 1 B. & C. 514; *Sheppard v. Shoolbred*, Car. and Mar. 61; *Load v. Green*, 15 M. & W. 219. *Rule nisi.*

**ROSSETT v. GURNEY.**—Tried at Liverpool, before **Platt, B.** Verdict for the plaintiff. Action on a policy of Insurance for 4,500l. insured on 3,700 qrs. of corn valued at 6400l. The defendant paid 3,500l. into Court, and the question was whether there was a total or partial loss. (*Thorneley v. Hobson*, 2 B. & Ald. 513.) *Rule nisi.*

**PEREMPTORY PAPER.**

**Re VOULES, gent. &c.**

*Struck out.*

**NEW TRIAL.**

**SOUTHALL v. RIGG.**—**Byles, Sergeant,** and **J. Brown** shewed cause. *Part heard.*

## COURT OF EXCHEQUER.

Reported by **FREDERICK BAILEY** and **C. J. B. HERTSFLET**, Esqrs. Barristers-at-Law.

Wednesday, April 16.

**JONES v. HARRISON.**

*County Court.*—When concurrent jurisdiction is given to Superior Court—Court or a judge's discretion to be exercised as to costs—The word may in 13 & 14 Vict. c. 61, s. 13, permissive only, not imperative.

By the 13 & 14 Vict. c. 61, s. 13 (*County Courts Extension Act*), it is provided that if the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to a judge at chambers upon summons, that the action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 128th section of the previous *County Courts Act* (8 & 9 Vict. c. 95), or for which no plaint could have been entered in any such County Court, or that the said cause was removed from

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a County Court by certiorari, then and in any of such cases the Court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order direct that the plaintiff shall receive his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if that Act had not been passed:

*Held*, that the word *may* in that section was permissive only, and not imperative, and that Court or judge could exercise a discretion upon the case under the circumstances as brought before them.

This was an action brought in the County Court upon a bill of exchange for a sum under 20*l*. (12*l*. 17*s*.) 12*l*. 11*s*. had been previously paid, and 6*s*. were subsequently paid into court. The plaintiff lived and carried on business in London, and the defendant lived at Doncaster,—more, therefore, than twenty miles apart from each other. An application had been made to Martin, B. at chambers for the costs of the action, pursuant to the 13th section of the 13 & 14 Vict. c. 61, whereupon he made the following order:—"That the Master tax the plaintiff's bill of costs in this cause, and also the costs of and occasioned by this application, but that execution herein shall be stayed until Monday, the 14th January, 1851." This was for the purpose of taking the opinion of the Court upon the construction of the above section, and a rule nisi having been obtained (reported *ante*, 16 Law T. 369) to rescind that order, and also a stay of proceedings until the rule be disposed of.

*Bovill* shewed cause.—The question is, whether under the County Courts Extension Act, 13 & 14 Vict. c. 61, s. 13, a discretion is given to the judges, and to be exercised by them, to allow costs on sums recovered under 20*l*. where the Superior Courts have concurrent jurisdiction. By section 11 of that Act it is provided, that plaintiffs recovering in the Superior Courts sums not exceeding 20*l*. in actions of contract, or 5*l*. in actions of tort, over which the County Court has jurisdiction, are to have no costs. Sec. 12, which does not bear upon it, says that the judge at the trial may certify to entitle the plaintiff to costs. Then comes section 13, which enacts, that if in any such action, whether there be a verdict in such action or not, the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 129th section of the said recited Act of the tenth year of her Majesty, or for which no plaintiff could have been entered in any such County Court, or that the said cause was removed from a County Court by *certiorari*; then, and in any of such cases, the court in which the said action is brought, or the said judge at chambers, may, thereupon, by rule or order, direct that the plaintiff shall recover his costs; and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this Act had not been passed. The 129th section of the 9 & 10 Vict. c. 95, enacts, that all actions and proceedings which before the passing of this Act might have been brought in any of her Majesty's Superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except, in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof, may be brought and determined in any such Superior Court at the election of the party suing, or proceeding as if this Act had not been passed. A doubt is said to exist in Mr. Justice Williams's mind on the point whether the word "*may*" is not to be read "*must*," and is compulsory, and that a judge's discretion is given only by express enactment, and there only is he to be satisfied, and to exercise a discretion. By sec. 11 there appears a prohibition clearly expressed against costs; then if you satisfy a judge in the terms of the 13th section, he may direct that the plaintiff shall receive his costs; but that is imperative, and costs must be given. The words "*shall have power*," used in the 14 Chas. 2. c. 12, s. 18, were held to be obligatory (*R. v. Barlow*, 2 Salk. 609); the words there were stronger than the present to import discretion, and yet they were held to be obligatory. Again, upon the stat. as to the suggestion of breaches. [*PARKE B.*—That has nothing to do with this case.—It is a fallacy in arguing upon that.] In *Roles v. Rosewell*, 5 T. R. 538, the stat. 8 & 9 Wm. 3. c. 11, s. 8, which enacts, "that in actions on any penal sum for non-performance of covenants, &c., the plaintiff may assign as many breaches, &c., and if judgment shall be given for the plaintiff on *nisi* *dicit*, the plaintiff may suggest on the roll as many breaches, &c., as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury be-

fore the justice of assize, &c., to inquire, &c., and to assess the damages," &c., it was held to be compulsory on the plaintiff; and he could not enter up judgment for the whole penalty on a judgment by default, as he might have done at common law; see also page 636, *ibid.*, *Hardy v. Bern*, where reasons are given for the judgment come to. (*Crisp v. Barnbury*, 8 Bing. 399, was cited.) [*PARKE B.*, all the cases are collected upon that point in the 19 Law Journal, 181, Q. B.]

*Watson, Q.C.*, contra, in support of the case. The 13th section of this Act of Parliament is to be construed according to the ordinary meaning of the words expressed in it, and unless the Court distinctly see that the word *may* is to be read as *must*, and is so intended clearly by the Act, they will not thus determine. (He was then stopped.)

*POLLOCK, C.B.*—I am of opinion that this rule must be made absolute, the rule to which the Court has been referred as to the construction of statutes must be here acted upon. In this case, by the 13th section, it is provided (the learned Judge read the section). What then is the meaning of the word "*may*?" Is the judge to abstain from exercising any discretion in the matter as to giving costs in the cases within that section? or, is he obliged, is it compulsory upon him to direct the costs without exercising any discretion or judgment in the matter? I cannot say there is no force whatever in Mr. Bovill's argument, that the word "*may*" should receive equal force throughout, but I should certainly say the word "*may*" must here be intended to give a discretion to the judge, so that his judgment might be exercised upon it as to whether the party should recover costs or not according to the circumstances of the case as he thinks right.

*PARKE B.*—I am of the same opinion as the Lord Chief Baron. Of late years, the Court acts according to the rule generally adopted, and in the construction of a statute, to adhere to the usual and ordinary meaning of the words used, unless that is at variance with the intention of the Legislature to be collected from the statute itself. The word "*may*," as used in the 13th section of the Act which has been referred to, is clearly permissive. It is to be read in its ordinary sense; and that being so, it gives a discretion to the judge, in my opinion, to be exercised by him as he thinks right. The ingenious argument of Mr. Bovill only caused me to doubt; but I am satisfied it was not well founded.

*MARTIN, B.*—I am of opinion, also, this rule should be made absolute. The order was made for the purpose of taking the opinion of the Court upon it, the question being an important one. The rule as to the construction of a statute, as laid down by my brother Parke in 2 M. & W. 193, is a very useful one, and in which I entirely concur. It is, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience; but no further. What Mr. Watson has said as to the meaning of the word "*may*" here is correct. It is, in my opinion, clearly permissive. It was the object of the Act to discourage actions in the Superior Courts for amounts under 20*l*.; and the 13th section gives a discretion to the judge at chambers, to be exercised by him in reference to the costs of cases within that section. A case must be made out to satisfy the judge upon it. There may be a vast variety of cases in which such actions may be brought; and in deference to the opinion of my brother Williams, I made this order, that the judgment of the Court may be taken upon it. I am satisfied, however, that the order is wrong, and the rule must be absolute to rescind it.

Rule absolute.

Wednesday, April 16.

DUNCALF F. BIDDLE.

Attorney's bill.—Construction of 6 & 7 Vict. c. 73, s. 37.—Delivery of a proper bill.

*Wheatley, Q.C.* moved in this case, tried at Stafford before Patteson, J. to set aside the plaintiff's verdict, and to enter a nonsuit, pursuant to leave, or to enter a verdict for the defendant on the third plea, or to reduce the damages. The action was upon an attorney's bill: money lent, money paid, and upon an account stated. *Pleas*.—*Nunquam indebitatus*, payment, and that no signed bill had been delivered. The question is, whether a proper and good bill has been delivered. The courts in which the proceedings took place are not properly described in the bill; no sufficient information given of the business done to enable the taxing officer to decide upon the matter; several things lumped together, instead of being separate items, and no reasonable dates are given. He cited *Irvine v. Marks*, 16 M. & W. 843; *Lewis v. Primrose*, 6 Q. B. 265; *Page v. Watkins*, 16 Law T. 512. [*PARKE B.*—You observe that there is no one item here of business done in either of the Superior Courts.] 6 & 7

## EXCHEQUER.

## EXCHEQUER.

Vict. c. 73, s. 37; *Dimes v. Wright*, 19 L.J.; *Haigh*, 14, Jur. 340, Ch.

Rule nisi to reduce the verdict.

## BUSINESS OF THE WEEK.

## EASTER TERM, 1851.

Tuesday, April 15.

*BLAIR v. JONES*.—*Crompton* had obtained a rule nisi for judgment *in rem* pro tunc herein, it was agreed that *Kabool* come on for argument at the same time as another rule for setting aside the award obtained by *Watson* in *Hilly Term* last.

*ADOCK v. WOOD*.—*Macanley* moved in arrest of judgment.

*SKIPPER v. THE GREAT WESTERN RAILWAY COMPANY*.—*James* moved for a new trial herein on the ground of misdirection. It was an action in assumpsit for the value of a celebrated steed—chase mare, which was killed on the railroad by a cart-horse getting out of an adjoining partition in the horse-box, knocking her down, and trampling her to death. The defendants, it appeared, presented to the groom, on the delivery of the mare, the following notice:—"The directors will not be answerable for damage done to any horses conveyed by this railway;" and the groom was required to sign, and had signed, the following thereunder-written memorandum:—"I agree to be bound by the above notice." The question was, whether this was restricted the responsibility of the railway company as to entitle them to a verdict? It was contended that they were bound to provide proper and sufficient boxes for the conveyance of horses, which they had neglected to do, and that, therefore, they were liable; a verdict had been returned for the defendants, under the direction of the Lord Chief Baron, that there was no evidence. *Shaw v. The York Midland Railway Company*, 18 L. J. 181, Q. B.; *Lyon v. Mills*, 5 East. 483; *Wild v. Fickford*, 6 M. & W. 461; judgment of *Parke, B.* in that case; *Stegny on Bailments*, 305; *The Carriers' Act*, 11 Geo. 4; and 1 Wm. 4. c. 98, were cited.

*ROWE v. CARPENTER*.—*Trepass* tried at Hereford before Patteson, J.—*Grewes* moved for a rule to show cause why a new trial should not be had, or judgment entered on *obstanti* verdict.

*DON DEM. GUEST v. BENNETT*.—*Humphrey* moved, pursuant to leave reserved for a rule to show cause why the verdict for the plaintiff herein should not be entered for the defendant. It was a question of construction of a will.

*ELLEN v. TOPP*.—To be reported.

*WILLIAMS v. PRICE*.—Tried before Maule, J. at the last Flintshire assizes, and a verdict returned for the defendant.—*Wesley* moved for a rule nisi for a new trial; it was an action for the price of standing, of certain stalls in a market-place. (The *Mayor of Walsingham v. Sanders*, 3 B. & Adol. 411.)

*SALAMAN v. COHEN*.—*Leach* moved for a rule to shew cause why the commissions issued by *Wightman, J.* in this cause should not issue to *Gibraltar* and *Barbados*, to examine witnesses *circa* voce, instead of upon interrogatories; and why, if necessary, the order of *Wightman, J.* should not be amended. (13 Geo. 3. c. 58, s. 44; 1 Wm. 4. c. 12, ss. 1, 4.)

*EDWARDS v. THE CAMERON COAL COMPANY*.—*Bovill* moved for a rule to shew cause why execution should not issue against a shareholder of this company.

Wednesday, April 16.

*FENN and OTHERS v. BITTLETON and OTHERS*.—*Knox*, Q.C. moved in this case, tried in London, before the Lord Chief Baron, to set aside the plaintiff's verdict, and to enter it for the defendants, or for a nonsuit, or for a new trial, on the ground of misdirection. He referred to *Gordon v. Harper*, 7 T. R. 9; *Bradley v. Copley*, 1 C.B. 685; *Mander v. Williams*, 4 Ex. 339.

Rule nisi, to enter a nonsuit on the authority of *Bradley v. Copley*. Refused on the other point.

*ABBOTT v. BACON*.—*Byles*, Serjt. moved to set aside the defendant's verdict, on the ground of misdirection, and for a new trial, or for judgment *non obstante* verdict. The action was for libel, tried at Norwich, before the Chief Justice of the Common Pleas, the defendant being proprietor of the *Norwich Mercury*, and the libel complained of was, that the plaintiff stole from the shop of another person, eggs, pickles, a hair brush, and other goods; that on its being discovered, had a promise made not to expose him, he afterwards disclosed the plunder. *Pleas*.—Not guilty, and justification generally to the whole; but it omitted the pickles, and the justification was only as to one bottle of capers, one parcel of rotten stone, one segar, one bottle of Macassar oil, one tooth brush, and one pot of cypers. The jury found he stole the capers but nothing else; therefore the plea was not supported, and the jury misdirected; but find, the plea is a bad plea. (*Wals v. Thorogood*, 1 Cro. Eliz. 633.)

Rule nisi on both grounds.

*STOCKTON AND DARLINGTON RAILWAY COMPANY v. FOX*.—The *Attorney-General* moved to set aside the defendant's verdict, on the ground of misdirection; that the verdict was against the evidence; and for judgment *non obstante* verdict. The action was upon three bills for 2,500*l*. each. He cited *Chalmers v. Lanion*, 1 Camp. 369, and, as to the sixth plea, *Carruthers v. West*, 11 L.J. 4, Q.B.

Rule nisi for a new trial, or for judgment *non obstante* verdict.

*HUDSON v. ROBERTS*.—*E. James, Q.C.* moved to set aside the plaintiff's verdict, and to enter a nonsuit, pursuant to leave. The action was in case, for keeping a ferocious bull, but there was no evidence given of a *scieler*, and the action could not be maintained without.

*SMITH v. HANFORD*.—*Parnell*, moved for a rule to quash the *certiorari* obtained upon an order of *Martin, B.* and for a *proceedendo*. (*Parke v. The Bristol and Exeter Railway Company*, 30 L.J. Ex. Jan. 1851.)

*PHILLIPS v. BALL*.—*Bovill* moved to set aside the plaintiff's verdict for 15*l*. in this case, tried at the last Warwick Assizes, on the ground that it had been settled before the trial, and due notice thereof previously given.

Rule nisi.

## RAIL COURT.

## RAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple  
Barrister-at-Law.

## EASTER TERM.

Tuesday, April 15.

(Before Mr. Justice COLERIDGE.)

Re THE TOWN COUNCIL OF SHEFFIELD.

Municipal corporation—Erroneous election of  
aldermen.

R. Hall moved for a *mandamus* for the election of seven aldermen for the borough of Sheffield. It appeared that on the 24th of August, 1848, a charter of incorporation was granted to the borough of Sheffield, and it was thereby directed that there should be fourteen aldermen, seven of whom should go out of office every three years. There was also a clause directing that the elections should take place at such times and places as is provided for in the cases of boroughs named in the schedule of the 5 & 6 Wm. 4, c. 76 (the Municipal Corporation Act), and by sec. 23 of that Act provision is made for the election of aldermen on the 9th of November, in the year 1835, and of one half of their number on the 9th of November, in every third succeeding year. Under this enactment, the last election of aldermen in boroughs named in the schedule thereto took place on the 9th of November, 1850. The town council of Sheffield, however, thinking that the triennial election of aldermen should be computed from the first election in 1843, elected such aldermen in the years 1846 and 1849, no election having taken place in the year 1850. Such times of election being deemed erroneous, and the case of *Reg. v. The Town Council of Bradford*, 16 Law T. 372 (Jan. 25, 1851), having decided that the elections under these charters should be holden at the same time as those under the 5 & 6 Wm. 4, c. 76, the present application was deemed advisable.

Overend, on the part of the town council, and also on that of the seven outgoing aldermen (each of whom had renounced), appeared to consent to the *mandamus* issuing.

Rule absolute for a *mandamus*.

Wednesday, April 16.

(Before Mr. Justice COLERIDGE.)

Ree. v. ISAACS and OTHERS.

Habeas corpus ad respondendum.

A motion for the above writ should be made to a judge at chambers, and not to the Court.

Johnson moved for a writ of *habeas corpus ad respondendum*, to be directed to the gaoler of Lewes, directing him to produce the body of one John Isaacs before the justices of Sussex, at Horsham on Saturday next, on the charge of burglary.

COLERIDGE, J.—This has always hitherto been an application at chambers, and I do not think I ought to depart from the ordinary rule, particularly as I shall be at chambers in the afternoon, when the application can then be made, and no time will be lost.

## BUSINESS OF THE WEEK.

Tuesday, April 15.

PILLAY and ANOTHER v. RICHARDSON and OTHERS.—Watson, Q.C. moved for a rule to set aside a plea in abatement of nonjoinder, on the ground that it was not dated on the day of its being pleaded.

Rule nisi.

Wednesday, April 16.

RITTINGHAM v. HILL.—Kerlake moved to set aside the declaration and all subsequent proceedings herein.

Rule nisi.

## ADMIRALTY COURT.

Reported by Dr. WADDELOVE, of Doctors' Commons.

Monday, March 3.

The CATHARINA, formerly the CROCKDALE.

Bottomry-bond—Sale of vessel.

A British vessel had taken up money on bottomry; she put into a foreign port, and was there sold by the authority of the master; the purchaser had no notice of the bond.

Held, that the bond attached to the vessel, and her value being insufficient to meet it, a sale was decreed.

This was a question whether a bottomry-bond attached to a vessel which had been purchased at a foreign port, the purchaser not being aware of the existence of such bond. The facts are sufficiently set forth in the judgment.

Harding appeared, in opposition to the claim of the bondholder. He cited *Rous v. Salcedor*, 3 Bing. N.C. 266, as showing that the doctrine held in *Thompson v. The Royal Exchange Assurance Company*, 1 M. & S. 31, did not apply to a foreign purchaser.

Bayford and Twiss, for the bondholder, cited *Thompson v. The Royal Exchange Assurance Company*; *The Draco*, 2 Sumner's American Rep. 157; *The Dante*, 2 Wm. Rob. 427.

## JUDGMENT.

Dr. LUSHINGTON.—Having before I came into Court carefully considered the facts and circum-

stances of this case, I see no reason for postponing my judgment. The question arises as to the validity of a bond, dated "Buenos Ayres, 16th April, 1849," for the sum of 315*l*. 10*s*. which includes maritime interest, payable on the arrival of this vessel at the port of London. The vessel originally belonged to the port of Sunderland, and in June 1848 sailed for Buenos Ayres, but put into Rio for supplies. There Messrs. Whittle and Co. advanced on bottomry 583*l*. 16*s*. payable on her arrival at Buenos Ayres. When she arrived there, however, on the 10th of January, 1849, the agent for the owners declined to advance the money, and it was therefore competent for the bondholder to have then proceeded against the vessel. This, however, he consented to abstain from doing, but advanced the sum necessary to enable her to prosecute her voyage home, and taking another bond to cover both the sums advanced. It is admitted that the bond is valid; and the defence is, that the circumstances which have occurred since the bond was given, have deprived the bondholder of his right to proceed against the vessel for the purpose of enforcing payment of the bond. It appears that the vessel put into Bahia, and it is alleged, on the one hand, that she was in distress, which is denied on the other. The Court has no evidence as to how the distress was occasioned; but the vessel was sold at Bahia. I must now consider the questions of law which arise out of these facts. Assuming that there has been a *bond fide* sale, by what means, when a vessel has once been affected by a lien on account of a valid bond, can she be released therefrom except by payment? It may be, that if a vessel is sold by the decree of a competent Court, the purchaser takes her free from all lien whatsoever. It must be presumed that the Court has protected him so far as the law will permit against all claims in the nature of lien. The question as to other sales may be divided under two heads—sales from necessity, and sales without necessity. In the latter case, whenever the sale takes place, the purchaser must take *cum onere*, otherwise the master might sell the vessel in any foreign port, and thus get rid of the bond. The effect of a sale from necessity is subject to another and a very different consideration. Suppose a master had no credit and no means of taking up money on bottomry, it may be questionable whether a purchaser would be justified in paying the purchase-money over to the master without any regard to the interest of a bondholder, supposing he knew that there was one in existence. The mischief would be great if a ship could be so sold. A wide door would be opened to fraud which scarcely any caution could prevent; and it would be exceedingly prejudicial to the mercantile interests of the country. I should greatly doubt whether, under such circumstances, a vessel could be sold free from lien. There was another question, which was originally raised in this case, but which has been in some measure withdrawn from the attention of the Court, because it was not earnestly contended that the Brazilian law was proved. It is very important, however, to consider the effect to be attributed to the law of a foreign country where a sale of this kind takes place. We must carefully distinguish between the law of a foreign country, where a British vessel is sold to a foreigner, and sales made by one shipowner to another where the municipal laws of England must be strictly enforced; but we must also take care not to confuse with these, sales under the direction of a competent Court. There was a period in the history of the sale of British ships when the law applicable thereto was held more strictly than it is now. The inclination of the Courts of Common Law went almost to the extent, that a master could not, under any circumstances whatever, sanction the sale of a ship abroad, unless invested with authority by his owners; such was the principle in *Reid v. Darby*, 10 East, 143. In later days I think a wiserview of this question has been taken, because I consider the law now to be, that where an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel. I will now examine the facts of this case itself. Has the sale arisen from absolute necessity, and has it been a *bond fide* sale? I will assume that the sale has been *bond fide*, because it is not necessary to raise that question; there is certainly not any evidence to convince the Court that there was any *mala fides* on the part of the purchaser. Whether there was any *mala fides* on the part of the master, is another and different question. His conduct is by no means satisfactorily explained. It was in the month of May that the vessel put into Bahia, and the Court is, as I have already remarked, without any information as to what took place on the voyage. The surveys made undoubtedly reported that the vessel, in order to be repaired, would require a larger sum of money to be laid out upon her than she was actually worth, and that she was not seaworthy. It would have been more satisfactory to have had the evidence of the British Consul than to be told the matter went on through him. However, a sale took place by public auction, and I ought to infer, in justice to the purchaser, that such sale took

place with the consent of the British Consul. The purchaser alleges that no notice was given of any lien. Then come the questions,—first, was notice necessary? secondly, if so, who ought to have given that notice? If the British Consul was aware of the lien, it was his duty not to sanction the sale under any circumstances whatever, without causing public notice to be given of the fact. It was also the duty of the auctioneer, and, *a fortiori*, of the master himself, but from these individuals we have no notice whatever. Who is the purchaser is also ingeniously concealed even from the proctor in the cause. It is alleged on behalf of the purchaser, that he never saw the British Register. Why, it is a matter of astonishment to me, notorious as it is that the British Register is the great title to all ships, and that mortgages and bottomry bonds are endorsed upon it, that any man should purchase a British ship, even in a foreign port, without requiring to see the Register. I do not mean to exempt from blame the master who did not shew it, or the British Consul who did not look at it; but it was an act of neglect on the part of the purchaser himself. It is admitted that when there is a lien on a ship it can only be removed in a legal form, yet no inquiry is made upon the matter. There is one gentleman who represents himself as having been present at the sale, and he declares that he heard notice given; but there are five or six who state they were present, and did not hear it. It may be, however, that the declaration took place when they were not present; but my judgment will not turn upon the fact that notice of the lien was or was not given. If the British Consul, the auctioneer, or the master knew of the bottomry bond, and the master must have known of it, for he signed it, and they concealed it from the purchaser, they were participants in a fraud. There is, however, still a fact which arises in this case independently of all others, to which I must advert. I do not find it averred that money might have been borrowed on bottomry for bringing the vessel home. If money could have been borrowed, there is an end of the necessity, and it is clear that the master had not authority to sell the vessel. That is not the law of England peculiarly; but it is the law of the whole maritime world for the protection of all shipowners against all masters. I have not therefore to consider whether this is a case of necessity or not. But supposing the vessel could have been brought to England, did the bottomry bond continue, or did it not? The case cited, *Thompson v. The Royal Exchange Assurance Company*, was an action on a policy of assurance upon a bottomry bond; and the question was, whether the insured could recover against the insurer, unless it was proved that the risk mentioned in the policy had actually taken place, and the bottomry bond thereby lost; and Lord Ellenborough decided that the bond could not be lost so long as the vessel remained in specie. That was the law of the land long before Lord Ellenborough declared it so to be. If a ship was once bottomried, the bond attached to the very last plank, and the bondholder might have that sold for his benefit. I have no doubt that when this vessel arrived at Bahia, if she was unable to prosecute her voyage, the bond instantly became due. The condition was gone, and the bond was good. That is the doctrine laid down by Mr. Justice Story in the *Draco*, and that was the doctrine I held in the case of the *Dante*. I do not think it necessary for me to enter minutely into the question as to whether all these repairs were necessary or not; perhaps the sum of from 2,000*l*. to 3,000*l*. was requisite, in order to make a complete repair; but, on the other hand, the vessel might have been brought to this country for a much smaller sum. I have, on the whole of the case, come to the following conclusion:—I think that a British vessel, coming into a foreign port, cannot be sold by the master, so as to confer a perfect title against his owners, and extinguish all mortgage claims, and all liens on bottomry or wages, even in a case of necessity. I do not say it might not be done where recourse was had to a court of justice, and a decree was made. That would override all other considerations to which I have adverted. I apprehend that the general maritime law of the world is directly opposed to the sale of vessels in the manner in which this has been sold, and to the consequences attempted to be engrafted upon it. I am of opinion that it is the duty of foreign purchasers to open their eyes, and to take care what kind of bargains they make, that it is their duty to guard themselves against liens which adhere to the ship. I am not satisfied in this case that there was any necessity for a sale, and therefore my judgment goes also on that lower ground. I am therefore of opinion that this was originally a valid bond, and that it can be lawfully enforced against the ship. I also give costs, it having been shown by affidavit that the value of the vessel would not satisfy the bond. The Court decreed the vessel to be sold.



## BANKRUPTCY.

## BANKRUPTCY.

**Vice-Chancellor KNIGHT BRUCE'S COURT**, reported by G. S. ALLERTON, Esq. Barrister-at-Law.  
**COURT OF BANKRUPTCY, LONDON**, reported by JOHN A. FORTHELMAY, Esq. Barrister-at-Law.  
**COURT OF BANKRUPTCY, DUBLIN**, reported by J. LEVY, Esq. Barrister-at-Law.

## COURT OF BANKRUPTCY, BASINGHALL-STREET.

Saturday, April 5.

(Before Mr. Commissioner EVANS.)  
*Ex parte* EDWARDS, *re* HAMER.  
*Equitable mortgage—Fixtures.*

*Fixtures on premises charged by way of equitable mortgage pass to equitable mortgagee.*

The bankrupt was indebted to Edwards in the sum of 250*l.* secured by the deposit of a lease, accompanied by a memorandum in the following terms, viz.:—"The lease you hold as collateral security for 150*l.* I am ready to convey to you whenever called upon so to do." There were on the premises comprised in the lease fixtures of the value of 25*l.* The premises and fixtures were sold, but did not realise sufficient to repay to Edwards the sum advanced by him. Edwards now applied to prove for the residue of his debt, and the question was, whether the fixtures formed part of his security, or whether the assignees were entitled to receive the sum for which they sold, such sum to be added to the residue to be proved for.

*Bagley*, for Edwards.*Jones*, solicitor, for the assignees.

Mr. Commissioner EVANS.—On the authority of *Ex parte Backhouse*, 2 M. D. & De Gex, decided that the fixtures passed under the equitable mortgage.

## COURT OF BANKRUPTCY, DUBLIN.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

Saturday, April 12.

(Before Mr. Commissioner PLUNKET.)

*Re* JAMES HURLEY.

*Concealing property—Arrest of bankrupt after adjudication.*

A bankrupt who is about to abscond, or to remove or conceal his property, may be arrested under the 4th section of the Irish Bankrupt Act, 12 & 13 Vict. c. 107 (English analogous, 12 & 13 Vict. c. 106, s. 94), even though adjudication has taken place; and upon being brought up and examined, he may be discharged by the Commissioner, such discharge to be indorsed on the back of the warrant upon which he is brought from the prison to the court.

The 4th section of the Irish Bankrupt Act and the 99th section of the English Consolidation Act are almost identical; they enact that where a Commission has issued, or a petition for adjudication has been filed against any trader, and that it shall be proved to the satisfaction of the Commissioner that such person is about to quit Ireland (or England), or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended, it shall be lawful for the Commissioner (or Court) to issue a warrant to seize the books, papers, goods, and chattels of such trader, or to arrest his person, and him safely keep until the expiration of the time allowed for opening such commission (or adjudication), or until such person shall be adjudged bankrupt, and be thereupon dealt with according to the laws relating to bankrupts. It has been held that if such person was so arrested before adjudication, the warrant was then spent, and that such warrant did not apply to an arrest after adjudication. The only decision on the point here was that of *Re Crompton*, before Mr. Justice Moore, in chambers; and the Commissioners having doubted its propriety, they granted a warrant some weeks ago, after adjudication, in the case of Ronaldson, but he had escaped to America, and it was not executed as far as his person was concerned. In the present case, the bankrupt was a trader, residing at Kinsale, in the county of Cork; and on the messenger of the Court going down, he found that the bankrupt was shut up in his house, the doors of which had to be broken open; but the house was perfectly empty, the goods having been previously removed and sold by auction. On affidavit of these facts, *Levy*, for the petitioning creditors, the Messrs. Lyons, of Cork, applied for a warrant under the 4th section, notwithstanding that the adjudication had taken place; and a special messenger having been sworn in, the bankrupt was arrested as he came out of the railway train at Cork, conveyed to prison in Dublin, and upon searching his person a hundred pounds in bank notes were found sewed in the lining of his vest. He was brought before the Commissioner on the following day, and examined at considerable length touching his estate and effects; and the petitioning creditors not seeking to detain him further, the Court directed

that he should be discharged. The form of the discharge was under the 6th section, which empowers the Commissioner to make such orders as to him shall seem meet (the same is in substance contained in the 99th section of the English Act), and was indorsed on the back of the warrant by which the bankrupt was brought from the prison to the court. The indorsement was to the effect that the bankrupt having been arrested by warrant under the 4th section, and having been brought up and examined touching his estate and effects, and his surrender having been taken, the Court doth discharge him from the said warrant, and grant him protection till the — day of —.

(NOTE.—This case is considered of great importance to the trading community, as it sanctions the principle of arrest, after as well as before adjudication, where the trader is about to abscond or conceal property. Heretofore, in order to effect an arrest after adjudication and before surrender, the bankrupt should be served with a summons to attend, to be examined, and, upon disobeying it, then a warrant was issued. In some cases such summons was only a notice to the fraudulent trader to escape, whilst, by the present proceeding, the arrest is effected without any previous notice or examination whatever.)

## INSOLVENT COURT, DUBLIN.

Reported by J. LEVY, Esq. Barrister-at-Law.

March 1851.

(Before Mr. Commissioner BALDWIN.)

*Re* ALLEN.

*Accommodation bill—Contracting a debt without probable means of payment—Evidence of fraudulent intent.*

Accepting an accommodation bill at a time when the acceptor is unable to pay his debts contracted for valuable consideration, is contracting a debt without probable expectation of paying same; and allowing the principal who received money for the bill to sell his chattels and leave the country without informing the parties who discounted the bill will be deemed evidence of an original fraudulent intention.

The insolvent was supported by *Creighton*, and opposed by *Phillips and Levy*, for the Royal Bank, under the following circumstances:—It appeared that he resided with his brother in the county Meath, who was a farmer and grazier, which business the insolvent also followed. A bill for 700*l.* was drawn by his brother, and accepted by him, for which the Royal Bank gave cash. This bill was renewed once or twice, and on each occasion accepted by the insolvent, his brother being the drawer, and, whilst the last renewal was running due, the brother sold all his farming-stock and chattels by auction, and absconded to America, without the insolvent ever having informed the bank of what he was doing. The insolvent himself was then arrested on a fiat or judge's order, as it was apprehended that he intended to follow his brother to America; and he now came before the Court to seek his discharge.

The opposing counsel contended, first, that accepting an accommodation bill that the party was not prepared to pay, or at a time when he was unable to pay his other debts, was contracting a debt under the 68th section of the Act (English analogous, 1 & 2 Vict. c. 110, s. 78), without probable expectation of payment; and, secondly, that omitting to inform the bank of his brother selling his chattels, and going to America, was evidence of an original intention to obtain the money fraudulently.

*Creighton*, for the insolvent, contended that the renewals of the bill ought to have led the bank to watch more closely, and inquire more particularly into the solvency of the parties. If they had not renewed the bill, they might have sued the brother, and recovered the amount before he left the country. The loss arose from their own laches: they were unable to trace a shilling of the proceeds of the bill into the possession of the insolvent, and his schedule had not been falsified, although there was a reference to the chief clerk for that purpose.

The Commissioner was clearly of opinion, that all the facts of the case fully sustained the points of opposition that had been raised. The interests of trade and the protection of bankers required that an example should be made, and he would remand the insolvent for sixteen months from the date of the vesting order.

## Irish Reports.

## COURT OF CHANCERY.

Reported by J. BLACKHAM, Esq. Barrister-at-Law.

Jan. 28, and Feb. 5.

MALCOLMSON v. MALCOLMSON.

*Will—Devise of freehold estate—Construction—Intent of cestui que trust—1 Vic. c. 26, s. 28, 30, & 31.*

*A. being seized of premises of a freehold tenure, devised them to B. "to be kept in trust for C. that*

*is, B. is to let the premises, and give the rent in my son C. for his support."*

*Held that C. took the absolute estate in the premises.*

*Held also, that the 1 Vic. c. 26, had put real and personal estate on a parity.*

This was a suit for the declaration of the plaintiff's rights as devisee of John Malcolmson, on the construction of whose will the question turned. The facts were, James Malcolmson, the father of John, being seized of premises held for three lives and ninety-nine years concurrent, one life being still in existence, by his will, bearing date the 14th August, 1840, devised in the following terms:—"Fourthly, I leave to my son, Thomas Malcolmson, the house I live in in Banbridge, the back-yard and garden, and the two fields in Ballyhally, &c. to be kept in trust for my son, John Malcolmson, that is, Thomas is to let the house, back-yard and garden, and said field, and give the rents thereof, after paying the ground rent, to my son John for his support," and the testator appointed Thomas Malcolmson trustee and executor. The testator, at the time of his making this devise, had four other sons, Samuel, Thomas, James, and Richard, and one daughter, Jane; to each of these, except Samuel, who was previously provided for, the testator gave absolute interests in the premises devised to them, John and Richard were both minors at the date of the will. In May, 1846, John Malcolmson died of full age and unmarried, having previously, 26th July, 1843, made his will, whereby he devised the premises given him by his father, to Thomas and Richard, the plaintiff, subject to a legacy of 100*l.* charged thereon. The defendant claimed, as heir-at-law of Samuel, who was the eldest brother. Thomas died in April 1847, having bequeathed his moiety to his sister Jane, who was also a defendant. James was always a person of weak mind and capacity, but by a consent entered into in the cause he was admitted to be capable of making a will.

*Hutton*, Q.C. with *Ross Moore*, for the plaintiff.

—The expression "his support," has been held to pass the whole estate, and the other expressions in the will indicate an intention in the testator that this estate was not to go to his heir-at-law. The state of John's mind is a reason for not giving him the actual management of the estate. Thomas took an absolute estate in trust. (1 Vic. c. 26, s. 28.) Therefore his *cestui que trust* must have taken a similar estate. The testator had four other children, all of whom took absolute interests in the estates devised to them, and though Richard was younger than John, yet the testator gives even to him an absolute estate. This is clear evidence of intention. He cited *Newland v. Shepherd*, 2 C. W. 194; S. C. 2, Ex. ca. ab. 139; *Peat v. Pole*, Amb. 387. And as cases in which there was no declaration of trust subsequently to the son attaining the age of twenty-one. (*Challenger v. Shepherd*, 8 T. R. 597, recognised by Lord Cottenham; *Moore v. Cleghorn*, 12 Jur. 591; *Knight v. Selby*, 3 Mac. & Gr. 29, S. C.; 3 Scott, N.R.)

*Brewster*, Q.C., *Andrews*, Q.C. and *S. Miller*, for the defendants.—The cases cited have no application. The Court cannot declare the intention against the positive rule laid down by the statute. Thomas takes but a life estate, and his *cestui que trust* can take no more. The 28th section applies only to persons taking themselves a beneficial interest; and 1 Vic. c. 26, s. 30, gives the same estate to the *cestui que trust* as was taken by the trustee. The question is, are there words in the will to shew a contrary intention? There is no authority in the books upon this section. On the 24th section it has been held that the intention must be apparent. (*Cole v. Scott*, 14 Jur. 25; 16 Sim. 259; 1 Mac. & G. 527.) The words "for support" mean during the life of John. Sect. 30 was intended to put an end to the indefinite state of the law as to the estate taken by trustees; but the question of the existence by implication of a life interest is still open. (*Jarman, Wills*, 228-30.) The power to let is consistent with the life estate; there are no words of limitation in this case as in *Moore v. Cleghorn*, and the other cases cited. *Newland v. Shepherd* was quarrelled with by Lord Hardwicke in *Fonereau v. Fonereau*, 3 Atk. 316. If the question of intention is open to us, the case of *Cole v. Scott* rules this case. *Nash v. Coates*, 3 B. & Ad. 13; *Trigonwell v. Sydenham*, 3 Dow. 194, P. C. were also cited. In all the cases cited the devisees got something more by the will than mere support.

*B. Stephens* appeared for Jane Malcolmson.

*Ross Moore* replied.

Wednesday, Feb. 5.—The LORD CHANCELLOR.—The bill in this was filed to ascertain the rights of persons claiming as devisees. [His lordship stated the facts.] The question for consideration depends on the construction of the devise by James Malcolmson to his son John, and is, whether the latter takes the entire interest in the premises devised or for his life only. The will was made after the passing of the recent Statute of Wills, 1 Vic. c. 26, we are not therefore embarrassed by the technicalities of the



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previously existing law. A devise of this nature would, before the passing of that statute, have conveyed only an estate for life, but the 28th section has altered the law in that respect; it is now reversed, and such a devise gives the entire interest or such other estate as the testator had in his power, and the expression of a contrary intention is necessary to limit that estate. It is contended, on the part of the plaintiff, that the construction of the devise must be governed by the provisions of the statute (s. 30), that where there is a devise to trustees, the *cestui que trust* will take the entire interest given to the trustees, and that in applying that doctrine to this case the trust will ensure to the *cestui que trust* as if made directly to him. A question has been discussed as to the meaning of the devise to trustees in the 30th and 31st sections. It is not easy to say whether these sections relate to the estate to be taken by the *cestui que trust* or to mere trust estates. It appears to me the estate of the *cestui que trust* is to be determined by the estate given to the trustee, as in the case of *Challenger v. Sheppard*. I do not think this is very material to consider, as on the whole I am of opinion John Malcolmson took the entire interest in the premises devised to him. The first case referred to was that of *Newland v. Sheppard*, 2 P. W. 194. Supposing that to be a valid decision, it is an authority to show that the devise in this case to the trustee in fee would give John Malcolmson the entire estate; that case was observed upon in *Fonereux v. Fonereux*, which has never since been overruled or declared not to be law. The marginal note in *Challenger v. Sheppard* is confirmatory of this view, and that case is followed in *Knight v. Selby*, and confirmed in *Moore v. Clegbora*. The Lord Chancellor, speaking of *Challenger v. Sheppard*, says, "in *Knight v. Selby*, Chief Justice Tindal says, 'This case cannot be distinguished from that of *Challenger v. Sheppard*, where it was held that when an estate in fee is devised to trustees in trust for A. B. without any limitation of the estate to the *cestui que trust*, the latter takes the beneficial interest in fee, these being the very words of the marginal note in *Challenger v. Sheppard*. Thus, then, the judges have that case cited, concur in the decision, and act upon it. No rule can, therefore, be better established than this is.'" *Challenger v. Sheppard* was again observed on in the case of *Bradshaw v. Bradshaw*, 5 Ir. Ex. R. 310, in the Court of Ex. I there said, in commenting on these cases, "but when we refer to the case of *Knight v. Selby*, where precisely the same question came before the Court of C. P. in England, we find that it was held that a devise of real estate to trustees, their heirs and assigns, in trust 'to the use of T. M. and J. M. and the children of the said W. M. and Mary Knight, in equal shares and proportions, as tenants in common,' gave to the *cestui que trust* an estate in fee. The Court considered the case of *Challenger v. Sheppard* as a binding authority upon the very point, and the judges, in delivering their opinions, expressly state that the true ground upon which *Challenger v. Sheppard* was decided was, that when lands are given to trustees and their heirs in trust for A. *cestui que trust* takes the absolute interest, though no words of limitation are used in the declaration of trust as to him." The Court decided that case on the particular reading of the will. My brother Richards concurred in the opinion I then expressed as to the authority of *Challenger v. Sheppard*, but my brother Leboy entertained some doubt of it; the Court, however, decided that case on other grounds. But there are some parts of the will in that case not devoid of applicability to the present. If the will in this case stopped at the words, "to be kept in trust for John Malcolmson," he would undoubtedly have taken the *cestui* interest. In construing this Act of Parliament, we must, as far as possible, construe it by the previously existing rules, and in *Cole v. Scott*, the Lord Chancellor Cottenham adopts this view; he says (p. 527), "Now, I find, on the fair construction of the will in question, adopting those rules of construction which are usually adopted in construing wills, that the contrary intention does not appear." If we consider these rules of construction, it will be found, that when there is, in the previous part of the instrument, a clear devise, conferring an absolute estate on the devisee, it would require clear words to cut down this limitation, and give him a lesser estate. The rule is stated in *Thornhill v. Hall*, 2 Cl. & Fin. 86: "I hold it to be a rule that admits of no exception in the construction of written instruments, that, where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, &c. it is not sufficient you should show a possibility; it is not even sufficient you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way." There are no words in this devise to alter the previous devise. I may go further, and say that the words "for support" make no difference in the devise. The matter to be considered is,—has the testator, in the first instance, expressed

his object in making this gift? If so, there must be a plain intention to restrict it.

The Statute of Wills has placed real estate and personal upon the same footing. (*Cole v. Scott*, ubi sup. 529.) I am of opinion, though the devise in this case is of rents and profits, it passes the absolute interest; there are decisions upon bequests of money in very similar terms, in which it has been held that the absolute interest passed to the *cestui que trust*. *Billing v. Billing*, 5 Sim. 232, establishes that proposition. It has been said that John Malcolmson was a minor; and, further, that he was incapable of conducting his own affairs. In *Billing v. Billing* the devisee was deaf and dumb; the bequest was in these words:—"I bequeath all my money, effects, &c. to (trustees), that they do invest and place the whole proceeds, &c. in such securities, &c. for the use and benefit of my nephew, and to be paid at such time and in such manner as they (the trustees) shall think fit; and when the said (nephew) shall arrive at the age of twenty-one, then that the said (trustees) shall by deed covenant and pay the interest or proceeds of the money and effects to (his nephew) as they shall think most for his advantage, in monthly or quarterly payments, for and during his natural life." These words are much stronger than any in the case before me to shew an intention to give a life estate only. The Vice-Chancellor (Shadwell) says, "In the first part of the will there is an absolute bequest; and I cannot cut down that which is plain because there is, in a subsequent part of the will, an imperfectly expressed intention that James E. Billing should take for life only." I find in the gift to John Malcolmson a plain bequest of an absolute interest, and the only words relied upon to limit that estate is, that the trustee is to "let the premises." In *Bickerton v. Cobbe*, 5 Myl. & Cr. 145, a bequest in equally strong terms was held to pass the absolute interest; I have not in this case any materials to cut down the absolute interest given by the statute; the subsequent declarations are not, in my mind, sufficient to cut down the previous absolute estate. These premises may hereafter be held for years after the expiration of the lives in the lease, in that event the authorities I have referred to settle the question as to personality, and I do not think I can hold differently as to the reality.

## EQUITY COURTS.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WALFORD, Esq. of the Inner Temple, Barrister-at-Law.

Feb. 27 and July, 1850.

COLEMAN v. MELLERSH.

Settled accounts—Opening accounts or giving leave to surcharge and falsify—Secondary evidence—Lunatic witness.

Where a gross sum had been alleged in an account between an attorney and his client, as professional charges, no bill of costs having been delivered, and it afterwards appearing that such gross sum considerably exceeded what was really due for professional charges, it was

Held, that the account must be taken as an open account, and that it could not be set right on a decree to surcharge and falsify.

Where it was proposed to read the entry of the defendant's clerk in a diary, such clerk having become lunatic, it was

Held, that as the making of the entry formed no part of the clerk's duty, such entry could not be read as evidence.

This was an appeal from the decree of the Vice-Chancellor of England directing the reopening of accounts between the defendants Mellersh and Marshall and their late client, William Coleman. The plaintiff is the widow and administratrix of Coleman. The bill stated a purchase in 1829, by Coleman, of the tithes at Dorking, with a view to resale to the owners of the lands affected by the tithes, and being in want of money to effect the purchase, employed Mellersh and Marshall, solicitors, who agreed to supply him with the money required for the purchase, in consideration of a bonus in addition to their professional charges. This bonus was alleged by one of the defendants to be 500*l.* by the other 1,000*l.* There had been, it was alleged, no delivery of accounts to Coleman, and the bill stated that there were apparent errors on the face of the accounts which were sufficient to open them, and that the bonus alone would induce the Court to reopen the account. The transaction between W. Coleman and the defendants formed the subject-matter of seven accounts, extending over the period between 1829 and 1832. It was admitted by the defendants that the first account, amounting to 3,200*l.* and for which W. Coleman had given a mortgage security dated the 28th October, 1830, had not been signed by W. Coleman, and that it contained an item of 600*l.* for professional charges, in respect of which no bill of costs

had been sent in. It appeared also, by a reference to the book from which the account must have been taken, that the real amount for professional charges could only have been 524*l.* 18*s.* 4*d.* According to the evidence of Mr. Lambird, a clerk of the defendants, the difference was accounted for by stating that there were certain fees to be paid to counsel, and other expenses which at the time it was agreed between W. Coleman and the defendants should be considered as included in and settled by the payment of the sum of 600*l.* It was endeavoured to be proved by the evidence of this clerk that W. Coleman had carefully inspected the accounts, and had had the documents connected therewith produced to him. The six subsequent accounts were all signed by W. Coleman, the seventh and last containing an item of 500*l.* which was treated in the argument as being in respect of the bonus. There was an indenture without date, but proved to have been executed on the 14th of May, 1830, by which W. Coleman secured to the defendants a sum of 500*l.* with interest, but it appeared by a memorandum, dated the 14th of May, 1830, that only one-half of this sum was then actually due. It was said by the defendants that this 500*l.* had nothing to do with the bonus, and also that the deed was never acted on, the 500*l.* secured by it being brought into the first of the seven accounts, and forming part of the 3,200*l.* in respect of which the mortgage of the 28th of October, 1830, had been given by W. Coleman.

Bethell, R. Palmer, and Humphreys, for the plaintiff, cited *Horlock v. Smith*, 2 Myl. & Cr. 495; *Pickering v. Pickering*, 2 Bea. 31.

Stuart and Gifford, for defendant Mellersh, cited *Alfrey v. Alfrey*, 1 Macn. & Gor. 87; *Hiles v. Moore*, 17 L. J. Chan. 385; *Morgan v. Lewis*, 4 Dow. 29; *Waters v. Taylor*, 2 Myl. & Cr. 526.

Rolt and Fleming, for defendant Marshall, referred to *Willis v. Jernegan*, 2 Atk. 251; *Harris v. Tremenhoe*, 15 Ves. 34.

Bethell, in reply, mentioned *Newman v. Payne*, 2 Ves. jun. 199; *Jenkins v. Gould*, 3 Russ. 385; *Montesquieu v. Sandys*, 13 Ves. 313; *Crossley v. Parker*, 1 Jac. & W. 460; *Bernett v. Taylor*, 9 Ves. 381; *Patterson v. Turford*, 3 B. & Ad. 690; *Phillips on Evidence*, vol. 1, p. 322; vol. 2, p. 210.

To prove that Coleman had gone over the accounts with a clerk of the defendants, who had since become lunatic, it was proposed, during the argument, to read from the diary of that clerk a memorandum to that effect.

The evidence was objected to, and it was claimed to be admissible as a contemporaneous entry, the clerk's insanity being equivalent to his death.

The LORD CHANCELLOR.—I think the evidence inadmissible, for the entry appears to be nothing more than a mere private memorandum; it was no part of the clerk's business to have made it.

## JUDGMENT.

July, 1850.—The LORD CHANCELLOR.—The decree appealed from directs an open account to be taken between the late Mr. Coleman and Messrs. Mellersh and Marshall, attorneys, at Godalming. The petition of appeal not only disputes the propriety of this direction, but prays that the bill may be dismissed. This is proved by the defendants' own case to be an untenable proposition, as will appear from the observations I am about to make. The only question is, whether the case proved justifies the decree as pronounced, or whether it ought to have been limited to a direction that the plaintiff should be at liberty to surcharge and falsify the accounts. There is a material difference in the principle on which the Court deals with settled accounts with reference to those two kinds of decrees, as there undoubtedly is in the effect in working them out. A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify upon the supposition that one error having been proved, others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, shew that the alleged settlement ought not to be considered as an act binding upon the party signing, and that it would be inequitable for the accounting party to take advantage of it, the Court is not content with enabling the party to surcharge and falsify an account which never ought to have been so settled; but directs the taking of an open account. Amongst the grounds on which the Court rests the application of this principle none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts proved that he possessed and abused the confidence which had been reposed in him; all these appear to me to concur in the present case. It is not possible from the evidence to ascertain with any degree of certainty at what time the late Mr. Coleman first became the client of Messrs. Mellersh and Marshall, nor does it seem to be very material, not-

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withstanding the anxiety displayed by Mr. Limbird, the witness for the defendants, to fix it at the autumn of 1829. I cannot doubt but their management with him, and their stipulation for a bonus over and above their professional charges, was correct, and arose from the application by him for their assistance in carrying into effect the purchase and resale of tithes. If Mr. Coleman was not a client of Messrs. Mellersh and Marshall at the time this stipulation was made, it is clear that it was the condition upon which they would undertake the duties of their professional calling. It would seem clear that the 500*l.* mentioned in the memorandum was the same 500*l.* for securing which the undated deed was executed. And Limbird says that such 500*l.* was brought into the account upon which 3,200*l.* was made to appear to be due from Mr. Coleman, and for which the security of the 28th of October, 1830, was given, and that the 500*l.* therein mentioned was the 500*l.* agreed to be given as a bonus to Messrs. Mellersh and Marshall. If such were the facts, the case would be that of a bonus in consideration of future profits, secured with interest from the date, taken by an attorney from his client under an account, and by a deed representing that the whole 500*l.* was an actual debt, the attorney by a memorandum acknowledging that half the sum only was actually due. It was argued at the bar on behalf of Mr. Marshall that the 500*l.*, for which the undated security was given, had nothing to do with the bonus, if the proposition was admissible and true, the position of the solicitor would not be improved. The security represents 500*l.* as actually due, and which, if it did not consist of the bonus, must have consisted of advances or costs, and provides for interest at five per cent. from the date, and the memorandum admits that this statement is false, and that 250*l.* only has been paid. It was also said that the interest was never charged upon this 500*l.*, but the solicitors took by their security the means of compelling payment of interest, and I am considering the transaction for the purpose of ascertaining the position in which they have placed themselves with reference to their client, and how they had used the power and influence they had acquired over him and his affairs. Those transactions are left in total obscurity by the defendants, whereas they might, if the facts were sufficiently proved, show how the 250*l.* had become due, and how the remaining 250*l.* had been subsequently advanced so as to entitle them to the whole 500*l.*; but this not having been done, it must be assumed, upon the ground of the memorandum alone, that the 250*l.* remains wholly unaccounted for, the 500*l.* having been treated as the amount of the debt. The Vice-Chancellor decided this case principally upon the item of 600*l.* for costs in the Bill, making 3,200*l.* due from Mr. Coleman; and although there is much more in the case, I think that item quite sufficient to support his decree. It is proved that at this time the costs of the solicitors against their client amounted to 52*l.* 18*s.* 4*d.*, was the whole that, according to their statement, they could have been entitled to demand; 600*l.*, however, was charged as due to them for costs. Mr. Limbird, their witness and clerk, endeavoured to account for this by stating, that there were heavy fees to counsel then due and unpaid, not included in their bills, and that the 52*l.* 18*s.* 4*d.* was raised to 600*l.* in order to provide for such fees. This, however, is not the ground taken by the defendant Marshall, who says, in his answer, that such addition was made at the client's request as an additional remuneration; but of this statement, or of the amount of fees due, no evidence is given. It must therefore be assumed that the 3,200*l.*, for which the security of the 28th October, 1830, was given, consisted in part of 600*l.* claimed as the amount of bills of costs, but of which no bills of that amount existed, and the amount in the books of the solicitor being considerably less than that sum. This is not only an error in the sense in which the term is used for the purpose of opening accounts, but a misstatement and false representation designedly made. It cannot be attributed to the bounty of the client, for of that or of any such intention there is no proof; and if in anticipation of costs not paid or ascertained, and such costs have not been proved to have subsequently become due, it is obvious that the security at the utmost can only be available for what may, upon investigation, be found to be due. After what I have already observed upon, it appears to me to be unnecessary to say anything upon the minor points which arise upon an examination of this account, making the 3,200*l.* due. These more important points prove not only that the accounts were erroneous, but that the dealings were such as could not be maintained between any parties, and certainly not as between solicitor and client. It was indeed argued from the pressure of the case, that whatever errors there might be in the first account, the subsequent accounts would not be affected by it, inasmuch as there were no balances on either side, and that the suppression of a balance really due, or destroyed by a false debit, would not affect a subsequent account; but it is

clear that all the subsequent accounts are affected by the vices of this first; and, indeed, except from the additional difficulties in which Mr. Coleman was afterwards involved, the relative situation of the parties was not altered by any subsequent transactions. I am, therefore, of opinion, that the Vice-Chancellor's decree was right, and the petition of appeal must be dismissed, with costs.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

## STEVENS v. THE SOUTH DEVON RAILWAY COMPANY.

Jan. 16, 17, and 24.

*Railway—Injunction—Application of the funds of the company to payment of expenses of obtaining an Act of Parliament—Using name or seal of the company—Undertaking—Scheme for commutation of privileges of one class of shareholders in a railway company—Breach of trust—Difference between public companies and private partnerships.*

*The South Devon Railway Company having been incorporated by Act of Parliament, and empowered to raise capital in the usual way, obtained a second Act of Parliament, whereby they were authorized to raise, by the creation of new shares or stock, a further sum not exceeding a certain amount; such new shares to be of such nominal amount and entitled to such privileges as the company might determine. In 1847 a resolution was accordingly passed, that a certain sum should be raised by the creation of shares of half the amount of the original shares, and that 6 per cent. should be guaranteed for a limited period on all calls, &c. paid thereon, and that such guarantee should not exclude the holders of such half-shares from participating in any higher rate of dividend for the time being payable on the whole shares. The plaintiff belonged to the class of original shareholders, and, as alleged by him, the directors were largely interested in the half-shares. In 1850 the directors endeavoured to obtain an Act of Parliament to authorize the creation of new shares, to bear interest in perpetuity, at any rate not exceeding 6 per cent. per annum, but they failed. At a general meeting held on the 12th November last, the directors recommended a scheme for the commutation of the privileges attached to the half-shares, similar to that previously proposed, and their report was adopted, and they were authorized to take all necessary steps, and particularly to apply to Parliament for additional powers to carry out the scheme. The plaintiff, considering the scheme as calculated to give a benefit to the holders of the half-shares at the expense and to the loss of the original shareholders, filed his bill to restrain them from proceeding to carry the scheme into effect, and moved for an injunction to restrain them from applying the funds or credit of the company in payment of the costs, &c. of soliciting the Bill in Parliament, and from using the name or seal of the company in so doing:*

*Held, that the nature of the case was not such as to make an application to Parliament by the company for the purpose of authorizing the scheme in question, a breach of trust or of duty to the company, the principles of private partnerships, unconnected with public duties and capable of dissolution, not being strictly applicable to companies of this kind:*

*That the defendants, however, were not at liberty to apply the funds of the company in their hands in payment of the costs, &c. of so much of the Bill as proposed to effect the scheme for the commutation of the privileges of the holders of the half-shares; but*

*That the defendants were at liberty to use the name and seal of the company in soliciting the Bill, upon giving an undertaking that the plaintiff and other members of the company, alleging themselves to have an adverse interest, should be at liberty to appear in opposition to the Bill.*

This was a motion to restrain the defendants, the directors of the South Devon Railway Company, from applying the funds of the company in payment of the expenses, &c. of carrying a Bill through Parliament, which was intended, as alleged, to affect the relative rights of different classes of shareholders to the injury of one class and the corresponding benefit of another; and from using the name or seal of the company in soliciting such Act. The facts and arguments are fully set out in the judgment.

Turner, Stevens, and Cairns, for the motion.  
R. Palmer and C. Hall, contra.

The following cases were cited:—*Const v. Harris*, Turn. & R. 496; *The Attorney-General v. Andrews*, 14 Jur. 124, 905; *The Attorney-General v. The Guardians of the Poor of Southampton*, 17 Sim. 6; *The Attorney-General v. The Corporation of*

*Norwich*, 16 Sim. 225; *Muntz v. The Shrewsbury and Chester Railway Company*, 15 Jur. 26; *Went v. Society of Attorneys*, 1 Coll. 370; *Heathcote v. The North Staffordshire Railway Company*, 2 Man. & G. 100.

**THE MASTER OF THE ROLLS.**—This was a motion made on behalf of the plaintiff for an injunction to restrain the defendants from using or applying the funds, moneys, and credit of the South Devon Railway Company in, for, or towards the payment of the costs, charges, and expenses of or incidental or preparatory to the introduction into and prosecution in Parliament of two Bills, mentioned in the plaintiff's bill of complaint, or either of them or any other Bills for the like purpose, and also from introducing or soliciting the said two Bills, or any other Bill for the like purpose, or using the name or seal of the company for the introducing or soliciting such Bills or either of them. The South Devon Railway Company was incorporated by an Act of Parliament, to which the royal assent was given on the 4th of July, 1844, and by which it was provided that the sum of 1,100,000*l.* should be the capital of the company, and that the same should be divided into 2,200 shares, each of the amount of 50*l.* and that every person subscribing 50*l.* to the capital was to be deemed a shareholder of the company, and to have one share therein allotted to him, and after the whole sum of 1,100,000*l.* should have been subscribed for, and one-half thereof had been actually paid up, the company were empowered to borrow on mortgage or bond such sums of money as should from time to time be authorized to be borrowed by order of the general meeting, not exceeding in the whole the sum of 366,500*l.* By a resolution of the company, entered into in August 1844, it was resolved that the directors should take measures to reduce the amount of the capital of 1,100,000*l.* to 1,000,000*l.*; and, consequently, 2,000 of the shares which were authorized to be issued were not issued. By an Act of Parliament, which received the royal assent on the 28th of August, 1846, the company were authorized to raise, by the creation of new shares or stock, a further sum, not exceeding 500,000*l.*, with a proviso that the new shares so to be created should be of such nominal amount, and entitled to such privileges, as the company might determine. At an extraordinary meeting of the shareholders, held on the 9th of January, 1847, the directors were authorized to raise an additional capital of 500,000*l.* in such manner as they might deem expedient, and in the interest of the company; and on the 25th of January, 1847, in pursuance of that authority, the directors resolved, that the sum of 500,000*l.* should be raised by the creation of half-shares of 25*l.* each; on the 15th of March, 1847, that 6 per cent. per annum should be guaranteed until the 15th of March, 1847, on all calls paid, and on all sums received in anticipation of calls, by authority of the board of directors, in respect of such half-shares, and that the guarantee should not exclude the shareholders from participating in any higher rate of dividend for the time being, payable on the whole shares. In pursuance and on the terms of this resolution, the directors, on the 15th of March, 1847, issued 20,000 half-shares of 25*l.* each. Under these circumstances, there are two classes of shareholders, namely, the holders of the original or 50*l.* shares, and the holders of the 25*l.* or half-shares. The plaintiff belongs to the first class; he is the holder of, or interested in, a great many original shares, and has paid about 70,000*l.* for calls thereon: he is not the holder of any 25*l.* or half-share. It is said that the company have borrowed all the money they are entitled to raise on mortgage or bond, and that the railway has been completed and opened for traffic from Exeter to Plymouth, a distance of fifty-seven miles, and is yielding a considerable yearly revenue, but that no dividend has yet been declared on either the whole or the half shares. In this state of things differences have arisen between the shareholders of the two classes as to the true meaning and effect of the resolution of the 19th of January, 1847. The plaintiff, who is interested only in the whole shares, alleges that the directors are largely interested in the half-shares, and although the holders of the half-shares are entitled to such and only such privileges as were given to them by the resolution of the 19th of January, 1847; yet the directors, in the year 1850, introduced, or caused to be introduced, into Parliament a Bill purporting to empower the company to create new shares to an amount not exceeding 625,000*l.*, to bear interest in perpetuity at any rate not exceeding six per cent. per annum; and the plaintiff apprehending that the effect of such Bill, if passed into a law, will be to alter the existing and established rights of the holders of the original shares, and the holders of the half-shares in the company as between themselves, and to vary the terms upon which the half-shares have been created, applied to be heard before the Committee of the House of Commons, to which the Bill was referred, and the committee reported that the preamble of the Bill was not proved, and the Bill was for that time abandoned. The directors,

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## V. C. KNIGHT BRUCE'S COURT.

however, continued to attend to the subject, and with a view to the difficulties arising out of the opposing claims of the two classes of shareholders, a special meeting of the shareholders was held on the 24th of September last, and it was then resolved that it appeared for the interest of the company that some equitable arrangement should be made with the holders of the half-shares with a view to admit both classes of shareholders to an immediate participation in the revenues of the company, and the directors were requested to put themselves in communication with some of the leading shareholders of both classes with a view to devise some scheme for the purpose, and that scheme was to be submitted to a meeting of shareholders, to be afterwards convened to consider it. The directors, having consulted Mr. A. and received a report from him, issued a notice, whereby they convened an extraordinary meeting of the shareholders of the company, to be held on the 12th of November last, to receive and consider a special report of the directors relative to the proposed commutation of the privileges attached to the 25l. or half-shares of the company referred to the consideration of the board by a resolution of the special meeting of the 24th of September, and also relative to the other matters in the same notice stated. At this meeting the directors made their own report, stating and recommending a scheme for the proposed commutation of the privileges attached to the 25l. or half-shares in the company. The report of the directors was adopted, and the directors were authorised to take all necessary and proper measures for the purpose of giving effect to the recommendation therein contained, and particularly to apply to Parliament for all such additional powers as might be requisite for that purpose; and accordingly the directors have taken, and are taking, the necessary steps for that purpose. I do not think it necessary to discuss the merits of the proposed scheme for the purpose of considering whether in itself, and independently of the peculiar circumstances which may on the whole recommend it to the adoption of the company, it is calculated to promote either its general interest, or the peculiar interest of either of the two classes of shareholders into which it is divided. The plaintiff alleges that it is calculated to give a benefit to the holders of the half-shares, at the expense and to the loss of the holders of the whole shares. It may be so, and it may at the same time be possible that even such an arrangement and such a commutation of the privileges attached to the 25l. or half-shares brought at first it would be productive of some loss to the shareholders of the whole shares, may ultimately be so beneficial to the general concerns of the company as in the end to be profitable to the holders of the whole shares themselves. Into this I do not enter; for it seems to me to be clear that the scheme, if authorised and carried into effect, will very materially alter the existing rights and interests of the two classes of shareholders who are interested in it. It is, I think, admitted that the company itself has no legal power to do this. Parliament alone has power to authorise it; but I cannot say the nature of the case is such as to make an application to Parliament by the company for the purpose of authorising the scheme a breach of trust or of duty to the company. To hold otherwise would, I think, be applying strictly to a company of this kind the principles admitted to be applicable to a private partnership—private partnerships resting on private contracts, unconnected with public duties and interests, and capable of dissolution. It was, indeed, stated that if the application to Parliament were made by or in the name of the company, the plaintiff and other members of the company, alleging that they had an adverse interest, would not be allowed to appear in opposition to the Bill. I own I have great difficulty in supposing that such is the course of proceeding in parliamentary committees; but it is said that some instances have occurred in which this has been done, and it is therefore satisfactory to me that there is in this Court such a precedent as is found in the case of *Parker v. The Dunn Navigation Company*; and in this case the defendants have offered to give the undertaking that was given by the defendants in that case; and upon their giving that undertaking, I am of opinion that I ought not to restrain the defendants from using the name or seal of the company for the introducing or prosecuting the Bill. It is plain that using the name or seal of the company may subject the company to some liability; and if the Bill should not pass, or if it should pass without a clause authorising the payment of the costs out of the funds of the company, or other funds, it may be a question hereafter how those costs ought to be paid,—that seems to me to be a question which the company in their authorised proceedings may be left to deal with when it arises,—and in respect of such future liabilities, I think I ought not now to interfere. But as to the present funds of the company, the case seems to be different. Those funds consist of moneys paid or subscribed for the general purposes of the company, for the purposes in which all

the shareholders of the company are interested, according to the contracts now subsisting between them: it is beyond the power of the company itself to alter and modify these contracts, and I think it is reasonable, and within the jurisdiction of this Court, until legal authority is obtained, to restrain the defendants from applying the funds or money of the company now in their hands in or towards the payment of the costs of so much of the Bill as proposes to effect the scheme for the commutation of the privileges attached to the 25l. or half-shares.

Some discussion then took place as to the form of the order.

Palmer then gave the undertaking alluded to in the judgment, and the injunction was granted till further order, in the limited terms therein also mentioned.

### VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

April 16 and 17.

*Ex parte CROSFIELD, re THE NORTH OF ENGLAND  
JOINT-STOCK BANKING COMPANY.*

*Joint-Stock Companies Winding-up Acts—Jurisdiction of the Master—Contributory—Executor.*

*A. and B. were the executors of C. D. the proprietor of thirty shares in a joint-stock banking company. C. D. died in 1838, and probate of her will was entered in 1840 in the company's books. In the dividend-lists of 1845 and 1846, A.'s name appeared as executor, but the warrants were made out in favour of A. simply. Notices were also addressed to A. alone, though in A.'s letters to the manager of the company he occasionally referred to his being executor. In 1845, A. alone, as executor, transferred fifteen of the shares to a purchaser. The company being ordered to be wound up, the Master placed A.'s name alone on the list of contributories, and excluded that of B. but subsequently he reviewed his decision and placed B.'s name on the list as personal representative of C. D. On an appeal by B. from this decision, the Court*

*Held, that the Master had jurisdiction, under the 17th section of the Act of 1849, thus to review his decision: and further, that B.'s name was properly placed on the list of contributories.*

This was a motion on behalf of Mr. James Crofield, that so much of the certificate or order of the Master charged with the winding up the North of England Joint-Stock Banking Company, dated the 12th day of March, 1851, as included the said James Crofield in the said Master's settlement of the list of contributories as a contributory for fifteen shares in the character of one of the personal representatives of Ann Hall, deceased, might be discharged or reversed, and that his name might be struck out of the said list, and that the official managers might be ordered to pay him the costs incurred by him in defending the proceedings of the official managers in this matter, and of the present application. The certificate of the Master was in substance as follows: I, James Wm. Farrer, hereby certify, at the request of James Crofield, that the official managers made out, on the 22nd of November, 1848, a list of contributories, wherein was included the names of the said James Crofield and of Richard Hall as contributories of fifteen shares of 100l. each, in the character of executors of Ann Hall, deceased, and on the 22nd of December following I settled the said list, and after reading (among other documents) four dividend warrants payable to the order of the said Richard Hall, and hearing his admission that he had received dividends on the shares, and reading the letters of the said Richard Hall after mentioned, I included his name in the settled list of contributories, as a contributory personally responsible for the said fifteen shares, and struck out the name of the said James Crofield. I was, on the 28th of May, 1850, applied to by the solicitors for the official managers to reconsider and review my settlement of the list, and to alter the same, by placing the names of the said Richard Hall and James Crofield thereon for the fifteen shares, in the character of personal representatives of Ann Hall, deceased. On the 26th of February last, I included the name of James Crofield as a contributory in respect of the fifteen shares as one of such personal representatives; and on the 7th of March I reviewed the settlement of the list as to the said Richard Hall, and included his name as a contributory in respect of the said fifteen shares as one of such personal representatives.—J. W. Farrer. The facts were, that by deed of transfer, dated the 10th of March, 1835, thirty shares were transferred to Ann Hall, widow, with the consent of the managing director of the bank, and the same was duly completed and registered. Mrs. Hall, by her will dated the 19th of November, 1829, bequeathed the residue of her personal estate (which included the thirty shares) unto and equally between her son Richard Hall and her daughter

Rebecca Hall, and appointed her said son and James Crofield (the appellant) her executors. She died on the 30th of December, 1838, and her will was proved by both executors on the 13th of April, 1839. From the share-ledgers of the company it appeared that "Probate of Ann Hall's will was exhibited 9th of March, 1840," and the names of Richard Hall, her son, and James Crofield entered as executors. In the dividend lists of 1845 and 1846 the name of Richard Hall appeared as Ann Hall's executor. The dividend warrants of March and September 1845 and 1846, were made out in favour of "Mr. Richard Hall" only, and signed by the managing director, or the manager of the company, "for the directors and company." Notices of matters of business, dated 1842, 1843, 1844, 1845, and 1846, were sent by the manager to Mr. Hall, and addressed to him without any reference to his being an executor, and in some of them speaking of his dividends on thirty shares. On the 7th of March, 1845, Mr. Hall wrote to the manager, "I will thank you to remit the dividend on the thirty shares in the name of Ann Hall." "Are there any other dividends due to the estate of Ann Hall?" On the 23rd of September following: "You would oblige me by forwarding the interest on the thirty shares of the late Ann Hall, which is in the name of Richard Hall, executor." On the 29th of September, 1846: "I believe there was a dividend due from the North of England Bank on the 15th of this month; will you please to remit me mine?"

Mr. Crofield affirmed that he had had nothing whatever to do with the shares, and that it was Mr. Hall and not he who exhibited the probate at the office of the company. On the 15th of October, 1845, Mr. Hall transferred fifteen of the thirty shares to a purchaser, and the transfer was duly entered in the books, and consented to by the directors, but the notice of their transfer when entered was given to the bank by Mr. Hall, as "executor of the said Ann Hall."

Russell and Randall, in support of the motion, contended that the Master had no jurisdiction to review his settlement of the list, but that by the terms of the Winding-up Act, 1848, he was concluded from so doing. They cited *Best's* case, before Lord Cranworth. (See 16 Law T. 340.)

Bacon and J. V. Prior argued that by the Winding-up Act of 1849 the Master had authority to review such a matter, and that Lord Cranworth had not decided the case referred to on any ground now insisted on.

The VICE-CHANCELLOR said that the ground of the decision did not appear in the report, but Lord Cranworth, in a note his Honour had received from him, said that he decided the Master to have no jurisdiction, because the matter had come before his Honour. The present case, his Honour was of opinion, was within the 17th section of the Winding-up Amendment Act, 1849, which empowered the Master to reconsider and review any order or proceeding which might have been made by, or might have taken place before, him under the Act, upon such terms and in such manner as he might think fit. He could conceive the possibility of a case in which the Master should so exercise his discretion under that section as that it might be fit to bring the matter under the attention of the Court, and the Court might dissent from what had been done, and direct that the matter should remain as it was.

Russell, on the main question, insisted that the whole proceeding on the part both of Mr. Hall and of the company shewed that Hall was treated as the absolute owner of the shares, and not as the executor of Ann Hall.

Thursday, April 17.—Randall, on the same side, referred to several of the clauses of the deed of settlement, to prove that the course of proceeding was such as to shew that the bank considered they were dealing with an absolute owner of shares, although the terms "executor" and "as executor" might occasionally appear.

Bacon was not called on to reply.

The VICE-CHANCELLOR.—How this case would have stood if Mr. Hall had not been an executor of the will of this lady it is not necessary for me to say. He was an executor, and joined with Mr. Crofield in proving the will of Mrs. Ann Hall, and, therefore, it appears to me that there is no case to shew that he was owner, or that his membership of the company was in any character than that of executor of the will in question. No act which took place, no circumstance that occurred between Mr. Hall and the company appears on the evidence to have taken place, or to have occurred in any other character, or to be attributable to any other character than that of executor. If any of the dealings between the company and Mr. Hall had been shewn to be inconsistent with the proper dealings between them and an acting executor of a will, the case might have been different; but such dealings were consistent with such character. If it was correct in the Master to review the decision he originally came to respecting the settlement of the list of contributories, and I think

## V. C. KNIGHT BRUCE'S COURT.

it was, I am of opinion that the Master came to a correct conclusion on such review, by placing the name of Mr. Crosfield on it in his character of executor. No circumstances appear to have arisen before the Master to satisfy my mind that such ultimate conclusion at which he arrived was not a correct one, nor to satisfy my mind that the course he took in proceeding to review his former decision was otherwise. I wish to know whether the counsel for Mr. Crosfield considers he has a case to shew that any circumstances took place which can alter Mr. Crosfield's position in consequence of the Master's decision? Whether any such circumstances have arisen as render it inequitable that the Master should have reviewed his decision as he has done? [Russell said he had no information sufficiently explicit on the point.] The motion must be refused.

Bacon applied for costs, but the Court refused to give them, and directed those of the official managers to be paid out of the estate.

Thursday, April 17.

*Ex parte* MEUX'S EXECUTORS *re* THE ROYAL BANK OF AUSTRALIA.

Joint Stock Companies Winding-up Acts—Contributory.

A. B., a director of a banking company, and the holder of twenty shares, in pursuance of a resolution of the directors, in 1840, signed a letter, agreeing to take 500 shares in addition to those he then held, and, in 1841, he gave a promissory note for 5,000*l.*, payable five years after date, in respect of these shares. Upon A. B.'s death his executors, in 1842, applied to the directors to ascertain the number of shares held by A. B., to which application it was replied that he held twenty shares. The executors afterwards sold the twenty shares. In 1843 the directors resolved to cancel the 500 "credit shares held by A. B.," and the promissory note, it appeared, was also cancelled. In 1850, an order to wind up the company was made. The Master placed A. B.'s executors on the list of contributories in respect of 500 shares. On appeal the Master's decision was reversed.

This was a motion on behalf of the Rev. Thomas Maude and Alfred Turner, executors of Thomas Meux deceased, that the decision of Master Richards, who was charged with the winding-up of the above-named bank or company, whereby the names of the said Thomas Maude and Alfred Turner, executors of the said Thomas Meux, had been included in Class 5 of the list of contributories, in respect of 500 shares, might be reversed, and that the names of the said Thomas Maude and Alfred Turner might be struck out of the said list of contributories of the said bank or company. Mr. Thomas Meux was one of the directors of the company, and the holder of twenty shares, and he had signed the letter, dated the 7th of August, 1840, and set out in *Robinson's case* (ante, p. 14.), in respect of 500 shares. Pursuant to a resolution of the directors, passed on the 29th of September, 1841, Mr. Meux gave the following promissory note, as a provision for payment of the calls on the 500 shares taken by him on credit:—

"London, 2nd Oct. 1841.

"Five years after date I promise to pay to the trustees of the Royal Bank of Australia the sum of five thousand pounds, with interest at the rate of 5*l.* per cent. per annum, value received.

"THOMAS MEUX."

In the general ledger of the company the following entry under Mr. Meux's name appeared:—

"Dr.

"1841. Dec. To subscribed stock ..... £5,000

"1842. Dec. To bills receivable ..... 5,000

£10,000

"Cr.

"1841. Dec. By bills receivable ..... £5,000

"1842. Dec. By subscribed stock ..... 5,000

£10,000."

After Mr. Meux's death, Mr. Turner, his executor, wrote the following letter:—

"To the Directors of the Royal Bank of Australia, 2, Moorgate-street, Louthbury.

"32, Red Lion-square, 24th Feb. 1842.

"Gentlemen,—I shall be obliged by your informing me, as executor of the late Thomas Meux, esq. of Bloomsbury-square, what shares that gentleman held in your company, and whether there is anything due to or from him in respect of them, as I wish, before proving the will, to ascertain the amount of Mr. Meux's property.

"I am, gentlemen, yours, &c.

"ALFRED TURNER."

To this letter the following answer was received:—

"Royal Bank of Australia, 2, Moorgate-street.

"London, 2nd March, 1842.

"Sir,—Your letter of the 24th ultimo, addressed to the directors, came before them this day at the meeting of the board, and in reply I am desired to

state that the late Mr. Meux held twenty shares in the Royal Bank of Australia, of 50*l.* each, and on which 10*l.* per share has been paid.

"I am, Sir, your most obedient servant,

"GEO. H. WRAY.

"To Alfred Turner, esq. 32, Red Lion-square." On the 27th of July, 1843, Mr. Turner addressed the following letter to Mr. Wray:—

"32, Red Lion-square, 27th July, 1843.

"Sir,—I shall feel obliged by your informing me if there is any and what interest due and receivable on the shares of the late Mr. Thos. Meux in the Royal Bank of Australia to the executors, of whom I am one.

"I am, Sir, your most obedient servant,

"ALFRED TURNER.

"To G. H. Wray, esq.

"Royal Bank of Australia, 2, Moorgate-street." It did not appear whether any reply to this letter was sent. Mr. Turner, in an affidavit, stated that he "never, upon any occasion, received the least information from Mr. Wray or the directors of the said bank as to 500 shares said to have been held by the late Mr. Meux."

The following entry appeared in the books of the company:—

"At a meeting of the Royal Bank of Australia, held on Wednesday, 29th June, 1843:

"Present Messrs. Sutherland, M. Boyd, Connell, Mitchell:

"The subject of the credit shares, held by the late Mr. Meux, was brought under the attention of the court, and after full consideration it was resolved that they be cancelled.

(Signed) "J. W. SUTHERLAND."

The name of Mr. Meux on the promissory note was cancelled. The twenty shares were duly transferred by Mr. Meux's executors. The company having been ordered to be wound up, the Master placed Mr. Meux's executors on the list of contributories in respect of 500 shares.

Bacon and Busk, in support of the motion, cited *Cockburn's case*, 15 Jur. 28, and *Robinson's case*, ante, p. 14.

*Malins and Daniel*, for the official manager.

THE VICE-CHANCELLOR said,—How this case would have stood if Mr. Meux had continued to live, and had himself dealt, and had been dealt with, as his executors dealt, and were dealt with, it was unnecessary to say: his Honour's opinion being that the executors did not, in every sense and for every purpose, stand in the same position as Mr. Meux, the personal knowledge possessed by whom they had not. Again, he thought it unnecessary to say whether, in the dealings between the executors and the directors, the latter exceeded the powers confided to them by the company or shareholders at large, because there were some cases in which, although an agent did exceed his authority, he bound his principal: there were, of course, many cases in which, exceeding his authority, he did not. The present, however, not being one of those cases, he thought, that if in what the directors did they exceeded their authority, the company were nevertheless bound. The facts were these: the executors of Mr. Meux, without any personal knowledge of the nature or extent of his connection with the bank, applied to the directors, or to the person who was conducting their affairs, or representing them, to know what was the extent and what was the nature of that connection, and their answer, in substance and effect, although not in terms, was, that the extent of that connection was, that Mr. Meux was the holder of twenty shares. This took place in 1842: the executors acted upon that information; they sold the shares, and considered, as they had a right to consider, their connection with the company as determined. More than seven years passed away, during the whole of which that mistake, if there was one, or misrepresentation, if there was any, was not corrected. Everything went on on each side, on the footing of the accuracy of the representations made to the executors in 1842. In 1850, more than seven years afterwards, a petition was presented for the purpose of winding up the affairs of the company, and an order was made upon it. Then it was said by the official manager, on behalf of the shareholders, that this representation, thus made by their agent, was to go for nothing, and that the executors were to stand exactly in the same position as they would have stood if they had been told that the whole 500 shares had been allotted. He thought that was against equity, if not against the law, and he could not place the names of these executors upon the list of contributories. He dissented from the Master's view.

Thursday, April 24.

*Re* THE GODOLPHIN MINING COMPANY.

Joint-Stock Companies Winding-up Acts.

*Hislop Clarke*, on behalf of the official manager of the above-mentioned company, moved that the order made by the Vice-Chancellor on the 30th of November last (see 16 Law T. 209) might be discharged, all the contributories of the com-

pany but two, one of whom was out of the jurisdiction, and the other insolvent, having compromised, with the consent of the Master, the call of 4*l.* per share, which had been made on the 19th of July. The Master having been applied to to sanction the payment by the official manager of the liabilities of the company, had directed that this application should be made before the funds were parted with. The official manager was willing that the costs of all parties appearing on this motion should be paid out of the estate.

Follett, for the contributories who obtained the order of the 30th of November, consented.

The VICE-CHANCELLOR said that, as Sir George Rose, the Master, considered the arrangement to be proper, he would discharge the order as asked.

## V. C. LORD GRANWORTH'S COURT.

Reported by W. H. BENNETT, Esq. of Lincoln's Inn, Barrister-at-Law.

Tuesday, April 15.

RICHARDSON AND ANOTHER *v.* GILBERT.

Copyright—5 & 6 Vict. c. 45.

Seemle, that the composition of an article in a periodical publication must be actually paid for by the proprietor of such publication, before he can obtain a legal title to the exclusive copyright of such article.

Where it distinctly appeared by the evidence that the plaintiffs had been supplied with the articles to a periodical publication, on the terms that they should be paid for, such articles will be protected by injunction from being published in any other periodical work.

This was a motion to dissolve an injunction which had been obtained *ex parte*, restraining the defendant (a bookseller in London) from printing, or publishing, or selling, or parting with any copies or copy of a publication containing a copy of an article in the *Dublin Review*, of the January number of the present year; or any copy of the said article, or any work or composition containing, or purporting to contain, any copy of the same, and from otherwise infringing the plaintiff's copyright. The plaintiffs alleged by their bill that they were booksellers, printers, and publishers, in London, in Derby, and in Dublin, and that they were the proprietors, publishers, and printers of the *Dublin Review*, a periodical work, published in quarterly numbers, consisting of original compositions or articles. That a certain article, being the tenth article in the fifty-eighth number of the said publication, had been composed for and for the use of the plaintiffs, by persons employed by plaintiffs to compose the same, on the terms that the copyright or property therein should belong exclusively to the plaintiffs, and should be paid for by them. That such article and number had been duly registered by them. That under the 5 & 6 Vict. c. 45, "An Act to amend the Law of Copyright," they were now entitled to the exclusive property and copyright in such tenth article. This article was entitled "The Hierarchy." The Bill subsequently alleged that the defendant had, early in the present year, published a printed pamphlet, called "The Roman Catholic Question," containing, amongst other things, a verbatim copy of the tenth article in the *Dublin Review*, with some trifling variations. This copy in the defendant's publication was headed "The Hierarchy," from the *Dublin Review* for January 1851," which publication was composed of a series of papers, published at the price of 1*d.* for general circulation. The plaintiffs denied having ever, directly or indirectly, authorised or sanctioned the defendant's publication. The bill then charged that the defendant had thereby realised large profits, and injured the sale of the fifty-eighth number of the *Dublin Review*. An injunction, in the terms before stated had been granted on the filing of the bill, and on the affidavit of the clerk or manager of the plaintiffs, verifying these facts.

To this bill the answer of the defendant had been filed; and by it he challenged the right of the plaintiffs to the exclusive copyright of the *Dublin Review*, or to the article copied from it into the defendant's publication, alleging his belief that the article had been written by, and was the property of, Cardinal Wiseman, and that the *Dublin Review* was the property of the said Cardinal Wiseman and the superiors of Maynooth College. The defendant also alleged his belief that the composition of the article had not been paid for by the proprietors of the *Review*, and that the nonpayment was to be assumed from the omission of the statement of any such payment in the plaintiff's bill. He also alleged that the fifty-eighth number of the *Review* had been sent to him anonymously, which he supposed was done by the editor of the *Review*, with the object, as he understood it, that the article should be copied into the defendant's publication, which publication had been in a previous number of the *Review* much praised. One of the expressions of praise was in these terms: "But we must first call attention to



## V. C. LORD CRANWORTH'S COURT.

no most useful compilations. The first is Gilbert's *ries of pamphlets on the Catholic cause*, purged, as has been, of some objectionable matter that had crept in. *It embodies many documents which would be otherwise sought with great labour in newspaper files.*" There was, however, no proof of a number of the *Review* in which the copied title was, having been sent to the defendant with the plaintiff's knowledge.

An application was now made to dissolve the injunction on the answer.

The *Solicitor-General* (Wood) and *Renshaw*, in support of the motion, contended that no legal title, the exclusive copyright in the article was shewn, but by the 18th section (a) of the Copyright Act, & 6 Vict. c. 45) it was provided that any article in periodical publication must be actually paid for before the legal title would be vested. That the same point had been adjudicated upon by the Vice-chancellor Shadwell, in *Brown v. Cook*, 11 Jur. 7; and, as in that case, the plaintiffs should be put to try their legal right by an action at law. They so stated, that the whole facts of the case had not been mentioned to the Court when the *ex parte* injunction was applied for and obtained; and that the title of the author or proprietor of the *Review* as to ownership should have been made, instead of that of clerk or manager.

*Jas. Parker* and *Bagshaw*, after referring to the 11th section of the Copyright Act, contended at the defendant having confessed to the piracy tempted to justify the act by saying that the plaintiffs had not made themselves proprietors of the article by paying for it. The injunction was obtained under great pressure of time, but the facts and dates were all then stated. It was said that a contract by a publisher with an author on certain terms did not entitle him to the copyright under the 11th section. In that view hardly a publisher would give a copyright, for it hardly ever happened that the money for an article was actually paid before or the time it was supplied; it was written under a general understanding as to the terms, and the relation once being shewn to subsist between the author and publisher, the copyright passed under the 18th section. It often happened, indeed, that the work was paid for by part of the proceeds of the sale of it; and the words "paid for" meant under the employment of the proprietors.

The *Solicitor-General*, in reply. (*Spottiswoode v. Clarke*, 2 Phill. 154, was also cited.)

## JUDGMENT.

The VICE-CHANCELLOR said that his opinion was at the injunction ought not to be dissolved. The only point was that it was said that the plaintiff's title did not appear. That the defendant was a wrong-doer was clear; but the Court must be very cautious in allowing itself to act upon that. It was a old saying that "hard cases made bad law;" but it is lordship's opinion was, that the plaintiff's title did sufficiently appear upon the bill and affidavits. Upon referring to the Copyright Act, it certainly appeared that the view of the *Solicitor-General* was right one, and that actual payment was a necessary

(a) The following is the section: "And be it enacted, that when any publisher or other person shall before or at the time of the passing of this Act have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopedia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same; and such work, volumes, parts, essays, articles, or portions shall have been, or shall hereafter be composed under such employment, on the terms that the copyright herein shall belong to such proprietor or projector, publisher or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopedia, review, magazine, periodical work, and work published in a series of books or parts; and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act, except only that in the case of essays, articles, or portions forming part of, and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act, provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assignee; provided also that nothing herein contained shall alter or affect the right of any person who shall have been, or who shall be, employed as an assignee, to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved, or may hereafter reserve, to himself such right; but every author reserving, retaining, or saving such right, shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

condition, and it was not certain that that was not intended by the Act. Now, upon referring to the bill, it not only appeared that all articles were supplied upon the terms that they should be paid for; but it was stated distinctly that the article called "Hierarchy" was the exclusive property of the plaintiffs, and this was confirmed by the affidavit.

*The motion must, therefore, be refused, but without costs.*

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOK, Esq. Barrister-at-Law.

April 15 and 16.

Re NICHOLSON.

Trustee Act—Practice—Affidavit—Trustee's certificate.

*Semble*, that the affidavit or certificate, under the Trustee Act (1850), for the appointment of a new trustee, on the ground of the unwillingness of the existing trustee to act, ought not merely to state generally the fact of such unwillingness, but to disclose circumstances shewing whether such unwillingness was or was not justifiable.

C. P. Phillips moved, upon notice, under the 38th section of the Trustee Act of 1850, to confirm the certificate of the Master for the appointment of new trustees, the surviving trustee having died, and his personal representative having expressed his unwillingness to act in the execution of the trust. The Master, in his certificate, stated that he had been attended by the solicitor, who, by his affidavit, merely stated that the representative of the surviving trustee was "unwilling to act." The parties had gone before the Master, without any previous application to the Court.

His Honour asked to be furnished with the certificate, and said he would mention on the following morning whether he was satisfied that the materials on which the motion was founded were quite regular.

Wednesday, April 16.—The VICE-CHANCELLOR, on coming into court, said that he had looked at the certificate, but he did not perceive in it any statement shewing that the party was sought to be removed for any other reason than that he had expressed his "unwillingness to act." This admitted of explanation, shewing whether his unwillingness arose from being requested to perform some act which he was not bound to do.

Glasse said he appeared for the personal representatives of the surviving trustee, and was instructed to consent to the application.

The VICE-CHANCELLOR then made the order as prayed.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL FARNELL, Esqs. Barristers-at-Law.

Wednesday, April 16.

WITTINGTON dem. WITTINGTON v. HARDS.

Writ of restitution after reversal of irregular judgment in ejectment.

*The lessor of the plaintiff in ejectment obtained an irregular judgment, which was afterwards set aside. By rule of Court, it was ordered that possession should be restored to the tenants, and that H. should be admitted to defend as landlord. H. did enter into the ordinary consent rule, but not as landlord, the premises having in the meantime been given up to him by the tenants. The rule could not be served upon the lessor of the plaintiff, who absconded, and an order was then made by a learned judge for a writ of restitution. Upon application to rescind that order,*

*Held, that a writ of restitution was the proper and established remedy in such a case.*

A rule nisi had been obtained to rescind an order of Maule, J. directing that a writ of restitution should issue in this case.

It appeared by the affidavits that in June last the lessor of the plaintiff obtained judgment as upon a vacant possession, but that judgment was erroneous, because the tenants of defendant Hards were then in possession. Accordingly the judgment was set aside by Patteson, J. in the Bail Court, and it was ordered that possession should be restored, and Hards admitted to defend as landlord. He did enter into a consent rule, but not as landlord, he having become himself the occupier in the meantime. The rule of Court was drawn up, but every effort to serve it upon the lessor of the plaintiff was ineffectual; and it was sworn that he had absconded. Application was then made to Maule, J. at chambers, who made the order above mentioned.

April 15.—*Macnamara* shewed cause against the rule. The writ of restitution is the proper remedy in this case and has been constantly resorted to. (*Goodright v. Norright*, Barnes, 178; *Doe v. Shail*,

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2 Dowl. & L. 161; *Doe dem. Pitcher v. Roe*, 9 Dowl. 971; *Doe v. Williams*, 2 Ad. & Ell. 381.) The dictum of Lord Holt, in *R. v. Leaver*, 2 Salk. 587, is not at all conclusive of this case; because, there the case put is that of mere strangers. This defendant is not a mere stranger. In *Doe dem. Stevens v. Lord*, 7 Ad. & Ell. 610, 6 Dowl. 256, the judgment had not been set aside, and therefore the writ could not issue. But the rule is, that when the judgment has been set aside, the writ lies to restore the party wrongfully dispossessed. (*Tidd's Forms*, 690.)

Gray, contra.—The writ of restitution can issue only upon matter of record, as between the parties to the record, the ordinary instance being upon reversal of a judgment by Court of Error. Several cases may certainly be found in which the writ has been issued in cases similar to the present, but they are all referable to the case in Barnes, where the matter was not at all discussed. [Lord CAMPBELL, C.J.—But we should not be disposed to disturb a practice settled by a long course of precedents.] There are authorities the other way:—*Lilly's Pr. Reg. tit. "Restitution and Re-restitution;" Anon.* 2 Salk. 588; and *R. v. Leaver*, ib. 587. It is not merely necessary that the applicant for the writ should be a party to the record, but the right to the writ must appear by record. [EARLE, J.—Even upon reversal of a judgment in error, it does not appear by the record that possession has been taken.] Then there must be a *sci. fa. quare restitutionem non*. [Lord CAMPBELL, C.J.—In reason, the party ought to be restored to what he has lost by an erroneous judgment.] But this is a writ of execution, and the ordinary incident attaches. [EARLE, J.—In Seldon's Practice, the rule is laid down that the writ is the proper remedy in a case like this.] In *Doe v. Williams*, it is said that the order of the Court ought to be upon the party in possession, not upon the sheriff. In *Doe v. Lord*, also, no sanction is given to this practice. [EARLE, J.—*Lilly*, in his Practical Register, upon which you rely, says that this writ is to be resorted to on extraordinary occasions, when the ordinary process will not do.] Attachment is the well-known remedy for disobeying an order of the Court. *Cur. adv. vult.*

## JUDGMENT.

Lord CAMPBELL, C.J.—In this case, which was argued yesterday, we took time to consider, and are now prepared to give our judgment. We think that the rule for rescinding the judge's order, directing a writ of restitution to issue, ought to be discharged. The established practice has been that when a judgment in ejectment has been irregularly obtained, and possession has been delivered under it to the lessor of the plaintiff, the Court will, in the first instance, grant a rule upon him for restoring the possession; but if that rule becomes ineffectual from the party having absconded, a writ of restitution is awarded. In *Doe dem. Williams v. Williams*, the writ of restitution was set aside as irregular; but there no previous rule had been made on the lessor of the plaintiff to restore possession, and the interference of the sheriff under the writ of restitution might have been unnecessary. So in *Doe dem. Stephens v. Lord*, the Court said that there could not be a writ of restitution, after setting aside a writ of *habere facias possessionem*; judgment having been obtained by the lessor of the plaintiff still remained in force, and the proper relief was declared to be by a rule on the party to restore possession. But in the present case the judgment in ejectment has been set aside, and the prior rule for restoring possession has been found ineffectual from the party having absconded. It was admitted by Mr. Gray that the case in Barnes has been followed by a number of other cases, in which a writ of restitution has been granted under similar circumstances. He very learnedly argued that all these decisions are different, and that the practice which has sprung up ought to be condemned, on the ground, that there can be no writ of restitution except on matter of record. The most usual writ of restitution has certainly been on the reversal of a judgment, by a Court of Error; but he did not cite any authority to shew that a writ of restitution is necessarily confined to matter of record; and on principle, there seems no reason, where possession has been obtained under a judgment, that the writ should not be directed to the sheriff, to restore possession if the judgment be set aside. The objection made in this case, that the defendant was not a party to the record, was answered by the affidavit that he had appeared and entered into a consent rule, and the possession may be considered as taken from him, as it was taken from the tenant who held under him, and it may well be said to be restored. We are, therefore, of opinion that the order of the learned judge was authorised by the established practice, and this practice is not contrary to any principle of law, and enables the Court to redress a wrong which could not otherwise be redressed, without the delay and expense of an action of ejectment. We all think it ought not to be disturbed, and the rule will therefore be discharged for setting aside the judge's order. *Rule discharged.*

## QUEEN'S BENCH.

Thursday, April 17.

DRUMMOND v. TILLINGHURST.

*Security for costs—Foreigner resident in this country.*

*A foreigner actually resident within this realm, and not shown to have any domicile abroad, will not be required to give security for costs, although it be sworn that he is only temporarily resident.*

Greenwood moved for a rule to shew cause why the proceedings should not be stayed until the plaintiff gave security for costs. The plaintiff was a negro, and had been hired by the defendant at California to serve as cook on board his vessel on her voyage to England. The affidavit further stated that the plaintiff had declared that he was a native of Philadelphia; that he was only temporarily resident in this country; and that the deponent believed that as soon as the money which he now had in his possession was spent he would have no means of subsistence, and would be compelled to go to sea again. (*Oliva v. Johnson*, 5 B. & Ald. 908; and *Naylor v. Joseph*, 10 Moore, 522, are authorities in support of this application. [Lord CAMPBELL, C.J. I always thought that the rule was, that even though the plaintiff was a foreigner, the Court would not require security for costs, if at the time he was resident in this country.] The rule is not so stated in *Oliva v. Johnson*. [ERLE, J.—That case seems to stand alone. In an *Anonymous* case, 8 Taunt. 737; 3 Moore, 78, it was said that security would not be required, where the plaintiff was a foreigner usually resident abroad, but at that time staying in this country; and that case is cited and acted upon in *Dowling v. Harman*, 6 Mees. & W. 132. WIGHTMAN, J.—In *Oliva v. Johnson*, a foreign domicile was distinctly shewn.] Surely, that cannot be the test. A foreigner who apparently has no domicile anywhere, but is wandering over the world from one country to another, is a sort of person from whom it would be more reasonable to require security for costs, than a foreigner permanently resident at some known place abroad, and occasionally visiting this country.

Lord CAMPBELL, C.J.—This application seeks to carry the rule further than any of the cases cited. The utmost that has been decided is, that a foreigner having a domicile abroad, may be called upon to give security, though at the time resident here; but in this case the plaintiff is a foreigner domiciled here, so far as appears, or at least having no domicile elsewhere. The presumption is, therefore, that he will remain here; and he ought not to be required to give security for costs.

PATTESON, J.—Even if a foreigner be domiciled abroad, it lies on the defendant who asks for security for costs to shew that his residence in this country is of a merely temporary nature.

WIGHTMAN, J. concurred.

ERLE, J.—In many cases the application has been refused, if the plaintiff, though a foreigner, was actually resident here at the time. There is only one case the other way, that of *Oliva v. Johnson*; that case, therefore, is not to be extended; and there it appeared clearly that the foreigner was domiciled abroad. There is no case or principle of law, which will sustain the present application.

*Rule refused.*

Wednesday, April 23.

Doe dem. HUDSON v. THE LEEDES AND BRADFORD RAILWAY COMPANY.

*Railway company—Compensation—Award.*

*A railway company (having by its Act of Parliament powers to take lands compulsorily) entered, by the consent of a landowner, upon certain of the lands, and an agreement was made between the landowner and the company to refer the question of the amount of compensation to an arbitrator. After the award was made, but before payment of any money or any tender of a conveyance of the lands, the landowner gave the company notice to quit the lands, and brought an action of ejectment:*

*Held, that the action was not maintainable.*

This was an action of ejectment brought to recover a piece of land adjoining the river Aire, and formerly belonging to the lessor of the plaintiff. Upon the 4th of July, 1844, the defendants obtained their special Railway Act, in which were contained powers for the compulsory purchase of certain lands. On the 29th of December, 1845, the lessor of the plaintiff gave the defendants permission to enter the land in question (part of the lands within the powers of the Act), and agreed with them by an agreement (which was modified in the year 1847 by another agreement) to refer the amount of compensation to be paid to him to an arbitrator. The company entered and took possession of the lands under this agreement. The arbitrator did not make his award until the 9th of May, 1849, when he awarded to the lessor of the plaintiff the sum of 5,023*l.* for the land and injury, &c. It appeared that at the reference there had been a dispute as to some rights claimed by the lessor of the plaintiff to the use of the water of the river Aire, and this dispute was renewed after the award in a negotiation about the terms of the

## QUEEN'S BENCH.

conveyance of the land to the company. There had been no payment or tender of the money, nor any tender of any conveyance by the company. The lessor of the plaintiff then gave notice to the company to quit and deliver up possession of the land and brought this ejectment. At the trial, before Cresswell, J. at the last assizes for the county of York, it was contended that the defendants, having been let into possession by the consent of the lessor of the plaintiff, were mere tenants at will, and that the lessor of the plaintiff was entitled to determine that will by notice, and bring this action. The learned judge, however, directed a verdict for the defendants, reserving to the plaintiff leave to move to enter the verdict for himself.

Knowles now moved accordingly, and contended as before at the trial. He argued, also, that *Doe dem. Armistead v. The North Staffordshire Railway Company*, Q. B. (not reported) was distinguishable, the landowner there being in fault, and having a remedy for the value of his land; and that case having also proceeded upon stat. 8 & 9 Vict. c. 18, which was inapplicable to the present.

Lord CAMPBELL, C.J.—The learned judge was quite right at the trial. This action of ejectment is not maintainable. Under the special Act of this railway, the defendants had a right to get possession of the property by proceeding in a certain manner. Instead of that, all the parties interested agree to refer to an arbitrator. Meanwhile the defendants take possession, and probably make valuable improvements. They cannot be treated as mere tenants at will, or at any time be made to become trespassers by a demand of possession. The plaintiff has here just as good a remedy as in *Doe dem. Armistead v. The North Staffordshire Railway Company*, for he may have his money for the land under the award.

PATTESON, J.—Under the special Act the company cannot enter upon the lands which they have the power to take compulsorily until compensation be made. But when consent is given to their entering, nothing remains but the compensation. It would be monstrous if any landowner, dissatisfied with the amount of compensation awarded him, might revoke his consent, and make the company trespassers.

WIGHTMAN and ERLE, JJ. concurred.

*Rule refused.*

## BUSINESS OF THE WEEK.

Thursday, April 17.

MARTIN v. BUTLER.—*Witness moved for a new trial on affidavits that the damages were excessive.* The trial took place before Cresswell, J. at York. *Rule refused.*

BLAIR v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.—*Henderson and Brumell were heard against the rule. The Attorney-General, Lush, and Cockle contra, were not called upon.* *Rule absolute for a new trial.*

DOE dem. NICHOLLS v. BOWEN.—*Butt moved to enter the verdict for the plaintiff on the first and second demises, and as to part of the property on the third.* *Rule nisi.*

BIDDULPH v. CHAMBERLAIN.—*Action for libel, imputing to the plaintiff that he maintained a nuisance on his property, tried before Patteson, J. at Hereford; verdict for the plaintiff, damages 40*l.* Whatley moved to enter the verdict for the defendant on the second special plea, or for a new trial, on the ground of misdirection. The learned judge told the jury that the plea was not proved, unless certain allegations in it were proved, which were now contended to be immaterial. (Laugher v. Pointer, 5 B. & C. 647; *Reedie v. The London and North-Western Railway Company*, 4 Ex. Rep. 244; *Quarman v. Burnett*, 6 M. & W. 469; *Rick v. Basterfield*, 4 C. B. 783, were cited.) *Rule nisi.**

HOOPER v. BAIL.—*Case for disturbance of a way; Plea, traverse of the right; tried before Martin, B. in Wilts, and verdict for the plaintiff. Kinglake, Serjt. moved for a new trial, on the ground of misdirection. The defendant held under a lease for lives from the bishop, granted in 1825; and had obstructed the way in 1846 by putting up posts, which had remained down to the commencement of the action in 1850. There was evidence of user for about twenty years before 1846. The judge merely asked the jury whether there had been a user as of right for twenty years before the obstruction; telling them that, if so, they ought to find an immemorial right, and a verdict for the plaintiff. He ought to have told them that, if there was an antecedent period when no such right existed, their verdict ought to be for the defendant; and there was such a period in this case, because the user subsequent to the lease in 1825 could not bind the reversioner. Bright v. Walker, 1 Cr. M. & R. 217; Gale on Easements, 113.* *Rule nisi.*

DOE dem. TATHAM v. CATTAMORE.—*Pearson moved for a new trial herein, on the ground that the learned judge had misdirected the jury as to the effect of certain enclosures in the deeds upon which the lessor of the plaintiff relied. (Piggott's case, 11 Rep. 27 Com. Dig. Falt. F. 1; Knight v. Clements, 8 A. & E. 215; Clifford v. Parker, 3 M. & G. 909.)* *Cur. adv. vult.*

PRETTYMAN v. COLLEGE.—*This was a title issue, tried before Alderson, B. at Lincoln, when a verdict was found for the defendant. Willehurst now moved for a new trial, on the ground of misdirection and that the verdict was against evidence.* *Cur. adv. vult.*

LATHAM v. BREDDY.—*Lush moved to rescind an order of Patteson, J. allowing the plaintiff costs under sec. 13 of the last County Court Act (13 & 14 Vict. c. 61), the cause having been removed by certiorari. The judge at the trial had refused to certify; and the clause was now held to be permissive. (Jones v. Harrison, 17 Law T. 41.)* *Rule nisi.*

DOE dem. LORD ASHBURNHAM v. MICHAEL.—*Allen moved for a new trial, on the ground that certain entries in the steward's accounts had been improperly received.* *Cur. adv. vult.*

Wednesday, April 23.

DOE dem. NEWMAN v. RUSHAM.—*Crowder moved, pursuant to leave reserved, to enter a nonsuit. The question was, whether a conveyance under which the lessor of the plaintiff claimed was void as against creditors. (Jones v. Whitaker, Long. & Town. F. Ex. Rep. 141; 2 Bagden v. Vend. & P. 934.)* *Rule to shew cause.*

MOSELEY v. HYDE.—*Whateley moved for a new trial, on the ground of misdirection. The question turned upon the construction to be put upon some conditions of sale. (Corrall v. Cattell, 4 M. & W. 734)* *Rule nisi, unless the parties can agree to a special case.*

ROWE v. MANEER.—*M. Chambers moved for a new trial, upon the ground that the verdict was against the evidence and upon affidavits.* *Rule to shew cause.*

EATON v. THE SWANSEA WATERWORKS COMPANY.—*J. Eccles moved for a new trial upon the ground of misdirection, and that the verdict was against the evidence, and upon affidavits.* *Cur. adv. vult.*

BRENNAN v. HUBBARD and ANOTHER.—*Shaw, Serjt. moved for a new trial, upon the ground that the damages were excessive, or to reduce the damages.* *Rule refused.*

DOE dem. FLAYLER v. DANERWOOD.—*Butt moved, pursuant to leave reserved, to enter the verdict for the defendant upon several grounds. The action was brought against a lessee upon an alleged forfeiture, and it was now contended—1. That there was a waiver of the forfeiture, if any, or an acquiescence in the doing of that which was complained of as the breach of covenant. (Doe v. Allen, 3 Taunt. 78; Doe v. Knight, 2 C. & P. 246; Doe v. Bates, 9 C. & P. 708; Armistead v. Woodward, 6 B. & C. 513. See also 1 Smith's L. C. Notes, 18, 19.) 2. That there was a license from the lessor to do the act complained of, which license was unrevoked. 3. That, under the private Act of Parliament for settling the estates in dispute, the lessor of the plaintiff had no title. (Dumpro's case, 1 Smith's L. C. 15—18; Spencer's case, ib. 28.)* *Rule refused.*

BAILEY v. OSBORNE.—*Kinglake, Serjt. moved for a new trial upon the ground of misdirection. He made two points, but the first was expressly decided by Telf v. Le, 4 Ex. 430, and the Court thought that there were no facts proved at the trial upon which the second could be raised.* *Rule refused.*

WOOD v. BARTLEY.—*Flood moved to set aside interlocutory judgment, to rescind an order of Erie, J. and to leave to the defendant to plead to the action.* *Rule nisi.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Thursday, April 17.

RIDSDALE v. LATOUR.

*Execution—Discharge of insolvent prisoner—Plaintiff dead, leaving no next of kin.*

*In the year 1847 a defendant was taken in execution, and in July 1849, the plaintiff died in insolvent circumstances. On 19th February, 1850, the plaintiff's will was proved, his widow being executrix. In the following August the widow died intestate, and without issue; and though diligent search had been made, no next of kin could be found. The Court declined granting a rule for the defendant's discharge, but acceded to a proposal of the defendant that the case should be referred to the Master to inquire into and report upon it at the defendant's expense, power being given him to advertise for next of kin.*

*Bail moved for a rule, to shew cause why the defendant herein should not be discharged out of custody. The affidavit disclosed the following facts. The defendant was taken in execution and imprisoned at the suit of the plaintiff in the year 1847, for the sums of 64*l.* and 112*l.* respectively. On the 18th of July, 1849, the plaintiff died, being then in insolvent circumstances. His will was proved on the 19th of February, 1850, his widow being executrix. In the following August the widow died intestate, without children; and though diligent search had been made, no personal representative of the parties nor any next of kin could be discovered. This gentleman remaining in custody under these circumstances, it is submitted the present motion should be granted. Broughton v. Martin, 1 Bos. & Pol. 176. In that case the Court discharged a defendant out of custody who was in execution at the suit of a plaintiff deceased, on whose part no will had been proved or administration granted, and whose family declined interfering. The difference is, that in the present case there are no next of kin to serve the rule on. (Parkinson v. Horlock, 2 New. Rep. 240; Gore v. Wright, 1 Dowl. N. S. 864; Taylor v. Burgess, 16 M. & W. 781; Camp v. Pope, 14 Law T. 264.) These are all the cases in favour of or adverse to this application. The case of Camp v. Pope is an authority which supports this motion. There the Court granted a rule for the discharge of the defendant, though the affidavit contained no statement of the plaintiff's death. Here we have not only evidence of the plaintiff's death, but also of administration. [WILLIAMS, J.—What a singular thing it is that here are two persons, neither of whom has any next of kin.] It is. [CRESSWELL, J.—There is one good reason on the face of your affidavit why the Court should not interfere. It is sworn that Ridsdale died insolvent. The defendant is imprisoned for a large sum of money, and the plaintiff's creditors may wish to detain him till payment.] The de-*

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ndant is wholly unable to pay; he might as well be asked to clear off the national debt as the sum for which he is imprisoned. We do not even know who the creditors are. Perhaps the Court will allow the case to go before the Master. [JERVIS, C.J.—You suppose that the Master should inquire into the case, and report upon it at your expense?] Yes.

JERVIS, C.J.—Let the application be referred to the Master to inquire into the case, and report upon it at the defendant's expense; power to be given to the Master to advertise for next of kin and make his report to this Court. — *Rule accordingly.*

## DOX dem. QUINLAN v. ROE.

*Judgment against casual ejector—Omission of signature.*

Where the notice to the tenant in possession had not been subscribed with the name of the casual ejector, the Court nevertheless granted a rule for judgment against him.

Joyce moved for judgment against the casual ejector on the usual affidavit of personal service of the declaration upon the tenant in possession. The Master having objected to draw up the rule, upon the ground that the notice to the tenant to appear was not signed in the name of the casual ejector or with any other name.

Joyce, for the lessee of the plaintiff, now submitted that the omission of the name was of no consequence and altogether immaterial; mistakes in more important parts of both notice and declaration had been held not material, and in one case where the notice was subscribed in the name of the plaintiff instead of the casual ejector; a rule for judgment was nevertheless granted. (*Haslewood v. Thatcher*, T. R. 351, overruling *Peaceable v. Troublesome*, 1ames, 173.)

By the COURT.—The notice will do, you can take rule. — *Rule granted.*

## DAVIS v. BURRELL and ANOTHER.

*Landlord and tenant—Covenant to pay rates—Demand—Re-entry.*

Where a landlord is entitled to retake possession of premises on breach of a covenant, in a lease, by the tenant, to pay rates, it is not necessary that the rates should have been demanded of the tenant before the landlord resumes possession under such proviso in the lease, nor that the tenant should have received notice of the assessment of such rates.

This was an action of trespass for false imprisonment. The plaintiff is a publican and livery-stable keeper, lately occupying a livery yard, stables, and coachhouse in Catherine Wheel-yard, Windmill-street. These premises were held by him under an assignment of a lease granted by the defendant Burrell to one Smith, which lease was purchased from the latter by plaintiff, and assigned to him by direction of Burrell. The lease contained a covenant to repair, also a covenant to pay rates, in the usual form, with a proviso for re-entry in case of breach. The defendant Burrell distrained for half a year's rent due at Lady-day, 1850, but found a sufficiency of goods in the premises, and the plaintiff still remained in possession, but he endeavoured to let the premises. On the 25th of April, during the temporary absence of plaintiff's servant, the defendant Burrell closed the outer gate of the yard, and placed adlocks on the stables, coachhouses, and other premises so occupied by the plaintiff; he also detained fixtures belonging to the plaintiff, and refused to permit their removal. In this state of matters the plaintiff, on the said 25th of April, proceeded with his attorney and other persons to the premises, where they saw Lane, the other defendant, who represented himself to be Burrell's attorney. A conversation ensued, and eventually the defendants called the police, gave the plaintiff into custody, and led him removed to the police station. For this trespass the present action was brought. The damages were laid at 300*l*.

The defendants pleaded, 1st, Not guilty by statute; 2nd, That defendant Burrell was at said time when, &c. lawfully possessed of the said premises, and being so possessed, the plaintiff with divers other persons were committing a breach of the peace, and endeavouring to beat in and break the doors of the said premises and to effect a forcible entry therein. Whereupon the defendants, to prevent his further proceeding in that breach of the peace, then gave the plaintiff into custody as they lawfully might for the cause aforesaid; 3rd, That the defendant Burrell as lawfully possessed of and in a certain part of a certain yard and certain stables adjoining thereto, and that plaintiff entered the yard with other persons and made a great noise and disturbance, and used violent and threatening language, and disturbed Burrell in the peaceable possession of the said yard, a breach of the peace, &c.; whereupon the defendants, in order to preserve the peace, gave the plaintiff into charge as they lawfully might.

*Replication—De injuria.*

The cause was tried before the Lord Chief Justice at the sittings after Hilary Term in Westminster,

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when a verdict was found for the defendant, leave being reserved to enter the verdict for the plaintiff if this Court should so order it, with 5*l*. damages. The landlord, Burrell, at the trial, contended that the premises were out of repair, and that two poor-rates were unpaid; and therefore he rightly took possession on breach of the covenant in the lease. The jury found that the premises were in repair, but that two rates were unpaid.

Prentice now moved as above, and for a new trial, on the ground of misdirection. He made two points.—First, that it was not proved at the trial that the rates had been personally demanded, or that the plaintiff had ever received notice of the rates having been assessed. It had been proved, indeed, that the rates had been demanded from the defendant's son upon the premises, but that was not sufficient, for a rate is not "due and payable" till it has been regularly made and notice given to and the rate demanded of the tenant. (*Winks v. Hurrell*, 2 Bailey Moore, 417.) [CRESSWELL, J.—All you make out by that case is, that the rate is not due by distress, and not that it is not "due and payable." The tenant must have a reasonable time allowed him to pay. The second point made was, that, as the taking of possession by Burrell, and the endeavour to regain possession by the plaintiff formed one transaction, the defendant's possession was in fact gained by a forcible entry, and therefore was not a lawful re-entry. (*Newton and Wife v. Harland*, 1 M & G, 644.)

CRESSWELL, J.—That case has been overruled. If the landlord has a right to enter, and he does enter, surely he does nothing wrong. This entry seems to have been lawful.

By the COURT.—In this case there must be no rule. The plaintiff was bound to take notice of the assessment of the poor-rate, and no point was made, or could have been made, that a reasonable time had not elapsed for the payment of the rates by the plaintiff. It was his duty to seek out the collector and pay the rates. He makes a covenant, and it is on him to fulfil it, which he has not done. This rule, therefore, must be refused.

*Rule refused.*

## BUSINESS OF THE WEEK.

Thursday, April 17.

FORMAN v. WRIGHT.—This was an action on a promissory note given by defendant to plaintiff on 7th November 1849, for the sum of 32*l*. 6*s*. 10*d*. The defendant pleaded—1st, that he did not make the note; 2ndly, that the note was given on fraudulent representation, and there was only partial consideration. The cause was tried at the last assizes at Maidstone, before Lord Campbell, C.J. and a verdict entered for the plaintiff, subject to a motion to enter it for the defendant on the second plea to the first count of the declaration; also on two other pleas. *Chambers*, Q.C. now moved accordingly, and contended that the second plea was not a plea of fraud, but of partial failure of consideration. The words "fraudulently and deceitfully" in the plea were mere surplusage, and might be struck out as immaterial. (Bayley on Bills, 494.) This being a plea of partial failure of consideration, it was not necessary to prove fraud. (*Barber v. Backhouse*, Peake's N. P. Cas. 61.) If you prove a partial failure of consideration, no matter under what circumstances, the plaintiff can only recover for the remainder. (*Ledger v. Ure*, Peake's N. P. Cas. 216.) By the COURT.—Take a rule.

*Rule nisi.*

PROPERTY and WIFE v. TARGAR.—This cause was tried before the Lord Chief Justice at the sittings after Term. Verdict for plaintiff, damages 5*l*. *Humphrey*, Q.C. now moved for a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the ground of misdirection, or to arrest the judgment, or for a venire de novo. It was an action for slander, and it was now contended that the words set out in the declaration did not justify the imputations, and that his lordship should have so directed the jury, whereas his lordship put the case to them in the very words used in the declaration. The language used by the defendant could not, in point of law, bear the meaning the plaintiff had put upon it in this declaration. [JERVIS, C.J.—It is the province of the jury to say what the words mean. I think the first count, at all events, is good, though the second may not be so.] The verdict being entered generally on both counts, if one is bad, I am entitled to my rule. By the COURT.—Take a rule to arrest the judgment, or for a venire de novo.

*Rule nisi.*

BODEN v. FRENCH.—This cause was tried before the Lord Chief Justice at Guildhall, and the plaintiff nonsuited. *Byles*, Serjt. now moved pursuant to leave reserved to set aside the nonsuit, and enter a verdict for the plaintiff for 7*l*. This was a question on the construction of a contract for the sale of coals.

*Rule nisi.*

RATT v. PARKINSON and ANOTHER.—In this case, which was tried before Erie, J. at the Spring Assizes for Buckingham, the plaintiff was nonsuited. *O'Malley*, Q.C. now moved, pursuant to leave reserved, for a rule calling on the defendant to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for the sum of 8*l*. This was an action of trespass against two justices of the peace for a levy made under a warrant issued by them for the payment of a church-rate. The objection is, that the warrant was bad on the face of it. The directions of the Church-rate Act have not been complied with. The learned judge ruled that this action had been brought in the wrong form; it should have been in "case" not "trespass." [JERVIS, C.J.—Supposing Parkinson's warrant had been in form right, he would have been acting within his jurisdiction.] He issued a warrant of distress because there had been a refusal to pay the churchwarden, whereas he ought not to have issued it until there had been a demand made before the magistrates.

He exceeded his jurisdiction by doing that which the law gave him no authority to do. There is a case directly in point in this question. (*Leary v. Patrick*, 4 New Sem. Cas. 258.) [JERVIS, C.J.—Has the warrant been quashed?] No. But that is immaterial; what the statute says is, that no action shall arise unless the conviction is first quashed. By the COURT.—Take a rule.

*Rule nisi.*

SOUTHAL v. RIDGE.—*Butt*, Q.C. and *J. Brown* agreed that this case should stand over. The Court consented to the arrangement.

BRELEY v. SPOON.—This cause was tried at Stafford Assizes, before Talfourd, J.—Verdict for plaintiff, damages, 100*l*. *Whately*, Q.C. now moved for a rule to shew cause why the verdict should not be set aside, and for a new writ of inquiry, on the ground that the damages were excessive. The learned judge seemed to think at the trial, that a sum of from 20*l*. to 30*l*. would be sufficient for the trespass complained of. [CRESSWELL, J.—But this might have been a case in which a jury were better competent to estimate the amount of injury than the judge.] There was no specific damage proved. By the COURT.—There will be no rule.

*Rule refused.*

GRIFFIN and OTHERS v. WHITE.—*Cole* moved for a rule calling on the defendant's attorney to shew cause why an order should not be made on him to pay a sum of money in this cause, on the ground that he had not paid the debt and costs in an action according to his undertaking. He had paid part, made many promises by letters to pay remainder, but *W.* was still due. [JERVIS, C.J.—Why did you not go to judges' chambers for the order?] In such a case we cannot get a judge's summons in term time. By the COURT.—Take a rule to shew cause.

*Rule nisi.*

HOARE v. RAMSEY.—This was an action against the defendant, the proprietor of the *West of England Conservative* newspaper, for giving an inaccurate report of proceedings which took place in a former action of libel brought by the plaintiff and tried at Guildford Assizes in 1847. The cause was tried at Exeter Assizes before the Lord Chief Baron—verdict for the defendant. *Carter* now moved for a new trial, on three grounds.—1st, The improper rejection of evidence; 2nd, Misdirection; 3rd, That the verdict was against the evidence. As to the first point, a newspaper was placed in the hands of a Mr. Hibbert, one of the defendant's witnesses, and he was asked "whether a report of the trial in that newspaper was the same as that which he had described as a fair report." The Lord Chief Baron ruled that the question could not be asked; such a question could only be put with reference to a paper in witnesses' own handwriting, or one which he had seen before. *Carter* then asked the witness, "Was a report of the trial published in the *National Standard*, and did you believe that to be a fair report?" The learned judge would not permit the question, and, on being requested to take a note that the question had been prohibited, said counsel "Will you take a note yourself?" This was the rejection of evidence complained of. And next, as to the point of misdirection; he submitted that misdirection might be by actions as well as by words. The Lord Chief Baron, by continued interruption and remarks, so prejudiced the case before the jury, as to induce them to overlook their duty (which was to give due weight to the plaintiff's case), and to find for the defendant. His lordship said, "Here is a plaintiff who complained of a libel last year, and now comes again to-day with the very same libel and makes a brief of it." *Carter* therefore submitted that such an observation from the Bench was improper, as he had not finished his case, and it was likely to prejudice the result. The learned judge replied, "Before you indulge, sir, in such observations, you should be careful to be correct and to speak the truth." On this counsel rejoined, "My lord, in what am I incorrect?" The learned judge, "In saying you had not finished your case." *Carter* then said he had not finished his cross-examination, and was entitled to call witnesses in reply. The Lord Chief Baron then said, "Sir, I have no personal acquaintance with you, I never heard of you before, and until this day I was not aware of your existence." Such observations as these were calculated, he submitted, to prejudice his client's interest, and amounted to a misdirection. The summing-up, he contended, was a complete "reply" on the plaintiff's case. The learned judge rebuked the defendant's counsel for not having been zealous enough for the defendant, and said to the jury, "Can you give more than a farthing damages?" It was imputed to plaintiff's counsel, that, because he asked the Rev. Mr. Hatchard, "Can you say, as a minister of the Gospel, that that is a fair report?" he was insulting the witness; and the same with regard to Captain Somers, of whom he had asked, "Were you not the writer of an anonymous letter?" Another misdirection was this, the judge said we were bound to prove the report an unfair one. This is not so, we did what was sufficient—we proved the publication of the paragraph, and the law will infer malice from the fact of publication. Lastly, in leaving the case to the jury, the learned judge gave all the evidence in chief for the defence, but not one word of the cross examination. The learned counsel then went into the point that the verdict was against evidence, where it is needless to follow him. By the COURT.—We will confer with the Lord Chief Baron as to the evidence rejected.

With regard to the verdict being against the weight of evidence, the rule cannot go on that ground, for two witnesses swore the report was a fair report, and Hibbert, on whose cross-examination the plaintiff relied, did not swear it was not a fair report; it was, therefore, entirely a question for the jury. As to the point of misdirection, it does not appear to the Court that the learned judge said any thing which could have misled the jury; there was nothing against which a bill of exceptions could have been tendered, and therefore we have no ground for a rule on that point. But on the point of improper rejection of evidence, the rule may go.

*Rule nisi.*

PRICE v. LITTLE.—*T. W. Saunders* moved for a rule calling on plaintiff's attorney to shew cause why an order should not issue for taxation of costs indorsed on a writ of summons, and, if more than one-sixth be taxed off, that he should not only pay the costs of taxation, but also of this application. The decision would govern five other cases.

*Rule nisi.*

Wednesday, April 23.

STAINBANK v. FENNING.—This cause was tried before Platt, B. at the last Spring Assizes at Liverpool, verdict for the plaintiff. The action was on a policy of insurance



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on the ship *Harland* for 1,675*l*. It appeared that the *Harland* had sailed from Quebec for England in the course of the year 1846; but having become injured, was brought back and repaired. The captain not having sufficient funds to meet the expenses incurred by these repairs, which amounted to 1,675*l*, applied to certain persons at Quebec trading under the name of Gilmore and Co. to advance the same, which they consented to do. He at the same time gave them bills on the owners in England, and executed a mortgage, by which it was agreed, in the event of the bills being dishonoured, Gilmore and Co. should be at liberty to take possession of the said ship, and by process in a Court of Admiralty have her sold. On the 1st of December, 1846, the policy was effected on behalf of Gilmore and Co. In November of the same year the vessel sailed for England, but having encountered unfavourable weather in the St. Lawrence she went on shore; she was ultimately got off, brought back, and by process in the Admiralty Court sold. On the 28th of February and the 17th of June, 1847, notices of abandonment were given by Gilmore and Co.—*W. H. Watson* now moved for a rule to shew cause why a verdict should not be entered for the defendant or a nonsuit entered, or why the damages should not be reduced. He did so on three grounds.—1st, That the master had no power to mortgage the ship; 2nd, Admitting that he had, then the interest of Gilmore and Co. was not properly described in the policy; 3rd, Supposing that this was a hypothecation of the ship, then no loss had been incurred, since the vessel still remained in specie. He cited the following authorities:—*Wilson v. The Royal Exchange Insurance Company*, 3 Camp. 623; *Thompson v. The Royal Exchange Insurance Company*, 1 M. & S. 30; Com. Dig. tit. "Admiralty"; *Viner's Abr. "Hypothecation"*, *Gratitudine*, 3 Rol. Ad. R.; *Bridgman's case*, Hob. 12; *Beaumont v. Leitch*, Noyes R. 9; *Atlas case*, 2 Hagg. Ad. R. 48; *Knight v. Faith*, 19 L. J. N.S. 509, Q.B.; *Margfield v. Maitland*, 4 B. & Ald. 562.

*Booth v. CLIVE*.—Tried at the last adjourned Middlesex sittings before Jervis, C.J. It was an action against the defendant as judge of the Southwark County Court for false imprisonment. Verdict for the defendant. *Humphrey* now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted on the ground of misdirection. *Cur. adv. vult.*

*BOND v. SMITH*.—Tried before Williams, J. at the last Glamorganshire Assizes. It was an action for seduction, and the plaintiff obtained a verdict for 20*l*. *Evans* now moved for a new trial, on the ground that the verdict was against evidence. *Rule refused.*

*CAUDWELL v. MILLER*.—Tried before Talfourd, J. at the last Spring Assizes at Oxford. It was an action of trover for title-deeds. Verdict for the defendant. *Alexander* now moved for a new trial, on the ground of misdirection. *Rule refused.*

*DOUGLAS RICHARDS v. LEWIS*; *RICHARDS v. SAME*.—These cases were tried at the last Assizes; the first before Talfourd, J. at Monmouth; the second before Williams, J. at Swansea. Verdict for the plaintiff in both cases. *Keating* now moved for a rule to shew cause why a nonsuit should not be entered, or a verdict for the defendant. *Rule nisi.*

*LEBCHMAN v. MANSEY*.—This was an action of *assumpsit* on the *indebitatus* counts, to which the defendant had pleaded several pleas. The action was brought for certain sums which the plaintiff alleged to be due, by virtue of an agreement made between her and the defendant, whereby the defendant, promised that, in consideration of the plaintiff withdrawing an appeal which she had entered at the Hertford Sessions in the year 1843 against an award made under the Inclosure Act, he would pay the costs incurred in entering and respiting the same. The defendant contended that he had paid all the costs that were incurred, and that nothing more was due. The plaintiff obtained a verdict. *Channell, Serjt.* now moved, pursuant to leave reserved, for a rule to shew cause why a nonsuit should not be entered, or why a verdict should not be entered for the defendant on certain of the issues raised by the pleas. *Rule nisi.*

*ASLEY v. DALE*.—This was an action of trespass for false imprisonment; plea, not guilty; verdict for the plaintiff. *Macaulay, Q.C.* now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit entered, on the ground that there was no evidence to connect the defendant with the apprehension of the plaintiff. *Rule nisi.*

*FOPHAM v. SMITH*.—In this case a verdict had been taken by consent for the plaintiff on certain terms. The plaintiff subsequently objected to comply with those terms. *Byles, Serjt.* now moved for a rule on the part of the defendant, to shew cause why a rule of Court should not be drawn up, embodying those terms, or why the verdict should not be set aside with costs. *Rule nisi.*

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HERTLEY, Esqrs. Barristers-at-Law.

Monday, Jan. 20.

ELLEN v. TOPP.

**Master and apprentice.—Master carrying on three trades.—Relinquishment by him of one of them during the time of apprenticeship.—Justification for the apprentice leaving before expiration of indenture.**

**Where an apprentice is bound to a master carrying on at that time three trades, and during the apprenticeship the master abandons one of those trades:**

**Held, to be a sufficient justification for the apprentice to leave the service before the expiration of the period of his apprenticeship.**

This case was argued on the 26th April, 1850, but was directed by the Court to be re-argued. It was a demurrer to a replication in an action of covenant upon an indenture of apprenticeship brought by a master against the father of his apprentice, in consequence of the apprentice refusing to serve the remainder of the term of five years, for which he

was bound by the indenture. The master had received 70*l*. as a premium, and, at the time the indenture of apprenticeship was entered into, was an auctioneer, appraiser, and cornfactor. During the term, the business of a cornfactor was relinquished; whereupon the defendant's son absented himself from the plaintiff's service, and the defendant pleaded that fact as a justification. The plaintiff replied that he discontinued one of such occupations, and ceased to carry on the business of a cornfactor; and that the alteration in his business was made by consent of the parties, but without setting out any deed. To this replication there was a demurrer. The argument, however, proceeded upon the validity of the plea, and the question was whether, if an apprentice is bound to a master carrying on three trades, and the master abandon one of them, he can maintain an action on an indenture of apprenticeship for the apprentice refusing to serve the whole term for which he was bound, or is it a justification for the apprentice to leave the service of the master when the master abandons one of the trades.

*Macnamara* appeared for the defendant.—The plaintiff, by his own act, has disabled himself from enforcing this contract. The gist of the breach is, that the apprentice should serve according to the nature and tenor of the covenant; yet here he had given up one of them, and he could not, therefore, do so. The plaintiff, consequently, cannot maintain this action. (Comyn's Dig. tit. "Condition," M. 3 & L. 4; Coke Litt. 206*b* and 221; *Hughes v. Humphries*, 6 B. & C. 280; *Winstone v. Linn*, 1 B. & C. 460; *Robson v. Drummond*, 2 B. & Adol. 303; see 1 Salk. 665; *Baxter v. Butterfield*, 2 Strange, 1266; *Planche v. Colburn*, 8 Bing. 14; 4 M. & Gr. 498; *Lloyd v. Blackburn*, 1 Dowl. N.S. 647; *King v. St. Martin's, Exeter*, 2 A. & E. 655; *Ford v. Tylee*, 6 B. & C. 325; *Bryant v. Beattie*, 4 Bing. N.C. 263; *Holme v. Guppy*, 3 M. & W. 389; *Keys v. Harwood*, 2 C. B. 905.) Second. The exercise of the three is entire and indivisible, and an abandonment of one is an equivalent to an abandonment of the whole. The consideration is also entire. The benefit was to result from the three trades jointly. (*Chanter v. Leese*, 4 M. & W. 295, and in error, 5 M. & W. 698). And the principle is laid down in 1 Saunders, 320*b*; *Kingdom v. Cox*, 5 C. B. 522; *Waicher v. Hall*, 5 B. & C. 269. It is analogous to a partial eviction, and if so no rent can be recovered in that case. Third. The exercise of the three is a condition precedent to the right of the master to insist on performance. (1 Saund. 320*b*; 2 Smith's Leading Cases, 9; *Boon v. Eyre*, 1 Hy. Black. 273 & 279; *Galsworthy v. Strutt*, 1 Ex. 659.) The non-abandonment of either of the three is a condition precedent to his power of insisting on or enforcing his right. The master was treated with not in his personal but in his trading capacity, and solely on account of his carrying on the three—suppose the case, also, of a solicitor and notary, or jeweller and watchmaker. Then the breach here cannot be compensated for in damages; the only remedy is to leave the service, and seek another master; the covenant goes to the whole of the consideration. (*Boon v. Eyre*, 1 Hy. Black. 273, note, and 2 Wm. Black. 1312; *Campbell v. Jones*, 6 T. R. 576; *Duke of St. Albans v. Shaw*, 1 Hy. Black. 270; *Grazebrook v. Woodruffe*, 8 T. R. 366; *Largave v. Cheshire*, 1 Ventris, 147; *Oliver v. Fielding*, 4 Ex. 138.) 4. If it be not a condition precedent, then they must be concurrent considerations, so that the plaintiffs should be always ready and willing to perform, and have the ability to do so; but here it is shewn he had relinquished one of the trades, and the defendant has a right to assume the most important one, and he has not therefore the ability to perform the covenant.

*Taprell*, for the plaintiff.—This plea is no answer to the declaration. (*R. v. Daniel*, 6 Moo. 182; 1 Salk. 68; *R. v. Horborton*, 1 T. R. 139; see 3 M. & Selw. 497, and 3 B. & C. 486, *King v. Chipping Warden*; and 1 Salk. 66; *Rex v. Barnaley*, 1 M. & Selw. 377; *Rex v. Stephen*, 1 Doug. 76; *R. v. St. Martin's, Exeter*, 2 A. & E. 659; Bacon's Abr. tit. "Master and Servant," G.; *Viner's Abr. "Apprentice,"* G.) An executor has an interest in the apprentice of a deceased master, so a service with the master's consent with another master to a different trade is a service under the indenture; personal instruction by the master himself is not necessary. (*Viner's Abr. tit. "Apprentice,"* K. p. 31; *R. v. Inhabitants of Gwinear*, 1 A. & E. 152.) The bankruptcy of a master is no discharge to the apprentice. (*Strange*, 582; and 49th section of Old Bankruptcy Act; 6 M. & Selw. 351.) When the master declines business it is not determined. (*R. v. Chipping Warden*, 8 T. R. 108.) If the master takes a different business it is not determined; the apprentice's time is his master's. (1 Salk. 68; *Wilkins v. Wingate*, 6 T. R. 62; 1 Taunt. 112; *Porter v. Stent*, 3 M. & Selw. 200.) It may be likened to an eviction (*Morrison v. Chadwick*, 7 C. B. 282); and that case is somewhat like this. Suppose that of a linen draper and hatter, on the Master giving up one, is the apprentice to abscond? Then these covenants are independent of each other. *Winston v. Lynn* is an

authority; the plaintiff is to teach the trade; the consideration is divisible. 8 Vict. c. 16, s. 2, is cited. The Court will not take judicial notice that these are three trades. (*Franklin v. Ellis*, 4 A. & E. 605; *Davidson v. Gwynn*, 12 East, 389.) There should have been an averment that the cornfactor was material. See 3 Bing. 355; 1 Saund. 320, C. *Cutler v. Bonner*, 11 Q. B. 973. Here there has been a teaching of the three trades for three years. 1 Wms. Saund. 28, shews a plea bad in part but in the whole. The parties here are not without their remedy against the master. 5 Eliz. c. 4, s. 1 Wms. Saund. 304, were referred to. The apprentice and his father should get rid of the indenture. The plea does not shew a sufficient breach, and a replication is no departure, and is good.

*Macnamara*, in reply. *Cur. adv. vult.*  
**Tuesday, April 15.—POLLOCK, C.B. delivered judgment.**—In this case, which was formerly argued before my brother Parke, the present *Lord Chancellor*, now a Vice-Chancellor, my brother *Parke* and myself, and was subsequently reargued, I now to deliver the judgment of the Court. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, for non-fulfilment of the contract, and the breach alleged is, that the apprentice "did not nor would faithfully serve the plaintiff, according to the tenor and effect true intent, and meaning of the said indenture." On the contrary thereof, the said *Richard Taprell*, during the said term of five years in the said indenture mentioned, to wit, on the said 22nd day of July 1849, did unlawfully absented himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture." On the part of the defendant it was a plea, cravingoyer of the indenture, from which it appeared that the master was to teach the apprentice, and the apprentice was to become his apprentice in the business of an auctioneer, appraiser, and cornfactor. The defendant pleaded that the master had discontinued one of those occupations, and had ceased to carry on the business of cornfactor. To this plea there was a replication that the alteration was made by the consent of the parties, but without setting out any deed. To that replication there was a demurrer, and the question that we have now to consider is, whether the plea is a good plea or not. On the part of the plaintiff it was not contended that the replication could be supported. It is obviously bad. Such a parol consent could not entitle the plaintiff to maintain an action of covenant in this form, which is founded altogether on a deed under seal. The question, therefore, resolves itself into the only matter really argued before us, which was, whether the plea was good. On the part of the plaintiff it was contended, that the plea afforded no answer to the plaintiff's cause of action, on two grounds.—first, Mr. Taprell contended that all which the plaintiff undertook to do was to teach three trades, and that he might continue to do, although he had ceased to carry on one of them; and that the plea contained no averment that he was unable to do so. But this objection is ill founded. The breach complained of is that the apprentice "did not, nor would, serve the plaintiff according to the tenor and effect, true intent, and meaning of the indenture." Now, looking at the indenture, we see that the real engagement was that the son *Richard*, by and with the consent of the defendant, his father, did put himself apprentice to the plaintiff, described (in the indenture) as an auctioneer, appraiser, and corn factor, to learn his art, and with him "after the manner of an apprentice to serve." And then the defendant, at the end of the deed, bound himself to the plaintiff for the due performance of that engagement. What then was it which the defendant contracted the son should do?—to become the plaintiff's apprentice, "to learn his art;" that is, the art of an auctioneer, appraiser, and corn factor, and "to serve him after the manner of an apprentice." Now, service with a man "after the manner of an apprentice" imports, according to the meaning of those words, as ordinarily understood, the party served should be carrying on the trade which the apprentice is to learn, otherwise the one is to teach, and the other is to learn the trade not as between master and apprentice, but as instructor and pupil, when, therefore, the one party ceases to carry on the trade, he, by his act, makes it impossible for the other, "to serve him after the manner of an apprentice," and he cannot be heard to complain that the other party has willfully made it impossible for him to do so. The other objection taken by Mr. Taprell was that the carrying on of all the three trades was not a condition precedent to the plaintiff's right to recover, but that the omission or refusal to carry on any one must be the subject of a cross action. This objection is founded on one of the rules for determining when covenants are dependent on each other, which was laid down in *Boon v. Eyre*, 1 Henry Blackstone, 273, in the note 4, and followed by *Campbell v. Jones*, 6 T. R. 670, and the other cases collected in the note in 1 Williams's



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Saunders, 320, C. That rule is, that where the covenant goes to part of the consideration on both sides, that is, forms part of the consideration on the plaintiff side for the defendant's covenant on the other, a breach of such a covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant. The covenant is independent, and the performance of it is a condition precedent. The reason of the decision in these cases is, as was observed by the learned editor of the work cited, that where a person has received a part of the consideration for which he has agreed to make a return, it would be unjust, because he did not actually have the whole; that he should enjoy that part without paying anything for it; and, therefore, the law obliges him to perform his part, and gives him a remedy for any damages he may have sustained from not having the whole consideration. It is remarkable, that according to this rule the construction of an instrument may be varied by matter *ex post facto*, and that which is a condition precedent, when the deed is executed, may cease to be so by the subsequent conduct of the covenantor in accepting the lease. So, in the cases referred to, the defendant, in the first, must have objected to the transfer altogether if the plaintiff had no good title to support the breach, and he might have refused to pay; and in the second he might have objected to the payment if the plaintiff had refused to transfer the payment, though he had had the benefit of learning the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon; yet there is often a difficulty in its application to the particular cases that arise; and it cannot be intended to apply to every case, even if the covenant be not completed as to that which forms no part of the consideration; and if the residue of the consideration has been performed by the defendant, that residue must be a substantial part of the contract. So, if in the case of *Boone v. Eyre* two or three negroes had been accepted, and the equity of redemption was not complete, we do not apprehend the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of the equity of redemption. Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us, but after much consideration we agree that it is not applicable to this case. If this had been an action on a covenant to pay an apprentice-fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think, be no answer to the action that the plaintiff had discontinued one of them. But this is an action for not continuing to serve as an apprentice, and although the later services of an apprentice are much more valuable than the earlier ones, and are, in part, a compensation to the master for the instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice-fee payable in *future*, the immediate cause of action is the breach of the contract to serve, and it seems that the obligation to serve depends on the corresponding obligation to teach "as an apprentice," and if the master is not ready to teach in the very trade in which he stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly in the nature of a condition precedent, and we are not able to distinguish between the three trades of an auctioneer, appraiser, and corn factor, so as to say one is a more substantial part of the contract than the other. As the plaintiff, by his own fault, has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant refusing to continue to serve him in any. Our judgment will therefore be for the defendant.

Judgment for the defendant.

BUSINESS OF THE WEEK.

Thursday, April 17.

**O'BRIEN v. Lord Kinnon.** Judgment.  
**SYMONS v. MAY.**—Tried before the Lord Chief Baron at Guildhall, and a verdict returned for the plaintiff, with liberty to move for a rule to enter the same for the defendant. *Humphrey* moved accordingly. This was an action on four bills of exchange drawn on Reid, Irving, and Company, in India. The defendant had pleaded that he had taken the benefit of the Insolvent Act in India, that he had set forth a true account of his debts, &c. in his schedule, and amongst others the debt of the plaintiff. Replication, that the defendant did not file the schedules mentioned in the plea, *modo et forma*. It appeared that the plaintiff's name was entered in the schedule as "Simons" instead of "Symons." It was contended that this was a sufficient description, and could not mislead; the object was that notice should be given to the creditors here that the bills were fully described. The Indian Insolventy Act, 11 Vict. c. 21, does not contain the same clause respecting the description of bills in the schedule as the English Act, but the setting out the bill is sufficient. (*Wise v. Nicholson*, Ryan and Moody, 322, and the judgment of Abbott, C.J. in that case; *Wood v. Jewett*, note A, B, and C. 20.)  
*Rule nisi granted.*  
**HAMPTON v. HARTLEY and another ASSIGNEE.**—Tried at York before Cresswell, J. when a verdict was returned for the plaintiff. *Knowles* now moved, pursuant to leave, for liberty

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to enter a nonsuit, if the Court should be of opinion that the plaintiff was not bound to pay a certain sum of money to the bank, of which he was a director; and for a new trial, on the ground of misdirection. The action was, brought for furniture seized under a bill of sale. Pleas, Not guilty, not possessed. The plaintiff was director of a bank at Huddersfield, and had permitted the bankrupt (Hanner) to overdraw his account, to secure the repayment of which he had taken an assignment of all his property in certain mills, &c. for 2,000*l.* stated to be for money lent. At the time of the execution of the deed no money had in fact passed, but certain bills, amounting to 1,300*l.* were coming due. It appeared that there were entries in the bank books as follows:—"This account (the bankrupt's) is guaranteed by Abraham Hirst for all above 500*l.*" "Mr. Hirst says, the account shall be paid off." "The 500*l.* is good too." These entries were signed by the plaintiff. It was contended that this was a void guarantee, there being no consideration, and that the plaintiff was not bound to pay; the sum was paid by the plaintiff after the act of bankruptcy. Cresswell, J., at the trial had said that this might be taken as a guarantee for any sum above 500*l.* The main point was whether the date of the Act of Bankruptcy was the date to be considered with reference to this payment or the date of the fact. (*Young v. Holt*, 2 Ex. 105; 2 & 3 Vict. c. 29; 12 & 13 Vict. c. 106, s. 125.)  
*Cur. adv. vult.*

**AWDE v. DICKSON.**—Tried at York, before Cresswell, J. when a verdict was returned for the plaintiff. *Watson* moved, pursuant to leave reserved, for a rule, to shew cause why the verdict should not be set aside, and a nonsuit entered. This was an action on a promissory note for 100*l.* The defendant pleaded that he did not make the note. The facts were these. The defendant's brother wished to borrow 100*l.* and applied to the defendant to become one of his sureties, which he agreed to do, on the representation that one Robinson should be his co-surety, and that he should not be responsible unless Robinson joined, and he wrote his name on the note, leaving a space for Robinson's. The name of the payee was left in blank. Robinson refused. The defendant then stated that he also refused to be a surety, and required that the note should be destroyed. The stamp had been provided by the borrower. Robinson refusing to join, the solicitor with whom the negotiation had taken place declined the security, and prevented his client advancing the money. Subsequently, the plaintiff agreed to become surety to the bank for the borrower (defendant's brother), and at that time he produced the note in question, and said he had authority to deal with it, and the bank agent then filled up the date, and inserted the plaintiff's name as payee. The offence of the borrower amounted to a clear forgery. [*POLLOCK, C.B.*—We held lately, that where a man indorsed for a particular purpose, and the bill was used for another, it was still a good indorsement, and his remedy was against the agent who had misapplied it.] Yes; but in *Russell v. Langstaff*, and many other similar cases, there was an authority to fill up. In those cases the instruments were perfect; this never was. [*POLLOCK, C.B.*—You mean to say, Mr. Watson, that where the person who has the possession of the note cannot use it without a crime, the indorsee is not responsible; but where otherwise, he is.] (*Marson v. Allen*, 8 M. & W. [*PARKER, B.*—The question is, did he take every means in his power to recover possession of the note? The general rule is, that the holder of a bill in blank has authority to fill it up; in this case a special contract is ingrafted on the original transaction.]  
*Rule nisi granted.*

**CHEESMAN v. EXALL.**—Tried in Kent, before Lord Campbell, C.J. Verdict for the defendant. *Shee*, Serjt. moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. The Court said that they had received an intimation from Lord Campbell, C.J. that he thought the verdict a proper one.

**FORSTER, Executor of Josh. Clarke, v. DAWKIN.**—Tried at Kingston, before Lord Campbell, C.J. Verdict for the defendant on the first, third, and seventh issues. *M. Chambers* moved for a rule to shew cause why the verdict should not be entered for the plaintiff on those issues. *Shee*, Serjt. moved for a cross rule. Both rules granted.

**FERNANDEZ v. PARKIN.** Part heard.  
**WARNER v. NUBRIC.**—D. D. Keane shewed cause. *Hornby*, in support.  
*Rule discharged.*

Wednesday, April 23.

**PAGE v. WATKINS.**—*Chambers*, Q.C. moved in this case, tried before the Chief Baron, in Middlesex, to set aside the defendant's verdict, and for a new trial.  
*Rule nisi.*

**WHERRY v. HILLMAN.**—*Shee*, Serjt. moved in this case, tried before Lord Campbell, C.J. in Kent, to set aside the plaintiff's verdict, on the ground that it was against the evidence, for misdirection, and that evidence had been improperly received.  
*Rule refused.*

**FERNANDEZ v. PARKIN** (part heard).—The *Attorney-General* continued his argument on this motion for a new trial. The cause was tried before Cresswell, J. and was a question as to custom of the manor of Wakefield. He contended there had been a misdirection, and an improper admission of evidence, and also to arrest the judgment on the second count, as the custom being an unreasonable one. (*Richardson v. Walker*, 2 B. & C. 827.)  
*Rule nisi for misdirection and rejection of evidence.*

**RIDGWAY v. LORD STAFFORD.**—*Whateley*, Q.C. moved for leave to enter a verdict for the defendant on the fifth count, or to reduce the damages. It was an action for an excessive distress.  
*Cur. adv. vult.*

**TOLMEY v. JOYNSON.**—*Knowles*, Q.C. moved to set aside the defendant's verdict, and for a new trial, on the ground of misdirection.  
*Rule refused.*

**TROWLER v. LOCKETT and OTHERS.**—*Watson*, Q.C. moved to set aside the plaintiff's verdict, obtained at Guildhall, before the Lord Chief Baron, on the ground that the verdict was against the evidence.  
*Rule nisi.*

**SLOCUMBER v. LYALL.**—*Humphrey*, Q.C. moved to set aside the defendant's verdict, on the ground of misdirection. It was an action of trespass, tried before the Chief Baron, in Middlesex.  
*Rule nisi.*

**WILLIAMS v. HOLDSWORTH.**—*Welsby* moved for a *certiorari* to bring up an order made against an attorney for certain costs, by the County Court judge at Merioneth, for the purpose of having such order set aside.  
*Rule nisi.*

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Reported by A. BRIDGES, Esq. of the Inner Temple, Barrister-at-Law.

ERROR FROM THE QUEEN'S BENCH.

*Saturday, Feb. 1.*  
**TANCRED and ANOTHER v. LEYLAND.**  
*Distress for rent—Distraint for more than is due—Sale.*

*There is no obligation upon a landlord, when he distrains for rent, to state for what amount he distrains; and if he makes a false statement of the amount, that does not give the tenant a cause of action, unless it be accompanied with special damage.*

*The case of Taylor v. Henniker, 12 Ad. & Ell. 488, overruled.*

*A declaration in case alleged that the defendants took the plaintiff's goods as a distress for certain arrears of rent, to wit 45*l.* pretended to be due, and under that pretence wrongfully sold the goods as such distress for the said alleged arrears of rent and the costs, whereas a small part only of the said pretended arrears was due:*

*Held, that there was no express or implied averment that more goods were sold than were necessary to satisfy the arrears actually due, and that the whole declaration disclosed no cause of action.*

Error upon a judgment of the Court of Q.B. in favour of the plaintiff, upon the first count of the declaration.

The first count of the declaration was in *case*, and alleged that whereas the plaintiff, before and at the time of the committing of the several grievances hereafter next mentioned, held a certain messuage and premises, with the appurtenances, as tenant thereof to the defendant, Charles Tancred, at and under a certain rent therefore, payable by the plaintiff to the defendant, Charles Tancred. Yet the defendants, contriving and intending to injure the plaintiff in this behalf, to wit on, &c. wrongfully and injuriously seized and took in and upon the said messuage and premises with the appurtenances, divers goods and chattels of the plaintiff, to wit, &c. of the value of 80*l.* as a distress for certain arrears of rent, to wit 45*l.* then claimed and pretended by the defendants to be due and in arrear to the defendant, Charles Tancred, for the said messuage and premises with the appurtenances, and the defendants aforesaid, to wit on, &c. under that pretence wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent, and the costs and charges of the said distress and of the appraisal and sale of the said goods and chattels. Whereas in truth and in fact, at the time of the making the said distress, and during all the time aforesaid, a small part only, to wit 17*l.* 10*s.* of the said pretended arrears of rent so distrained for as aforesaid, was in arrear to the defendant, Charles Tancred, for or in respect of the said messuage and premises.

The second count was in *trover*.

To the first count the defendants pleaded payment into Court of 1*s.* and no damages ultra.

*Replication*—Damages ultra; and issue thereon.

The jury found for the plaintiff upon that issue, with 40*l.* damages; and the judgment was that the plaintiff should recover the sum of 40*l.* and 7*l.* for his costs. Upon that judgment error was brought, and the following points for argument were stated by the plaintiff in error, that the first count of the declaration discloses no cause of action, for that no legal injury or damage is shewn to have been sustained by the plaintiff below. The only cause of action alleged being that at the time of the making the distress the defendants below said, or, in the language of the declaration, pretended that more rent was due than was in fact due. It will be contended, therefore, that as the declaration admits that a tenancy existed, and that at the time of the seizure and sale of the goods therein mentioned to have been distrained there was some rent due, and that as it nowhere appeared that the said seizure was excessive as a distress, or that the goods so seized were sold for more than the amount admitted to be due, such distress, seizure, and sale were lawful acts. The declaration does not state that the act complained of, if, indeed, any act is complained of, was wilfully or maliciously done.

The case was argued on Wednesday, Nov. 27, before Parke, B. Maule and Cresswell, J.J. Platt, B. and Talfourd, J. by

*Peacock* (Udall with him) for the plaintiff in error; and

*Cowling*, contra.

The following authorities were cited: *Taylor v. Henniker*, 12 Ad. & Ell. 488; *Wilkinson v. Terry*, 1 Moo. & Rob. 377; *Avenel v. Croker*, 1 Moo. & Malk. 172; *The Six Carpenters' case*, 8 Co. Rep. 290; *Lynne v. Moody*, 2 Stra. 851; *Crowther v. Ramsbottom*, 7 T. R. 654; *Etherton v. Popplewell*, 1 East, 139; *Grenville v. The College of Physicians*, 12 Mod. 387; *Carter v. Carter*, 5 Bing. 406; *Hunt v. Round*, 2 Dowl. 558; *Rogers v. Birmynge*, Cas. Temp. Hard. 245; 2 Stra. 1040; *Wait v. The Bristol Poor*, 1 Ad. & Ell. 282; 2 Wms. Saund.

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284 a. 2; *Smith v. Goodwin*, 4 B. & Adol. 413; *Crowder v. Self*, 2 Moo. & Rob. 190; Vin. Ab. "Distress," S.; *Tebbutt v. Selby*, 6 Ad. & Ell. 786. *Cwr. adv. vult.*

## JUDGMENT.

PARKE, B. now delivered the judgment of the Court. On the argument before us, it was contended that the first count in the declaration was bad, inasmuch as it disclosed no cause of action, as no legal injury was shown to have been committed by the plaintiff below. The first count alleges as the cause of action: first, that the defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by the defendant to be due to him, whereas part only of the rent was due; and, secondly, that they wrongfully sold the said goods as such distress for the said alleged arrears of rent and costs. As some rent is admitted to have been due at the time of the distress, the distress itself was not a wrong to the plaintiff below. There is no allegation that an unreasonable quantity of goods were taken, such as to constitute an excessive distress; and the only question is, whether the fact of the making of the distress for rent, some rent being due, is rendered illegal by being accompanied by a claim or pretence by the defendant that more was due than really was due, or by being followed by a sale of the goods distrained for, for these pretended arrears, in the manner described in the latter part of the first count. It cannot be disputed that an untrue claim or pretence may give a cause of action, as all false and untrue statements may, if all the circumstances should concur in respect to it which are necessary to make a false representation actionable, and, amongst others, if it had been followed by any special damage; as if, for instance, the tenant had been prevented thereby from obtaining sureties to join in a replevin bond, some friends being ready to join in the bond to secure the true amount, who would not join in one to secure the amount claimed; nor can it be disputed, if a larger quantity of goods is taken than was sufficient to raise the amount of the rent in arrear and the legal costs, and had been subsequently sold, such excessive sale would have been illegal and actionable. But it is contended for the plaintiff in error that, putting the construction the most favourable to the plaintiffs below that can be put on the allegation in the first count as to the sale, it has really no such import. We agree that every intentment is to be made for the plaintiff, and that the declaration is to be construed to contain a sufficient cause of action, after pleading over, if it be reasonably capable of such a construction; but we think this allegation cannot be reasonably so understood. The argument is simply that the goods distrained were sold for the said arrears and costs, that is, for the purpose of satisfying the said arrears and costs, not for a sum equal to the said arrears and costs, or as and for arrears due. There is no express or implied averment that more goods were sold than were necessary to raise the amount of the arrears actually due and costs, and all that need have been proved if that allegation had been traversed, was that he sold the goods seized for the purpose of paying the arrears, and consequently by the plea nothing more is admitted. That being so, the only question is whether the simple fact of making the distress accompanied by an untrue claim or pretence that more was due than really was due, is actionable? It is said it is so at common law, and the argument, therefore, is founded on the supposition that the common law casts the duty on a landlord distraining to inform the tenant what is the arrear of rent for which he distrains. We think that the common law casts no such obligation on the distrainer. It has been expressly laid down, "if the lord distrains for rent or services, he has no occasion to give notice to the tenant for what he distrains, for the tenant by intentment knows what things are in arrear for his land." That is cited from Roll's Abridgment, title "Distress" (S), 674, and the authority for this is the Year Book, 45 Edw. 3, 9, where the Chief Justice, in answer to an argument that the lord, on taking a distress, ought to give notice to the tenant what the cause of taking is, says, "It is not so, for the tenant is always held by common intentment to know what things are in arrear for his land, as rent and service;" and this is adopted by Lord Chief Baron Gilbert, in his Treatise on Distress, 48. The defendant, however, relied on the decision on a similar question by the Court of Q. B. in the case of *Taylor v. Henniker*, 12 A. & E. 488, in which it was laid down that a distress under a pretence that more was due than really was due was unlawful in its inception, the sale being only matter of aggravation. We do not think that case was well decided. We do not see on what legal principle it can be supported. No authority was cited in favour of the decision, and those above referred to in Roll's Abridgment and the Year Book were not brought before the Court. Some Nisi Prius authorities which were cited were in favour of the defendant; that of Lord Tenterden in the case of *Avenal v. Croker*, 1 Moo. & M. 172, in particular; but that of Lord Abinger, in *Crowder*

*v. Self*, 2 Moo. & R. 190, was not cited. We are not satisfied with the decision of the Q. B. and therefore think it should be overruled. The judgment, therefore, in the present case must be reversed. *Judgment reversed.*

## ERROR FROM THE QUEEN'S BENCH.

Monday, Feb. 3.

HALL AND OTHERS v. FLOCKTON AND OTHERS. *Pleading—Accord and satisfaction—Accord without satisfaction—Part performance.*

*An averment in a plea that it was agreed between plaintiffs and defendants that certain things should be done, and "that the action and causes of action should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned."*

*Held, to be an insufficient averment that the mere agreement was accepted in satisfaction. The plea went on to aver that the defendants performed some of the things specified in the agreement, and were ready and willing to perform the rest:*

*Held, insufficient to make this a good plea of accord and satisfaction.*

Error upon a judgment of the Court of Q. B. in favour of the plaintiff upon demurrer to defendants' plea. The action was in case, for the infringement of a patent.

*Plea, prout darrien continuance*, that the plaintiffs ought not further to maintain their action, because the defendants say, that after the commencement of the suit, to wit, &c. "it was agreed between the plaintiff W. F. and the defendants, that the defendants should admit (and as they then did admit) their liability to this action; and further that a license should be taken by the defendants from the plaintiffs, and which plaintiffs were to grant to the defendants for the use of the said invention in the declaration mentioned, and that the defendants should draw a cheque upon their (the defendants') bankers, to wit, &c. for 75*l.* payable to the bearer thereof, and deliver the same to one C. B. to be held by him until the said license should be granted, and to be then delivered over by him to the plaintiffs; and further that the plaintiffs and the defendants should respectively bear and pay their own costs incurred in this action, and that the action and the causes of action included in the same should be settled, satisfied, discharged, and terminated by the arrangement and agreement before-mentioned. That thereupon, and within a reasonable time in that behalf, and on the faith of the said agreement, and before this day, to wit, on, &c. the defendants did admit their liability as aforesaid, and did draw and deliver to the said C. B. a cheque on their bankers, to wit, &c. for 75*l.* payable, &c. according to the said agreement, and upon the terms thereof as aforesaid, and the same was then received and thence hitherto hath been and still is held by the said C. B. upon the terms aforesaid, and the defendants have always from the time of the making of the said agreement and arrangement hitherto been ready and willing to perform and fulfil the said agreement in all things on their part to be performed and fulfilled, and to take the said license to be granted to them by the plaintiffs, and to bear and pay their own costs incurred in this action, and whereof plaintiffs have always hitherto had notice."

Special demurrer, assigning for grounds (*inter alia*) that the accord is not sufficiently certain, as no time is stated within which it is to be performed. That the plea is in effect a plea of accord without satisfaction, as the agreement could not operate as a satisfaction, there being no allegation that the agreement was accepted by the plaintiffs in full satisfaction; neither could the admission of a liability which did not advance the plaintiffs' right or remedy. That the delivery of a cheque to C. B. was mere part performance, and insufficient. That it should have been shown that the accord was executed before plea. That if the plea is intended not to bar, but in suspension of the right of action, it is bad, as it must be a final bar or nothing.

Upon that demurrer the Court of Q. B. gave judgment for the plaintiffs; and upon that judgment error was brought.

The case was argued before Parke, B. Alderson, B. Maule, J. Cresswell, J. Talfourd, J. and Martin, B. *Phipson*, for the plaintiffs in error.—The plea is good. An agreement accepted in satisfaction is in itself a good bar without performance (*Case v. Barber*, 11 Raym. 450; *Good v. Cheesman*, 2 B. & A. 328); and that is the effect of this plea. Where there are words of express present agreement that the action shall be barred, it would be superfluous to add, that the agreement was accepted in satisfaction. [PARKE, B.—What do you say to the word "arrangement"?] There is no special demurrer on the ground of ambiguity; and agreement and arrangement are identical. *Evans v. Powis*, 1 Ex. Rep. 606, confirms the doctrine of *Good v. Cheesman*; and if the acceptance in satisfaction had been added to the plea, it could not have been tra-

## EXCHEQUER CHAMBER.

versed. If the Court should construe this as an agreement by the plaintiff to accept, not the agreement itself, but the performance of it, that would be a different case altogether; but even in that view it is submitted that the plea is good, because it does shew a performance by the defendant of all that was to be performed by him. [PARKE, B.—That is not enough, if the thing to be done in satisfaction was not done.] When we had performed our part, that performance became satisfaction by virtue of the agreement. [MAULE, J.—In an ordinary plea of accord and satisfaction, the agreement alleged is, that when the thing is done it shall operate as satisfaction; as, for example, if you deliver a horse, I will accept him in satisfaction. But then it is not enough to say that the horse was delivered, without adding, that he was accepted in satisfaction.] Then the first point is sufficient, that the agreement alone bars the action, and that the plea would be a good plea if it ended with the words "by the arrangement and agreement before mentioned." He also referred to *Jones v. Yates*, 9 B. & C. 532; *Wallace v. Kelsall*, 7 M. & W. 264.

*Mellish*, contra, was not called upon. PARKE, B.—We are all of opinion that the judgment of the Court below is right, and that the plea is defective in not stating that the plaintiff accepted the agreement (not the performance of it) in satisfaction. All that is said in the plea is, that it was agreed that the causes of action should be settled and satisfied by the agreement and arrangement mentioned, and we think that that must mean something more than the mere agreement, viz. the carrying out of the agreement. That was the view taken by the Court of Q. B. and we concur in it.

MAULE, J.—We are not to be considered as saying that there are no other defects in the plea. *Judgment affirmed.*

## RAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

Thursday, April 17.

(Before Mr. Justice COLERIDGE.)

HUNT v. THE GREAT NORTHERN RAILWAY COMPANY.

County Court—Prohibition—Tolls.

*Under their Act of Parliament the Great Northern Railway Company were required to convey on their line the coals, &c. of other persons in the carriages of such persons at a certain rate; and they were also required to convey back the empty carriages at so much per mile for each. On a certain number of loaded carriages being presented to the company for conveyance along their line, they not only then demanded payment for the forward carriage, but also a sum for the back carriage; this latter sum being refused, the company declined to convey the goods, whereupon an action was brought in the County Court for damages, resulting from the non-conveyance of the said goods. Upon an objection taken at the trial, that this was a question of a right to toll, and, therefore, under the proviso of sec. 58 of the 9 & 10 Vict. c. 95, not within the jurisdiction of the County Court, the judge held that he had jurisdiction, and decided the cause of action in the plaintiff's favour. Upon a motion subsequently to this Court for a prohibition: Held, that as the title to the toll was not denied, but only the time at which it was demandable and payable, which depended upon the construction to be put upon the Act of Parliament, the judge of the County Court had jurisdiction, and the writ was refused.*

Wordsworth moved for a prohibition to restrain the judge of the County Court, at Barnet, from further proceedings in this cause, under the following circumstances. By their Act of Parliament, the company are required to carry the coals, &c. of other parties, in the carriages of such parties, at the rate of 4*d.* per ton per mile; and they are also under an obligation to convey back the empty carriages at the rate of 4*d.* per mile each. The plaintiff being desirous of sending ten trucks of coal by this line from Peterborough to Potter's-bar, applied to the company to convey them. The company, however, not only required payment for the forward carriage, but demanded 2*l.* 10*s.* as then payable for the back carriage, which they insisted, under their Act, 13 & 14 Vict. c. 61, secs. 12 and 13, they were entitled then to have. The plaintiff having refused to pay in advance the amount for the back carriage, the company declined to carry the trucks, whereupon the plaintiff sued them in the County Court, at Barnet, for the amount of loss sustained by him in consequence of such refusal. The cause came on for trial on the 24th of February, when it was objected on the part of the company that the action involved a right to tolls, and therefore the Court had no jurisdiction, sec. 58 of the 9 & 10 Vict. c. 95 (the County Courts Act), providing "that the Court shall not have cognizance of any action of ejectment, or in which the

## BAIL COURT.

title to any corporeal or incorporeal hereditaments, or to any toll, fair market, or franchise, shall be in question," &c. The question having been argued at length, the judge took time to consider his judgment, when, on the 28th of March, he gave it in favour of the plaintiff, assessing the damages at 39l. 13s. 6d. On the 9th of April a copy of the order was served, adjudging the defendants to pay 53l. 10s. 10d. being the total amount of damages and costs. The present rule was moved for on the ground that the action involved a title to toll, and was therefore not within the jurisdiction of the County Court.

**COLERIDGE, J.**—There appears to be no dispute about the toll itself, but only when it is payable, which turns upon the construction of the Act of Parliament; and I cannot interfere with the construction put upon the Act by the County Court judge.

**Wordsworth.**—The plaintiff says that the company are not entitled to demand this toll; the plaintiff tendered all the toll except that for the back carriage; it is, therefore, a *bona fide* question as to a right to take toll.

**COLERIDGE, J.**—It is not a question as to a right to toll, but whether it was then payable. Suppose a demand for a turnpike toll is made upon a person who has never passed through the gate; that would not be a question of a right of toll. The question is, whether the company have a right to secure in the first instance the toll for the back carriage.

**Wordsworth.**—The argument on the other side was that they had no right to charge this toll.

**COLERIDGE, J.**—I am far from saying that in this case the judge of the County Court has properly construed the Railway Act; of that I form no opinion. The question I have to decide is, whether the title to the toll in this case came in question at all. It seems to me that it did not, but only whether in this particular case the company had a right to demand payment at the time they did. This is really merely a question of the construction of an Act of Parliament, and that was clearly a matter for the judge, and with which I cannot interfere. Now it is not disputed that the company had a right to toll in respect of particular carriages, and the question was whether the carriages of the plaintiff were such as were liable to toll at that time. The judge would have had no right to decide whether or not toll was demandable upon carriages, but he had as to whether or not these carriages were such upon which toll could rightly be demanded. I think, therefore, that the judge had jurisdiction, and that there should be no rule.

Rule refused.

# REG. V. THE JUDGE OF THE COUNTY COURT OF OSWESTRY.

*Ex parte HARPER AND ANOTHER.*  
County Court—Interpleader claim—Sufficiency of notice—Mandamus to a judge to hear.

Where a judge of a County Court refuses to hear an application upon an erroneous supposition that some preliminary requirement has not been complied with, this Court will interfere by mandamus to compel him to hear.

Judgment having been obtained against a defendant in an action in the County Court, execution issued, and certain property was seized thereunder. Hereupon a claim was made by A. and B. that such goods were theirs, and the forms of their grounds of claim was, "that the said two horses, two collars, and two bridles were assigned to us by an indenture, dated the 28th day of May, 1850, and made between," &c. (stating the parties). Upon an objection taken at the trial, that this statement was not a compliance with Rule 39, the judge held the objection to be good, and refused to hear the claim.

Upon an application to this Court for a mandamus to the judge to hear the claim,

Held, that the statement of the ground of claim was sufficient, and the mandamus was ordered to go.

In this case a rule nisi had been obtained, calling upon the judge of the County Court of Oswestry, Shropshire, to shew cause why a mandamus should not issue commanding him to hear and adjudicate upon a claim to certain goods made by Harper and Jones. It appeared that a claim had been entered in the County Court in a cause of *Davies v. Holbrook*, wherein Davies obtained judgment, upon which, on the 31st of October, execution issued. A levy was made, and certain goods were seized. On the 6th of November following a claim was made by Harper and Jones to such goods under a deed of assignment from Holbrook, executed in May preceding. The particulars of the claim were as follows:—

"To the clerk and high-bailiff of the County Court of Shropshire, at Oswestry, and to whom else it may concern.—The particulars of the claim made by us, and mentioned in the interpleader summons issued from the above court in the cause of *Davies against Holbrook*, dated the 5th day of November, 1850, are as follows:—Two horses, two collars, and two bridles, which were seized in a stable at Begley, in the parish of Hordley, in the county of

Salop, on the thirty-first day of October, in the year of our Lord 1850: the ground of our claim to the said two horses, two collars, and two bridles is, that they were assigned to us by an indenture, dated the twenty-eighth day of May, in the year of our Lord 1850, and made between Thomas Holbrook, defendant in the said cause, of the one part, and ourselves of the other part. Dated the eleventh day of November, 1850.

"Geo. Harper,  
R. Parry Jones."

At the hearing, it was contended, on the part of the execution creditor, that the notice was insufficient, and did not comply with the 39th Rule, inasmuch as it was not stated what was the consideration for the assignment. The judge, thinking the objection to the claim was well founded, decided upon not hearing the claim.

**Peacock, Q.C.** now appeared for the judge of the County Court, and contended that the judge was right in his decision, inasmuch as the notice was insufficient. (*Ex parte Tanner*, 19 L.J. 318, Q.B.)

**COLERIDGE, J.**—There the claim was merely repeated, but here it is said that the claim is founded upon a deed.

**Peacock.**—The statement should have shewn that the deed was made for a valuable consideration.

**COLERIDGE, J.**—*Prima facie* the deed imports consideration. Your contention is that a claimant should set out a good case. In *ex parte Tanner* the claimant merely said the goods were his property, which was not sufficient.

**Lush**, for the execution creditor, argued, first, that as a competent tribunal had already decided upon the insufficiency of the notice, this Court would not interfere; second, that the notice was not sufficient in form for not stating the consideration or purposes of the deed.

**Jones**, for the claimant, submitted that the notice was sufficient, and that as the judge had declined to adjudicate upon the claim, the *mandamus* ought to go.

**COLERIDGE, J.**—It is a well-known distinction with reference to inferior courts, that if they abstain from adjudicating upon a question upon any erroneous view of a preliminary point, this Court will interfere to compel them to proceed and adjudicate, but that it is otherwise where they enter into the question and decide it, though their decision is unsatisfactory. The question is, whether there has been an adjudication upon the merits; or whether the Court abstained on account of a preliminary point. Now, I must take it that the claimant has been refused a hearing on account of not having given a sufficient notice; but as to that, it really seems to me that the notice was quite sufficient. The notice need not set out a good ground of claim; it will still be a good claim if it describes in what way the party claims. The judge will decide upon the validity of the claim when he has heard the case. This is not the case of *Ex parte Tanner*. Here the claimants shew how they claim. It is said that the claim is not sufficient, as the deed may have been a voluntary one, and void as against creditors. So it may be; still they say this is our claim, and it is for the judge to adjudicate upon it. The rule must be absolute.

## BUSINESS OF THE WEEK.

**Thursday, April 17.**  
**EX PARTE FRIDAY.**—*Watson, Q.C.* shewed cause against a rule for a prohibition to certain parties to restrain them from proceeding further upon an application to have possession of certain premises given up under the 1 & 2 Vict. c. 74.—*Lush contra.* *Cur. adv. vult.*

**RE THE ARBITRATION BETWEEN LAURENCE AND BRAKIN AND OTHERS.**—*Maynard* moved for a rule calling upon the defendants to pay a sum of money pursuant to an award.

**REG. V. DAWK.**—*Phiss* moved for a *certiorari* to bring up the depositions taken before the coroner of Somersetshire, upon an inquisition, whereupon a verdict of manslaughter was returned, and why the defendant should not be admitted to bail.

Application granted.

## BANKRUPTCY.

**VICE-CHANCELLOR KNIGHT BRUCE'S COURT,** reported by G. S. ALLNUTT, Esq. Barrister-at-Law.

**COURT OF BANKRUPTCY, LONDON,** reported by JOHN A. FOMBLANQUE, Esq. Barrister-at-Law.

**COURT OF BANKRUPTCY, DUBLIN,** reported by J. LEVY, Esq. Barrister-at-Law.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Nov. 26, 1850, and March 31.

*Ex parte WAKEFIELD, re WAKEFIELD.*  
**Bankrupt Law Consolidation Act—Certificate.**  
Where a bankrupt had been guilty of breaches of trust, the Court granted to him a certificate, with a proviso that it should not extend to protect him from claims upon him as a trustee.

This was a petition by the bankrupt appealing from the decision of Mr. Commissioner Balguy, who had refused to grant to the bankrupt his certificate on the ground of breaches of trust committed by him, and reckless trading. The case came on to

be heard on the 26th of November, when, after some discussion by *Bacon* and *H. Humphreys*, in support of the petition, and *Russell* and *Daniel*, for the assignees,

The VICE-CHANCELLOR observed that it had not been shewn that the breaches of trust were committed by the bankrupt in his conduct as a trader, and that a case of reckless trading had not been established against the bankrupt, and accordingly his Honour granted a certificate of the third class, upon the bankrupt's undertaking that it might be recalled and cancelled upon any grounds which might thereafter be shewn for so dealing with it.

**Monday, March 31.**—The petition came on for rehearing, when

*Bacon* and *H. Humphreys* appeared for the bankrupt; and *Russell* and *Daniel* for the assignees.

The VICE-CHANCELLOR said that he considered it a very important ingredient in the case, though it seemed that the order, by inadvertence, did not provide for it,—that the certificate did not extend to protecting the bankrupt from any claims upon him as a trustee, or any demands upon him as an executor,—a circumstance which rendered it unnecessary for his Honour to give any opinion, as far as this case was concerned, upon the effect or meaning of the words "conduct as a trader," as well as upon the effect, whether retrospective or not retrospective, of the 286th section of the Bankrupt Law Consolidation Act. With regard to the other grounds of objection, he must say, not only were they not brought before him with sufficient clearness and precision to enable him to act upon them, but assuming them to be subject to fair observation, as probably they were, he was of opinion that this bankruptcy having been adjudicated in July 1848, and the certificate on which this re-hearing now proceeded having been granted more than two years afterwards, there had been a sufficient degree in effect, though not in name, of suspension. It seemed to his Honour, in this state of circumstances, that the period had arrived when the certificate must go. It must be so worded as not to protect the bankrupt as to all demands against him as a trustee; but for this, there was a portion of the transactions which would have required very careful and attentive consideration, but, as he said before, there were circumstances which relieved him from dealing with that portion of the case.

## COURT OF BANKRUPTCY, DUBLIN.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

(Before Mr. Commissioner BALDWIN.)

Re WALSHE.

*Rehearing of insolvent—Dismissal of petition—Bankruptcy.*

A trader, who has been discharged under the Insolvent Debtors' Act, 3 & 4 Vict. c. 107 (*English analogous*, 1 & 2 Vict. c. 110), may be declared bankrupt upon a debt returned in his schedule; but his estate is not thereby divested from the provisional assignee, and it can only vest in the assignee under the bankruptcy upon the dismissal of his petition; and such dismissal can take place only on a rehearing.

*Creighton* applied to the Court for a rehearing of this case, with a view to have the insolvent's petition dismissed. He proved upon the affidavit of *Lyndsay*, a creditor, which stated that the insolvent had been discharged in Cork some six months previously; that the debt due to *Lyndsay* was returned in insolvent's schedule; that upon that same debt he had recently issued a commission of bankruptcy, to which the bankrupt had surrendered; that upon his examination on surrender it appeared that he had concealed property to a considerable amount, and having, therefore, obtained his discharge by false representations, any creditor was entitled to ask for a rehearing. [COMMISSIONER.—Then if I rehear the case, I must adjudicate on it, and punish him for the fraud. You seem to wish to have the petition dismissed.] That was undoubtedly the object of the application. The case had been brought into the Bankrupt Court, but the property discovered could not be administered there until the petition was dismissed, and the dismissal could take place only upon a rehearing. [THE COMMISSIONER.—The creditors in the bankruptcy have got hold of the property, and they want to withdraw the case from this Court; but have not I a duty to perform in punishing the fraud?] No doubt that was the object; but as the discovery was made through the agency of the Bankrupt Court, the creditors wished to have the estate administered there. They did not seek to have the bankrupt punished, inasmuch as he made a full and true disclosure when examined before the commissioners, and thus made every atonement in his power for what he had previously done. [THE COMMISSIONER.—I am not satisfied to let a case of this kind escape because creditors have now got hold of property which cannot be administered in the Bankrupt Court without withdrawing the insolvent from the jurisdiction of this Court.] It would embarrass the case very much if it were to

## BANKRUPTCY.

be retained in the Insolvent Court, and the insolvent subjected to a long remand for fraudulent concealment of property.

The Commissioner consented to dismiss the petition, the case not to be taken as a precedent for the future.

## Re DOYLE.

## Equitable assignment of bond—Laches.

*A creditor to whom is handed a bond as a security for his debt without any assignment, and omits to have judgment entered up against the obligor, whereby the debt is lost, cannot, upon the insolvency of the obligee, prove upon his estate for the amount.*

This had been an insolvency of many years' standing. The insolvent had died, and a schedule creditor having discovered that his personal representative was in possession of property that had been omitted from the schedule, proceeded to have it made available for the benefit of the creditors.

Creighton, for the creditor, moved the Court for an order to compel the personal representative of the insolvent, who had been also appointed assignee, to execute a declaration of trust as regarded the property omitted from the schedule, and which was in his possession as personal representative of the insolvent.

Levy, for the personal representative and assignee, obtained a reference to the chief clerk to inquire and report into the nature and amount of the creditor's debt; and the chief clerk's report stated that the creditor had been originally handed a bill for 28l. and a bond for 50l.; the acceptor of the bill and the obligor of the bond was a person named Hughes, who was dead, having left property sufficient to pay the bond and the bill, but the former was barred by the Statute of Limitation, and the second could not be recovered, inasmuch as judgment had never been entered up on it.

Creighton contended that the mere handing over of the bond was an imperfect assignment of a chose in action; and that not being duly assigned to the creditor, it vested in the assignee of Doyle, and that it was not competent for the creditor to have judgment entered up on it after the insolvency; that it was the duty of the debtor, who was to have been discharged, to have taken care that a proper assignment should be executed. It was his duty to do that which was to release him from his liability. (*Crawley v. Hillery*, 2 M. & S. 120.) It was his duty also to inform the obligor of the bond that it had been handed over or assigned to a third party. The creditor was not therefore guilty of any laches, it was the debtor and his estate should be liable. With regard to the bill, he admitted that that should be struck off the creditor's claim.

Levy was stopped by the Court.

His LORDSHIP thought there had been a perfectly valid equitable assignment, and that a creditor could not be permitted to hold over a security, originally good, until it was valueless, and that having neither put it in suit himself or offered it to the assignee for the benefit of the creditors, he could not now be permitted to prove it on the insolvent's estate. Claim on foot of bill and bond rejected.

## Re WALSH.

## Insolvent debtor—Petitioning creditor's debt.

*A debt from which an insolvent is discharged by the Insolvent Debtors' Court will be a good petitioning creditor's debt; but the Bankrupt Court cannot administer his estate until his petition in the Insolvent Court is dismissed.*

The bankrupt in this case had been discharged as an insolvent debtor in Cork, and the petitioning creditor was returned in his schedule for the same debt, upon which the present commission had been issued out. The Commissioner, on the case coming before him, was somewhat apprehensive that there would be a difficulty in the way, for although, on the authority of the case of *Jollis v. Mountford*, 4 B. & A. 256, a debt returned in an insolvent's schedule, under which he had taken his discharge, will be a good petitioning creditor's debt, yet, inasmuch as more than two months elapsed since the filing of the schedule, the Bankrupt Court could not administer the estate until the insolvent's petition was dismissed, and the property divested from the provisional assignee in the Insolvent Court.

Creighton, for the petitioning creditor.—There was no doubt that the creditor's debt was not discharged by the operation of the Insolvent Debtors' Act, so as to prevent him suing out a commission. The other difficulty, no doubt, existed, and it was the intention of the petitioning creditor to apply to the Insolvent Debtors' Court to have the petition dismissed.

Levy, for the bankrupt.—His client would co-operate in having his petition dismissed, and his estate brought into the Bankrupt Court.

## NISI PRIUS.

## COURT OF COMMON BENCH.

Reported by W. J. MITCHELL, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS AT WESTMINSTER AFTER HILARY TERM.

Monday, Feb. 10.  
(Before JERVIS, C.J.)

DAVIS v. BURRELL and LANE.

*Amendment—Evidence—Postea—Apprehension—2 & 3 Vict. c. 47—Notice of action—Covenant—Waiver—Certificate—13 & 14 Vict. c. 61.*

*The defendant pleaded not guilty by statute, and it was so entered in the issue; but in the Nisi Prius record the words "by statute" were omitted:*

*Held, that it could not be amended, except by consent.*

*And quære, as to the amendment with consent.*

*The Nisi Prius record of an action in ejectment, with the postea indorsed, is evidence to shew that the trial took place, but not to shew that the lessor of the plaintiff was not entitled to the premises:*

*Quære, whether an action in ejectment between Doe dem. A. v. B. is admissible in an action by B. v. A. and C.*

*Plaintiff was tenant to defendant, with a covenant in the lease for the payment of rates, and a proviso for re-entry, on non-payment. The rates were in arrear; the defendant entered in plaintiff's absence, and put locks on the doors; plaintiff, on his return, broke the locks, and was given into custody. In trespass for false imprisonment:*

*Held, defendant was lawfully in possession of the premises, and that he was authorised by 2 & 3 Vict. c. 47, ss. 54, 66, to give plaintiff into custody.*

*Quære, if defendant had been simply in possession. A covenant to paint at the end of every five years is not a continuing covenant.*

*A verdict for a sum not exceeding 5l. requires a certificate for costs under 13 & 14 Vict. c. 61, s. 11.*

This was an action of trespass for false imprisonment. The defendants pleaded not guilty by statute, and that the plaintiff was found within the Metropolitan Police District committing a breach of the peace and endeavouring to make a forcible entry.

The words "by statute" were annexed to the plea in the issue, but were not inserted in the Nisi Prius record.

Byles, Serjt. for the defendant, applied to amend the record by inserting the words; the record was made up by the plaintiff, and it was his fault that the omission was made.

JERVIS, C.J.—I cannot amend it; it can only be done by consent.

E. James, Q.C. for the plaintiff, consented.

JERVIS, C.J.—I will not, even with consent, make the amendment; and I should advise the officers to have nothing to do with it; the plaintiff's attorney has made the mistake; he ought to make the amendment.

[The record was then amended by the plaintiff's attorney.]

It appeared that Burrell had demised to Smith for twenty-five years, from December 25th, 1842, at 175l. per annum; that the lease contained a covenant to repair and to pay rent and rates, with a proviso for re-entry for breach of covenant; that Smith had assigned to the plaintiff; that the defendants, alleging breaches of covenant, had entered and obtained possession in the absence of the plaintiff; that the plaintiff, on his return, endeavoured to force an entry, and knocked off from the doors the locks which had been put on by the defendants; that for so doing he was given into custody, and that the charge made at the police station was "wilfully breaking off some locks from some doors in Catherine Wheel-yard, Great Windmill-street." To shew that the defendants were not lawfully in possession of the premises damaged, the Nisi Prius record of a prior action in ejectment in which the present plaintiff was defendant and the defendant Burrell was lessor of the plaintiff, was tendered; the postea was indorsed, shewing a verdict for the then defendant.

Byles, Serjt. objected the record was not properly made up, and was therefore not admissible. But even if admissible, it was not evidence against the present defendants—first, because Doe was the plaintiff in the former action; secondly, because Lane, at all events, had nothing to do with it.

JERVIS, C.J.—If binding on Doe it is binding on his lessor.

Byles, Serjt.—Probably they would be identical, but at any rate it was not evidence against both the present defendants.

Prentice, contr.—This was the only record made up when the verdict was for the defendant.

JERVIS, C.J.—No doubt that is the practice, but the postea proves only that there was a trial between the parties, not that judgment followed.

## Nisi Prius.

The evidence was not pressed. It was shewn there was a distress on April 13th on behalf of a defendant Burrell for rent due March 25th.

Byles, Serjt. contended that Burrell was lawfully in possession; that he had a right to enter for repair, for non-payment of rent and of rates; that he did enter; that after he had entered, and was lawfully in possession, the plaintiff came and broke the locks; that for this he was properly given in charge, under the Police Act, 2 & 3 Vict. c. 47, s. 54, div. 10; that s. 66, of that Act enabled the owner of the property to apprehend any person found committing such offence. But the defendants were entitled to notice of action, for 2 & 3 Vict. c. 47, was to be construed as one Act with 10 Geo. 4, c. 43, and sec. 41 of that Act expressly required notice of action. Notice of action was also required under 7 & 8 Geo. 4, c. 30, s. 41. The being an offence against sec. 24 of that Act, any person acting in execution of the Act was entitled to notice. (*Hughes v. Buckland*, 15 M. & W. 346; *Essex v. Thornborough*, 3 Ex. 846.)

JERVIS, C.J.—The question is, whether the defendant believed that the plaintiff was breaking his lock, not whether he believed himself to be owner of the property. It is for the jury; so is the question whether there was a want of repair.

Byles, Serjt.—They have shewn our right to enter our entry, and that we were at the time in possession. It is sufficient that the defendants were in possession.

JERVIS, C.J.—I shall leave to the jury whether the defendants were lawfully in possession. If not I shall reserve to you the question whether possession alone is sufficient.

Byles, Serjt.—The defendants claim to have given the plaintiff into custody under sec. 54 of 2 & 3 Vict. c. 47, for attempting to commit a forcible entry, and for a breach of the peace. Sec. 66 of that Act says "That any person found committing any offence punishable either upon indictment or as a misdemeanour, upon summary conviction by virtue of the Act, may be taken into custody," &c. We find him committing a forcible entry. This, too, is done in the presence and sight of the police constable who takes him.

JERVIS, C.J.—Breaking locks or breaking the peace in the presence of a constable would authorise the constable to take him. But in this case the constable waits and the defendants give him in charge. The constable does not do it on his own motion, but on your order. It comes, therefore, to the question whether you were owners of the premises. If the jury think that there was a want of repair and an entry, and if they shall think that the defendants, being thus lawfully in possession, before that they were acting under the statute, they would be entitled to notice of action.

Byles, Serjt.—The defendants were also entitled to enter for breach of the covenant to paint inside at the end of every five years, and outside at the end of every seven years.

Prentice.—That is not a continuing breach; it was waived by distress for rent. So the covenant for payment of rates.

JERVIS, C.J.—To the jury: Was Burrell in possession? The defendant's counsel says there are three ways in which he may have been so: under the proviso for re-entry for non-repair; for non-payment of rates; and for not painting. Now, the plaintiff covenanted to yield up the fixtures to the defendant at the end of his lease, and he has removed some; but the Court of C. P. has held that removal gives no right of re-entry, for he may put them back during the term: I shall hold so; but if he has removed them so recklessly as to commit damage, it would amount to want of repair. There must be reasonable repair, but there must also be a reasonable time for repair. If you find want of repair, the defendant had a right to enter: he would then be lawfully in possession, and I should direct a verdict for the defendants on the general issue under the Police Act. So if you find that the rates were in arrear. As to the painting, it is not in my opinion, a continuing covenant, but it is better to have your opinion upon it. As to the second plea was the plaintiff there making a disturbance and endeavouring to enter forcibly? Assess the damages contingently.

*Verdict—premises in repair and painted by rates in arrear, and plaintiff there made a disturbance—damages, 5l.*

JERVIS, C.J.—I think, that as the rates were in arrear, the defendant was entitled to enter; that he was therefore properly in possession, and was entitled to notice of action. The verdict must be entered for the defendants on the general issue.

Prentice applied for a certificate under the Courts Act, in case they should succeed in obtaining the verdict for the plaintiff. The Extension Act, 13 & 14 Vict. c. 61, s. 11, provides that the plaintiff shall have no costs, if "he shall recover a sum not exceeding 5l."

JERVIS, C.J.—Granted the certificate.



## LORD CHANCELLOR'S COURT.

## LORD CHANCELLOR'S COURT.

## LORD CHANCELLOR'S COURT.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

July 4 and 15, 1850.

Re St. GEORGE STEAM PACKET COMPANY,  
ex parte HENESSEY.

Transfer of shares—Acceptance—Purchase in name of another person—Liability—Contributory.

Where the deed of settlement of a joint-stock company required that each transfer should be executed by both the transferor and transferee, and a purchaser of shares had been made by a father in the name of his son, whose name was thereupon inserted in the list of shareholders; neither the purchaser or his son executed the transfer, and the son repudiated the shares; it was held that a valid transfer of the shares had not been made by the vendor, and that he was properly placed on the list of contributories under an order to wind up the company.

J. C. Hennessey, the executor of M. Hennessey, appealed against an order made by Vice-Chancellor Knight Bruce, by which was reversed the decision of the Master, who had excluded the name of the appellant from the list of contributories of the above company, and referred back the report to be reviewed. In 1841 M. Hennessey was the owner of certain shares in the St. George Steam Packet Company. On the 22nd Oct. 1841, he sold sixteen shares of 25l. each to Thomas Richard Needham for 90l. that sum being provided and paid by T. R. Needham. It appeared that, in consequence of directions given by T. R. Needham, the shares sold were transferred into the name of R. Needham, the son of T. R. Needham; that this transfer was executed by M. Hennessey, but was not executed by R. Needham; that the name of R. Needham, was, however, duly enrolled in the books of the company, and registered as one of the shareholders of the company. It also appeared that R. Needham gave no authority to his father for the transfer, but, in fact, from the first repudiated the gift; that he never received any dividend on the shares, or attended any meeting of the company; that the repudiation of the transfer, though known to T. R. Needham, was never communicated to M. Hennessey or the company; that both M. Hennessey, during his life, and J. C. Hennessey, as his executor, after his death, which took place in May, 1846, paid calls on shares, which M. Hennessey continued to hold in the company, but no calls on the sixteen shares transferred; that neither M. Hennessey nor his executors heard anything in reference to these shares until October 1849, when the latter received notice that his name was put on the list of contributories of the company by the official manager. T. R. Needham made an affidavit, stating that in consequence of his son repudiating the gift of the shares, and the transfer not having been executed, he treated the transaction as at an end, and that, though he received circulars and notices addressed to his son, he destroyed them without making any communication to his son. The following clauses of the deed of settlement were referred to:—"Clause 17. That it shall be lawful for the proprietors in the said company, or their legal representatives, whether by marriage, or as executors, or administrators, or legatees, to sell and transfer to any person or persons whomsoever all or any of the shares of such proprietor in the property and funds of the company, and whenever any such sale and transfer shall be made, a return or account thereof shall be made to the clerk or the agent for the time being of the said company, and shall from time to time be entered and registered in the books of the said company, on payment of the fee of 2s. 6d. on each share so transferred; and the person or persons to whom such transfer shall be made, shall be and shall stand in all respects, and to all intents and purposes, in the place and stead of the person or persons making such transfer, and shall be liable to be sued in an action of covenant, or otherwise, for any breach of the rules and regulations of the said company, as fully and effectually, to all intents and purposes, as if such person or persons to whom such transfer or transfers shall have been made had been a proprietor or proprietors at the date of these presents, and the form of transfer of such share or shares may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties as the case may require:—

To ———, of ———, in  
both inclusive, } consideration of  
paid to me by ———, in the county of ———, do hereby  
bargain, sell, assign, and transfer to the said  
shares, of ——— each, numbered as per margin, of  
and in the capital stock of the company called the  
St. George Steam Packet Company, to hold unto  
the said ———, his heirs, executors, administra-  
tors, and assigns, subject to the same conditions as  
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I held the same immediately before the execution hereof. And I, the said ———, do hereby agree to accept and take the said shares, subject to the same conditions. As witness our hands, this day of ———, 18 ———.

Witness,

Signed,

Clause 18. "And every deed or transfer being executed by the seller or sellers and the purchaser or purchasers of such share or shares shall be delivered to and kept by the clerk of the said company, who shall enter in a proper book or books to be kept for that purpose, a memorial of such transfer and sale, and endorse the entry of such memorial on the said deed of sale or transfer, for which no more than 1s. is to be paid, and on request a certificate of each share shall be delivered by him to the purchaser or purchasers for his, her, or their security, and for which certificate no more than 1s. 6d. shall be paid; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share in the profits of the said company, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof as a proprietor or proprietors of the company."

Clause 22. "That every person who, being a purchaser of any shares in the capital of the company, shall take a transfer or assignment of such shares, and shall not, previously to such purchase, have executed or otherwise acceded to these presents, and shall not at the time of the said shares vesting in him in such capacity by the means aforesaid, be a recognised proprietor in the company in respect of any other shares in the capital, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered as a proprietor in the company from the time of the shares being so purchased by or becoming so vested in him as aforesaid, but as to all profits, rights, privileges, benefits, and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise acceded to these presents."

By the 51st clause it was declared that the person in whose name the shares stood should be deemed the absolute owner, and that the company should not be affected with notice of any trusts.

*Malins and Lunge*, for the appellant, cited *Taylor v. Hughes*, 2 Jones & Lat. 24; *Barnes v. Pennell*, 2 House of Lords Cas. 497; *Foster v. The Bank of England*, 15 L. J. Q.B. 212.

*Bacon and Prior*, contra.

## JUDGMENT.

The LORD COMMISSIONER (Mr. Baron Rolfe).—In this case the company had been duly constituted by deed, and it was in full operation. Michael Hennessey was in and prior to the year 1841 a shareholder, holding several shares, that is, one of 100l. and several of 25l.; and the only question is, whether on the 22nd October, 1841, he sold and transferred sixteen 25l. shares, as to have gotten rid of all liability to the company in respect of them. M. Hennessey died in 1846; and J. C. Hennessey is his personal representative. The Master considered that M. Hennessey had in 1841 divested himself of all interest in these sixteen shares, and refused to place his executor on the list of contributories. But on the application of the official manager, Vice-Chancellor Knight Bruce came to a different conclusion, and referred it back to the Master to review his report, in order that he might place on the list the name of J. C. Hennessey, as executor of Michael. Mr. Hennessey moved by way of appeal to discharge this order, on the ground above stated, namely, that Michael Hennessey had ceased to be the holder of these shares in October, 1841. A great deal of evidence was taken before the Master; but there appears in the result to be no doubt about the facts, and the only question is as to the legal consequence of those facts when considered with reference to the clause in the company's deed relative to transfers. The clause directing the mode of transfer is clause 17, and is as follows. (His lordship here read the clause as above set out.) The facts are these: in October, 1841, Thomas Richard Needham, wishing to benefit his son, Richard Needham, who was an engineer, and whose business made it necessary for him often to cross to and from England and Ireland, purchased for his son, through a broker, at Cork, the sixteen shares in question from Michael Hennessey (the holder of shares to a certain amount, having the privilege of passing to and from in the company's vessels without charge. The purchase-money, 900l. was then paid to Michael Hennessey by the agent of Thomas Richard Needham; but the purchase was made in the name of the son. Michael Hennessey thereupon executed, at the office of the company at Cork, a transfer to the son, that is, Richard Needham, of the sixteen shares; but this transfer was never executed or acceded to by Richard Needham. On the contrary, when he was soon afterwards informed by Thomas Richard Needham, his father, of what had been done, he wholly declined to have anything to do with the shares, believing, as he says, that the company was insolvent. Under these circumstances it is plain that nothing had been done

by Richard Needham which could make him liable as a contributory. It was, however, argued, that though Richard Needham, the proposed transferee, might not be liable, still the company had precluded itself from treating Michael Hennessey as still being one of its members; but this is not so; Michael Hennessey, in order to relieve himself from liability, was bound to procure a transferee, who should put himself in his place. The only transfer ever attempted to be made was to Richard Needham, the son, who, it is admitted, never in any manner accepted it. The mode of transfer required by the deed of settlement is, as we have already seen, a transfer to be executed by the transferee, in order to signify his consent, and so to make himself liable as a purchaser. Till that had been done, the seller continues liable to the company as one of its members. It was said that there were *laches* in the company in not getting the transferee to signify his acceptance or rejection, but this is not so. What could the company do more than they did? There was the transfer executed by the seller waiting to be executed by the purchaser, if he had chosen to present himself, but he never did so. It was argued that this was really a purchase by the father, and some facts were relied on in the evidence tending to shew that the company considered and treated the father as the purchaser. This, we think, is not at all made out, but even if it were, it would not vary the case, for it is abundantly clear that the transfer in the books was to the son and not to the father; and the evidence clearly shews that the father never accepted or intended to accept any of the shares in question. Whether, as between Hennessey and the father, the father might be compelled to accept the shares in question, is not now before us. Vice-Chancellor Knight Bruce was of opinion that Michael Hennessey, as a shareholder, was liable up to the 21st of October, 1841; that never having made a valid transfer, he continued liable after that date, and up to his death, and so that the name of J. C. Hennessey, his executor, was properly placed on the list of contributories. In that opinion we entirely concur, and this motion must therefore be refused with costs.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLSUTT, Esq. of the Middle Temple, Barrister-at-Law.

Saturday, April 26.

Re THE WORCESTER CORN EXCHANGE COMPANY,  
Joint-stock Companies Winding-up Acts—Ad-  
vertisements of order of reference to the Master.

In this case an order was made on the 16th of November last, referring it to the Master to inquire whether it was expedient or necessary that the company should be dissolved and wound up under the Act (16 Law T. 189). The Master (Kindersley) having reported that it was expedient, the present petition was presented, praying the usual order for the dissolution and winding up of the company.

*Smythe* appeared in support of the petition, and stated that the order of reference had not been advertised pursuant to the 15th section of the Winding-up Act of 1848, which requires that the date, title, and ordering part of every order of the Court made upon any such petition previously to, and including the order absolute, shall, within twelve days after the date thereof, be advertised once in the *London Gazette*. The original petition, however, had been duly advertised, and all the other proceedings were regular. The directors had filed a declaration of insolvency, upon which the original petition was founded, and they had been summoned by the Master upon the inquiry before him. The 16th section of the Act of 1849 enacts "that it shall be lawful for the Master in such cases, as he thinks fit, to dispense with any advertisements required by the said Act to be made of any call, or of any other proceedings, by or before the Master;" and the Master considered that in this case the advertisement might be dispensed with.

*Begehewe*, for the secretary of the company, consented.

The VICE-CHANCELLOR said that the 16th section of the Act of 1849 was applicable only to proceedings by or before the Master; but he thought that if Master Kindersley was satisfied that the advertisement might be dispensed with, he might be. He would, therefore, make the order.

March 14 and 15.

DICKIN v. WARD.

WARD v. DICKIN.

Evidence—Accounts.

A. B. and C. D. had dealings and transactions together, in the course of which a bond for 4,000l. was given by A. B. to C. D. Both of them afterwards died. E. F. the representative of C. D. (the obligee) filed a bill to enforce the bond. G. H. the representative of A. B. (the obligor) filed a bill to have the accounts between A. B.

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and C. D. taken, and the bond made subject to such accounts, and proved an account in C. D.'s handwriting. A decree was made in both suits referring it to the Master to take the accounts, and to inquire under what circumstances the bond was given, and in the decree the account in C. D.'s handwriting was entered as read:

*Held, on exceptions to the Master's report, that this account was receivable by the Master in evidence, as well against as for G. H. the representative of A. B.*

This case came on to be heard upon exceptions to the Master's report, under the following circumstances:—George Dickin and Stephen Dickin, who were brothers, had various dealings together, in the course of which a bond for 4,000*l.* was given by George Dickin to Stephen Dickin. George Dickin died, leaving E. Lloyd Ward and John Dickin his executors; and afterwards Stephen Dickin died intestate, and letters of administration of his effects were granted to his widow, Mary Dickin. Mary Dickin instituted the suit of *Dickin v. Ward*, against E. L. Ward and J. Dickin, for the purpose of enforcing the bond for 4,000*l.* against George Dickin's estate. Subsequently E. L. Ward and J. Dickin instituted the suit of *Ward v. Dickin*, against Mary Dickin, in order that an account might be taken of the various dealings and transactions between George Dickin and Stephen Dickin, and that the bond might be taken as subject to such accounts. Ward and J. Dickin proved, in the suit of *Ward v. Dickin*, two accounts in the handwriting of Stephen Dickin, the obligee of the bond. Upon the causes coming on to be heard, a decree was made whereby it was referred to the Master to take an account of the dealings and transactions between George and Stephen Dickin, and to inquire whether any accounts had been settled between them, and when and under what circumstances such accounts were settled, and under what circumstances the bond mentioned in the pleadings had been given; with liberty to state circumstances specially. In this decree the two accounts in Stephen Dickin's handwriting, and which were marked respectively C. and S. were entered as read. By his report the Master stated (among other things) as follows:—"The exhibit C, proved in the second mentioned cause by and on behalf of E. L. Ward and J. Dickin, plaintiffs in that cause, and defendants in the first mentioned cause, is partly written in ink and partly in pencil, and is wholly in the handwriting of the said intestate, Stephen Dickin, and was found among his papers by the said Mary Dickin, and is in the words and figures following, that is to say (*setting out the account*), and I consider that the said exhibit C is to be taken as sufficient proof between the parties (independently of any other evidence given in these causes) as to the accuracy and truth of the several items therein contained, except as hereinafter appears, and as showing the dealings and transactions between them so far as the items therein extend." The report also contained a similar statement as to the exhibit S. and a statement of the excepted items before referred to. To this report E. L. Ward and J. Dickin took several exceptions, the third of which was in the following terms:—

"The Master has allowed the said exhibit C as such proof accordingly, and has charged the estate of the said G. Dickin, in account with the estate of the said S. Dickin, upon the evidence of the said exhibit; whereas the said Master ought not to have allowed the exhibit C as evidence against the exceptants, whereon to charge them with any of the items of account therein appearing."

The seventh exception related to the Master's report as to the exhibit S.

Russell and Goodere, in support of the exceptions, relied upon the case of *Handford v. Handford*, 5 Hare, 212, where it was held that evidence received at the hearing of the cause, and entered in the decree, is not necessarily admissible as against all parties on inquiries before the Master under the decree.

Glaess appeared in support of the Master's report.

The VICE-CHANCELLOR said, the question was not before him whether a document in a dispute between the two litigants, which was made evidence by one of them against the other for one purpose, was therefore to be evidence between them for all purposes. He had nothing to do with any such question, and, of course, he gave no opinion upon it. The question here was this:—There were two brothers who had various pecuniary dealings and transactions together, in the course of which a bond was given by one to the other. After the deaths of both, the bond was, on the behalf of the estate of the obligee, sought to be enforced according to the letter. "No," said the representative of the obligor, "It cannot be enforced according to the letter, because you, the obligee, have yourself written accounts between yourself and your brother which show that an account was pending, and therefore the bond cannot be treated as a bond intended to be used according to the letter." By means of that evidence, either alone or with other evidence, the personal representatives

of the obligor succeeded in being relieved against the bond, as a bond to be taken according to the letter, and the accounts between the two estates were directed to be taken on that footing. That was entered on the decree. It was then said, when the accounts were obtained in this manner, and by these means, that the person against whom, for the purpose of obtaining the accounts, this document was used, should not be allowed to use it for himself. He never heard of such a proposition being advanced before, and believed it to be entirely without foundation. The question was, not what was the weight of the evidence, but whether it was to be evidence—whether it was to be some evidence of the truth of those items, figures, or things mentioned in the accounts. There might be evidence against them which might destroy every portion of them. That was not the question. The question was, whether the Master was justified in looking at it as evidence for, or as between the two, or for each, and against each. His Honour was of opinion that he was, and made the following order:—"Declare, as respects the third and seventh exceptions, that the exhibits C. and S. having been made and used at the hearing of these causes as evidence on the part of the exceptants, and having been entered in the decree accordingly, they were, from the nature of pleadings and the circumstances of the case, properly receivable by the Master in evidence, as well against as for the exceptants, and with that declaration neither allow nor overrule the exceptions."

Monday, March 17.

COCKBURN v. GREEN.

*Practice—Evidence on claims—Affidavits by the parties.*

This was a special claim, in which the minutes of an order for reference to the Master to take certain accounts had been agreed upon. A question was raised as to the mode in which the affidavits filed by the plaintiff and defendant should be treated in the order.

Shebbeare appeared for the plaintiff. Elderton for the defendants.

The VICE-CHANCELLOR said that the affidavits of the plaintiff and defendant should be entered as read, with a direction to the Master that the plaintiff's affidavit was not to be considered as evidence of the matter there stated, except by the consent of the defendant, and that the defendant's affidavit should be treated in all respects as if it were his answer to a bill filed against him.

Thursday, May 1.

*Ex parte PREECE and EVANS, re THE RUGBY, WARWICK, and WORCESTER RAILWAY COMPANY.*

*Joint-Stock Companies Winding-up Acts—Costs—Calls.*

Where a company had been ordered to be wound up, and no debts had been established, but the Master had allowed the claims of creditors as claims only, the Master was held to have jurisdiction to make a call upon the contributories in respect of the costs of proceedings in and about the winding up, although they had not been taxed or adjudicated by the Court.

The Master having settled the list of contributories, and divided it into several classes (one of which contained those scripholders who, previous to the order for winding up, had received back part of the original deposit from the directors upon the cancellation of their shares), made a call in respect of the costs in and about the winding up, upon that class and another. A motion by one of such scripholders to discharge the Master's order for the call was refused.

This was a motion on behalf of Richard Matthias Preece and Thomas Henry Evans, whose names appeared on the list or class of contributories No. 6 jointly as Messrs. Preece and Evans, that the order or direction of Richard Richards, esq. the Master charged with the winding up of the above-mentioned company, made in this matter on the 28th of March, 1851, whereby it was ordered that a call of 4*s.* per share should be made upon all contributories in lists or classes 4 and 6 (being the contributories to whom 1*s.* per share was paid or returned), and all such other contributories in lists or classes of contributories numbered 1 and 2 as were not included in lists or classes 4 and 6, and who had neither transferred their shares, nor received or been paid 1*s.* per share; and whereby it was ordered that each of such contributories on or before Monday, the 28th day of April, 1851, should pay to the official manager of this company at his office, No. 4, Sambrook-court, Basinghall-street, in the city of London, such call of 4*s.* per share on the balance (if any) which would be due from him after debiting his account in the company's books with such call, might be discharged. The Rugby, Warwick, and Worcester Railway Company was projected in 1845, and in 1846 the project was abandoned. In June, 1846, the directors announced that they would return 1*s.* per share to the holders of

scrip, upon their agreeing to the cancelling of their shares. The sum of two guineas per share had been paid by way of deposit upon the allotment of the shares. On the 1st of June, 1849, an order for winding up the company was made. (13 Law T. 230.) The official manager carried into the Master's office a list of contributories, arranged in the following manner:—

"Class No. 1.—List of contributories, being shareholders, who have paid deposit and signed deeds.

"Class No. 2.—List of contributories, being shareholders, who have paid deposit, and not signed deeds.

"Class No. 3.—List of allottees who have applied for shares, and to whom they have been allotted, but who have neither paid deposit nor signed deeds.

"Class No. 4.—Original allottees, who had not parted with shares, and delivered them up on receiving 1*s.* per share from the directors.

"Class No. 5.—Original allottees who had not signed, but who have received the 1*s.*

"Class No. 6.—Transferees of shares, for which the original allottees have signed the deed.

"Class No. 7.—Transferees of shares for which the original allottees have not signed the deed.

"Class No. 8.—Persons who have signed the deed and not received back the 1*s.*

"Class No. 9.—Persons who had not signed the deed nor received back the 1*s.*

"Class No. 10.—Provisional directors who have signed the deed, and who paid the deposit.

"Class No. 11.—Provisional directors who have neither signed the deed nor paid the deposit."

Messrs. Preece and Evans were stockbrokers, and entitled to 680 shares in the company, having purchased the scrip from persons who either were, or represented parties who were, original allottees; they were placed by the Master in class No. 6. Classes No. 3 and No. 5 were disallowed by the Master, and in class No. 7 no names were inserted. The Master, on the 28th of March last, made a call of 4*s.* per share on classes No. 4 and No. 6, in which were those persons who had received the 1*s.* per share, and on classes 1 and 2, and it was this order which was now sought to be discharged. The order did not state the ground upon which the call was made, but was in the form given in the schedule to the Act of 1848. There had, however, been no debts established against the company, but the claims of creditors had been allowed by the Master as claims only.

Russell and Field, in support of the motion, contended that the order ought to be discharged, as it had been made not in respect of debts, for none had been allotted, but to provide for costs which had not been awarded or ascertained, and in respect of which no bill had been delivered or taxed. No person had been found liable to costs, and the 83rd section of the Act of 1848, provided that the Master should make calls on contributories or classes of contributories "so far only as such contributories respectively should be liable at law or in equity to pay the same." No scripholder could be liable either at law or in equity in respect of an inchoate company. These scripholders had surrendered their rights in the company upon receiving the 1*s.* per share, and they were not, therefore, parties on whom a call should be made. If, however, they were to be considered in any degree liable, the call was bad, as it was not made upon all the members or contributories, but only on those included in certain classes.

The 103rd and 104th sections of the Act of 1848, and the 12th section of the Act of 1849, (a) were also referred to.

The VICE-CHANCELLOR (without hearing Swenson and Daniel, who appeared for the official manager) said—It is quite clear the Master had jurisdiction to make this order. Therefore, it is only a question of discretion. Before I come to interfere with the discretion of the Master, I must have a *prima facie* case made, shewing that that discretion has been erroneously exercised; I mean "erroneously," in my judgment. I must think it erroneous, although it may really be very right. Now no impression has been made upon my mind that the discretion of the Master has been erroneously exercised. I am of opinion, that it is not the intention of these Acts of Parliament, or either of them, that the Master should delay making a call for costs until there has been a taxation, or until the Court has adjudicated upon the case. I am of opinion that it was within the jurisdiction of the Master, viewing all the circumstances before him, and upon an estimate of all the facts within his knowledge, to make a call for costs. That call might be either improperly made at the time, or it might be made upon persons not liable. No ground whatever has been established for inducing me to hold that

(a) This section is as follows:—"That the costs of all proceedings which shall take place in and about the winding-up, as to which the Court shall have made no order shall be in the discretion of the Master; and that it shall be lawful for the Master to award a single sum or the full or any costs awarded by him, or otherwise to settle the principle and the scale of fees, upon or according to which such costs shall be ascertained and settled."

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call is too great in amount. Then, has it been made on improper persons? It has been suggested that it was made upon improper persons, as to the gentlemen who made this motion, for having been only purchasers of scrip, they are not liable for debts, in the same sense as members of the company—original members—were or would have been. I am not aware, however, of any such difference. They are placed generally by the Master on the list of contributories. When I add to these considerations the knowledge of the fact, that these two gentlemen have already received 15s. a share from the directors, in respect of, or by reason of, two guineas or share paid by those who originally held the shares so now held by them, all difficulty vanishes on my mind entirely. This is an application which ought never to have been made, and I refuse it, with costs.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BURNET, Esq. of Lincoln's Inn, Barrister-at-Law.

Thursday, April 24.

BOWER v. CUNNINGHAM.

Practice—Short claim—Setting down.

Where a party wishes to set down his claim to be heard as a short claim, it is not necessary to move for leave to do so; but the registrar, on the production of one counsel's certificate, will set it down as a short claim, to be at the risk of costs to the party so obtaining it to be set down, if it should turn out to be not a short cause.

Cory, for the plaintiff, moved for leave to set down his cause as a short claim, and stated that the registrar had, in consequence of what took place in *Hills Treacher*, 16 Law T. 457, and 15 Jur. 267, refused to set down the claim upon the certificate of the plaintiff's counsel alone; and required either the certificates of counsel for both plaintiff and defendant, or the consent of the defendant's solicitor.

The VICE-CHANCELLOR stated there must be some mistake; that it was not necessary to move for leave to set down the claim as a short claim; and that the registrar ought to set down the claim to be heard as a short claim on the production of the certificate of either counsel alone; at the risk of costs, however, to the party so applying, if, upon the hearing, it should turn out not to be proper to be heard as a short claim, *ex relatione*.

Friday, April 25.

Re JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849, and Re THE INDEPENDENT ASSURANCE COMPANY.

R. HOLT'S Case.

Winding-up Acts—Contributory.

A party who has executed the subscribers' deed, and to whom shares had been allotted:

Held to be a contributory in respect of those shares, although they had been allotted to him as the agent of the managing director, for and in respect of the salary of such director, who, being also a trustee, could not be a shareholder himself, and notwithstanding this was well known to the directors, the resolution directing the allotment rescinded, and although he (the contributory) had not applied for any shares.

This was an application by the official manager appointed to wind up the affairs of the above company, on motion to have the name of Mr. R. H. Holt reinstated on the list of contributories, the Master, settling the list, having excluded his name therefrom. Mr. W. Holt had been the managing director of the company, and as such, and being also a trustee, was precluded from holding shares in such company. On the 27th September, 1848, a resolution was passed by the board of directors "that in consideration of his services the board assign 300 shares to Mr. W. Holt, the managing director, the value of them when issued to be deducted from his allowance, the amount of which shall be hereafter determined." The shares were issued in accordance with this resolution. On the 28th December following, at a meeting of the board, the above resolution was rescinded, and 100 certificates of the above 300 shares allotted to Mr. R. Holt had been returned to the directors. Mr. W. Holt had been examined before the Master, and the effect of his evidence was that he was the managing director of the company, and approved the passing of above resolution, and that it was afterwards rescinded. The 300 shares were issued to his two brothers F. Holt and R. H. Holt (the contributory), 150 shares each, to be held by them as trustees for him. 100 shares were allotted to Robert H. Holt, but he had never applied for the shares for his own benefit. Mr. Robert H. Holt signed the deed in respect of 100 shares apportioned to Wm. Holt as managing director, and this with the full knowledge of the board of directors. Wm. Holt held the shares, and his brother, Robert Holt, never had possession of them, nor had any control over them, and the certificates of them were, in fact, returned to the company on a new arrangement as to the remuneration to William for salary being come to.

The Master held that a mistake having been made by the directors of the company by appropriating a certain number of shares as payment of services to W. Holt, had wished to correct that mistake, and they therefore had the resolution rescinded and the certificates for the shares so allotted delivered up. He thought it was clearly a mistake, and although Robert Holt had signed the deed, there was no consideration moving to him, and he directed his name to be taken off the list of contributories. From this decision the official manager appealed.

*Bethell* and *Roxburgh*, in support of the appeal motion, contended that Robert Holt having signed the deed, contracted liabilities with the shareholders at large, and not merely with the board of directors, and the shares having been allotted to him in respect of this execution of the deed, he was clearly a contributory.

*Cairns*, contra, urged the hardness of the case; and contended that Robert Holt had never been in any way the proprietor of these shares, that they had never in fact been in his possession, but that he was merely holder of them for his brother, and that what the directors had done in rescinding the resolution as to the allotment of the shares, and directing the certificates to be delivered up, was clearly within the scope of their authority; that it was a private contract by them with William Holt, and the execution of the deed by Robert Holt, merely as the agent of his brother, which was fully known and acquiesced in by the directors, was superfluous and not binding upon him; that there was an implied authority in the directors to annul this agreement with William Holt, on the ground of a common mistake; and that there was no pretence of any fraud in the transaction, and this the Master had certified.

## JUDGMENT.

The VICE-CHANCELLOR said it appeared to him a perfectly clear case. What the motives were which had governed Robert Holt in executing the deed, it was now too late to speculate upon. The deed contained various recitals and binding covenants on Robert Holt with persons (the other shareholders) who could know nothing of any arrangement between him and the directors, and upon the faith of the execution of which deed it might be that many other persons had executed the deed. Now, one of the covenants in the deed was this,—"It is hereby agreed and declared between and by the several parties hereto, and each of such persons (except the said William Holt), so far as relate to the acts, deeds, and defaults of himself or herself, and of his or her heirs, executors, and administrators, and not further or otherwise, doth hereby for himself and herself, and his and her heirs, executors, and administrators severally and respectively, covenant with the said William Holt, his executors, and administrators, that all the said several persons, parties to these presents (who are hereinafter denominated by the title of shareholders, and the several other persons who shall become shareholders as hereinafter mentioned), shall, while holding shares in the capital of the company, and notwithstanding the death, bankruptcy, insolvency, or retirement of any of the shareholders, or the marriage of any of the female shareholders, be and continue until the same shall be dissolved, and the affairs thereof wound up and dissolved under the provisions hereinafter for that purpose contained, a company under the name, and for the purpose, and upon the terms and conditions hereinafter expressed and contained; and, further, that each such shareholder respectively shall and will, when thereunto required, according to the provisions thereof, pay up the amount of the instalments payable on the shares taken by such shareholders respectively in the capital of the company, and shall and will perform the several engagements herein contained on the part of the shareholders of the said company." The covenant applied, therefore, to all the parties to that deed, and when Robt. Holt entered into it he became liable to all the obligations thereupon arising. He (the Vice Chancellor) did not believe that any fraud had been intended by the directors, but the case before him at present was not between them and the surety, or between the trustee and the managing directors, but between a party who had executed the deed and the general body of the shareholders. The name, therefore, must be restored to the list of contributories. Order accordingly.

Thursday, April 17.

Re EMERY'S Trust.

Trust.

The presumption of a trust for a particular person may be assumed from the circumstances.

This was a petition for the payment of the dividends of a trust fund to the widow of the celebrated comedian Emery. After his death a benefit had been taken for his family at Covent Garden Theatre. The amount received had been paid to four highly respectable gentlemen, who had, as it was intended they should have, the fullest discretion as to the appropriation of the fund, for the benefit of his widow and children. No declaration of trust had

been formally executed. The affidavit in support of the petition, made by two of the trustees who had survived, deposed to the fact of there having been no declaration of trust, and stated that it was understood by all parties that the original trustees were to have unlimited and unfettered discretion as to the disposition of the fund so raised, as they should think best for the family. The stock now consisted of 6000 East India Stock, and prayed that the dividends might be paid to the widow for her life.

*Shebbeare* in support of the petition. The VICE-CHANCELLOR said, that under the circumstances, he might at any rate assume that one of the trusts was for the benefit of the widow, and ordered the dividends of the remainder of the trust-fund to be paid to her for her life.

Monday, April 28.

Re JOINT-STOCK COMPANIES ACTS 1848-49, and *Ex parte* THE BARNETT AND NORTH METROPOLITAN JUNCTION RAILWAY COMPANY.

Winding-up Acts—Provisional Committee-man—Contributory.

A provisional committee-man, to whom shares had been allotted, had accepted them, although he had not acted, nor was his name inserted in the list of provisional committee-men:

Held, to be a contributory.

*Roxburgh* applied to have the name of Mr. Nicolay struck out of the list of contributories to this company, the Master having placed him upon the list. The evidence upon which the Master proceeded was contained in two letters, dated the 3rd and 6th of October, 1845,—the first from the secretary of the company, stating that he was directed by the committee of management to acquaint Mr. Nicolay that each member of the provisional committee might become the allottee in that character of 100 shares, and requested to have an accompanying form filled up, to so entitle him; the second from Mr. Nicolay, accepting the proposal, and saying that his name might be entered for 100 shares; but he had never paid any deposit, nor was there any proof that his name ever appeared in any prospectus. *Upfill's* case, 15 Law T. 449, went upon the fact of the name appearing in a prospectus, and the party being aware of that circumstance. Mr. Upfill had put the letters "P. C." after his name, and was therefore liable; but in the present case there was no such ingredient, and the Master had, therefore, improperly placed Mr. Nicolay's name on the list.

*Bethell* and *Glasse* for the official manager, but without calling upon them.

The VICE-CHANCELLOR said he was of opinion that, as the shares were allotted to Mr. Nicolay as provisional committeeman by the terms of the secretary's letter, and he had accepted them, that was sufficient evidence to fix him as a contributory. He might have said, "You are mistaken in saying I shall take them as a member of the provisional committee;" but he had not said so, and therefore

Motion refused with costs.

## COMMON LAW COURTS.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL PARNELL, Esqrs. Barristers-at-Law.

Saturday, Feb. 22.

*Doe dem.* ARMISTEAD v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Railway company—Compulsory taking of land—expiration of time for ascertaining amount—right to possession—Stat. 8 & 9 Vict. c. 18, s. 85—"Deviation"—Stat. 8 & 9 Vict. c. 20, s. 15—Notice to take lands not necessary for purposes of company—effect of.

A railway company had entered upon lands under the 8 & 9 Vict. c. 18, s. 85, had paid a sum of money into the Bank of England, and had given a bond, as thereby is required; but the three years limited by the 123rd section of that Act were suffered to expire without the amount to be paid for the land having been ascertained, or the legal title becoming vested in the company. Thereupon ejectment was brought by the owner of the lands:

Held, that the 68th section applied to the case of land entered on and used under the 85th section, and therefore that if the effect of the expiration of the three years were to make it impossible to ascertain the amount of compensation, that effect would follow from the owner's neglect, who could not be permitted to avail himself of it for making wrongful a possession which had been rightful; and,

2. That if the original possession had been lawful, the present possession of the defendants was also lawful, and ejectment not maintainable. The expression "deviation," in the 8 & 9 Vict. c. 20, s. 15, applies to the line of railway actually laid down, and the meaning of that section is, that the

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actual line of railway shall not deviate more than 100 yards from the line laid down and delineated in the parliamentary plan.

The owner of certain lands necessary for the purposes of a railway company required the company, by notice, to take the whole piece, of which the land required was only a part. The whole piece was comprised in the books of reference. The company was willing; but the owner receded from his notice. The company then took the whole piece of land:—

Held, that the company was justified in taking the lands, even though they might not have been necessary for the purposes of the railway, because the owner had, by notice, required that the company should take them.

The facts of this case, the arguments, and the authorities relied on are sufficiently set forth in the judgment.

Whitely and Whitmore, for the lessors of the plaintiff.

Keating, and Phipson for the defendants.

Cur. adv. vult.

## JUDGMENT.

The judgment of the Court was now pronounced by PATTERSON, J. — The first question in this case turns upon the 85th and 123rd sections of the 8 & 9 Vict. c. 18. Under the 85th section the defendants had entered upon the lands in question, and complied with all the requisites by paying a sum of money into the Bank of England, and giving a bond, but they had taken no further steps to ascertain the amount to be paid to the lessor of the plaintiff for the land, or to clothe themselves with a legal title; neither did the lessor of the plaintiff take any steps for that purpose, both parties remaining inactive. The three years limited by the 123rd section of the same Act expired, on which this action of ejectment is brought, the lessor of the plaintiff contending that, as soon as the three years had expired, the possession of the defendants became wrongful, and all their previous proceedings inoperative as much as if none such had taken place. The 123rd section enacts that the powers of the promoters for the compulsory purchase and taking of any lands for the purposes of the special Act shall not be exercised after the expiration of three years from the passing of the special Act. The 85th section empowers the company to enter on and use the lands, but has not the word "take." We do not think the difference of the words adopted has any material bearing on this case. It is conceded that the entry was lawful when made, and that the possession continued to be lawful till the expiration of three years, at least with respect to all except a small part of the land now in question. This being so, the duty of taking steps for ascertaining the amount of compensation to be paid by the company is, by sec. 61 of the same Act, thrown upon the owner of the land. He is to state what sum he claims, and if the company, within twenty-one days, enter into a written agreement to pay that sum, the question of compensation is settled; but if the company dispute the proper amount, then it is to be settled by arbitration; or if the owner gives notice that he wishes to have a jury, then by such jury, which the company is required to summon within twenty-one days; and if they make default therein, they are liable to pay the sum claimed. No power is given to the company by that, or any other section, to initiate proceedings for settling the amount to be paid. We are clearly of opinion that section 68 applies to the case of land entered, on and used under, section 85. Of this opinion, also, were Vice-Chancellor Wigram and Lord Chancellor Cottonham, as appears by the judgment in the case of *Adams v. London and Blackwall Railway Company*, 19 L. J. 557, in Chancery. I believe reported also in the Chancery Reports, but I have not taken a note of exactly where. It is not pretended, except as to a small part, 15 perches, that the company were not entitled to take the land in question; therefore, if the effect of the expiration of the three years were to make it impossible, under the clauses of the Act, to take proceedings for ascertaining the amount of compensation, that effect is from the neglect of the owner of the land, and he cannot, by his own neglect, make wrongful that possession of the land by the company which was rightful when they made their entry. We are clearly of opinion the expiration of the three years has no such effect in this case. The compulsory clause, 85, was acted upon, and the land rightfully entered on and taken. The company have exercised their compulsory powers under it completely, so far as they were concerned; and so far as they, in law, had any powers, the thing was done and finished on their part. For, it is to be observed, the words of the 123rd section are in the disjunctive,—for the compulsory purchase, or for ascertaining the amount of compensation, after the land has been taken in the exercise of compulsory powers on the part of the company. And with all possible respect for the opinion of the late Vice-Chancellor Wigram, we cannot agree in the view he took in the case of *Adams v. The Blackwall Railway Company*, 5 Railway Cases, 573, in which view,

it is plain the Lord Chancellor did not acquiesce. This Court has granted a *writ* to compel a company after the expiration of three years to take steps to have the amount of compensation for land ascertained at the requisition of the owners to whom they have given notice to take. That is *Osborne's* case, 14 Jurist, 901. I have not been able to find it in any other reports, which decision has been supported by the Court of Ex. Ch. a few days since. The case of *Brocklebank v. Whitehaven Junction Railway Company*, 16 L. J. Ch. 471, is distinguishable from the present, because there no compulsory possession had been taken; the land remained still in the possession of the original owner, and that circumstance is remarked by the Vice-Chancellor in his judgment. We are, therefore, clearly of opinion, if the original entry was lawful, the present possession is lawful, and this ejectment cannot be sustained. But it is contended, secondly, as to fifteen perches, that the entry was not lawful, and being bad in part, it is bad altogether; first, because they lie beyond the limits of deviation; and secondly, because they were not necessary for the purposes of the special Act. With respect to the first ground of objection, we are of opinion that the expression "deviation" in the Act of Parliament, the 8 & 9 Vict. c. 20, s. 15, (a) is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more than 100 yards from the line laid down and delineated on the parliamentary plan. This appears to be the natural construction of the Act and in accordance with the decision of the Court of Ex. Ch. in *Dee dem. Payne v. The Bristol and Exeter Railway Company*, 6 M. & W. 320; and that of the Vice-Chancellor of England in *Crawford v. Chester and Holyhead Railway Company*, 11 Jur. 920. In this case there has been no deviation in that sense, and the first ground of objection is not, in truth, raised by the facts. As to the second ground of objection, it appears that the only land taken, called "Kat's Paddock," including the fifteen perches in question, is contained in the books of reference; but it is said that circumstance alone is not sufficient, and that in order to justify the company in taking the lands, they must be necessary for their works. Now, the upper part of Kat's Paddock, which was taken and paid for, was clearly necessary; the company then required a further part of Kat's Paddock, which was also necessary; the lessor of the plaintiff gave notice, if they took a further part, they must take the whole, which they were willing to do, but he afterwards receded from the notice. Whether the fifteen perches were necessary or not was a question of fact for the jury. But it was assumed at the trial that the company were entitled to take what was within the line of deviation, and the circumstance of the fifteen perches being without the line was mainly relied on. The question as to being necessary would apply not only to the fifteen perches but to all under the 85th section, that is to all but the upper part, which was taken and paid for by agreement. So far as the Court can see, as the matter now stands, the fifteen perches were as necessary as the rest, or, at all events, the company were justified in taking them, because the lessor of the plaintiff required them, by notice. We think, therefore, the rule must be absolute to enter the verdict for the defendants. Rule absolute.

Jan. 17 and Feb. 22.

WORSLEY v. THE SOUTH DEVON RAILWAY COMPANY.

*Lands Clauses Act—Limitation of time for exercise of compulsory powers—De injuria.*

To an action in case by a reversioner against a railway company for entering his lands, the company pleaded a justification under sec. 85 of stat. 8 & 9 Vict. c. 18. The plaintiff replied, admitting the Act of Parliament, *de injuria abque residuo casus*:

Held, that the replication was bad, the defendants, by their plea, claiming an interest in the land, and justifying under an authority given by law.

A railway company having entered upon lands which they have the power under their Act to purchase compulsorily, and having paid the deposit as required by sec. 85 of stat. 8 & 9 Vict. c. 18, before the expiration of the limit of time imposed by their Act for the exercise of compulsory powers, are entitled to keep the lands and continue their works after the expiration of such limit so imposed.

This was an action upon the case containing several counts, upon which several issues in law were raised. One of the points decided in the argument has been already reported. (*Worsley v. The South*

(a) Which enacts that "it shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, &c. than one hundred yards from the said line, and that the railway, by means of such deviation, be not made to extend into the lands of any person, &c. whose name is not mentioned in the books of reference, unless, &c."

*Devon Railway Company*, 16 Law T. 363.) The plaintiff, by the second and third counts of the declaration, claimed a reversionary interest in certain lands, and complained that the defendants broke and entered upon the lands, and used them for the purpose of constructing a railway to the damage of the plaintiff's reversion. The defendants pleaded a justification to each count under sec. 85 of stat. 8 & 9 Vict. c. 18, whereby the promoters of the railway were empowered, upon payment of a certain deposit into the bank by way of security for the amount of compensation claimed by the landowner, to enter upon and use any lands which they had power under their special Act to take. The pleas shewed performance of all the matters requisite to make out a justification under this section. The plaintiff, in his replication now assigned that he brought his action, not merely for the entry and user of the lands in the plea justified, but also for continuing to occupy and use the same after the expiration of three years from the passing of the special Act of the South Devon Railway Company,—the period of three years being the time limited by the special Act for the exercise by the company of compulsory powers for taking lands. The defendants pleaded to the new assignments pleas similar to those pleaded to the original count, except that they averred that the payment of the deposit and the entry upon the lands was before the expiration of the three years. The plaintiff replied, that though true it was that the Act was passed, &c. yet that the defendants, *de injuria abque residuo casus*, &c. To these replications the defendants demurred.

Upon the argument, the plaintiff contended that the pleas were bad, and the replications good. The defendants supported the pleas, and contended that the replications were bad.

Peacock (with him Phipson), for the defendants.

Bust (with him A. J. Stephens), for the plaintiff.

Stat. 8 & 9 Vict. c. 18, s. 16, 85, 88, 91; *Crogate's* case, 8 Rep. 67; *Wood v. Leadbitter*, 13 M. & W. 828; *Adams v. The London and Blackwall Railway Company*, 2 M. & G. 118.

Cur. adv. vult.

## JUDGMENT.

PATTERSON, J. delivered the judgment of the Court.—In this case the demurrer to the first count of the declaration was disposed of at the time of the argument in favour of the defendants. The second and third counts state a reversionary estate of the plaintiff in certain premises taken by the defendants for the purposes of their railway, and the defendants pleaded to each count a justification under the *Lands Clauses Consolidation Act*, stat. 8 & 9 Vict. c. 18, s. 85. The plaintiff now assigned as to each plea, that the defendants continued the injury after the expiration of three years from the passing of the defendants' special Act, that being the limit within which, by the special Act, the compulsory powers to take lands were to be exercised. The defendants pleaded to the new assignment, that they entered under the compulsory powers given by section 85 of stat. 8 & 9 Vict. c. 18, before the expiration of the three years, and paid the required deposit into the bank, though they continued to hold over afterwards. To these pleas the plaintiff replied, after admitting the Act of Parliament, *de injuria abque residuo casus*. The defendants demurred to these replications, on the ground that *de injuria* could not be replied where the defendant claims an interest in land which is taken under an authority given by law. On the argument the plaintiff objected to the pleas to the new assignment, contending that though the entry under sec. 85 within the three years was lawful, yet that the continuance after the three years was unlawful unless compensation were paid within the three years. The same point arose in the case of *Dee dem. Armistead v. The North Staffordshire Railway Company*, in which we have just held that such continuous possession is not unlawful, for the reasons there given, which it is not necessary to repeat, and in which my Lord Campbell, who heard this case, fully concurred. We are of opinion, therefore, that the pleas are good. The plaintiff further contends that the replications *de injuria* are good, inasmuch as they admit the Act of Parliament, and deny that the defendants acted under it, and also because there is no claim to interest in the defendants, who only set up a statutable license. We are, however, of opinion that the replications are bad, and that this case is really like *Crogate's* case, 8 Rep. 67. The right and interest claimed by the defendants is much more than a mere license, and an authority in law is plainly asserted by them. The admission of the Act of Parliament does not assist the plaintiff, for the denial of the defendants acting under it is a traverse of the authority in law, which it is admitted that the Act confers, and the interest claimed by the defendants is also traversed by the replication; both those traverses being included in the *abque residuo casus*. Judgment, therefore, must be for the defendants.

Judgment for the defendants.



## QUEEN'S BENCH.

Thursday, April 24.

DOE dem. NICHOLS v. BOWEN.

Practice at Nisi Prius—Evidence—New trial.

It is no ground for granting a new trial that the judge erroneously allowed the plaintiff, after his case had been closed, and the defendant's counsel had addressed the jury, to give evidence, which might have been produced as part of his original case.

Crowder moved, pursuant to leave reserved, to enter a verdict for the defendant on the third demise, as to part of the premises for which the ejectment was brought. He also moved for a new trial, on the ground that the learned judge had allowed the lessor of the plaintiff after his case was closed, and the counsel for the defendant had addressed the jury, to give additional evidence, which might have been given in the first instance. The case originally opened by the plaintiff was a case of landlord and tenant; but when it was discovered that that case had failed, he then claimed to rely upon his title under a will; and although his case had been completely closed, he was allowed to begin again, and set up an entirely new case. (*Jacobs v. Trelton*, 11 Q.B. Rep. 421. (a))

WIGHTMAN, J. referred to *Williams v. Davies*, 1 Cr. & M. 464, where Lord Lyndhurst, C.B. said "it must be left to the discretion of the judge to admit the evidence or not; and if ultimately the evidence is received, it cannot be complained of;" and Bayley, B. said, "Have you ever known a case where a new trial has been granted, because a judge, in the exercise of his discretion, has allowed a party to give evidence at a late period of the cause?"

Lord CAMPBELL, C.J.—We think there ought to be no rule for a new trial. I am strongly inclined to agree with the Court of Exchequer, that if the evidence is proper to be admitted in the cause, there ought to be no new trial on account of a mistake of the judge as to the time when it might be admitted. Upon the point on which leave was reserved, the acts should be stated in a special case.

Rule accordingly.

Tuesday, April 29.

LIDDELL v. ROBINSON.

Statute of Limitations—What a sufficient acknowledgment to take the case out of the Statute.

A letter written by a debtor to his creditor, in answer to one asking for security by mortgage of the debtor's property, and objecting to that proposal, but saying, "I will endeavour, before any great length of time, to give your account my serious consideration, and see what can be done with it," is not a sufficient acknowledgment to take the case out of the Statute.

Debt for goods sold, &c. Plea, the Statute of Limitations, and issue thereon. The question was, whether the correspondence between the plaintiff and defendant contained an acknowledgment of the debt sufficient to take the case out of the Statute. The facts had been turned into a special case for the opinion of the Court.

M. Smith, for the plaintiff, relied upon a letter written by the defendant in answer to an application made by the plaintiff for security for his debt. He proposed that the defendant should give him a mortgage upon her property; but in the letter in question she declined to do so. She added, however, that she "would endeavour before any great length of time to give his account her serious consideration, and see what could be done with it." That was a clear admission of liability; she only objected to the mode of payment. [Lord CAMPBELL, C.J.—If an acknowledgment of the debt is followed up by a qualified promise to pay, will that do? No; it must certainly be such an acknowledgment that the law would infer from it a promise to pay on request: but this is quite as strong a case as *Gardner v. McMahon*, 3 Q.B. 561; or *Bird v. Gammon*, 3 Bing. N.C. 883; or *Dodson v. Mackey*, 8 Ad. & El. 225, n.] WIGHTMAN, J., referred to *Morrell v. Frith*, 3 Mee. & W. 402, where the acknowledgment was held insufficient; and PARKS, B. said, "the utmost that can be made of this letter is, that it acknowledges the existence of the debt mentioned in the previous letters; but that the defendant does not mean to express any promise to pay, but reserves it for further consideration."

Peacock, contra, was not called upon.

Lord CAMPBELL, C.J.—I am sorry to say that I feel bound to give my opinion that these letters are insufficient. It is difficult to say that the one relied upon contains any distinct acknowledgment of the amount; but even if it did, and then goes on to add anything which repels the presumption of a promise to pay on request, the Statute is not barred. Now, I think that the words "I will endeavour before any great length of time to give your account my serious consideration, and see what can be done with it," do repel any inference of a promise to pay on request, which the simple acknowledgment of a debt would be sufficient to raise. Upon the authority

## QUEEN'S BENCH.

therefore, of *Morrell v. Frith*, in which I concur, I think our judgment must be for the defendant.

PATTESON, J.—In *Hart v. Prendergast*, 14 M. & W. 741, it was held that the mere expression of a hope that the defendant may soon be able to pay, will not do.

WIGHTMAN and ERLE, JJ. concurred.

Judgment for defendant.

GABRIEL v. SMITH.

Conditions of sale—Construction.

Certain conditions of sale provided that the vendors should not be required to produce any deeds or instruments of title not in their possession; and that all deeds of covenant for production, &c. which the purchaser should require, and also all searches for the purpose of ascertaining where such instruments were to be found, and all costs incidental thereto, should be paid, made, searched for, and obtained by, and at the expense of the purchaser:

Held, that this condition threw upon the purchaser the risk of obtaining covenants to produce from the parties who had possession of some of the deeds necessary to make out the title; and that their refusal to enter into such covenants did not entitle the purchaser to rescind the contract of sale and recover back his deposit.

This was an action for money had and received, to recover back the deposit paid upon a purchase of certain premises by the plaintiffs' testator, on the ground that the conditions of sale had not been performed. The facts were stated in a special case for the opinion of the Court, and the whole question turned upon the construction of the following articles in the conditions of sale:—

"5th. That the vendors will, within ten days from the day of sale, deliver an abstract of title to the purchaser or purchasers, and, inasmuch as in the will under which the sale is made there is a declaration that the receipt of the vendors shall effectually discharge the purchaser or purchasers from seeing to the application of his purchase-money, the purchaser shall not require the persons beneficially interested therein to concur in the conveyance, or require the vendors to enter into any other covenant than that usually entered into by trustees."

"6th. That the recital or statement of any intestacy, descent, or any fact whatsoever contained in any deed or other instrument or assurance, dated twenty years ago or upwards, shall in itself, and without further evidence or inquiry, be full and conclusive evidence of the intestacy, descent, or fact so recited or stated; and the vendors shall not be required to produce any deeds, instruments, or documents of title not in their possession; and all deeds of covenant for production, and attested official or other copies or extracts of, or from any deed, will, Act of Parliament, surrender, admittance, court roll, or other document or instrument, whether recited or referred to in the abstract or not, which the purchaser shall, subject to this condition, require for verifying the abstract, or for any other purpose, and all certificates, copies, or entries in registers, and other evidence which may or (but for this condition) might be required to prove or establish any descent, fact, matter, or thing whatsoever; also all searches and inquiries for the purpose of ascertaining where such instruments or evidence are to be found, and all costs and expenses incidental thereto respectively shall be respectively paid, made, searched for, and obtained by and at the expense of the purchaser requiring the same; and all expenses of the examination and comparison of the abstract with the deeds, and of procuring the production of such deeds as the purchaser under this condition will have a right to require, shall be exclusively borne and paid by the purchaser.

"8. That such of the deeds in the possession of the vendors as relate to more than one of the lots hereby offered for sale, shall be delivered to the largest purchasers of the same to the greatest amount in value, or shall be retained by the said trustees if the whole shall not be sold; and the purchaser to whom the deeds are delivered, or the trustees, in case of their retaining the said deeds, shall, at the expense of any other purchaser requiring the same, enter into the usual covenants with such other purchaser for the production thereof; but the purchaser or purchasers shall only require a deed of covenant from the vendors for the production of such deeds as are in their possession and limited to the continuance of their possession thereof."

The material facts were, that two deeds, referred to in the abstract, and forming an essential part of the title, were in the hands of third persons, who had allowed them to be compared with the abstract, but refused to enter into covenants for their future production.

Cowling (with him Hance), for the plaintiff, contended that the conditions of sale clearly implied that covenants to produce were procurable, although they were to be procured at the expense and trouble of the purchaser; and that as no such covenants were in fact procurable, and without them, though there was a good legal title, a marketable title could

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not be made out, the plaintiff was entitled to recover back the amount of his deposit. (*Osborn v. Harvey*, 7 Jur. 229; *Southby v. Huft*, 2 Myln. & Cr. 207.) Peacock (C. Clark with him), contra, relied upon the word by in the sixth condition as quite conclusive.

Cowling, in reply.

Lord CAMPBELL, C.J.—I think that the defendants are entitled to our judgment; and that the vendors have done all that could be required of them by the conditions of sale. They have made out a good legal title by existing deeds produced and compared with the abstract. Still, without special stipulation, the plaintiff would be entitled to recover, because the vendor would be bound to hand over to the purchaser the muniments of title; but then comes the sixth condition, which discloses that certain necessary deeds are not in the possession of the vendor; and it is expressly agreed that all covenants for production are to be obtained by as well as at the expense of the purchaser. What language can be clearer to shew that the purchaser took upon himself the risk of the persons who had the deeds refusing to enter into those covenants. They have refused once, but it by no means follows that they will continue to do so. This is quite different from *Osborn v. Harvey* and the other case cited; where the risk which the purchaser was said to have undertaken was altogether unreasonable.

PATTESON, WIGHTMAN, and ERLE, JJ. concurring, Judgment for defendants.

Wednesday, April 30.

REG v. THE OVERSEERS OF LEEDS.

Poor—Removal of children—Residence with step-mother—9 &amp; 10 Vict. c. 66, s. 3.

Two children, under the age of sixteen, were, with the consent of their stepmother, with whom they were living, taken into the workhouse, locally situate within the parish, and there they remained for several months. They were then removed, by order of justices, to the parish of their settlement:

Held, that when they went to live in the workhouse, they ceased to reside with their stepmother, within the meaning of 9 & 10 Vict. c. 66, s. 3; and were, consequently not rendered irremovable by that section.

This was an order for the removal of two children, one aged nine and the other six years, from Wakefield to Leeds. Upon appeal, the Sessions had confirmed the order, subject to a case; from which it appeared, that at the time of the making of the order the children were residing in the union workhouse, situate in the parish of Leeds, and apart from their step-mother, but that they had resided with her in the same parish up to the time when they were taken into the workhouse. They were taken there with her consent, and had been in about five months when the order was made, during the whole of which time the stepmother had not visited them. The question was, whether they were rendered irremovable by 9 & 10 Vict. c. 66, s. 3.

Hardy, in support of the order of sessions.—The words of the statute are conclusive. In order to bring the case within the section, the children must be residing in the parish with the father, mother, stepfather, stepmother, or reputed father. In that case they are not removable unless the father or mother, &c. may be lawfully removed. Here the children were not residing with their stepmother, but apart from her.

Pashley, contra.—The section intended to put all these relations on the same footing in this respect (*R. v. Stafford*, 10 Ad. & Ell. 417); and if the argument on the other side be correct, the guardians may, by application of the workhouse test, separate parents and children. They may refuse to give a family any relief unless the children are sent into the workhouse; and then, when they are there, may remove them to their place of settlement, perhaps in a distant part of the country. That is contrary to the policy of the law. (*R. v. Stogumber*, 9 A. & E. 622.)

Lord CAMPBELL, C.J.—There is a great distinction between the relationship of parent and child, or husband and wife, and that of stepmother and step-child. This case depends altogether upon the statute. Then either the statute means "residing in the same parish with," or, if not, the mere removal into the workhouse, where the persons *in loco parentis* still have an opportunity of protecting and taking some charge of the children, will not prevent the operation of the clause, and enable the guardians to send them away to a distant parish.

Lord CAMPBELL, C.J.—I cannot doubt that these children were removable. They were so, unless rendered irremovable by sec. 3 of 9 & 10 Vict. c. 66. That section applies while they are residing with any of the persons specified. These children had been residing with their stepmother; but they had ceased to do so. They had gone into the workhouse; they were no longer under her care; and it is expressly found in the case that they were residing apart from her, and not with her, as the statute requires.

(c) See *Wright v. Wilson*, 19 L. J. 333, Q.B.

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PATTERSON, J. WIGHTMAN, J. and ERLE, J. concurred. Order confirmed.

REG. v. THE INHABITANTS OF ST. MAURICE. Lunatic order—Justices of city—Jurisdiction. An order of maintenance under sec. 62 of 8 & 9 Vict. c. 126, purported to be made by two justices, in and for the city of York:

Held, that the Court was bound to take judicial notice that the city of York was a county of itself; and that the jurisdiction, therefore, sufficiently appeared.

Upon appeal against an order made by two justices in and for the city of York, adjudging the settlement of a lunatic pauper, and ordering the parish of settlement to pay the costs of his maintenance in a lunatic asylum, the Sessions quashed the order, subject to a case. The objection made to the order was that the justices did not appear to have jurisdiction to make it, inasmuch as sec. 62 of 8 & 9 Vict. c. 126, gives the jurisdiction only to county justices, or to justices being visitors of the asylum. The learned recorder was asked to amend the order by inserting the words "the county of" before the words "the city of York;" but he declined to do so, because the commission of the peace for the city, when produced, did not describe the city of York as "the county of the city," but simply as "the city of York."

Price, in support of the order of Sessions.—Sec. 62 gives jurisdiction only to justices of a county at large, so that even if the Court would take judicial notice that the city of York is a county of itself, the jurisdiction to make the order does not appear.

Hall, contra.—The interpretation clause (sec. 84) provides that the word "county" shall mean "county of a city;" so that the only question is, whether the Court can take judicial notice that the city of York is a county of itself. [WIGHTMAN, J.—Can they be justices of the city without being justices of the county of the city? No; 6 & 7 Wm. 4, c. 103, s. 1, makes the boundaries of the old and the new jurisdiction the same.]

PATTERSON, J.—By the 98th sect. of 5 & 6 Wm. 4, c. 76, it is provided that his Majesty may issue commissions of the peace, "in and for each borough, and in and for each of the counties of cities and towns respectively named in schedule (A);" and in schedule (A) is named, "The mayor and commonalty of the city of York."

Lord CAMPBELL, C.J.—I think that the order is sufficient. The two magistrates, if properly described, had clearly jurisdiction; because, coupling the 62nd section with the interpretation clause, the word "county," in the former, means, "county of a city;" and these were magistrates of the county of the city of York. I think also that we must take judicial notice that York is a county of a city, and, indeed, it seems to have been so recognised by statute.

PATTERSON and WIGHTMAN, JJ. concurred.

ERLE, J.—In the 2nd Institute, 557, it is said, that the county palatines of Chester, Lancaster, and Durham, "are exempted from the jurisdiction of the King's Courts, and within them are *jura regalia*, and plenary jurisdiction, and so known to the King's Courts; for they take notice of all the counties of England, because they are immediate to them for direction of writs." Order of Sessions quashed.

## BUSINESS OF THE WEEK.

Thursday, April 24.

SHRELOCK v. FULLER.—Crawder moved for a new trial, on the ground that the verdict was against evidence, and of misdirection. *Cur. adv. vult.*

LADY BRAGULERO v. CLIFT.—Trespass for means profits, tried before the Lord Chief Baron in Hampshire. Kinglake, Serjt. moved to enter a nonsuit by leave of the judge, on the ground that the plaintiff had not such a right to the immediate possession as entitled her to maintain the action. The defendant had been her tenant of a farm, and at the end of the tenancy gave up all to the incoming tenant except two rooms, for which ejectment was brought. It was said that the incoming tenant had treated the defendant as his tenant, and that, therefore, the plaintiff could not recover. The Court thought the possession of the incoming tenant was that of the landlord for this purpose. *Rule refused.*

BEVAN v. UMPHREY.—Shee, Serjt. moved for a new trial, upon affidavits. *Rule refused.*

REG. v. THE SOUTHAMPTON DOCK COMPANY.—C. Saunders moved to set aside the side bar rule for costs obtained herein. *Rule nisi.*

DON dem. OKEY v. FLATERS.—Macaulay moved to enter a verdict for the defendant in this case, which was tried before Alderson, B. at Lincoln. *Rule refused.*

JAMES v. LITTLEWOOD.—Pearson moved for a new trial, on the ground that the verdict was against the evidence. *Rule refused.*

CHAMBERS v. FRAYCROFT.—Keane moved for a new trial, on the ground of misdirection. *Rule refused.*

WALTON v. THE MIDLAND RAILWAY COMPANY.—Atherton moved for a new trial, on the ground that the verdict was against evidence. *Rule nisi.*

DON dem. BORD v. BURTON.—Phin moved to enter a nonsuit. The action was brought to recover premises in Shepton Mallett, which the defendant had agreed to buy of the plaintiff, if he could make a title. It did not appear how the defendant had come into possession of the premises; but being in possession, he agreed with the lessor of the plaintiff to buy them of him upon certain conditions, viz. that the plaintiff should make out a good title within twenty-one days. If the purchase was not completed by a

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certain day, interest on the purchase-money was to be paid from that time, and the defendant was to be entitled to the possession from the day of the agreement. The Court thought that the agreement was an acknowledgment of plaintiff's title, and that it was not necessary for him to give other evidence of title, the purchase not having been completed. *Rule refused.*

MILVAIN v. CASSAVETTI and OTHERS.—Wilkins, Serjt. moved for a new trial, upon the ground that the verdict was against the evidence. *Cur. adv. vult.*

ARMISTEAD v. WILDE.—Wilkins, Serjt. moved for a new trial, upon the ground of misdirection, and that the verdict was against the evidence. The action was against an innkeeper to recover damages for the loss of the plaintiff's goods stolen from the defendant's inn, and the misdirection complained of consisted in leaving to the jury the question whether there had been negligence on the part of the plaintiff, there being no evidence of any negligence at all. (3 Stark. on Evid. 561; Richmond v. Smith, 8 B. & C. 9; Kent v. Shackard, 2 B. & Ad. 803.)

ATKINSON v. WARNE.—Knowles moved for a new trial upon affidavits. *Rule refused.*

ALEXANDER v. LINGHAM.—Joyce moved for a new trial, upon the ground of misdirection. *Rule refused.*

SCHOLFIELD v. ANDREWS.—Atherton moved for a new trial, upon the ground of misdirection. It was contended that the judge wrongly directed,—1. That sufficient evidence was given to support a right of common as alleged. 2. That a private Inclosure Act referred to did not extinguish all rights of common over the locus in quo. (Bicketts v. Solway, 1 B. & A. 380; Goodworth v. Torrington, 1 Q. B. 783; Brunton v. Hall, Ibid. 788; Bailey v. Appleyard, 8 A. & E. 161; Cro. Elis. 723; Stat. 41 Geo. 3, c. 109, s. 71.)

REG. v. HILLS.—M. Chambers moved for a new trial, upon the ground of misdirection. *Rule refused.*

WOODS v. SHALWON.—M. Chambers moved for a new trial, upon the ground that the verdict was against the evidence. *Rule refused.*

DON dem. JONES v. WILLIS.—Hewkins moved for a new trial, upon the ground of misdirection. The question was whether the defendant, who had been let into possession upon an agreement for a lease which was to contain a covenant to repair, was liable to be turned out for a forfeiture for not keeping the premises in tenable repair. (Don dem. Thompson v. Aney, 13 A. & E. 476.)

Cur. adv. vult.

Friday, April 25.

TABLETON v. LIDDELL.—This was a special case for the Chancery. Peacock (W. T. S. Daniel with him) for the plaintiff. Butt (with him Prior), contra.

Cur. adv. vult.

ELLIOTT v. LEWIS.—Butt for the plaintiff. Lush for the defendant. Postponed in order that it might be referred to an arbitrator.

THE SUNDERLAND MARINE INSURANCE COMPANY v. KRAMPTON and ANOTHER.—Manisty for the plaintiff. D. Seymour (with him Watson), for the defendant.

Cur. adv. vult.

Monday, April 26.

REG. v. KAYE, proprietor of the Wesleyan Times, ex parte CLARKSON.—M. Chambers and Hance showed cause against the rule for a criminal information. Sir F. Thesiger and Atherton, in support of the rule.

Cur. adv. vult.

COST and ANOTHER v. THE AMBERGATE RAILWAY COMPANY.—Macaulay moved for a new trial, upon the grounds of misdirection, and that the verdict was against the evidence. The misdirection complained of consisted in leaving to the jury the question whether the defendants had prevented the plaintiff from performing his contract, it being contended that there was no evidence of such prevention, the evidence relied on supporting, if anything, a dispensation with performance, not a prevention from performance. (West v. Blakeway, 3 M. & G. 739; Philpotts v. Beane, 5 M. & W. 475; Ripley v. M. Church, 4 Ex. 346.)

Cur. adv. vult.

DON dem. BADDELEY v. MARLEY.—M. Chambers moved, pursuant to leave reserved, to enter a nonsuit, or a verdict for the defendant. The question was whether stat. 7 Wm. 4 & 1 Vict. c. 29, was confined to the case of mortgage and mortgages, or whether it applied to strangers to the mortgage wherever a mortgage of the lands existed. (Doe v. Williams, 5 A. & E. 201; stat. 3 & 4 Wm. 4, c. 27, ss. 2, 3.)

Cur. adv. vult.

BOND v. MANNING.—Pigott moved for a prohibition to the judge of a County Court, upon affidavits. *Rule refused.*

Tuesday, April 27.

MORRICE v. CLERK.—Demurrer to pleas. The question turned upon the construction of a lease. Sir F. Thesiger (Sir John Bayley with him), in support of the demurrer. Bovill, contra.

Judgment for the defendant.

THE EARL OF CHICHESTER v. HALL.—Special case as to the right to heriots. Cressey, for the plaintiff. Bovill, contra.

Judgment for the plaintiff.

Wednesday, April 30.

REG. v. THE DEAN and CHAPTER of ROCHESTER.—Argument concluded. Judgment for defendants.

REG. v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.—Demurrer to a return to a writ of mandamus to make a branch line. Knowles (Hodges with him), in support of the demurrer. Sir F. Kelly, contra.

Cur. adv. vult.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Wednesday, April 23.

BOOTH v. CLIVE.

County Court—Notice of action under 9 & 10 Vict. c. 95, s. 138.

A County Court judge, after a prohibition, proceeded and committed the plaintiff to prison upon a judgment order for non-payment of instalments of a judgment debt, whereupon the plaintiff brought an action against him for the false imprisonment, and, in leaving the case to the jury,

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the judge told them that if the defendant trying the case acted under a bona fide belief that his duty as judge made it incumbent on him to do so, notwithstanding the prohibition, act done by him must be considered as done in pursuance of the County Court Act, and that he was entitled to notice of action; and left the jury to say whether the defendant reasonably believed that he was so bound to proceed, and told them that if "reasonably" meant anything else than in good faith it meant according to reason, and in contradistinction to acting capriciously.

Held, that his direction was correct.

Case.—The third count of the declaration alleged that a person of the name of Still had received judgment in the Southwark County Court for a debt and damages against the plaintiff; that subsequently a prohibition was issued out of the Petty-bag Office of the Court of Chancery, directed to the defendant as judge of the said County Court, which was duly made known to him; that it, thereupon, became his duty as such judge to refrain from proceeding as such judge in the said cause, but that, after the said writ of prohibition had been issued, the Petty-bag Office, maliciously, and without reasonable or probable cause, did make an order that the plaintiff should be committed for the term of one calendar month to Horsemanonger-lane Jail, to pay the sum alleged to be due and owing to the said Still in respect of two instalments of a said debt and costs so recovered as aforesaid.

The defendant pleaded, secondly, that the instances were committed by the defendant after the passing of a certain Act, the 9 & 10 Vict. c. 95, intitled "An Act for the more easy Recovery of Small Debts," and that they were, and each of them was done in pursuance of the said Act, and in notice in writing of the action had been given to the defendant within one calendar month before the action had been commenced, &c. The plaintiff replied that the grievances in the declaration mentioned were not done in pursuance of the said Act & Parliament in the said plea mentioned.

The cause came on for trial before Jervis, C.J. at the Middlesex sitting after last Term, when the facts above stated were proved; but it was not shown that any notice of action had been given in pursuance of the 9 & 10 Vict. c. 95, s. 138. The Lord Chief Justice in summing up told the jury that if the defendant, in trying the cause and making the order, acted under a bona fide belief that his duty as judge of the County Court made it incumbent on him to do so, notwithstanding the prohibition that had issued out of the Petty-bag Office, the act done by him must be considered as done in pursuance of the County Court Act, and he was entitled to notice of action, and that it was for them to say whether the defendant reasonably believed that he was so bound to proceed; and that if "reasonably" meant anything else than good faith, it meant according to reason, and in contradistinction to acting "capriciously." The jury found a verdict for the defendant.

Humphrey now moved for a rule to show cause why a new trial should not be granted, on the ground of misdirection. The defendant was not entitled to the protection of the statute. The manner in which the learned judge left the question to the jury was incorrect. He should have asked them whether they thought a reasonable man, filling the situation of the defendant, would have pursued the course he did. The writ of prohibition was binding on him; and it was impossible to say that he believed that it was disregarding it, he was acting in pursuance of the statute. Kine v. Evershed, 10 Q. B. 143, is directly in point. That was an action of trespass for putting the plaintiff in charge to a constable for a malicious injury to a house. The defendant was attorney to the owner, and alleged that he had acted under 41 Geo. 4th, c. 30, ss. 24, 28, and was entitled to notice under 41st sec.; and it was held that before he could claim the benefit of the statute the jury must be satisfied not only that he acted bona fide, but that he had a reasonable belief that he was the owner's servant, or possessed his authority. In Hopkins v. Crowe, 4 Ad. & El. 774, the Court of Q. B. decided that a defendant, who had given the plaintiff into custody, under the 6 Wm. 4, c. 59, s. 19, for ill-using a horse, the property of his father, was not entitled to notice of action, even though he acted bona fide, inasmuch as the statute applied only to an officer or owner of an animal ill treated acting upon view or information. He also referred to Wedge v. Berkeley, 6 Ad. & El. 663; Hughes v. Buckland, 15 M. & W. 346; Horn v. Thornborough, 3 Ex. 846.

Cur. adv. vult.

The judgment of the Court was now delivered (24th April) by CRESSWELL, J. After stating the facts his lordship proceeded:—A great many cases were mentioned by Mr. Humphrey, in which the right to notice of action was discussed. At first it seems difficult to reconcile all the expressions used by the judges in dealing with those cases; but on examination the difficulty is rather seeming than real, and arises from the circumstance that the language used

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the judges, with reference to particular circumstances, has been afterwards quoted, and used by them generally. First, we find some judges saying, the parties are claiming notice of action because of its imputed to be done in a particular character, or the exercise of a particular authority, such parties either having or not having reasonable ground for believing they filled that character or had not authority, whereas it is manifest the meaning of the word used by them is, that the parties must, according to the evidence, be assumed to have acted on the *bona fide* belief that they filled that character, and had the authority then in question; and in other cases the judges have said the real question is whether the party *bona fide* believed it, and acted under that belief. Now, then, apply that to this case. There is a difference in the terms used, though there is no difference in the principle laid down in the cases, and we apprehend the true principle in determining its application is, did the defendant in trying the cause honestly believe his duty as judge, under the County Court Act, called on him to do so? The last case, *bat of Horne v. Thornborough*, 3 Ex. Rep. 846, illustrates the view we have above taken of the whole series of authorities. There a reversioner caused a party to be apprehended under the Malicious Trespass Act, the 7 & 8 Geo. 4, c. 3, an action of trespass was brought against him, and he pleaded "not guilty, under the statute," and "no notice of action given." The Court of Ex. held he was entitled to notice of action, provided he *bona fide* believed he was acting in pursuance of the statute,—which was strictly in accordance with the ruling in the present case. It is remarkable that Mr. Baron Parke mentioned the case of *Hughes v. Buckland* as a decision that the protection afforded by the statute then under consideration is extended to all persons who had a *bona fide* belief that they filled the character mentioned in the statute, and acted *bona fide* under that belief. *Hughes v. Buckland* was mentioned by Mr. Humphrey as an authority for holding that a *bona fide* belief would not suffice, unless founded on reasonable grounds. Lord Cranworth, in his judgment, said that the use of the word "reasonably" was intended to explain what was meant—the word there being an ingredient—to enable the Court to arrive at a conclusion as to the *bona fides*; and it does not appear to be used in any sense at variance with that in the case of *Kine v. Evershed*, 10 Q. B. Rep. 143. The defendant there was attorney to the mortgagee of a house, and gave the plaintiff into custody on a charge of wilfully damaging the house, and the learned judge who tried the cause asked the jury whether the defendant acted *bona fide* in apprehending the plaintiff, or whether the charge was colourable or not? They found that he acted *bona fide*, whereupon the judge directed a nonsuit, and the Court, upon being moved for a new trial, in giving judgment, observed, that the jury were asked whether the defendant acted *bona fide*, or whether the proceeding was colourable or not, no question being put as to his being a servant, or his having authority from the mortgagee, or reasonably believing himself to be in either of those positions. Ultimately, the Court held, they should have been asked not only as to the *bona fides* of the defendant, but as to his reasonable belief that he was the servant of, or had the authority of, the mortgagee. Now, the *bona fides* there meant, is the *bona fides* on which the jury were asked their opinion, namely, whether it was an honest charge as opposed to a colourable charge, and the reasonable belief afterwards mentioned is equivalent to a *bona fide* belief that he was the servant of, or had the authority of, the mortgagee. And this makes the case consistent with the opinion of the Court of Ex. in *Horne v. Thornborough*, and many earlier cases, such as *Wedge v. Berkeley*, 6 A. & E. 663, and various others which it is unnecessary to mention. The case of *Hopkins v. Crove* is not at variance with this view of the subject. The statute 5 & 6 Wm. 4, c. 59, gave authority to the owners of horses to give in charge persons guilty of cruelty towards those animals. The defendant it appeared was the son of the owner of a horse that had been ill-used, and he gave the party in charge. It was held that he must be taken to know the law, namely, that the owner only was the party authorised, and that he had not, and could not have, any reasonable ground for believing himself to be the owner; therefore, he was not protected by the statute. There, the absence of all reasonable ground for such belief was a sufficient ground for holding that he did not act under that *bona fide* belief which was necessary to give him a statutory protection. We, therefore, think, that the direction of the Lord Chief-Justice is right, and ought not to be discharged. There will, therefore, be no rule.

Rule refused.

Friday, April 25.

TAPLIN v. FLORENCE.

Auctioneer—Authority of.

An auctioneer has no right to remain on the premises for the purpose of delivering the goods sold by him to the purchasers, after his licence has

been countermanded by his principal; and if he does, and his principal turns him off, the auctioneer cannot sue for the expulsion.

Trespass for assaulting the plaintiff, an auctioneer, and expelling him from certain premises, he then being in the same lawfully engaged in the sale and delivery of goods there sold by him by public auction, and thereby preventing him from proceeding with the sale and delivery of the goods to the purchasers; and, in consequence thereof, the plaintiff was vexed with certain suits at law for not delivering the goods sold.

Plea.—Justifying the removal of the plaintiff from the defendant's premises, the plaintiff making a noise and disturbance therein.

Replication.—That the plaintiff was an auctioneer, and retained by the defendant to sell his goods upon the said premises; that the plaintiff incurred expenses about the preparation for the sale, and that he sold certain goods to purchasers at the sale; that it became his duty to deliver such goods to them upon receiving the purchase money; that within a reasonable time, and according to the usage of sale, and at the said time when, &c. the plaintiff, with the said purchasers, assembled in the said premises for the delivery of such goods to the purchasers, and made no unnecessary noise and disturbance.

Rejoinder.—That before the completion of the sale, the defendant revoked his licence to the plaintiff to remain on or come into the said premises, and put an end to the plaintiff's authority as auctioneer; and that the plaintiff afterwards remained making a noise and disturbance, and the defendant, in defence of his possession of the said premises, committed the trespasses.

Sur-rejoinder.—That it was not agreed that the retainer of the plaintiff, as such auctioneer, should be revoked without the consent of both parties, and that the plaintiff did not consent to the revocation. Then followed a repetition of the greater part of the replication.

Special demurrer and joinder in demurrer.

W. H. Watson (Manisty with him) in support of the demurrers; and

Lydekker (Maxwell with him) contra.

Cases cited:—*Wood v. Leadbitter*, 13 M. & W. 838; *Smart v. Sanders*, 5 C. B. 895; *Wood v. Manley*, 11 A. & E. 34; *Webb v. Paternoster*, 2 Roll. Rep. 143; *Andrews v. Adams*, 15 Jur. 149; *Williams v. Millington*, 1 H. Bl. 84; *Edwards v. Chapman*, 1 M. & W. 231.

JENKINS, C.J.—I am of opinion that the defendant is entitled to our judgment. The action is in substance for an assault and an expulsion from the defendant's premises by the defendant, and the defendant pleads a justification in defence that he was possessed of the premises, and that the plaintiff was making a noise and disturbance therein, and that he therefore expelled the plaintiff. The plaintiff then says, in reply,—"But I was employed by you, the defendant, as an auctioneer, to sell goods on the premises, and by reason of that authority I had a right to make such noise and disturbance;" to which the defendant rejoins, "I revoked your authority;" and the plaintiff thereupon surrejoins,—“Yes; but before you revoked the authority I had allotted and sold the goods, and incurred certain expenses, and therefore you had no right to revoke my authority.” The defendant then demurs, and raises the question which we have to determine, whether the defendant had the right to revoke the authority under these circumstances. The right of the plaintiff to enter upon the premises is put upon two grounds,—1st, on the ground of a licence, and it is said that that was irrevocable because coupled with an interest; and then, secondly, it is said, that if the plaintiff was not in by licence, he was in under an agreement with the defendant, and that the agreement could not be put an end to by the will of one of the parties only. To judge of these grounds, we must look at the substance of the defence. The defendant says, "I turned you out because you were on my land making a noise, without my authority." Now, upon the case of *Wood v. Leadbitter*, an agreement by parol can confer no interest in, or right to enter upon, the land. The question then resolves itself into whether this was a licence coupled with an interest which could not be revoked, or a bare licence which might be revoked. In the judgment in the case of *Wood v. Leadbitter*, which was subsequent to the case of *Wood v. Manley*, it is said, "That a licence to hunt in a man's park and carry away the deer to his own use; to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants." In order to confer an irrevocable licence there must be an interest in the thing to which the licence extends; but it is not contended that the plaintiff had any interest in the premises in this case, and therefore the licence was revocable. In the instance already put, of a licence to hunt in a park and carry away the deer, so long as the deer remain there the party may enter and

take them away. But that is not this case. It is then said that the plaintiff had a special property in the goods sold, and so they became his goods, and that he had a right to enter and deliver them to the purchasers. Now, the facts on the record are, that the plaintiff was retained as an auctioneer to sell goods of the defendant on the premises of the defendant, so that the plaintiff was retained for a particular purpose only,—to sell the goods. Although it was not necessary for the plaintiff to contend that he had a right to go on and sell the goods, even if his authority had been revoked, yet that would be the consequence of our holding the plaintiff entitled to our judgment. After he had sold the goods and fulfilled the purpose for which he was employed, there is no authority to shew that he had any further interest in the goods. The case of *Williams v. Millington* is not infringed upon by our decision.

CRESSWELL, J.—It is perfectly clear that the plaintiff had no interest in the goods to make the licence irrevocable, and any incidental expenses incurred after the employment would not make it so.

WILLIAMS and TALFOURD, JJ. concurred.

Judgment for the defendant.

Saturday, April 26.

HUNT v. THE GREAT NORTHERN RAILWAY COMPANY.

County Court—Prohibition—"Tolls"—Jurisdiction—9 & 10 Vict. c. 95, s. 58.

A railway company were required by their Act to convey along their line goods and minerals in the carriages of other persons, and to provide at all times sufficient locomotive power to convey back the empty carriages, for which services they were empowered to charge for every carriage a maximum sum of 4d. per mile. The plaintiff requested the company to convey several of his trucks laden with coal along a portion of their line, but the company first demanded a certain sum per mile for the returned empty carriages, which the plaintiff refused to pay, alleging they ought to be conveyed back free. Several trucks having been delayed in consequence of this dispute, the plaintiff brought a plaint in the County Court for damages accrued by reason of the conduct of the company; and, notwithstanding an objection to his jurisdiction, the judge tried the cause, giving judgment in the plaintiff's favour.

On motion for a prohibition under 9 & 10 Vict. c. 95, s. 58, on the ground that a question of title to "tolls" was involved, and that, therefore, the County Court had no jurisdiction:

Held, that title to "tolls" as meant in the County Court Act, was not here in question; and, therefore, as the judge had jurisdiction, prohibition would not lie.

Byles, Serjt. (Wordsworth with him) moved for a rule calling on the plaintiff to shew cause why a writ of prohibition should not issue for restraining, in this case, all further proceedings in the County Court at Barnet. This was an action for loss sustained and expenses incurred by reason of delay in the carriage of certain goods along the Great Northern Railway from Peterborough to a place called Potter's Bar, and for refusing to carry coals. By their Act (13 & 14 Vict. c. 51, s. 13) the company "with respect to the conveyance of goods and minerals, may lawfully demand and receive, as their maximum rate of charge for the conveyance thereof along their railway, including the tolls for the use of the railway and trucks and locomotive power, except (amongst other things) a reasonable sum for warehousing and wharfage, for every carriage fourpence halfpenny per mile; and the company shall not be compelled to provide waggons and carriages for the conveyance of coal." &c. By sec. 16 the company "is required at all times to provide sufficient locomotive power and to convey all merchandise, articles, empty waggons, matters and things upon and along their railway." A similar motion had been made before Coleridge, J. in the Bail Court, who refused the rule (17 Law T. 54, Bail Court), but the application to this Court is made upon altered affidavits. The facts of the case are as follows:—The plaintiff having several trucks of coal for conveyance by the Great Northern line from Peterborough to Potter's Bar, desired the company to perform that service. But the company not only required payment for the forward carriage, but charged 2l. 10s. for back carriage, which they said they were entitled to by the 13th section of their Act. The plaintiff having refused to pay in advance the amount so claimed for returned empty carriages, the company refused to carry the trucks at all. The plaintiff gave them notice he should claim and sue for loss of time and of profit occasioned by delay, with such expenses as he had been compelled to incur by this conduct of the company, and eventually he brought his plaint in the County Court for the damage thus sustained through the refusal of the company to carry the goods. When the case was tried it was objected that the Court had no jurisdiction, because a question of title to "tolls" was involved in the case. The judge, however, tried the case,

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and gave judgment for the plaintiff for 39l. 13s. 6d. and on the 5th of April an order was served on the company for the payment of 53l. 10s. 10d. the amount of damages and costs. One question is whether the word "carriage" in the company's act means a carriage running on its own wheels or a carriage which may be placed on a truck. It is contended for the company that the plaintiff was compelled to pay 4d. for every empty "truck" returning on the line. The carriages run on their own wheels, drawn by the company's engines; in fact, it is the company's horse and the plaintiff's carriage. It is submitted the Court should grant this rule for a prohibition on the ground that the title to take this toll was disputed by the plaintiff. The question entirely turns on the word "toll." The 58th section of 9 & 10 Vict. c. 95, contains a proviso that the County Court "shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question." [WILLIAMS, J.—Why did you not come to the Court for *certiorari*?] Because prohibition is the proper remedy. The cause has been tried, and, generally speaking, *certiorari* does not lie after trial. The question is whether this is "toll." If it is, then it raises a question of title. It is submitted that the toll for empty waggons is here in dispute. The word "toll" is applicable to goods carried upon the company's own waggon, to carriages conveyed on the company's trucks, and to the carriages of others conveyed by the company's locomotives.

JERVIS, C.J.—You must show that title came in question, and that the judge did not decide the matter of fact, for that was his province.

By the Court.—The question as to title to "toll" does not appear to the Court to arise here. There will, therefore, be no rule in this case.

Rule refused.

Re NICHOLAS and DAVIES.

Fine—Cheirograph destroyed.

Where the cheirograph of a fine had been burnt in an accidental fire or otherwise destroyed or mislaid, the Court, on being applied to for an order on the Master to amend the record, so as to place parties in the same position as if the cheirograph had not been destroyed, refused to interfere.

Spicer moved for an order directed to the Master to "amend" a record of a fine, the cheirograph of which had been burnt in a fire which consumed a large portion of the public records. The affidavit showed that in 1818 a conveyance had been executed by Nicholas to Davies, and a fine was to be levied. There was every reason for believing that the cheirograph was burnt in the fire at Paper-buildings, where the public records (now kept at Carlton-ride) were, in 1818, deposited; at all events, it could not be found. Nearly all the public records for that year were consumed by the fire or materially injured. The object of this application is to place the assignees of Davies as to title in the same position as if the cheirograph were not destroyed. [JERVIS, C.J.—You want the Court to make a record, not to amend one. We cannot do that.] I am told amendment of *postea* has been permitted. We have a copy of the cheirograph, and only seek that the assignees of Davies may have a marketable title.

JERVIS, C.J.—You are asking us to interfere with existing rights without notice, and that we cannot do. Let the parties, if they all agree, execute the deed. If they do not, we cannot interfere.

Order refused.

Wednesday, April 30.

HUGHES v. CLARK.

Evidence—Counterpart—Stamp.

In debt for rent, the declaration making profert of a counterpart of the indenture sealed by the defendant, the plaintiff produced the counterpart, stamped as such; and it being objected that the other counterpart of the lease should have been produced to shew that it was stamped with a lease stamp, and that the one produced was really a counterpart, and properly stamped with the counterpart stamp only:

Held, that it was not necessary to produce the counterpart signed by the plaintiff, as that would be presumed to be in the defendant's possession, and it lay on him to shew that it was not properly stamped, if the fact were so.

Debt for rent.—The declaration stated that the plaintiff by a certain indenture demised the premises to the defendant, and made profert of the counterpart sealed by the defendant.

Fine—Non est factum.

At the trial the plaintiff produced a document purporting to be a counterpart of a lease, stamped with the counterpart stamp only, and executed by the defendant alone. The attesting witness was called, and he said that he did not see the plaintiff execute the document, nor did he see him sign any other instrument. Upon this it was contended that the counterpart, signed by the plaintiff, should have been produced, stamped with a lease stamp, to shew

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that the document put in was, in fact, a counterpart, and properly stamped as such. The objection was overruled, and a verdict given for the plaintiff, debt, 425l.

Corrie moved to enter a nonsuit. There was no evidence that this document was a counterpart, or that there was any other instrument between the parties. The *onus* was on the plaintiff to shew that this was a counterpart, in order to bring the stamp within the smaller denomination. If this was the only instrument signed by the parties, the stamp could not have been sufficient. It may be, that there was no other instrument, and there was no foundation laid for secondary evidence of its being a counterpart. (*Garnons v. Swift*, 1 Taun. 507, 37 Geo. 3, c. 19, continued by subsequent statutes.) It must be admitted that *Paul v. Meek*, 2 Y. & J. 116, is somewhat against this objection.

JERVIS, C.J.—I am of opinion that there should be no rule. The presumption arises in this case, that there was a counterpart signed by the plaintiff. By the evidence, it appears that the defendant executed a deed containing covenants, and in order to make them binding on him, there must have been another instrument executed by the landlord, which, in the ordinary course of things, would be in the defendant's possession; and that is all that is necessary to satisfy the presumption that another deed existed; and if so, the document produced was a duplicate. The defendant of course might have shewn that there was, in fact, no such counterpart, or that it was not properly stamped.

CRESSWELL, J.—The tenant, as the consideration for executing this part of the indenture, stipulates that he should have a part executed by his lessor, and it is fair to presume that the defendant had it in this case. There is no evidence that that part was not properly stamped.

WILLIAMS and TALFOURD, JJ. concurred.

Rule refused.

BUSINESS OF THE WEEK.

Thursday, April 24.

BOOTH v. CLIVE.—CRESSWELL, J. delivered written judgment in this case, which will be duly reported.

Rule discharged.

AKING v. GOODACRE.—This case was tried before the Lord Chief Justice, at the last sittings for Middlesex. Damages for the plaintiff, 40l. Byles, Serjt. now moved for a rule to shew cause why a new trial should not be had, on the ground of misdirection, the damages having been assessed upon a wrong principle. This was an action on the case against the sheriff of Leicestershire for an escape. The plaintiff had written out a gentleman named Bingham, in the county of Leicestershire, Somerset, and Middlesex, for 2,600l. The latter was arrested near Leicester, whilst attending his father's funeral. Taking advantage of an opportunity, he jumped into a dog-cart, drove off, and eventually safely reached the continent. He had been left 300l. a year by his father's will, payable at Nottingham Town Hall. At the trial Bingham's brother was called to prove assets, and he proved them sufficient to satisfy the debt for which his brother had been arrested. Bingham having returned from abroad, was subsequently taken in Kent, and then lodged in goal. No active measures had been taken by the plaintiff to arrest him. A communication was addressed to the plaintiff's attorney that Bingham was in custody; but as that gentleman was not at home, and had left no authority in the matter, Bingham was not detained. When captured in Kent he made two assignments of property to satisfy the several debts for which he was arrested. This verdict, which is no compensation to the plaintiff, it is submitted, was obtained through the misdirection of the learned judge, who thought the plaintiff should himself have used diligence to take Bingham. His lordship said, "To those who have their eyes open, and not to those who sleep, the laws subserve." It was no duty of plaintiff's to catch Bingham; it was the duty of the sheriff (5 & 6 Vict. c. 93, sec. 31). This statute says: "If any debtor in execution shall escape, the sheriff shall be liable for the damages sustained by the execution creditor." Now, what were the damages sustained by the plaintiff in this case? The man was taken with the money, as one may say, in his pocket. He is allowed to escape, and the sheriff is liable for the whole loss the plaintiff has sustained. The defendant, indeed, says: "You had a chance of getting the money from him by taking him again." But I say, in reply, "we have done all that the law requires; it was the sheriff's duty to take the man, and not ours." The jury should not have been told it was our duty to take him. [JERVIS, C.J.—There were circumstances of aggravation shown at the trial. It was proved that Bingham had since been arrested by other parties, and his money taken by them. His estate being so lessened in this way, do you say that there was no ground for decrease of damages, seeing that the plaintiff, when told the man was in custody, took no steps to obtain from him satisfaction for his debt?" I submit the verdict was given on an improper direction; that it is against evidence, and that the sum awarded is the mere shadow of the damage the plaintiff had sustained. [JERVIS, C.J.—The man, when arrested, says, "I will make an assignment." The plaintiff replies, "I will not have the assignment unless you both will join and sign." The plaintiff goes to consult his attorney, and in the meantime the bird is flown.] [CRESSWELL, J.—The question is whether you are to have the value of the prisoner at the time of his escape, or what you might have made of him when he was afterwards arrested.] By the Court. Take a rule.

Rule nisi.

WALKER v. ELDER.—This was an action of trespass for pulling down a board belonging to plaintiff, and affixed against a wall claimed by the plaintiff. It was tried before the Lord Chief Justice at the last sittings for Middlesex. Verdict for the defendant. Byles, Serjt., now moved for a rule to shew cause why there should not be a new trial,

on the ground that the verdict was against the evidence. The question entirely turned on whose property was the wall, against which the plaintiff's board was affixed.

Rule refused.

M'CALMONT and OTHERS v. RANKIN.—This was an action for money had and received, brought by direction of the Chancellor Wigram. It was tried before the Lord Chief Justice in Middlesex. Verdict for the plaintiff, 2,023l. 4s. 1d. It was a question of principal and factor. The case reported (as it stood in the Court of Equity) in 1811, 218 Ch. Crompton moved, pursuant to leave reserved, for a rule to shew cause why a nonsuit should not be entered, or a verdict entered for the defendant, or to reduce damages. The Court granted a rule to shew cause why there should not be a nonsuit entered, and to reduce damages.

Rule nisi.

GLADSTONE v. SATLER.—This cause was tried before the Lord Chief Justice. Verdict for the plaintiff. It was an action on a bill of exchange; the defendant pleads that the bill was given for a consideration that had not been performed. *H. Hill* now moved for a new trial, on the ground that the verdict was against the weight of evidence. There had been a contract for the supply of best description of screened Hartley Hartlepool coal, and the defendant pleaded that the goods supplied were not according to the contract.

Rule refused.

PRITCHARD v. BAGGELOW.—This was an action of trespass, tried at the sittings in Middlesex, before Talbot, J. It was an action on a bill of exchange; the defendant pleads that the bill was given for a consideration that had not been performed. *H. Hill* now moved for a new trial, on the ground of the improper reception of evidence, and misdirection. The action was for the recovery of a quantity of "plant," which had been used in reclaiming Lough Swilly, in Ireland. The only material plea was, Not guilty, and Statute of Limitations. An abstract of title, which had been used before the Master to shew the title of the plaintiff in equity to an embankment on the lake, had been put in at the trial. This was improperly received in evidence. As to the point of misdirection, the action had been kept alive by a series of alies and new writs. It was objected to these, that the rule did not shew that the indorsements were made upon them at time of service. (*Walter v. Collett*, 4 Ex. 171; *Milner v. Hunter*, 5 Ex. 34.) The Court granted a rule at this point, and refused it on the ground that evidence had been improperly admitted.

Rule nisi.

BASTINGALE v. HENDRY.—This cause was tried before Lord Campbell, C.J. at Maidstone. Verdict for the defendant. *Bramwell* now moved for a new trial, on the ground of misdirection, and because the verdict was against the evidence. It was an action on the case in the nature of waste for removing posts and rails on a slight ground. There was also a count in trover. The misdirection complained of was, that the learned judge, in putting the case to the jury, asked them to find whether the fixtures had been sold "out and out," or whether the defendant was to step in the shoes of a former tenant, and be bound by his agreement for the premises. It is contended the sale of the fixtures by the former tenant to the plaintiff was an "out and out" sale, and not an agreement, and the alternative put by the learned judge to the jury was not necessary or proper. [JERVIS, C.J.—We will speak to Lord Campbell on this matter.] On another day, JERVIS, C.J. said the Court had consulted Lord Campbell, C.J. who informed them that it was purely a question of fact for the jury. There would, therefore, be no rule.

Rule refused.

PARKINSON v. MUGGERIDGE.—*Burwell* moved herein for a rule to shew cause why proceedings in this action should not be stayed till one of five other actions by the same plaintiff should be tried. He grounded his application on the statement that this action was substantially the same as the others.

Rule refused.

GLADSTONE v. MACLEAY.—*Postor* moved to make absolute a rule for judgment as in case of nonsuit, the plaintiff not having taken down the cause to trial pursuant to a peremptory undertaking.

Rule absolute.

Saturday, April 28.

THE ELECTRIC TRAMWAY COMPANY v. BENTLEY and LITTLE.—CRESSWELL, J. gave the written judgment in this case.

Rule discharged.

THE WEST-LONDON RAILWAY COMPANY v. LONDON and NORTH-WESTERN RAILWAY COMPANY.—Sir F. Thesiger stating he should be engaged in the Court of Q.B. to-day, prayed the Court that this case should stand over till Monday.

Leave to stand over.

ROBERTSON v. GREENING and ANOTHER.—*Lock* moved herein for a rule calling on the plaintiff to shew cause why judgment in this case should not be set aside, and a suggestion entered upon the roll to deprive the plaintiff of costs. It was an action of trespass—breaking and entering the plaintiff's house, and taking his goods. Plea—*Verdict* distress. Verdict for the plaintiff, damages, 3l. 14s. The goods were taken within the jurisdiction of a County Court wherein one defendant dwelt, and sold within jurisdiction where other defendant lived. Taking either of these, a material part of the cause of action arose within the jurisdiction of Court wherein a defendant dwelt. (*Perry v. Davies*, 19 L. J. 284, Ex.) The Master sets the issue of this rule; and it is proved if the plaintiff should sign judgment in the interim, it should be at his own cost. It was not necessary to ask a County Court to come to sue, because a material part of the cause of action arose within the jurisdiction where the defendants reside. There is an authority in the Ex. decided by Bull, B. sitting alone—*Perry v. Davies*, 19 L. J. 284, Ex. By the Court.—You may take a rule.

Rule nisi.

SOUTHALL v. RIGGS.—*Jo. Brown* (Byles, Serjt. with him) shewed cause against a rule obtained by *Bull*. It was an action on a promissory note for 50l. to which the defendant pleaded two pleas, one of which was amended at the trial, and on that amendment the question arose. *Bull*, Q.C. and *Bell* were heard in support of the rule. [JERVIS, C.J.—We will not give judgment in this case till we have decided the case of *Forman v. Wright*, in which a rule is now pending.]

Cur. adv. vult.

WHITE v. GARDNER.—This case was called on, but the parties not being ready, was ordered to

Stand over.

Monday, April 30.

DONALD v. GOODWIN v. JORDAN.—*Chamwell*, Serjt. moved for a rule, calling on the Master to review his taxation. This was an issue directed to be tried by the Court of Chancery to determine the right to certain freehold pro-



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party. The plaintiff sued in *formal pauperis*. At the trial a verdict was returned for the defendant, and a rule for a new trial was applied for, on the ground that the verdict was against evidence. WILDS, C.J., who tried the cause, thought the verdict was right, but as the action had been brought by order of the Court of Chancery, and it was for the purpose of settling finally the right to property of very considerable value, the Court treated it as an exceptional case, and granted a rule for a new trial, on payment by plaintiff on a certain day, named to defendant, of the costs occasioned by the trial already had, and of the motion for a new trial. It appeared that a pedigree had to be traced from 1730 up to the present time. There were three grounds of review—first, the Master had disallowed the costs of the attendance of the country attorney for the defendant on the trial of the cause, and on the motion for a new trial; secondly, he had allowed for two counsel only, instead of three; and, thirdly, he had disallowed the shorthand-writer's notes. The bill of costs, which amounted to 648*l.*, had been reduced to 121*l.* 17*s.* 10*d.* It was contended that this was not a common case of a new trial on payment of costs—the intention of the Court was, that the defendant should be indemnified from all costs, and the cause was of such importance that several of the items struck out ought to have been allowed.

*Rule refused.*  
*Dee dem. MACKENZIE v. ROSE.*—Bevill moved judgment against the casual ejector. This was a question of sufficient service. The service of the declaration on the land-lease was regular. That on the tenant had been thus effected.—The premises were a house, &c. called Colobry House, Kensington, used as a Roman Catholic convent. Service had been made on the trustees; but on attempting to serve the lady superior the attorney was told she was ill; but ultimately the declaration was left with the servant, and the attorney was referred to Mr. Few, the solicitor. On calling on Mr. Few that gentleman produced the declaration, and admitted receiving it from the lady superior, and she, on a subsequent visit to the convent, said she had been to Mr. Few's and had given it to him; but all these communications had been by messages sent through the servant. Ultimately she signed a copy "Emily Creswick, superior," but that was not done in the presence of the attorney, and there was no proof of her handwriting, in fact she could never be seen.

*Rule nisi service to be made on all the parties.*  
*COLUMBINE v. PERRELL, assignee.*—Kerr moved for a rule calling on the defendant to show cause why all the proceedings herein should not be stayed, on the ground that they were continued in breach of good faith. In June 1847, a fiat in bankruptcy was issued against the plaintiff. In May, 1849, he filed a petition to annul the fiat, and an action was tried to try the validity of the fiat; in November 1849 there was a judgment against the plaintiff, and the costs were taxed. There had been a great deal of litigation between the parties. Ultimately an agreement was entered into by which a policy of insurance was to be settled on the plaintiff's wife; another policy on plaintiff's mother; 100*l.* was to be given to the plaintiff, and she was to deliver up certain securities and to submit to the fiat, and all further proceedings were to be put an end to. This agreement had been partially carried out, and it was stated that the plaintiff had performed his part, but the defendant had threatened to upset the agreement, and on the 8th of January had served a rule to surjoin.

*Rule nisi granted.*  
*PROBERT and UX. v. TREGBAR.*—Horn shewed cause. *Hemptry and Dowdell*, contra. It was agreed that there should be a *stet* process in both these actions.  
*ABNEY v. DALE.* To stand over till Wednesday.  
*THE WEST LONDON RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.*—Thesiger, Channell, Serjt., and Bevill, shewed cause. *Byles*, Serjt. James, and Arpland, in support. *Cur. adv. vult.*

*Tuesday, April 20.*  
*GRANAM and OTHERS, Assignees of Fulford v. RAWOOD.*—This was a demurrer to a plea to the second count of the declaration, for a sum of money stated to be due for use and occupation of certain premises under the plaintiff's assignees, and on an account stated with them as assignees. The plea stated the use and occupation to have been had under an agreement with Fulford before his bankruptcy, which provided that Fulford should put the house, which was part of the premises occupied, in perfect repair, and build a new part, and that no rent should become due until those repairs and that building had been completed. Demurrer to the plea.—1. That it amounted to the general issue; 2. That the agreement with Fulford was no answer to rent accruing due in respect of an occupation under the plaintiff; 3. That the plea was at all events no answer to the account stated. *Willis* in support of the plea. *Dowdell*, without arguing the demurrer, admitted that judgment must go for the plaintiff.

*Judgment for the plaintiff.*  
—v. —. *Leah* moved for a rule to show cause why an order should not issue, calling on the defendant to pay a sum awarded against him and costs, or for an attachment.

*Rule nisi.*  
The Court having exhausted the cases entered in the special paper for the day, went into the new trial paper.  
*Dee dem. HALE v. GALVIN.*—This was an ejectment for non-repair of certain premises held by the defendant. The cause was tried before Maule, J. in Middlesex. Verdict for the lessor of the plaintiff, with leave to move the Court to enter a nonsuit. *Prentice* now moved accordingly. By the COURT.—We will speak to brother Maule on this case. *Cur. adv. vult.*

*BUCHANAN v. SMITH.*—Hawkins moved for judgment in a cause where there was a plea of *nil tibi record*. The officer said the record was in court.

*Judgment for the plaintiff.*  
*VALLEY v. ANDERSON.*—J. H. Hodgson made absolute in this case a rule to compute.

*Rule absolute.*  
*ARNDING v. GOODACRE.*—This was an action on the case against the sheriff of Leicestershire for an escape. The facts are stated in the report of the rule nisi. *Channell* shewed cause. *Leah* and *Karslake* in support of the rule.

*Cur. adv. vult.*  
*CHOW v. BEVAN.*—Bramwell moved for a rule to shew cause why a judgment improperly signed in this cause should not be set aside.

*Rule nisi.*  
*FRITCHARD v. BAGSHAW.*—Phipson prayed the Court that this cause, which is in the paper for to-morrow, might be ordered to stand over; as he was required to be

absent on business. [JERVIS, C.J.—Is it professional business, Mr. Phipson?] It is, my lord. JERVIS, C.J.—That makes the case so much the worse, we cannot accede to the application. You must find a substitute.

*Refused.*

*Wednesday, April 30.*  
*DREWS v. RILEY.*—Tried in Middlesex, at the sittings in this term, before Maule, J. verdict for the plaintiff. *W. H. Watson* moved to enter a nonsuit or a verdict for the defendant.

*Rule nisi.*  
*FRITCHARD v. BAGSHAW.*—Channell, Serjt., and H. Hill shewed cause, and Phipson supported the rule to set aside the verdict and enter a nonsuit. *Cur. adv. vult.*

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILLY and C. J. B. HERBERT, Esqrs. Barristers-at-Law.

*Thursday, April 24.*  
*OATES v. HUDSON.*  
Money had and received—Dues of goods—Notice.

*Deeds of the plaintiff had been placed in the hands of the defendant, an attorney, and he refused to give them up, except on the payment of 63*l.* claimed by his aunt. At the time he was told that he would hear further of the matter: Held, that he was liable in an action for money had and received to the use of the plaintiff, and that the above intimation was sufficient notice. This was an action for money had and received. Plea—General issue. Tried at York before Cresswell, J. and a verdict found for the plaintiff.*

*Watson* moved for a new trial, on the ground of misdirection.—The plaintiff married the heiress-at-law of a Mrs. Bingworth, who died, in 1834, possessed of certain freehold and leasehold property, which she had devised and bequeathed to Mrs. Oates. Mrs. Bingworth, some years before, had brought up and educated a Mrs. Hudson, to whom she promised to leave her property, and in whose house she resided until her decease; and Mrs. Hudson had paid her funeral expenses, &c. Prior to her decease she had deposited in Mrs. Hudson's hands certain title-deeds relating to her property, which were afterwards refused to be delivered up until the sums paid on account of the deceased were repaid, and after some negotiation it appeared that Mrs. Hudson had said she would have no more to do with the matter, but referred to the defendant, her nephew and solicitor, who would give up the deeds on payment of 63*l.* An application was subsequently made to the defendant, who delivered up the deeds on receiving the 63*l.* At the same time the plaintiff's attorney said, "You shall hear of this again." Within two days the defendant paid the amount to the account of his aunt at the bankers. The learned judge, at the trial, had directed the jury that the plaintiff was entitled to recover, that the defendant had no right to the 63*l.* and that he had notice. It was now objected that the defendant had only acted as attorney, and was not therefore primarily liable, and this was a voluntary payment made in consideration of the deeds being given up. (*Atlee v. Backhouse*, 3 M. & W. 633; *Snowden v. Davis*, 1 Taunt. 359.)

*PARKER, B.*—If this money had been paid voluntarily, it could not have been recovered back; but it was not so; it was a payment made in order to get the deeds. The duress of the person invalidates an agreement; the duress of goods does not; but at the same time it negatives the voluntary payment. The learned judge was right; and there will be no rule.

*Rule refused.*

*Monday, April 28.*  
*MUIRHEAD v. EVANS.*  
*Practice—Irregularity in the number of the jury. Thirteen jurymen were by mistake sworn in the box: the mistake was not discovered until a witness had been called, and the defendant not consenting that one of the thirteen should retire, the judge discharged the jury, postponed the case till the following morning, and then tried it as undischarged, the defendant having protested against such trial, and withdrawn:*

*Held, that the proceedings were regular; and if not, per Pollock, C.B. and Martin, B. that the defendant should be left to his writ of error.*

This action was tried as a special jury case, at the Radnor Assizes, before Williams, J. and it appeared that the names of thirteen jurors were called, that the thirteen jurors went into the box, and were sworn. The case was opened on the part of the plaintiff, and the first witness called, when the mistake was discovered, and the plaintiff offered to allow one of the thirteen jurors to withdraw from the box, but the defendant would not consent. After some discussion, the judge discharged the jury, and postponed the case till the following morning, when it was again called on, and twelve of the thirteen who had been sworn on the previous day, were called and sworn to try the case. The defendant protested against the trial taking place, and in consequence of an observation made by the learned judge on the

previous day, which he thought calculated to prejudice him, the defendant withdrew, and the case was tried as undischarged, and a verdict returned for the plaintiff. It did not appear that the names of these twelve jurymen were the names first drawn on the previous day.

*T. Allen* now moved on the part of the defendant for a *venire de novo*. First, the learned judge ought to have proceeded to try the action with the jury of thirteen, although the defendant refused his consent, and the verdict would have been good. (32 Hen. 8, c. 30.) [MARTIN, B.—That statute only applies to cases tried by a jury of the proper number, and then the verdict cures previous mistakes.] Secondly, as it does not appear that the twelve who tried the cause were the twelve whose names were first drawn from the box, a *venire de novo* ought to be granted. (6 Geo. 4, c. 50, s. 26; *Norman v. Beaumont*, Willes, 484; *Carns v. Nicoll*, 3 Dowl. 115; *Dovey v. Hobson*, 6 Tamm. 469; *Doe dem. Lord Ashburton v. Michael*, Q.B. Feb. 1851 (not reported).)

*POLLOCK, C.B.*—I am of opinion that there should be no rule in this case. It appears that thirteen jurymen were called into the box and sworn, and that the case had proceeded some way when the mistake was discovered. This was a mere irregularity, and such proceeding not being by consent, the trial would have been null and void. The judge had, therefore, the right to treat the proceedings as null and void, and to begin the trial over again. The next morning the cause was again, as I think, properly, called on and tried. If there was anything erroneous, it is a ground for a writ of error, but we ought not to set the verdict aside.

*PARKER, B.*—The moment the mistake was discovered, the learned judge was right in correcting it at once. I agree with Mr. Allen that the twelve first called and sworn were the proper men to try the cause, under the 6 Geo. 4, c. 50, s. 26. The only course that could have been pursued was to allow the trial to proceed, and then all the proceedings would have been set aside, or to begin and try the cause over again; the latter was done here, and that I think was correct.

*PLATT, B.* concurred.  
*MARTIN, B.*—It seems to me that if there was any defect in the trial it was right to correct it at once. As it is, the defendant must be left to his writ of error, if these proceedings are not correct.

*Rule refused.*

*TOZER v. MASHFORD.*  
*Slander—Suspicion of felony.*  
*Where the slanderous words imported suspicion of felony only, but the inducement and innuendoes in the declaration explained them to mean a direct charge of felony, and the judge at the trial told the jury that if they thought that the words meant suspicion only, to find for the defendant; but if a direct charge, to find for the plaintiff. Held, that the direction was right.*

*Slander.*—The words in the declaration were, "I (meaning the defendant) have a suspicion that you (meaning the plaintiff) and Bone have robbed my house (meaning thereby that the plaintiff had feloniously stolen and carried away certain goods and chattels of the defendant's) and therefore I (meaning the defendant) take you into custody." There was an averment in the inducement that the defendant intended to impute felony to the plaintiff.

At the trial in Devon, Pollock, C.B. told the jury that if they thought that the defendant intended nothing more by the words than that he had reason to suspect the plaintiff of felony, they should find for the defendant; but that if they thought he intended to make a direct charge of felony against the plaintiff, to find for the plaintiff. Verdict for the defendant.

*Collier* moved for a new trial, on the ground of misdirection. The words are libellous of themselves without any innuendo. Com. Dig. E. 1, 3, F. 18; *Curtis v. Curtis*, 10 Bing. 477; *Davis v. Noake*, 1 Stark Rep. 377. [Parker B. referred to 1 Stark on Lib. 65, and Com. Dig. F. 13.]

By the COURT. The plaintiff has by his inducement and innuendo taken upon himself to prove that the defendant meant to impute a direct charge of felony, when the words themselves import suspicion only. The declaration, therefore, was not proved. It is clear that words which denote suspicion only on the part of him who speaks them, are not actionable.

*Rule refused.*

*Tuesday, April 29.*  
*BRANCHFORD v. GEORGE.*  
*County Court—Costs.*

*Macnamara* moved for a rule that one of the Masters of this Court be directed to tax the plaintiff's costs in this case. It was an action of debt brought for 7*l.* The defendant had paid into court 2*l.* 12*s.* 6*d.* and so pleaded. That sum had been taken out, and *ex nolle prosequi* entered as to the residue. The defendant's costs upon the *nolle prosequi* had been paid by the plaintiff, who wished to be paid his costs of the suit in respect to the money paid into court.

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It was then contended that the plaintiff was entitled to these costs under the reg. gen. Trinity Term, 1 Vict. notwithstanding the County Court Act, 13 & 14 Vict. c. 61, secs. 11 and 13; and that it had been so decided by Platt, B. at Chambers in *Jones v. Power*, 16 Law T. 493. The 43 Geo. 3, c. 46, s. 3, was analogous. *Keene v. Deebie*, 3 B. & C. 491; and *Roe v. Rose*, 2 C. & M. were cited.

**POLLOCK, C.B.**—At present we give no opinion whatever upon the subject; but the costs of a rule here, the Master informs us, would be about 15*l*.; so that if you succeeded upon the rule your client must be a loser by obtaining it; and if he failed he would still be worse off. If you think it beneficial to your client's interest to proceed, or should the plaintiff persist under these circumstances in asking for a rule, take it.

## BUSINESS OF THE WEEK.

Thursday, April 24.

**GRENDERS v. WILLIAMSON AND ANOTHER.**—Tried at Stafford before Patteson, J. when a verdict was returned for the defendants. This was an action of trespass for breaking and entering a close. Pleas, 1st, that the close was not plaintiff's; 2nd, leave and license. *Whately* now moved for a rule nisi for a new trial, on the ground of misdirection. *Rule nisi granted.*

**HARMING v. HODGKINSON.**—This was another cause tried at Stafford before the same learned judge, and was also for trespass for breaking and entering a close. The pleas were not guilty and not possessed. Verdict for the plaintiff. *Whately* now moved to set aside the verdict and for a new trial, on the ground of misdirection, and also that the verdict was against evidence. Henshaw Moss died before 1845, and by his will left the ground in question to the plaintiff in trust for sale, and to divide the produce amongst his children. At the trial two of the sons, who would be interested in the proceeds, were admitted as witnesses. The question was, whether they were properly admitted under Lord Denman's Act. On that point the Court took time to consider, the other being abandoned.

Cur. adv. vult.

**JONES v. DAVIS AND OTHERS.**—Tried before Williams, J. Verdict for the plaintiff for 8*l*. 18*s*. *Johs Evans* moved for a rule nisi for a new trial on an affidavit, on the ground of surprise. *Rule nisi granted.*

**DON DEM. DAVIS v. THOMAS.**—Kjement. Verdict for plaintiff. *Johs Evans* moved for a new trial on an affidavit, and that the verdict was against evidence. (10 & 11 Vict. c. 103, s. 10; *Le Sarak Garde*, 15 Law T. 347; 3 Keble, 166, 307; Ventris Rep. 247; Coke Litt. by Hargreave, 571.) *Rule nisi granted.*

**GRAMAN AND ANOTHER, ASSIGNERS OF SANDERS, v. NEWHAM.**—Trove for goods, &c. Pleas, denying the property in the assignees of the bankrupt and in the bankrupt. Tried at Guildhall before the Lord Chief Baron. Verdict for the plaintiff. *Watson* now moved to set aside the verdict and to enter a nonsuit, or for a new trial, on the ground of misdirection and that the verdict was against evidence. The defendant and the bankrupt were near relations. In 1840 the defendant had made himself responsible for the bankrupt on a bill for 300*l*. which had not then arrived at maturity; and on the 17th of February, in that year, he advanced to the bankrupt a further sum of 217*l*. 10*s*. on condition that the bankrupt should execute a warrant of attorney for 600*l*. 10*s*. which he accordingly did. On the 25th of May defendant entered up judgment and issued execution; on the 30th of May there was a second execution at the suit of one Marshall for 62*l*.; and on the 21st of June the defendant paid out Marshall, and took an assignment from the sheriff. On the 20th September possession was taken; and on the 8th of October the flat issued against the bankrupt. The goods remained in the defendant's possession until after that time. It was contended—1st, That if the sheriff seizes and sells and assigns generally under both the executions, that is a valid assignment, and the learned judge ought so to have directed the jury; 2nd, that there was no act of bankruptcy; and, 3rd, no fraudulent preference. *Rule nisi granted.*

**ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY.**—In this case, which was tried last Term before the Lord Chief Baron, and a verdict returned for the plaintiff on certain counts, and for the defendant on the rest, the Attorney-General moved to set aside the verdict, and for a new trial, on the ground of misdirection. There was also a cross rule moved for by Sir Fitzroy Kelly on behalf of the London Dock Company, to enter certain issues for them, which was only partly heard when the Court rose; they therefore postponed their decision in both cases, and appointed Saturday morning for Sir Fitzroy Kelly to finish his case. *Part heard.*

**DON DEM. BRAY v. ROE.**—*Wise* moved for a rule to let the landlord defend. *Granted.*

**BATHOLOMEW v. HEWSON.**—*T. W. Saunders* moved for a distringas to compel appearance. *Granted.*

**TARK v. INGRAM.**—*T. W. Saunders* moved for a distringas to compel appearance. *Granted.*

Friday, April 25.

**SEKLS AND OTHERS v. WATERS.**—*Knowles, Q.C.* moved to set aside the plaintiff's verdict pursuant to leave, and to enter it for the defendant. The cause was tried before Greenwell, J. at Newcastle. *Cur. adv. vult.*

**CUNLIFFE v. HARRISON.**—*Knowles, Q.C.* moved in this case, tried before Platt, B. at Liverpool, to set aside the plaintiff's verdict and to enter a nonsuit, pursuant to leave. The action was for goods sold and delivered, the plaintiffs being wine merchants at Bordeaux, and the defendant at Liverpool. Order was given in 1847 to a deceased partner of the plaintiff for ten casks; fifteen were afterwards sent and five were to be selected and put out, the remaining ten to be kept by the defendants. But this, it was said, had never been done, and therefore this action could not be maintained. *Rule nisi.*

**MATHER v. ECKHART.**—*Knowles, Q.C.* moved to set aside the plaintiff's verdict, as being against evidence. Tried at Liverpool before Platt, B. *Rule refused.*

**RUTHERFORD v. PARKER.**—*Knowles, Q.C.* moved to set aside the plaintiff's verdict, on the ground that it was against the evidence. The learned judge who tried it was not being dissatisfied. *Rule refused.*

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**TURNER v. WINTERBOTTOM.**—*Keating, Q.C.* moved to set aside the plaintiff's verdict and to enter the same for the defendant. It was an action on the case for obstructing a right of way, and tried at Gloucester before Patteson, J. *Rule nisi.*

**TOMS v. TAYLOR.**—*James, Q.C.* moved to set aside the plaintiff's verdict for 13*l*. and for a new trial on payment of costs, on the ground that the verdict was against the evidence. *Rule nisi.*

**ROB v. THE BIRKENHEAD, LANCASHIRE, AND CHESTER JUNCTION RAILWAY COMPANY.**—*Welshy* moved in this case to set aside the plaintiff's verdict for 50*l*. pursuant to leave, and to enter a nonsuit instead, or for a new trial, as being a verdict against the evidence. The cause was tried before Maule, J. at Chester, and was an action for assault and false imprisonment. It appeared the plaintiff had taken an excursion-ticket to Bangor and back. He asked at the station as to which train he could return by, and was told by one of the clerks. He did return by that train, but it was not the proper one, and, on being asked subsequently for his ticket allowing him to go by this particular train, he had it not, but only an excursion-ticket, and 2*s*. 6*d*. was therefore demanded as an additional fare, in consequence of his coming by the wrong train. He declined paying it, and was taken ultimately into custody, and to a police office at Chester. He then paid the 2*s*. 6*d*. but was detained in consequence all night at Chester, and prevented going on to Liverpool as he intended, and put to some necessary expenses. There was, however, no evidence to show that those persons who ordered or took him into custody were the defendants' servants, nor was there any evidence to fix the defendants. *Rule nisi.*

**FARRINGTON v. BOLT.**—This case was tried at Chester before Mr. Chilton (sitting for Maule, J. who was then ill), when the plaintiff obtained a verdict for 193*l*. *Welshy* moved to set aside that verdict, on the ground of misdirection. *Rule refused.*

**PEACOCK v. PESCOT.**—*Watson, Q.C.* moved to set aside defendant's verdict obtained at Durham before Platt, B. and to enter it for plaintiff, pursuant to leave. *Rule refused.*

**WOOD v. MANCHESTER RAILWAY COMPANY.**—*Watson, Q.C.* moved to set aside the plaintiff's verdict for 500*l*. and for a new trial, on the ground that there was no evidence to go to the jury, and as being against the evidence. *Rule refused.*

**NEWTON v. VAUCHER.**—*Watson, Q.C.* moved in this also to set aside the plaintiff's verdict. *Cur. adv. vult.*

Saturday, April 26.

**THE ATTORNEY-GENERAL, BRADLEY AND EVANS.** Appointed to be heard on Tuesday, the 6th of May. **WOOD v. THE MANCHESTER RAILWAY COMPANY.** *Rule refused.*

**WALSTAB v. THE PATENT FUEL COMPANY.** *Rule refused.*

*To stand over, right to move being reserved.*  
**GRIFFIN v. HUMPHREY.**—Tried before Lord Campbell, C.J. Verdict for plaintiff on the 2nd issue. *M. Chambers* now moved, pursuant to leave reserved, to set aside the verdict for the plaintiff on that issue, and to enter it for the defendant, on the ground that no right of way had been established for twenty or forty years, or for a new trial, on the ground of misdirection, and that the verdict was against evidence. The question was a right of way along a lane to certain wharfs in the occupation of the plaintiff. *Rule nisi granted.*

**SANDERSON v. COOPER.**—Tried before Maule, J. Verdict for plaintiff, damages 25*l*. *M. Chambers* moved, pursuant to leave reserved, for a rule nisi to enter a nonsuit, on the ground of variance, or for a new trial, if the plaintiff refused to reduce the damages. *Rule refused.*

**HESLOP v. BAKER AND OTHERS.**—Trove tried before Greenwell, J. Verdict for defendants. *Bliss* moved for a rule for a new trial, on the ground of misdirection. It was an action for certain furniture, &c. seized by a bankrupt's assignees, which previously to the bankruptcy had been assigned to the plaintiff. *Rule nisi granted.*

**WILLIAMS v. MARSDALE AND OTHERS.**—Tried before Patteson, J. at Stafford. Verdict for the plaintiff. *Allen, Serjt.* pursuant to leave reserved, moved for a nonsuit or new trial, on the ground of misdirection. *Rule nisi granted.*

**GRAMAN v. GURNEY.**—Tried before Platt, B. at Durham. Verdict for the plaintiff; damages, 230*l*. *Temple* moved, on behalf of the plaintiff, for a rule to shew cause why the damages should not be increased to 400*l*. The question was whether a policy of insurance on a ship was an open or a valued policy. *Rule refused.*

**SHALLER v. TAYLOR.**—Tried before Platt, B. Verdict for the defendant. *Knowles* moved for a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground that the verdict was against evidence and misdirection. *Rule refused.*

**TURNER AND ANOTHER, ASSIGNERS, v. SHEPHERDSON.**—Tried before Platt, B. at Liverpool. *Wordsworth* moved for a new trial on an affidavit. *Refused.*

**LAW v. RAWSON.**—Tried before Platt, B. Verdict for the defendant. *Wilkins, Serjt.* moved for a new trial, on the ground that the verdict was against evidence. *Rule nisi granted.*

**HARVEY v. TOWER.**—Tried before Martin, B. at Guildhall. Verdict for plaintiff. *Wilkins, Serjt.* moved to set aside the verdict and enter a nonsuit. There were two causes of the same nature. *Rule nisi granted in both cases.*

**HEWITT v. WHITE.** *Withdrawn.*

**CARNE AND ANOTHER v. MALIN AND ANOTHER.**—*M. Smith* moved to amend the writ and all subsequent proceedings herein, by adding the names of certain plaintiffs. *Rule nisi granted.*

**BRUFORD v. GRIFFIN AND ANOTHER.**—*M. Chambers* moved for a rule to shew cause why all proceedings should not be stayed, the costs as taxed having been paid. *Rule nisi granted.*

**DON DEM. DIXIE v. DAVIS.**—*Grove* moved to enter the verdict herein for the defendant. *Rule nisi granted.*

**GREEN v. COX.**—*Pashley* moved for a new trial, on the ground that the verdict returned for the defendant was against the summing up, and against evidence. *Rule nisi granted.*

**OLANDER v. VONROSEN.**—*Branswell* moved to postpone this trial, on the ground of the absence of material witnesses. *Granted.*

**BENJAMIN v. BOCK.**—*Hortelst* moved to set aside no-

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tion of declaration herein, and all subsequent proceedings, on the ground of irregularity. The declaration had been filed, and notice given after an appearance entered by the defendant. *Rule nisi granted.*

Monday, April 28.

**PRICE v. WOODCOCK.**—Tried at the Brecon assize before Williams, J. Verdict for the defendant. *Grove* moved for a new trial, on the ground of misdirection and verdict against evidence. *Rule nisi as to the misdirection. Consult the Judge upon the other point.*

**THE ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY.**—*Sir F. Kelly* resumed his motion. A verdict had been taken for the Crown on the 7th, 8th, 9th, and 10th counts. The 7th and 8th were framed on the 8 & 9 Vict. c. 87, s. 28; and the 9th and 10th counts on the 8 & 9 Vict. c. 91, s. 13. *Rule nisi; on the part of the Crown for a new trial, and on the part of the defendants to enter the verdict on these counts for the defendants, or for a new trial.*

**DON DEM. HELLIER v. KING.**—Tried at Liverpool before Platt, B. Verdict for the lessors of the plaintiff on the 1st, 2nd, and 4th counts. *Atherton* moved to enter the verdict for the defendant on these counts. *Cur. adv. vult.*

**DON DEM. WALKERLEY AND ANOTHER v. KING.**—Tried at Liverpool before Platt, B. and verdict for the lessors of the plaintiff on the 2nd count. *Atherton* moved for a new trial on the ground of the verdict being against the evidence. *Rule refused.*

**DURELL v. KHAIR.**—*Leah* moved to rescind an order of Platt, B. dated 15th Feb. for the review of the taxation herein, on three grounds:—That it was obtained too late; that the Master had properly allowed the costs of the day, the notice of trial being irregular; and that the matters were in the discretion of the Master, which was properly exercised. *Rule nisi.*

**YATES v. EASTWOOD.**—Tried before Greenwell, J. at York. Verdict for the plaintiff; damages, 200*l*. *H. Hill* applied to enter the verdict for the defendants, or to reduce the damages to 9*l*. *Rule nisi.*

**COX v. PLATT.**—Tried at Liverpool before Platt, B. verdict for the plaintiff, damages 150*l*. *Wilkins, Serjt.* moved to arrest the judgment or for a new trial, on the ground of misdirection. 7 Vict. c. 15, ss. 7, 11, 22, 23. *Rule nisi.*

**BEDSON v. LINTHALL.**—*C. Wood* moved for a new trial on the part of the plaintiff, with liberty to amend the declaration by changing the venue and increasing the damages. This was an action on a bill of exchange for 21*l*. and was tried as undefended at Hertford, but it being in *assumpsit*, and the damages in the declaration laid at 10*l*. the verdict was for that amount only. *Rule nisi.*

**YATES v. GARDNER.**—Tried at Liverpool before Platt, B. verdict for the plaintiff for 10,000*l*. *Burnie* moved for a new trial, on the ground of misdirection. (*Laird v. Pin, 7 M. & W. 44; Thomas v. Hancock, 8 M. & W. 160.*) *Rule nisi.*

**SKATTOCK v. CARBEN.**—*Hinds* applied for leave to add two pleas. *Rule nisi.*

**BREWER v. OWEN.**—Tried before the judge of the County Court of Newtown Montgomery, verdict for the plaintiff. *J. Thompson* moved to set the proceedings aside for want of jurisdiction and irregularity. The question was, whether a writ of trial under the 3 & 4 Wm. 4, c. 42, could be directed to a judge of a County Court. *Rule nisi.*

**HORSFALL v. WARREN.**—Tried before the under-sheriff of Middlesex. *Needham* moved for a new trial, on the ground of the verdict being against the evidence. *Rule nisi.*

**DAVIES v. WARRING.**—Tried at Montgomery before Maule, J. verdict for the plaintiff. *M. Lloyd* moved to set aside the verdict and enter a nonsuit. (*Frost v. Hamlin, 15 M. & W. 389; Higge v. Mortimer, 1 Ex. 711.*) *Rule nisi.*

Tuesday, April 29.

**MIDDLEMAS v. HOOKER.**—*Knowles, Q.C.* moved to set aside the plaintiff's verdict, obtained a few days since before Alderson, B. in Middlesex, on the ground that the verdict was against evidence, and that no evidence was given, in fact, to establish the plaintiff's claim. *Rule nisi.*

**LINGARD v. TAYLOR.**—*Humphrey, Q.C.* moved to reduce the verdict by 4*l*. The cause was tried at Warwick before Alderson, B. *Rule refused.*

**LOCK v. BAKER.**—*Humphrey, Q.C.* moved in this case, tried at Lincoln before Alderson, B. to set aside the plaintiff's verdict for 40*l*. and to enter a verdict for the defendant, pursuant to leave. It was an action of covenant on an indenture of apprenticeship, for dismissing the apprentice from the master's service. The master had pleaded several grounds of justification for doing so. The question was, whether those grounds were sufficient. *Rule nisi.*

**BLAKELEY v. THE GUARDIANS OF THE POOR OF THE HUDDERSFIELD UNION.**—*A. W. Higgins* moved for a rule to quash a certiorari, on the ground that the writ issued out of the Court of Ex.; but that the affidavits in the case were entitled and sworn in the Q. B. and also that no point of law was involved in the case. *Rule nisi.*

**CRIDLAND v. HODGSON.**—*Keating, Q.C.* moved in this case (tried before Alderson, B. on Friday last) to set aside the plaintiff's verdict, and for a new trial, on the ground of misdirection. *Refused.*

**HART v. BAKENDALE.** *Cur. adv. vult.*

**WOOD v. BOWCLIFFE.** *Part heard.*

Wednesday, April 30.

**EMERY v. OWEN.** *Judgment.*

**SPECIAL PAPER.**  
**DON DEM. POTROW v. FRICKER.**—Judgment for lessor of the plaintiff as to the land, and for the defendant as to the tithes. *To be reported.*

**DON DEM. PATRICK AND OTHERS v. THE DUKES OF BRANFORD.** *Judgment for the plaintiff.*  
**VAXHALL BRIDGE COMPANY v. SAWYER.**—The question in this case was, whether the tolls of the bridge were liable to the payment of land-tax. *Part heard.*

**SHERRON v. THE BARR OF CARLISLE.** *Settled.*

**DON DEM. BOZON v. ROE.**—*Horn* moved that service of the declaration on the attorney and assignees of a bankrupt should be sufficient. Defendant was a bankrupt, and could not be found. The premises were unfinished. *Rule refused.*

## BAIL COURT.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple  
Barrister-at-Law.

Thursday, April 24.

(Before Mr. Justice COLERIDGE.)

Re AN APPEAL BETWEEN ST. JAMES'S, COLCHES-  
TER, AND LEBBETWOOD, SALOP.

*Certiorari to remove order of Sessions—Sufficiency  
of affidavit of notice to justices.*

Scotland moved to set aside the writ of *certiorari* issued to bring up an order of Sessions, on the ground of the insufficiency of the affidavit upon which it was obtained. This was an appeal against an order of maintenance of a lunatic pauper, and the order having been confirmed, the appellants applied for and obtained a *certiorari* upon an affidavit of notice to parties, of which the following is a copy:—That the deponent "did personally serve John Thomas Smitheman Edwards, esquire, one of her Majesty's justices of the peace in and for the county of Salop, with the notice heretofore annexed, marked B. by delivering a true copy of the said notice to the said John Thomas Smitheman Edwards, and did, on the 10th of February, serve Sir Baldwin Leighton, baronet, one of her Majesty's justices of the peace in and for the county of Salop," &c. "And this deponent further saith, that he was present at the General Quarter Sessions of the peace holden at Shrewsbury, in and for the county of Salop, on or about the 14th day of October last past, and did then and there see the said John Thomas Smitheman Edwards, esquire, and Sir Baldwin Leighton, baronet, acting as justices of the peace for the said county of Salop, at the said General Quarter Sessions of the peace."

Scotland now contended that the affidavit of service of notice upon the two justices was insufficient, inasmuch as it did not state that the justices in question were present when the appeal was heard. (*Reg. v. Darton*, 12 Ad. & E. 78; *Reg. v. Cartwright*, 5 Q. B. 201.) He also moved on an affidavit stating that one of the said justices was, in fact, not present. He moved also upon the ground that the notice to parties did not sufficiently set forth that it was given on behalf of the parties suing out the writ.

Rule nisi.

Friday, April 25.

REG. v. GARRETT, POOL, JOHNSON, STRATFORD,  
AND CLARKE.

*Stealing and receiving property—Removal of in-  
dictment by prosecutors into this Court—Pri-  
soners brought up to plead—Sentences upon those  
who pleaded guilty.*

Several indictments were preferred against the above defendants for stealing and receiving property belonging to the London Dock Company; such indictments, however, having been removed by the prosecutors into this Court by *certiorari*, the prisoners were this day brought in custody into Court in order to plead.

Garrett and Johnson severally pleaded "guilty," and were ordered to be brought up on the following day to receive judgment.

Pool, Stratford, and Clarke severally pleaded "not guilty," and were remanded, the Court permitting them to be admitted to bail on finding each two sureties in 20*l*. each.

The next day (Saturday) the two prisoners Garrett and Johnson, who had pleaded guilty, were brought up for judgment. Garrett having pleaded guilty to two indictments for stealing certain bags of pepper, and Johnson to one similar indictment, the property of the London Dock Company.

In mitigation of punishment, Garrett urged that he had been in prison since November last; and Johnson, that he had at once admitted his guilt, and had done all in his power to assist the company since his apprehension.

Ballantine, who appeared on the part of the prosecution, left the case as it appeared upon the depositions in the hands of the judge.

His LORDSHIP, after observing upon the character of the offence, and the duty of the prisoners as servants of the company to protect their property, sentenced Johnson to nine months' imprisonment, with hard labour, in the House of Correction for Middlesex; and Garrett to four months' imprisonment, with hard labour, in the same prison, upon each of the two indictments,—the one imprisonment to commence at the expiration of the other.

Wednesday, April 30.

(Before Mr. Justice COLERIDGE.)

Cox v. PRICHARD.

*Death of plaintiff—discharge of prisoner.*

The defendant being taken in execution at the suit of the plaintiff, and the latter dying leaving no personal representative (though two infant children were living), the defendant applied to the Court to be discharged out of custody; upon this the attorney for the late plaintiff appeared in court, and stated that he had a lien upon the

judgment against the defendant for his costs, and a sum of money advanced by him to the plaintiff upon the security of the judgment, and that he intended himself to take out letters of administration to the plaintiff. Upon these facts the Court refused to order the defendant to be discharged.

This was a rule, calling upon the plaintiff (on notice to be given to his attorney), to shew cause why the defendant should not be discharged out of the custody of the sheriffs of London, as to this action. The facts were the following. The plaintiff having brought an action against the defendant to recover a large sum of money, final judgment was signed in August, 1847. The defendant being out of the way, proceedings to outlawry were taken, and judgment of outlawry was signed in June, 1848, and a *capias utlagatum* issued. On the 25th March, 1851, the defendant being then in custody upon other process, he was detained at the suit of the present plaintiff. The plaintiff died in February 1849. On a former day in this Term, Ball obtained the present rule. In answer, an affidavit of the late plaintiff's attorney was made use of, whereby it appeared that the plaintiff had left two children, both under the age of ten years, and wherein the defendant stated, that, should it be true that the plaintiff is dead, that it is his present intention to take out, or cause to be taken out, letters of administration to his effects. It moreover appeared that the plaintiff's attorney not only was interested in the suit to the amount of his costs, but that he had advanced the plaintiff a sum of money upon the strength of the judgment.

Lush now shewed cause on behalf of the attorney for the late plaintiff, and contended that there is no precedent for this application, where an interested party comes forward and opposes the discharge, saying that he himself is about to become the personal representative; that the cases where the Court has ordered the discharge have been only where the personal representative has come forward and consented; that here the plaintiff's attorney is interested, and declares himself ready to take out letters of administration; independently of whom there are the plaintiff's two children, who are interested. (*Camp v. Pope*, 8 C.B. 375; *Broughton v. Martin*, 1 Bos. & P. 176; *Taylor v. Burgess*, 16 L.J. 204, Ex.; *Gore v. Wright*, 1 Dowl. N.S. 861; *Parkinson v. Horlock*, 2 New Rep. 240; *Rex v. Cooke*, 1 Mac. & G. 196.

O'Malley, Q.C. and Ball, contra, argued that, as the plaintiff was dead and there was no personal representative, the defendant is entitled to his discharge. That the case of *Wagstaffe v. Darby*, Barnes's Notes, 366, is precisely in point, the report of which is, "a motion was made to discharge a prisoner in the Fleet detained by a *capias utlagatum* (plaintiff being dead) upon affidavit of the death of the plaintiff, and searching the proper offices at Doctors' Commons and finding no administration granted or will proved, a rule was made to shew cause, which was afterwards made absolute." (*Pyne v. Erle*, 8 T. R. 407; *Shoman v. Allen*, 1 Man. & Gr. 96, n.; *Hancock v. Fish*, 9 L. J. N.S. 17; *Walter v. Thelluson*, 1 Dowl. N.S. 277.

COLERIDGE, J.—There have been several points discussed in this case, which, if they had been material to the decision, would have induced me to have looked into the affidavits. There are two or three points which, I think, are sufficient to discharge this rule. (His lordship here stated the facts.) If, immediately upon the death of the plaintiff, the defendant had made this application to be discharged, it is quite clear that he would have been answered by a person coming forward with an intention of taking out letters of administration. If that is the same case now, it ought to receive the same decision. Now, although this application is made in 1851, it may (from the circumstance of the plaintiff's death not having been known) be considered as being made immediately after the death. Then the defendant is met by these circumstances:—the plaintiff has left two children who are infants and ought to be protected, and in respect of whom administration might be obtained *durante minoritate*. Then there is the attorney, who has a lien upon the judgment for his costs, and who has advanced money upon the security of the judgment; I ought not therefore to preclude him from any advantage in getting his money, one of which is the hold he has over the person of the defendant. He says he intends either himself or by another creditor to take out letters of administration and to realise the assets. If I discharged the defendant out of custody, I should deprive him of the fruits of the judgment. Upon principle this is within the general rule. I do not wish to throw any doubt upon the cases in Barnes's Notes, but the case cited from them, which is comprised in about four lines, is so short and so unsatisfactory, that I cannot act upon it. If the defendant means to do justice, he can easily do so.

Rule discharged.

## BAIL COURT.

## BAIL COURT.

## BUSINESS OF THE WEEK.

Wednesday, April 23.

(Before Mr. Justice COLERIDGE.)

Re H. C. B. HENNING, gent.—Fitzherbert moved to discharge the rule herein which was moved against an attorney with costs, no cause being shewn.

Rule discharged with costs.

Friday, April 25.

THE QUEEN v. AYRE.—Watson, Q.C. moved for a rule, calling upon Mr. Ayre, an attorney of this Court, and clerk to the justices of Kingston-upon-Hull, to shew cause why a criminal information should not be filed against him for certain alleged misconduct in his office of such clerk, touching certain proceedings which had taken place against one Jackson, under the Nuisances Removal Act, 1846 (11 & 13 Vict. c. 123).

Rule nisi.

THE QUEEN v. THE TOWN COUNCIL OF TREMOUTH.—Orompton moved for a *mandamus* to the town council, to elect certain aldermen for the borough. The necessity for this application was similar to that which arose in the case of *Reg. v. Bradford*. Searle, on behalf of the town council, appeared to consent.

Rule absolute.

REG. v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.—Sir F. Thesiger, Q.C. moved for a rule for a *mandamus* commanding the above company to make and complete a certain railway pursuant to their Act of Parliament for that purpose.

Rule nisi.

REG. v. R. H. MARTIN.—These were indictments found against the defendant for larceny and conspiracy, which have been removed into this Court by *certiorari*. The defendant now appeared, and pleaded "not guilty," whereupon he was admitted to bail, himself in 250*l*. and two sureties in 250*l*. each. Lush appeared for the prosecution.

Monday, April 29.

Re PATTERSON AND CURTIS.—James, Q.C. moved for a rule calling upon two attorneys to pay over a sum of money.

Rule nisi.

REG. v. GRANT.—Ball moved for a rule for a *mandamus* to be directed to the justices at the Middlesex Sessions, directing them to enter continuances, and hear the appeal of one Grant against a summary conviction.

Rule nisi.

REG. v. THE RECORDER OF DERBY.—Wilmore moved for a rule calling upon the parish officers of St. Werburgh, Derby, to pay the costs of the *mandamus* obtained herein (see *Reg. v. The Recorder of Derby*). Boden shewed cause in the first instance.

Rule absolute.

Tuesday, April 29.

Ex parte THOMAS WATKINS.—J. Brown moved for a rule for a *mandamus* to be directed to the Eastern Counties Railway Company, commanding them to issue their warrant to empanel a jury to assess the value of certain land which they had given notice they intended to take for the purposes of their railway.

Rule nisi.

## Irish Reports.

## COURT OF CHANCERY.

Reported by J. BLACKHAM, Esq. Barrister-at-Law.

Friday, Feb. 14.

ELLARD v. COOPER.

*Marshalling of assets—Devastavit by executor—Time at which the right to marshal accrues.*

At the death of the testator there were ample funds to satisfy both simple contract and specialty creditors: the executors wasted a portion of the personality, and subsequently the residue, in discharge of the specialty debts:

Held, that the simple contract creditors were not, by reason of the devastavit, deprived of their right to marshal.

Held also, that simple contract creditors having acquired a right to marshal, will be affected by the Statute of Limitations, as if they were the specialty creditors, in whose place they stand.

The bill stated that the plaintiffs, in December 1833, had filed their bill in the Court of Chancery against William Cooper, John Turner Cooper, and Samuel Cooper, being three of the defendants in the present cause, as executors of a person named Austen Cooper, charging that one Letitia Burke had by her will, dated 11th day of April, 1808, bequeathed a sum of 400*l*. to the plaintiff's father, and 100*l*. to plaintiff, and charged the same on all her real and personal estate, and appointed Samuel Cooper the elder, and Austen Cooper, her executors and trustees. That plaintiff's father died in 1828, and that plaintiff became entitled to the legacy of 400*l*. and obtained letters of administration to him. That Austen Cooper alone proved the will of Letitia Burke, and possessed himself of all her estate, real and personal. That Austen Cooper had died in August 1830; that the defendants, William Cooper and John Turner Cooper, and Samuel Cooper the younger, proved his will, and that administration, *de bonis non*, to the said Letitia Burke had been granted to the plaintiff, and prayed an account of the personal estate of Austen Cooper, and an account of Letitia Burke's freehold estates, and that if Austen Cooper should be found to have misapplied the personal estate of the said Letitia Burke, his executors might be directed to make good the same out of his assets. A decree to account was pronounced in that cause on the 26th day of April, 1838, declaring the plaintiff entitled to the legacies of 400*l*. and 100*l*. and on the 29th of June, 1842, the Master made his report, finding that Austen Cooper had received, out of the real and personal estate of the said Letitia, a sum amounting in the whole to 5,641*l*. 15*s*. 11*d*.

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That of this sum, he had duly administered about 2,955*l.* 5*s.* 3*d.* and that there was then owing to the plaintiff on foot of these said legacies a sum of 1,318*l.* 14*s.* 6*d.* That the said Austen Cooper, at the time of his death, was seized in fee of certain freehold lands in the counties of Dublin and Donegal, and that his executors had received of the personal estate of Austen, and of the produce of the sale of the lands in Donegal, 22,027*l.* 17*s.* 6*d.* and had expended in the due administration of their testator's assets about 15,349*l.* 12*s.* 6*d.* By a final decree in the Chancery cause, pronounced the 27th November, 1842, the said John Turner Cooper and Samuel Cooper were ordered to lodge in the bank the sum of 3,029*l.* 15*s.* 8*d.* being the sum ascertained to be due by the said Austen Cooper, on foot of the estate of the said Letitia Burke, and it was declared that in default thereof the plaintiffs should be at liberty to enforce payment of their demand out of the real and personal estate of the said Austen. That John Turner Cooper and Samuel Cooper had not lodged the money in bank pursuant to this decree. That a person named William Cooper, a defendant in the present suit, filed his bill in the Court of Ex. against the said John Turner Cooper and Samuel Cooper the younger, for the purpose of raising an equitable mortgage, made the 19th of November, 1819, to secure the payment of 10,000*l.* to the plaintiff in that suit. The Remembrancer made his report in the latter cause on the 14th day of Jan. 1843, and found that 10,143*l.* 8*s.* 9*d.* was due to William Cooper on foot of his mortgage, and that John Turner Cooper had in his hands a balance of 7,528*l.* 7*s.* 5*d.* of the assets of the said Austen unapplied or misapplied, and the said Samuel Cooper the younger, as devisee of the said Austen, had received, as executor of the said Austen Cooper, 980*l.* 18*s.* That a considerable portion of Austen's personal estate, and also of the produce of those denominations of his real estate which had been sold pursuant to his will, had been applied to disburse the interest due on the said equitable mortgage of William Cooper, and that several judgments obtained against the said Austen had been also paid out of his personal estate. The present bill charged that the plaintiff was entitled to have her demands, which were proved against the said Austen Cooper, on foot of the assets of the said Letitia Burke, received by her, paid out of the freehold estates of said Austen Cooper, to the extent to which his personal estate had been applied in discharge of the interest on the said mortgage, and in payment of the said judgments. The bill also charged that John Turner Cooper and the defendant Samuel Cooper the younger had misapplied the assets of the testator, and prayed for an account of what was due to the plaintiff on foot of the said legacies of 400*l.* and 100*l.* and of the other debts of Austen Cooper; and that if it should appear that the whole of the personal estate of the said Austen should have been exhausted, then that the plaintiff and the other simple contract creditors of the said Austen, should be declared entitled to stand, *pro tanto*, in the place of the said William Cooper, the mortgagee, and of the judgment and specialty creditors of Austen, whose demands had been satisfied out of his personal estate. The will of Austen Cooper contained the following clause. After reciting the said equitable mortgage: "Now, I do hereby charge all my said estate of Kinsealy with payment of all and every sum of money which at the time of my decease I may owe to my said brother, (the original mortgagee); and, to avoid any question between my said sons, John Turner Cooper, and Samuel Cooper, of apportionment of said debt, I hereby order and direct that as between my said sons, and all in remainder to them, each of the said two divisions of said land shall bear and pay one full moiety of said debt; and both divisions of the said lands nevertheless being, so far as regards the security of the said debts, chargeable with the entire thereof. And I hereby further declare, and my will is, and I hereby order and direct, that my personal estates and other funds hereby provided in aid and augmentation thereof, for payment of my general debts, be first applied in payment of all my other debts, and that the residue or surplus of the said funds, if any, may be applied in the next place, so far as the same may extend, in or towards payment and satisfaction of the said debt to my said brother, in exoneration, as far as same may be, of the said lands of Kinsealy." In April 1846, a decree to account was pronounced, and the Remembrancer reported that 3,577*l.* was due to the plaintiffs, and a sum of 3,634*l.* to the Commissioners of Charitable Donations and Bequests; that a sum of 518*l.* 15*s.* 2*d.* of the assets of Austen had been applied, by John Turner Cooper, to pay the interest on certain judgments against Austen; and a sum of 2,221*l.* 1*s.* 3*d.* to the said William Cooper on foot of interest due on the said mortgage, and that more than enough had been received by the defendants, John Turner Cooper and Samuel Cooper, from time to time, out of the mortgaged lands, to keep down the interest.

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PENNEFATHER, R.—This case involves at least one question not previously determined. It now comes before the Court, on report unexpected to. The case made for the plaintiff is, that inasmuch as the personal assets of Austen Cooper had been to a certain extent applied in discharge of his specialty debts, the plaintiff is entitled to stand in the place of the specialty creditors, and onerate the realty to the extent to which it had been previously exonerated by the payment of the specialty debts out of the personally. The claim is based, not only on the general rule of equity, that when one creditor has two funds for the payment of his demands, and another only one, and he with the two takes that to which alone the other is entitled to resort, that then the latter shall stand in the place of the former, but it is also rested on the special provisions of Austen Cooper's will, especially the clause in the latter part of it, providing "that if any portion of the personal estate should be applied in discharge of the mortgage, the simple contract creditors should be recompensed out of the real estate." It appears to us, that the case of the interest, paid on foot of the judgment, is not embraced in that clause, and as to that portion of his demand the plaintiff must rest on the general rule of equity alone, so that the sums paid on account of the interest due on foot of the mortgage, and on foot of the judgment, do not stand on the same footing. The defendants insist, in the first place, that the plaintiff had no right to file her bill in this court, but ought to have proceeded in Chancery to sequestration on the decree obtained there against the real estate of Austen Cooper; secondly, that this debt, as to the realty, is barred by the Statute of Limitations, and partly that by the report in the cause of *Cooper v. Cooper* adopted here, at the death of the testator, his personal estate was found sufficient to pay, not only the interest on the specialty debts, but all his simple contract debts, and if that fund was subsequently reduced by the executors, or if they have committed a *devastavit*, the general rule of equity to which I have adverted does not apply, as, if the fund was originally adequate at the time of the testator's death, its subsequent deficiency does not entitle the plaintiff to resort to the real estate. It is argued, on the other hand, for the plaintiff, that, no matter at what point of time the deficiency occurred, whether by failure of a security, or *devastavit* by executors, yet if the specialty debts had gone to exhaust the personal assets, the general equity would arise. The view taken by the Court on the point differs from both these positions. The time of the testator's death is not, in the opinion of the Court, the period at which to ascertain the state of the personal fund, in reference to the payments made out of it; the time is, that of the payment of the specialty debts, and if at that period the personalty is sufficient to answer the interest on the specialty debts, as well as the simple contract debts, in that event the heir is not to suffer by the *devastavit* of the executors. It is urged by the defendant, that if the personal estate be exhausted before the specialty creditors were paid, the heir ought not to be liable, for that in effect would be to make the heir responsible for the executors; but as, if there had been a wasting of the personal estate by the testator himself in his lifetime, the devisee could not complain; so if the wasting be by the executor, the appointee of the testator, on the same principle, the heir cannot complain, and the simple contract creditor is entitled to his equity. The principle is this, that if the specialty creditor exhausts the fund to the prejudice of the simple contract creditor, the simple contract creditor shall stand in his place, that is, if he exhausts the assets to the prejudice of the simple contract creditor at the time that he is paid, or, in other words, if at that moment he leaves enough to satisfy the simple contract creditor's demand, then the latter has no right to complain, for it is by his own negligence that he fails to realise his claims, and that is the principle of all the cases. This is the true principle—a principle, indeed, for which we have failed to find any express authority; but there are expressions and *dicta* found in reported cases, which fully warrant our conclusion. The personal fund cannot be said to be exhausted, if enough is left at the time of the discharge of the specialty claims. The question is between the heir and the simple contract creditor, whether the heir shall be obliged to pay twice over the same sum. The principle the Court acts upon is more agreeable to the general principles of equity than either of the above extremes,—namely, either taking into account the state of the personalty at the time of the testator's death, as contended for by the defendant, or at any or every subsequent period, as insisted on by the plaintiff. This distinction applies to the payments made on foot of the interest on the judgment. In this case, it appears on the face of the report, that the personal fund was not at the time of such payment adequate to pay that interest as well as all the simple contract creditors, to that extent; at all events, the plaintiff is entitled to stand in the place of the judgment creditors, and

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that being a payment to reduce the interest, not the principal of the debt, must be considered as a sum paid not carrying interest; on the principle, that the estate in the hands of the heir is not benefited by the reduction of the interest; with regard to the interest on the mortgage, that stands on a different ground, and besides, it depends on the particular clause of the will to which I have adverted. The testator might undoubtedly have subjected his estate to such payment, and if so, the will creates a term of years to guard against the defalcations of the executors, but each moiety of the estate was to bear the defalcation of the executor to whom it was devised, and not that of the other, and it is limited to the life estate of the respective devisees, that is to say, the moiety of John Turner Cooper is amenable for his default, and so of Samuel. John Turner Cooper's default, which is very great, is thrown upon his moiety. There is no default on the part of Samuel Cooper, and the interest in the house in Merrion-square, referred to in the pleadings, is the only assets in his hands. Then comes the latter clause of the will—it begins by reciting the debt to his brother, Samuel Cooper, the equitable mortgagee, and proceeds, "I do hereby charge all my estate with the payment of all the money which I owe to my brother at my decease, and as between my sons and all in remainder to them, both shall have a moiety of my real estate, each being overchargeable with the whole of the said debt; and I further advise, that my personal estate be first applied in payment of all my other debts, and the residue of the general fund be applied in satisfaction of the mortgage," thereby directing that the personal estate should not be applied in discharge of the mortgage, unless there was a surplus after payment of the simple contract debts. Thus, if a part has been paid towards relieving the mortgaged estates; the mortgaged estate must reimburse the simple contract creditors, and this would carry the right of the plaintiff beyond the trust fund, and give her, by the express desire of the testator, a right to come on the real estate. Now, it appears that a sum of 2,300*l.* has been applied in exoneration of the real estates, contrary to the directions of the testator. This was clearly a misapplication of the funds, and would entitle the plaintiff to come on the real estate, but as it was a payment on account of interest, the plaintiff is not entitled to calculate interest upon it. It then remains to consider, whether there are sufficient facts in the report for the Court to ascertain whether, at the time of payment, there was a deficiency of personal estate, and that payment was made to the prejudice of the simple contract debts; if the *devastavit* was committed before the time of payment, or if the fund became at that time deficient, by the payment of the specialty creditors, the simple contract creditors are entitled to stand in their place. The case comes on, upon a report unexpected to, not reserving any particular question for our consideration, we will construe the report in reference to the prayer of the bill, and will not encumber parties with further inquiry as to the alleged *laches* of the plaintiff, in not carrying into effect the Chancery decree by sequestration; that course would seem to have been vain. A sequestrator had been, long previously to that decree, appointed over the estates in this Court, and a sequestrator would have no power to disturb him. Besides, from the frame of that cause, there was no opening left for raising the question as to the marshalling of assets, and thus that ground of objection fails. As to the question raised on the Statute of Limitations, the simple contract debts were established against the executors, and the debts of the specialty creditors existed against the estate, and if the specialty creditors took that which was the legitimate fund for the simple contract creditors; it does not lie in the mouth of the heir to say, that the simple contract creditor must not stand in the place of the specialty creditor, his estate having been exonerated to that extent.

RICHARDS, B.—If there were no funds available to pay the simple contract debts after payment of the specialty debts, no default should onerate the executor with the amount of the personal assets so properly applied, but, if at the time when the specialty debts were paid, the executor, in consequence of his having wasted the personal assets, were unable to make them available for the benefit of the simple contract creditors, or if it were not sufficiently shown that there were then sufficient assets to pay the simple contract debts, then an inquiry should be directed as to their sufficiency, and if sufficient, he is guilty of a *devastavit*, if not, the specialty creditors have got the fund properly, and it is not possible to charge the executor with the deficiency.

LEPROY, B.—This is a question of great difficulty, and the inclination of my mind has changed during the progress of the cause. The authority of Lord Clare has been relied on to show that the rule of marshalling assets, is only properly applicable at the death of the party whose assets are to be marshalled, and if there be then assets to pay the simple contract debts, the rule does not apply, so



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natter what may be the course of subsequent events, that is said to have been a mere *obiter dictum*, and from the authorities, it appears to me, that proposition cannot be maintained. If there be no sufficient assets at the time of the testator's death, no right of marshalling between the creditors can arise. If there be a sufficiency, or the fund be then able to pay the debts and fail afterwards, the simple contract creditors are not to bear that loss. It is said, that as the loss arises in this case from the default of the appointee of the testator a common depositary for all parties, that the loss should not fall upon the heir in preference to the simple contract creditor, that there being two innocent parties, the loss must remain where it falls, that because the simple contract creditors have a right to be paid out of the assets of the testator, is no reason that the heir at law should make good a deficiency occasioned by the default of the executor. In my opinion, the default of the executor can make no difference, the heir is a surety for the proper application of the personal estate. The specialty creditor has two funds for his security, but looks to the personal estate as the primary one. The question is one of principal and surety, and, if no time be given to the principal, on his failure the surety must pay. The heir-at-law is a mere surety pledged in the second degree only; it is his duty to see the creditors paid, if he wishes to be secure: as surety he may undoubtedly call on his principal to pay, but if he remain quiescent, he must take the consequences on himself. The true criterion whether the simple contract creditor shall have a right to marshal is not the state of the funds at the testator's death, but whether there were funds at any time. In *Aldrich v. Cooper*, Lord Eldon lays down the rule to be "whether the specialty creditors have exhausted the personal assets." If the criterion were the state of the assets at the testator's death, the rule would not be stated to be generally applicable to the case of an abstraction by one creditor to the injury of another. The case of *Pollexfen v. Moore*, 3 Atk. 372, appears to me an explicit authority to show that the period of death is not the criterion. The decree of Lord Hardwicke, stated in the note, is, "that an account be taken of the personal estate of the testator come to the hands of his executor, &c. and of all his other debts, legacies, and funeral expenses; and, if such personal estate of the testator be not now sufficient, &c. the deficiency to be made good out of the purchased estate;" there is a peculiarity in this case, that the person committing the *devastavit* was both heir-at-law and executor. I do not think that makes any difference; the authorities appear to me sufficient to outweigh the dictum of Lord Clare in *Kearnan v. Fitzsimon*, and clearly establish the principle that the time of death is not the true criterion. In the present case the assets were quite sufficient at the time of the testator's death, and I am quite prepared to say, on the facts of this case, whether the time be that of the testator's death, or the application of the personality in satisfaction of the specialty debts, at whichever time the funds became insufficient to pay the simple contract debts, then the right of marshalling arose.

On rehearing, by the Lord Chancellor, of the decree of this Court, which had been abolished, *O'Brien, Serj., R. W. Greene, Q.C., and Maley*, for the plaintiff, cited as to marshalling, *Kearnan v. Fitzsimon*, 2 Ridg., P.C.; *Prowse v. Abington*, 1 Atk. 482; *Law v. Horbuck*, 9 Beav. 148; *Pearce v. Lomas*, 3 Ves. 135; *Hollings v. Moon*; *Laurence v. Moon*, 8 Cl. and Fin. 504; *Gorton v. Hardwicke*, Cos. temp. Hardwicke, 305; *Harrison v. Boswell*, 10 Sim. 382; *Molony v. Heman*, 2 Dr. and War. 31; *Seton on Decrees*, 88-96, 97, 102, 207; *Wright v. Sampson*, 6 Ves. 714; 11 Ves. 12-22; *Lanoy v. Athol*, 2 Atk. 446; *Hanby v. Roberts*, Amb. 127; *Wilson v. Fielding*, 2 Vern. 763; 10 Mod. 426; *Gibbs v. Angier*, 12 Ves. 416; 1 Vern. 455; *Pearse v. Norman*, 3 Ves. 319; 2 Ross. Leg. 979; 3 Mer. 178; *Culpepper v. Aston*, 2 Ch. Cas. 117; *Westfaling v. Westfaling*, 3 Atk. 467; *Baldwin v. Belcher*, 1 Dr. & War. 176; 6 Ir. E. R. 424; *Conally v. McDermott*, 3 Ion. and L. 260. As to the Statute of Limitations, *Putnam v. Bates*, 3 Russ. 188; *Busby v. Seymour*, 7 Ir. E. R. 433; 1 Ion. and L. 527; *Vickers v. Oliver*, 1 You. & Coll. V. C. 211. *Brewster, Q.C.* with *William Smith*, for Austen Cooper, the devisee, cited *Rainforth v. Ryan*, 2 Ir. Ex. 277; 4 Beav.; on the Statute of Limitations, cited *Boyd v. Belton*, 8 Ir. E. R. 113.

*Thomas Lefroy*, for the Commissioners of Charitable Bequests, *Wright v. Simpson*, 6 Ves. 714; *Magray v. Critchett*, 2 Swan, 191; *Pollexfen v. Moore*, 3 Atk. 272.

*Rollston Q.C.* for a minor son of Austen Cooper, *Cox v. Bateman*, 2 Ves. sen.

*F. Walsh* appeared for another party.  
Feb. 14.—Lord CHANCELLOR.—This case comes before the Court upon a rehearing of a decision upon this question in the Court of Ex. where this case was originally instituted. The Bill is filed by persons claiming in the character of simple contract

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creditors of Austen Cooper, and seek to be paid their demands out of the real estate, the personal assets being deficient by reason of their having been applied to the discharge of debts secured by judgments, and by an equitable mortgage. One question was raised in this case depending upon a proviso in the will of Austen Cooper, which particularly provided for the payment of this mortgage debt out of the lands of Kinsealy. With respect, however, to the general question of marshalling, raised by the application of the personal assets to the payment of the mortgage and judgment debts, both these classes of debts stand upon the same footing. The demand of plaintiff is resisted upon two grounds.—First, that it is barred by the Statute of Limitations; and, secondly, assuming it to be a subsisting demand, that at a period subsequent to the death of Austen Cooper, there were in the hands of the executors assets sufficient to pay the simple contract as well as the specialty debts, and that these assets were wasted by the executors previously to the application of the personal estate to the payment of the interest on the specialty debts, and that therefore now the simple contract creditors have no right to ask this Court to marshal the assets in their favour. As to the first objection, it is admitted that, as simple contract debts, they would be barred by the operation of the Statute of Limitations, but the bill in this case does not seek to recover them as simple contract debts. The plaintiff puts himself forward in the character of a claimant against the real estate, and as such to stand as against it in the position of a specialty creditor. The case of *Vickers v. Oliver*, 1 You. & Coll. V.C. 211, is, I think, not to be distinguished from this; the marginal note is that "A simple contract creditor who has acquired a right of marshalling real estate is not barred by the lapse of less than twenty years." And the Vice-Chancellor says, p. 221,—"It must be remembered also that it is only under the right of the specialty creditors that the simple contract creditors seek to affect the descended estate by standing in the place of specialty creditors paid out of the personal estate." The case of *Busby v. Seymour*, 7 Ir. E. R. 433, was also referred to, but the facts of that case show that it does not conflict with that of *Vickers v. Oliver*, and though the latter case has been spoken of doubtfully by Sir John Leach, it appears to me to be a good decision; and that when the specialty creditors have exhausted the fund which was the only security the simple contract creditors had primarily a right to avail themselves of, that the demands of the simple contract creditors are not barred, the bill being to establish rights, founded upon the rights of the specialty creditors, whose debts were not barred at the time this suit was instituted. This case must then be decided on the ordinary grounds applicable to the right of creditors to whom the assets should be marshalled. Two questions appear to have been argued at length at the hearing in the Court of Ex. The majority of the Court then decided that the period at which the simple contract creditor acquired the right to marshal was not to be decided by the state of the assets, either at the death of the testator or at any time subsequent to that at which the deficiency was discovered, but that it was to be decided by the state of the assets at the time of the payment of the specialty debts. On the other hand, it was contended that the right to marshal is to be decided irrespectively of the time of payment of the specialty debts, and that the simple contract creditors are entitled to proceed against the real estate whenever an insufficiency arises, by reason of the application of the personality to the payment of specialty debts. It is singular that to the present day there has been no decision to that effect, nor is there any form of a decree making the right of the simple contract creditor depend upon the *devastavit* of the executor. The usual form of decree is, that as to so much of the personal assets as are exhausted by the specialty creditors, the simple contract creditors are declared to be entitled to recover against the realty, but there is no case making their rights depend upon the question as to whether, at the time of the *devastavit*, the executor had sufficient assets in his hands to pay the simple contract debts (Ross Leg. 496), where the rule is stated as to legatees, and that the rule as to legatees and creditors is the same. It is contended by the plaintiff, that there is authority for this proposition, and the case of *Kearnan v. Fitzsimon*, 3 Ridg. P. C. 1, is relied upon, and the opinion then stated by Lord Clare. He says, p. 16:—"The rule of marshalling assets holds only when it is proper to be done at the death of the party whose assets are to be marshalled; it can never arise upon any subsequent fact or accident." That rule includes this proposition, viz. that if the executor, at the time of the testator's death, have assets sufficient to pay both simple contract and specialty creditors, and pays the latter class only, and wastes the residue, that the simple contract creditors have a right to recover against the realty. The facts of that case fall very short of those in the case before me. Lord Clare appears to treat the case as being a breach of

## IRELAND.

trust on the part of the executors, and to consider that the nonenforcement of the demand by Peter Keven, the appellant, was a fraud against the creditors. The trustee was in that case dead thirty-four years before the bill was filed; and the bill prayed that the plaintiff should be declared entitled to recover a demand against a trustee dead forty-two years before the case was heard in the House of Lords; and Lord Clare was of opinion the plaintiff was not entitled to recover against the executor of the trustee in whom the personality vested, as the loss arose from the fraud of the appellant allowing his father to remain in possession of the property liable to the debt sought to be recovered. That case is not an authority for the proposition it is cited to sustain, and there is no case deciding the contrary. The case of *Pollexfen v. Moore*, 3 Atk. decided that simple contract creditors were entitled to be paid out of the realty, the personal estate being exhausted. That was the case of a demand by a vendor of an estate for the unpaid purchase-money against the real and personal estate of the purchaser, and the demand of a legatee of the purchaser against the personal estate, and there was a *devastavit* by the devisee of the purchaser, against whose heir-at-law the bill was filed. The decree was, that if Thomas Moore, the original purchaser, did not leave assets to pay the residue of the purchase-money, and all his debts, funeral expenses, and legacies, that the purchased estate and the personal estate should be marshalled so as to let in the simple contract creditors. That case is fully reported in 3 Sug. Ven. 206. *Laurence v. Blake*, 8 Cl. & Fin. 504, is not very clear as an authority to the extent of the proposition it is cited to uphold; the *devastavit* in that case did not interfere with the rights of the parties claiming as simple contract creditors. I have examined the papers; in that case there was a *devastavit*, but he had paid large sums, and the Court gave the simple contract creditors a right as against the realty in respect of this payment out of the assets; but though there was a *devastavit* in that case, the personal assets were far short of being sufficient to pay both classes of debts. No matter, then, what took place, the simple contract creditors had *qua cunque via* a right to the realty. The point now raised was suggested by counsel in speaking of the case of *Kearnan v. Fitzsimon*. In *Seton on Decrees*, 81, all the cases are collected, and the rule is there stated to be, that if the specialty creditors exhaust the personality, the simple contract creditors are entitled to stand in their place. *Kearnan v. Fitzsimon*, is the only case in which the question was raised, whether the personality was valuable at the death of the testator. In *Laurence v. Blake*, the Court gave no decree on this point. At p. 155, Lord Cottenham says, "the decree is stated to be the subject of complaint, but the effect of it is merely to restore to the personal estate sums which had been paid out of that estate in relief of the real estate; these being simple contract creditors, who had no other fund but the personal assets to resort to, and the debts altogether far exceeding the amount of the personality." There is nothing to show that the question of marshalling has ever been considered to be affected by the fact of the funds getting into the hands of the executors, and misapplied by them; if the question had ever been raised, we would find it noticed in some text-book or report. I find no allusion to the case of a *devastavit* either prior or subsequent to the payment of the specialty debts, such cases must continually arise, and the Court would not in that case give a decree without some allusion to the *devastavit* of the assets. The case of *Marsh v. Evans*, 1 P. W. 668, bears slightly upon this case. The testator there gave legacies of 2,000*l.* each to his two sons and his daughter, directing that if his assets should fall short, the daughter should be paid her legacy, those of the sons abating proportionally. The assets were sufficient at the testator's death, but were wasted by the executor: Lord Chancellor Parker said, "the estate actually falling short to pay the legacies, that as the testator had not restrained it to any particular means by which the assets should fall short, it must be taken generally; viz. if by any means there should be a deficiency," giving the preference to the daughter, as being within the provisions of the will. That case shows that the rights of the parties are not disturbed by the *devastavit* of the executors. It has been observed that the parties could in this case have filed their bill, and in the case before me they might have done so when the fund was sufficient, and therefore the loss is not one which should fall upon the heir-at-law. The case of *Ellard v. Cooper*, 1 N. M. 27, appears to have been reported with care. Lefroy, B. does not concur in the dictum of Lord Clare, and seems to have differed in some respects from the view taken by the rest of the Court. [His lordship read the judgment.] The funds were sufficient till wasted by the executor, and as he had funds, there is no authority to show that the *devastavit* of the executor can deprive the simple contract creditors of their rights. I am, therefore, of opinion that the plaintiff is entitled to relief, and I concur with the view taken

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by Lefroy, B. in that case, and not with that taken by the rest of the Court. In consequence of this decision I need say nothing of the question as to the mortgage debt.

## Equity Courts.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Friday, March 21.

CHAPMAN v. CHAPMAN.

Possession of title-deeds—Equitable mortgage—Bond creditor.

A bond creditor was in possession of the title-deeds of certain freehold property belonging to the debtor, but the evidence did not sufficiently shew that they were deposited by way of equitable mortgage. It was argued that the possession alone was sufficient evidence of such deposit:

*Held, however, that it was not: and the Court refused to direct a reference to the Master for further inquiry, and dismissed the bill as to the equitable mortgage, but without prejudice to the filing of another bill.*

The bill did not pray an account of the real estates, and the plaintiff was

*Held, not to be entitled to such account under the general prayer, but an account of the personal estate was decreed.*

On the 27th of February, 1827, the plaintiff, J. Chapman, lent Robert Chapman, deceased, the sum of 1,900*l.* the repayment of which, together with 5*l.* per cent. interest, was secured by the bond of the said Robert Chapman, who also deposited with plaintiff the title deeds of a farm called "Hayes Farm;" but at the time of the delivery of the deeds to the plaintiff, no memorandum of the deposit thereof was executed by Robert Chapman. The deeds, however, remained ever since, and now are, in the possession of the plaintiff. Three several and promissory notes for the sums of 150*l.* 180*l.* and 120*l.* respectively were also, as alleged, given by Robert Chapman to the plaintiff for arrears of interest on the bond debt. Robert Chapman died without having paid the said debt, and having by his will devised the Hayes Hill Farm, and appointed certain persons his executors. The plaintiff then filed his bill, which was a creditor's bill, against the parties interested under the testator's will in the Hayes Hill Farm, and against the executors, and thereby prayed that an account might be taken of what was due to the plaintiff for principal and interest on the said sum of 1,900*l.* remaining due and unpaid, and the three several sums of 150*l.* 130*l.* and 120*l.* and that the said three last-mentioned sums might be declared to be a charge on the Hayes Hill Farm, as being in respect of interest on the said debt of 1,900*l.* and that the necessary parties might be decreed to execute to the plaintiff a legal conveyance in fee by way of mortgage of the Hayes Hill Farm to secure the said debt of 1,900*l.* and the interest which should be found then already due thereon, and future interest, or that the premises might be sold and the proceeds applied in payment of the said debt and interest, and that an account might be taken of what was due in respect of the promissory notes and interest thereon; and if the executors should not admit assets that an account might be taken of the personal estate of the testator, and that it should be applied in a due course of administration. The bill did not allege that the testator had any other real estate besides Hayes Hill Farm, nor did it seek an account of his real estates, but only to establish a lien or equitable mortgage on the Hayes Hill Farm. The bond debt was proved, and it was admitted that the title deeds of Hayes Hill Farm were in the possession of the plaintiff, and had come into his possession in a fair and proper manner, but there was no admission of an agreement to give the plaintiff an equitable mortgage, nor was there any evidence of such an agreement, nor did it appear at what time or under what circumstances the deeds came into the possession of the plaintiff.

R. Palmer and Bayshawe, for the plaintiff, argued that possession of the deeds was in itself sufficient, taken in connection with the debt of 1,900*l.* to entitle the plaintiff to an equitable charge on the Hayes Hill Farm. But if the Court should think differently, then they asked a reference to the Master, to inquire under what circumstances the deeds came into the plaintiff's possession, or if that should not be conceded, then that under the general prayer for an account, an account might be taken of the testator's real estates, and that the same should be sold, and the proceeds applied in payment of the testator's debts.

Turner and Chandless, contra, argued that the agreement for an equitable mortgage not being proved, a reference to the Master for further inquiry could not be directed according to the practice of the Court; nor could there be an account of the

testator's real estates, as there was no allegation or special prayer in the bill to justify it, and the persons interested in the real estates other than Hayes Hill Farm, were not before the Court. They cited *Holden v. Hearn*, 1 Beav. 445; *Jope v. Mosshead*, 6 Beav. 613.

Turner and Haldane cited *Martin v. Whitchelo*, Cr. & Ph. 260.

Welsh and Rossiter, for certain incumbrancers. K. Parker and Goodeve, for the executors.

The MASTER of the ROLLS was of opinion that the production of the deeds from the possession of the bond creditor was not sufficient in itself to prove a deposit by way of equitable mortgage; nor could there be a reference to the Master for further inquiry. He therefore dismissed the bill as to so much of it as sought to establish an equitable mortgage, but without prejudice to another bill being filed. He was also of opinion that the plaintiff was not entitled to a general account of testator's real estates, in the absence of any allegation on the bill to support such a decree. But he decreed an account of the personal estate.

March 24 and 25.

REEVES v. BAKER.

Practice—Revivor—Motion by executor of deceased defendant—Costs.

The suit having abated by the death of one of the defendants, the executor of the deceased defendant moved on notice before decree that the plaintiff should, within ten days from the date of the order, file a bill of revivor or supplement against the executor, or in default thereof that the plaintiff's bill might stand dismissed as against the said late defendant, with costs.

*Held, that the plaintiff had an option, to revive or not, and that the executor of the deceased defendant had no means of compelling him to revive, and the motion was dismissed, but without costs.*

Motion on notice before decree by the executor of the late Mrs. Lucy Bridger, deceased, one of the defendants, that the plaintiff should, within ten days from the date of the order to be made on the motion, file a bill of revivor or supplement against the executor, or that in default thereof the plaintiff's bill might stand dismissed as against the said late defendant, Lucy Bridger, with costs.

R. Palmer, with whom was Cole, for the motion, cited *Burnell v. The Duke of Wellington*, 6 Sim. 461.

W. W. Cooper, contra, contended that the application was unusual, and that there was no precedent for the order sought. The only authority on the subject was the case cited, which was made in the absence of the plaintiff, and in which no mention was made of the costs; that even if that case could be considered as an authority for an order that the plaintiff should revive within a limited time, or in default that the suit might be dismissed, it clearly was no authority for an order in the terms of the notice that the bill should stand dismissed, with costs. The 63rd order of May, 1845, provided for the case of a sole plaintiff dying, and enabled a defendant to compel his legal representative to revive, but did not provide for a case like the present. He cited Smith's Handbook of Chancery Practice, 259.

R. Palmer, in reply, contended that the order to revive, or that the suit be dismissed, was one of course (1 Daniel's Ch. Prac. 787); and that the Court having jurisdiction to make such an order, clearly had power to deal with the costs.

The MASTER of the ROLLS.—I do not at present see why an executor of a deceased defendant should not be allowed to compel the plaintiff to revive the suit. It would be a great hardship for an executor to be obliged to stand by for any length of time, with a bill of revivor impending over him. However, as there seems to be some doubt on the practice, I will cause inquiries to be made, and state my opinion to-morrow.

Tuesday, March 25.—The MASTER of the ROLLS.—I have caused inquiries to be made as to the practice in this matter, and am disappointed in finding it to be that the plaintiff has an option to revive or not, and the executor of a deceased defendant has no means of compelling him to revive. I therefore, with regret, must decline to make any order on the motion.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple, Barrister-at-Law.

Wednesday, Dec. 18.

SIMPSON v. CHAPMAN.

Exceptions for insufficiency—Partnership accounts.

A. a partner in a bank with B. and C. died, leaving D. his residuary legatee, and B., E. and F. his executors. E. was afterwards admitted a partner in the bank. D. filed a bill against B., E. and F. for the administration of A.'s estate,

and interrogated them as to the accounts of the partnership, &c.:  
*Held, that the defendants were not bound to answer these interrogatories, as they were put by the bill.*

This case came on to be heard upon exceptions to the answer for insufficiency. The plaintiff was one of the residuary legatees under the will of Thomas Simpson, who carried on business as a banker in partnership with John Chapman and Abel Chapman. By his will, dated the 20th of April, 1843, Thomas Simpson appointed the said John Chapman and Henry Simpson and Thomas B. Simpson, his executors; and he died in the following month, and his will was proved by all the executors. After the testator's death the banking business was carried on, Henry Simpson being admitted a partner. The bill was filed against the three executors for the administration of the testator's estate; and after stating the circumstances before mentioned, alleged that application had been made to the executor, and that they had rendered an account, but that such account was incomplete and imperfect, especially with reference to the testator's share and interest in the banking business, and the capital and effects thereof, and the mode in which the same had been dealt with, and that the plaintiff had required a further account, which had been refused. The bill also charged, that in fact the business had, since the testator's death, been carried on by means of the capital which was therein at the time of his death, and that the plaintiff was entitled, if it should be for his benefit, to have the testator's estate credited with one-third of the profits which had arisen from the business since the testator's death, with an option of taking the testator's share as it was at his death, with interest thereon; and further, that the assets of the partnership ought now to be realised, and its debts and liabilities discharged, and the one-third therein belonging to the testator ascertained and paid, or if it should be more for the plaintiff's advantage, that the defendants ought to be charged with the value thereof at the testator's death, with interest thereon. Among the interrogatories were the following:—

"Whether, in fact, the business in the said bill mentioned had not, since the death of the testator, been carried on by means of the capital which was therein at the time of his death, or some other and what capital?"

"What has been the amount of the profits of the said banking business in each and every year since the said testator's death?"

"What is now the value of the capital thereof, or of the assets thereof after deducting its liabilities?"

"Whether the said defendants, John Chapman and Henry Simpson, or Abel Chapman, have brought any capital into the said business since the said testator's death?"

"That the defendants should set forth an account of all sums drawn out of the said banking business by the said John Chapman, Henry Simpson, and Abel Chapman respectively since the said testator's death."

The defendants declined to answer these interrogatories, and accordingly, the exceptions now coming on to be heard were taken to their answer.

Malins and Prior, appeared in support of the exceptions.

R. Palmer and Cantkies appeared for the defendants.

Malins, in reply.

The following authorities and cases were cited: *Wigram on Discovery*, 165; *Rowe v. Teed*, 15 Ves. 378; *Somerville v. Mackay*, 16 Ves. 384; *Adams v. Fisher*, 2 Myl. & Cr. 549; *Lancaster v. Beers*, 1 Ph. 349; *Francis v. Wiggall*, 1 Madd. 258; *Wedderburn v. Wedderburn*, 2 Keen, 722; *Wood v. Hitchings*, 3 Bea. 504; *De Feuchères v. Dawson*, 5 Bea. 110; and *Way v. Bassett*, 5 Haro. 55.

The VICE-CHANCELLOR said that the questions under consideration related to the capital, profits, and the internal affairs of a banking partnership. They were put in a suit in which the accounts of that partnership could not be taken, and in a suit moreover to which one of the partners in that banking-house was not a party. He did not find it necessary to say that such a state of circumstances was of itself necessarily decisive against the right to put the questions, but thus much may, he thought, safely be said,—that in such a state of circumstances, the Court ought to require the questions, if capable of being put at all, to be put only where they were founded upon specific, pointed allegations of clear and unquestionable materiality. The allegations on this record were such as in his judgment to relieve him from deciding the general principle, and, considering the nature of the questions, and the nature of the record, the allegations were not so pointed, not so precise, nor of such clear and unquestionable materiality as to entitle the plaintiff to have them answered. He overruled the exceptions the less unwillingly as the questions appeared to him to be not probably put with no other object than that of justice.

## V. C. KNIGHT BRUCE'S COURT.

## V. C. KNIGHT BRUCE'S COURT.

## QUEEN'S BENCH.

Saturday, May 3.

WALWORTH v. HOLT, and *Re THE IMPERIAL BANK OF ENGLAND.**Joint-Stock Companies Winding-up Acts—Costs in former suit.*

Prior to the passing of the *Winding-up Acts* a suit was instituted for winding up the affairs of a company, and against some of the defendants the bill was dismissed with costs. Subsequently an order under the above Acts to wind up the company was obtained, and the official manager petitioned for the payment to him of a sum in court standing to the credit of the suit. The defendants against whom the bill had been dismissed, and who were unable to obtain their costs from the plaintiff, appeared upon this petition, and asked that their costs might be paid out of the fund in court, and it was

Held, that they were entitled to have their costs so paid.

The suit of *Walworth v. Holt* was instituted some time since, for the purpose of winding up the affairs of the Imperial Bank of England. It was found, however, that from the number of necessary parties to the suit, and other circumstances, it was impracticable to obtain the proposed object in this manner. After the passing of the *Joint-Stock Companies Winding-up Act, 1848*, an order for winding up this company was obtained. The official manager now petitioned for the payment out of court of a sum of money paid in in the suit of *Walworth v. Holt*.

Bacon and J. V. Prior appeared in support of the petition.

Follett, Fleming, and Hardy, for different parties in the suit, consented to the order being made.

Hare, for some defendants in the suit, against whom the bill had been dismissed with costs, asked that their costs should be paid out of the fund in the first instance. The costs had been taxed, but the plaintiff was unable to pay them. In consequence of these defendants not being at present parties to the suit, they had not been served with the petition.

Bacon for the official manager, contended that the remedy of these defendants could only be against the plaintiff in the suit.

The VICE-CHANCELLOR said, that it was no more than reasonable and just that these defendants' costs, and the costs of their appearing on the present petition, should be paid out of this fund, and he should order accordingly.

*Re SMYTH's settlement*, and the 13 and 14 Vict. c. 60.

*Appointment of new Trustees—Right to transfer of stock.*

An order under the 35th section of the *Trustee Act, 1850*, only amounts to a declaration by the Court that the new trustees are the proper persons to have the stock transferred to them; and therefore the new trustees cannot, under such an order, and the 26th section of the Act, require the Bank of England to transfer to them stock standing in the names of the old trustees.

By an order made in this matter on the 15th of February last, after reciting (among other things) the settlement made in the marriage of the late Sir E. Bowyer Smyth, Baronet, and that John Weyland, one of the trustees, was desirous of being discharged, and that John Ballard, another of the trustees, was incapable to act; it was ordered that Sir C. W. Champion de Crespigny, Bart., the Rev. A. J. E. Bower Smyth, G. W. J. Gyll, and B. B. H. Rodwell be appointed new trustees of the settlement in the place of the said John Weyland and John Ballard, the late Sir John Tyrrell, and the late Mr. Strutt; and it was declared that the right to the sum of 12,169l. 17s. 2d. Three per cent. consolidated bank annuities, standing in the names of the said J. Weyland and J. Ballard, as the survivors in the joint account of the four trustees, vested in the four new trustees; and it was directed that the right to transfer the stock so vested in the new trustees, under the provisions of the *Trustee Act, 1850*, be exercised by them in obtaining a transfer into their own names of the stock to be held upon the trusts of the settlement. The Bank of England refused to act under this order, and on the 26th of April an application on the subject was made to the Lord Chancellor, who directed that the matter should be brought before the Vice-Chancellor.

Headlam appeared for the parties upon whose petition the order was made.

The VICE-CHANCELLOR inquired on what ground the bank refused to act under the order.

Wigram, for the Bank, said that so far as the appointment of new trustees was concerned, the bank had nothing to object, for the Court would satisfy itself that the order for the appointment was correct. The *Trustee Act, 1850*, however, did not authorise such a declaration as was contained in this order, namely, that the right to the stock should vest in the new trustees. The stock was standing in the names of two persons, and they only could be permitted by the bank to make a transfer of it.

Headlam contended that the Court was to be satisfied that such a case was made out as to enable it to act under the 35th section, and then the powers of the 26th section might be brought into operation. By the 35th section it is provided, "that it shall be lawful for the Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or any subsequent order, to vest the right to call for a transfer of any stock, subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees." The 26th section showed what was the effect of an order made under the 35th section, and therefore, as the present case was within the latter section, the Bank were wrong in refusing to act under this order.

The VICE-CHANCELLOR said that in his opinion an order under the 35th section only amounted to a declaration by the Court that the new trustees were the proper persons to have the stock transferred to them. Those persons would therefore have to apply to the persons in whose names the stock was standing, to transfer it to them. If those persons should be unable, or refuse, to make the transfer, resort must be had to other provisions in the Act applicable to those events. The order in the present case must be discharged, so far as it directed that the right to the stock should be exercised by the new trustees in obtaining a transfer of the stock, and instead of that direction he should declare that the right to call for a transfer of the stock should be vested in the new trustees.

Wigram asked for the costs of the Bank's appearance, the Lord Chancellor having directed that the Bank should be served.

Headlam opposed this, but

The VICE-CHANCELLOR directed the costs of the Bank to be paid by the petitioners.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL, Esqrs. Barristers-at-Law.

Saturday, April 26.

REG. v. THE MANCHESTER AND SOUTH JUNCTION, &amp;c. RAILWAY COMPANY.

*Rating of railway—Value of adjoining land.*

Where a line of railway is carried through a town, and the value of the adjoining land for building purposes is greater than the value of the land used for the purpose of the railway, the poor-rate is not to be imposed upon the railway company as if their land was of equal value with the land adjoining, but upon an estimate of what a tenant would give for it in its existing condition.

Upon appeal against a rate for the relief of the poor of the township of Manchester, the Sessions confirmed the rate, subject to a case.

It appeared that about one mile and a half of the defendant's line of railway passed through the township of Manchester, and that the land adjoining that part of the railway was of great value, in consequence of its eligibility for building purposes. The parish officers had assessed the land occupied by the company for the purposes of the railway upon a rateable value of 2,000l. according to the value of the adjoining lands; but it was found by the case that if the land was rated upon an estimate of the amount which a tenant would give for it, in its actual condition as a line of railway, the rateable value would be 300l. only. The question was, whether the land was to be rated according to its value as land merely, or according to its value as a line of railway.

Peacock (with him Wheeler) in support of the order of Sessions, contended that as the land was the subject-matter of the rate, the amount for which the land would let to a tenant was the criterion of rateable value; and if the defendants chose to use the land in such a manner as to render it less productive than otherwise it would be, the other rate-payers were not to suffer on that account. Unquestionably if the mode of occupation increased the value of the land, the rate would be proportionably increased; but it did not follow that if the mode of occupation decreased the value, the rate ought on that account to be less. (*R. v. The Grand Junction Railway Company*, 4 Q.B. Rep. 18.)

Sir F. Kelly and Cowling, contra, were not called upon.

PATTESON, J. (a)—It is quite clear that the rateable value ought to be reduced to the sum for which the railway would let as a railway. There is no ground whatever for rating it according to the value of the adjoining land; because though the land is the subject-matter of the rate, this is not land which could be used for any other purposes than the rail-

(a) Lord Campbell, C.J. was sitting in the court for hearing Crown Cases reserved.

way. The company's Act of Parliament devotes it to that purpose, and prevents any other use of it.

WIGHTMAN and EARLE, J.J. concurred.

Rate amended accordingly.

REG. v. THOMAS COWARD.

*Municipal corporation—Quo warranto—Election of councillor—Voting-papers—Description of candidate's place of abode.*

Sec. 142 of 5 & 6 Wm. 4, c. 76, applies only to cure an inaccurate description of the right place of abode in a voting-paper, delivered upon the election of councillor under sec. 32.

An accurate description of a wrong place renders the voting-paper bad.

This was an information in the nature of a *quo warranto*, calling on the defendant to shew by what authority he assumed to exercise the office of town-councillor of the borough of Cambridge, for East Barnwell ward; to which the defendant pleaded his election to that office on a vacancy.

Replication, in substance that some of the voting-papers on which the defendant relied contained erroneous, false, and untrue statements of the place of abode of the defendant, inasmuch as they stated it to be in Gonville-place, in the said borough, whereas, in truth and in fact, the real residence was in Newmarket-road, in the said borough; and Gonville-place was in the East Barnwell ward, while the Newmarket-road was in the West Barnwell ward, and the distance of one from the other was 2,000 yards.

Rejoinder.—That Gonville-place (stated in the voting-papers to be his place of abode) had been and was the place of his abode for three years next before, and up to, and until a short time, to wit, twenty-one days, before the said election; and that the said Gonville-place, before and at the time of the said election, and the delivery of the said voting-papers was commonly understood, that is to say, in and throughout the said borough, to continue to be his place of abode, and that the descriptions of the defendant in the voting-papers were respectively such descriptions as to be and as then were commonly understood in and throughout the borough, as descriptions of him, the defendant, by his christian name and surname, with his place of abode and description.

Demurrer and joinder.—By stat. 5 & 6 Wm. 4, c. 76, s. 32, it is enacted, "that every election of councillors within any borough according to the provisions of this Act, shall be held before the mayor and assessors for the time being of such borough, except as herein excepted, and the voting at every election shall commence at nine o'clock in the forenoon, and shall finally close at four o'clock in the afternoon of the same day, and shall be conducted in manner following (that is to say):—Every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen by delivering to the mayor and assessors, or other presiding officer, as hereinafter mentioned, a voting-paper, containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess-roll is situate." By the 43rd section, where a borough is divided into wards, the aldermen and assessors of each ward are to have the same power in regard to elections in their ward as the mayor and assessors of the whole borough, if not divided into wards. The 142nd section provides, "that no misnomer or inaccurate description of any person, body corporate, or place, named in any schedule to this Act annexed, or in any roll-list, notice, or voting-paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place, be such as to be commonly understood."

Watson (Worledge with him) in support of the demurrer.—In these voting-papers there is an untrue, not an inaccurate, description of the place of abode; and there is nothing in the statute to cure such a defect. (*R. v. Deighton*, 5 Q.B. 896; *Sheldon v. Fletcher*, 5 C.B. 15.)

Cowling (Naylor with him) contra.—The object of the 142nd section was to prevent objections of this kind; and to render any description of a person sufficient, which would clearly designate him to the common understanding of his neighbours. In the present instance the mistake as to the place of abode could not mislead any one as to the person intended; and the rejoinder positively alleges that the description of the defendant in the voting-paper was such as was throughout the borough commonly understood to be his proper description. Probably, if the defendant's new address had been inserted, it might, to common understanding, have less clearly designated the person meant.

PATTESON, J.—This question must be determined



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by the Act of Parliament. Now sec. 32 requires that the voting-paper shall contain the place of abode of the candidate; and it is admitted that the voting-papers in question did not contain the defendant's place of abode at the time of election, but described him by another place, where he had previously resided. It is said, however, that the defect is cured by the 142nd section; but if that section is read, as it clearly must be, *reddendo singula singulis*, it only provides that no inaccurate description of any place named in any voting-paper shall hinder the full operation of this Act with respect to such place, provided that the description of such place be such as to be commonly understood. It applies, therefore, to the inaccurate description of the actual place of abode; but that is not this case. Here the description of the place is quite accurate; but it is an accurate description of a wrong place; and to that the section does not apply.

WIGHTMAN, and ERLE, JJ. concurred.  
*Judgment for the Crown.*

Monday, April 27.

REG. v. HENRY THOMPSON AND OTHERS.

*Indictment—Limitation of time—Repeal of statute—Conspiracy—Repugnant verdict.*

*The defendants were indicted for conspiring to procure the removal of certain foreign goods from bonded warehouses, without payment of the duties due upon removal. The Customs Acts in force at the time assigned to the conspiracy were stat. 3 & 4 Wm. 4, c. 51—61, which were repealed (except as to duties payable under them) by stat. 8 & 9 Vict. c. 84. The indictment was not preferred until after the passing of the later statute:*

*Held, that neither the limitation clause in stat. 3 & 4 Wm. 4, c. 53, s. 120 (which was in the same language as stat. 8 & 9 Vict. c. 87, s. 134), nor the repeal of the Acts themselves was any answer to the indictment.*

*An indictment for conspiracy charged "that A., B. and C. did conspire together, and with divers other persons to the jurors unknown," &c. No evidence was offered affecting any other persons than A., B. and C. The jury found A. guilty, but acquitted B. and C. being of opinion that either B. or C. was guilty, but not being able to determine which of the two:*

*Held, by Lord Campbell, C.J. Patteson and Coleridge, JJ.: dissented, Erle, J. that the verdict was inconsistent, and that A. was entitled to an acquittal.*

This was an indictment against Henry Thompson, Samuel Tillotson, and Samuel Henry Maddox, found at the Lancashire Assizes, but removed into this court by a *certiorari*, which charged that the defendants "unlawfully and fraudulently did combine, conspire, confederate, and agree together, and with divers other persons to the jurors unknown," to cause and procure certain foreign goods, which had been theretofore imported, and which were deposited in certain approved vaults, and upon the removal of which certain duties would be due and of right payable to our Lady the Queen, clandestinely and illegally to be removed from the vaults where the same were deposited, without the payment of the duties, &c. with intent to cheat and defraud our Sovereign Lady the Queen of divers large sums of money, &c. &c. There were various counts in the indictment setting out different overt acts, and there were also counts charging, generally, a conspiracy to defraud the Queen of duties payable, without setting out any overt acts. The date assigned to the conspiracy in each count was May 13, 1841, and the evidence was confined to transactions happening between the years 1839 and 1842. At the trial before Cresswell, J. at Liverpool at the Summer Assizes, 1850, it appeared that the defendant Thompson was the occupier of certain bonding warehouses, from which it was alleged that the conspiracy contemplated the removal of certain goods without the payment of duty, and that Tillotson and Maddox were servants in the docks, called "lockers," in the keeping of one or other of whom from time to time would be a key, without the use of which the goods could not be got from the warehouses. No other person was shown to be connected with any such fraud as was charged in the indictment but the three defendants. The jury were satisfied that Thompson conspired with one or other of the two lockers, i.e. either with Tillotson or Maddox, but as they could not say with which, Tillotson and Maddox were both acquitted, and a verdict of acquittal was also claimed for Thompson, upon the ground that one man could not be guilty of conspiracy, and that the only persons with whom Thompson could have conspired were acquitted. It was also contended at the trial, that this prosecution was barred by stat. 3 & 4 Wm. 4, c. 53, s. 120, or that the Acts of Parliament, stats. 3 & 4 Wm. 4, c. 51—61, being repealed by stat. 8 & 9 Vict. c. 84, s. 1, no indictment could be sustained for a conspiracy to commit an offence against a repealed statute. The learned judge overruled all these objections, and directed a verdict to be

entered for the Crown against the defendant Thompson. In the following term a rule nisi was obtained for a new trial, upon the ground of misdirection, against which

The Attorney-General, Knowles, and Edward James now shewed cause. 1. This indictment is maintainable. Stat. 3 & 4 Wm. 4, c. 53, s. 120, enacts, "that all suits, indictments, or informations exhibited for any offence against this or any other Act relating to the customs in any of his Majesty's Courts of Record at Westminster, or in Dublin, or in Edinburgh, or in the Royal Courts in the Channel Islands, shall and may be had, brought, sued, or exhibited within three years next after the date of the offence committed." The present indictment is for a conspiracy, which is not an offence against the statute, but at common law; and, further, it was exhibited before the grand jury at the Assizes, and not in any of his Majesty's Courts of Record at Westminster. The word "indictments" is fully satisfied by reference to the indictments mentioned in sec. 112, as to be preferred in the name of the Attorney-General, and probably sec. 120 was framed with a reference to secs. 75 and 112. The Crown is not to be barred from prosecuting offenders except by express words of limitation; and if all indictments against the Customs Acts are within sec. 120, it would follow that the felonies made capital by secs. 58, 59, would also be within it, and barred by a limitation of three years. Again, the repeal of Stat. 3 & 4 Wm. 4, c. 53, by Stat. 8 & 9 Vict. c. 84, s. 1, is no answer to this indictment. A conspiracy is not an offence against the Act, for the conspiracy might fail or be detected, and so no offence against the Act be committed, though the conspiracy would be complete. Besides, stat. 8 & 9 Vict. c. 84, s. 1, expressly keeps alive the former Acts, as to the duties due and payable, or penalties or forfeitures incurred under the former Acts, and this conspiracy is in regard to the duties payable. 2. The acquittal of the other two defendants does not operate as an acquittal of Thompson. The charge in this indictment is joint and several. Thompson is charged with conspiring with the other two, and with divers persons unknown. The word "other" has either no meaning, or it means other than Thompson, or than Tillotson, or than Maddox, as applied to each respectively. When the petty jury cannot say whether Tillotson or Maddox were the co-conspirator, surely the co-conspirator is unknown. The gist of the offence is the conspiracy. The finding of the grand jury is separate as to each, and in principle their trial must be considered as the trial of each. If Tillotson and Maddox had been tried first, their acquittal or conviction could not have been made evidence against Thompson. *R. v. Kinnersley*, 1 Stra. 193; *Reg. v. Herne*, cited, *Ibid.* 195. In considering the case of Thompson, the acquittal of the others ought no more to be regarded than if they had been tried separately. The finding of the petty jury is equivalent to this—"we cannot say which of the two defendants, Tillotson, or Maddox, is guilty,"—it does not mean "we find that both of them are innocent." (They referred also to *Rex v. Bush*, R. & R. 272.)

*Murphy*, Serjt. Cowling, and H. Hill in support of the rule.—1. All offences against the customs are creatures of the statute law, and depend entirely upon it, and therefore, the limitation cannot be got rid of by investing a statutable offence with a common law character. The words in sec. 120 are not "indictments" upon the statute, but "indictments" generally. The other words in the section, with reference to the Courts at Westminster, apply only to "suits or informations." Then the repeal of the statute destroys everything of which the statute must be the basis. Not every conspiracy is indictable; but a conspiracy to do an unlawful act is undoubtedly so. The only unlawful act suggested was made unlawful by the statute, and the statute being repealed, the illegality of that act ceases, and so the indictable character of the conspiracy. 2. The acquittal of two of the defendants inures, under the circumstances, to the acquittal of all. If Thompson, Tillotson, and Maddox only had been indicted, without the mention of divers unknown persons, it would as plainly follow that the acquittal of two of a charge of conspiracy wrought the acquittal of all, as that the acquittal of one has that effect when two only are charged. The words "divers other persons" mean "other than" those mentioned before, because Thompson, Tillotson, and Maddox are persons known to the grand jury, and the "other persons" mentioned in the indictment are declared to be unknown to them. An alternative verdict, such as that Thompson conspired with Tillotson or with Maddox, would be wholly unprecedented, and bad in law. (*Rex v. Pywell*, 1 Stark. 402, was also mentioned by them.)

Lord CAMPBELL, C.J.—I am of opinion that the first objection cannot be supported. If we look to the plain language employed by sec. 120 of the stat. 3 & 4 Wm. 4, c. 53, we see that it cannot embrace indictments found at a Court of Oyer and Terminer at the Assizes, but is confined to indictments found

in this Court at Westminster. This indictment was not so found, but was found at the assizes at Lancaster. It is suggested that the words of sec. 120 may be taken distributively, and may mean "suits or informations exhibited in any of his Majesty's Courts of Record at Westminster," and indictments wheresoever found. But I think a reference to secs. 75 and 112, shews that a more limited construction was intended. The argument as to the repeal of the statute cannot prevail. A conspiracy is an offence at common law, consummated as soon as it is entered into. Here, at the time of the conspiracy, the Queen was of right entitled to the duties in respect of which it was entered into. The second, objection, however, seems to me to be insuperable. We must take it upon the evidence as the same thing as if the indictment had been against the three defendants, and no evidence had been offered except against them. If, then, the verdict had been against Thompson, and in favour of Tillotson and Maddox, it could not have been supported. It is allowed that if there be an indictment against two for conspiracy, and one be acquitted, the other must be acquitted likewise. I cannot distinguish that case and the present, for the jury, in point of fact, declare that the two last-named defendants did not conspire with the first, and, if so, he could not conspire with them. The only mode in which it struck me that the verdict could be supported was, as a finding, that Thompson conspired with either Tillotson or Maddox. But I am satisfied that an indictment in those terms would be contrary to law, and a verdict equally so. The expression "divers others to the jury unknown" cannot include Tillotson nor Maddox. Neither the grand jury nor the petty jury could have intended that.

PATTERSON, J.—I quite agree. I hardly know to what the word "indictments," in sec. 120, does refer, but probably it means the same as the indictment preferred by the Attorney-General, spoken of in sec. 112. At all events, sec. 120 is confined to proceedings in the Superior Courts at Westminster. Upon the other point, I am of opinion that Thompson could not, upon the evidence, have been convicted of conspiring with persons unknown, the same being other than Tillotson or Maddox. The evidence was applied only to the three persons named, and failing as to two of them it fails altogether. There would otherwise be a contradiction in the verdict, for a conspiracy implies mutual consent and agreement. The indictment would have been proved if it had charged simply that Thompson conspired with certain persons to the jurors unknown.

COLERIDGE, J.—I am of the same opinion upon both points. Upon the first it is sufficient to say that this charge is not within the words of sec. 120, either as to the court in which it is preferred, or the matter of the charge itself. Upon the other point, I think you must read this indictment, giving to ordinary language its ordinary meaning. It imports that each defendant conspired with the rest, and with some others who are unknown. What amount of evidence would suffice for separate trials of these persons is wholly immaterial. The jury find that neither Tillotson nor Maddox was guilty with Thompson, and there was no evidence against anybody else. Upon ordinary principles that is an acquittal of Thompson. The difficulty is, because of the reason assigned by the jury for the acquittal. But, in point of fact, they are acquitted with all the legal consequences of an acquittal, and Thompson, standing alone, cannot be convicted of conspiracy.

ERLE, J.—Upon the second point I differ with the rest of the Court. It is clearly conceded that the defendant Thompson was shewn to be actually guilty of the offence in respect of which he was indicted. Then, is that offence comprised in the terms of the indictment upon which he was tried? The language of the indictment must be tried by the rules of pleading, not by the common interpretation put upon ordinary language. There is a conventional meaning attached, for pleading purposes, to a variety of allegations of time, value, and the like, in every indictment, which is wholly different from the meaning which would belong to the same expressions in the language of ordinary life. Where an offence charged upon several is of such a nature that one may be guilty, and the others—some or all of them—not guilty, the matter must be considered as to each as if he were indicted alone. And further, with reference to each, though the same offence may be charged in an indictment in a variety of ways in various counts, and with attendant circumstances of more or less aggravation, if the offence of which the defendant is proved to be guilty be included in the matter charged, the defendant may be found guilty without the circumstances of aggravation, and in any one of the forms included in the indictment. The present indictment includes a charge of conspiracy in a variety of forms. It imputes that Thompson conspired with Tillotson; that he conspired with Maddox; that he conspired with an unknown person. If any of those alternatives be proved, the indictment is sustained as against him. The judge ought to sum up the evidence, and take



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the opinion of the jury upon each by itself. Did Thompson conspire to do the matters here complained of? The jury say that he did. Did he conspire with Maddox or with Tillotson? The jury answer, "we cannot say: we are sure he conspired with one of them." Then he conspired with a person unknown. The person is as much unknown when the jury cannot pronounce upon an alternative of this kind, as when they have no idea whatever of who the second conspirator is. They may well say, in such a state of doubt between two offenders, that the actual offender is unknown to them. I think it would be a violation of the rules of pleading to strain the words here employed to their strict meaning in an ordinary grammatical sense, and as we are occasionally compelled to defeat justice by adhering to the rules of pleading, it would be satisfactory to my mind that justice should sometimes be assisted by a similar adherence.

Rule absolute.

Wednesday, April 30.

REG. v. THE DEAN AND CHAPTER OF ROCHESTER.  
Mandamus—Jurisdiction—Interest—Visitor—Appeal—Master of grammar school—Cause of removal.

Upon the construction of the statutes of Rochester Cathedral:

Held, that the power of the dean and chapter to appoint and remove the master of the cathedral grammar school was subject to the control of the bishop as visitor; and that a master who had been removed by the dean and chapter was not entitled to a mandamus commanding them to restore him, he not having appealed to the bishop.

The cause of removal was the publication of a libel reflecting upon the bishop as well as upon the dean and chapter:

Held, that the bishop had not such an interest in the master, as would prevent him from deciding an appeal by the master against his removal; and as would therefore be a sufficient excuse to the master for not appealing to him.

Mandamus, commanding the dean and chapter of the cathedral church of Rochester to restore the Rev. Robert Whiston to the office of head master of the cathedral grammar school, from which he had been removed by the dean and chapter.

Return, in substance, that the said cathedral church was founded and endowed by letters patent of King Henry 8, and that by the statutes the dean and chapter had the power of appointing and removing the master of the cathedral grammar school, of which the Bishop of Rochester for the time being was, by the same statutes, appointed the visitor, and that Mr. Whiston had not appealed to the visitor as he might and ought to have done.

Pleas in bar.—1. That the prosecutor had not been removed for a lawful cause; 2. That the dean and chapter had removed him (the prosecutor) for the publication of a pamphlet, entitled "Cathedral Trusts and their Fulfilment," in which pamphlet he had charged the bishop with conniving at the misapplication of the cathedral funds by the dean and chapter, and also with being guilty of a similar offence while formerly dean of the cathedral church of Worcester; and that, by reason of the premises, the Bishop of Rochester had such a personal interest in the subject matter of the appeal as disqualified him from deciding upon the same in his capacity of visitor; 3. That the prosecutor had been dismissed from his office upon the grounds stated in the plea, and upon no other grounds, viz. that he had complained to the dean and chapter that they had neglected to increase the allowances assigned by the statutes for the support and maintenance of students and poor scholars, which allowances, notwithstanding the vast increase in the income from the cathedral lands, remained the same as they were in the time of King Henry 8, while the whole of the said increased income was divided by the dean and chapter among themselves; that not meeting with any redress from the dean and chapter, he applied to the bishop, who refused to hear his appeal; that in consequence he published a pamphlet entitled "Cathedral Trusts and their Fulfilment," which was then set out in the plea, and the contents thereof alleged to be true; that the dean and chapter of Rochester had twice removed him (the prosecutor) from his said office of head master of the cathedral school by a deed poll, in which they declared that they removed him for the publication of the said pamphlet, which they alleged to be a slanderous libel upon the bishop, and dean, and chapter of Rochester, as well as upon the bishops, and deans, and chapters of the cathedral churches.

General demurrer to those pleas.

The following are the material statutes set out in the plea:—

The 26th statute (*de pueris grammaticis et eorum informatoribus*) gave the power to the dean, or, in his absence, to the vice-dean, and chapter, to appoint the head master.

35th. "Ut in ecclesia nostra morum integritas

servetur, statuimus et volumus, ut si quis minorum canonicorum, clericorum, aut aliorum ministrorum, in levi culpa deliquerit, arbitrio decani, aut, eo absente, vice-decani, corrigatur. Si gravior fuerit delictum (si iustum iudicabitur), ab eisdem expellatur a quibus fuerit admissus."

38th. "Cui quidem episcopo, presentis statuti vigore, plenam concedimus potestatem et auctoritatem, ut super singulis articulis in statutis nostris contentis, et de quibuscunque aliis articulis statutum, commodum aut honorem ecclesie nostre concernentibus, decanum, canonicos, minores canonicos, ceterosque ministros interroget et cogat eorum quolibet per juramentum ecclesie presentem veritatem dicere de omnibus delictis et criminibus quibuscunque. Comperta et probata, juxta delicti et criminis mensuram, puniet episcopus atque reformet, omniaque faciet quae ad vitiorum reformationem necessaria videbuntur, quaeque ad visitatoris officium de jure pertinere dignoscuntur. Quos quidem omnes, tam decanos quam canonicos, et alios ecclesie nostrae ministros, quoad alia praemissa, volumus et mandamus ipsi episcopo parere et obedire."

The case was argued Saturday, April 26, and Wednesday, April 30, by Sir F. Kelly (Counsel with him) in support of the demurrer. Sir F. Theisiger (with him W. D. Lewis and Rochfort Clarke) on the part of the prosecutor.

Sir F. Kelly contended that the statutes clearly conferred upon the bishop a complete visitatorial authority; and that Mr. Whiston's remedy was by appeal to the visitor, and not by writ of mandamus. *Phillips v. Barry*, 4 Mod. 109; 2 T. R. 356; *Dr. Walker's case*, Cas. temp. Hardwicke, 212; *R. v. The Dean and Chapter of Chester*, 19 L. J. 485, Q.B. The pretence that the bishop was personally interested in the matter was no answer to the return. It might as well be said that a judge of this court could not try an action or an indictment for libel, which reflected upon himself.

Sir F. Theisiger, contra.—1. Assuming the bishop to be visitor, he has no jurisdiction in this case, on account of his personal interest in the matter. No man, by the law of England, can be judge in his own cause; and the bishop would be so if he were to decide this case. When the matter came before him he would have to decide upon the truth or falsehood of an accusation made against himself as well as against the dean and chapter; and it was no answer to say that he might exercise his visitatorial functions by deputy; because in the eye of the law the deputy was identified with the principal, and interest in the principal disqualified both. (*R. v. The Bishop of Ely*, 2 T. R. 338; *R. v. The Bishop of Chester*, 2 Stra. 797; recognised by Lord Hardwicke, 1 Ves. 471.—and by stat. 2 Geo. 2, c. 29; *Brooks v. Earl Rivers*, Hard. 503; *Wood v. The Corporation of London*, 1 Salk. 397; Holt, 396; *Day v. Savadge*, Hob. 87; *Reg. v. The Chellenham Commissioners*, 1 Q. B. 467; *R. v. The Justices of Herts*, 6 Q. B. 763; *Reg. v. The Aberdare Canal Company*, 19 L. J. 251, Q. B.; 14 Jur. 735; *The Grand Junction Canal Company v. Dimes*, 12 Beav. 77.) 2. The bishop has not in any case any visitatorial authority in regard to the grammar school; the words of the 38th statute, *de visitatione ecclesie*, are large enough to give that authority; but they are controlled by the other statutes, which shew that the intention was to place the management of the grammar school in the hands of the dean and chapter. The power of appointing and removing the master is given to them alone; and if they abuse that power, this Court will correct them. (*Attorney-General v. Middleton*, 2 Ves. 327; *R. v. The Bishop of Ely*, cited supra; Com. Dig. tit. "Visitor.") Lastly, the publication of the pamphlet is not *gravius delictum* within the meaning of the statutes; and so the removal of Mr. Whiston was unlawful.

PATTON, J.—The first question here is, whether the bishop has any visitatorial authority in respect to the grammar school. That depends upon the 35th and 38th statutes. (His lordship read them.) Now I think the 38th gives the bishop not only an original but an appellate jurisdiction, as was held in the case of *R. v. The Dean and Chapter of Chester*, 19 Law J. Q.B. 485, which I cannot distinguish from the present case. Then has there, in the course of the proceeding by the dean and chapter, been such an excess of jurisdiction as calls upon this Court to interfere by mandamus? I think certainly not. I do not see how, in the circumstances under which, or the manner in which, the removal takes place, there can be such an excess of jurisdiction as would oust the visitor of his jurisdiction, and enable us to interfere. It is not a matter of discretion with us; it has been universally laid down that we cannot interfere, if the visitor has the power. But then we come to the answer set up in the second plea, that the pamphlet reflected on the bishop, and that he was therefore personally interested, and had no jurisdiction in the matter. Many cases were cited to shew that no man can be judge in his own cause (*Day v. Savadge*, Hob. 87; *Wood v. The Corporation of London*, Salk. 397; *Brooks v. Earl Rivers*, Hard. 503;

*R. v. Bishop of Ely*, 2 T. R. 338); and other more recent cases in this Court relating to the interest of magistrates in cases heard at Quarter Sessions. The principle cannot be denied,—the only question is, whether it is applicable to the present case. Now, the master of the school is not appointed by the bishop in any case; he has, therefore, no interest in the appointment. It was otherwise in *R. v. The Bishop of Ely*; but there he had no visitatorial power at all. So in all the other cases, the interest was a direct interest in the subject matter to be decided; here it is clear that the bishop has no direct interest; but it is argued that he is interested in the removal of Mr. Whiston, because he is himself included in the reflections which the pamphlet contains against the dean and chapter. The removal, however, is the act of the dean and chapter only; the bishop is not a party to it; nor has he any personal interest in the alleged misapplication of the funds. The question for the visitor is, whether the publication of the pamphlet was a sufficient cause for the removal; even if the question were whether Mr. Whiston had been properly punished for libelling the bishop, which it is not, I do not think he would be so interested as to lose his jurisdiction. The bishop might still bring his action or indictment for the libel; and he seems to me to be in no way interested in the removal. The circumstance that Mr. Whiston has chosen to add to his pamphlet some reflections on the bishop, cannot enable him to oust the bishop of his jurisdiction. In *Brooks v. Lord Rivers*, the prohibition was refused, and the Court said that favour was not to be presumed in a judge; so here favour is not to be presumed in the bishop, because he has been reflected upon in the pamphlet. The pleas, therefore, afford no answer to the return, and therefore our judgment must be for the defendants.

WIGHTMAN, and ERLE, JJ. and Lord CAMPBELL, C.J.(a) concurred.

Judgment for the defendants.

Thursday, May 1.

GLOVER v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Railway—Landowner—Right of Action.

The test of whether lands are "injuriously affected by the construction of a railway" within the meaning of stat., 8 & 9 Vict. c. 20, s. 6, is whether the lands are deteriorated in value by an act, for which, if done by an individual, the landowner might maintain an action on the case.

Where a private road leading to the house and lands of a landowner was crossed upon a level by a railway, gates being placed across the road upon each side of the railway, and the curve of the railway was such that there was some caution required in crossing in order to avoid accidents, the jury having found that the house and lands were by these circumstances deteriorated in value:

Held, that the landowner was entitled to compensation upon the ground that his lands were "injuriously affected" within the meaning of stat. 8 & 9 Vict. c. 20, s. 6.

This was a special verdict found at the Lent Assizes, 1850, for the county of Stafford, before Patteson, J. in an action of debt brought under the authority of stat. 8 & 9 Vict. c. 18, s. 68, to recover the amount of compensation claimed by the plaintiff from the defendants in respect of his lands being injuriously affected by the construction of the North Staffordshire Railway, the defendants having failed to callout a jury, or to have the compensation assessed in manner prescribed by the statute. The question raised for the opinion of the Court was, whether the plaintiff's lands were injuriously affected by the construction of the railway within the meaning of stat. 8 & 9 Vict. c. 20, s. 6.

It appeared that the house situate upon the plaintiff's lands was at a distance of 350 yards from the nearest part of the railway, and that no part of the plaintiff's lands was at a less distance than 115 yards from the railway. The railway, however, crossed upon a level two private roads (over which the plaintiff had a right of way to his lands) running at a small angle to each other, which were the only modes of access to the plaintiff's house and lands (the Sideway estate) from any high-road. The curve of the railway at the point where it crossed one of the private roads was such, that trains progressing along the railway could not be seen until within eighteen seconds of their crossing the road. Gates were constructed upon both sides of the level crossing at each private road, which were kept locked, the plaintiff being allowed a key and a key being kept also at a lodge at a little distance. The jury found that the plaintiff's house and lands (the Sideway estate) were deteriorated in value by the construction of the railway, but left the question before stated open for the determination of the Court.

Whateley (with him Phipson) for the plaintiff.

Keating for the defendants.

Stats. 8 & 9 Vict. c. 18, s. 68; c. 20, ss. 6, 16; *Reg. v. The Eastern Counties Railway Company*,

(a) Lord Campbell, O.J. was only present during part of the argument of Sir F. Theisiger on the second day.

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2 Q.B. 347; *Re v. The London Dock Company*, 5 A. & E. 163; *Cooling v. The Great Northern Railway Company*, 19 L. J. 25, Q.B.; *Turner v. Sheffield and Rotherham Railway Company*, 10 M. & W. 425.

LORD CAMPBELL, C.J.—It is quite clear that the plaintiff's property is depreciated in value by the company having done that which would have been an actionable injury but for the powers given to them by their special Act. That is a fair criterion by which to decide this question. There may be such a thing as a loss in consequence of the construction of a railway without there being any claim for compensation, e.g. if that which is done by the railway might lawfully have been done by some persons without the aid of any Act of Parliament. Here, by the erection of the gates at all events, there is an annoyance and a damage to the plaintiff in respect of the occupation of his house and lands, for which, even if it had been done by the owner of the land over which the plaintiff has the right of way, the plaintiff might have maintained an action.

PATTESON, J.—This cannot be put as a mere inconvenience to the plaintiff. The jury say his lands are depreciated in value by it. If so, surely they are injuriously affected.

WIGHTMAN, J.—The right test is this: if the owner of the land had done upon his own land what the railway company has done, the plaintiff would have had a right of action in respect of the injury to his property.

ERLE, J.—I think the principle suggested for determining this question is correct, and that the plaintiff has here a cause of action both in respect of the gates and the passage of the trains.

*Judgment for the plaintiff.*

PILLAY and ANOTHER v. RICHARDSON and OTHERS.

*Practice—Plea in abatement.*

*A plea in abatement is within Reg. Gen. H. T. 4 Wm. 4, R. 1, and if entitled of a date different from that upon which it is pleaded will be set aside as an irregularity.*

This was an action against several defendants upon a charter-party. The defendants pleaded in abatement the non-joinder of other co-contractors. The plea in abatement was dated April 8, 1851, which was the date also of the affidavit of the truth of the plea, &c. The plea and accompanying affidavit were not, however, delivered until the afternoon of the 9th of April. The plaintiff applied to a judge at chambers to set the plea aside for irregularity, and the matter was by the judge referred to this Court. A rule nisi having been obtained to set aside the plea in abatement for irregularity with costs, *Alterton* shewed cause.

*Watson and Rev. in support of the rule.*

See *Johnson v. Popplewell*, 2 C. & J. 544; *Reg. Gen. H. T. 4 Wm. 4, pl. 1.*

*Rule absolute.*

DORRIS, TATHAM v. CATTAMORE.

*Deed—Erasure in immaterial part.*

*An erasure or interlineation appearing upon the face of a deed is to be presumed, unless the contrary be shewn, to have been made at the time of the execution of the deed.*

*A judge may therefore leave it as a question for the jury, whether the erasure or interlineation took place before the execution, although there is no other evidence on that subject than the deed itself.*

Ejectment upon the forfeiture of a lease on breach of a covenant to insure, tried before Parke, B. at the last Kingston Assizes. The lessor of the plaintiff produced, in support of his title, a lease and an assignment, in which there were erasures and interlineations in parts not material to the case, neither in the covenant to insure nor in the proviso for re-entry. It was objected that the deed was void, unless the erasures were explained; but the learned judge asked the jury whether they were made before or after execution, and the jury said before execution. The verdict was accordingly found for the lessor of the plaintiff.

Thursday, April 17.—*Pearson* moved for a new trial, on the ground of misdirection. The judge ought to have told the jury that it lay on the plaintiff to explain the erasures; and no evidence was given on the subject. (*Piggott's case*, 11 Rep. 27; *Com. Dig. Falt. F. 1*; *Knight v. Clements*, 8 Ad. & El. 215; *Clifford v. Parker*, 2 M. & G. 909.)

*Cur. adv. vult.*

LORD CAMPBELL, C.J. now delivered the judgment of the Court (a).—In this case the deed on which the lessor's title depended, when produced, happened to have an interlineation and an erasure in parts not material. An objection was made that the deed was void, unless the lessor of the plaintiff gave evidence to shew when the alterations were made. The learned judge left it to the jury to say whether the alterations were made before the execution of the deed; and it was

(a) Lord Campbell, C.J. Patteson, Wightman, and Erle, JJ.

found that they were. In moving for a new trial it was contended that this question ought not to have been left to the jury without some evidence besides the deed itself. In Co. Litt. 225, b, it is said that anciently if a deed appeared erased or interlined in places material, the judges held it to be void; but in later times the judges have left it to the jury to say whether the erasure or interlineation was before it was executed. In a note upon this passage in Hargrave and Butler's edition of Co. Litt. it is laid down that the interlineation is to be presumed, if the contrary be not proved, to have been made at the time of making the deed. This doctrine seems to us to rest on good reason; for a deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud or wrong. A testator may alter his will without fraud or wrong after it is executed, and there is no ground for any presumption that his alteration was before the execution. We therefore think that the defendant has no right to complain of the course pursued by the learned judge at the trial, and that a rule for a new trial ought to be refused. *Rule refused.*

Friday, May 2.

WATKINS v. THE GREAT NORTHERN RAILWAY COMPANY.

*Railway—Right of action—Special damage.*

*An action upon the case for obstruction of a right of way is not maintainable by the person interested against a railway company, by reason of their having, under the powers of their Act, obstructed the way without first making a new way (see Stat. 8 & 9 Vict. c. 20, ss. 53 & 55), unless the person interested have sustained some special damage, by reason of the mode in which the obstruction has been made.*

This was an action upon the case for obstructing the plaintiff's right of way over certain lands. The defendants, justified under the powers conferred upon them by the acts passed for the formation of their railway. The plaintiff replied that the way over which the right was claimed was, at the time when, &c. an existing road, within the meaning of "The Railways Clauses Consolidation Act," and that the defendants did not, before interfering with it, cause another sufficient road to be made instead of the road interfered with. General demurrer and joinder.

The question was, whether, under the circumstances, no special damage being shewn, the action was maintainable.

Stat. 8 & 9 Vict. c. 20, s. 55, enacts that, if any party entitled to a right of way over any road so interfered with by the company (see ss. 53 & 54), shall suffer any special damage, by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company with costs, by action on the case, in any of the inferior courts, and that, whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same.

*Phipson* in support of the demurrer.—This action cannot be maintained against the defendants, as the plaintiff has not alleged special damage. The plaintiff may be entitled to compensation, under some of the sections of "the Lands Clauses," or the Railway Clauses Consolidation Act; but s. 55, by necessary implication, takes away the right to the present form of action from all persons not specially damaged. By stat. 8 & 9 Vict. c. 20, s. 6, the company, in exercise of the powers given them to construct the railway, are subject to the provisions and restrictions in that Act and in the Lands Clauses Consolidation Act, and the company are to make to the parties interested full compensation. It is plain by sec. 16, that the matter here complained of having been done by the company, was within the powers given them by the Legislature. Then ss. 53, 54, require new roads to be substituted before the old ones are obstructed, and impose a heavy penalty for breach of this regulation. But s. 55, by expressly reserving to a person who has sustained special damage a right of action on the case, impliedly enacts that no more interference with a right of way, before the construction of a new road, shall give any right of action. *Reg. v. Scott*, 3 Q.B. 543, is distinguishable.

*Portescue* for the plaintiff.—Where a statute creates a wrong and gives a remedy, that remedy must be strictly pursued. This, however, is an existing common law right of action, which cannot be taken away but by express words. The company have the right to obstruct the plaintiff's right of way, subject to the condition of their first making a new road. They cannot defend themselves under the powers given by their Act, unless the condition be complied with; ss. 54, 55, speak of any road being interfered with, and s. 55 is either only in affirmation of the existing law, or is intended to preserve a right of action to persons specially damaged by the

insufficient mode in which a new road may be made or maintained.

*Phipson* in reply.

LORD CAMPBELL, C.J.—I think the defendants are entitled to our judgment. No doubt, we must take it upon these pleadings that the defendants have been guilty of an illegal act in obstructing the road over which the plaintiff has a right of way without setting out a new road. The question is, what is the remedy? A statutory remedy is provided by the clauses which regulate the mode of assessing the compensation of a landowner, and this remedy would be cumulative, if the party were not confined to it by the Act of Parliament. But the stat. 8 & 9 Vict. c. 20, s. 55, though not very perspicuously framed, limits the common-law remedy to cases where there is special damage. In other cases there is no remedy but under the compensation clauses. Under any other mode of construction section 55 has no meaning.

PATTESON, J.—The case of *Reg. v. Scott* was decided four years before the passing of the Railways Clauses Consolidation Act, and upon the construction of a very different statute. By the proper interpretation of the present Act, the parties are limited to the remedies given by the statute. Sec. 16 gives the company the power to stop up or close a way. Then sec. 53 enacts, that before the commencement of any such operations, the company shall cause a sufficient road to be made instead of the road to be interfered with; sec. 54 provides, that if the company do not cause such road to be made, they shall forfeit the sum of 20*l.* a day, to be recovered as in the Act provided. And beyond that, sec. 55 enacts, that if there be special damage, there shall be a further remedy by action, but remedy by action is only available where the plaintiff can shew special damage.

WIGHTMAN, J. concurred.

ERLE, J.—It appears that the right of way has been obstructed by the company under the power of the Railway Act, but without special damage. Sec. 6 of the stat. 8 & 9 Vict. c. 20, provides that, "except where by this or the special Act otherwise provided, the amount of such compensation shall be ascertained and determined in manner provided by the said Lands Clauses Consolidation Act, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof." This case was within secs. 6, 16, and not within the exception of sec. 55.

*Judgment for the defendant.*

Saturday, May 3.

REG. v. ST. PANCRAS.

*Lunatic order—Workhouse licensed for reception of lunatics.*

*It is no objection to an order for the costs of maintenance of a lunatic in a licensed house, under s. 62 of 8 & 9 Vict. c. 126, that the licensed house in which the lunatic pauper is maintained is, in truth, a part of the workhouse of the parish, obtaining the order, licensed for that purpose.*

This was a case reserved upon appeal against a lunatic order, made under s. 62 of 8 & 9 Vict. c. 126. The only question was, whether the order was invalid, because the licensed house in which the pauper was maintained was a part of the workhouse of St. Pancras parish, which had obtained the order.

Huddleston, in support of the order. All the requisites of the 8 & 9 Vict. c. 126, s. 62, have been complied with; and this Court will not enter upon the question whether part of a workhouse ought to be licensed for the reception of lunatics. Stat. 8 & 9 Vict. c. 100, s. 24, provides securities against the licensing of improper places; and has intrusted that matter to other hands.

Ballantine, contra. It may be that this Court cannot interfere upon any ground of inconvenience to prevent the conversion of workhouses into lunatic asylums; but it is essential to the validity of this order that the parish of St. Pancras should have actually paid to the officers of the licensed house the costs of maintenance, which by the order are alleged to have been paid; and the question here is, whether there has been anything but a colourable payment. The workhouse and the licensed house are all one; both belong to the parish; and the only payment that can have taken place is a payment out of one hand into the other.

LORD CAMPBELL, C.J.—All the requisites of the stat. 8 & 9 Vict. c. 126, s. 62, have been complied with; and if it is an objectionable thing to license part of a workhouse for the reception of lunatics, upon which I express no opinion, it is a matter to be referred to the lunacy commissioners.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred.

*Order confirmed.*

REG. v. OSSETT.

*Poor—Settlement by serving an office—Clerk of district church.*

*The office of clerk of a district church erected under stats. 58 Geo. 3, c. 45, and 59 Geo. c. 134, is a public annual office within the meaning of*

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3 W. & M. c. 11, s. 6, so as to confer a settlement.

A person originally appointed by the district curate, but executing the office for several years, with the knowledge of the vicar of the parish: Held to gain a settlement, though the original appointment should have been by the vicar; and the vicar at the time remonstrated with the curate for removing the pauper's predecessor.

Upon appeal against an order of removal, the Sessions confirmed the order, subject to a case.

The appellants set up a subsequent settlement gained by the pauper in the parish of Wakefield, by serving the office of clerk to the district church of Alverthorpe-cum-Thorn. That church had been erected under the stats. 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and a district had been assigned to it. Originally the vicar of Wakefield appointed a person of the name of Beaumont as clerk of this church; but he was removed by the then curate, who appointed the pauper in his place. The vicar at the time remonstrated with the curate for removing Beaumont, and said he alone had a right to appoint; but the pauper was continued in the office for about eight years, during which there was a succession of curates. The question was whether a settlement was gained.

Pashley and Hardy in support of the order of Sessions. 1. This is not a public annual office within s. 6 of 3 Wm. and M. c. 11. The statutes under which the district church was erected deal with ecclesiastical rights only. The present vicar of Wakefield still is as he was then incumbent of the whole parish; and the clerk of the district church has no freehold, as a parish clerk has. Even the curate does not execute an office within the statute. (R. v. Over, 2 Bott. 243; Burr. S. C. 746; R. v. Wantage, 2; East, 65.) It was doubted in R. v. Stogursey, 1 B. & Ad. 795, whether a parish clerk was an officer within the statute; but that is now settled. (R. v. Bobbing, 5 Ad. & Ell. 682.) 2. There must be a legal appointment. In this case the appointment was in the vicar and not in the curate. (Roberts v. Price, 4 C. B. 241; R. v. Stogursey, supra; R. v. Ecomarket, St. Mary, 3 Ad. & Ell. 151; R. v. Alston, 12 Q. B. 971.) R. v. Amluch, 4 B. & C. 757, was also referred to.

Hall, Overend, and Pickering, contra, were not called upon.

Lord CAMPBELL, C.J.—I am of opinion that a settlement was acquired. By s. 29 of 59 Geo. 3, c. 134, we find that this is an annual office; so that as to the tenure of the office there is no objection. Then as to the functions, they are of course the same as those of a parish clerk; and it has been held that the office of parish clerk is within the statute. No person can well fill a more prominent situation in the district, or is more likely to be known to all his neighbours. He is not like the organist, (a) who performs under a mask. Then the remaining objection is, that he was not properly appointed. Now, if it could be shewn that he was clearly an usurper, holding the office illegally, even though he had exercised it for some years, I should agree that the settlement was not gained; but how am I to say that in the present case, when it appears that he has filled the office for several years, with the full knowledge and consent of the individual in whom the appointment is said to be. I should say that probably the right of appointment was in the vicar; but, if he did not concur in the original appointment, I think he must be taken now to have ratified it; and the subsequent ratification is equal to an original concurrence in the act of the curate.

PATTESON, J. concurred.

WIGHTMAN, J.—R. v. Stogursey is distinguishable. In that case there was no appointment at all. The pauper was a mere usurper; and Lord Tenterden in his judgment expressly says: "The only proper appointment would have been by the vicar. If, however, he had been elected by the parishioners, and the vicar had afterwards assented, it might, perhaps, have been said that the service under such election was a good execution of the office."

KELK, J. concurred. Order quashed.

## BUSINESS OF THE WEEK.

Wednesday, April 30.

DOE dem. WESTBROOK v. JOHNSON.—Hall moved to enlarge rule for judgment as in case of a nonsuit. The plaintiff was under sentence for a misdemeanour in Coldbath-fields prison; and by one of the regulations of that prison no process could be served on any of the prisoners. The Court expressed an opinion that the regulation was an improper one. Rule enlarged.

Thursday, May 1.

DOE dem. EARL OF ASHBURNHAM v. MICHAEL. Rule to show cause.

KARON v. THE SWANSEA WATERWORKS COMPANY. Rule to show cause.

DOE dem. JONES v. WILLIS. Rule to show cause.

PRESTMAN v. COLLEGE. Rule refused.

SHERLOCK v. FULLER. Rule refused.

MILVAIN v. CASSAVETTI. Rule refused.

DOE dem. TATHAM v. CATTMORE. Rule refused.

FISKE v. BREWSTER.—Willis moved to rescind an order

(a) R. v. St. George, Hanover-square, 5 B. & Ad. 571.

of Wightman, J. for the examination of a witness upon a commission, upon the ground that such an order could not be made before plea. (Mundell v. Steele, 8 M. & W. 300.) Rule nisi.

BLAIR v. ORMOND.—Kinglake, Serjt. for the plaintiff. But for the defendant. Cur. adv. vult.

## JUDGMENTS.

SHERLOCK v. FULLER. Rule refused.

PRESTMAN v. COLLEGE. Rule refused.

MILVAIN v. CASSAVETTI. Rule refused.

Friday, May 2.

THE SUNDERLAND MARINE INSURANCE COMPANY v. KARNY. Judgment for the defendant.

THE MASTER, &c. OF THE TOBACCO-PYRE MAKERS v. LODGE. Judgment for the defendant.

SHERINGTON v. YOUNG.—J. D. Coleridge for the defendant. Barstow for the plaintiff.

ROOPER v. LOFTUS.—G. S. Carr for the plaintiff, prayed the judgment of the Court. Judgment for the plaintiff.

PHILLIPS v. BROWNE.—Hansen for the defendant. Needham for the plaintiff.

Judgment for the plaintiff as to one breach; for the defendant as to the other.

VALPY AND ANOTHER, ASSIGNERS, &c. v. OAKLEY.—H. Hill for the plaintiff. Welby (with him Beaman) for the defendant. Adjourned.

Saturday, May 3.

REG. v. W. BILLS.—Bovill and Crouch showed cause against a rule, to quash a rate for the repair of a sea wall. Procees, contra. Rule absolute.

REG. v. ST. MARY, PEMBROKE.—Whitmore and Rose, in support of the order of Sessions. Pashley, contra. Rate quashed.

REG. v. WELCH.—Locke and Hugh Hill, in support of conviction under Registration of Designs Act. Conviction quashed.

Monday, May 5.

DOE dem. SHALCROFT v. FALKNER. (Judgment.) Rule discharged.

Re BARBER.—Roebuck renewed the application of Mr. Barber to be admitted to practise as an attorney, upon fresh materials. Cur. adv. vult.

REG. v. HEWITT.—Warren moved to set aside bar rule for costs. Rule refused.

DOE dem. JONES v. WILLIS. Rule discharged.

Tuesday, May 6.

VALPY AND ANOTHER v. OAKLEY.—Argument concluded Judgment for the plaintiff, with nominal damages.

ACKMAN AND ANOTHER v. HERMAN.—M. Smith for the plaintiff. Barstow (with him S. Lucas) for the defendant. Judgment for the plaintiff.

HOLT v. DAW.—Cole for the plaintiff. Rew for the defendant. Cur. adv. vult.

COLLETT v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.—Coxing for the defendants. Bramwell for the plaintiff. Judgment for the plaintiff.

JOHNSON v. CLARK.—Willis for the plaintiff. Lusk for the defendant. Willis prayed leave to amend. Leave to amend.

STODDERT v. LUTHER VALLEY RAILWAY COMPANY.—Channell, Serjt. for the defendants, prayed leave to amend. J. Henderson, for the plaintiff. Leave to amend.

BERNARD v. SHELTON, Administratrix, &c.—Corrie for the plaintiff. Wells for the defendant. Judgment for the plaintiff.

LLOYD v. BLACKBURN, LLOYD v. FRANCE.—Bovill for the defendants. Crowder for the plaintiff. Judgment for the plaintiff.

Wednesday, May 7.

R. v. LONDON AND NORTH-WESTERN RAILWAY COMPANY. Judgment for the defendants.

[Several cases in the Crown Paper were disposed of, and will be reported next week.]

REG. v. CALDECOTT.—White, in support of the order of Sessions. Macaulay and Hayes, contra. Cur. adv. vult.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Thursday, May 1.  
DUNKLEY v. PARIS.

Forged writ of summons.—Attorney and solicitor. Where a forged writ of summons had been served on a party, the Court, on affidavit of the circumstances, granted a rule calling on the attorney, from whose office the writ issued, to shew cause why the writ should not be set aside and all proceedings stayed, and why he should not pay the costs of the rule; intimating, at the same time, that stronger proceedings ought to be taken.

Field moved herein for a rule calling on the plaintiff, or his attorney, to shew cause why an alleged writ of summons, served on the defendant, should not be set aside and all proceedings thereunder stayed, and why the attorney of the plaintiff should not be required to pay all the costs incurred, including those of this application. The defendant says in his affidavit that he was served with the alleged writ on Saturday last, and forthwith placed it in the hands of his attorney, who directed his clerk to search for the *præcipe* of the writ, and also at the office where the writ professed to have been sealed. Search was accordingly made on Monday, but no trace of the issuing of such a writ could be found in the offices. The gentleman whose name was endorsed as the attorney for the plaintiff was next called upon. He admitted the writ had issued from his office. The writ was handed to one of the Masters of the Court, and is now in his possession.

JERVIS, C.J.—If the writ be a forgery your motion is surely short of the mark.

Field.—If the Court thinks that a public duty is

to us to go further, we will. At present we thought insufficient to make this motion. We have been informed that many writs are in the hands of officers of the Court issued under similar circumstances. Rule nisi.

Friday, May 2.

THE EARL OF CLARENDON AND OTHERS v. THE RECTOR, VESTRYMEN, &c. OF ST. JAMES'S, WESTMINSTER.

Poor-rate.—Liability to be rated.—Societies devoted to literature.—6 & 7 Vict. c. 36.

A society for the purpose of collecting a comprehensive library by annual subscriptions, the members being allowed the use of the books on the premises or at their own houses, and its laws providing that no dividend or profit should be distributed among the members, is a society exempted from rates by the 6 & 7 Vict. c. 36. But if such a society sublets part of its premises to other societies, though they may be exclusively devoted to literature, and receives rent from them, it is not exempted by the 6 & 7 Vict. c. 36.

Special case.—This case was stated by consent of the parties, and by a judge's order, pursuant to the 12 & 13 Vict. c. 45, s. 11 (An Act to amend the procedure at Quarter Sessions, &c.).

Case.—This is a case of notice of appeal by the trustees of the society next hereinafter mentioned against a rate made on the 4th day of May, A.D. 1849, by the rector, vestrymen, churchwardens, and overseers of the poor of the parish of St. James, within the liberty of Westminster, in pursuance of the several statutes authorising the same, whereby the said society was rated in respect of the premises hereafter mentioned, occupied by it in the sum of 31l. 10s. It is not intended to raise any question in respect of the form of the rate, or of the time at which the notice of appeal was given. It is admitted that the rate in question is a local rate within the meaning of the Act of Parliament hereinafter mentioned, to which the appellants, in respect of their occupation hereinafter mentioned, were, at the time of making the rate aforesaid, liable to be assessed, unless they were entitled to exemption from such liability under the provisions of the Act of Parliament hereinafter mentioned, and that the facts hereinafter stated respecting the said society are true of the whole period for which the said rate was made (that is to say, of the year ending the 5th day of January, A.D. 1850, and that they are also true of the whole period, beginning with the 17th day of April, A.D. 1846, down to the day of the date of the notice of appeal aforesaid).

The London Library is the name of a society instituted A.D. 1841, for the purpose of establishing a large and comprehensive lending library in the metropolis, to which the members might resort for books of a superior class to those supplied by the ordinary circulating libraries. The books are lent to members only, and a collection of upwards of 50,000 volumes has been made by the society, and that collection constantly receives, at the expense of the society, additions, including almost every new work of interest or importance, both in English and foreign literature. The books of the society are deposited, and its business is transacted, in the house No. 12, St. James's-square, in the county of Middlesex, where apartments are open for the use of the members of the society from the hour of 11 a.m. to the hour of 6 p.m. daily.

This house has been leased to the Earl of Clarendon, the Earl of Devon, and Philip Pusey, esq. the trustees of the funds and property of the society, for a term of twenty-one years, at an annual rent; and they, as such trustees by the society, are the occupiers of the said house.

The society is supported in part by annual voluntary contributions from its members, and does not, and by its laws may not, make any dividend, gift, division, or bonus, in money, unto or between any of its members. The society has caused a catalogue of the books in its possession to be printed at the expense of the society, copies of which catalogues are sold to the members and to any other persons applying for them at the said house, at a sum below the cost price of printing. No profit has been ever derived from the sale of the catalogues by the society; on the contrary, the society has sustained a considerable loss by such printing and sale.

A portion of the said house is used for the meetings held by a certain society called "The Philological Society;" another portion of the said house is sublet for the transaction of its business to a society called "The Statistical Society;" certain portions of the said house were also used from the 1st of Jan. to the 24th of June, 1849, for the transaction of its business by a certain society called "The Hakluyt Society." The Philological Society pays to the society called the London Library, for its use of the said portion of the said house the sum of 35l. as an annual rent. The Statistical Society pays to the society called the London Library, for its exclusive use of the said portion of the said house the sum of 150l. as an annual rent; and the Hakluyt Society

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paid to the society called the London Library, for the said use by the Hakluyt Society of a portion of the said house during the time aforesaid, the sum of 5*l*. The said several annual rents, making together the sum of 185*l*. are wholly expended in defraying the expense of the said society called the London Library. The Philological Society, the Statistical Society, and the Hakluyt Society, are severally societies established for purposes of literature and science exclusively, and are not nor is either of them under the authority or control of, or (save as aforesaid) connected with the society called the London Library.

In the year 1846 the society called the London Library submitted, in the manner prescribed by an Act of Parliament (6 & 7 Vict. c. 36) entitled "An Act to exempt from County, Borough, Parochial, and other local Rates, Land and Buildings occupied by Scientific or Literary Societies" to the barrister-at-law for the time being appointed to certify the rules of friendly societies in England, three copies of a printed book containing along with other matters the laws, rules, and regulations for the management of the said society, called The London Library, for the purpose of ascertaining whether the last-mentioned society was entitled to the benefit of the last-mentioned Act, and the said barrister afterwards gave a certificate on each of the said copies that the last-mentioned society was entitled to the benefit of the last-mentioned Act, and transmitted one of such copies so certified to the clerk of the peace of the county of Middlesex, who laid the same before the justices of the said county at the General Quarter Sessions, held next after the time when such copy had been so certified and transmitted as aforesaid, and the same was then and there on the 17th day of April, A.D., 1846, allowed and confirmed by the said justices, and filed by the said clerk of the peace with the rolls of the sessions of the peace in his custody. A copy of the last-mentioned printed book is annexed to this special case, and marked A. The Philological Society and the Statistical Society have, since the commencement of the year 1851, obtained from the said barrister certificates that they are entitled to the benefit of the last-mentioned Act. The question for the opinion of this Court is, whether, under the circumstances above set forth, the said Earl of Clarendon, Earl of Devon, and Philip Pusey, esq., as such occupiers of the said house, as aforesaid, were or were not, at the time of the making of the said rate by virtue of the last mentioned Act, entitled to exemption from liability to be assessed or rated to any local rate, within the meaning of the last-mentioned Act, in respect of such occupation of the said house as aforesaid. If this Court shall be of opinion that the said Earl of Clarendon, Earl of Devon, and Philip Pusey, esq., as such occupiers of the said house as aforesaid, were so entitled, the decision of this Court is to be in favour of the appellants, and judgment of allowance of the said appeal on the ground of such exemption, and for such costs as this Court shall adjudge, shall be entered at the sessions accordingly. But if the Court shall be of the contrary opinion, its decision is to be in favour of the respondents, and judgment for dismissing the appeal, and for such costs as this Court shall adjudge, and for amending the said rate by substituting the names of the said appellants for the words, "The London Library," therein to be entered accordingly.

Channell, Serjt. (*D. D. Keane* with him) for the respondents, began according to the practice laid down in the Q. B. in special cases under the 12 & 13 Vict. c. 45, s. 11. (*Reg. v. Holbeck*, 20 L. J. 108, note 1, M.C.) First, this society is not a society for literary purposes within the exemption of the 6 & 7 Vict. c. 36. This is a lending library in one sense, and the members may use the books at the library or take them to their own houses. The subscription of the members is for their own amusement or instruction, instead of going to circulating libraries, and it cannot be argued that the Act intended to exempt joint-stock circulating libraries from rates. *The Churchwardens of Birmingham v. Shaw*, 10 Q.B. 868, it must be admitted, favours the appellants, but *Reg. v. Manchester*, 20 L. J. 113, M.C. which exempted a literary institution from rates, is not a very deliberate judgment upon this point. A society such as a musical club, the primary object of which is the gratification and amusement of the members and their families, is not exempted. (*Reg. v. Brandt*, 20 L. J. 119, M.C.; *Reg. v. Jones*, 8 Q.B. 719; *Reg. v. Pocock*, 8 Q.B. 729.) Secondly, the premises occupied by the society were not so used as to entitle them to be exempted from rates. Three other societies occupied them as sub-tenants. (*Purvis v. Trail*, 3 Ex. Ch. 345.) Thirdly, the barrister's certificate under 6 & 7 Vict. c. 36, is not conclusive. (*Reg. v. Phillips*, 8 Q.B. 745.)

Crowder (*Parry* with him) for the appellants. The case of *The Churchwardens of Birmingham v. Shaw*, is not distinguishable from the present. Secondly, the premises were occupied exclusively for societies devoted to literary purposes, to which societies the barrister has granted his certificate of exemption.

## JUDGMENT.

JERVIS, C.J.—I adopt the language of Lord Campbell in the case of *Reg. v. Brandt*:—"I trust this society may long flourish, paying its poor-rates." On considering this case I am of opinion that the respondents are entitled to the judgment of the Court; in fact, taking the case as it now stands upon the statement and argument, and considering it with reference to the facts found, it is entirely precluded by express authority. The two points which are urged are met by the decided cases. The first question is, is this society within the meaning of the Act of Parliament? However we might be inclined to consider whether it can be said to be a voluntary contribution in respect of which the parties get a personal advantage in reading the books at the rooms, it seems to be concluded by the authority of *The Overseers of Birmingham v. Shaw*, recognised and adopted in the case of *Reg. v. The Overseers of Manchester*, although the latter case in some respects differs from it, yet in the first case the facts are the same, that an institution like this is held to be within the meaning of the Act of Parliament. We are, therefore, in my opinion, precluded by a decided authority; and it is better to adhere to a decided authority than to speculate on the uncertain meaning of an Act of Parliament that raises conflicting decisions of law. On the facts stated, likewise, with respect to the second point, the case is met by express authority; because the fact of the occupation of part of the premises by the Statistical and other societies which are devoted to literary purposes, those societies not being certified at the time of the rate, and not being found by the case to be within the Act of Parliament by their rules and provisions, leaves this case precisely like the authority of *Purvis v. Trail*; because it matters not that we happen to know the objects of the Statistical Society, which are unfound in the case. It differs not from a lecture-room or an exhibition, or as Mr. Baron Parke puts it, "Suppose the society converted two-thirds of their premises into butchers' and bakers' shops, would they not be liable to be rated notwithstanding they expended the profits in the purchase of globes and astronomical instruments? The case is entirely met by the authorities on both points. It would be sufficient for us to stop there, because we are not called upon to pronounce another opinion; but in answer to the application to amend the rate, I apprehend the words of the Act shew we are not entitled to look into the objects of one society occupying under another society. The whole of the house is occupied by the London Library: the law imposes on the occupiers of the house the liability to the rates; the statute 6 & 7 of Vict. c. 36, interposes on this, and entitles them to exemption on complying with the terms of the Act of Parliament. The society must be for all purposes devoted to literature; and the authorities shew they must occupy the premises for the transaction of the business of the society; not for the purposes of literature, science, or the fine arts, but it must be for the purposes of the society which is liable to the rate. If they take premises larger than are required for their business, they must leave a part unoccupied, practically so, and if they receive rent for the use of them, that does not bring them within the protection of the Act of Parliament. Under these circumstances I am of opinion that the respondents are entitled to our judgment.

CRESSWELL, J.—I also think the respondents are entitled to our judgment according to the decided cases. I consider it is established by the statement in the case that this society is established for the purposes of literature within the meaning of this Act of Parliament, and further, that it is a society supported in part, at least, by annual voluntary contributions; but it appears that the society occupy a house, a considerable portion of which is not used for the purposes of the society, but for the purposes of other societies. It may be that those others are literary or scientific societies, for aught I know, but the purposes of those societies are not the purposes of the society in question, according to *Purvis v. Trail*, and that prevents the parties having the benefit of the Act. Indeed, I should be surprised if any other conclusion should be arrived at by any person reading the Act of Parliament.

WILLIAMS, J.—I am of the same opinion. In this case the appellants claim a total exemption from rates, on the ground that they are a society instituted for the purpose of literature, within the meaning of the statute 6 & 7 Vict. Assuming that they are so, it remains to be inquired, in order to sustain the right to exemption, whether the premises were rightly occupied by the appellants for the transaction of their business, and in carrying into effect the purposes for which the society was instituted. I think it is clear, upon the facts of the case, that they do not solely occupy the premises in question for the purposes of the transaction of their business or carrying into effect the purposes of the institution. The case of *Purvis v. Trail*, 3 Ex. Rep. appears to be completely in point, in regard to this case. I

think, really, it does not need any authority to shew that the appellants are not entitled to the exemption they claim. If they were, it would come to this, a literary society within the meaning of the Act of Parliament, when they were considering what house they would take for the purposes of the society, might say, "Such a house is a great deal too large: it does not signify, we will take it, and we can occupy it for our own purposes, and if we want to underlet the rest, we shall have the benefit: the parties will pay no rates who have taken part from us." I think it is impossible to suppose that any thing of that sort was contemplated by the Legislature.

TALFOURD, J.—I am entirely of the same opinion. Whatever opinion I might have formed with respect to the right of the society to bring itself within the description of a society intended to be exempted by the Act, I feel myself bound by the authorities; and I think, though the society has fulfilled the first condition, that it has failed entirely to conform to the second condition, which is necessary to entitle it to be exempt. It seems to me we must consider this society as one having rooms which they sublet to another society, and as if that other society had no connection with science, literature, and art. I think the authority of *Reg. v. Brandt*, which has been referred to, decides this question, and that the respondent is entitled to our judgment.

Channell, Serjt.—As I understand the facts of the case, I submit to your lordship that the statute calls upon the Court to give judgment in respect to the costs of the application. I can find no case in point. I believe this is the first case that has come before this Court.

JERVIS, C.J.—We must give judgment for dismissing the appeal with such costs as we shall adjudge. That is a matter for the Master, to ascertain what is done in the other courts. Do you know, Mr. Parry, what the practice is?

Parry.—I am not aware. I think it is in the discretion of the Court.

Channell, Serjt.—The practice, I believe, has been to give indemnifying costs, and the Court refers it to its own officer to ascertain the amount. The costs have been nominal—40*s*. At Sessions the parties have indemnifying costs.

JERVIS, C.J.—What do you mean by indemnifying costs—costs as between party and party?

Channell, Serjt.—Full costs as between parties. But I do not pledge myself to that. The Court of Q. B. have determined they shall be full costs as between party and party, and it refers it to its own officer to ascertain the amount.

Keane.—The case to which my friend Serjt. Channell refers, is the case of *The Holy Trinity of Exeter v. Hinde*, and in that case an application was made by Mr. O'Malley to have the costs taxed by the officer of the Court: Lord Campbell assented to that, and Mr. Justice Coleridge said it must be indemnifying costs, for it is really absurd to give 40*s*. That was the reason it was referred to the Master.

JERVIS, C.J.—If you tax the costs, you do not give 40*s*. The taxing shews it is not a capricious amount.

Keane.—The officer of the Crown office had the brief before him to tax the costs.

Parry.—The words are, "This Court shall give judgment for dismissing the appeal, and for such costs as this Court shall adjudge." This is a very recent Act of Parliament, and I do not think there has been any uniform practice. It may be possible the Court may give judgment against a party without saddling him with costs. At Sessions, though this appeal might have been dismissed, it would have been dismissed without costs.

JERVIS, C.J.—At Sessions there would have been no costs, and on appeal to the Q. B. there would have been 40*s*. only; on appeals they would not give full costs.

Parry.—That is where the case is sent up from Sessions to the Q. B.

Channell, Serjt.—Where the case is sent up from Sessions the costs are taxed.

TALFOURD, J.—I think it is in the nature of a rule to shew cause.

Allen (attorney for the respondents, as *amicus curiae*).—When the case is remitted from the Sessions the costs are taxed by the Crown-office. The costs follow as a matter of course, if the prosecutor succeeds.

Parry.—Only to pay such costs as the Court shall order.

JERVIS, C.J.—I think the better way will be for the officer to inquire and state to us what the practice is, and that we may have an opportunity of speaking to the judges on the point, for the sake of obtaining uniformity.

WILLIAMS, J.—It is a long time since I considered the subject, but I considered the costs were part of the order. You bring up the order by *certiorari*, and you are bound by the statute to give security for costs.

Parry.—That is where the case is sent to the Q. B.

JERVIS, C.J.—We will inquire about that.



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WILLIAMS, J.—That is what we are talking—where the case comes up by *certiorari*.  
TALFOURD, J.—I believe the costs are taxed in Crown-office in all these cases. This is in the nature of an appeal to the Sessions.

JERVIS, C.J.—We are to amend the rate by substituting the name of the appellants. Therefore, the rule must be drawn up to amend the rate on the London Library by inserting the name of the appellants.

Parry.—They failed in the court below, and we considered there should be an amendment.

CRESSWELL, J.—Have you got the statute under which the case is stated and the form of judgment?

Parry.—The judgment is to be entered at Sessions.  
Hannell, Serjt.—The practice has been this, the case has been drawn up by the Court, but it has been referred to the Master to inquire the amount the costs. That is taken to the next Quarter Sessions.

CRESSWELL, J.—No; the rule is drawn up by the Court; we by that rule agree that our opinion shall be given, and the judgment is in conformity with the decision of the Court, and for such costs as the Court shall adjudge may be found on motion by her party at the next Sessions, or the next after it. Therefore, the judgment is to be by the Sessions. All we have to decide first is, whether the party is or not entitled to exemption; we must then decide whether they are not to have costs.

Hannell, Serjt.—The rate is to be amended.

JERVIS, C. J.—That is not part of our judgment. It is part of your agreement.

Parry.—It is in the nature of a case reserved, and is tried by leave of the Quarter Sessions.

CRESSWELL, J.—“Such judgment shall and may be entered accordingly, and shall and may be the same in all respects as if the same had been given by the Quarter Sessions on appeal.” Therefore the judgment is to be the judgment of the Quarter Sessions.

Parry.—Yes, my lord.

JERVIS, C.J.—Do they give costs at Sessions, Mr. Serjt?

Hannell.—Very seldom.

JERVIS, C.J.—If this case had been heard at Sessions, there would have been no costs then. There might have been extra costs.

Hannell.—They might have been given, but they would have been nominal costs.

Hannell, Serjt.—If the case had been reserved to this Court, the costs would have been paid.

JERVIS, C.J.—On the second step costs would have been paid. It might have been there would have been extra expense.

Hannell.—If this case had been reserved as an appeal to the Sessions on this decision, the appellant would have had to pay costs to be taxed by the Court officer.

JERVIS, C.J.—Not costs of the first appeal.

Parry.—That is what I submit to the Court. I submit this, my lord, if it was in the discretion of the Court, probably there would be no costs we consent to have the rate amended. There is no doubt they are wrong in the form of the rate.

JERVIS, C.J.—I do not think the Court will alter the rule in each case. We should fix a rule, and in the other Courts what is the practice there.

CRESSWELL, J.—It is much better to have a fixed rule than have parties coming here speculating on it as may be the rule or decision of this Court.

Parry.—This is in the nature of an appeal.

JERVIS, C.J.—On the other hand they say just the same as if you had an appeal there.

Parry.—That is what I say.

JERVIS, C.J.—That is what I say, you have argued the first step.

CRESSWELL, J.—This is that step which is in general attended with costs.

Parry.—Provided the second step is taken.

CRESSWELL, J.—The question is, whether you amended the second, or whether you skipped over first. It is better to have a general rule.

Costs deferred.

## CROSS v. SEAMAN.

## City of London Small Debts Court.

A plaintiff claimed in the action more than 20*l*. and the defendant pleaded a tender as to part, the residue being under 20*l*. and the plaintiff took the sum out of court on the plea of tender, which, with the sum recovered by verdict, exceeded 20*l*. It was held that the defendant was not entitled to enter a suggestion to deprive the plaintiff of costs under the City of London Small Debts Act.

Before moved to enter a suggestion to deprive plaintiff of costs under the 10 & 11 Vict. c. lxxi. (The City of London Small Debts Act). The action was brought to recover 25*l*. 1*s*. 5*d*.; and the defendant pleaded except as to 7*l*. 15*s*. never indebted, to 7*l*. 15*s*. tender before action, and except as to 15*s*. payment. At the trial the plaintiff recovered 6*s*. 5*d*. in addition to the sum paid into court on the plea of tender. The 113th section deprives plaintiff of costs where he shall recover not more

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than 20*l*. This case is within the rule laid down in *Turner v. Parry*, 1 L. M. & P. 747. The plaintiff admits the tender before action, and takes the amount out of court. [CRESSWELL, J.—Could he have sued for 26*l*. in the City Small Debts Court?] No. [CRESSWELL, J.—Was he not entitled to have 26*l*.? and, if so, how was he to get it? The action was well brought for 26*l*.] The plaintiff would have had to pay the costs of the plea of tender, and if the tender had been of the whole amount claimed, the plaintiff would have failed in the action. [JERVIS, C.J.—How was the plaintiff to know that the defendant would plead the tender? CRESSWELL, J.—The plaintiff was entitled to have the whole 26*l*. and he must have given up some part of that sum before he could have sued in the Small Debts Court, and even that would not have got rid of the plea of tender, for the defendant might still have pleaded it to the residue.]

By the COURT.

Rule refused.

May 2 and 5.

## BODEN v. FRENCH.

## Contract—Construction—“Net cash.”

The defendant sold coals for the plaintiff in pursuance of these instructions, “Please sell for me 250 tons, &c. at such a price as will realise me not less than fifteen shillings per ton, net cash, less your commission for such sale.”

Held, that this did not shew a promise not to sell otherwise than for ready money.

Assumpsit.—The declaration was framed upon the following document, and alleged that the defendant promised “that he would not sell otherwise than for ready money.”

From the plaintiff to the defendant.

“Please sell for me 250 tons of anthracite coals now lying at Neal’s Wharf, Blackfriars, and belonging to me at such a price as will realise me not less than fifteen shillings per ton, net cash, less your commission for such sale.”

The defendant had sold the coals for fifteen shillings and sixpence per ton on credit. And it being contended at the trial that the letter would not bear the construction put on it in the declaration the learned judge was of that opinion, and directed a nonsuit.

Thursday, April 17.—Byles, Serjt. obtained a rule nisi to set aside the nonsuit, and enter a verdict for the plaintiff for 75*l*.

Dowdswell and Bramwell shewed cause.—The question is upon this declaration, whether the defendant was bound to sell for ready money, and had no option. The letter is to be construed with reference to the usage of trade. See the cases collected in the notes to *Wigglesworth v. Dallison*, 1 Sm. L.C. 299. It appeared that the custom was to sell for sixty days’ credit. [JERVIS, C.J.—And 15*s*. 6*d*. per ton is 15*s*. cash, allowing for two months’ interest.] Then the letter means, “as long as you can sell for such sum as will give me 15*s*. cash, I am satisfied.” If the meaning is doubtful, the nonsuit must be retained.

Byles, Serjt. and J. Gray, in support of the rule.—The letter is susceptible of five meanings. 1. The sale must produce me not less than 15*s*. per ton, and that ready money. 2. The sale must be upon such terms as, although the payment may be at a distant date, yet it must be equivalent to ready money. 3. The sale might be upon what terms the defendant pleased, yet he was to pay the plaintiff in cash. 4. The sale was to realise 15*s*. net, payable at some time or other. 5. That the sale was to average 15*s*. per ton, if sold in lots. The plaintiff contends that the first construction is the correct one; that the sale was to be for ready money, payable immediately. *Eddison v. Collingridge*, 19 L.J. 268, C.P.

JERVIS, C.J.—This rule must be discharged. At the trial I was of opinion that this was a contract at least of a doubtful kind, and that the plaintiff had not established the construction he was bound to make out. It is alleged in the declaration that the sale was to be for ready money only. And in the course of the argument it was admitted that the letter was open to four other constructions, on all of which a good deal might be said. Now to entitle the plaintiff to a verdict, he is bound to support his declaration by the undoubted construction of the instrument. But I think that the real meaning of the letter is this, please sell for me 250 tons of Anthracite coal, &c. so that you have for me at the time of the sale 15*s*. per ton cash. If so, the nonsuit was right.

CRESSWELL, J.—I am of the same opinion. The plaintiff took upon himself to construe this obscure instrument in his declaration. And he alleges that the defendant undertook not to sell otherwise than for ready money. The defendant says he never made any such promise as that. It is very common for an agreement to be made with reference to some usage of trade connected with the subject-matter of it, and I think that the true construction has been put upon it by the Chief Justice.

WILLIAMS and TALFOURD, JJ. concurred.

Rule refused.

Saturday, May 3.

## DOE dem. BEER v. NEAL.

## Judgment as in case of nonsuit—Practice.

Where the defendant, in an action of ejectment, stated by affidavit, that shortly after service upon him of the declaration, he gave up possession of the premises to A. W. B. a tenant in common with the plaintiff, and that, since then, he had neither authorised nor been aware of any further proceedings in the cause, the Court discharged a rule for a like judgment as in case of nonsuit, but without costs, the plaintiff to give an undertaking not to proceed with the ejectment.

Hake shewed cause against a rule obtained on a former day, by Ffooks, for a like judgment as in case of nonsuit, the plaintiff not having carried the cause down to trial. Issue had been joined on the 3rd June, 1849, but no notice of trial had been given. The defendant stated in his affidavit that the plaintiff and A. W. Beer were tenants in common; that the defendant, shortly after the service of the declaration in ejectment upon him, gave up possession of the premises to the said A. W. Beer, and that since then he had neither authorised nor been aware of the proceedings subsequently adopted, and that the present step was taken without any communication with him upon the subject. (The other affidavit stated that the disputes between the parties were now in Chancery, and that, in those proceedings, the attorney for A. W. Beer, was acting as solicitor for both parties.) Under these circumstances, it is submitted the Court should discharge the rule with costs, as it was evident the rule had been improperly moved for. (*Jenkyns v. Charity*, 2 Dowl. 197; *Doe dem. Steppins v. Lord*, 2 Dowl. 419; *Chitty’s Archbold*, 1301.)

Ffooks, in support of the rule. The affidavits shew that the defendant is favouring one of the tenants in common, in preference to the other; and this rule was necessarily moved for, because the action of ejectment could not otherwise be put an end to.

By the COURT.—The best course will be that this rule be discharged without costs, the lessor of the plaintiff undertaking not to proceed with the ejectment.

Rule discharged.

## RIDSDALE v. LAUTOUR.

## Discharge of insolvent prisoner—Suspicious affidavit—Attorney and solicitor.

In this case Ball on a former day had obtained the consent of the Court that the Master should inquire into and report upon an application then made for the discharge of the defendant, an insolvent prisoner. (17 Law T. 50, C. P.)

O’Malley, Q.C. now moved that the report of the Master should be read.

A reference to 17 Law T. 50 will shew that on the 17th of April last an application was made to the Court, upon the joint affidavits of General Peter Augustus Lantour, a prisoner for debt in the Queen’s Prison, and George Hetherington, of Great Union-street, Newington-causeway, “his agent,” for a rule to shew cause why General Lantour, who was in the Queen’s Prison in execution for two sums of 64*l*. 18*s*. 3*d*. and 112*l*. 10*s*. at the suit of the plaintiff, William Ridsdale, should not be discharged from custody, on the ground that the plaintiff was dead, and that his widow and sole executrix was dead also, and that they had left no personal representatives who could give General Lantour a legal discharge from custody. General Lantour, after stating the above facts in his part of the affidavit, stated that he had caused search to be made for a grant of administration, and had been informed, and verily believed it to be true, that there was no grant of administration either to the rights and credits of the said plaintiff, or to the rights and credits of his said widow; and that there were not now any personal representatives of the plaintiff. Hetherington in his part of the affidavit also stated that on the 26th of March last, by direction of Colonel Lantour, he searched at the Will-office at Doctors’ Commons for the will of the plaintiff, which he found, and for a grant of administration to the plaintiff’s widow; but that no grant could be found; that he had made diligent inquiries as to any next of kin of the plaintiff and his widow, and had been informed by a Mr. Byron, who held a situation in the India House, and was intimately acquainted with the plaintiff and his widow, that they had left no personal representatives, and that the plaintiff had died in insolvent circumstances; that he had also made inquiries for Simon Pile, the plaintiff’s attorney, and was informed that he had departed this life three years since; and that he had requested Byron to make an affidavit on the subject, but that he refused, alleging as a reason that his duties required his constant attendance at the India House, and that the board did not like their clerks interfering in business. The Court ordered one of the Masters in Chancery to inquire by such means as he should think fit for the next of kin, and also for the creditors of the plaintiff at the time of his death, and report thereon to

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the Court, and that the defendant should pay the costs attending such reference.

**Ray (Master)** now made a verbal report, stating that a day or two after the rule was granted Hetherington came to him and stated that he knew no parties who survived the plaintiff or his wife, or who knew anything about the matter. A day or two later, Mr. Samuel Shuttleworth, an attorney of Gray's-inn, appeared before him, and produced a copy of the *Morning Herald* newspaper, in which a report of the case had appeared, and stated that he appeared for a Mr. Rogers, who was the father of Mrs. Ridsdale, and who, seeing the report in the newspaper, had sent to inquire what had better be done, and that Mrs. Ridsdale died in August last, and that in September he (Mr. Rogers) had taken out letters of administration.

**Jervis, C. J.**—Who instructed the counsel who made the application? Who was the attorney in this case?

**Ball.**—I moved for the rule, my lord. The name of the attorney on my brief was H. J. Hembury, but I handed my brief to the Master, and have received no further instructions.

**Ray.**—Hetherington in his original affidavit swore that he had made diligent inquiry as to any next of kin of Mr. Ridsdale and his widow, and had been informed by a Mr. Byron, of the India House, that neither Ridsdale nor his widow had left any personal representatives; and, moreover, that Ridsdale died in insolvent circumstances. It now appeared that Byron had told Hetherington that Mrs. Ridsdale had a father named Rogers living at Newmarket, and that Hetherington had thereupon written this letter:—

"10, Great Union-street, Newington-causeway, London, March 19, 1851.

"Sir—Will you be so good as to inform me if there are any next of kin or relatives to William Ridsdale deceased? I am informed he was married to your daughter, who is also deceased.

"Yours obediently,

"G. Hetherington.

"To Mr. J. Rogers, trainer, Newmarket." Hetherington had placed before him an affidavit, in which he swore that he received no answer to this letter, but he (the Master) had also an affidavit of the attorney of Mr. Rogers, in which, after setting out Hetherington's letter, he said that he had received the following letter from Mr. Rogers:—

"Newmarket, May 2, 1851.

"Sir,—I received your letter, and have enclosed the letter I received, which I replied to, stating that William Ridsdale had a brother in or about London, and two sisters—one, Mrs. Wilson, at Redcar, Yorkshire—the other, Mrs. Horton, residing at Lewisham; and that my daughter, with her husband William Ridsdale, were dead, and left no children. I have also sent the letters of administration, as you requested, &c.—I am, sir, your obedient servant,

"JOSEPH ROGERS.

He (the Master) had also received this letter from General Laitour:—

"Sir,—Since I authorised Mr. Hetherington to apply to the Court in the matter of Ridsdale against myself, I have been informed that administration has been granted; and under these circumstances, it not being possible to pursue the rule further, I have instructed Mr. Hetherington to abandon it.—I am, &c.

"P. A. LAITOUR."

Then there was a second affidavit of Hetherington's, in which he said that on the 19th of March last, in consequence of information he had received from Byron, he wrote to Rogers the letter previously read, and that he posted the letter himself, either in the chief or one of the receiving-houses, on the 19th March, but, no reply reaching him, he on the 24th of the same month went to the Will-office, Doctors'-commons, to make search for the will of the said William Ridsdale, where he found the same, and that probate was granted to the plaintiff's widow on the 19th of February, 1850; that he on the same day made further search for any grant of administration to the said Wm. Ridsdale's widow, as in his former affidavit, but did not then find any, but that on the reference held on the 30th April last, before the Master, he was much astonished and surprised when he was informed by Mr. Shuttleworth that a grant of administration was made to Rogers in the month of September, 1850, whereupon he again went and searched, and to his surprise found a grant of administration sworn to under 200*l.* and that he must have accidentally turned over a leaf in the book, &c.—[**Jervis, C. J.**—Mr. O'Malley, what do you propose to do?] At present, my lord, I only ask that Mr. Hembury be ordered to pay all the costs of this application.

**Jervis, C. J.**—That will be ordered, of course. But had you not better move as a substantive motion, that Hembury be struck off the Rolls? Meanwhile I will consider with my brothers how Hetherington may be indicted for perjury; for, as far as I can do it, it shall be done.

**Cresswell, J.**—There is this difficulty in the case—that no rule has been granted; and then there

is the further one—for whom do you appear here?—by whom are you instructed?

**O'Malley.**—The Master informed me some one must appear to hear his report, or it could not be read. So I appear for Mr. Shuttleworth, who is acting for Mr. Rogers. It so happens that the report in the *Morning Herald* acted as an advertisement to Mr. Rogers, and seeing it he has come before the Master, as administrator, to defend his rights. But for this your lordships would never have heard the Master's report, and then this scene of iniquity would never have been brought to light.

**Jervis, C. J.**—Having now heard the report, you may frame a substantive motion to strike the attorney off the rolls, and any other motion you may think proper. In the meantime let the report be formally drawn up, and again mentioned, and then you will be prepared to move upon it.

Order accordingly.

Wednesday, May 7.

JANES v. WHITBREAD AND OTHERS.  
Deed—Mistake.

In an assignment, the grantee was called James James, his right name being James Janes, and his residence and occupation were given. He executed the deed by his right name, and it appeared at the trial that his residence and occupation were correctly stated in the deed:

Held, that the assignment was not void for uncertainty, the question as to the party intended to be grantee being one of identity, and the plaintiff being proved to be the party intended.

**Interpleader issue**, to try whether certain goods which had been seized by the sheriff on the 4th of March, under an execution against one Ellis, were the property of the plaintiff at the time of seizure.

At the trial before Maule, J. it appeared that the defendants obtained judgment against Ellis on the 12th of February, and that the plaintiff claimed the goods under an assignment dated the 10th of February. The indenture of assignment was put in, and it appeared that the assignment was to the plaintiff as a trustee for the benefit of creditors; and that in the part describing the parties, the plaintiff was called James James, trustee, &c., of 70, Westmoreland-place, City-road, tailor and draper, instead of James Janes; that in the body of the deed he was referred to as trustee, and not by name; and that he executed the deed by his right name, James Janes. It further appeared in evidence that his residence and calling were described correctly. Verdict for the plaintiff.

**M. Chambers (Honyman with him)** now moved to set aside the verdict and enter a nonsuit, or to enter the verdict for the defendants. The deed is void for the misnomer as against the defendants, who are creditors. No such person as James James was proved to be in existence; it is the same as if the name of the grantee had been in blank. "If an ordinary man grant by his surname only, without any name of baptism; or by his name of baptism, without any surname at all: in these and the like cases the grant will be void for uncertainty, unless there be some matter in the deed to help it." &c. (Shep. Touch. 234.) [WILLIAMS, J. referred to Shep. Touch. 236:—"In some cases, though the name be mistaken, the grant will be good; as if a grant is made to Alfred Fitzjames by the name of Ethelred Fitzjames." "And if a lease be made to J. S. for life, the remainder to him that shall come first to St. Paul's such a day, or to him that J. S. shall name in three days, this is a good grant of the remainder."] Viner's Abr. Additions, was also referred to.

By the COURT.—Upon this point there will be no rule. The grantee is described as being of a certain place and occupation, and so far as he binds himself by the deed he is estopped from denying its validity by his execution; and so far as he takes any benefit under it, his description is a matter of identity; and it was clearly established at the trial that the plaintiff was the party meant, by proof of his residence, trade, and execution of the deed. *Refused.*

## BUSINESS OF THE WEEK.

Thursday, May 1.

**STEEBING v. MOTTAM.**—*Bill* moved herein for a *discovery*, submitting that the calls, appointments, and search for appearance were regular. [CRESSWELL, J.—There is no statement from beginning to end of your affidavit that the place where the endeavours to serve the defendant were made was his residence or his place of business; neither is it stated that the deponent believed the place where the attempted service was made, was one or the other. *Refused.*

**v. —**—*Hawkins* moved for leave to enter an appearance *sec. stat.* on a return by the sheriff of *nulla bona* and *non est inventus* to a writ of *distingas*. The defendant had not appeared, and he could not be anywhere found. *Granted.*

**ABLEY v. DALE.**—*Leak* shewed cause, and *Hugh Hill* was heard in support of the rule. The question was, whether, after a party had been dealt with in the Insolvent Court, he was liable on a judgment summons in the County Court. The following cases were cited and authorities referred to. *Ex parte Horsey*, 1 L. M. & P. 16; *Steel v. Both*, 1 L. M. & P. 440; *Ewart v. Jones*, 14 M. & W. 774;

*Thompson v. Ingham*, 19 L. J. 189, Q.B.; *Ex parte Kinnings*, 4 C. B. 507; *Bircham v. Oveighon*, 10 Bing. 11; *Francis v. Dodsworth*, 4 C. B. 302; *Phillips v. Sherwood*, 6 Q. B. 944; *Rord v. Dwyford*, 8 Q. B. 583; 9 & 10 Vict. c. 95; ss. 78, 90, 98, 102, 108. By the COURT.—This is a question of great importance; as it will regulate the practice of many of the County Courts, therefore the Court will consider its judgment. *Cur. adv. vult.*

**BRYAN v. LIVINGSTONE.**—*Channell*, Serjt., prayed the Court that this case might be ordered to stand over to a future day. *Leave granted.*

Friday, May 2.

**SMITH v. HARTLEY.**—*Demurrer* to a declaration for uncertainty. The declaration was upon an award under a reference of certain matters in difference respecting railway shares. The objections to the declaration were, 1st, that the nature of the difference between the parties, and, 2ndly, that the amount to be paid were not specifically stated; and, 3rdly, that the request to pay the balance was not sufficient. *Brant* (Hogins with him) argued in support of the demurrer, and *Hunfrey* (Husler with him) contra. The Court said that, upon the construction of the whole declaration, the objections were not tenable. *Judgment for the plaintiff.* *Part heard.*

**BOHEN v. FRENCH.**

Saturday, May 3.

**RICHARDS v. LEWIS.**—*Alexander*, Q.C. prayed the Court to order that this case be taken on Monday, as it would add greatly to the convenience of counsel, and probably not disturb the arrangements of the Court. *Jervis, C. J.*—The cause must be taken in its turn. *Refused.*

**Dox dem. v. —**—*Corrie* moved for judgment in this cause against the casual ejector. The tenant could never be found at home, and his wife refused to accept service, whereupon the rule was thrown through the window. *Rule granted.*

**PEITCHARD v. BAGSHAW.**—The Court, after taking time to consider, this day delivered judgment in this case, making absolute the rule. The point they decided was that the production of the roll and the alias and pluries writs were not sufficient evidence that the indorsements upon the writs were made at the time of service, so as to defeat a plea of the Statute of Limitations. The case, when the shorthand-writer's note of the judgment is furnished, will be promptly reported. *Rule absolute.*

Monday, May 5.

**CHARLEWOOD v. ELLIOT.**—*T. Jones* moved herein for a writ calling on the plaintiff to shew cause why judgment signed in this case should not be set aside, and why the roll should not be brought in, with liberty to the defendant to enter thereon a suggestion to deprive the plaintiff of his costs. The action, which was brought on the 28th of June, 1850, was tried before the Secondary of the City of London. Verdict for the plaintiff, 8*l.* The secondary had given no certificate for costs. The defendant's affidavit shewed that the whole cause of action arose within the jurisdiction of the County Court of Middlesex, and duly negatives all the exceptions in the statute. [Jervis, C. J.]—Does the affidavit state in what district court the defendant resides? That is not material; it is enough if it states the county. [Jervis, C. J.]—What is your authority for that? I bring myself within the Act by saying that the cause of action arose within the county of Middlesex, and that the parties reside within twenty miles of each other. There is a court for every part of the county, so that the cause of action must have arisen within the jurisdiction of a County Court of Middlesex. The goods were sold and delivered within the Brompton County Court of Middlesex. [TALPOUR, J.]—There is no such court. The affidavit expressly states "that the defendant dwelt and carried on business within the Brompton district of the County Court of Middlesex;" the whole cause of action, in fact, arose within the jurisdiction of the County Court of Middlesex, and that statement alone is sufficient. It would seem unreasonable that where the defendant does not reside in the same district as the plaintiff, the latter should have the privilege of going to the Superior Court. In any view of the matter, the defendant, it is submitted, is entitled to this rule. [Jervis, C. J.]—You may take a rule; and if it should turn out that there is no court bearing the title of the Brompton District County Court, the rule on costs shewn will be discharged with costs. *Rule nisi.*

**BRADNEY v. GARTH.**—*Brerer* moved for a *distingas*. The requisite calls and appointments were duly made at the defendant's residence in Hans-place, Chelsea. Search for appearance was made yesterday, and none entered. *Granted.*

**ATKINSON v. BOTTRILL.**—*Ball* moved for a *distingas*. The calls and appointments had been duly made. The defendant was always from home, but his daughter had said if there was anything to leave for him it should be given to her. The copy writ was then left with her. Search for appearance was made yesterday, but defendant had not entered an appearance. *Granted.*

**HAND v. BOY.**—*Thomas* moved for an order to set aside a rule granted herein that the defendant might plead several matters, on the ground, 1st, that the summons had no judge's signature; 2ndly, that it was served after nine o'clock at night. [Jervis, C. J.]—You lie by, and come now too late. *Refused.*

**SERRELL v. THE DEERY, STAFFORD, and WORCESTER JUNCTION RAILWAY COMPANY.**—*Evans* moved for a rule to shew cause why a certificate for the costs of a special jury should not be rescinded, on the ground, 1st, that the certificate was granted too late; 2ndly, that it had been granted by the late Chief Justice Wilde, after he became Lord Truro, and had ceased to be a judge of this Court, and after the appointment of the present Chief Justice. (6 Geo. 4, c. 50.) It is submitted that in this case the delay has gone beyond the indulgence of the Court, and the usual arrangement of counsel. The cause was tried on the 30th of December, 1849. Verdict for the defendant, subject to a special case, which was urged in this Court on the 11th of June last past. The defendants having chosen their own time to bring the plaintiff before the Master for taxation of costs, and the production of the record without any certificate for a special jury on the back thereof; I ask, will the Court extend the indulgence beyond what it has hitherto done? As to the second point, we have a certificate signed "Truro;" now, there never was any chief justice or judge of this Court bearing that title. A great deal of learning on this point is collected

## COMMON BENCH.

## EXCHEQUER.

## EXCHEQUER.

**Bacon's Abr. Tit. "Court."** letter C. J. Jervis, C.J.—The act of Lord Trevelyan having now a higher status does not invalidate his act. The thing was agreed to in my presence, it was like a bargain between the parties.—*Overruled.* J.—It is quite impossible to accede to the application. If we did, we should be destroying all the good which exists amongst the gentlemen of the Bar.

**ROBERTO v. GURNEY.**—This was an action of *conscriptio* a policy of insurance effected in the ship *Habe*, bound from Odessa to Liverpool, brought against the Alliance Marine Insurance Company. The question was, whether there had been a total or only a partial loss of cargo. Verdict for the plaintiff, with leave to move to reduce the damages, or for a new trial. *Knowles, Q.C. and Crompton* were this day heard for the plaintiffs. *Port heard.*

**BODIN v. FRENCH.**—Concluded, see the report. *Rule discharged.*

**RATT v. PARKINSON and WROTH.**—D. D. Keane and D. Power showed cause against a rule to set aside a nonsuit in this case, tried at the Bucks Spring Assizes, 1881. *Spies, Serjt. O'Malley, and Wortledge* in support of the rule. To be reported. *Rule discharged.*

**JAMES v. WHITFIELD and OTHERS.**—Tried at the sittings at Middlesex during this Term, before Maule, J. verdict for the plaintiff. *M. Chambers (Honyman with him)* moved to set aside the verdict and enter a verdict for the defendant, or a nonsuit, or for a new trial, as against evidence. One ground of application on which a rule was refused is reported above. As to the verdict being against evidence, *Consult the judge.*

**PENSON v. WOODROFFE.**—*Wordsworth* moved for a *discharge* to compel appearance. *Granted.*

**DONHAM v. HALL v. GALVIN.**—In this case, in which the court took time to consider whether they would grant a *discovery* for a new trial, the Court said that a receipt of rent by Lord Southampton had been proved, which was evidence of a seisin in fee in him, and that it lay upon the defendant to cut down that estate and show that he had not done it, and failing to do that, the verdict for the lessor of the plaintiff, who traced title through Lord Southampton, must stand. *Rule refused.*

**MOUNT v. HORN.**—*Shinner* moved to set aside an interlocutory judgment for irregularity. *Referred to the Judges' Chambers.*

**ANONYMOUS.**—*Branswell* moved for a rule nisi calling on an attorney to pay over two sums of 1,432l. 10s. and 17l. 19s. 2d. these being admitted to be due to the attorney's clients. It appeared that the attorney's bill had not been taxed, and the Court refused to grant this rule before taxation. *Rule refused.*

**WILSON v. FRANKLIN.**—*Phipson* moved for a prohibition to the judge of the Shropshire County Court, on the ground that the claim on the plaintiff had been brought within the limited amount by a set-off. *Rule nisi.*

**PRICE v. BARKES, PRICE v. LITTLE, PRICE v. CUNNINGHAM.**—Three actions had been brought by the plaintiff against parties to a bill of exchange for 14l. 15s. 9d. and 10s. writ was indorsed 2l. costs. The debt and costs were paid, and a summons taken out at chambers to tax and refund the excess. An order was made for refunding in each case. It was now sought to review the taxation, and to call upon the attorney to refund all but 10s. 2d. the sum alleged to be due for costs on each case. *Branswell* showed cause. And T. W. Saunders appeared in support of the rule. *Rule absolute.*

**ROBERTO v. GURNEY.**—*Blackburn* showed cause, and F. H. Watson and H. Hill, supported the rule. Argument concluded. *Cur. adv. vult.*

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENNING, Esqrs. Barristers-at-Law.

Tuesday, Feb. 11.

EMBREY v. OWEN.

The right of the proprietors of adjacent lands to the benefit of running streams is not absolute and exclusive, but is subject to the similar rights of all the proprietors of the banks on either side. It is only, therefore, for an unreasonable and unauthorized use of the water that an action will lie; but where such unauthorized use is made of it, an action will lie, even although there be no actual damage to the plaintiff.

*Branswell (E. Beavan with him),* showed cause. *Welsby, Fowler, and W. Wynn,* in support. The facts, arguments, and cases, fully appear in 18

## JUDGMENT.

Wednesday, April 30.—**PARKE, B.**—This case as argued before the judges at the sittings after last term. The action was brought by the plaintiff, as coupler of a water grist mill, against the defendant, Mrs. Owen, as owner of land on one side of the stream above the mill, for diverting part of the water for the purpose of irrigating the meadows in the occupation of her tenant, John Jones. The case was led before my brother Talfourd at the last Summer sittings for Montgomeryshire, and a motion was afterwards made in Michaelmas Term, on a point served by the learned judge to enter a verdict for the plaintiff, and for a new trial for misdirection, and enter judgment *non obstante veredicto* if necessary. The declaration contained three counts, to which there were many pleas, but, from the course the use took at the trial, it is unnecessary to refer to any part of the record but that relating to the first and fourth issues, nor to the pleas upon which those issues arise, except so far as they are pleaded to the second count. That was a count, stating in the ordinary form, the plaintiff's possession of a water grist mill, his right to have and enjoy the benefit and advantage of a stream or water-course, which ought to have

run and flowed for the supplying thereof with water for the working thereof, save and except when it might be reasonably necessary to irrigate the defendant's closes on the south side of the stream; and the breach assigned was, that the defendant made cuts, and sluices, and aqueducts above the mill, and diverted the water from it, to the damage of the plaintiff's mill. The first issue is on the plea of not guilty. The fourth issue on the fourth plea stated that John Jones was possessed of four closes on the bank of the stream above, and the bed of it up to the mill, and the waters immemorably flowed over that part of the bed at certain periods of the year, namely, January, February, and March, when the water was more than sufficient for the use of the mills. That the defendant as servant of John Jones diverted small and reasonable quantities of water for the irrigation of the four closes, which, excepting such a small quantity as was absorbed and used in irrigation were returned to the stream above the mill, and that she made cuts for that purpose. The plea also averred the diversion was not continuous, but only intermittent, and the quantity of water that was absorbed and lost was very small and inappreciable, and that the diversion caused no damage to the plaintiff's mill. To this plea there was a replication *de injuria*. On the trial it was proved that the defendant did divert the water by means of a cut and aqueduct, when the river was full, for the purpose of irrigating the four fields on the northern bank of the stream, and also that there was a loss of a portion of water by absorption and evaporation. The quantities were differently calculated by scientific witnesses on both sides, one for the plaintiff estimating it at four or five per cent. and one for the defendant at only a fractional part, one-seventh per cent. even in summer. All the witnesses concurred that there was no sensible diminution by reason of the diversion, none cognizable by the senses, but the amount of loss was ascertainable only by inference from scientific experiments, of the absorption and evaporation of water poured on soil. The learned judge left some questions to the jury on other parts of the case not material to be now adverted to; and on those relative to the first and fourth issues he left the two following; first, were the quantities of water absorbed and evaporated in the process of the defendant's irrigation small and inappreciable quantities? secondly, did the abstraction of the water by the defendant cause any sensible diminution of the natural flow of the water of the stream? Both these questions were answered in favour of the defendant, the first in the affirmative, the second in the negative. The learned judge directed a verdict for the defendant, on the plea of not guilty, reserving liberty to move to enter the verdict for the plaintiff on that plea, and a rule nisi was granted to enter it accordingly. All the issues were found for the defendant. On the fourth issue the learned judge left the question to the jury in the terms of the plea whether the quantity of water lost was small and inappreciable; but in explaining the meaning of the latter word, the learned judge intimated that he felt great difficulty in affixing a legal meaning to the term "inappreciable." He suggested that it might mean so inconsiderable, as to be incapable of value or price. The rule for a new trial, on the ground of misdirection was granted in consequence of the objection to that mode of interpretation. We are not prepared to say the learned judge was correct in the interpretation of the word "inappreciable," when connected with the word "quantity," nor are we sure that he was not. The word "unappreciable" or "inappreciable" is one of a new coinage, not to be found in Johnson's Dictionary, Richardson's, or Webster's. The word "appreciate" first appears in the last edition of Johnson by Todd in 1827, with the explanation, "to estimate and value." And assuming that to be the true meaning, which we suppose, it is a compound adjective signifying a quantity when not capable of being estimated or valued, and, in that sense, the plea was not proved. It is, however, matter of little importance, for, assuming that the word was wrongly explained, the only consequence would be that a nice question would arise whether the fourth issue, and others involving the same terms, ought to be found for the plaintiff or not. We are very much disposed to think they might have been found rejecting the word "inappreciable" from it. The issue on not guilty remains, and it is now found for the defendant, as we think it ought to be, and there should be no new trial if the defendant consents, as he probably will, that the fourth and other corresponding issues should be found for the plaintiff. This course was adopted in the case of *Stead v. Anderson*, 4 C.B. Rep. 806. The important question is that which arises on the plea of not guilty, the jury having found that no sensible diminution of the natural flow of the stream to the plaintiff's mill was caused by the abstraction of the water. That the working of the mill was not in the least impeded was clear on the evidence, and on that finding we think the verdict was properly ordered to be entered for the defendant. It was very ably

argued before us by the learned counsel for the plaintiff that the plaintiff had the right to the full flow of the water in its natural course and abundance as an incident to his property in the land through which it flowed, and any abstraction of the water, however inconsiderable, by another riparian proprietor, although productive of no actual damage, would be actionable, because it was an injury to the right, and, if continued, would be the foundation of a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition; with respect to every description of right, actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew the violation of a right, in which case the law will presume damage *injuria sine damno* as actionable, as is laid down in *Ashby v. White*, 2 Ld. Raym. 938, by Lord Holt, and in many subsequent cases which are referred to for the truth of that proposition in the very able judgment of the late Mr. Justice Story, in 3 Sumner's American Reports, 189, in *Webb v. The Portland Manufacturing Company*. But in applying this admitted rule, in the case of rights to running water, to the analogous cases of air and light, it must be considered what the nature of those rights is, and what is a violation of them. The law, as to flowing water is now put on its right footing by a series of cases beginning with *Wright v. Howard*, 1 Sim. & St. Rep. 190, followed by *Mason v. Hill*, 5 B. & Adol. 1, and ending with that of *Wood v. Waud*, 3 Ex. Rep. 748; and is fully settled in the American Reports. (See 3 Kent's Commentaries, Lecture 51.) The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes. The flowing water is *publici juris*, not in the sense that it is *bona vacuum*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have the right of access to it. None can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his own possession, and that during the time of his possession only. But the proprietor of the adjacent land has the right to the usufruct of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state. If it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable. But it is the right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side, with a reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie; for such an unauthorised use it will lie, as the cases above cited from the American Reports shew, although there may be no actual damage to the plaintiff. In the part of Kent's Commentaries to which I referred, the law upon this subject is most perspicuously stated, that it will be of advantage to cite it at length. "Every proprietor of lands on the banks of the river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solum*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere* is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and lands of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat*

*Wednesday, April 23.  
RIDWAY v. LORD STAFFORD.  
Landlord and tenant—Distress and sale of produce  
of farm to be consumed on the premises—Right  
of reservation that produce be spent thereon.  
Where goods are taken as a distress upon the farm  
of a person bound to spend its produce thereon,  
these goods ought not to be sold with reference to  
that covenant, but should be disposed of for the*

NEAT V. HARDING AND ANOTHER.  
*Money had and received—Waiver of trespass. A. and B. entered the premises of C. and A. seized certain moneys belonging to D. (C.'s son), and afterwards they paid the same into a bank to their joint account:*  
*Held, that D. might waive the tort, and maintain an action against A. and B. for money had and received.*  
*Action for money had and received.*  
*Plea.—Non assumpsit. Verdict for plaintiff, damages 163d.*  
*Kinglelake, Serjt. moved for a rule to show cause why a nonsuit should not be entered herein pur-*

Route refused

*Knowles, Q. C.* moved in this case, tried by *Cresswell, J.* at Newcastle, to set aside the plaintiff's verdict and to enter a nonsuit; the action was brought to recover 143*l.* for money had and received, and the question was whether one Williamson, one of the abovenamed plaintiffs, should have been joined in the action; the defendant was a Dutchman, and in January 1850, was employed by one Donald, who afterwards became bankrupt, to make out a bill of lading for a ship; Donald was a partner, and the ship's captain, and the defendant knew no one else in the band, and the defendant knew no one else in the transaction except Donald. Serle owned one-eighth, Thompson one-eighth, Wilson two-eighths, Henderson one-eighth, and Donald three-eighths. Williamson had then no interest at all in it; Donald was not a plaintiff here, but Williamson was. On the 8th April defendant sold the ship for 1,000*l.* On the 22nd April the money was paid, and defendant, by Donald's order, paid Wilson 350*l.* Thompson 125*l.* Henderson 115*l.* Serle 75*l.* and various other expenses which came to 191*l.* 13*s.* and all other disbursements which came to the balance. Three days after Donald had given the defendant directions to sell the ship, he mortgaged one-eighth to Williamson; and on the 4th of March, he also conveyed two-eighths to Henderson. The defendant had no notice of these mortgages, nor did Donald convey any legal interest to Williamson. It was a mortgage, not under seal; besides which the mortgage was afterwards defeated by the repayment of the money. He referred to *Sim v. British*, &c.



## EXCHEQUER.

Adol. 589, and to the Register Act, 8 & 9 Vict. 89, s. 45, which provides for proper entries in such cases being made in the book of registry and endorsement, &c.; and also that a mortgagee is to be deemed an owner. *Cur. adv. vult.*

*Saturday, May 3.*—**POLLOCK, C.B.**—In this case, which was tried before my brother Cresswell, moved Mr. Knowles, on the ground that a person of the name of Williamson, one of the plaintiffs, was not properly joined as a plaintiff, we are of opinion that, under the circumstances, Williamson was a contracting party in point of law. The ship had been put into the hands of a person of the name of Donald for the purpose of sale; and before the actual sale a share of his was transferred to Williamson, and Williamson became the owner of one of the shares of the vessel; and the contract, in point of law on the date when it was made, was a contract by the persons who constituted the plaintiffs in the action. We are of opinion, therefore, that the action was well brought in the name of that plaintiff, and that there should be no rule to enter a nonsuit.

*Rule refused.*

**LOCK V. BAKER.**

*Master and Apprentice.—Dismissal of apprentice.—Misconduct.*

*Humphrey, Q.C.* moved in this case, tried before Alderson, B. at Lincoln, when a verdict for 40s. was given for the plaintiff to set aside that verdict, pursuant to leave, and enter it for the defendant. It is an action of covenant upon an indenture of apprenticeship, brought against the master for dismissing the apprentice; the defendant, by his third plea, justified doing so, in consequence of the apprentice's treating women, said to be of bad character, with oysters, in the master's shop; of leaving the master's shop, and remaining out all night, and, being asked where he had been during the night, said he had slept at home that night, which was a fact untrue, with other minor grievances set up by the master, as grounds of complaint against the apprentice, and the question was whether these are sufficient. *Cur. adv. vult.*

*Saturday, May 3.*—**POLLOCK, C.B.**—In this case, which was tried before Mr. Baron Alderson, we are of opinion that the contract is not dissolved, and that, therefore, there will be no rule.

*Rule refused.*

*Wednesday, April 30.*

**DON DEM. POTTOW AND ANOTHER V. FRICKER AND ANOTHER.**

The word "estate" means primarily the thing to be devised, and will carry a fee-simple, unless restrained by other expressions. I give Horsecroft, my estate that I now live in, to my son."

*Field, to be a devise in fee-simple.* Ejectment to recover two equal undivided third shares, the whole into three equal shares to be divided of an estate called Horsecroft, and the tithes thereof, situate in the parish of Lyneham, in the county of Wilts.

The declaration contained three demises, all of them dated the 1st of January, 1850, the first being joint demise of two equal undivided third shares of the premises sought to be recovered by John Pottow and John Curtis. The second being a demise of one equal undivided third share of the same premises by John Pottow, and the third being a demise of one equal undivided third share of the same premises by John Curtis.

*Plea.*—Not guilty.

Ultimately the following case was stated for the opinion of this Court, according to the form of the statute:—

*Case.*—John Prior, of Christian Malford, in the county of Wilts, maltster, being seized in fee-simple in possession of the said estate, called Horsecroft, previous to his marriage with Maria Cockle, executed an indenture of settlement, bearing date the 7th day of March, 1770, of which indenture only one part executed by the said John Prior alone appears to be now in existence, and which indenture is as follows:—"This indenture, tripartite, made the 7th day of March, in the 10th year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. and in the year of our Lord 1770, between John Prior, of Christian Malford, in the county of Wilts, maltster, of the first part, Maria Cockle, of Calcare, in the parish of Hilmarton, in the said county, sister, of the second part, and John Sheppard, of the parish of Newbury, in the county of Berks, and Francis Sheppard, of Kinbury, in the said county of Wilts, of the third part, witnesseth that in consideration of a marriage intended to be had and solemnised between the said John Prior and Maria Cockle, and of the conveyance and settlement hereinafter made by the said Maria Cockle of the estates, appurtenances, money, and hereditaments hereinafter mentioned, and also in consideration of such further advancement of benefit, in money, lands, or otherwise, as will accrue or raise to the said John Prior by the said intended marriage, and for settling and assuring a competent jointure and maintenance for the said

Maria Cockle, and her child and children, during her life, and also for settling and assuring the free estate, commonly known as Horsecroft, situate, lying, and being in the parish of Lyneham, belonging to the said John Prior, and for surrendering all and singular other the moneys, goods, chattels, with every the premises belonging to the said Maria Cockle, except 100l. of good and lawful money of Great Britain, to be reserved to the said John Prior, and for and in consideration of 5s. of good, &c. by the said John Sheppard and Francis Sheppard, or either of them, to the said John Prior, paid in hand, at or before the sealing and delivery of these presents, the receipt, &c. and for divers other good causes and considerations him thereunto moving, he, the said John Prior, hath granted, bargained, sold, released, and confirmed unto the said John Sheppard and Francis Sheppard, or either of them (in their actual possession, &c.), and to their heirs, all that the said freehold estate, right, title, interest, use, property, possession, benefit, trust, claim, and demand whatsoever of him, the said John Prior, of, into, or out of all and singular the said estate, moneys, and other the premises hereinbefore mentioned, and intended to be hereby released by the said Maria Cockle, except the 100l. granted to the said John Prior, and to and for no further use whatsoever. And this indenture further witnesseth that in consideration of the said intended marriage, and of the jointure intended to be made and provided for the said Maria Cockle during the term of her natural life, in and by this present indenture, pursuant to the covenants and agreements herein contained, and for settling the said freehold estate and premises thereunto belonging and appertaining, together with the other moneys, chattels, and effects (except the said 100l. before excepted to the said John Prior), and also for and in consideration of the sum of 5s. of &c. to be paid by the said John Sheppard and Francis Sheppard to the said John Prior, in hand, &c. the receipt, &c. and for divers other good considerations, the said John Prior hath bargained, sold, assigned, released, and confirmed, and by these presents doth bargain, sell, assign, release, and confirm unto the said John Sheppard and Francis Sheppard in their actual possession, by virtue of this present indenture tripartite, in trust for the said Maria Cockle,—to the use of her first son of the said John Prior, on the body of the said Maria Cockle, lawfully begotten, and to the heirs male of the said son, lawfully begotten, and that the said John Prior now hath in himself full power and lawful authority to sell, release, and dispose of the said freehold estate, with every the appurtenances, with all other the chattels, moneys, and effects, except as hereinbefore is excepted, for the use, benefit, and behoof of the said Maria Cockle as aforesaid, according to the true intent and meaning of these presents, to the uses, intents, and purposes hereinbefore expressed and declared concerning the same respectively, as by the said John Sheppard and Francis Sheppard, their heirs or assigns, or either or any of their counsel learned in the law shall be reasonably devised, advised, or required. In witness," &c. Executed only by the said John Prior.

The said marriage took place, and there were four children of the said John Prior, by Maria, his wife, namely, John Prior the younger, the eldest child and only son, and three daughters, namely, Gaziah, who afterwards married Robert Pottow, the defendant, Azuba Fricker, and Elizabeth, who afterwards married John Curtis. The said John Prior, the son, for several years before the death of the said John Prior, the father, became a lunatic, and he so continued until the time of his own death, but he was never found so by inquisition. The said John Prior, the father, duly signed and published his last will and testament, bearing date the 16th day of December, 1823, which was duly attested, as the law then required for the devise of freehold estate, and which will is as follows:—"In the name of God, amen, I, John Prior, of Horsecroft, in the parish of Lyneham, in the county of Wilts, yeoman, being weak of body, but of sound mind, memory, and understanding, do hereby make this, my last will and testament, in manner and form following. First, I desire that all my just debts and funeral expenses may be first paid and discharged; also I give Horsecroft, my estate that I now live in, to my son, John Prior, a lunatic; also I give to my granddaughter, Maria Curtis, of Hullarington, in the county of Wilts, my writing-desk; also I leave Charles Fricker, my son-in-law, in full trust over my son, John Prior; all the real residue and remainder of my estate and effects, whatsoever and wheresoever, I give and bequeath to my daughter, Azuba Fricker, now living with me at Horsecroft, whom I likewise constitute and appoint to be whole and sole executrix of this my last will and testament, contained in one sheet of paper. In witness," &c. Executed and properly attested.

The said testator, John Prior, died in the year 1824, without having altered or revoked his said will, which was duly proved by the said Azuba

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Fricker, as the sole executrix, in the Archdeaconry Court of Wilts, on the 16th day of July, 1824. The said testator left the said John Prior, the son, his heir-at-law, him surviving. The said Gaziah Prior intermarried with Robert Pottow, on or about the 23rd of May, 1809, and died in the lifetime of the said John Prior, the son, leaving John Pottow, one of the lessors of the plaintiff, his eldest son and heir-at-law. The said Elizabeth Prior intermarried with John Curtis, on or about the day of February, 1808, and also died in the lifetime of the said John Prior, the son, leaving the said John Curtis, the other lessor of the plaintiff, his eldest son and heir-at-law. The said John Prior, the son, died a bachelor on or about the 12th of March, 1848, intestate, leaving his sister, the said Azuba Fricker, and his nephews, the said John Pottow and John Curtis, his coheirs at law, him surviving. The said Charles Fricker, and Azuba his wife, are now in possession of the whole of the estate called Horsecroft, and for the purposes of this action it is to be taken, have ousted the said John Pottow and John Curtis from the said estate, and have dispossessed and removed them from the possession thereof. The said John Pottow and John Curtis claim to be each entitled to one equal undivided third share of the said estate, called Horsecroft, and the inheritance thereof, in fee-simple in possession, as two of the coheirs of the said John Prior, the son, who, as they contend, took an estate in fee-simple under the said settlement, or if not that he took an estate in fee-simple under the said will. The said Charles Fricker, and Azuba his wife, insist either that the settlement of the 27th day of March, 1770, passed no estate to the said John Prior, the son, or if it did that, at all events an estate in fee-simple was vested in John Prior, the father, at the time of his death, and that the aforesaid devise in favour of the said John Prior, the son (the lunatic), was for his life only, and that by reason of his decease without issue, they, the said Charles Fricker, and Azuba his wife, in right of the said Azuba, are entitled to the entirety of the said estate, called Horsecroft, and the inheritance thereof in fee-simple in possession by virtue of the devise in the above recited will of the said John Prior, the father, of the residue and remainder of his estate and effects to the said Azuba Fricker. The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action. If the Court should be of that opinion, then the defendants agree that a judgment shall be entered against them by confession immediately after the decision of this case or otherwise, as the Court may think fit, and if the Court shall be of opinion that the said plaintiff is not entitled to recover in this action, then the lessors of the plaintiff agree that a judgment shall and may be entered against the plaintiff of *nolle prosequi* immediately after the decision of this case, or otherwise as the Court may think fit, and such judgment shall be entered accordingly.

*Fitzherbert* (with him *Lowndes*), for the lessors of the plaintiff, now contended that the limitation in the settlement to the use of the first son of the said John Prior, and to the heirs male of the said son, gave to the said first son an estate in fee in the said estate called Horsecroft, and that if the fee-simple was vested in John Prior in possession at the time of his death, such fee-simple passed by his will to John Prior, the son. And also, that if the fee-simple was vested in the said John Prior in remainder (after the estate granted to John Prior, the son, by the settlement), such fee-simple passed by his will to John Prior, the son; first, because the words in the will, in their strict and primary sense, were sufficient to pass the fee; and, secondly, because, if any other construction were adopted, the devisee could not in any possible way have benefited by the devise; and they cited *Holdfast* on the demise of *Copwer v. Marten*, 1 T. R. 411; *Roe dem. Allport v. Bacon*, 4 M. & S. 366, per Lord Ellenborough; *Doe dem. Richardson v. Hood*, 7 Taunt. 35; *Doe dem. Child v. Wright*, 8 T. R. 64; *Randall v. Tuchin and Another*, 6 Taunt. 409; *Harding v. Gardner*, 1 Bro. & Bing. 72; *Pettit v. Prescott*, 7 Vesey, 541; 2 Jarman's Conveyancing; *Bridgewater v. Bolton*, 6 Mod. 106, case 151; *Roe dem. Child v. Wright*, 7 East, 259; *Parie v. Miller*, 5 M. & S. 408; *Pocock v. Bishop of Lincoln*, 3 Bro. & Bing. 27; 2 Brooke's Abridgment, tit. Grants, fo. 23, pl. 169; *Roe dem. Wilkinson v. Transmerry*, Willes, Rep. 682; *Doe dem. Lewis v. Davies*, 2 M. & W. 503; *Doe dem. Daniell v. Woodroff*, 10 M. & W. 608; *Coke Litt. 27 a, s. 21*; *Rep. 41 d*; *Goodright v. Goodridge*, Willes, Rep. 369; *Nanfan v. Legh*, 7 Taunt. 89.

*Bramwell*, on the part of the defendants, contended that the deed of settlement was unintelligible and void, or if not, that the only estate taken under it by the son, John Prior, was an estate in tail male. That, in either view, a reversion in fee remained in John Prior, the father. That by the will he gave a life estate only to John Prior, his son, and the remainder in fee to the defendant, Azuba; and, further, that the plaintiff shewed no title under the grantees

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in the deed of settlement, and he cited *Doe dem. Lean v. Lean*, 1 Q. B. Rep. 229.

*Fitzherbert*, in reply, cited *Jarman on Wills*, 388 note.

**POLLOCK, C.B.**—We are satisfied that the plaintiff in this case is entitled to the estate. With respect to the tithes, there is no demise in the will except the residuary one to pass them, and we are of opinion that they go to the residuary legatees. The settlement appears by its terms to have intended to convey a fee-simple, and the effect of the will, reference being had to the cases and current authorities, commencing with that of *Barry v. Edgworth*, reported in *Moseley's Reports*, page 172, is that the meaning to be given to the word "estate" is primarily the thing intended to be devised, and, secondarily, the interest in that thing. Thus, the expression "my estate" would carry the estate of the testator as he possessed it, unless something further appeared to alter the ordinary meaning.

**PARKE, B.**—I am of the same opinion. I think that the plaintiffs in this case are entitled to the land, and the defendants to the tithes. (He referred to *Coke Litt.* 51.) *Beresford's* case is distinguishable from this; but the modern decisions establish the rule that the word "estate" means the whole of the interest, unless the context of the instrument shows a contrary intention. The effect of describing the estate as in his own possession really makes no difference. According to *Harding v. Gardner* that would give all the interest he possessed; and in my opinion the will operates in a similar manner, namely, to give all, that is to say, the fee-simple. With respect to the tithes, they are different, and pass under the residuary clause in the will to the residuary legatees.

**PLATT, B.**—I think, also, that the plaintiffs are entitled to the land and the defendants to the tithes; but my opinion in some respects differs from that of the Lord Chief Baron and my brother Parke. It seems to me that this is a deed artificially drawn, and in many instances tautologous. There are two *testatum* clauses in it: the first describes the property as "the free estate commonly known as Horsecroft [he read the deed of settlement]; now the legal estate is conveyed to the trustees and their heirs; and although it may be twice expressed, it is only one deed. This deed then, I think, would convey to the first son of the marriage an estate in fee; however, if I am wrong, and the deed is void, he would be entitled to it under the will. At the first blush of the case, there may be some colour for supposing that it was only intended by the testator to give his son a life estate, because he is confided to the care of Fricker; and it would therefore appear that the father did not think he was likely to recover from his malady, but I think the words "my estate" must be taken to mean "the whole of my estate that I have to give."

**MARTIN, B.** concurred.

*Judgment for the lessee of the plaintiffs for the land, and for the defendants for the tithes.*

Saturday, May 3.

**WOODS v. FINNIS.**

*Sheriff's fees—Liability of sheriff for money, the debt, &c. in the action paid to his officer upon the arrest.*

This was an action brought by the plaintiff, who had been defendant in a previous action, and against whom a judgment had been recovered and a *ca. sa.* issued thereupon to the defendant (a sheriff). The present plaintiff having been arrested upon that *ca. sa.* by an officer of the defendant, paid to that officer, at the time of the arrest, the debt and costs in the suit, including one guinea for the caption fee, 3s. 6d. searching, and 4s. 6d. discharge fee, and obtained his discharge: the officer, it appeared, did not pay over the money, and the present plaintiff had been subsequently arrested for the same debt in another bailiwick, whereupon the present action was brought, and the above-named fees treated as extortion: the cause was tried before *Martin, B.* in Middlesex, a few days since, when the jury gave the plaintiff a verdict for 50l.

*Bramwell* moved to set aside that verdict, and to enter a nonsuit or a verdict for the defendant, or to arrest the judgment; the defendant had pleaded not guilty, traversed the extortion, &c.: it was contended the sheriff is not liable in this action, there is no implied authority given by the sheriff to the officer to receive the money, and the money being paid to the officer under these circumstances is no payment to the sheriff, the officer alone is the party clearly liable, there cannot be two parties primarily liable unless jointly liable, and that is not pretended here. [*PARKE, B.*—Is not every act that the bailiff does under colour of the writ the act of the sheriff? This was rather the case of a bargain with the plaintiff than any thing else. *Slackford v. Austen*, 14 East, 468; and *Woodman v. Gist*, 8 Car. & P. 213, were cited.]

*Rule nisi.*

**WAGNER v. IMBRIE.**

*Pleading—Puis darrien continuance.*

*A defendant having been sued upon recognisance of bail, pleaded, 1st, Denial of the recognisance; 2nd, No ca. sa.; 3rd, Payment. The two first were found against him, and judgment signed. Upon the trial of the remaining plea of payment a plea puis darrien continuance was put in and received by the judge at Nisi Prius.*

*Held, that such plea was properly received.*

*Hornby* moved for leave to strike out a plea of *puis darrien continuance*, and to be at liberty to sign final judgment. This action was brought against the defendant upon a recognisance of bail, to which he pleaded three pleas:—1st, A denial of the recognisance; 2nd, That no *ca. sa.* had issued; and, 3rd, Payment. The trial of the issue upon the last plea was fixed for the 29th April, when the defendant handed in a plea of *puis darrien continuance*, which *Mr. Baron Martin* allowed, and discharged the jury. The two first issues on *nisi prius* record, and no *ca. sa.* were previously found for the plaintiff. It was now contended for the plaintiff, that a defendant, by pleading *puis darrien continuance*, waives his former pleading, and the case then stands in the same state as if this plea only had been originally put in,—the defendant should have first set aside his two previous pleas so found against him. [*MARTIN, B.*—The judgment upon those was quite right.] In *Stoner v. Gibbons*, *Moore's Repts.* 871, it was held that a plea of *puis darrien continuance* cannot be pleaded after demurrer, and why should he be allowed to do so where there are other issues as here, which have been found against him. He also referred to *Sharpe v. Witham*, 1 McCal. and Young, 350.

[*PARKE, B.*—Why, in principle, should he not do so? the pleading this plea is, no doubt, a waiver of all the other pleas remaining to be tried, but not of any others; the plea was, I think, quite regular, and, under the circumstances of the case, properly received.]

**POLLOCK, C. B.** and **MARTIN, B.** concurred.

*Rule refused.*

May 5 and 7.

**MONTOYA v. THE LONDON ASSURANCE COMPANY.**

*Marine insurance—Perils of sea—Liability of underwriters.*

*A cargo of hides and tobacco shipped on board a vessel, were insured against perils of the sea: during the voyage the hides became damaged by the sea water, and the effluvia of the damaged hides destroyed the tobacco:*

*Held, that the underwriters were liable for the whole, and that the loss by the damage to the tobacco was not a remote consequence of the peril insured against, but a direct and immediate loss by the perils of the sea within the terms of the policy.*

*Sir P. Thesiger* (Tomlinson with him) appeared for the plaintiff.—This was a special case stated for the opinion of the Court, and the question was whether certain damage which the plaintiff had incurred in consequence of tobacco which had been placed on board a vessel, as also some hides, these hides having been damaged by sea-water, and became corrupted or putrid, the effluvia from which injured the tobacco, was a loss by perils of the sea, insured against, within the meaning of the policy, or was it too remote a damage and not recoverable under the policy. The maxim or general rule of law, "*in jure non remota causa sed proxima spectatur*," would be applied to the case; but the authorities upon the subject would shew that the cause here was immediate, and the loss a direct, not a remote, consequence of the peril insured against. The following cases were referred to:—*Livie v. Janson*, 12 East, 648; *Tatham v. Hodgson*, 6 T. R. 656; *Halin v. Cutell*, 2 Bing. 263; *Parke on Insurance*, 138; 3 Douglas, 232; *De Vaux v. Salvador*, 4 A. & E. 431; *Cullin v. Butler*, 5 M. & Sel. 461; *Lawrence v. Aberdeen*, 5 B. & Ald. 107; *Bayley, J.'s* Judgment, p. 112; *Gaby v. Lloyd*, 3 B. & C. 793; *Phillips on Insurance*, 1st vol. p. 639, an American case there; and 3rd Kent's Coms. p. 300.

*Peacock, Q.C.* contra.—The maxim of law referred to by the other side as the rule is strictly applicable to this case, because the underwriters contend that this is the cause of a cause, not an immediate cause, and the loss which has been sustained too remote to entitle the plaintiff to recover as for a direct and an immediate loss in consequence of the perils of the sea insured against under this policy.

[*PARKE, B.*—Suppose a quantity of hides put together on board a vessel, and the lower ones became much damaged by sea-water, and therefore corrupted the upper ones, would not the underwriters be liable for the whole as caused by perils of the sea, and the same observation may be applied to a quantity of corn.] In this case it was, no doubt, the effect of the water upon the hides, and the effluvia from the hides, which caused the damage to the tobacco; but can that be said to be by perils of the sea and a loss immediate in consequence. In *Powell v. Gudgeon*, 5 M. & Sel. 431, where the ship, being delayed by

the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and in order to defray the expenses of such repairs, the master having no other means of raising money, sold part of the goods and applied the proceeds in payment of these expenses; the Court held that the underwriters was not answerable for this loss, for the damage was to be considered, according to the rule of law referred to, as not arising immediately from a peril of the sea, although in a remote sense it might be said to have been brought about by a peril of the sea; he also mentioned *Logan v. Hale*, 4 C. B. 598, and endeavoured to distinguish this from all the cases cited on the other side.

**POLLOCK, C.B.**—We do not think it necessary to hear the plaintiff in reply in this case, as we think it clear and free from any difficulty; the only question is whether the underwriters are liable to the damage done to the tobacco from the effluvia of the hides, which became corrupted in consequence of the sea water, and under the circumstances stated here I think they are liable; *Mr. Peacock* has argued at some length, and very ingenious arguments have been used by putting extreme cases to shew the fallacy, or rather point out the difficulties and hardship that must attend the construction contended for by the learned counsel on behalf of the plaintiff; no doubt many extreme cases may be put, and I think I may refer to what was said during the argument; suppose a large quantity of corn on board a vessel, and by means of tempestuous weather a part of the cargo became much damaged by sea water, and the remainder of the cargo corrupted and spoiled by the part which was damaged by sea, would not the underwriters in that case be liable for the loss of the whole upon a policy of insurance against the perils of the sea? I think they would; so they are liable here in the same way, where sea water gets in and does damage to some portion of the cargo, and that portion affects the rest, the whole is by damage of the sea, the proximate cause of the injury sustained is reducible clearly, in my judgment, to the perils mentioned in the policy, and that therefore the underwriters are responsible.

**PARKE, B.**—I am of the same opinion in this case with the Lord Chief Baron, and think our judgment must be for the plaintiff; the rule is *jure non remota causa sed proxima spectatur*, referred to by *Mr. Peacock*, is no doubt the correct rule; the only question is, whether it is a remote cause or a proximate cause, and where are you to draw the line; there is sometimes considerable difficulty in drawing the line as to whether the cause is remote or proximate within the meaning of that rule by Lord Bacon (*Max. Reg.* 1), but here the circumstances are such as to shew no difficulty, if the owner could recover against the master and owner of the vessel, so also could he against the underwriters under the policy; if, instead of hides and tobacco, the cargo had consisted of hides only, and the whole had been damaged, the owner could have recovered for the whole, and I do not see that any distinction can be made in consequence of part being hides and part tobacco, the hides being corrupted by sea-water, and the tobacco damaged by the effluvia from the hides; it is in fact the same case, and I think this at all events is clearly within the rule; I feel no difficulty in saying it was from perils of the sea, just as if the whole had been hides, and it appears to me the whole amount is recoverable under the policy.

**PLATT, B.**—I agree also in thinking that the whole amount is recoverable. Suppose a cargo of wheat, shipped from Odessa to England, and shortly after sailing a part had become seriously damaged by sea-water, and that the damaged portion was not unladen, so that, on arrival at the port of destination, the whole cargo is affected, would it not be a total loss, and recoverable for accordingly. Here a part consisted of hides and part tobacco; the hides are injured by the sea, the effluvia therefrom destroys the tobacco, is it not a total loss in the same way. I think the loss is immediate and direct from the perils of the sea.

**MARTIN, B.**—I am of the same opinion, and that the plaintiff is entitled to judgment; common sense must at once shew this to be so (here the learned baron read that part of the special case which particularly referred to the damage by perils of the sea), well, what is the case here? a quantity of hides are put on board, as well as some tobacco; during the voyage the sea-water comes into the vessel, and cannot be put out, which causes the hides to be damaged, and the damaged hides destroy the tobacco, surely this is a loss direct and immediate from the perils of the sea. I cannot draw the line, or say where it should be, so as strictly to define it within the meaning of the rule which has been referred to, that is a very difficult matter; but this case, I think, is clearly within it, and one to which the underwriters are liable.

*Judgment for the plaintiff.*

**BUSINESS OF THE WEEK.**

Friday, April 28.

*NEWTON v. VAUGHAN*.—*Watson, Q.O.* moved in this case, tried before *Platt, B.* at Liverpool, to set aside the plain-

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a verdict, and for a new trial, on the ground of misdirection of specification. The question was, whether there was any infringement of the patent, or whether it was new. *Saturday, May 3.*—**POLLOCK, C.B.**—In this case, which was tried before my brother Platt, on action for patent, there will be a rule to show cause. *Rule nisi.*

*OR v. KING.*—**POLLOCK, C.B.**—In this case there will be a rule to show cause.

*Friday, May 3.*

## DEMURRER PAPER.

**AMELESS v. THE YORK, NEWCASTLE, AND BREWICK RAILWAY COMPANY.**—By consent.

*Judgment for the plaintiff on the 1st plea, and for the defendants on the 2nd plea.*

**LET v. THIMBLEBY.** *Cur. adv. vult.*

**THE BANK OF AUSTRALASIA v. FRASER.** *Settled.*

**OLLY v. COOK.** *Settled.*

**TUCKS v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF HALIFAX.** *To stand over.*

**WOODHAMS v. THE EARL OF LIVERPOOL.** *Settled.*

**LINK v. UNWIN.** *To stand over.*

**PETERBUX v. BEMERY.** *Settled.*

*Plaintiff to have liberty to amend upon payment of costs. No costs if the defendant elect to amend in a week.*

**BLAND v. CROWLEY.** *Cur. adv. vult.*

**VATERFORD, WEXFORD, WICKLOW, AND DUBLIN RAILWAY COMPANY v. W. W. DALBIAO.** *Settled.*

**AME v. FRANKLIN.** *Judgment for the plaintiff.*

**HILL v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF CHESTER.** *Withdrawn.*

**WALSH v. THE PATENT FUEL COMPANY.** *Struck out.*

*Part heard.*

*Saturday, May 3.*

**KIPPER v. THE GREAT WESTERN RAILWAY COMPANY.** *Rule nisi granted.*

**LARDING v. HODGKINSON.** *Rule refused.*

**JUST v. HATLEY AND ANOTHER, Assignees.**—In this case, after stating the facts of the case (see ante, p. 53), **LOCK, C.B.** said—We think the deed was perfectly good; that he was under that sort of obligation to pay; might very well justify the execution of that deed, that the person conveying that property under those circumstances could not afterwards question it. We think, therefore, there ought to be no rule. *Rule refused.*

**RICE v. WOODCOCK.**—**POLLOCK, C.B.**—In this case we consulted Williams, J. who is satisfied with the verdict, and therefore, as against evidence, the rule will not be granted. It will stand as already granted, on the ground of misdirection.

*Rule nisi for a new trial on the ground of misdirection; refused as being against evidence.*

**ROTHSTON v. BURGESS.**—**H. Hill** showed cause that a rule obtained to set aside the plaintiff's verdict to enter a nonsuit instead, or a verdict for the defendant, or for a new trial. *Lush, contra, not heard.*

*Rule absolute to enter a nonsuit.*

**MAER v. BODDINGTON.**—**Whitehurst, Q.C.** showed cause against a rule obtained to set aside the defendant's verdict, and enter it for the plaintiff for 107l. 14s. 11d. or a new trial. **Watson, Q.C.** and **Mellish, contra**, called on to support the rule. *Rule discharged.*

**OSGEMID and WIFE v. HOLMIDAY.** *Cur. adv. vult.*

*Monday, May 5.*

**THE DUKE OF BUCKINGHAM v. THE COMMISSIONERS OF INLAND REVENUE.**—An appeal from the determination of the Commissioners, upon the 15th sect. of the 13th Vict. c. 97. *Cur. adv. vult.*

**ORTOYA v. THE LONDON ASSURANCE COMPANY.** *Part heard.*

*Tuesday, May 6.*

**HOWARD v. KERSHAW AND OTHERS.**—*Consent moved to be a judgment of outlawry.* *Rule nisi granted.*

**LACKBURN v. TWENDALE.**—*Corrie* showed cause against a rule obtained herein for judgment as in case of nonsuit, in support. *Set processa to be entered.*

**ALMON v. GIBNEY.**—*Charnock* showed cause against a rule to enter a nonsuit herein. *Rule discharged on peremptory undertaking.*

**HOWELL v. BECK.**—*Kerlake* moved for a distringas to compel appearance. *Granted.*

**JOHN FRANK, Administrator, v. JAMES WILSON, Executor.**—*Udall* applied for a prohibition to the judge of the county Court of Durham to restrain him from proceeding therein. It was a plaintiff for a share of a residuary estate. The question was, whether the judge had jurisdiction within the 65th section of the County Court Act. *Cur. adv. vult.*

**MERCIVAL v. OWEN.**—*J. Thompson* moved to set aside verdict herein, or for a new trial. *Rule refused.*

**— v. —.**—*C. Pollock* moved for judgment against a casual ejector. *Granted.*

**TILLENFORD v. BROMAGE.**—*Simon* moved for a rule to urge the peremptory undertaking herein. *Naylor* withdrew cause in the first instance.

*Rule enlarged for a fortnight, on payment of costs.*

**JARVIS v. BOW.**—*J. Gray* showed cause against a rule to set aside so much of the award herein as related to the 1s. *Rule absolute to go to the Master to fix the amount; notice to be given to the arbitrators.*

## NEW TRIAL PAPER.

**FOOD v. ROWCLIFFE.** *Postponed.*

**ALDON, the younger, v. CAMPBELL.**—*Altherton* showed cause (Crowder with him). *Bramwell* in support. *Cur. adv. vult.*

**WILKS AND ANOTHER, v. WYATT.**—*W. H. Watson* (with *Barstow*) showed cause. *Burnie* in support. *Rule discharged.*

**EFFEGHAN v. CAPONE.**—*Unthank* showed cause (Crowder with him). *Scotland* in support. *Cur. adv. vult.*

**ANDREW v. LEACH.**—*Bramwell* showed cause. *Knowles* in support. *Rule absolute.*

**EIGHTLEY v. WALKER.**—*Henderson* moved to enter judgment on a *scire facias*, for want of an appearance. *Granted.*

*Wednesday, May 7.*

**THE ATTORNEY-GENERAL v. BRADBURY AND ANOTHER.**—It was an information, filed by the Attorney-General, for over certain penalties, by reason of the defendant's

## EXCHEQUER.

publishing the work called "Household Narrative," without stamp. The question was, whether the same was liable to pay the stamp or not, under the 6 & 7 Wm. 4, c. 76. *Cur. adv. vult.*

**WALSH v. THE PATENT FUEL COMPANY.**—*Willes* appeared for the plaintiff. *Peacock, Q.C.* for the defendant; the question turning upon the validity of the 17th and 18th pleas, upon the deed as set out. *Judgment for the plaintiff.*

**SAME v. SAME.**—*Chambers, Q.C.* moved, pursuant to leave, to increase the damages. *Rule nisi.*

**SAME v. SAME.**—*Shaw, Serjt.* moved also for a rule nisi herein, on the 20th plea. *Refused.*

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

*Friday, May 2.*

(Before Mr. Justice COLERIDGE.)

**REG. v. J. T. INGHAM, Esq. ex parte SYMONS.** *Metropolitan Building Act—Powers of Commissioners under local Act.*

*Aspland* moved for a rule calling upon Mr. Ingham, one of the metropolitan police magistrates sitting at the Thames Police Office, to show cause why he should not proceed to hear and adjudicate upon a complaint preferred against one Peter Mackintyre, for certain encroachments upon the highway contrary to the provisions of a local Act, 11 Geo. 3, and the 57 Geo. 3, c. 29. At the hearing it was contended on the behalf of Mr. Mackintyre, that the magistrate had now no jurisdiction to hear the complaint, which was preferred at the instance of the surveyor of the district commissioners, inasmuch as the Metropolitan Building Act, 7 & 8 Vict. c. 84, ss. 5, 18, and the schedules point out the course to be pursued. The magistrate thinking it doubtful whether or not he had jurisdiction, and wishing to have the opinion of the Court, declined to hear. It was now submitted that as the former Acts were not repealed by the 7 & 8 Vict. c. 84, the proceedings were regular, and the magistrate had jurisdiction. *Rule nisi.*

**Re THE GREAT WESTERN RAILWAY COMPANY AND THE PARISH OF TILKURST, BERKSHIRE.** 12 & 13 Vict. c. 45—*General and Quarter Sessions Court Procedure Act—Reference by Quarter Sessions to Arbitration—Motion to set aside award—Practice.*

*Smirke* moved for a rule to set aside the award herein, under the following circumstances. The Great Western Railway being assessed by a great many parishes, upon one of their branch lines at an amount which they deemed excessive, appealed against the rates to the Berkshire Quarter Sessions. At the Sessions these appeals (fifty-three in all) were, under the authority of the 12 & 13 Vict. c. 45, referred to arbitration to two arbitrators, with power for them to call in a third. The 13th section of the above statute enacts "that it shall be lawful for any Court of General or Quarter Sessions of the Peace, before which any appeal," &c. "shall be brought, to order, with the consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner, and on such terms, as the said Court shall think reasonable and proper," &c. "Provided always, that the Court of Q. B. may, if it think fit, on application within the term next after the making and publication of such award or umpirage, either refer the case back again to the same arbitrator, arbitrators, or umpire, or wholly set aside the award or umpirage already made, and may, in the latter event, order the Court of General or Quarter Sessions to enter continuances, and hear the appeal." The arbitrators having agreed as to all the facts, but not being enabled to come to a decision as to the principle of rating, the branch railway in question being complete in itself, and capable of being let to a tenant, independently of its connection with the main line of the Great Western line, it was determined, with the concurrence of all parties, that the opinion of this Court should be taken upon the principle of rating in question, and, therefore, the arbitrators made their award affirming the rates, in order that the Court may be moved to set aside such award, and so have the question raised. It was here suggested that the case should be set down in the Crown Paper for argument.

*COLERIDGE, J.* thought it might be put either into the Special Paper or the Crown Paper; if in the Special Paper, one counsel only would be heard.

It was ultimately arranged that the case should go into the Crown Paper. *Rule nisi.*

*Saturday, May 3.*

(Before Mr. Justice ERLE.)

*Reg. v. WEST.*

*Copyright of Designs Act, 5 & 6 Vict. c. 100.* Under class 2 of the above Act, which is applicable to "articles of manufacture composed wholly or chiefly of wood," an ornamental design for the borders of straw hats composed of the leaf of the Brazilian pine was registered.

## BAIL COURT.

*Quære, whether such a design was properly registerable under that class.*

*Willes* moved, on the part of the defendant, for a rule for a *certiorari* to remove into this court a conviction made by certain justices under the *Copyright of Designs Act, 5 & 6 Vict. c. 100*, in order that the same may be quashed. By sec. 3 of the above Act a copyright is conferred on the proprietor of certain designs for various terms according to the nature and quality of the design, namely, for articles comprised within the second class, namely, "articles of manufacture composed wholly or chiefly in wood," for the term of three years; and for articles comprised within the thirteenth class, namely, "Lace and any article of manufacture, or substance, not comprised in any preceding class," for the term of twelve months. Sec. 4 provides that, in order to have the benefit of the Act, the proprietor must register his design according to the class to which it belongs. Secs. 7 and 8 make it an offence to pirate any registered designs, punishable by fine, recoverable by action or summary conviction before justices. In the present case a Mr. Barford had registered a design under class 2 for the application of an ornamental border of the Brazilian pine leaf to straw hats, which the defendant having, as he alleged, pirated, he laid an information before justices against him, whereupon he was convicted. It was now contended that the conviction was bad, inasmuch as there had been no legal registration of the design, it being registered under a wrong class, the proper class being 13, and not 2, a palm leaf not properly coming under the designation of "wood," and there being a much shorter term of protection for class 13 than for class 2.

*ERLE, J.*—May it not be fairly said that as the leaf comes from the same substance that forms the tree, it properly partakes of the nature of wood?

*Willes.*—A leaf of a tree cannot be properly designated as wood.

*ERLE, J.*—I think it may be discussed. *Rule nisi.*

*Monday, May 5.*

(Before Mr. Justice COLERIDGE.)

*Future sittings in London.*

At the sitting of the Court, his lordship announced that for the future there will be two sittings in London, in Term, for the trial of cases, and that the judge sitting will sit throughout the day and that for the greater accommodation of the Bar the sittings in London of each of the Courts will be held upon the same day. His lordship further announced that this arrangement will in no way interfere with the business of this Court.

**REG. v. THE PRINTER AND PUBLISHER of the**

*Morning Advertiser Newspaper.*

*Rule nisi for a criminal information.*

*Shaw, Serjt.* (with him *Scott*) moved for a rule for leave to file a criminal information against the printer and publisher of the *Morning Advertiser* for certain libels inserted in that paper on the 12th and 20th March last, relative to a certain religious establishment called the Convent of Notre Dame, Bedford-lane, Clapham. *Rule nisi.*

**REG. v. THE PRINTER AND PUBLISHER of the**

*Morning Herald Newspaper.*

*Rule nisi for a criminal information.*

*Shaw, Serjt.* (with him *Scott*) moved also for a rule for leave to file a criminal information against the printer and publisher of the *Morning Herald* newspaper for a certain libel published of the same establishment on the 20th of March last. *Rule nisi.*

*Tuesday, May 6.*

(Before Mr. Justice COLERIDGE.)

**REG. v. THE JUSTICES OF MIDDLESEX.**

*Costs of mandamus to sessions.*

The right to the costs of a mandamus to the sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but upon whether or not unsuccessful cause has at all been shown.

At the sessions an objection was raised by the Bench to the right of the appellants to be heard, and they accordingly refused to hear the appeal. Upon a motion for a mandamus to compel the justices to hear the appeal, the respondents showed cause, but the rule was made absolute, and the appellants succeeded at the sessions: Held, upon an application by the appellants for the costs of the application for the mandamus, that they were entitled to have them of the respondents.

This was a rule calling upon the churchwardens and overseers of St. James, Clerkenwell, to show cause why they should not pay to the churchwardens and overseers of the parish of St. Luke, Middlesex, the amount of costs incurred in and about the procuring of a writ of mandamus, commanding the above justices to enter continuances

## BAIL COURT.

and hear an appeal. It appeared that on the 17th of July, 1846, an order of removal was made from the parish of St. James, Clerkenwell, to the parish of St. Luke, Middlesex. On the 10th of August, St. Luke's gave a notice of appeal, but afterwards revoked such notice, and the pauper was removed on the 28th of September. On the 23rd of November notice and grounds of appeal were served, and the appeal came on for hearing upon the 11th of December. At the trial the Court (which had decided similarly in a former case) held that there was no grievance for which an appeal would lie, and refused to hear the appeal. A rule for a *mandamus* was then moved for, against which the parish officers of St. James shewed cause, which rule was made absolute. Continuances were afterwards from time to time entered, and on the 27th of January, 1850, the order of removal was quashed, subject to a case. This case never was brought up; but the pauper had been returned, and the costs of removal, and maintenance were paid.

R. Hall shewed cause, and contended that as the objection was one taken by the Sessions themselves, the rule as to giving costs by a rule of this sort would not apply, and was thus distinguishable from *Reg. v. The Justices of Surrey*, 19 L. J. 171, M.C. which is the strongest one upon the subject; that the general rule as applicable to costs is, that a party who merely comes to support a judgment made in his own favour shall not be liable to costs; that as the judgment in the court below was in the respondents' favour, they acted correctly in opposing the *mandamus*. [COLERIDGE, J.—Can you maintain that simply because you were right in shewing cause you are not to pay the costs?] This case would appear to be an exception to the general rule, if any exception be at all recognised. He also contended that this application was made too late.

*Pashley*, contra, was not called upon.

COLERIDGE, J.—I cannot treat this application as being made too late, because, until the appeal was decided, it might not be known whether or not they would be entitled to these costs. The general principle upon which this Court acts in these cases is that of looking at the general result, and being averse to exercise any discretion in particular cases. The facts here are clear: there was a decision by the Quarter Sessions which was wrong, and the application was made to this Court for a *mandamus*; this application was opposed by the other side; they were not bound to have opposed, but they chose to do so. I am far from saying that they did wrong in so opposing, but when they decided that they would oppose, they did it at the peril of having to pay costs if unsuccessful. And if this were entirely a new case I should be inclined so to hold, but many decisions have now established this point. The right to costs in these cases does not in any manner depend upon the fact of whether or not the opposition was vexatious; it may have been a very proper thing to have shewn cause, and it would be right that the successful party should have the costs.

*Rule absolute.*

Wednesday, May 7.

REG. V. ST. JAMES'S, COLCHESTER.

Certiorari to remove order of Sessions—Sufficiency of affidavit of service of notice.

A certiorari had been obtained to remove an order of Sessions upon an affidavit of service of notice upon two justices, which affidavit stated that deponent was present at the General Quarter Sessions of the Peace, Holden, &c., and "did then and there see the said A. B. and C. D. (the two justices served), acting as justices of the peace for the said county of S. at the said General Quarter Sessions of the Peace."

Upon a rule to set aside the certiorari, on the ground that the affidavit of service was insufficient in not stating that the said two justices were present at the hearing of the appeal:

Held, that the affidavit was bad for this reason; and this, notwithstanding the caption of the order of Sessions described the said two justices as being present at the Sessions, and the rule was made absolute.

In this case a rule had been obtained to quash a writ of certiorari, issued to bring up an order of Quarter Sessions, on the ground that the affidavit of service of notice upon the justices, whereon the said writ was obtained, was insufficient.

This was an appeal against an order of maintenance of a lunatic pauper, and the order having been confirmed, the appellants applied for and obtained a certiorari to bring up the said order upon an affidavit of notice to the justices, of which the following are the material parts. The deponent swore that he "did personally serve John Thomas Smitheman Edwards, esquire, one of her Majesty's justices of the peace in and for the county of Salop, with the notice hereunto annexed, marked B, by delivering a true copy of the said notice to the said John Thomas Smitheman Edwards, esquire, and did, on the 10th of February, serve Sir Baldwin Leighton, baronet, one of her Majesty's justices of

the peace in and for the said county," &c.; and "and this deponent further saith, that he was present at the General Quarter Sessions of the Peace, holden at Shrewsbury, in and for the county of Salop, on or about the 14th day of October last past, and did then and there see the said John Thomas Smitheman Edwards, esquire, and Sir Baldwin Leighton, baronet, acting as justices of the peace for the said county of Salop, at the said General Quarter Sessions of the Peace."

The present rule was moved upon the grounds, first, that the above affidavit was insufficient, inasmuch as it does not state that the two justices were present when the appeal was heard and determined; 2nd. That the writ did not appear to have been issued at the instance of the party who gave the notice. (a)

The order of Sessions, which had been returned to this Court, contained in its caption the names of both John Thomas Smitheman Edwards, esquire, and Sir Baldwin Leighton, baronet, as being at the sessions at which such order was made.

By the 5 Geo. 2, c. 18, s. 5, it is enacted, "And for the better preventing vexatious delays and expense occasioned by suing forth writs of certiorari for the removal of convictions, judgments, orders, and other proceedings before justices of the peace, be it further enacted by the authority aforesaid, that no writ of certiorari shall be granted, issued forth, or allowed to remove any conviction, order, or other proceedings had or made before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective General or Quarter Sessions thereof, unless such certiorari be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceedings shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order, or other proceedings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari."

Barnard now shewed cause, and contended that the words of the statute had been literally complied with, it appearing by the caption of the order, that Mr. Edwards and Sir Baldwin Leighton were two of the justices present at the Sessions. [COLERIDGE, J.—The point is, that the affidavit does not state that they were acting at the trial of the appeal; only that they were present at the Sessions.] The order shews them to have been present at the Sessions, which is a fact that does not appear in any of the cases cited; the cases cited in support of this rule are all wanting in proof that the justices served were at the Sessions, which fact is here supplied by the order itself. (R. v. Darton, 2 Dowl. & Lownd. 492; R. v. Cartworth, 5 Q. B. 201; R. v. Gilbert, 5 Q. B. 207.) R. v. Sevenoaks, 14 L. J. 92, M.C. is a decision in my favour. [COLERIDGE, J.—There is generally the first day of the Sessions upon which the justices assemble in numbers, but upon which no judicial business is transacted, and after that day a great number of the justices usually leave, but still the names of those who attended on the first day appear in the documents of the Sessions.] Until the contrary is proved, it is to be assumed that the justices named in the caption of the order were actually present at the hearing of the appeal; and, taking the order and affidavit together, it sufficiently appears that these two justices were present at the appeal.

Scotland, in support of the rule, was not called on.

COLERIDGE, J.—This rule is dependent upon the proper construction to be given to the Act of Parliament, which is an Act "for the better preventing vexatious delays and expenses occasioned by suing forth writs of certiorari," and it makes it a condition, before obtaining the writ, that "it be duly proved upon oath that the said party or parties suing forth the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be), by and before whom such order shall be so had or made;" and it gives as a reason, "to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari." It is perfectly clear, therefore, that the Act of Parliament intended that the very justices who made the order should receive the notice, the words being, "by and before whom;" and the object of the Act makes it necessary, because the justices are to have an opportunity of shewing cause against the issuing or granting of the certiorari, and they could not have that opportunity, unless it appears from the affidavit that such justices have received the notice. The mere chance of a justice being present at the first day of the Sessions, before the appeal was heard,

(a) The 2nd objection became unimportant in consequence of the decision upon the first.

affords no presumption that he heard the appeal tried. At one time it was supposed that the Sessions not being named in the Act, that the Act did not apply to orders of Quarter Sessions, but this doubt was removed by a direct decision; for although the Act does not apply with such force to Quarter Sessions as to orders of justices the words are large enough to include them. Therefore we are to apply the same rule to orders of Sessions as we should to summary convictions. Then the question is, whether in this case the affidavit makes out that the two justices who were served were those who had heard the appeal; and it has been attempted to be shewn by the caption of the order, and the affidavit that they were such, and I asked Mr. Barnard upon which he relied—whether upon the caption or the affidavit? and he answered upon the combined effects of both. I do not agree with the propriety of this, as we must look to the nature of the caption. On the first day of the Sessions, usually a great many justices attend, and leave after, and do not further interfere with the business; the caption, therefore, proves nothing, and certainly is not evidence that the justices therein named actually heard the appeal. The affidavit says that the deponent was present at the Sessions on the 14th of October, "and did then and there see the said John Thomas Smitheman Edwards, esquire, and Sir Baldwin Leighton, baronet, acting as justices of the peace for the said county of Salop at the said General Quarter Sessions of the peace." Now, it is clear that here is no proof that these two justices were present when the order was made; but I am asked to presume that they were. I have, however, a great objection to the making of presumptions in a case where the affidavit itself might make everything clear. In R. v. Darton the certiorari was quashed, it not appearing that the justices who were served were present at the appeal, and it seems to me that that case is so clearly in affirmance of the statute, that it ought to be fully carried out, and I do not think that when the Act expresses that it was passed to prevent delays in the obtaining of writs of certiorari that any presumptions ought to be made in favour of the party suing out such a writ. The rule, therefore, must be made absolute.

*Rule absolute.*

Ex parte FRISBY.

Landlord and tenant.

Proceedings under the 1 & 2 Vict. c. 74 (An Act to facilitate the recovery of possession of tenements after due determination of tenancy).—Jurisdiction of justices.

On a former day, Watson, Q.C. shewed cause against a rule obtained by Lush, for a prohibition to be directed to certain justices of Cambridgeshire, restraining them from proceeding further upon an application, made under the 1 & 2 Vict. c. 74 (to recover possession of premises), on the ground that the title to the premises came into question. *Curr. adv. vult.*

The facts sufficiently appear in the following

JUDGMENT.

COLERIDGE, J.—This was a rule for a prohibition to certain justices of Cambridgeshire, to restrain them from further proceeding upon an application to restore possession of certain premises, which application was made under the provisions of the 1 & 2 Vict. c. 74. No objection was made to the regularity of the preliminary demand, and notice required by the statute, but it was contended that the relation of landlord and tenant did not subsist between the parties promoting the proceeding and the defendants W. Cumming, H. Harding, and J. Frisby: that the latter relied on an adverse title, and, consequently, the magistrates had no jurisdiction. I am of opinion that this objection is not sustained. It appears clear that R. Cumming, under whom A. Cumming and H. Harding claimed, had originally let the premises to J. Frisby, who had been in his service, and that for some years J. Frisby had paid rent, but had discontinued to do so, and in consideration of his having a large family, he was allowed to continue in occupation without payment of rent; and moreover, that the outside repairs were done for him, Frisby doing what was necessary within. On the death of Cumming, Harding allowed Frisby to remain in occupation as before, on the same terms as to the repairs, and Harding paid the rent for Frisby; until, wanting the premises for his own use, he told him so; Frisby thanked him for allowing him to remain in the house so long, and begged to remain a year longer and repair the house, but he ultimately refused to go out. It appears that Frisby had been occupying in the manner above-mentioned for more than twenty years since he paid rent, but he was in possession for less than twenty years without payment of rent, before Cummings died, and he has been less than twenty years in possession since. The plaintiff clearly gave such evidence of the relation of landlord and tenant having commenced under Cummings in the first instance, and themselves in the second, after Cummings' death, as gave the magistrates jurisdiction, and it cannot now be suggested



## BAIL COURT.

that the right of entry was taken away. They would have, and it would be their duty to consider the weight of the objection, and how far it was supported by the facts; if there were such reasonable grounds for it as might be considered to bring the title clearly in question, it would be then, and only then, proper to decline proceeding further. Looking here to the facts, I think they have rightly decided the contrary, and that the rule must be discharged with costs. *Rule discharged with costs.*

Monday, May 12.

(Before Mr. Justice WIGHTMAN.)

HOLLOWAY v. THE QUEEN (in error).  
Plaintiff (in error) assigning errors—Proceedings thereon.

The plaintiff in error in this case had been tried and convicted at the Epiphany Quarter Sessions, held at Coventry, upon a charge of aiding and assisting a man of the name of Thompson to attempt to escape from gaol, the said Thompson never having in fact made any attempt to escape. Having been found guilty, he was sentenced to fourteen years' transportation; whereupon a writ of error was obtained, and a *habeas corpus* having upon a former day been obtained to bring up the prisoner to assign errors, the said writ was now returned, and the plaintiff (in error) brought into Court.

Flood now demanded oyer of the record, which having been complied with, the plaintiff (in error) prayed the Court to assign him as his counsel Flood and Partridge, which prayer being complied with, Flood assigned errors on behalf of the plaintiff, whereupon the latter was remanded to Coventry gaol to await the ultimate decision.

Tuesday, May 13.

(Before Mr. Justice ERLE.)

REG. v. THE PRINTER AND PUBLISHER of the  
Morning Advertiser newspaper.  
Rule for a criminal information for a libel—  
Apology.

In this case, on a former day (the 5th inst.) *Shee*, Serjt. obtained a rule calling upon the printer and publisher of the *Morning Advertiser* newspaper to shew cause why a criminal information should not be filed against him for certain libels, inserted in that paper on the 12th and 20th of March last, reflecting on the moral characters of the ladies composing the convent of Notre Dame, situate in Bedford-lane, Clapham.

Sir F. Thesiger to-day appeared for the defendant, and on his behalf expressed his deep regret at the publication of the libels in question, which he was now satisfied were wholly destitute of foundation.

*Shee*, Serjt. (Scott with him) after stating that the ladies for whom he appeared were animated by no vindictive feelings, but only anxious to vindicate their characters from the aspersions which had been cast upon them, consented to accept the apology offered, and was willing that the rule should be discharged upon payment of all costs.

*Rule discharged upon payment of costs.*

REG. v. THE PRINTER AND PUBLISHER of the  
Morning Herald newspaper.

This was a similar rule for a libel published against the same ladies in the *Morning Herald* newspaper of the 20th of March last.

Sir F. Thesiger also appeared for the defendant in this case, and tendered an ample apology for the libel, which he admitted was wholly unwarranted.

*Shee*, Serjt. (Scott with him), on behalf of these ladies, was ready to accept such apology, and consented to the rule being discharged upon the same terms as in the former case.

*Rule discharged upon payment of costs.*

#### BUSINESS OF THE WEEK.

REG. v. HOLLOWAY.—Partridge moved for a *habeas corpus* to bring up the defendant, who had been tried at the Epiphany Sessions for the Coventry division of Warwickshire, and found guilty of a charge of felony, and sentenced to fourteen years' transportation, in order that he may assign error. *Writ granted.*

Saturday, May 3.

LANE and ANOTHER v. HOOVER and ANOTHER.—Sir F. Thesiger, Q.C. moved for a rule calling upon the plaintiffs (upon a long series of facts which he detailed) to shew cause why execution should not be stayed for a week after the settlement of the bill of exceptions herein. *Rule nisi.*

Monday, May 5.

REG. v. THE JUSTICES of MERIONETHSHIRE.—Welsby moved for a rule for a *mandamus* to be directed to the justices of Merionethshire, commanding them to pay the sum of 87l. 10s. being their remaining quota towards the expense of building a lunatic asylum for North Wales. *Rule nisi.*

CLARK and ANOTHER v. THE GUARDIANS of the COCKFIELD UNION.—Hanes applied for a rule to set aside the verdict for the plaintiff herein, and to enter a nonsuit, on the ground that the defendants being a corporation the contract should have been under seal. *Rule nisi.*

MAX v. BUCKENFIELD.—These were two rules, one calling on the defendant to shew cause why the Master should not tax the plaintiff's costs; the other for a suggestion to deprive the plaintiff of costs. *Peerson*, for the plaintiff. *H. Hill*, for the defendant. It was arranged by the parties that the first rule should be discharged, and the second made absolute. *Rules accordingly.*

## LORD CHANCELLOR'S COURT.

As *parte* THE PARISH of GATESHEAD.—*Pashley* moved for a *certiorari* to bring up an allowance of the poor-law auditor, wherein, as it was alleged, he improperly allowed some charges, and disallowed others, in order that the same may be quashed. *Rule nisi.*

REG. v. THE JUSTICES of GREAT YARMOUTH.—*Palmer* moved for a rule calling upon two justices of Great Yarmouth to issue their warrant of distress to levy the amount of a poor-rate. *Rule nisi.*

REG. v. HELLIER.—*Pashley* moved for a rule to quash an order of sessions which had been removed into this Court under sec. 18 of the 12 & 13 Vict. c. 45. *Cur. adv. vult.*

REG. v. THE RECORDER of MANCHESTER.—*Pashley* moved for a rule for a *mandamus* directing the recorder to enter continuances and hear an appeal. *Rule nisi.*

As *parte* FREERY.—In this case his lordship directed the rule to be discharged with costs. *Discharged with costs.*

REG. v. THE TOWN COUNCIL and BURGESS of BRIDFORD.—*Bramwell* moved for a rule calling upon the above parties to proceed to the election of two revising assessors and two auditors for the borough, and to two assessors for each of the wards of the borough, no election of these officers having taken place on the 1st of March last. *Rule absolute.*

Thursday, May 8.

REG. v. THE JUSTICES of ROCHEDALE.—*Cowling* moved for a rule calling upon the justices of Rochdale to proceed and adjudicate upon an application made before them by the commissioners of that town against a Mr. Fiahwick, for erecting an obstruction. *Rule nisi.*

TODD and ANOTHER v. HILL.—*Brown* moved for a rule to set aside a judge's order herein, and for the return of a sum of money. *Rule nisi.*

REG. v. DELAFOSSE and ANOTHER.—*Collier* shewed cause against a rule obtained by *Pashley*, calling upon Mr. Delafosse and Another, who were overseers of a certain parish, to shew cause why they should not pay over a sum of money, pursuant to an order of justices, or why a *mandamus* should not issue, commanding them to make such payment. *Rule absolute for a Mandamus.*

Friday, May 9.

*Keane* moved for a rule calling upon an attorney to answer the matters of an affidavit, and to pay over a sum of money. *Rule nisi.*

REG. v. —.—*Hawkins* moved for a *certiorari* to remove into this court an indictment found against the defendant at the Central Criminal Court for perjury. *Rule nisi.*

REG. v. THE INHABITANTS of MOUNTFERRY.—*Hayes* moved in this case, which was a road indictment, upon which the defendants were convicted for the imposition of a fine. *Rule accordingly.*

Saturday, May 10.

As *parte* THORNTON.—*O'Malley*, Q.C. moved that the service of this gentleman under his articles of clerkship may be reckoned from the time of entering into them, and not from the period of their enrolment, they not having been enrolled in due time from the neglect of his master. *Application granted.*

GARRETT v. STOKES.—*Karslake* moved to set aside the award herein. *Rule nisi.*

Monday, May 13.

REG. v. THE CHURCHWARDENS, GOVERNORS, AND GUARDIANS of the POOR of St. MARY, NEWINGTON.—*Murphy*, Serjt. (*Keane* with him) applied for a *mandamus* (upon the facts stated in affidavits) to be directed to the above parties, commanding them to proceed to the election of certain parish officers, pursuant to their local Act of Parliament. *Rule nisi.*

REG. v. THE RECORDER of LIVERPOOL.—*Pashley* moved for the costs of the writ of *mandamus* herein. *Rule nisi.*

PHILLIPS v. HIGGINS.—*Skinner* shewed cause against a rule for an attachment for not paying a sum of money under an award. *Cooke and Jones*, contr. *Rule absolute.*

As *parte* THE LEAMINGTON PAYING COMMISSIONERS.—*Hayes* moved for a rule calling upon certain justices at Leamington to issue their distress warrant against the goods of a Mr. Woodhouse, to levy the amount of a paving rate. *Rule nisi.*

SAVOURY v. BROWN.—*Phigson* moved to set aside the award herein. *Rule nisi.*

CLARK and ANOTHER v. THE GUARDIANS of the COCKFIELD UNION, SUSEX.—*Welsby* and *Piggott* shewed cause against the rule herein for a nonsuit. *Hanes* in support of the rule. *Cur. adv. vult.*

Tuesday, May 13.

THE QUEEN v. THE BIRMINGHAM, CHESHIRE, AND LANCASHIRE RAILWAY COMPANY.—*Hoggins*, Q.C. moved for a *mandamus*, commanding the above company to construct a certain bridge. *Rule nisi.*

RE OUTTS and ANOTHER.—*Shee*, Serjt. (and *Willies*) shewed cause for Mr. Outts, an attorney of this Court, who, together with Mr. Pattison, were called upon to shew cause why they should not pay over a sum of money. Sir F. Thesiger, Q.C. appeared for Mr. Pattison, but he was not called upon. *James*, Q.C. and *Prentice* in support of the rule. *Rule absolute against Mr. Outts; to be referred to the Master, to ascertain the amount.*

#### Equity Courts.

#### LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

EAST AND WEST INDIA DOCKS and BIRMINGHAM JUNCTION RAILWAY COMPANY v. GATTK.

Dec. 20, 1850, and Feb. 11, 1851.

Lands Clauses Consolidation Act—Consequential injury to property—Lands not required for making railway within 68th section.

The 68th section of the "Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), extends to the case of consequential injury, and, consequently, where the defendant's shop was interfered with by the driving his customers in another direction than

by his premises, and disturbing his access thereto, and the defendant had taken proceedings against the company to compel them to summon a jury to assess the injury he had sustained; an injunction to restrain such proceedings, granted by the Court below, was dissolved.

The decision in this case held not to overrule the case of the London and North-Western Railway Company v. Smith, 1 McN. & Gord. 216, the circumstances being distinguishable, but the application of the principle of that decision will not be extended.

This was an appeal motion to dissolve an injunction, by which the defendant was restrained from taking proceedings under his notice, given in pursuance of the Lands Clauses Consolidation Act, to compel the plaintiffs to summon a jury to settle the amount of compensation claimed by him, and from bringing an action to recover 480l. claimed by the defendant. The facts are fully stated in the Lord Chancellor's judgment.

The Attorney-General (Romilly) and Grove for the appeal motion.

Wood and Hetherington supported the injunction.

The following cases were cited and referred to:—*Smith v. London and North-Western Railway Company*, 1 McN. & Gord. 446; 9th, 26th, 28th, 29th, and 68th secs. of the Lands Clauses Consolidation Act, 8 Vict. c. 18; *Owen v. Eastern Counties Railway Company*, 2 Railway Cases, 736; 2 Q. B. Rep. 329; *Bell v. Hull and Selby Railway Company*, 6 M. & W. 699; *Frewin v. Lewis, M. & C.* 249; *R. v. London Dock Company*, 5 A. & E. 204; *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. Rep. 347; *Thicknesse v. Lancaster Canal Company*, 4 M. & W. 472.

#### JUDGMENT.

The LORD CHANCELLOR.—This case came before the Court on a motion to dissolve an injunction by which the defendant was restrained from taking any proceedings whatever against the plaintiffs under or pursuant to a notice dated 11th March, 1850, in the plaintiffs' bill mentioned, and in particular from taking any proceedings to compel the plaintiffs to issue their warrant to the sheriff to summon a jury for settling the amount of compensation claimed by him in the plaintiffs' bill mentioned, and also from bringing any action, or taking any proceedings at law against the plaintiffs to recover the sum of 480l. so claimed by him in respect of the premises until further order. The company, who are the plaintiffs on the present occasion, is incorporated by an Act of Parliament made and passed in the 9th and 10th year of the reign of her present majesty, and is intitled "An Act for making a Railway from the East and West India Docks to join the London and Birmingham Railway at the Camden-town Station, to be called; 'The East and West India Docks and Birmingham Junction Railway;'" and it appears from the bill that the company have commenced their works, and are in the course of constructing their railway; that in September in the year 1849, the defendant made a claim against the company for the sum of 480l. as compensation due to him for damages and injury alleged to have been sustained in consequence of the dust and dirt occasioned by the company having damaged his goods, and by reason of his customers having been compelled by the obstruction occasioned by the plaintiffs' works, to quit the side of the road on which the defendant's shop was situated, and to pass on the opposite side, by reason whereof, during several weeks, he had sustained great loss in his trade; and the defendant also alleged that he had been injuriously affected and injured by the company having stopped up a lane or passage along which he was entitled to a right of way to an entrance at the back of his premises. The bill then alleges that no part of the defendant's premises was inserted in the schedule to the special Act, and that no part of those premises had been taken, used, or interfered with by the works of the company, and therefore the defendant had no claim to compensation under the provisions of the statute; and it also alleges that several matters complained of by the defendant were wholly false and without foundation, and that they had therefore declined to comply with his demand to pay his compensation, or to issue a precept. The bill then states that the defendant had required the company to enter into a written agreement to pay the amount of his claim, or to issue the precept to summon a jury, and that the company refused to do so for the reasons before stated; and they allege that the issuing of such precept would operate as an admission of title in the defendant to compensation, and the jury would have no jurisdiction to consider or decide upon that question under the statute; but that by omitting to issue the precept, the defendant would acquire a right to recover the full amount of his claim for costs, unless this Court interfered to restrain him; and, further, that the statute contains no provision by virtue of which the right or title of the defendant to compensation can be legitimately tried and decided, and that such question could not be determined without

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the aid of this Court. The bill then prayed a declaration that the defendant was not entitled to any compensation, and that if necessary an issue might be directed to try whether the interests of the defendant had been injuriously affected by constructing the works of the company, and that the defendant might be restrained from taking all proceedings to compel the plaintiffs to issue their precept to the sheriff to summon a jury, or from taking any other proceedings to recover the amount of the compensation claimed by him. The defendant in his answer sets forth his interest in the premises occupied by him, and states the manner in which he alleges the company's works had injuriously affected his premises, and which is stated in the claim to which I have before adverted. The defendant admits in his answer that no part of his premises has been taken or directly interfered with by the works of the company; but he contends they have been injuriously affected within the meaning of the statute, and therefore he insists upon his right to compensation. It will be observed that the case of the plaintiffs rests upon two grounds. It was contended that the Act of Parliament imposes no liability upon the company to make compensation or incur costs merely from the works to be constructed; but the compensation is only given in respect of premises actually taken and injuriously affected by an immediate and direct meddling or interfering with that which the answer admits has not been done with regard to the defendant's premises. Secondly, it was alleged that the defendant has, in fact, sustained no damage whatever from the company's works; and upon those grounds, and especially the first, the plaintiffs insist that the defendant ought to be restrained in equity from enforcing the company to issue the precept, and from commencing any action to recover the amount of his claim by reason of omitting to do so; and that the Court ought to declare the defendant is not entitled to compensation, or to send the question under proper directions to a Court of law for decision. The Vice-Chancellor Wigram granted the injunction as prayed, and his decision appears to have been founded upon principle, and upon the authority of the decision of Lord Cottenham, in the case of *The London and North-Western Railway Company v. Smith*, 1 Mac. & Gor. 216. The object of the present application is to dissolve that injunction? The first and most important point to be considered is, whether, upon a correct construction of the statute of the 8 Vict. the defendant is within the class of persons entitled to compensation. In other words, has he the occupation of land that has been injuriously affected by the works of the company? The only sections of the Act that appear to have any particular relation to this question are the 22nd and the 68th, and they are to the following effect:—By the 22nd section of the 8 Vict. it is enacted, "That if no agreement be come to between the promoters of the undertaking and the owners or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking or any interest in such lands as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50l. the same shall be settled by two justices." By section 68 compensation is given in respect of land or any interest therein which shall have been taken or injuriously affected by the execution of the works of the company. I am not aware that the two sections to which I have adverted have ever received a judicial construction, but it appears to me that the sections and expressions contained in other Acts of Parliament of the same import as those on which this case depends, have come under judgment and ought to be decided by the rules of construction which have been applied to railway Acts and other Acts of the same nature, that they are to be liberally expounded in favour of the public and strictly expounded as against the company. The authorities upon this rule are so well known that it cannot be necessary to enter into their nature. The case of *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. Rep. 347, arose upon an Act of Parliament passed in the 6th and 7th years of the reign of his Majesty Wm. 4, c. 106, and Lord Denman remarks,—"Before we advert to the provisions of this particular Act, we think it not unfit to premise that where such large powers are entrusted to a company to carry their works through so great an extent of country without the consent of the owners and occupiers of lands through which they are to pass, it is reasonable and just that any injury to property which can be shewn to arise from the prosecution of those works should be fairly compensated to the party sustaining it." These remarks, I think, are reasonable, and I think it is to be presumed that all the Acts of Parliament which have been passed since that time are embraced within them, and have been framed in reference to such a view which are no doubt to be qualified and rebutted by the contents of the Acts of Parliament to which they are to be applied. The statute of the 6 & 7

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Wm. 4, c. 106, upon which this case of *Reg. v. The Eastern Counties Railway Company* arose, incorporates the company for the purpose of constructing an extensive line of railway, and by section 19 of that statute, power is given to the company to take the land for the purposes of the railway, and construct a vast variety of works, and to do all other things necessary and convenient to the use of the railway, and there the statute contained the following words:—"And the said company making full satisfaction in manner hereinafter mentioned to all persons interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." The 29th section of the same statute contained the direction for trying or determining disputed claims for compensation, and by that section the jury are directed to assess and give a verdict for the damages which had been before that time done or sustained, or for or by reason of a severance of the land; and it then contains these words, "which satisfaction, recompense, or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or used." In that case compensation was claimed upon the ground that the party was interested in land injured by reason of the execution of the works; but it appears that such injury was not occasioned from any direct interference with the land, nor was any part of the land taken, but was consequential from the works of the company. The injury arose from the company having lowered a road adjoining the plaintiff's premises, by which access was impeded, and additional fences were made necessary for the claimant's property. It was contended, on the part of the company, that secs. 9 and 29 ought to be construed in connection, and that the direction in respect of the form of the verdict, and what it should contain, shewed that the compensation referred to in the 9th section was intended only to be given to persons whose lands were taken, used, or directly interfered with, and the consequential damage gave no right to compensation. It seems to have been scarcely intended that the 9th section, uncontrolled by the 29th, would not have entitled the party to compensation. Lord Denman, in giving the judgment of the Court, says that sec. 9 in terms comprehends cases of injury independently of taking land; and next, that it is assumed that the satisfaction is to be so made (which, if parties could not agree, must refer to the compensation clause), as to extend to all the cases of injury, one of which was injury to any person, whether his land was taken or not. The argument urged in that case appears to have been that as the jury were specially directed under the 29th clause to find as to matters applying to land taken and damaged thereby, it must have been intended that the jury were to make compensation for no other matters referred to. The Court, however, held, for the reasons assigned, that the 29th section did not control or limit the 9th, and by the 9th the intention was plainly to give compensation to persons whose lands were not taken, but sustained consequential injury. The material words of the 9th section of the 6 & 7 Wm. 4, c. 108, being "that the company are to make full compensation to all persons interested in any lands which should be taken, used, or injured for all damage sustained by reason of the execution of the powers granted by that Act." It will be found, upon comparing those words with the words in the 68th section of the 8 Vict. c. 18, the Act of Parliament which governs the present case, the clauses cannot be distinguished, and that the same construction must apply to both. The question which arises upon the sections which I have compared is precisely the same question, that question being simply whether compensation is limited to damage sustained by persons whose lands, or part of whose lands, are taken, used, or indirectly interfered with, or whether the right to compensation was excluded as to consequential damage. The judgment of the Court of Q. B. was deliberately considered, and the Court acted upon it by directing a peremptory *mandamus* to the company to issue their precept. The 68th section, and which we have now to consider, expresses the same meaning, and ought to receive the same construction, especially when it is remembered that the judicial construction of the sections of the 6 & 7 Wm. 4, to which I have referred, was pronounced in *Michaelmas Term*, 1841, and the section in question was enacted in the eighth year of her present Majesty, in March 1845, and it cannot be reasonably supposed that the framers of the 8 Vict. c. 18, were not aware of that judicial construction, still less were the framers of the Act under which this company was incorporated ignorant of it, and who, if the compensation to be given by that Act was intended to be more restricted than the decision in the Q. B. comprised, would doubtless have procured some legislative enactment more distinct and expressive of the intended restriction. The only ground of equity raised by this bill is founded upon the question whether the 22nd and 68th sec-

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tions entitle other persons to compensation than those whose lands are taken or directly interfered with. The defendant's lands not being so circumstanced, I think that the judgment of the Court of Q. B. is a satisfactory answer to that, and that the only ground of equity fails, and therefore the injunction ought to be dissolved. It was strongly argued on the part of the plaintiffs that the case of *The London and North-Western Railway Company v. Smith* governed the present case, and that the injunction in this case could not be dissolved without overruling that decision. If the question in that case were precisely the same as that determined in the case referred to, I should yield to its authority, because I do not think it would be proper for me to overrule a former recent judgment of this Court, as such a course of proceeding must introduce a great uncertainty in the law of this Court; it is more fit, under such circumstances, that the case should be overruled, if at all, by an appellate court. I may, however, state, that I should not deem it right, for reasons which will hereafter appear, to extend the application of the principle of that decision, although at the same time I disclaim the intention to overrule it. I think this case is quite distinguishable from the case of *The London and North-Western Railway Company v. Smith*. In the case of *The London and North-Western Railway Company v. Smith*, compensation was claimed solely upon the ground of the injurious effect resulting from the permanent stoppage of what at the time of the company's Act was a public highway. No damage or injury was done by the plaintiffs but what is a greater or less degree applied to all her Majesty's subjects, and the question was a question of law, which seems to approximate very nearly to the question decided in the case of *Reg. v. The Bristol Dock Company*, in which case compensation was claimed by certain brewers who were in the habit of using the water of the river Avon for brewing, and the works constructed by the railway company rendered the water unfit for that purpose, in respect of which compensation was claimed; but the Court held that there was no such appropriation of the water to take place, so as to give the claimant more right to compensation than any other individual of the public who had been in the habit of getting water from the river. The complaint in substance was a public nuisance, for which an indictment would have been the only remedy if the Legislature had not authorised it to be done. In that case the injury complained of was common to the public, as was also the case of *The London and North-Western Railway Company v. Smith*. In this case the claim is personal and individual, and is supported by a distinct decision of the Q. B. and, upon the authority of the case in the Q. B. I think the defendant is entitled to have his compensation assessed by a jury, and, therefore, the case is distinguishable from the one before referred to, and that the injunction, as I said before, ought to be dissolved. The application of the principle of *The London and North-Western Railway Company v. Smith* to this case and to others of the same nature would operate very hard upon the complainant, and would, I think, defeat its intention clearly entertained by the Legislature. The duty of the company to issue a precept to compel payment of the compensation, in the event of the defendant being found entitled to the performance of that duty, cannot operate as an admission on the part of the company, who have no discretion after the compensation jury shall have decided that the defendant has sustained damages for which he is entitled to be compensated; the claimant is to enforce payment by a formal proceeding for that purpose, which used to be by a *mandamus*, and if the jury had no jurisdiction to decide upon the right, it followed that question of the right be raised upon the return to the *mandamus*; but since the decision of *Corrigall v. The London and Blackwall Railway Company*, in 5 Man. & G. 219; and *Williams v. Jones*, 13 M. & W. 628, it seems the remedy of the claimant is by action upon the judgment; and the pleadings, as referred to in *Corrigall v. The London and Blackwall Railway Company*, in such an action, shew that the right might be well disputed, supposing, as before stated, the compensation jury had no jurisdiction to decide the question. The argument founded upon the supposed admission on the part of the company, I think, therefore fails; and it has also been assumed in the argument that the compensation jury have no power to decide upon the right; but during the many years that compensation has been assessed, several questions upon the construction of the clauses have constantly arisen, and they have been of necessity decided by a jury: such questions of construction have arisen incidentally and indirectly, and of necessity, therefore, could not be anticipated, and were compelled to be decided upon the trial. The jurisdiction of the jury has been frequently recognised. In the case of *Reg. v. The Lancaster and Preston Junction Railway Company*, 6 Q. B. Rep. 759, the jury found the claimant had sustained no damage, and upon application for a *mandamus* to compel the

## LORD CHANCELLOR'S COURT.

company to issue a new precept, the Court refused to do so, and therefore upheld the injunction. Lord Denman in giving judgment, after speaking of the duty of the jury, says, "They are to inquire and assess the damages, and even if Mr. Atherton be right in his argument, that the issuing of the warrant admits the fact of some damage, that admission cannot bind the jury. The question whether any damage has been sustained or not is inseparable from the question, how much damage has been sustained. The words in the warrant, therefore, though it would have been better if they had been omitted, do not alter the duty, and all parties are bound by this verdict; and if the proceedings show on their face a defect of jurisdiction, a *certiorari* is not wanted." Mr. Justice Coleridge said, "The words 'if any' though it would be better if they were away, do not affect the validity of the warrant, for though it may go only to the quantum, that quantum may be nothing. Then, the jury cannot be expected to give a farthing; strictly speaking, such a finding if there were no damages would be a violation of their oath as much as the finding of a large sum." In that opinion Coleridge and Wightman, JJ. concurred. In the case of *Reg. v. The Eastern Counties Railway Company*, 3 Railway Cases, 460, the plaintiff tendered evidence under a certain head of claim, and the undersheriff rejected the evidence, upon the ground that by the Act the compensation jury had no jurisdiction to assess compensation for that head of damage. A motion was afterwards made for a *mandamus* for a new precept, but it was refused, upon the ground that it was in effect and in another form to review the decision by a new trial, which the party could not do; therefore the power of deciding upon how far a particular claim came under the consideration of a jury, was to be recognised. In the case of *Reg. v. The Eastern Counties Railway Company*, it was also objected that evidence had been improperly received of determination by the construction of the works, and the Court said such evidence was receivable to shew jurisdiction, plainly importing that the question of jurisdiction was within the province of the presiding officer and compensation jury. The assumption, therefore, that the presiding officer and jury had no jurisdiction to construe the Act upon the point whether any claim made for compensation is or is not within its provisions, is founded on mistake, but it was said that the tribunal is not such that it was competent to discharge the duty of deciding questions of law and constructions; but the real question is, has the statute given them that power? If it has, a serious question arises as to the competency of any Court to withdraw that power and jurisdiction from them. The supposed inconvenient course which is suggested in preference to delay and expense of a *mandamus* is urged; but what is the course that this Court is asked to substitute for that statutory form? Instead of going to a jury and assessing the compensation, and leaving the question of his right to be afterwards decided, the Court is asked to subject the claimant, how small soever the claim may be, to a suit in Chancery, in which the question involved is admitted to be a question of law which the Court of Equity is not competent to decide, and then the Court is asked to send this case to a Court of Law for decision by an action. The proceedings in this court are liable to be appealed to the House of Lords, where, if the party succeeds in his appeal, he gets no costs. An action is subject to a bill of exception, and then a writ of error, and then afterwards to an appeal to the House of Lords. The delay in such a course of proceeding cannot be predicted. In case the result be favourable to the claimant, he has then to begin a course of prosecution to obtain compensation, and all this is brought upon the plaintiff by means of the Legislature having attempted to give a short remedy, and to avoid delay and expense. The means of companies to prosecute litigation cannot be compared with those of individual claimants. The claimant's interest is expedition, that of the company may be delay. The claim may be of a moderate amount; and to enter into a conflict with a company must be often ruinous, and, I may say, such a course being open to a company, is always unwise; and the company, by making an example of one complainant, would in all probability succeed in deterring many others from advancing what might be just claims. It is also to be observed that if the course pointed out by the statute is inconvenient or open to the objections that have been urged, the company are much more responsible for that inconvenience than the plaintiff, for the company had the opportunity of satisfying Parliament, if they could, of the unreasonableness of it, and of suggesting a more just course. In this case I see no reason to doubt if the defendant has in fact sustained damage by the cause he has alleged, he is a person entitled to compensation, and under the statute he is entitled to have that question submitted to a jury, and the injunction, therefore, must be dissolved with costs.

## V. C. KNIGHT BRUCE'S COURT.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLRUTT, Esq. of the Middle Temple, Barrister-at-Law.

December 5 and 6, 1850.

CUTTS v. SALMON.

*Attorney and Client—Sale—Specific performance. In the case of a contract by a solicitor for the purchase of his client's interest, the confirmation or acquiescence sufficient to give the solicitor a good title to specific performance must be strong and plain.*

This suit was instituted by Mr. Cutts for the specific performance of the contract mentioned in the case of *Salmon v. Cutts*, 16 Law T. 502.

J. Parker, Lee, and F. S. Williams appeared for the plaintiff; Cooper, Elderton, Malins, and Craig for the several defendants.

The VICE-CHANCELLOR said—Some lands in Essex, belonging to three young men, brothers, one being at the time a minor, were put up to sale by auction in 1845, in the country. The plaintiff, Mr. Cutts, an experienced attorney in the neighbourhood, was consulted professionally in the matter as the solicitor for the three vendors. He became a bidder at the sale, openly, for one of the lots, not the only, but the highest bidder, and it was knocked down to him. Of course, *prima facie*, such a transaction is not enforceable in a court of equity—is one which the vendors are entitled to treat as good for nothing as against them; but, nevertheless, it is competent for the solicitor to shew, if he can, special circumstances which may take the case out of the general rule, and entitle him to have the purchase completed. The question is, whether he has done so. Mr. Cutts says, and probably with accuracy, that the reason which induced him to buy was, that these particular fields form a corner which he is desirous of having, as it adjoins his estate; that the defendants caused the auctioneer to combine the fields in one lot with other lands, to render them, in the dialect of the auction-room, "heavy." That fact, and the argument founded upon it, do not seem to me unworthy of attention. He purchased without any communication with the defendants before the sale. Had they been older, or more experienced men, or men of a position in society materially different from their actual position, there might have been great weight in that argument, for I believe there was no such communication. The defendants were all very young; the eldest was a shopkeeper, or a farmer; the second, a farm bailiff in the plaintiff's service at the time; and the third, a farmer and a minor; and I cannot attribute to them a sufficient knowledge of the nature and probable effect of the consequence of a bidding at an auction by the attorney to hold them bound. The plaintiff might have informed them before the bidding, but he did not do so. He might have interposed a professional man between himself and them, but he did not do so. He might possibly have taken a course which (subject to the question of the youngest brother's minority) might have maintained the purchase, but he did not do so. The next question is, whether there has been any subsequent confirmation or acquiescence by the defendants. In the case of a contract by a solicitor for the purchase of his client's interest, the confirmation or acquiescence sufficient to give the solicitor a good title to specific performance must be strong and plain; I do not think it is so here. The conduct of the defendants since the auction, notwithstanding their station in the world, has been such that it may be thought a strong measure not to give specific performance; but the importance to society of holding a strict hand over dealings between a solicitor and his clients when they are bargaining together, so far as the solicitor is concerned, renders it in my judgment in such a case as the present, proper to exercise the judicial discretion of the Court in a suit for specific performance to dismiss the bill, and leave Mr. Cutts at liberty to proceed at law against the defendants as he may be advised, and to take any further proceedings in the other suit lately before Sir Lancelot Shadwell, and now before Sir Robert Rolfe.

Cooper and Malins, for the defendants, asked that the bill might be dismissed with costs.

The VICE-CHANCELLOR offered the plaintiff the alternative of delivering up the possession of the estate by a certain day, or having his bill dismissed with costs.

J. Parker, for the plaintiff, declined to deliver up the estate, and

The VICE-CHANCELLOR accordingly directed that the bill should be dismissed with costs.

Wednesday, March 12.

RING v. JARMAN.

Pleading—Parties.

A testator gave his real estate to trustees upon trust to lay out the rents during twenty-one years from his death, in the purchase of freehold or copyhold lands, and to convey them at the end of

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that term to the person then answering the description of the testator's heir. The personal estate was bequeathed to the same trustees to lay out in land for the same purpose. In a suit instituted shortly after the testator's death, by a person claiming to be the heir-at-law, for the administration of the testator's estate, it was

Held, that the next of kin were necessary parties.

Richard Ring, by his will dated the 25th of March, 1850, gave all his real estate to trustees upon trust during the term of twenty-one years from the testator's decease to receive the rents and invest them in the purchase of freehold or copyhold lands in England or Wales, and after the expiration of twenty-one years, to convey the real estate so devised and to be purchased to the use of the person or persons who should then answer the description of the heir general of the testator. The testator also bequeathed his personal estate to the same trustees, upon trust, after payment of debts, &c. to lay out the same in the purchase of lands, to be conveyed as before directed as to the real estate; and he appointed the persons named as trustees, his executors. John William Ring, the plaintiff in this suit, claimed to be the heir-at-law of the testator, and filed a bill against the trustees and executors of the will for the administration of the estate under the direction of the Court. The cause now coming on for hearing,

Giffard appeared for the plaintiff;

Malins and Briggs for two of the trustees; and

Toller for the third trustee.

The VICE-CHANCELLOR said that he considered the next of kin of the testator were proper parties to the suit, as in the event of there being no heir of the testator living at the end of the twenty-one years, they would have an interest.

The case accordingly stood over for the bill to be amended, by making the next of kin parties.

Thursday, Dec. 5, 1850.

PHILIPS v. EVANS.

Will—Construction.

A testatrix bequeathed her personal estate in trust for her sister for life, with remainder to her niece, C. D. for life, with limitations to C. D.'s children, and in default of children to another niece, E. F. for life, with limitations to E. F.'s children, and in the event (which happened) of C. D. and E. F. dying without having had a child, in trust for the personal representatives or next of kin of the testatrix's late father:

Held, that the next of kin entitled were the next of kin at the death of the testatrix, and not those at the death of the surviving tenant for life.

Ann Tatin, the testatrix in this cause, by her will dated the 14th of July, 1796, bequeathed unto Jeremiah Bigsby and Francis Evans, their executors, administrators, and assigns, all her personal estate upon trust to receive the same, and to place the moneys to arise thereby out at interest, and to pay the clear yearly dividends, interest, and produce to her sister, Elizabeth Gelstharp, for her life, and after the decease of her said sister to pay the said interest and dividends to her niece, Elizabeth Gelstharp, for her life, and after her decease to deliver all such moneys unto the issue, child or children, of her said niece, Elizabeth Gelstharp, as in the will mentioned, and in default of such issue upon trust for the testatrix's niece, Catherine Tutin, for her life, and after her decease for the issue, child or children, of the said Catherine Tutin, as in the will mentioned, and in case the testatrix's said sister should not be living at the time of the decease of the survivor of the testatrix's said two nieces, Elizabeth Gelstharp and Catherine Tutin, without such issue as aforesaid, in trust to deliver and pay the same unto and amongst the personal representatives or next of kin of the testatrix's late father, Edward Tutin, their executors, administrators, and assigns; and the said testatrix appointed her said sister, Elizabeth Gelstharp, the said J. Bigsby, and F. Evans joint executrix and executors of her said will. The will was proved on the 24th of October, 1796. Catherine Tutin and Elizabeth Gelstharp the niece survived Elizabeth Gelstharp the sister, and Catherine Tutin died in September 1824, without having been married, and Elizabeth Gelstharp, the niece, died on the 11th of January, 1848, without having been married. The question, therefore, arose whether the persons entitled under the last limitation in the will were the next of kin of Edward Tutin at the death of the testatrix, or the next of kin at the death of Elizabeth Gelstharp the niece, the surviving tenant for life.

Metcalf, for the plaintiff, contended that the class was to be ascertained at the death of the testatrix, and relied upon *Bird v. Luckie*, 14 Jur. 1015, and the cases there referred to.

De Gex, for the persons claiming to be next of kin at the death of Elizabeth Gelstharp, the niece, cited *Miller v. Eaton*, Coop. 272; *Say v. Creed*, 5 Hare, 580; *Clapton v. Bulmer*, 3 Myl. & Cr. 108; and *Beck v. Bown*, 7 Bea. 492; and said that the present case was distinguishable from *Bird v.*



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*Lachie*, as the next of kin to be ascertained here were not the testatrix's next of kin.

*M. A. Shee*, for the trustees.

The VICE-CHANCELLOR said that this case differed from those relied upon by the plaintiffs in the circumstance that the next of kin were those not of the testatrix, but of another person. That was not, however, in his Honour's opinion, sufficient to distinguish it in principle from them, and having recently considered all these cases in the latest one referred to, he should give a similar decision in this in favour of the next of kin at the time of the testatrix's death.

Saturday, May 10.

*Re THE ASHBURTON UNITED MINING COMPANY. Joint-Stock Companies Winding-up Acts.*

In this case an order was made (see 16 Law T. 456) on the 15th of February, but before the registrar a discussion arose as to the amount of calls to be paid by the petitioner, the one side alleging it to be 21l. and the other 47l.

*Bacon* and *Logie*, for the petitioner, now asked that, under the circumstances, the petition should be dismissed without costs.

*R. Palmer* and *Glasse*, for the respondents, asked that the dismissal should be with costs.

The VICE-CHANCELLOR thought that no sufficient reason had been shown for dismissing the petition without costs. He should therefore dismiss the petition with costs, in the same manner as if it had been dismissed with costs when the order before-mentioned was made.

Tuesday, May 13.

*Ex parte JAMES, re THE NORTH LONDON JUNCTION RAILWAY COMPANY. Joint-Stock Companies Winding-up Acts—Acts of Provisional committee.*

The provisional directors of a railway company, for the purposes of the company, took a lease of offices for a term of twenty-one years, determinable at the end of seven or fourteen years; and the trustees of the company executed such lease by their direction. A subscribers' agreement was executed, but the company was afterwards dissolved. The company being ordered to be wound up, one of the trustees claimed to be repaid the sums he had paid on account of rent since the dissolution of the company; but the Court

Held, that the company at large were not liable.

This was a motion on behalf of Mr. Wm. Boyce James, the interim manager of the above-named company, that the order or report of Master Brougham, dated the 17th of March, 1851,—whereby the Master allowed the state of facts, charge, and claim of John Bagshaw, esq. one of the contributors of the company, in respect of the sum of 4034. 2s. 6d. charged to be due and owing to him, as also the claim of the said John Bagshaw, to be indemnified from the consequences of having executed the counterpart of a certain lease, and to be repaid all sums of money and costs which he had paid or incurred in consequence thereof, after deducting the several amounts which he had received in respect of the said house—might be discharged. The company was provisionally registered on the 15th of May, 1845; and shortly afterwards a provisional committee, of which Mr. John Bagshaw was one, was appointed. The subscribers' agreement, dated the 7th day of July, 1845, contained the following clauses:—"That it shall be competent for the said committee of management, at any time or times until an Act of Parliament shall be obtained authorising the said undertaking, to enter into any contract for the taking or purchasing of land or buildings of leasehold, freehold, or copyhold tenure, or any property which may probably be required for the purposes of the said undertaking, or which it may be deemed expedient by them to take or purchase for any purposes connected therewith, in consideration of such sum or sums of money, or in consideration of such yearly rent or rents, and generally for such considerations and upon such terms in all respects as the said directors shall think fit, but so that such contracts shall be entered into upon condition that such Act shall be obtained:" "That the said committee of management shall have full power to appoint, suspend, or remove, and to re-appoint bankers, &c. . . . and to enter into contracts and agreements for any purpose whatever connected with the undertaking, and which can be legally entered into:" "That whether the said Act or Acts of Parliament shall or shall not be obtained, the several subscribers to the said undertaking shall and will save harmless and keep indemnified the said committee of management and every individual member thereof from and against all costs and charges, damages, losses, and expenses which they, or any or either of them, shall or may incur, sustain, be at, or be put unto in the execution of the trusts, powers, and authorities committed to them by these presents, such costs, charges, damages, and expenses, to be respectively computed, assessed, paid, and made good by the

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said several parties hereto respectively, and their respective executors and administrators, rateably according to the amount of the sums subscribed by them respectively:" "That nothing herein contained shall be taken or construed as intending to authorise the said committee of management to do any act whatsoever which the rules of law will not permit."

At a meeting of the company on the 4th of July, 1845, Mr. Bagshaw and Mr. W. Hughes Hughes were appointed trustees of the company. At a meeting of the directors on the 11th of July, the following minute of proceedings was entered: "The directors having found it desirable to take offices in the house, No. 8, Finsbury-place South, and the landlords of that house having refused to let it except upon a lease, it was resolved, on the 27th day of June, ult. that it was expedient that such offices should be taken on a lease for a term of seven, fourteen, or twenty-one years, in the name of W. H. Hughes, esq. and John Bagshaw, esq. the trustees of the company, and it is now resolved that they be requested to execute such lease, and that they shall be, and are hereby indemnified by the directors and shareholders of this company against any liability that may be incurred by them in respect thereof." In pursuance of this resolution Mr. Bagshaw executed the lease, dated the 5th day of July, 1845, by which the offices in Finsbury-place were demised to Mr. Hughes and Mr. Bagshaw for twenty-one years, determinable at the end of seven or fourteen years, at the rent of 150l. per annum. On the 4th of July, 1846, the company was dissolved. Mr. Bagshaw having had to pay the rent upon the lease since the dissolution of the company claimed to have this repaid to him, and to be indemnified out of the assets of the company, which had been ordered to be wound up. By arrangement, in order to bring the matter before the Court, the Master allowed the claim, now appealed against.

*Bacon* and *Terrell*, in support of the motion, contended that the taking a lease of this description was not authorised by the subscribers' agreement, or the Joint Stock Companies Registration Act, and therefore the liabilities under it were not properly to be borne by the company.

*Wigram* and *Grove*, for Mr. Bagshaw, said that if the company were not liable, some classes of the contributors were, and Mr. Bagshaw ought to be indemnified, as provided by the 83rd section of the Winding-up Act of 1848. But under the 23rd section of the Registration Act (7 & 8 Vict. c. 110), and the subscribers' agreement, the taking this lease was authorised. It could not be said that the Company's Act of Parliament would be obtained within the first or second year after their formation, and therefore a lease for seven years was not improper; and, under the circumstances of difficulty in obtaining at that time suitable offices, the directors were justified in the course they had taken. They cited *Garwood v. Ede*, 1 Ex. Rep. 264.

The VICE-CHANCELLOR (without hearing *Bacon* in reply).—Not only do I think that a contract of this description was in its nature improper—not using that word offensively—towards the company at large, the directors being aware of the uncertain and provisional position in which they stood, but it seems to me to have been absolutely prohibited by the subscribers' agreement or the Act of Parliament, or both. It is impossible to sustain this as a charge on the whole company. Mr. Wigram has very properly suggested, and it may probably be true, that this burden ought to be borne by the directors as between themselves. I cannot, however, enter into that question upon the present application. All I have before me is the question, whether the company are liable or not. I do not understand that I am dissenting from the Master, for he has not been called on to exercise any judgment upon the question. I only decide that the company at large are not liable. I consider the question between the directors as quite open and unaffected by my decision.

*Re THE ROYAL BANK OF AUSTRALIA.*

*Joint-Stock Companies Winding-up Acts—Inspection of documents by creditors.*

Certain creditors of a company ordered to be wound up had filed their claims in the Master's office. The Master, upon their application, gave them leave to inspect certain documents relating to the company which were in the possession of the official manager. Some of the contributors moved that the Master's order should be discharged or varied, but the motion was refused.

This was a motion on behalf of some of the contributors that the Master's order, dated the 8th of May, 1851,—whereby it was ordered that Mr. Dobie should, on behalf of his respective clients (whose claims to be admitted as creditors herein had been filed in the proceedings in his office, by Mr. Dobie, in this matter), be at liberty to inspect and take copies at their expense of the several books and documents in the said order mentioned in the hands of the official manager in the above-named matter—might be discharged or varied. The creditors or

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debenture holders of the Royal Bank of Australia having filed their claims in the Master's office, applied to the Master for leave to inspect and take copies of certain documents relating to the bank which were in the possession of the official manager, and the Master had by the order now appealed in given such leave.

*Bacon*, in support of the present motion, contended that these creditors must make out a case to establish their right to examine the books. The 48th section of the Winding-up Act of 1848 provides "that subject to the control of the Master all contributories shall be entitled, without fee or reward, to inspect all or any of the books of the company, of the official manager, or receiver, if any, and to take copies or abstracts of, or extracts from, of any of such books, or any part thereof." These creditors were not contributories, and therefore had not the right under this section to inspect the books. The 58th section enacted that, except as by the Act expressly provided, nothing in the Act contained, nor any petition or order under the same in its dissolution and winding up, or for the winding up of any company, should extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors. A creditor must establish in right before he can compel the production of a debtor's books; and such right had not been established here. He cited also the 63rd section of the Act of 1848, and the 19th section of the Act of 1844.

*Deniel*, for the official manager, did not object to the production of the books. The VICE-CHANCELLOR (without hearing *Wigram* and *Selwyn* for the creditors) said that he considered the Master had a right to permit the production and inspection of these documents, and that there was reason to suppose that the Master had not exercised a proper discretion in the matter. He should allow the motion.

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Reported by W. H. BAKER, Esq. of Lincoln's Inn, Barrister-at-Law.

Monday, May 6.  
DUGBY v. BOYCON.

*Discretion of the Master—Trusts and cestui que trust.*

In a case purely for the discretion of the Master, the Court interferes with reluctance: But where that discretion has evidently been exercised against the wishes of the parties beneficially interested in estates under the will of a testator, and in accordance with the wishes of the trustees under that will, the Court will interfere, and declare an agreement for the purchase of an estate to be a beneficial agreement, although the Master had certified that it would not be so.

This was a petition by certain cestui que trusts, to the nature of an exception to the Master's report, by which it had been found that an agreement for the purchase of an estate which had been entered into, was not fit and proper and for the benefit of those cestui que trusts and the other parties interested in the trust estates, and that it should be set aside and carried into effect. The cestui que trusts, thinking that the agreement was a beneficial agreement, brought the subject before the Court for its decision. The testator, John Morse, had in his lifetime accumulated a very large personal estate, with its accumulations, amounting at the present time to nearly 300,000l. By his will, dated the 14th June, 1842, he gave and bequeathed all his personal estate and effects to trustees upon trust, after satisfying certain specific and pecuniary legacies, to lay out and invest the surplus of his residuary personal estate in the purchase of manors, messuages, lands, or other hereditaments of an estate of inheritance in fee simple, to be situate in England or Wales, and contiguous to each other, or to the several real estates thereinbefore devised, or some of them, as near as conveniently might be procured by him, said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of him or the survivor, or elsewhere in England or Wales, and his full and free discretion; and he directed that the manors, messuages, lands, and hereditaments so to be purchased, together with the other hereditaments thereinbefore mentioned and directed should be settled and assured to the uses and upon the trusts therein mentioned.

At the time of his death the testator was possessed of an estate at Abbots Wootton, in Dorsetshire, of about 800 acres; he had also estates in Norfolk and Suffolk.

By an agreement, dated the 2nd Nov. 1840, and executed by the trustees of the will, it was agreed that they should purchase of certain persons, trustees for the Bank of England (to whom the land had been mortgaged), an estate in Wiltshire, called Manningford Bohun, consisting of about 1,157 acres of pasture, arable, water-meadow, and down land, let to responsible tenants, the rent, after all outgoings, being 1,655l. per annum. The sum of



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## QUEEN'S BENCH.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BIDDLETON and PAUL PARRELL,  
Esqrs. Barristers-at-Law.

Friday, May 2.

DOE dem. PARSEY v. HEMMING and OTHERS.  
Devise—Construction of—False demonstration.

A testator by his will devised to A, his heirs and assigns for ever "all those three several freehold messuages in N. street, together with the piece of freehold ground in the rear of the said messuages, whereon I have erected certain cottages, parcel of Parsey's-gardens, and which said last-mentioned hereditaments were conveyed to me by indentures bearing date," &c. There was a piece of freehold land in the rear of the three messuages which had been included in the conveyance referred to; but the only cottage built by the testator to which the words could apply, was built upon some leasehold land adjoining, of which the testator became possessed at a different time and under a different conveyance:

Held, that this cottage did not pass to A under this devise.

This was an action of ejectment which came on for trial before Wightman, J. at the sittings in Mid-summer, after Hilary Term, 1850, when a verdict was found for the plaintiff, subject to the opinion of the Court upon a special case.

The action was brought to recover possession of a house and premises known as No. 4, Parsey's-gardens, in Whitechapel, under the will of the late Jacob Parsey, who died Sept. 26, 1841. By that will the testator devised to his son, the lessor of the plaintiff, "all that my freehold messuage, &c., in the Mile-end road, with the appurtenances thereunto belonging, and all and singular other the premises which were conveyed to me by certain indentures of the 13th and 14th Jan. 1806, &c. (describing them), part of which said premises now consist of a messuage or tenement, No. 150, Whitechapel-road, and on the residue of which said premises I have erected a cottage, now forming No. 3 in Parsey's-gardens, North-street, Whitechapel-road; also all those my three several freehold messuages, situate, standing, and being on the west side of North-street, &c. together with the piece of freehold ground in the rear of the said messuages, whereon I have erected certain cottages, parcel of Parsey's-gardens aforesaid, and which said last-mentioned hereditaments were conveyed and assured to me in and by certain indentures of the 10th and 11th September, 1804, &c. (describing them), to hold the same, &c., to the use of my said son, his heirs, and assigns for ever," &c. After bequests, which are immaterial, the testator "gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, in possession, reversion, &c. &c. unto his two daughters, in equal shares, &c. and to their several and respective heirs, executors, administrators, and assigns," &c. These two daughters, with their husbands, were the defendants. The premises sought to be recovered were built by the testator upon a small portion of a leasehold estate, held for a term of more than 200 years, conveyed to the testator upon Feb. 18th, 1804. The deeds of 10th and 11th Sept. 1804, mentioned in the will, conveyed to the testator in fee simple some land and houses, which at the time of the death of the testator consisted of three houses in North-street, being Nos. 4 and 5 in that street, and No. 1, Parsey's-gardens (a corner house), and a piece of land of about equal extent with that covered by the three houses mentioned, on which was a house, No. 2, Parsey's-gardens, and a paved yard, at the back of Nos. 4 and 5, North-street, in which paved yard, at the back of the last two mentioned houses respectively, the testator had erected certain washhouses. The leasehold land adjoined part of this freehold land, being in the rear of the paved yard, behind Nos. 4 and 5, in North-street. The testator had built No. 4, Parsey's-gardens (the premises sought to be recovered), upon a small portion of the leasehold ground; he had also built No. 5, North-street. Except No. 3, Parsey's-gardens, which was built upon a different plot of freehold land, as shewn by the words in the earlier part of the will, he had built no other cottages. The question was, whether the lessor of the plaintiff or the defendants were entitled to the premises sought to be recovered.

Crowder (with him J. Henderson), for the plaintiff. The words in the devise are not strictly accurate, but they are sufficient to pass this property to

may exist against the same, on behalf of the company, or any other contributory thereof; but that it shall be lawful for the official manager to prove for the amount thereof, in the case of such bankruptcy or insolvency (if any), and to receive dividends thereon, or to proceed against any contributory for the same, whenever it may appear expedient so to do; and any moneys so to be recovered shall be dealt with as part of the assets of the company, or otherwise, as the Master shall direct."

5,000*l.* was to be paid for this estate, thus realizing early 4*l.* per cent. on the purchase money. By consent of all parties, an order of the Court, dated the 11th Nov. 1850, had been made, referring it to the Master to inquire and state whether it would be fit and proper, and for the benefit of all parties interested in the trust estates of the testator, that the agreement for the purchase of the estate should be perfected and carried into effect. When this order was under consideration in the Master's office, the trustees under the will objected to carry into effect their own agreement, and brought in a counter state of facts, alleging that it would be contrary to the intentions of the testator to purchase such an estate as the one at Manningford Bohun, and that they, the trustees, signed the agreement for the purchase of it because they understood that the parties interested considered he purchase a good one, and desired to have it submitted to the Court, which could not be done in the present instance without having the signature of the testator's trustees. They therefore submitted that the Dorsetshire estate was an eligible and advantageous one to become the nucleus for the future purchase of other estates adjoining the same or in the immediate neighbourhood thereof, and that the purchase of the Manningford Bohun estate ought not to be completed.

Master Blunt, by his report found (amongst other things) that the testator was at the time of his death possessed of an estate, which he derived under the will of his father, and which had been for many years his family estate, situate in the county of Suffolk, containing about 400 acres, and another estate in Lincolnshire, also of about 400 acres; and also of an estate in Dorsetshire, on the borders of Devonshire, of about 800 acres; and he found that on the last mentioned estate there was an eligible site for building a mansion house or residence. He also found that two small estates in that neighbourhood were offered for sale, and there might be shortly offered for sale. He also found that the estate at Manningford Bohun was not in itself in magnitude sufficient to become the family estate, as it was a long and comparatively narrow strip of land, lying between the estates of other large landed proprietors, and distant from the Dorsetshire property 75 to 80 miles; and that separate agents would probably be required to manage the said estates, and, upon the whole, he found that it would not be fit and proper, and for the benefit of the parties interested in the trust estates, that the agreement for the purchase of the Manningford Bohun estate should be performed and carried into effect. From this report of the Master, the persons beneficially interested under the trusts of the will now petitioned praying generally, that the agreement for the purchase of the estate should be perfected and carried into effect.

Stuart and G. L. Russell, for the petitioners, stated that the real question was, whether the wishes of all parties who were beneficially interested in the testator's estates should or should not be complied with, in opposition to the mere caprice of the trustees, who, after having solemnly executed the agreement for the purchase, now endeavoured to repudiate it. That it was too late for them now to object to the locality of the estate, for that was equally well known to all parties before signing the agreement, as it was at the present time; that the land was of the richest character, paying an unusually high per centage on the advance to be made for it.

Bethell, Anderson, and Batten, for other parties in the same interest, urged on the Court the propriety of completing the purchase, and contended that in a case where all the *cestui que trusts* were before the Court, the trustees were not to interfere. *Davis v. Lord Combermere*, 14 Sim. 404.)

Payne, for the proposed vendors of the estate, desired that the contract should be carried out.

The Solicitor-General, Roll, and Prior, for the trustees, supported the Master's finding, and urged that his report ought to be attended to by the Court, unless he had miscarried most flagrantly. That it was peculiarly one of those cases which was to be regulated by the Master's discretion, and having fairly exercised that discretion, his report ought to be confirmed. That it was the bounden duty of the trustees to call the Master's attention to all the circumstances of the case. (*Cyfe v. Bent*, 3 Hare, 245; *Middleton v. Reay*, 7 Hare, 106.)

The VICE-CHANCELLOR.—The discretion is to be regulated by the Court. The Master is to hear all parties, but not to be bound by the wishes of the trustees exclusively.

Roll.—Some of the *cestui que trusts* may not yet be in existence, and infants are concerned, and there is no evidence that other estates may not be equally contiguous to those which the Master finds to be in the market near the Dorsetshire estate, and that was the locality for the nucleus of a large family estate, the acquiring of which the testator evidently contemplated, and that the intention of the testator, as expressed by his will, would be utterly disregarded if the report was not confirmed.

Stuart, in reply, said the reference to the Master

was not that he should look out for other estates, but to say whether the estate in question was a proper purchase, and for the benefit of the parties interested. That the Master's discretion was not a roving discretion, but to be exercised as the parties interested wished, unless there was a manifest objection; in the same way as his discretion was exercised in approving of a guardian, a receiver, and such like cases, and he urged that if the case were now for the first time before the Court, it would undoubtedly hold the purchase to be a beneficial one.

## JUDGMENT.

The VICE-CHANCELLOR said, the doubt he had entertained upon the subject was as to the propriety of overruling the decision of the Master, and setting up his own in opposition to it: where the discretion of the Master had been fairly exercised, and where the case was purely a matter of discretion, he thought he should hesitate to do so. However, in the present case, he thought he might hold, that the Master had exercised a wrong discretion, and upon the ground that he had disregarded that which ought to have pressed upon his mind, the wishes of the parties beneficially interested, nine-tenths of whom were in favour of the purchase, considering it a most beneficial investment. He thought the Master had not sufficiently considered this; the investment was clearly not a speculative one, but a good *bond fide* investment, and so it appeared by the Master's report itself, which stated the rental of the estate: and being such, and all parties wishing for it, he thought the agreement for the purchase ought to be carried out—particularly as considerable expense must have been already incurred in the preliminary steps relating to the agreement; and it was to be remarked that what the real objections of the trustees were to the purchase had not been stated, except as it appeared another agent might have to be employed. He should, therefore,

Not confirm the Master's report, but declare that the contract for the purchase of the estate should be carried into effect.

April 25.

BAXTER v. LOSH.

Special case—Turner's Act—Practice.

Stratton applied for leave to set down a special case for argument, a married woman being a party. He made this application under the 13th section of 13 & 14 Vict. c. 35. An affidavit had been made, verifying the terms of the will of the testator, under which the question in the case arose, and also the other statements and allegations in the special case.

The VICE-CHANCELLOR thought the section mentioned authorised the Court to grant leave to have the case set down for argument, a married woman being a party. Order accordingly.

May 13.

Re THE INDEPENDENT ASSURANCE COMPANY.  
Winding-up Acts—Compromise with a party found to be a contributory.

The Court will confirm an arrangement by which a party found to be a contributory in a joint stock association, in consideration of the payment of a certain sum, was to be released from all future liabilities.

G. O. Edwards moved to confirm a report of Master Tinney, whereby he found that an agreement had been entered into between A. B. (who had been placed upon the list of contributories to the liabilities of the above association) and the official manager. By this agreement, it was arranged that, in consideration of 100*l.* paid by the contributory to the official manager, he, the contributory, was to be discharged from all liability in respect of the present or any future call or calls, and from all right, title, claim, or demand whatsoever, which the said company or the official manager has or may hereafter have or be entitled to against the said A. B. (the contributory) in respect of the said company.

Roxburgh for the official manager.

The VICE-CHANCELLOR made the order. (a)

The costs of the official manager out of the fund in hand.

(a) By sec. 88 of the Winding-up Act, 1846, it is enacted "that it shall be lawful for the official manager, with the approbation of the Master, from time to time to enforce payment of, give time, or compound, or require to take any security for any balance or claim, as against any of the contributories of the company, and also to abandon any such balance or claim where the contributory against whom the same is claimed shall die, or be found and adjudged bankrupt, or to take the benefit of any Act for the relief of insolvent debtors, or dwell or escape beyond seas, or be known to be insolvent or incapable of paying his debts, or in such other cases as the Master shall think fit, and it shall not be necessary to include in any subsequent call any contributory against whom any balance or claim shall have been abandoned, but the whole amount of every subsequent call shall be apportioned among the other contributories: provided always, that nothing herein contained shall extend to discharge the estate of any such contributory so left out of any call from any claim which

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the son of the testator. Leaseholds will pass, though erroneously described as freehold, if the context require it, and the reference to the deeds under which the testator supposed he acquired the property, is merely *falsa demonstratio*. This cottage is "in the rear" of the three houses, and it is parcel of Parsey's gardens, erected by the testator. Nothing else will satisfy the words of the devise. (See *Day v. Trig*, 1 P. Wms. 286; *Doe v. Cranston*, 7 M. & W. 1.)

*Hawkins* (with him *Parnell*), for the defendants. The testator had acquired his property in three separate parcels, two of freehold, and one of leasehold. The intention of his will was plainly to devise the freeholds to his son, and all the rest to his daughters. He uses in the devise not only the word "freehold" which occurs three times, but words of succession applicable to freehold estate only. No alteration of the words of devise will make them fit the property sought to be recovered. It is not freehold land; it was not comprised in the conveyance referred to, and the testator did not erect cottages upon the land in the rear of the three houses in North-street; for the only cottage that he erected to which these words are applicable was No. 4 itself. Rejecting the words about the erection of the cottages as *falsa demonstratio*, the whole matter is clear and consistent, even if those words cannot be satisfied by the washhouses erected on the freehold land. (See *Hall v. Fisher*, 1 Coll. 47; *Stone v. Greening*, 13 Sim. 390; *Doe v. Carpenter*, 20 L. J. 70, Q.B.)

*Crowder*, in reply.

LORD CAMPBELL, C.J.—When this case is fully understood, it is very clear we must carry into effect, as far as we can, all the expressions in the will. If the matter of devise be described so as to admit of no reasonable doubt, a false demonstration will not prevent its operation. Here there is property substantially answering the words in the will. There is a piece of freehold land in the rear of the three messuages, which land is not otherwise specifically devised, and which land was included in the conveyance of September, 1804. On the other hand, the property sought to be recovered in this action is neither freehold, nor included in the conveyance, nor is it strictly true of it that it is land upon which the testator had erected certain cottages; so that the words in the will contain no true demonstration of it at all. The slip of freehold land in the rear of the three messuages is sufficient to satisfy all the words except "whereon I have erected certain cottages, parcel of Parsey's gardens," which may be rejected as *falsa demonstratio*.

PATTERSON, J.—There is a piece of freehold land in the rear of the messuages, and included in the conveyance, which will satisfy all the words of the will, except the assertion that the testator had erected cottages upon it. But we cannot apply the words to the cottage for which this action is brought, without rejecting the word "freehold," and the reference to the deeds of conveyance. Something must be rejected, and we reject the least by treating the statement about the erection of the cottages as *falsa demonstratio*.

WIGHTMAN, J.—The doctrine *falsa demonstratio non nocet* applies where there is enough to shew the intention of the testator without the *demonstratio*, and especially where nothing will fulfil the words of the devise, but something which is accurately described, except for the *falsa demonstratio*. Here the words of the devise may be literally fulfilled in every respect, except the erection of the cottages, by referring them to the land for which this action is not brought. And there is much less of *falsa demonstratio* in applying the words to the land than to the houses.

ERLE, J.—There is a perfectly clear intention to pass freehold land behind the three messuages in North-street, which was included in the conveyance of Sept. 1804. That is a true demonstration of the freehold land behind the three houses, which was acquired by the testator at the same time as those three houses. Then there is a false demonstration "whereon I have erected certain cottages," but that false demonstration would neither hinder the strip of freehold land from passing under that devise, nor will it operate to pass the leasehold land, to which all the other words of the devise are wholly inapplicable.

*Judgment for the defendants.*

Tuesday, May 6.  
ACRAMAN and ANOTHER (Assignees, &c.)  
v. C. HERNAMAN.

*Bankruptcy*—Stat. 12 & 13 Vict. c. 106, s. 136—*Filing affidavit.*

A warrant of attorney, filed under stat. 12 & 13 Vict. c. 106, s. 136, without an affidavit of the time of its execution, is null and void as against creditors, and any judgment signed upon it is a nullity, the affidavit being an essential part of that which the statute requires to be filed.

This was a special case, stated upon an action of *detinue*, brought by the assignees of Garratt, a bankrupt, to recover certain goods and chattels of the bankruptcy, seized under an execution of the

defendant against the bankrupt, upon the ground that the judgment signed by the defendant, and the warrant of attorney upon which it was signed were fraudulent, null, and void. It appeared that the bankrupt had executed a warrant of attorney in favour of the defendant upon March 4, 1850, the date of the warrant itself. The warrant of attorney authorised the signing of judgment for 600*l.* but there was a defeasance to it for the payment of 300*l.* by instalments, the first of 75*l.* upon May 4; in default of payment of which execution might issue. The judgment was signed March 11, 1851, and upon the same day a copy of the warrant of attorney was filed in the proper office of this court, but no affidavit of the time of the execution of the warrant of attorney was filed with the copy. The bankrupt made default in payment of the instalment upon May 4, and upon the 11th of that month execution was issued, under which the goods and chattels for which this action was brought were seized. Garratt shortly afterwards became bankrupt, and the plaintiffs were appointed his assignees. By stat. 12 & 13 Vict. c. 106, s. 136, it is enacted, "That if any warrant of attorney to confess judgment in any personal action shall have been given by any such trader, and such warrant of attorney shall not have been filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days next after the execution thereof in manner and form provided by stat. 3 Geo. 4, c. 39, every such warrant of attorney shall be deemed fraudulent, null, and void to all intents and purposes whatever," &c. By stat. 3 Geo. 4, c. 39, s. 1, it is enacted, "that every warrant of attorney to confess judgment in any personal action, or a true copy thereof, &c. shall, within twenty-one days after the execution thereof, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the judgments of the Court of King's Bench." See *Dillon v. Edwards*, 2 Moo. & P. 550, that under the statute 3 Geo. 4, c. 39, s. 1, the filing of the warrant of attorney without annexing an affidavit of the time of its execution, was nugatory. See also *Green v. Wood*, 7 Q. B. 178.

*M. Smith* for the plaintiffs.

*Barstow* (with him *S. Lucas*) for the defendant, contended that the words of sec. 136 were to be confined in their operation to warrants of attorney not followed up by judgment, and referred to the Acts regulating proceedings in insolvency and to the Irish stat. 12 & 13 Vict. c. 107, s. 111, as shewing that the Legislature did not intend the strict rule contended for by the plaintiffs.

LORD CAMPBELL, C.J.—The enactment is very plain, and we cannot put a forced construction upon it. The words are, that if the warrant of attorney shall not be filed within twenty-one days, in manner and form provided by stat. 3 Geo. 4, c. 39, it shall be deemed fraudulent, null and void. Then stat. 3 Geo. 4, c. 39, requires the thing filed to be authenticated by an affidavit of the time of the execution thereof. In this case the only foundation of the judgment signed by the defendant against the bankrupt was a warrant of attorney filed without the requisite affidavit; the warrant, therefore, and every thing depending upon it is fraudulent, null, and void. The words "in manner and form provided by stat. 3 Geo. 4, c. 39," refer to the mode in which the act of filing is to be performed, i. e. with an accompanying affidavit. There is no necessity for implying any exception to the words of the statute, because the literal language may, without any difficulty or hardship, be fully carried out.

PATTERSON, J.—The filing a warrant of attorney, without an affidavit, is the same thing as not filing it at all, for the affidavit is of the utmost importance, as by it the creditors are enabled to determine whether the warrant of attorney be really filed within twenty-one days of its execution.

WIGHTMAN, J., concurred.

ERLE, J.—Stat. 12 & 13 Vict. c. 107, s. 111, is a very special clause, and properly looked at shews that the legislature intended in England the very thing contended for by the plaintiffs. That clause regulates as well the registry of judgments as the filing of warrants of attorney. In Ireland you may in the same office either file a warrant of attorney, or register the judgment signed upon it, so that one is not more notice to creditors than the other.

*Judgment for the plaintiffs.*

Wednesday, May 7.

REG. v. LLANELLY.

*Poor—Removal of wife and children—Absence of husband—Break of residence.*

A wife and her children had resided in parish A. for ten years. During the last two years her husband had been absent from her, having gone to America. She had received a letter from him since his arrival in that country, and was expecting to receive from him money to defray the expenses of her passage thither.

Held, that the wife and children becoming chargeable to parish A. were removable to the place of their settlement.

Upon appeal against an order for the removal of a wife and her children, the Sessions quashed the order, subject to a case. It appeared that the pauper had resided in the respondent parish for ten years before the application for the order; but that about a year and a half before, the husband had left him to go to America, for the purpose of getting employment. Since his arrival there he had written a letter to his wife, who stated upon the trial of the appeal, that she expected to receive from him remittance to defray the expenses of her passage to that country, and to enable her and the children to join him there. The Sessions held that there had been no disruption of the husband's residence in the appellant parish, and consequently that the pauper were irremovable.

*Pashley*, in support of the order of Sessions.—If the husband, supposing him to have been in the parish, would have been irremovable, the wife and children are irremovable. (9 & 10 Vict. c. 61, s. 11 & 12 Vict. c. 111; *R. v. Pott Shrigley*, 15 Q. B. 143.) Now here the departure of the husband to America has not broken his residence in the respondent parish; because his family remain there, and the law will presume that that continues to be his place of residence, his domicile. *Ubi natus ibi domus*. The mere fact of absence from the parish does not imply a break in the continuity of residence; it is a question of fact depending upon the circumstances; and the Sessions have found that there was no disruption of residence in this case. The mere expectation of the wife as to the husband's intention cannot affect the case. (*R. v. Holton*, 20 L. J. 107, M.C.; *R. v. St. Ebbes*, 12 Q. B. 115.) [LORD CAMPBELL, C.J.—The Sessions seem to have adopted the maxim *ubi natus ibi domus*; which may be very true *prima facie*; but is it not rebutted, if a man goes to a foreign country, *animus emendandi*, and gives his wife and family directions to join him? If there was evidence of a clear intention on the part of the husband to change his domicile, the case would be very different; but the statement made by his wife in this case affords no such evidence. But, if he had abandoned his wife and family altogether, that would not deprive them of the right of irremovability. [LORD CAMPBELL, C.J.—Do you say that she can acquire it *proprio jure*?] Under such circumstances.

*Willes* and *V. Richards*, contra, were not called upon.

LORD CAMPBELL, C.J.—It seems to me that these paupers were removable. They were so, if the husband would have been removable. Now I think that when an absence such as this is shown, the law lies upon those who assert that there is a virtual residence to explain that absence, and to shew an *animus revertendi*. Here there is no such evidence; indeed, any little evidence that there is a contrary tendency. The husband has established himself in America, and transferred his domicile to that country. Having been absent about two years he writes to his wife, and she expects to receive from him money to defray the expenses of her passage. It seems to me, therefore, that he cannot be considered as resident in that parish, and if he is not, it is impossible to say that the wife by her residence there in his absence can have acquired that right. Her husband being alive, and not having deserted her, would be removable if he were in the parish; and she therefore is removable.

PATTERSON, J.—I am far from saying that non bodily absence from the parish of necessity is a disruption of residence. In *R. v. Ticehurst*, 11 Q. B. 157, we held the contrary; but here the husband goes to America and is absent at least a year and a half before the application for the order. In such a case I must say I quite agree that the case is upon those who say that in point of law he continued to reside during all that time in the respondent parish. There is no evidence here of any intention to return, but rather, so far as it goes, the contrary.

WIGHTMAN, J. concurred.

ERLE, J.—Upon the principle contended for by Mr. Pashley, a man might be taken to reside for five years in a parish in which he never set foot. If he went abroad ten years ago, any parish in which during his absence, his wife and family resided for five years would be his place of residence for those five years. I think, therefore, that when there is such an absence as this, and the party who alleges it to be a virtual residence gives no evidence to explain it, it ought to be considered as a disruption of residence.

*Order of Sessions quashed.*

REG. v. SHAVINGTON-CUM-GRANLEY.  
*Poor—Removal—Five years' residence—Relief received by parents on account of their children is relief received by the children within the meaning of the proviso to sec. 1 of 9 & 10 Vict. c. 66; and a residence of five years, including the period during which it is received, will not render the children irremovable.*

Upon appeal against an order for the removal of two children from the township of Manchester, the

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Sessions confirmed the order, subject to a case. The paupers had resided in the township of Manchester for eight years next before the application for the order. During the first five years they were living with their mother, who was a widow, and in the receipt of relief from the appellant township for the support of herself and the paupers, they being under the age of sixteen, and unemancipated. Their mother died at the end of the five years, and during the three remaining years the paupers had themselves received relief. The question was, whether they were removable.

*Parkley*, in support of the Order of Sessions.—The point here is, that the relief given to the widow on account of the children was relief to the widow only, by virtue of 4 & 5 Wm. 4, c. 76, s. 56, which provides that "any relief given to or on account of any child or children under the age of sixteen, of any widow, shall be considered as given to such widow;" but the object was to render the mother as well as the child chargeable by such relief, and so to enable the parish officers to remove her with the child. It is not less relief received by the child, because it is made also relief to the mother.

*Couch*, contra.—The words of sec. 56 of the Poor Law Act are very explicit; and if the Legislature had intended that the relief should be considered as given to the child as well as to the mother, nothing would have been easier than to say so.

Lord CAMPBELL, C.J.—I am of opinion that these children were removable; and if they were not, it certainly would be a monstrous violation of the intention which the Legislature had in passing the 1 & 10 Vict. c. 66. The intention was to protect from removal in those cases where there had been an industrial residence in a parish for five years; and they have anxiously excluded the period during which parochial relief is received. Here the case is that, in fact, the paupers did receive relief during the whole period; but reliance is placed upon sec. 56 of the Poor Law Amendment Act. That makes relief given to or on account of the children relief given to the mother; but it does not exclude as being relief to the children as well as the parent; and the obvious object of it was to make it relief to the parent, so that the parent might be removable as well as the child. It does not, in my opinion, affect the construction to be put upon the first section of 9 & 10 Vict. c. 66; and these children, therefore, being in the receipt of relief during the whole period of their residence, did not acquire the right of irremovability.

PATTESON, J.—The latter proviso to s. 1 of 9 & 10 Vict. c. 66, seems only to apply where the parent is living; and the question therefore is, whether the latter proviso to that section applies to this case; and I do not see why, because, by a provision of the Poor Law Amendment Act, relief to the children is to be considered as relief to the widow, it is the less so that account relief received by the children.

WIGHTMAN and ERLE, JJ. concurred.

Order confirmed.

## REG. v. DALL.

*Recognition to keep the peace—Names of Justices—Initial letters—Sci. fa. against surety—Writ of sci. fa. upon a recognizance of the peace described the justices by the initial letters of their Christian names:*

*held, upon demurrer, that the writ was good.*

*Sci. fa.* upon a recognizance of the peace against a defendant, who was one of the bail. The writ leged the recognizance to have been acknowledged before "Lee Townsend, Esq. and J. H. Harper, Esq." two justices of Cheshire.

*Demurrer.*

*Cole* in support of the demurrer. 1. The writ ought to show that the 24th and 25th rules of practice on the Crown side, made by the judges of this court pursuant to 6 Vict. c. 29 (see *Corner's Crown Side Forms*, p. 6), have been complied with.

The names of the justices are not sufficiently set out. It has been held that a single vowel may be a name, but that a consonant cannot. (*Lomas v. Endelle*, 6 C. B. 577; *Miller v. Hay*, 3 Ex. l.) [ERLE, J.—Are all legal proceedings void, if Christian name is imperfectly written? I think I have often seen, in commissions of oyer and terminer, the Christian names of the commissioners signified by initials only. These justices may be designated in the commission of the peace.] It is not necessary to say that the recognizance is void; it is pleading it, either the names ought to be set out fully, or an excuse for not doing so alleged.

*Appld.*, contra, was not called upon.

Lord CAMPBELL, C.J.—I think that there is nothing either point. No authority has been cited for the affirm that the compliance with certain rules of notice must be stated in the writ; and as to the names of the magistrates, it is said that they are signified by initial letters; but I do not know that they are initials; it may be Mr. Harper's proper Christian name. I do not think that the objections taken by special demurrer to declarations upon bills of exchange apply to a case like this; but I must

say that I cannot at all acquiesce in the distinction which has been drawn between vowels and consonants. I allow that a single vowel may be a name; but why may not a consonant only? Indeed, I have just been informed by a gentleman, on whose accuracy I place the most implicit reliance, that he knows a lady who was baptized by the name of D.

PATTESON, J.—I have heard no authority for saying that a recognizance in this form would not be good.

WIGHTMAN and ERLE, JJ. concurred.

Judgment for the Crown.

## REG. v. THE INHABITANTS OF PRIEST SUTTON.

*Irremovable lunatic pauper—Costs of removal to and maintenance in asylum—Gilbert's unions. Sec. 5 of 12 & 13 Vict. c. 103, providing that the costs of lunatic poor, who are irremovable, shall be borne by the common fund of the union, comprising the parish in which the pauper was resident at the time of his removal into the asylum, applies as well to unions under Gilbert's Act as to unions formed under the Poor Law Amendment Act.*

Upon appeal against an order of two justices for payment of the costs of maintenance of a lunatic pauper in an asylum, the Sessions confirmed the order, subject to a case.

The lunatic pauper, at the time of his removal into the asylum, resided in a parish, which forms part of an union created under Gilbert's Act (22 Geo. 3, c. 83); and, if not a lunatic, would have been exempt from removal by a five years' residence under 9 & 10 Vict. c. 66. The pauper was removed into the Asylum in October, 1848, but the order in question was made on the 4th May, 1850, and ordered the treasurer of the guardians of the union in which the parish of his settlement was situate, and also the overseers of that parish, to pay to the overseers of the parish in which he had resided the expenses incurred in the maintenance of the pauper in the asylum from the 4th of May, 1849, to the date of the order, and also the costs of his future maintenance.

*Hall*, in support of the order.—1. The statute 12 & 13 Vict. c. 103, s. 5, does not apply to Gilbert's unions, but only to unions formed under the Poor Law Amendment Act. That section is part of a code; it is supplemental only to the provisions contained in 11 & 12 Vict. c. 110, secs. 1 and 3; and to secs. 1 and 3 of 12 & 13 Vict. c. 103; and all those previous sections clearly refer only to unions under the Poor Law Amendment Act. If, therefore, sec. 5 of the latter Act is held to apply to Gilbert's unions, there will be a different law with regard to the maintenance of irremovable paupers who are lunatic, and irremovable paupers who are not lunatic. The section was rendered necessary by the decision in *R. v. Leaden Roothing*, 12 Q.B. 181. (He referred also to secs. 28 and 29 of 4 & 5 Wm. 4, c. 76.) Secondly, sec. 5 of 12 & 13 Vict. c. 103, applies only to "costs and expenses incurred since the 25th March, 1849;" and as the removal of the pauper into the asylum took place in October, 1848, the expense of that removal clearly would not be a charge upon the union fund. The question is whether, in such a case, the section applies to the subsequent expenses of maintenance. If so, an order on the parish of settlement would be necessary for the expenses of removal, and an order on the union of residence for the expenses of maintenance since the 25th March. Thirdly, even though the 5th section should be held to apply to this case, it may be questioned whether the order ought not still to be made upon the parish of settlement according to the 62nd sec. of 8 & 9 Vict. c. 126. That section is not repealed, and the effect of sec. 5 of 12 & 13 Vict. c. 103, would be, in the case of irremovable lunatic paupers, to make that order enure as an order upon the union of residence. In *R. v. Wigton*, 20 L.J. 110, M.C.

*Parkley*, contra.—*R. v. Wigton* decides this case if the 5th sec. of 12 & 13 Vict. c. 103, applies to Gilbert's unions; and it does so. The words are quite large enough, and, by sec. 109 of the Poor Law Amendment Act, "Union" is interpreted to mean Gilbert's as well as other unions. (He also referred to 10 & 11 Vict. c. 110.)

Lord CAMPBELL, C.J.—The question appears to be, whether a Gilbert's union is an union within the meaning of sec. 5 of 12 & 13 Vict. c. 103. It clearly is so, giving to the words of that section their natural and grammatical construction; and if we refer to the interpretation clause of the Poor Law Amendment Act, which must be considered as applying to all these later enactments, we find it expressly provided that the word "union" shall include unions formed under Gilbert's Act.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred.

Order of sessions quashed.

## REG. v. THOMAS POSCOCK and Others.

*Coroner's inquisition—Man-slaughter—Trustees of a road.*

*A coroner's inquisition alleged that the defendants were trustees of a road under an Act of Parlia-*

*ment, and that it was their duty to contract for the reparation of that road; that they feloniously did neglect and omit to contract for the reparation thereof, whereby the same became very ruinous, miry, &c., and a cart, which the deceased was driving along the road, went into a hole, and the deceased, being thrown out, sustained injuries of which he afterwards died:*

*Held, bad, for not shewing any such neglect of duty as could render the trustees guilty of manslaughter.*

This was a rule to quash a coroner's inquisition which had been removed into this Court by certiorari. The inquisition alleged that the defendants were the trustees of a public road under an Act of Parliament; that it was their duty to contract for the due reparation of the said road; that they feloniously did neglect and omit to contract for the repair of the same, whereby it became very miry, ramous, deep, broken, and in great decay; and that a cart, which the deceased was driving along the road, fell into a hole in the road, and by reason thereof the deceased was thrown out, and sustained the injuries, of which he afterwards died.

*Charnock* shewed cause. This case is not distinguishable from those of persons who have the charge of machinery at mines, of signals, or locomotives on railways, and the like; and there are many precedents of indictments for manslaughter in such cases where death has been occasioned by a neglect of duty on the part of the persons so intrusted. (*R. v. Barrett*, 2 Car. & K. 343; *R. v. Haines*, ib. 368; *R. v. Gregory*, 5 B. & Ad. 555.) Here a public duty was cast upon the trustees, and they were authorised to raise money by rates for the purpose; and if their neglect of duty has caused the death of another, they are guilty of manslaughter.

*Hayes*, contra, were not called upon.

Lord CAMPBELL, C.J.—The cases cited shew a personal duty, the neglect of which has directly caused death; and, no doubt, where that is the case, a conviction of manslaughter is right. But how do those cases apply to trustees of a highway? How can it be said that their omission to raise a rate, or to contract for the reparation of the road, directly causes the death? If so, the surveyors or the inhabitants of the parish would be equally guilty of manslaughter; for the law casts upon them the duty of keeping the roads in repair. To uphold this inquisition would be to extend the criminal law in a most alarming manner, for which there is no principle or precedent.

PATTESON, J.—This is really too extravagant.

WIGHTMAN, J. concurred.

ERLE, J.—In all the cases of indictment for manslaughter, where the death has been occasioned by omission to discharge a duty, it will be found that the duty was one connected with life, so that the ordinary consequence of neglecting it would be death. Such are the cases of machinery at mines, of engine-drivers, or the omission to supply food to helpless infants. *Inquisition quashed.*

## REG. v. CHARLESWORTH.

*Highway—Obstruction—Limited dedication—Reservation of right to cross public road with tram-roads.*

*A public turnpike-road, which went over the property of a large pit owner, was crossed by tram-roads leading to the pits. As pits were opened on one side of the road, tram-roads leading to and from the pits had always for many years been made across the road. They were let into a groove in the road, so that the highest part of the tram-road was on a level with the turnpike-road. By the Turnpike Act, the trustees of the road had power to grant licenses for these tram-roads.*

*Upon an indictment for obstructing the road:*

*Held, that the tram-roads were an obstruction, and that there could not be a dedication to the public with a reservation by the owner of the soil of the power to make as many of such tram-roads as he should think right for the convenient use of his property.*

Indictment for obstructing a public highway, tried before Cresswell, J. at York, when a verdict was taken for the Crown, subject to a case. It appeared that the highway in question was a turnpike-road, under the management of trustees appointed by a local Act; that it went over the property of Lord Stourton, who was the owner of many coal-pits on the west side of the road. For the convenience of conveying the coal from those pits, tram-roads had been laid down across the turnpike-road; and for many years, as often as a pit was opened, a new tram-road was laid down. The tram-roads were sunk in a groove in the road, so that the highest part of the tram-road was on a level with the turnpike-road. By their Act of Parliament, the trustees of the turnpike-road had power to grant licenses for the formation of these tram-roads across the turnpike-road; but no license had been obtained for the formation of the tram-road which was the subject of the present indictment.



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*Tomlinson* appeared for the Crown, but the Court called upon

*Hardy*, contra.—There was no such obstruction to the highway as amounts to an indictable nuisance. The tram-road presents no obstacle to the passage of vehicles along the road. (*R. v. Tindall*, 6 Ad. & Ell. 143; *Reg. v. Russell*, 6 B. & C. 566; *Reg. v. Ward*, 4 Ad. & Ell. 384) (a). 2. The evidence shows that there has only been a partial and limited dedication of this road to the public. These tram-roads have always been made as often as pits have been opened; and it must be taken that in dedicating the road to the public, he reserved a right of way for the carriage of his coals from the west side across the road; and if so, he is entitled to carry them across in the most convenient mode. (*R. v. Chorley*, 12 Q.B. Rep. 515; *Dand v. Kingcote*, 6 Mee. & W. 174; *Marquis of Stafford v. Cooney*, 7 B. & C. 257(b).

LORD CAMPBELL, C.J.—I do not think that Mr. Hardy has succeeded in shewing any ground why this prosecution should not be sustained. First, he says that there is no obstruction. Now I do not lay any stress upon the obstruction occasioned in the making of these tram-roads, because that is not charged in the indictment; but taking the description of them from the case, I cannot help saying that they must necessarily lead to some inconvenience to travellers passing along that road; and, in my opinion, they do constitute an indictable nuisance. But then it is suggested that the owner of the soil has reserved to himself a right to make as many of these tram-roads across the highway as he likes for the convenient use and enjoyment of his own property; but no authority has been cited for the position that a dedication of a highway may be accompanied by so large a reservation as that; and I think it cannot. I hope that no inconvenience will result from our decision; because the trustees have a right to grant licenses for the purpose, whenever such license ought to be granted.

PATTESON, J.—I can't doubt that the road must to some extent be rendered less safe for passengers upon it by these tram-roads; and as to the other point, how can there be a reservation so large as that which is suggested?—a reservation of a right to cross the road not confined to any particular places, but wherever and often as he finds convenient for the use of his property. If the tram-road had been made by the license of the trustees, it may be doubtful whether an indictment could be sustained; but the trustees may not only grant a license for the tram-roads, but require their removal, and a penalty is imposed for not removing them when required.

WIGHTMAN, J., concurred.

ERLE, J.—I am only desirous of confining my judgment to this case. If, in fact, these tram-roads are no nuisance to the highway, that ought to have been found in the case.

*Judgment for the Crown.*

## REG. v. ST. GEORGE'S, BLOOMSBURY.

*Poor—Settlement by apprenticeship—Allowance of indenture by a single police magistrate—Binding within a city or town corporate.*

A single police magistrate, sitting at a police court within the Metropolitan Police District, has, by virtue of 2 & 3 Vict. c. 71, s. 14, authority to make a valid allowance of a parish indenture, under s. 3 of 3 & 4 Wm. 4, c. 63.

Upon appeal against an order of removal, the Sessions confirmed the order, subject to a case. The respondents relied upon a settlement by apprenticeship, gained in the appellant parish; and the question was whether the indenture had been sufficiently allowed under s. 3 of 3 & 4 Wm. 4, c. 63. The allowance was by Mr. Dyer, a police magistrate, sitting at one of the police courts within the Metropolitan Police Districts; and both the parishes of St. James and St. Anne, from which and into which the pauper was bound, were found to be situate in the county of Middlesex, and the city and liberty of Westminster.

*Pashley*, in support of the order of Sessions.—This was a binding within the city of Westminster; and therefore, by sec. 3, of 3 & 4 Wm. 4, c. 63, an allowance by two justices, one for the county, and the other for the city, was necessary; but Mr. Dyer filled both characters; and by 2 & 3 Vict. c. 71, s. 14, a police magistrate, sitting at a Police Court within the metropolitan police district, may do alone any act which is by any law directed to be done by more than one justice. (*R. v. Tyrwhitt*, 19 L. J. 249, M.C.)

*Hodges*, contra.—The distinction between this case and *R. v. Tyrwhitt* is, that here the Act is required to be done, not merely by more than one justice, but by justices of different jurisdictions. The main object of the enactment contained in sec. 3 of 3 & 4 Wm. 4, c. 63, would be defeated if an allowance by a single individual should be held sufficient. Two separate classes of persons cannot properly be represented by a single individual. (*R. v. Shipston*, 8 B. & C. 772, is in point.

LORD CAMPBELL, C.J.—The Legislature seems to

(a) See also *R. v. Bots*, 15 Law T. 162.  
(b) But see *R. v. Leake*, 5 B. & Ad. 400.

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have intended universally to empower one police magistrate at a police court to do what otherwise could only be done by two or more magistrates; and the language used is, I think, sufficiently large to carry that intention into effect. Then this is an act to be done by more than one justice, and it may therefore be done by a single police magistrate at a police court; and it would be matter of regret, if by nice distinctions between the acts which could and the acts which could not be done by a single police magistrate, proceedings of great importance might be nullified.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred. Order confirmed.

## REG. v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

*Mandamus to complete a railway after expiration of the compulsory powers of the company.*

*Mandamus will not lie to command an impossible thing, even though the impossibility may have arisen from the laches of the defendants. Therefore where a railway company had neglected to take lands for the purpose of making a portion of their line within the period limited for the continuance of their compulsory powers, the Court refused to issue a peremptory writ of mandamus commanding them to purchase lands for the purpose of completing and to complete the line.*

*Mandamus*, tested 22nd of April, 1850, to the defendants, commanding them to purchase the lands necessary for making one of their branch railways, and to make and complete the same, alleging a demand on the 18th of June, 1849. Return thereto setting forth (amongst other things, as want of funds, &c.) that by the special Act of Parliament authorising the construction of the line in question, the compulsory powers of the company for taking land had expired before the day on which the writ was tested, viz. on the 27th of July, 1849. Demurrer to the return.

Wednesday, April 30.—*Knowles*, in support of the demurrer.—These Railway Acts are treated as contracts between the company and the public, the specific performance of which may be compelled by *mandamus*. (*Blakemore v. The Glamorganshire Canal Company*, 1 Myl. & K. 162; *R. v. Cumberworth*, 3 B. & Ad. 108; *R. v. Edge Lane*, 4 Ad. & Ell. 723; *R. v. Cumberworth*, ib. 731. It is of great importance that companies should be compellable to make their branches as well as their main lines. [LORD CAMPBELL, C.J.—They certainly would be bound to do what the Act required, if it were possible.] That question was considered in *R. v. The Eastern Counties Railway Company*, 10 Ad. & Ell. 531; but the Court answered, "Such difficulties, be they more or less, should have been duly estimated before the undertakers pledged themselves to the execution, for the sake of obtaining such large and extensive powers, as most certainly are vested in them, for the purposes already mentioned;" and in many subsequent cases, want of funds and other suggested grounds of impossibility, have been held no answer to a writ of *mandamus*, commanding the company to do an act, which they had undertaken in their Act of Parliament to do. (*Cohen v. Wilkinson*, 18 L. J. 378, 411, Ch.; *Carlisle v. The South Eastern Railway Company*, 19 L. J. 477, Ch.; *R. v. The Luton Roads Trustees*, 1 Q.B. 860; *R. v. The Commissioners of Woods and Forests*, 19 L. J. 497, Q.B. *R. v. The Clerkenwell Improvement Commissioners*, 12 Law T. 241; *Reg. v. The Birmingham and Oxford Railway Company*, 19 L.J. 453, Q.B. and in *R. v. The Birmingham and Gloucester Railway Company*, 2 Q.B. 61, the Court expressly say, "with respect to the rest of the return, that the company cannot now obey the writ, for the reasons therein specified, we have had frequent occasion to observe that we consider such an excuse inadmissible." The company is not to be permitted to take advantage of its own wrong. In the present case, however, the impossibility is not made out,—because the company may be able to contract with the landowners, although their compulsory powers are at an end; and when they were applied to to do the act which the writ commands, their compulsory powers had not expired. If they originate the proceedings before the time has expired, that is enough; the subsequent steps for the purpose of ascertaining the amount of purchase-money, or compensation, may be taken afterwards.

Sir F. Kelly contra.—1. *Mandamus* is not the proper remedy in a case like this. The Railway Acts contain no compulsory words as to the construction of the line; they merely empower the companies to make their lines; they do not require them to do so. In the cases cited the writ has issued to compel the execution of a bridge, or some other work expressly required by the Act of Parliament, to be constructed in a particular manner. In *R. v. The Eastern Counties Railway*, the question was not judicially determined, though an opinion was expressed by the Court. It is said that the company ought to have given notice of their intention to take the lands be-

fore the compulsory powers expired, or that it ought now to enter into contracts for the purchase of the lands; but as they have no funds for the purpose, they ought not to enter into such contracts and the demand made upon them to complete the branch was only made a few weeks before the powers expired. Will *mandamus* lie to compel the defendants to do a thing which is not within their power? [LORD CAMPBELL, C.J.—Some of the landowners may be under disability, and even, if willing, unable to sell.] All the powers of the company, which could enable them to make this branch, if they got the land, cease in July 1851, long before the branch could be completed. This is a *mandamus* to subject the members of this company to perpetual imprisonment, or to compel them to sell themselves to the mercy of the Court, or to go to the Legislature for relief. As a mode of enforcing the performance of the act required, it must be wholly inoperative. *R. v. Round*, 4 Ad. & Ell. 137, is in point. (a)

*Knowles*, in reply.—In *R. v. The Severn and Wye Railway Company*, 2 B. & Ad. 646, the *mandamus* was to reinstate the railway, not to exact any particular work according to the express requirements of the statute. Here at all counts the return is clearly bad, for not shewing that the Act commanded is impossible. It is consistent with its return that the company might, without difficulty, obtain possession of the land, and at once construct the two miles of railway, which are wanting to complete the branch in question. Cur. adv. val.

## JUDGMENT.

LORD CAMPBELL, C.J. now delivered the judgment of the Court. (b)—In this case we are of opinion that the defendants are entitled to our judgment. The objection that the powers of the company for the compulsory purchase of land had expired before the writ of *mandamus* issued, or was applied for, seems to us to be clearly decisive. We are not called on therefore to decide the many doubtful questions, whether there lay on the company an obligation to make and complete the rail, which might have been enforced by *mandamus*, or whether the return sufficiently shews a want of funds for that purpose; or how far this want of funds would be an answer. This writ of *mandamus*, which is tested the 22nd day of April, 1850, commands the company immediately to purchase the lands necessary for making, constructing, executing, and completing the Birtle Branch Railway, and extension thereof, and to make, construct, and complete the same Birtle Branch Railway, and extension thereof, in pursuance of the powers and authorities contained in the recited Act of Parliament. This special Act, the 9 & 10 Vict. c. 262, which received the royal assent on the 27th July, 1846, enacts, by section 18, that the powers of the company for the compulsory purchase of land for the purpose of this Act, shall not be exercised after the expiration of three years from the passing of this Act; and, by section 20, that the works hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period, the powers granted to the company for executing the same shall cease to be exercised, except as to so much of the same respectively as shall have been completed. The powers effectually to obey the command in the writ having expired in July, 1849, ought we in the Queen's name to have given that command in the month of April, 1850? On full consideration, we think not. A writ of *mandamus* supposes the required act to be possible, and to be obligatory, when the writ issues. Generally speaking, the writ suggests acts shewing the obligation and the possibility of fulfilling it; and a return purporting the suggestion and traversing it is good. *Res v. The Commissioners of Sewers of Essex*, Strange, 763; *Res v. Round*, 4 A. & E. 139; *Res v. Williams*, 8 B. & C. 681; *Res v. Penrice*, Strange, 1232. The supposed obligation here is founded on a public Act of Parliament, which is cited in the return, and which we are bound to take judicial notice of. If it shew the company have no longer the power to do the act commanded, the writ is bad. What power have the defendants now to purchase the lands necessary for making a line of railway of several miles in length? On the return to a peremptory *mandamus* going as prayed, no excuse can afterwards be made, and the defendants must implicitly and fully obey it, and abide any penalty attached to it. Supposing that they were bound to pay any price which might be demanded, however exorbitant, can it be reasonable, and would it be supposed that all the landowners along the line would willingly sell at any price, and that none of them are under disability to sell? Mr. *Knowles* contended that the return should have shewn an application to all the landowners, and a refusal by them; but such a return, and the issues arising from it, would be highly inconvenient; and if all had promised to sell without a binding contract having been entered into, they might afterwards have changed

(a) The argument on other points is omitted.

(b) Lord Campbell, C.J. Patteson, J. Wightman, J. and Erle, J.



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their minds, and the defendants might be subject to perpetual imprisonment for not doing what the law forbade them to do. It was then said that they had violated the Act of Parliament, by not fully completing the whole of the railway, and that they ought not to be allowed to make an objection which amounts to taking advantage of their own wrong. But assuming that they were under the obligation contended for, and that they were liable to be punished by indictment for a breach of it, how can we say that the remedy now is to command them to do what they have no longer the power to do, however obedient they may be inclined to be? Reliance was very properly placed on the case of *Reg. v. The Birmingham and Gloucester Railway Company*, 2 Q.B. 47; which, at first sight, seems in authority in favour of the *mandamus*; but, when properly explained, it will be found, on this point, to be entitled to little weight. The great struggle there was, whether a turnpike road, when restored, must be made as wide as it formerly was. There the notice to do the act had been given as nearly as possible to the time of the act to be done, namely, to restore the turnpike road to its former width, which apparently required no purchase of land either voluntary or compulsory. In the present case the respondents were guilty of *laches* by giving no notice to do the act until the power of doing it was nearly expired, and not applying for a *mandamus* till a considerable time after the power expired. In the former case the company might reasonably have been expected to be able to do the act without powers for compulsory purchase; but in the present case this is a mere impossibility. We therefore sink, as much on principle as authority, our judgment must be for the defendants.

## Judgment for defendants.

Friday, May 9.

Re JAMES EDMONDSON.

*Assessment by justices of compensation to landowners under Railway Acts—Limitation of time.* 11 & 12 Vict. c. 43, s. 11, applies to an assessment by justices of compensation to landowners for lands purchased or injured by Railway Companies; and justices have no jurisdiction to make such assessment after the lapse of six months from the time when the matter of the complaint or information arose.

A rule had been obtained for a *certiorari* to remove an order of two justices assessing the amount of compensation to be paid to Mr. Edmondson by the Leeds and Bradford Railway Company, for land taken by the company, in order that the same might be quashed, on the ground that the application to the justices had been made after the lapse of six months from the time when the matter of Mr. Edmondson's complaint arose.

*Addition*, on behalf of one of the justices, now moved. The order is made under ss. 22 and 4 of 8 Vict. c. 18; and it is said that the limitation of six months imposed by 11 & 12 Vict. c. 43, s. 11, applies to such a case. That, however, is not so. It can only come under that statute as an order for the payment of money (s. 1); and it is not properly an order for the payment of money, but an award or assessment of amount merely. The words which direct the company to pay are surplusage. The duty of the justices is to settle the amount; and by stat. 8 Vict. c. 20, s. 140, that amount may be recovered by distress. Sect. 142 shews also that the justices are to determine the amount. Besides the machinery provided by 11 & 12 Vict. c. 43, is clearly inapplicable to the case of an order upon a railway company; for it provides a remedy by imprisonment. *R. v. Bolton*, 1 Q.B. 66, was cited.

*T. F. Ellis* appeared for the other magistrate.

*Hall*, contra, was not called upon.

Lord CAMPBELL, C.J.—I am of opinion that the lapse of time was a bar; and that the magistrates had no jurisdiction. Sec. 11 of 11 & 12 Vict. c. 43, provides "that in all cases where no time is already prescribed shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." Now, to understand what is meant by "such complaint," we must turn to the 1st section, which shews that the Act applies to "all cases where a complaint shall be made to any such justice or justices, upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise." Then, is this an order for the payment of money? I cannot see any reason for doubting it. The order is made under 8 Vict. c. 18, s. 22, 24, which gives the magistrates exclusive jurisdiction where the demand is under 50*l.*; and although nothing is said expressly about an order in those sections, yet, when the mode of recovery is provided for, in 8 Vict. c. 20, s. 140, it is enacted, that if the amount ascertained by the justices be not paid, it may be recovered by distress; and "the justices by whom the

same shall have been ordered to be paid," or either of them, or any other justice, &c. shall issue their order or warrant accordingly. It is said that this is not an order, but an award; it is however clearly an award, with authority to direct the amount to be paid. Another argument is, that the machinery of the 11 & 12 Vict. c. 43, is inapplicable to the case of a railway company; but it is not necessary that all the machinery should be applicable to every case; it is sufficient if a portion of it is applicable, so that it can be enforced against the company; and it is so, because under that Act a warrant of distress may be issued against the goods of the company. Therefore I think that this case is within the statute, and that the complaint not having been made within six months from the time when the matter of it arose, the justices had no jurisdiction to make the order.

PATTERSON, WIGHTMAN, and ERLE, JJ. concurred.

Rule absolute.

Saturday, May 10.

REG. v. THE INHABITANTS OF CALDECOTT.

*Poor—Irremovability—Break of residence by removal under order.*

*Removal under a valid order of removal causes a disruption of residence, within the meaning of 9 & 10 Vict. c. 66, s. 1; even though the absence from the parish has continued for a few hours only.*

Where, therefore, a pauper was removed from parish A. to parish B. under a valid order of removal; but on the same day allowed to return to parish A. and to continue to reside there under an agreement between the officers of the two parishes that he should be maintained at the expense of B.:

Held, that the removal constituted an interruption of the residence; and that a residence for five years next before that removal would not confer irremovability.

Upon appeal against an order of removal, the Leicestershire Sessions confirmed the order, subject to a case. The only question was, whether the pauper was rendered irremovable by 9 & 10 Vict. c. 66, s. 1. It appeared that the pauper had resided more than five years in the respondent parish, viz. from 1835 to 1845; but in the latter year the pauper was removed under an order of removal, to the appellant parish. Upon that occasion the pauper was taken to the appellant parish, and received by the officers of that parish; but an agreement was then entered into between the officers of the two parishes, that the pauper should be allowed to return to the respondent parish, and be there maintained at the expense of the appellant parish. Accordingly the pauper did return on the same day, and continued to reside in the respondent parish, receiving relief, down to the application for the present order.

White in support of the order of Sessions.—*R. v. Halifax*, 12 Q. B. 111; and *R. v. Seend*, ib. 133, govern this case; because they depend upon the nature of the proceeding under stat. 13 & 14 Car. 2, c. 12, the very object of which was to put an end to inhabitancy and residence, and not upon the duration of the absence from the parish. Here, by agreement, the pauper is taken back, but not as an inhabitant. It is no more than if the respondents had contracted with the appellants to keep the pauper in their workhouse. [Lord CAMPBELL, C.J.—The pauper was never absent from the parish a single night. ERLE, J.—I apprehend that pernoctation is not at all essential to residence. The occupation of some people prevent them from being at their place of residence during the night. The case of the Newmarket coachman is an instance. (*R. v. Mildenhall*, 3 B. & Ald. 374.)]

Macaulay and Hayes contra.—The lawfully constrained absence of the pauper for a few hours from the respondent parish cannot be enough to break the residence. [PATTERSON, J.—Not every such absence; because if a man was apprehended upon a charge of some offence and taken out of the parish, and then the charge was not made out, of course it could not be contended that the residence was thereby broken; but the question is as to the effect of an order of removal. ERLE, J.—All the early settlements depended upon the supposed acquiescence of the parish in the inhabitancy of the pauper for 40 days; and yet you say that, although the parish has adopted the means which the law provides for turning a pauper out of the parish, still the continuity of residence is not broken.] The 9 & 10 Vict. c. 66, was intended to protect from removal persons who had actually resided for five years without receiving relief; and although in the eye of the law the residence may be broken with reference to the acquisition of a settlement, residence, in fact, is all that is required by that Act. Here, if the order of removal is to be taken as indicating the intention of the parish officers to put an end to the residence, the subsequent agreement must be taken as a revocation of that intention. Besides, "residence," with reference to the poor-laws, has always been held to have reference to the place of rest. The place in which a party is held to reside for the purpose of

gaining a settlement, is that to which he retires for the purpose of sleeping, as the place of his ordinary and sufficient rest." Nolan, i. 465 (4th edit.); and applying that test here, the residence certainly in the respondent parish continued notwithstanding the removal. [ERLE, J.—The term "residence" has a different meaning in different statutes. In the statute of Bridges "resident" means occupier of land. Lord CAMPBELL, C.J.—If the pauper was not resident in the respondent parish, where was he resident? That question cannot be answered. The truth is, he never ceased to reside in the respondent parish at all. If the order of removal is not acted upon, of course it would not operate to break the residence. Then will it have that effect, if, as soon as the pauper has crossed the boundary of the parish, he is allowed to return? The only reasonable construction to give to the statute is, that which will allow it to operate, whenever, according to the plain and ordinary understanding of the expression, the pauper has in fact resided the necessary time in the parish. (*R. v. Holbeck*, 20 L. J. 107 Mag. Cas.; *R. v. Barham*, 8 B. & C. 99; *R. v. Willoughby*, 4 Ad. & Ell. 143.)

Cur. adv. vult.

JUDGMENT.

Lord CAMPBELL, C.J. now delivered the judgment of the Court. (a)—In this case we are of opinion that the order of removal was properly confirmed by the Court of Quarter Sessions. This case appears to us to be governed by *Reg. v. Halifax* and *Reg. v. Seend*, establishing the doctrine, which we see no reason to doubt, that in construing the 9 & 10 Vict. c. 66, the removal of a pauper, under a valid order of removal, interrupts the continuity of the residence in the removing parish. Here the pauper has returned to the removing parish upon the same day on which he left it; but he had been removed from it under a valid order of removal, and had been delivered to the overseers of the parish of settlement. Not till after this removal was the agreement entered into between the overseers of the two parishes respectively, that the pauper should return to the parish from which he had been removed, and, residing there, should be maintained by the parish of settlement. There was a period of time during which he had ceased to reside in the removing parish, and during which he had no power to return, and the duration of this period cannot be taken into consideration. The order of removal was valid, and was *bona fide* carried into execution. We do not see how this decision is at all contrary to the policy or spirit of the Act, for the continuity of residence cannot be thus interrupted so as to prevent irremovability being acquired, unless the pauper becomes chargeable, and the Legislature only intended that irremovability should be acquired by a five years' residence without bringing any charge on the parish. Establishing a chargeability by fraudulent contrivances is guarded against, but the apprehension of such a possibility cannot affect the decision of a case where the removal took place before the passing of the 9 & 10 Vict. c. 66, and could not have proceeded from any fraudulent motive. The rule for quashing the order of sessions must therefore be discharged. Order confirmed.

## BUSINESS OF THE WEEK.

Thursday, May 8.

ROBERTS v. BURN.—*Stimmer* and *Cooks* showed cause. *Prisoners* in support of the rule. Rule discharged.

REG. v. MASTER AND FELLOWS OF THE COLLEGE OF GOD'S GIFT IN DULWICH.—*Sir F. Kelly* moved for a *mandamus* to the defendants to admit Richard William Allen as warden of the college. He referred to the charter of the college, the ordinances of the founder, and to *E. v. St. John's College*, *Oxford*, 4 Mod. 260, 269, S. C.; *Comber*, 288.

LOKE v. BROCKLEY.—*Sir F. Theigier* and *J. Wilds* showed cause. *Shaw*, Serjt., and *Bovill* in support of the rule. Rule absolute.

Friday, May 9.

REG. v. THE PUBLISHERS OF THE "MORNING HERALD" NEWSPAPER.—*Sir F. Theigier* appeared to show cause against a rule for a criminal information. The Attorney-General to support the rule. By consent.

MURRAY v. BORN.—*Sir F. Kelly* for the plaintiff. *Willes*, for the defendant, prayed leave to amend.

BLAMIER v. HUNT.—*H. Hill* for the plaintiff. *Atkinson* for the defendant. Judgment for the plaintiff.

Saturday, May 10.

WADSWORTH v. THE QUEEN OF SPAIN.—*Hoggins*, *Welsh*, and *Locke*, showed cause against a rule for a prohibition to the Lord Mayor's Court. Chambers, contra.

Cur. adv. vult.

Monday, May 12.

REG. v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.—*Sir F. Theigier* moved for a rule nisi for a *mandamus* to make such openings in the ledges of the railway as were necessary to enable Mr. Stevenson to connect the branch line, which he was authorised to make on his own land, with the main line.

REG. v. THE JUSTICES OF NEWBURY.—*Adolphus* showed cause against a rule for a *mandamus* to hear a complaint against Dr. Binney for non-payment of a paving-rate. *Whateley* in support of the rule. The Court thought that the magistrates were bound to hear.

Rule absolute.

(a) Lord Campbell, C.J. Patterson, Wightman, and Erle, JJ.

## COMMON BENCH.

**REG. v. OWEN WILLIAMS.**—*Knowles and Brewer* showed cause against a rule for a criminal information against a magistrate. *Watson* in support of the rule.

*Rule discharged on payment of costs.*

**Re PRICE.**—*Drumell* showed cause against a rule calling upon an attorney to pay over money. *Crowder* in support of the rule.

*Rule discharged without costs; money to be paid in a fortnight.*

**WILLIAMS v. MOULDEN.**—*Hawkins* moved for an attachment against an attorney for not complying with the order of a judge, to deliver particulars of the abode and occupation of his client. (*Smith v. Bond*, 13 M. & W. 594.)

*Rule nisi.*

**REG. v. BLACKWELL.**—*Cooling and Heath* showed cause against a rule for a *quo warranto*. *Crompton* contra.

*Rule absolute.*

**Re LONGHORNE.**—*Crompton* and *A. W. Higgins* showed cause against a rule for a *mandamus*, to compel Mr. Longhorne to deliver to the overseers of a parish in Westmoreland a sum of 134l. 18s. 6d. belonging to a lunatic, pursuant to an order under 3 & 4 Vict. c. 54, s. 2. *Cooling*, contra.

*Rule discharged.*

**DON v. DAVID AND OTHERS v. JONES.**—*W. H. Cooke* showed cause against a rule to review the Master's taxation of costs. *Phipson*, contra.

*Rule absolute.*

**REG. v. THE SOUTHAMPTON DOCK COMPANY.**—*Sewell* showed cause against a rule to set aside the side-bar rule for costs herein. *C. Saunders*, contra.

*Rule absolute.*

**LATHAM v. SPEDDING.**—*M. Chambers* and *Wood* showed cause against a rule to rescind an order of *Paterson, J.* allowing the plaintiff his costs under 13 & 14 Vict. c. 61, s. 13.—*Lock*, contra.

*Our adv. vult.*

**Re GETHING v. ROBSON.**—*Keane* moved to set aside an award.

*Rule nisi.*

Tuesday, May 13.

**Re THE LONDON AND NORTH WESTERN RAILWAY COMPANY.**

*Rule enlarged.*

**GILL v. FLETCHER.**—*Lock* showed cause against a rule to set aside a *certiorari*, removing a plaint from the County Court.

*Russell*, contra.

*Rule discharged, on payment of costs incurred in the Court below.*

**REG. v. THE EASTERN COUNTIES RAILWAY COMPANY.**—*Crowder* showed cause against a rule for a *mandamus*, to compel the company to issue their warrant for summoning a compensation jury.—*J. Brown*, contra.

*Rule absolute.*

**ROSE v. DAW.**—*Lord CAMPBELL, C.J.* delivered judgment for the defendant.

*Rule enlarged.*

**REG. v. SCHLESINGER.**—*Granger* (*Haider* with him) showed cause against a rule for a criminal information. *Watson* (*Bayley* with him) contra, admitted that he was answered.

*Rule discharged, with costs.*

**GILL v. FOCKE.**—*T. Y. Lee* moved for a rule for a *sc. fa.* to revive a judgment fourteen years old.

*Rule absolute, in the first instance.*

**Re THOMAS GREAVES.**—*Row* showed cause against a rule for an attachment, for not delivering up a bill of exchange. *Tomlinson*, contra.

*Rule absolute, to lie in the office a month.*

**REG. v. THE AMBERGATE, NOTTINGHAM, & CO. RAILWAY COMPANY.**—*Pescott* moved for a *mandamus* to the above-named company, to complete their line of railway between Ambergate and Grantham.

*Rule nisi.*

**Re BAKER.**—*Lord CAMPBELL, C.J.* said the Court wished to take a longer time to consider the affidavit.

**FINNEY v. BRADLEY.**—*Tomlinson* showed cause against a rule to set aside a judge's order for a commission for the examination of witnesses. *Willes*, contra.

*Rule discharged.*

**SHEPHERD v. THE MARQUESS OF LONDONDEBERRY.**—*Atherton* moved to add two pleas in bar. *Manisty* appeared to show cause in the first instance.

*Rule refused.*

**MOSELEY v. HYDE.**—*Pescott* and *Phipson* showed cause against a rule for a nonsuit. *Whately, Keating, and Gray*, contra.

*Rule discharged.*

Wednesday, May 14.

## (APPEALS FROM THE COUNTY COURTS.)

**BROOKS v. BACKHAM.**—(Appeal from the County Court of Norfolk).—*Drumell* for the appellant. *Willes* for the respondent.

*Appeal dismissed.*

**WATSON v. THE AMBERGATE, NOTTINGHAM, & CO. RAILWAY COMPANY.**—(Appeal from the Lincolnshire County Court).—*Devlin* for the appellant. *Lock* for the respondent.

*Judgment affirmed.*

**PUGH v. CARTER.**—*Demurrer* to plea.—*Bovill*, in support of the demurrer. *Pearson*, contra.

*Judgment for the plaintiff.*

**BRADSHAW v. FOCKE.**—*T. Jones* showed cause against a rule to rescind a judge's order, requiring the plaintiff to give security for costs. *Bovill*, contra. *Rule absolute.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Monday, May 5.

RATT v. PARKINSON and WROTH.

Magistrate—Jurisdiction—11 & 12 Vict. cc. 43, 44—Church-rates.

Two justices made an order on the plaintiff on the 6th of May, for the payment of a church-rate under the 53 Geo. 3, c. 127, s. 7. On the following day a minute of the order was served on the plaintiff, and he still refused to pay. Subsequently a formal order and warrant of distress were drawn up on the same day, and both dated the 6th of May. The formal order was filed at the Midsummer Sessions, and the distress warrant executed in the following October. Whereupon the plaintiff brought an action of trespass against the two justices:

Held, that the justices had not exceeded their jurisdiction, and that they were protected by the 11 & 12 Vict. cc. 43 and 44.

Trespass, for taking and converting a cart of the plaintiff.

Plea, not guilty, by statute.

Upon the trial before Erie, J. at the Backs Spring Assizes, 1851, it appeared that the churchwardens of the parish of Linslade, Buckinghamshire, borrowed 1,800l. from the Public Works Loan Commissioners, under the 5 Geo. 4, c. 36, and the plaintiff, a rate-payer of the parish, having refused to pay a rate for the repayment of that sum, was summoned before the defendants, two justices at Ivinghoe, on the 1st of April, 1850. The hearing was adjourned till the 6th of May, when they made an order upon the plaintiff to pay 3s. 6d. On the following day a minute of the order was drawn up, dated as of the 6th of May, and served on the plaintiff; and subsequently a more formal order was drawn up, and signed and sealed by the two justices, and on the same day a warrant of distress to the following effect. The formal order and the warrant were both dated the 6th of May.

"To the churchwardens and overseers of," &c. "and to the constable of," &c.

"Whereas on the 27th of March last past, a complaint was made before Henry Harmer, esq. one of her Majesty's justices," &c. "by the churchwardens," &c. "that William Ratt, being a person duly rated and assessed, in and by a rate made on," &c. "by the churchwardens and the overseers of," &c. "in pursuance of" the 5 Geo. 4, c. 36, "for the payment of an instalment and interest due to the commissioners authorised and empowered to make advances for public works, in respect of a loan advanced to, and received by, the churchwardens and overseers of the said parish, under and in pursuance of, and according to the provisions of the said Act, in the sum of 3s. 6d. had not paid the same, or any part thereof, but had refused to do so; and now at this day, to wit, on the 6th day of May, A.D. 1850, at Ivinghoe, in the said county, the said churchwardens, by William Cotching, the younger, one of the said churchwardens, and the said W. R. appear before us, the undersigned, two of her Majesty's justices of the peace in and for the said county, and now having heard the matter of the said complaint, and it being now duly proved to us upon oath, in the presence and hearing of the said W. R. that an assessment in pursuance of, and according to the Act of Parliament aforesaid, dated the 7th day of January, A.D. 1849, was duly made by the said churchwardens and overseers, and that the said W. R. is thereon and thereby assessed at the sum of 3s. 6d. aforesaid, and that the said sum has been duly demanded of the said W. R. and that he hath not paid, and hath refused, and still refuses, to pay the same; and the said W. R. now not shewing to us any sufficient cause for not paying the same: These are therefore to command you in her Majesty's name, to make distress of the goods and chattels of the said W. R. if within the space of five days after the making of such distress, the said sum of 3s. 6d. and the sum of 19s. for the costs incurred by the said churchwardens in obtaining this warrant, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels, &c. &c."

"Dated the 6th day of May, A.D. 1850."

(Signed)

"W. B. WROTH,

"J. B. PARKINSON."

The warrant of distress was retained by the churchwardens, not delivered to the constable till the 27th of September, who made the distress on the 1st of October. The order formally drawn up was filed at the Midsummer sessions. Upon these facts a nonsuit was entered, with leave reserved to the plaintiff to set it aside, and enter a verdict for him for 8s.

A rule nisi having been obtained accordingly, *D. D. Keane* and *D. Power* showed cause. First. This being an action against defendants as justices for an act done by them in the execution of their duty, and over which they had jurisdiction, it should have been an action on the case, and not of trespass. (11 & 12 Vict. c. 44, s. 1.) It appeared that a sum of money had been borrowed from the Public Works Loan Commissioners under the 5 Geo. 4, c. 36, for the rebuilding of the parish church; and by sec. 1 church-rates are to be made for the repayment of the loan in the manner prescribed. Then sec. 2 enacts, that such rates may be collected, levied, and recovered in such ways as any church-rates may be; and 53 Geo. 3, c. 127, s. 7, provides, that if any one duly rated to a church-rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse to pay the same, he may be brought by warrant before two justices, and they may make an order for payment; and upon refusal to pay, they may order the amount to be levied by warrant of distress. The section then gives the parties aggrieved power to appeal. It is clear upon the facts found, that the defendants had jurisdiction in the case; but it is said, that because the order finally drawn up and filed at the sessions, and the warrant of distress were made out on the same day, there was no refusal between the making of the order and the warrant, and therefore that the warrant was illegal. That is not so. The plaintiff had a minute of the order made, served

on him on the day after it was actually pronounced, and that will sustain the warrant. The 11 & 12 Vict. c. 43, s. 17, enacts, that in all cases where by any Act of Parliament authority is given to levy a sum upon a person's goods or chattels by distress, the defendant shall be served with a copy of the minute of such order before the warrant of distress shall issue. Here that was done, and the order afterwards formally drawn up was filed at sessions, pursuant to sec. 14. Then the 53 Geo. 3, c. 137, s. 7, does not require the order or any copy of it to be served upon the party. The plaintiff has not appealed against the order. The object of sec. 17, in requiring service of a minute of the order was to meet the case of notice of appeal, and to enable the justices to draw up a more formal order at their convenience. The warrant being an existing warrant, and unappealed against, is a sufficient answer to the action: 11 & 12 Vict. c. 44, s. 2. The proviso in sec. 2 must be read as if it were "no such action shall be brought for any thing done under such conviction or order until after such conviction 'or order' shall have been quashed," &c. *Reg. v. Wigton*, 20 L. J. 111, M. C. No doubt the words "or order," in the last clause, were omitted by mistake. It will be said that there was an excess of jurisdiction here, and that therefore trespass will lie upon sec. 2, according to *Leary v. Patrick*, 19 L. J. 211, M. C. But there the warrant of distress authorised a levy for costs, and falsely recited the conviction as adjudging costs when it did not, while here there is no such variance between the warrant of distress and the order. If, however, there is any irregularity at all, *Barton v. Bricknell*, 20 L. J. 1, M. C., shews that once, and not trespass, is the proper form of action. (11 & 12 Vict. c. 44, s. 1.) This Act (11 & 12 Vict. c. 44), is a remedial Act, and is to be construed liberally; and where it appears, as here, that the justices were acting according to their duty, every presumption should be made to bring them within the provisions of the Act.

*Byles, Serjt., O'Malley, and Worledge*, in support of the rule.—The issuing of the warrant of distress was not an act within the defendant's jurisdiction, as there was no order under their hands and seals in existence at the time which the plaintiff had disobeyed. The 53 Geo. 3, c. 127, s. 7, requires the warrant of distress, as well as the order to pay, to be under hand and seal; and the 11 & 12 Vict. c. 43, s. 17, is cumulative, and requires a copy of the minute of the order to be served before issuing the warrant of distress. In this case that has not been done, for the minute served is of no effect, and there was no sufficient order until the formal one was drawn up, at the same time as the warrant of distress. There could not therefore have been any disobedience to any binding order before the warrant of distress issued. *Painter v. The Liverpool Oil Gas Light Company*, 3 A. & E. 433, shews that a distress warrant, without previously summoning and hearing the party to be distrained upon, is illegal, though a summons and hearing are not expressly required by the Company's Act. Secondly. There was an excess of jurisdiction in this case, for which an action of trespass would lie. (11 & 12 Vict. c. 43, s. 2.) There being no valid order in existence which the plaintiff could disobey, it was excess of jurisdiction to issue the warrant of distress. The 53 Geo. 3, c. 127, s. 7, only authorises the distress upon refusal to pay the sum adjudged to be paid by the order. The existence of a legal obligation to pay is a necessary preliminary condition to the authority to enforce payment (*Newbold v. Colman*, 20 L. J. 149, M. C.), and if no such obligation exists, the justices, if they act, do so without jurisdiction, and are liable in trespass. *Rogers v. Jones*, 3 B. & C. 409, and *Wicks v. Chatterbank*, 2 Bing. 483, were also cited.

*Jervis, C. J.*—I am of opinion that this rule should be discharged. Taking it that the warrant would not bear a close examination, it is a case expressly within the provisions of the 1st section of the 11 & 12 Vict. c. 44, providing the justices were acting in other respects within their jurisdiction. And that being so, it is unnecessary to put a construction upon the 2nd section. Now, as I understand this case, the proceedings were these:—A church rate was made, and the plaintiff did not pay his portion of it; the plaintiff was then summoned before the justices; the matter was then discussed, and, at the request of the plaintiff's attorney, the final determination was adjourned until the 6th of May. On the 6th of May, the justices met, and made an order that the plaintiff should pay the rate: the plaintiff says that that order should have been drawn up under their hands and seals, and that it is not an order until it is so drawn up. I am of opinion that, under the 11 & 12 Vict. c. 43, ss. 14, 17, the minute of the order may be drawn up when the judgment is pronounced by parol, and that an order afterwards drawn up, bearing date the day of such parol judgment, is such an order as that Act contemplated. The Act of Parliament seems to me to be clear on this point. If the justices convict, they make an order; and

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when the order is in fact made, a minute or memorandum should be made, for which no fee is to be paid, and then the order may be drawn up. The 7th section then says, that before there shall be any commitment or warrant of distress, the minute shall be served with notice of what has been done. It seems to me that the parties are protected by the 8th section of the Act of Parliament, and that they have acted within their jurisdiction, though they have not followed the precise forms given by that Act. It is unnecessary, in the view I take of the case, to enter upon the consideration, but I think that the words "excess of jurisdiction," mean this, that the justices assume to do that which under no circumstances can be justified by their authority.

CRESSWELL, J.—I am of the same opinion. I think that the defendants in what they did on this occasion, were exercising their functions as justices, and that what they did was within their jurisdiction. They certainly had jurisdiction to issue a warrant for non-payment of the church-rate; then it appears that a summons was issued, that the parties came before the justices, and the matter was then discussed, and that on the 6th of May their decision was given. Notice of it was sent to the plaintiff's attorney in London at his own request. That decision was for the payment of a certain rate, and for a sum to be paid for costs. They, therefore, did order at the time payment of costs. I suppose that Mr. Worledge thought that that was not so, and that that was within the case where a warrant was ordered or costs not included in the conviction. Then with respect to that which is called an order: the statute contemplates that the justices shall pronounce the order at the time, and that what they then say is their judgment in making the order. But it is further contemplated by the statute that a minute shall be made at the time, and that afterwards the order shall be drawn up. The statute distinguishes between the minute and the formal order to be drawn up afterwards. Then it is said, that they had no jurisdiction to issue a warrant until that order so drawn up was obeyed; and it was objected that the warrant and order were drawn up on the same day. They bear the same date, but it does not follow that they were signed on the same day, though probably they were. But before that there was a minute of an order served, and this formal order is not required to be served by the very terms of the 17th section, but only the minute of the order. Then what has been done? The warrant of distress was sealed and placed in the hands of the constable, but with directions to suspend the execution. In the absence of evidence to the contrary, the inference would be that it was to be suspended until the time when in fact it was executed. Under these circumstances I think that the defendants were protected by the Act.

WILLIAMS and TALFOURD, JJ. concurred.

Rule discharged.

Saturday, May 10.

PARV v. SOUVERA.

*County Courts*—13 & 14 Vict. c. 61, s. 11—Costs—Demurrer—Writ of inquiry.

*plaintiff obtaining judgment upon demurrer in an action of covenant, and recovering less than 20l. damages upon a writ of inquiry, is not entitled to costs.*

*query, whether he would be entitled to costs, if the judge before whom the writ of inquiry was executed, had certified that the action was a fit action to be tried in a Superior Court?*

This was an action of covenant. The defendant demurred to the declaration, and judgment was given for the plaintiff. A writ of inquiry was subsequently issued, and the jury gave a farthing damages. The plaintiff having taxed his costs, and entered up and perfected final judgment for damages and costs, rule was obtained by *Prentice*, on a former day of this term, calling upon him to shew cause why so much of the judgment as related to the costs of the action should not be set aside, and why he should not pay the costs of the application.

Byles, Serjt. (*Wordsworth* with him) shewed cause. The question is, whether a plaintiff who gets judgment upon a demurrer is deprived of costs by the County Court Act if he recovers less than 20l. damages. That question depends upon 13 & 14 Vict. c. 61, secs. 11, 12, and 13. If the Court decides that those sections deprive him of costs in such cases, it will decide that questions of law of the greatest importance and difficulty, which may also sometimes involve large sums, can no longer be brought before the Superior Courts. Thus, in an action against the Bank of England for a half-yearly dividend of 18l. an important question of law may be involved, and the sum really in issue may be 1,200l. three per Cent. Consols; yet if the construction contended for on the other side is to prevail, such an action cannot be brought in the Superior Courts without a sum of his costs by the plaintiff. To prevent such an abuse, the Court will, if necessary, strain the language of the Acts. It is admitted that the plaintiff could not have obtained a certificate from a judge at chambers, under the 13th sec.; for the

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action is not one in which the Courts have "concurrent jurisdiction," or one for which "no plaintiff could have been entered in any County Court," nor was it "removed by *certiorari*." Nor could any certificate have been procured under the 12th sec. because the word "verdict" has been held to mean "verdict on issue joined." (*Reed v. Shrubsole*, 6 D. & L. 707.)

JERVIS, C. J.—It may be that "verdict" means any recovery before a jury. If so, the hardship suggested will be cured by the certificate of the presiding officer.

WILLIAMS, J.—The principle on which I proceeded in *Reed v. Shrubsole* was, that the word "verdict" being susceptible of a narrow or a wide meaning, and justice and convenience requiring that it should be construed in the narrow sense in that case, I adopted that construction.

Byles, Serjt.—That decision is undoubtedly weakened by the circumstance that Cresswell, J. dissented from the rest of the Court; nevertheless, it must be taken as deciding that the word "verdict" in the 129th sec. of the earlier Act, means verdict upon the trial of an issue, and the same meaning must be given to the same word in the 12th sec. of the recent Act. The question is, whether the 11th sec. protects the plaintiff, and that depends upon whether the judgment which he has obtained, may be considered a judgment by default. It is admitted that the general meaning of those words is—a judgment where a day being given to the defendant *in banco*, he does not come; or coming, says nothing; or his attorney says, *non sum informatus*; but it may also mean, a judgment in a case where the defendant does not dispute the facts. At all events, if the judgment be wrong, the error appears on the record, and the defendant should bring his writ of error.

Wordsworth.—It has been held that the words in Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, "if the plaintiff in any action of trespass, or of trespass on the case, shall recover by the verdict of a jury less damages than 40s. such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever," do not comprehend an inquiry after judgment on demurrer. (*Taylor v. Rolfe*, 5 Q.B. 557.) There is also a technical objection to this rule, which is, that the rule ought to have been to amend the inquisition.

JERVIS, C. J.—I am of opinion that this rule should be made absolute. I think we ought not, as has been suggested, put the defendant to his writ of error; for by so doing we should only compel him to resort to an expensive process, and give the plaintiff an opportunity of persecuting him into terms of compromise. Where, indeed, a reasonable doubt exists, we ought not to prevent a party from carrying his case to a Court of Error; but where the case is plain, I think we ought not to listen to the suggestion which has been made on the part of the plaintiff. Neither do I think we should listen to the technical objection; for though the inquisition be ever so bad, it does not affect the defendant. We then come to the substantial question, and I think that does not depend upon the meaning of the word "verdict" in the 12th sec. If there was a manifest injustice in our construction of the Act, and the words were so doubtful that, in order to avoid injustice, we should feel ourselves at liberty, as it were, to legislate for ourselves, we might be induced to strain the language of the Act in the manner suggested. But it is not necessary to resort to such a mode of construction, for the words in the Act are perfectly plain. The 11th sec. says that "if in any action commenced after the passing of this Act, in any of her Majesty's Superior Courts of Record in covenant," which this is, "the plaintiff shall recover a sum not exceeding 20l." which is the case here, "the plaintiff shall have judgment to recover such sum only and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default," which this clearly is not. The question then is, what is the meaning of the word "recover," not "recover by verdict," and that is what the plaintiff gets in the action. Here he has got a farthing, which is less than 20l. This, therefore, is an action of covenant in a Superior Court, in which the plaintiff has recovered less than 20l. and which is not within the exceptions in the Act. I think, therefore, he is not entitled to costs. As to the meaning of the word "verdict," it will be time enough for us to put a construction upon that when the question arises by the presiding judge certifying upon a writ of inquiry.

CRESSWELL, J.—I am entirely of the same opinion. The plaintiff has recovered a sum not exceeding 20l. in an action of covenant in this court, and he is not within either exception in the 11th sec. It is unnecessary to consider now what is the meaning of the word "verdict" in the 12th sec. On a former occasion the Court differed as to the meaning of that word in 129th sec. of 9 & 10 Vict. c. 95. I only advert to the subject, to say that if the question should arise again, I shall be ready to reconsider the reasons of my judgment, which vary very much in the several

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reports, and which in some of them appear to me to be unintelligible.

WILLIAMS and TALFOURD, JJ. concurred.

Rule absolute.

Saturday, May 10.

BESANT v. CROSS.

*Pleading issuably—Bill of exchange—Satisfaction—Parol agreement.*

*A plea to an action on a bill of exchange by indorsee against acceptor, that at the time of accepting the bill, it was agreed that the defendant should pay the drawer by instalments—that the drawer afterwards indorsed it to the plaintiff, as his agent, and without consideration—and that afterwards, and before action, the defendant paid the drawer the first three instalments in discharge and satisfaction of those instalments, and after action paid the drawer the last instalment, in pursuance of the said agreement, is not an issuable plea.*

*Assumpsit* on a bill of exchange, drawn by F. W. Thomas upon and accepted by the defendant, for 98l. 19s. 6d. payable four months after date, and indorsed by Thomas to the plaintiff. The defendant, being under terms to plead issuably, pleaded "that the plaintiff ought not further to maintain his said action, because before and at the time of making and accepting the bill of exchange he, the defendant, was indebted to Thomas in the sum of 65l.; and thereupon and before the making and accepting the said bill, it was agreed by the defendant and Thomas that the defendant should pay to Thomas the said sum of 65l. by certain instalments, to wit, four instalments of 16l. 5s. each, to wit, on, &c.; that for the purpose of securing the due payment by the defendant to Thomas of the said sum of 65l. in manner aforesaid, Thomas should make his bill of exchange in writing, and that the defendant should accept the same; that thereupon afterwards, to wit, &c. in pursuance of the said agreement, Thomas made and the defendant accepted the said bill of exchange in the declaration mentioned, for the purpose of securing to the said Thomas the due payment by the defendant of the said sum of money in manner aforesaid, and not otherwise; and save as aforesaid, there never was any value or consideration for the acceptance by the said defendant of the said bill, or for the payment by him of the amount thereof; that Thomas afterwards, to wit, &c. indorsed the said bill to the plaintiff, without value or consideration for the same, in order that plaintiff might hold the same as the agent and for the benefit of Thomas, and that the plaintiff has always held and now holds, without value or consideration, and as agent, &c.; that before the commencement of the suit the defendant paid to Thomas, and Thomas accepted from the defendant, the first three instalments, amounting to 49l. 15s. in full satisfaction and discharge of the said three instalments; that afterwards, and after the commencement of the suit, to wit, &c. being the day agreed upon for the payment of the last instalment of 16l. 5s. he, the defendant, paid to Thomas, and Thomas accepted and received of and from the defendant, the last instalment, in pursuance of the said agreement, so due to the said Thomas; that thereupon it became and was the duty of Thomas to obtain from the plaintiff the bill, and to return it to the defendant, and not suffer the suit to proceed; yet Thomas, not regarding his duty, did not then, nor at any time, obtain from the plaintiff the said bill of exchange, but wrongfully suffered the suit to proceed, and the plaintiff now continues agent for Thomas. *Verification.*

This plea was delivered April 11, and on 25th plaintiff signed judgment, of which defendant had notice on 24th. On 28th, plaintiff obtained rule to compute, and on 29th defendant obtained a rule, calling upon plaintiff to shew cause why the judgment and subsequent proceedings should not be set aside for irregularity, with costs.

*Look now shewed cause.*—First, the defendant's application was too late. He must apply in a reasonable time, and before a fresh step has been taken, which it is submitted means by either party. Here the plaintiff, after signing judgment, had obtained a rule to compute after the defendant had notice of the judgment. Secondly, the plea is non issuable. It seeks to vary the terms of a bill of exchange by a parol contract. Such a plea has been repeatedly held bad. (*Adams v. Wordley*, 1 M. & W. 374.) [JERVIS, C. J.—An issuable plea is one which offers a substantial issue of law or fact. This plea does not do so. Many pleas better in form have been held non-issuable. (*Hughes v. Poole*, 6 Scott's N. R. 959.) WILLIAMS, J.—Is not the plea one of failure of consideration?] It only says there was no consideration for the excess beyond 65l. The fourth instalment was not due until after action brought, and the plea does not aver that it was accepted in full satisfaction and discharge of the causes of action in the declaration, but only that Thomas accepted that instalment "in pursuance of the said agreement." [CRESSWELL, J.—He admits that the action was maintainable at the time it was brought, and does not say that what was afterwards paid was in satisfaction of the action.]



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It is submitted the plea would be bad on general demurrer, or after verdict.

**Bramwell, contra.**—The plea is an issuable and also a good plea. [CRESSWELL, J.—All you need do is to show that it is not very bad.] It is a plea of payment of part before and part after the action. [JERVIS, C.J.—Yes, but it is pleaded in satisfaction of the agreement instead of in satisfaction of the bill.] We do not plead it in satisfaction, but in performance. The question is, have we given a plausible answer to this action? In effect the plea is—I have performed my agreement, and there is a failure of consideration for the bill upon which the action is brought.

**JERVIS, C.J.**—This rule must be discharged. The plea is no answer to the action unless the agreement suspended the right of action when the bill arrived at maturity, which it could not do unless the promise in the bill could be varied by a parol agreement.

**WILLIAMS, J.**—The plea is an obscure way of saying that the plaintiff did not promise that which on the face of the bill he did promise.

**CRESSWELL and TALFOURD, JJ.** concurred.

*Rule discharged with costs.*

*Tuesday, May 13.*

**DUNCHELY v. PARIS.**

*Forged writ of summons—Attorney and solicitor.*

**Byles, Serjt.** showed cause against a rule obtained by **Field**, on Thursday last, calling on the attorney of the plaintiff, to show cause why the writ of summons issued in this case should not be set aside, and all proceedings stayed, and why he should not pay the costs of the rule. (The motion for the rule *nisi* states the circumstances, *ante*, p. 75.) There is no doubt that in this matter some person or other has been guilty of what is exceedingly wrong. On the one hand, I should be exceedingly sorry to make reflections on the clerks in the Writ offices, who are not here to answer for themselves; while, on the other hand, it is my duty to protect the plaintiff's attorney and his clerks, who, if the affidavits are to be believed, duly fulfilled their duty. The plaintiff's attorney swears that he gave his clerk directions to issue the writ in the usual manner, and that he was not at all aware that it had not been so issued. His clerk had been several years in his office, had served him faithfully, and he had never had occasion to suspect him of dishonesty. Down (the clerk) deposed, that having received instructions from his master, he filled up a blank parchment form of writ, made a *præcipe* thereof, and entered it in the *præcipe* book kept in the office; that he then took it in the usual way to the C. P. writ office, delivered the writ for sealing there, paid 5s. for it, and received it back with the seal thereon which it now bore; that as the plaintiff was waiting for the writ at the office (it had been arranged that the plaintiff should serve the writ himself), he was in a hurry, and did not take notice of the person who sealed it; that he was only absent ten minutes, and on his return delivered the writ and copy to the plaintiff, and gave her directions how to serve the writ. He further stated that he had been informed the stamp on the writ was incorrect, but he was wholly unable to account for it, and he solemnly swore that he did not, nor did any other person to his knowledge, stamp the writ, except the clerk in the writ office from whom he received it.

**JERVIS, C. J.**—Does the same clerk in the Writ Office file the *præcipe* as seals the writ?

**Ray (Master).**—He does.

**Byles, Serjt.**—The attorney here has given every possible facility for inquiry into the circumstances, and no blame lies upon him. The seal on the writ in question is reversed, there is no question about that. It may be asked how a reverse impression could be given at the office; the answer is, it might as easily be done there as elsewhere. There should be an inquiry instituted, whether there are not other cases where a reverse impression has been placed on a writ and no *præcipe* filed. If the clerk's affidavit be false, no doubt here is a transportable offence. **Knell**, another clerk in the attorney's office, corroborates Down's deposition in some material points. The case therefore stands thus. The clerks at the Writ Office say the writ was never produced there; we say we handed in the writ and *præcipe* at the office, paid the fee, and received back the writ stamped as it now appears. The case should not stand here. The Court is therefore prayed to direct an inquiry by the Masters which may clear up the matter, and satisfy all parties. But supposing this should not prove to be the seal of the Court, but a forgery of the attorney's clerk, that would not be the attorney's fault, and he should not be punished for it.

**JERVIS, C. J. (to Field).**—Do you wish the rule disposed of now? If you do, there must be an inquiry, nevertheless.

**Field.**—I leave it in the hands of the Court.

**JERVIS, C. J.**—The difficulty is as to costs.

**Byles, Serjt.**—The question of costs may be reserved.

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By the Court.—Let this rule be enlarged, and the whole matter referred to the Master, to inquire into it and report thereon, paying attention to the question, whether there are other writs in existence under similar circumstances. The rule is enlarged to the 10th day of next term. Every consideration shall be shown to the attorney without charge. In the mean time the proceedings are stayed.

*Rule accordingly.*

## BUSINESS OF THE WEEK.

*Thursday, May 8.*

**STAINBACH and OTHERS v. FENNING.**—Rule to enter verdict for defendant in action on policy of Marine Insurance.

*Part heard, adjourned.*

*Friday, May 9.*

**Re AN ATTORNEY.**—**Leach** moved to have the name of John William Smith erased from the roll of Attorneys of the Court, and the name John William Pye Smith substituted for it, the applicant being desirous of adopting a family name borne by his late father. *Motion allowed.*

**SHARPE (Clerk) v. ALL of HORBURY.**—**Cowling** showed cause against a rule for a prohibition to the Consistory Court of the Diocese of Ripon. In Horbury there is an ancient chapel which became dilapidated in 1794, and was rebuilt in pursuance of a faculty, and the pews were allotted, two of them being allotted to a Mr. Carr, in respect of two ancient messuages in the parish. This allotment was afterwards confirmed by another faculty which issued from the Consistory Court of the Archbishop of York. In April last a citation issued from the Consistory Court of Ripon, addressed to the inhabitants of Horbury, calling upon the inhabitants of Horbury to show cause why further alterations should not be made, and the pews be re-allotted. On 26th September, Mr. Carr (a grandnephew of the former Mr. Carr) put in a defensive allegation to this citation, which was admitted to proof, and a term probatory granted, the consequence of which was to put an end to the suit in the Consistory Court, yet that Court was proceeding to try the prescriptive right claimed to these pews. Under these circumstances the rule for a prohibition was obtained, but it was now objected that this mode of procedure was irregular, and that the proper course would be for Mr. Carr to declare in prohibition, so that the question of prescriptive right to the pews might be brought for adjudication into this Court. (Rogers's Ecclesiastical Law, p. 733; Corner's Crown Practice, p. 247; *Duke of Rutland v. Bagshaw*, 19 L.J. Q.B.) **H. Hill, contra.**—I admit the Court may compel me to declare in prohibition. The only question, therefore, is, whether the Court will do more than require me to do so. By the Court.—The rule may be enlarged upon the party's declaring in prohibition upon the proceedings in the Ecclesiastical Court, so as to bring the matter before this Court.

*Rule accordingly.*

**JOHNSON v. WILSON.**—**Charnock** showed cause against a rule for judgment as in case of a nonsuit. The affidavit stated that notice of trial was given for the sittings before Easter Term, but plaintiff could not go to trial on account of the absence of a material witness, and was willing to give a peremptory undertaking to try at the next sittings, provided the attendance of the witness could then be secured. By the Court.—We cannot discharge the rule upon a contingent undertaking. If the witness be not then forthcoming, you may apply to have the undertaking enlarged.

*Rule discharged upon peremptory undertaking to try at the sittings after this term.*

**DREW v. ROBERTS.**—**Cole** moved for a rule calling upon the defendant's attorney to show cause why he should not pay to the plaintiff 10s. 10s. pursuant to a contingent undertaking to do so, and the costs of this application. He cited *Re Porthorne*, 3 D. & L. 540.

*Rule nisi.*

**GRAHAM v. NEWMAN.**—**Howkins** showed cause against a rule for judgment as in case of a nonsuit. The ground was that notice of trial had been countermanded at the express request of the defendant's agent. **Bramwell**, in support of the rule, argued that as no time had been arranged between the parties, the arrangement related only to the sittings for which notice of trial had been given, and that the plaintiff should have proceeded to try at the next subsequent sittings. By the Court.—Such a countermand is a general one, and not for a particular sitting.

*Rule discharged, with costs.*

**SMITH v. BELL.**—Action of covenant on a mortgage-deed to recover principal and interest. **Byles, Serjt.** moved, pursuant to 7 Geo. 2, c. 20, for a rule to "compute." [JERVIS, C.J.—Does that statute apply to actions of covenant?] Yes. (*Sweeten and Another v. Collier*, 1 Ex. R. 467; 17 L.J. Ex. 57, S.C.) **JERVIS, C.J.**—That is an authority expressly in point.

*Rule granted.*

**CATTELL v. HAY.**—**Budd** moved for a *distringas* to compel appearance upon the usual affidavit.

*Rule granted.*

*Friday, May 9.*

**STRAINBACH v. FENNING.**—**W. H. Watson** and **Tomlinson** were heard in support of the rule.

*Cur. adv. vult.*

**DOE dem. RICHARDS v. LEWIS, and RICHARDS v. LEWIS.**—The former of these cases was tried at the Monmouth and the latter at the Glamorganshire Assizes; but the defence in both cases being substantially the same, they were argued together. **Alexander** and **Gray** showed cause against the rule in *Doe dem. Richards v. Lewis*, and *Chilton* and *Pulling* against that in *Richards v. Lewis*.

*Part heard.*

**KEMPSON v. MALTRY.**—**Field** moved for a *distringas* to compel appearance.

*Granted.*

*Monday, May 12.*

**WILLIAMS v. THE LORDS COMMISSIONERS OF THE ADMIRALTY.**—**Crocker** (M. Smith with him) moved to set aside the copy and service of a writ of summons herein. The writ was served on Capt. Mills, one of the commissioners, and an affidavit was produced shewing that the commissioners were not a corporation.

*Rule nisi.*

**HOPPER v. SMITH.**—**Wilkins, Serjt.** and **Horn**, showed cause, and **Byles, Serjt.** and **Wiles**, supported a rule calling on the plaintiff to carry out an agreement alleged to have been entered into at the trial, or for a new trial, and why the plaintiff should not pay the costs of the former trial.

*Rule absolute for a new trial, plaintiff to pay the costs of the former trial.*

## EXCHEQUER.

**BOSLEY v. MELLADREW.**—**Byles, Serjt.** showed cause against a rule *nisi* for a new commission to examine witnesses. It appeared that the former commission had been rendered useless from having been taken in a firm, and before parties who were not competent to administer an oath by the law of Denmark. **Channell, Serjt.** in support of the rule.

*Rule absolute; the commission to be directed to a burgomaster, the applicant to pay the costs of this rule and the costs rendered useless by the former commission.*

**SCOTT v. COURT DE REICHENBURG.**—**J. Brown** moved to be allowed to deduct the costs of the defendant from the costs of the plaintiff.

*Rule nisi.*

**DIXON v. ROYER.**—**Haly** showed cause, and **J. Thompson** supported a rule for judgment as in case of a nonsuit.

*Rule discharged.*

**FORMAN v. WRIGHT.**—**Bramwell** showed cause against a rule *nisi* to set aside the verdict herein.

*Part heard.*

**HOARE v. RANNEY.**—**Greenwood** showed cause against the rule for a new trial herein. **Carter** was heard in support of the rule. The Court said that the point upon which the rule *nisi* had been granted did not arise, according to the notes of the trial as furnished by the Lord Chief Baron.

*Rule discharged.*

*Tuesday, May 13th.*

**COLOMBINE v. FRIEWELL.**—**Leach** showed cause against a rule obtained by **Kerr**, calling on the defendant to show cause why a rule to surjoin should not be set aside with costs. This was an action brought by the plaintiff against his assignee, for costs of certain proceedings in the courts of France. It appears that an agreement had been entered into between the parties, by which all further litigation was to be put an end to, and this rule having been obtained in violation of that agreement, it is submitted the Court should set it aside with costs. In the year 1847, a bill of bankruptcy was issued against the plaintiff as a scrivener, on the ground that whilst in a state of insolvency he had executed a marriage settlement and an assignment of property to his mother, with intent to defraud his creditors. On the last day he was at liberty to do so, the plaintiff presented a petition to annul the fiat, and on the 3rd of May, 1848, the Vice-Chancellor gave him liberty to bring an action to try its validity, which was tried in the Q.B. and terminated in a verdict for the defendant. A new trial was afterwards had, in which the verdict was again for the defendant. Afterwards the plaintiff brought another action in the Ex. which was still pending, and then he brought a fresh action in the County Court, which was deferred to await the result of certain proceedings in Chancery. The plaintiff had also filed four suits in equity, and the defendant was obliged to file two suits to set aside the marriage settlement and the assignment to the plaintiff's mother. In this state of things the defendant obtained judgment for his costs on the trial in the Q.B. which amounted to 500*l.* and he was about to take the plaintiff in execution for them when a compromise was proposed, and the terms of it were left to be settled by counsel. Accordingly, the counsel on the plaintiff's side wrote to the defendant's counsel a proposal, commencing, "I have seen Mr. Colombine, and he authorizes me to propose the following terms," and then the terms were stated. These terms were accepted by the defendant's counsel, and the legal proceedings were stayed until the terms of the agreement could be drawn up formally; but after some time it appeared that no provision had been made in the terms for representing the interests of one of the plaintiff's children under the marriage settlement, and thereupon, although it had been distinctly arranged beforehand that Mr. Vallance was to act as solicitor for the plaintiff and his wife and mother and child, the plaintiff refused to carry out the agreement. The defendant's counsel then gave him notice that the treaty of an agreement was abandoned, and that he should proceed with the execution, and accordingly did so, and the plaintiff was taken in execution, but obtained his discharge under a writ of *habeas corpus*. Under these circumstances, as the projected agreement had been defeated by the plaintiff himself, and as the defendant had been put to the expense of thousands of pounds by the plaintiff's vexatious proceedings, the Court should discharge the rule with costs. **Byles, Serjt.** and **Kerr**, in support of the rule, contended that a written agreement having been entered into between the parties, which had been partially acted upon, it could only be put an end to by another written agreement; and that as one provision of that agreement was that all suits and actions between the parties should be stayed, the rule obtained by the defendant was a breach of that agreement. It was also contended, that the plaintiff had always been willing to appoint some one to represent the interests of his child, and said he was willing to do so now, and that as to the action before the Court, he was willing to enter a *set* process.

**JERVIS, C.J.**—The Court is of opinion that it was the fault of the plaintiff alone that the agreement had not been carried out, and therefore the rule must be discharged with costs.

*Rule discharged with costs.*

**RIDSDALE v. LAUTOUR, re HENRY.**—**O'Malley** and **Bailey** appeared, and were heard in this matter. It was ordered to stand over till the first day of next term.

**MATLIN v. MILLER.**—**Wordsworth** made absolute a rule herein, for judgment as in case of a nonsuit.

*Rule absolute.*

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILLY and C. J. B. HENKIN, Esqrs. Barristers-at-Law.

*Nov. 29 and Dec. 2.*

**HALLIWELL v. EASTWOOD.**

*Pontefract Honour Court—Replevin—9 & 10 Vic. c. 95, s. 5.*

Certain cotton-spinning machines were fired by means of screws, some in wooden fastenings, and some fixed in stones with molten lead, and thereby fastened to the building. The machines were distrained for rent, and subsequently replevied; held, that they were not a part of the freehold, but were properly distrainable.

By 17 Geo. 3, c. 15, jurisdiction is given to the



## EXCHEQUER.

*Court of P. for the recovery of debts up to 5l. and in replevin. That jurisdiction is, by 2 & 3 Vict. c. 85, extended to 15l. That Court was, by 9 & 10 Vict. c. 95, s. 5, abolished: Held, that the power of granting as well as hearing replevin was thereby taken away.*

Hoggins, Q.C. shewed cause against a rule obtained by Watson in this case, to increase the verdict from 460l. to 2,500l. It was an action of trespass, tried at York before Alderson, B. The question depends upon the construction of 17 Geo. 3, c. 15, enacted in 2 & 3 Vict. c. 85, and 9 & 10 Vict. c. 95. The question is, whether the power of granting replevin has been taken from the Court of the Honour of Pontefract by either of those Acts. By 2 & 3 Vict. c. 85, s. 4, that power is taken away. The Court Baron has become a new court, namely, the Court of the Honour of Pontefract. It is, however, contended, that by the operation of the County Courts Act, the Court Baron has been revived. That, however, could not have been the intention of the Legislature.

Pashley, on the same side.—The Court is abolished, and the power to grant replevin cannot survive it. (*Hallat v. Burt*, Car. 380.) A prescription for a steward to grant replevin out of court is void. (Co. Entries, 294.) The word steward ought to be read sheriff. The lord may bring his action in Court Baron, because the suitors are the judges, but it cannot grant replevin except by charter or prescription. He cited Co. Entries, 294; *Hallat v. Burt*, Car. 380; Bac. Abr. "Court Baron" and "Replevin," C.; Viner's Abr. "Replevin," Z.; Com. Dig. "Pleader," 3 K. 3 & 9; 4 Trust. 266—269; Kitchen on Courts, 95 b, & 74 a; Comyn's Digest, "Copyhold," R. 14.

Watson, Q.C. contrâ.—The Lords of the Honour of Pontefract have power to grant replevin to the exclusion of the sheriff. (*Mounsey v. Dawson*, 6 L. & E. 750.) There is a distinction between the power of granting replevins and that of hearing them. The sheriff in liberties has no power to grant replevin, except where the bailiff has refused. It is not the suitor in a Court Baron that grants replevin. It is granted by the lords, and though, since the passing of 9 & 10 Vict. c. 95, the jurisdiction to hear appeals has been transferred to the new County Courts, still the right to grant replevins still continues in the sheriff. (*Edmonds v. Challie*, 2 C. C. 14, 142.)

Ellis and Hall (in continuation) referred to *Iron*, 1 New Reports, 292; and 2 & 3 Vict. c. 85, s. 4. [PLATT, B.—It is an old Court with a new name. The question is whether that Court is abolished.] The 9 & 10 Vict. c. 95, s. 5, says that former Courts for the recovery of small debts and demands shall be repealed; but not so as to revive any Act thereby repealed. [PARKE, B.—The last section of the 2 & 3 Vict. c. 85, puts an end to the present jurisdiction and practice of the Honour of Court of Pontefract; and unless you can set it up again some way or other it is gone. Have you a single instance of a replevin granted by any officer or other person not of the Court?] No; there appears to be none. (*Fitz. N. B.* 72 f, 73 b; *Wilson v. Todday*, 4 Mau. & Sel. 120; 2 Inst. 139; 30 Edw. 1, p. 23; *Thompson v. Farden*, 1 Man. & Gr. 535; and Maule, J. observations at p. 544, were referred to.)

PARKE, B.—It would be better to dispose of this no point first; and in this case I have satisfied my mind that the power of granting replevin was taken away by the operation of the statute. The simple question is, is the power of holding replevin taken away? It seems to me, on looking at the authorities, and the different statutes, there is no doubt about it, and that the power in the present instance is taken away. The 17 Geo. 3 gives jurisdiction to the amount of 5l.; that recognises the right; then the 2 & 3 Vict. extends the jurisdiction to 15l.; then comes the 9 & 10 Vict. c. 95, s. 5, which abolishes the Court; the 2 & 3 Vict. is mentioned in the schedule, and that Court is abolished from and after the time there referred to. The effect of this is to put an end to the Court of Honour of Pontefract to hold replevin. The granting replevins out of court, though practised by the steward, was so loosely connected with the Court which ultimately did them, that it is impossible to say it could exist after the court had been abolished.

ALDERSON and PLATT, BB. concurred.

*Judgment for the defendants.*

There was a cross rule in this case, and the question was, whether mules used in a cotton factory are fixtures?

## JUDGMENT.

Monday, Dec. 16, 1850.—PARKE, B.—This case as argued a few days ago; a part of the case was imposed of, and this is the remainder. The question remaining to be disposed of in this case is whether cotton-spinning machines, which were fixed by means of screws, some in wooden fastenings, some stowed with lead in a molten state in stones, for the purpose of receiving the screws, were, by law, disainable for the rent of the mill in which they were

affixed. Before the machines were so attached, they were mere chattels, and undoubtedly they were distrainable chattels. The question is whether they lost that character by being attached to the floor in the manner described. The question is to be determined exactly in the same way as it would have been if the statute had decided that no chattels can be distrained which were not the subject of distress at common law, except those provided for by the statute. This distraint of chattels is not. Neither the power to levy a distress, given by the statute of Wm. 3, nor the power to impound on the premises given by the 11 Geo. 2, extends the right of distress to chattels not before the subject of it; still less does the right of the landlord for a year's rent before the goods taken in execution can be removed, afford a reason for holding that all goods that can be taken in execution can also be distrained. We must decide the case in the same way as if the distrainer was obliged to take the chattels distrained immediately to a public or a private pound. At Common Law, things fixed to the freehold, and which become part of it, cannot be distrained: for two reasons.—Lord Gilbert, C.B. says, "whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal, consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised, and the nature of the distress is not to presume part of the thing itself for the rent, but only *inducta illata* upon the soil or house. Hence it is that doors, windows, furnaces, &c. affixed to the freehold are not distrainable." Gilbert on Distress, 34 to 48, and on the sole ground that they were parcel of the freehold in the construction of law: keys, windows, and *chertiers* concerning the realty are not liable to be distrained. It was, besides, a rule at common law that things which could not be restored in the same plight and condition cannot be distrained for rent: that is laid down in Comyn's Digest, 47, and Gilbert on Distress, in the part I have already cited. We have, therefore, to decide whether these machines fall within either of these categories, otherwise they were not protected; they do not fall within the latter, for, being taken to be part, they must be brought back without damage to themselves. If they are not of a perishable nature they would not suffer by careful removal. If it were necessary to take some to pieces in order to remove them, that circumstance would make no difference, for that might occur with respect to chattels with respect to which there is no question, as, for instance, a post bedstead, which could not be carried to a pound without being first taken to pieces, and the distrainee would have no reason to complain that they were restored to him in a disjointed state at the pound, where he must attend to receive them, and that he should be saved the trouble of taking the beds to pieces again in order to replace them if they had been restored at the time. Nor does it make any difference that the distrainee would be obliged to bear the expense of refixing the machinery. Precisely the same objection might be made to a distrainee on any article which it required expense to carry back from the pound and restore to its former position. A distrainee at common law must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding upon the premises. The only question therefore is, whether the machinery, when fixed, was parcel of the freehold? and this is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the annexation to the soil, or if brick, the house to which it is united, whether it can be easily removed *integro et salvo*, or not without injury to itself or the fabric of the building. Secondly, upon the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causa*, or that of the Year Book, 28 Hen. 7, 13, *per rente en quel propriete remain, &c. en la possession*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. Now, in considering this case, we cannot doubt the machines never being part of the freehold, but were attached slightly to it, and were capable of being removed without the least injury to the fabric of the buildings, the object and purpose of annexation was not to improve the inheritance, but was to render the machinery steadier and for the more convenient use of the inheritance. They never were part of the freehold any more than a carpet would be, which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, or looking-glasses, pictures, and other matters of an ornamental nature which have been slightly attached to the walls of a dwelling, as furniture, and which is probably the reason why those and similar articles have been held in different cases to be removable. The machines would have passed to the executors: that is laid down by Lord Lyndhurst, in *Treppee v. Harter*, 2

## EXCHEQUER.

Cro. & M. 153, they would not have passed by the conveyance or demise of the mill, they never ceased to have the character of moveable chattels, and were therefore liable to the distress: the result is that Mr. Watson's rule will be discharged, and Mr. Martin's rule will be made absolute.

*Judgment accordingly.*

April 24 and May 3.

HARDING v. HODGKINSON.

*Evidence—Lord Denman's Act 6 & 7 Vict. c. 85. The Plaintiff was a trustee under a will to sell certain land, and divide the proceeds amongst the testator's family. The only title to the land was by user; and in an action of trespass the testator's son, one of the parties beneficially interested, was called to prove the exercise of certain acts of ownership.*

*Held, that this evidence was properly received.*

Trespass for breaking and entering a close.

Pleas—Not guilty, and not possessed.

This was a cause tried at Stafford before Patteson, J. when a verdict was returned for the plaintiff.

Whateley now moved to set aside the verdict and for a new trial, on the ground of misdirection and the improper reception of evidence. The plaintiff claimed as devisee of Henshaw Moss. By the will of Henshaw Moss the property was devised to plaintiff in trust, to sell and to divide the property amongst the family of the testator. The only title of the testator was by user, and John Moss, the son of the testator, and one of the parties beneficially interested, was called to prove acts of ownership. The Court took time to consider whether his evidence was properly admitted.

Saturday, May 3.—POLLOCK, C.B.—In this case the only question was, the competency of a witness who was called to prove the case of the plaintiff. We are of opinion that the witness was competent. The rest of the Court have no doubt about it. I at first entertained some doubt, but I think the current of decisions is in favour of the reception of the testimony of that witness. Certainly, the spirit of the Act of Parliament which was referred to has for its object as far as possible to admit testimony, leaving the question of credit to the jury who hear and see the witness. In the present case, property had been left to the persons who were represented by Harding, the plaintiff, as trustees, to sell and to divide among the family. The witness, whose competency was objected to, was undoubtedly a member of the family interested under the will, entitled to call upon the trustees to account, and to claim his share. We are of opinion that he did not stand in the relation pointed out in the exception of Lord Denman's Act, which would have excluded him from giving evidence, and therefore we think that his testimony was properly received, and that there ought to be no rule for a new trial on that ground.

*Rule refused.*

Friday, May 9.

BRESSE v. OWENS.

County Court—Action under 20l.—Writ of trial directed to County Court judge instead of sheriff. The 3 & 4 Wm. 4, c. 42, s. 17, provides that in any action depending in any of the Superior Courts for any debt or demand not exceeding 20l. the Court or a judge, if satisfied that the trial will not involve any difficult question of fact or law, and such Court or judge should think fit so to do, may order that the issue joined be tried before the sheriff of the county where the action is brought, or any judge of any Court of Record for the recovery of debt in such county. The County Court Act (9 & 10 Vict. c. 95, s. 3) enacts that every Court holden under that Act shall be a Court of Record.

Query—Can an order be made directing a judge of the County Court to try such issue?

Semble—By Pollock, C.B. and Alderson, B. it can; the County Court judge being a judge of a Court of Record, and within the meaning of the 3 & 4 Wm. 4, c. 42: by Parke and Platt, BB. it cannot; for although the County Court judge may be a judge of a Court of Record, yet such courts as the County Courts, established under the 9 & 10 Vict. c. 95, are not such courts as are within the meaning of the 3 & 4 Wm. 4, c. 42.

This was an action brought against the defendant, an attorney, to recover the sum of 34. 1s., 11. 13s. 6d. of which had been paid into court, leaving 11. 7s. 6d. for which the action proceeded. A summons had been taken out by the plaintiff, under the 3 & 4 Wm. 4, c. 42, requiring the defendant to shew cause why the issue joined between them should not be tried before (not the sheriff, but) the judge of the County Court. The defendant opposed the application; but Mr. Justice Wightman made an order that it be tried before the County Court Judge. Accordingly, a rule nisi having been obtained to set aside that order, and all subsequent proceedings thereon, with costs,—

Bramwell shewed cause.—After this order of Mr. Justice Wightman was made, the plaintiff delivered,

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on the 28th of March, the issue, &c. in the usual way to the defendant. The cause went down to trial in the ordinary course, and was tried before the judge of the County Court of Newtown, in the county of Montgomery, on the 9th April last. My affidavit states also, that the defendant's agent there attended the trial, and cross-examined the witnesses; but a verdict was found against the defendant for 1*l.* 7*s.* 6*d.* The learned judge had a perfect right to make this order, that the writ of trial be directed to the judge of the County Court, instead of the sheriff, as the 3 & 4 Wm. 4, c. 42, s. 17, enacts, that in any action depending in any of the said Superior Courts, for any debt or demand, in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20*l.* it shall be lawful for the Court in which such suit shall be depending, or any judge of any of the said courts (if such Court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any Court of Record for the recovery of debts in such county, and for that purpose a writ shall issue, directed to such sheriff, commanding him to try such issue or issues by a jury, to be summoned by him, and to return such writ, with the finding of the jury thereon, indorsed, at a day certain in Term or in vacation to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues. The judge of a County Court therefore has power to try cases under the section of that Act, because he is a judge of a Court of Record. The County Courts are expressly made Courts of Record by the County Courts Act, 9 & 10 Vict. c. 95; sec. 3 of which enacts, "that every court to be holden under this Act shall have all the jurisdiction and powers of the County Court for the recovery of debts and demands, as altered by this Act, throughout the whole district for which it is holden; and there shall be a judge for each district to be created under this Act; and the County Court may be holden simultaneously in all or any of such districts; and every court holden under this Act shall be a Court of Record." This action was for the recovery of a debt, and it was within the county; consequently the order is valid. (*Clarke v. Warren*, 2 Dowling, 774.) Some objection is raised because the order directs the judge of the County Court to try the cause, and the sheriff to return the writ; but that is a mere irregularity, from the printed form of order being used, as it usually is directed, to the sheriff, and not altered throughout by the clerk; and, being an irregularity merely, it has been clearly waived by the defendant's accepting it without any objection, and afterwards attending by his agent the trial of the cause. It would seem to be the practice also now to direct writs of trial under such circumstances to judges of the County Courts instead of the sheriff, as heretofore. [ALDERSON, B.—I have made several orders.] Then it is to be said, the sheriff was directed to summon the jury; and *Parmer v. Mountfort*, 8 M. & W. 266, cited to show that a writ of trial directed to the recorder of a borough, commanding him to summon a jury of his county, was irregular. And the same case in 9 M. & W. 160, where a writ of trial was directed to the recorder of a borough directing him to summon a jury of the borough duly qualified according to law, it was held regular, and that it was not necessary, under the 3 & 4 Wm. 4, c. 42, s. 17, that the jury should be taken from the county. No doubt a recorder cannot summon a jury from any part of England; but the judge does not here summon the jury: it is the bailiff or officer of the Court. Further, if this case be doubtful, the proceedings are on record, and the Court will decide, so that the defendant may avail himself of a writ of error if he pleases; and that is a course the Court usually adopts. *Walker v. Needham*, 1 Dowl. N. S. 220.

The Court then called upon the other side. Lush (Thompson with him), in support of the rule.—It becomes necessary, in the first place, to see what courts were in existence at the time the 9 & 10 Vict. c. 95, passed, establishing courts held under that Act, to be the so called Courts of Record, in order to ascertain whether it could be ever intended by the Legislature that these County Courts should be the Courts of Record contemplated under the 3 & 4 Wm. 4, c. 42, s. 17, to substitute or give the same power to a County Court judge as to a sheriff to try issues between parties. At the time the 9 & 10 Vict. c. 95, passed, there were then subsisting various descriptions of minor courts; for instance, Courts of Requests, Borough Courts, and County Courts as originally constituted. The new County Court Act is only, in fact, a substitution of the present courts for the previous Courts of Requests, with additional power to enforce larger amounts; and the judge of a County Court rather sits with the powers of the ancient Courts of Requests than of a Court of Record. These two sections, the 16th and 17th, of the 3 & 4 Wm. 4, c. 42, assume that the judge has power to summon a jury,

which is not the case with the County Court judge. No doubt the judge under the newly-constituted County Court has power to order a jury to be summoned as for his own court; but the bailiff, in fact, does it in every case. Again, what jury is the County Court judge to summon? What number? or where from? or what should be their qualification? A County Court jury is to consist of five only, under the County Court Act: he has no power to summon a jury of twelve, the only number qualified to try the causes contemplated under the 3 & 4 Wm. 4, c. 42, s. 17. The qualifications, also, of jurors are different in the one case to the other, as well as the locality from whence they are to be summoned. Again, could the County Court judge examine either of the parties to the suit? Clearly not under the 3 & 4 Wm. 4, c. 42. Then the writ is altogether informal, and not in compliance with the 17th section; neither is the order of the learned judge, as the County Court judge is directed to try the cause, and the sheriff to return the writ with the finding of the jury thereon indorsed. This being so, the Court will set it aside, as well as all the subsequent proceedings.

POLLOCK, C.B.—I must confess that the argument on behalf of the defendant has considerably shaken the confidence I at first entertained upon this case; so that now my determination is to leave the parties to a writ of error. I think that this cause was tried before a judge of a Court of Record within the meaning of the 17th section of the 3 & 4 Wm. 4, c. 42; the 9 & 10 Vict. c. 95, commonly called the County Court Act, expressly enacting that the courts holden thereunder should be Courts of Record. We are not to find the motives of the Legislature in framing Acts of Parliament, but to construe them as they are made, putting the most reasonable construction upon the terms used which appears to us to be consistent with the intention expressed in giving effect to the whole. The County Courts have power to decide on matters within their jurisdiction in as full and as ample a manner as the Superior Courts of Westminster. I know no difference, and therefore, where there is a clause in an Act of Parliament which clearly and expressly enacts that those courts so to be holden under that Act shall be Courts of Record, the judge of such a court is, for all purposes, a judge of a Court of Record. It would, as it appears to me, be very dangerous, in such cases, to look back and say, "But, at the time when that Act passed, making these courts Courts of Record, there were only such and such courts, for which the existing ones were meant to be a mere substitution, and the intention of the Legislature was different to that which is expressed in the Act of Parliament;" at least it is very doubtful to me if it be so. The effect of the argument has, however, certainly shaken my judgment. Two of my learned brothers here incline to think it is not a Court of Record, and not within the intention or operation of the 3 & 4 Wm. 4. I think it is, myself, and that this rule ought to be discharged. The Court is, however, equally divided upon the point, and the defendant can bring a writ of error. Part of the order is irregular, at all events.

PARKE, B.—My mind is not made up upon this case; and the arguments of Mr. Lush and Mr. Thompson have certainly caused me to entertain some doubt about it. On reading the 17th section of the 3 & 4 Wm. 4, c. 42, and also the 3rd section of the 9 & 10 Vict. c. 95 (the County Court Act), the inclination of my opinion at present is, that those County Courts directed to be holden under or by virtue of that Act, are not the Courts of Record intended to be within the meaning or contemplation of the 17th section of the previous Act. The writ of trial under a judge's order may be directed to the sheriff of the county, or a judge of any Court of Record, for a debt in such county. But was it intended to operate upon Courts of Record of this description within the meaning of the Act of the 3 & 4 Wm. 4, at the time that Act was passed? By the 3rd section of the County Court Act, there is no doubt that the County Courts holden under it are Courts of Record; but are they so for all purposes beside the enactments in that Act, or were they declared to be Courts of Record by the new Act for new matter arising only under that Act? My present impression is, that a judge of a County Court, under the 9 & 10 Vict. c. 95, s. 3, although judge of a Court of Record, is not such as was intended by the 17th section of the 3 & 4 Wm. 4, c. 42; at the same time I have doubts upon the subject, and am by no means certain that this is so. It is a point for a Court of Error to determine. It seems to me, that by the expression a Court of Record, it meant a Court of Record *quodam generis* at that time. I think myself, that the judgment here should be arrested, and so leave the plaintiff to bring the writ of error; but as we differ in our present opinions, the rule will be discharged, and the defendant will bring the writ of error.

ALDERSON, B.—I think a County Court judge is not only a judge of a Court of Record, under the 3rd section of the 9 & 10 Vict. c. 95, but is such a judge of a Court of Record as comes within the meaning of

the 17th sec. of the 3 & 4 Wm. 4, c. 42, for all the purposes required by it; still, should this view be the correct one, the judge of the County Court must sit and try the cause in the same way as a judge at common law; he could not examine either party to the suit, and he must have the usual number of jurors in the ordinary way: and indeed if he did not proceed in all respects according to the rules of the common law, a new trial may be moved for, and would be no doubt obtained. This is at present my view of the matter, although I do not give it as a positive opinion; the question is open to some doubt.

PLATT, B.—The distinction which Mr. Lush has pointed out, seems to me to be the correct one. The 3 & 4 Wm. 4, c. 42, s. 17, meant by any judge of any Court of Record, such Courts of Record as were subsisting at the time that Act of Parliament passed, not any subsequent Court of Record, established by a new Act of Parliament as a Court of Record, for the purpose of carrying out the particular objects and effect of such new Act. I do not think we are to look at the Act so as to construe it literally, but to see and judge, as far as we can, as to what was the real object and intention of the Legislature at the time the Act was passed. When the 3 & 4 Wm. 4, c. 42, became law, it was certainly not then intended that County Courts, as at that time holden, should try issues of the description referred to in the 17th sec. of that Act. My impression is at present strong upon the subject, yet at the same time I own it is not altogether free from doubt.

PARKE, B.—I wish to add, that I quite agree with my brother Alderson as to the course the judge should take in trying a cause under these Acts, if it should be determined that he has any right to try; certainly he must go according to the rules of the common law, if at all.

*Rule discharged, without costs; proceedings to be stayed for a week, that defendant may bring a writ of error.*

Saturday, May 10.

ENGLAND AND OTHERS v. SMITH.

8 & 9 Wm. 3, c. 11, s. 7.—Death of one of the parties to an action—Suggestion—Nonsuit—Costs.

Joyce shewed cause against a rule for judgment as in case of a nonsuit. One of the defendants was dead, and no suggestion had been entered pursuant to 8 & 9 Wm. 3, c. 11, s. 7. Issue was joined in August last, and the death took place in December; since then the suit had abated, and either party desirous of proceeding should enter a suggestion.

Coles, in support.—There is nothing in the Act to require the defendant to enter a suggestion, and nothing in the affidavit to show that no suggestion has been entered. [PARKE, B.—Their argument is, that if the suit has abated there can be no nonsuit.] It is consistent with the facts before the Court that the plaintiff has entered a suggestion. (*Larchin v. Buckle*, 1 L. M. & P.) [PLATT, B.—That case differs from the present.] According to that case, I might traverse the suggestion.

By the COURT,

*Rule discharged without costs.*

Tuesday, May 13.

(Before ALDERSON, B. sitting alone to hear motions in the Court of Ex. Ch.)

County Court—Suggestion form of affidavit.

The affidavit to found a motion for a suggestion to deprive a plaintiff of costs, under the County Courts Act (9 & 10 Vict. c. 95, secs. 128 and 129), must allege with certainty and precision that the plaintiff did not at the time of the commencement of the action dwell more than twenty miles from the defendant; and where the affidavit stated that the plaintiff at the time of the commencement of the action dwelt at Birmingham, which is within twenty miles from Wolverhampton, the place where the defendant dwelt and carried on his business at the time this action was commenced:

*Held insufficient, as not showing distinctly that the plaintiff and defendant dwelt within twenty miles of each other at the time the action was commenced.*

This was an application for leave to enter a suggestion upon the roll, to deprive the plaintiff of costs, under the County Courts Act (9 & 10 Vict. c. 95).

The affidavit upon which the rule nisi was granted, stated that the above-named plaintiff now dwells, and at the time of the commencement of this action dwelt, at Birmingham, in the county of Warwick, which is within twenty miles from Bitter, aforesaid, the place where the defendant now dwells, and also within twenty miles from Wolverhampton, in the said county of Stafford, the place where this defendant dwelt and carried on his business at the time this action was commenced by the plaintiff against the defendant.

Joyce shewed cause.—The affidavit is objectionable and defective in this respect: it states that at the time of the commencement of the suit, the plaintiff dwelt at Birmingham and the defendant at Wolverhampton, and that Birmingham is within

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twenty miles from Wolverhampton. It may be quite consistent with this statement that the plaintiff's residence is more than twenty miles distant or apart from where the defendant dwells, which is what the law requires. In *Johnson v. Ward*, 7 C. B. 868, it is held that the affidavit in a similar case must allege with certainty and precision that the plaintiff did not at the time of the commencement of the action dwell more than twenty miles from the defendant. In *Duck v. Barton*, 1 L. M. & P. 201, the affidavit was insufficient which stated the defendant carried on his business within the jurisdiction of the Southwark County Court, and that the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles of the defendant, on the ground that it did not shew distinctly that the defendant dwelt within twenty miles from where the plaintiff dwelt. *Paton v. Davis*, 6 C. B. 235, cited in *Duck and Barton*, and upon which that case was decided, is to the same effect. In *Kirby v. Hickson*, 1 L. M. & P. 364, the affidavit stated, that plaintiff dwelt and still dwells in K. street, within twenty miles of defendant, who dwelt and still dwells, in P. street. This was held insufficient for not shewing that the residences were within twenty miles of each other. In *Room v. Toffan*, 1 L. M. & P. 729, the affidavit stated that plaintiff at the commencement of the action did not well more than twenty miles "from the defendant," as held bad for not saying "from the defendant's residence," and in *Brooker v. Cooper*, 3 Ex. 112, the Court laid down that the defendant must shew affirmatively that the case is not within the exceptions contained in the 128th section. The Court may be judicial notice, perhaps, of the boundary of a county, but certainly not of a town.

*Pashley*, in support of the rule.—The Court will be as astute in discovering difficulties where a clear *trid facie* case is made out, and the affidavit is reasonably conclusive. In this case there can be no reasonable doubt, upon reading this affidavit, that when this action was commenced the defendant resided within twenty miles of where the plaintiff dwelt; and the affidavit states that the plaintiff dwelt in Birmingham, which is within twenty miles from Wolverhampton, where the defendant dwelt.

*ALDERSON, B.*—Suppose they lived twenty-five miles apart from each other, and upon this affidavit a party making it was to be tried for perjury, do not you think you could go to the jury for an acquittal on perfect success? That would depend upon circumstances. No doubt it lies upon the defendant to make out that the Act of Parliament has been complied with; and the question is, whether he has done so with reasonable certainty. Part of Birmingham may be within and part without the county, and it is as fair to presume it within as without a town. [*ALDERSON, B.*—How can you say that *om* Wolverhampton includes Wolverhampton?] In *Johnson v. Goston*, 9 Q. B. 137, it was determined that the word *from* was to be taken as including not, including, the date there mentioned; and *Patterson, J.* said:—"This demurrer is founded upon the notion at the word '*from*' must be exclusive, otherwise cannot see how the demurrer can be sustained." *id* again:—"The demurrer is wrong in assuming at the word '*from*' must be exclusive; though I see that *primid facie* it is so." And *Williams, J.* says:—"To say that the word is necessarily exclusive, I think, be erroneous."

*ALDERSON, B.*—The affidavit is insufficient, and the rule must be discharged; and as in all the previous cases where it has been discharged it was discharged with costs, so here I wish to follow the precedents. *Rule discharged with costs.*

## BRUFORD V. GRIFFIN AND ANOTHER.

## Costs—Taxation—Practice.

Here there are several defendants, who appear by separate attorneys, and obtain a verdict generally, it is not necessary that they should all attend at the taxation of costs, or that the several bills of costs should be taxed at the same time. *See, the case of Smith and Others v. Campbell and Others*, 6 Bing. 637.

*Lush*, on the part of the defendant Griffin, shewed cause against a rule obtained by *M. Smith*, calling the defendant to shew cause why the taxation of costs herein should not be set aside, and the sum of 41l. 16s. paid into court under an order of *Allderson, B.* should not be paid out and restored to a plaintiff.

This was an action for fraudulently removing certain goods taken under a distress. At the trial a verdict was returned for the defendants. A motion *id* been made for a new trial, and the rule had been discharged. The defendants had appeared by separate attorneys. Blandford, one of the defendants, gave notice of taxation, and the plaintiff having raised an objection to the Master proceeding, on the ground of the absence of the other defendant, it was stopped. On the 20th of December, the plaintiff's and Blandford's attorney again attended before the Master, and the taxation again stood over, and on the 24th the Master granted his allocation

for 129l. 6s. 6d. no notice having been given to the defendant Griffin. On the 31st of December the costs so taxed were paid, and a receipt given as the amount of the taxed costs of the defendant Blandford. On the 25th of January, Griffin's attorney presented his bill of cost for taxation, and it was then objected before the Master that he should have come in before when Blandford's costs were taxed; the Master disregarded the objection, and a summons was taken out to stay proceedings, and on the 31st of January, Alderson, B. made an order to stay the proceedings, the sum of 41l. 16s. to be paid into court, to abide the judgment of the Court. I surmise that there was some arrangement between the plaintiff and the defendant Blandford. No notice was given to Griffin, and the first he heard of it was on his applying to the Master to tax his costs. At this moment the judgment is imperfect in the books, the costs of the defendant Blandford alone appearing. The other side rely on a case of *Smith and Others, Assignees of Cook, v. Campbell, Shouls, and Cooper*, 6 Bing. 637; that case was distinguishable. That was a case in *assumpsit*, this is in *trid*. There Cooper defended separately; the plaintiffs countermanded notice of trial; before they gave a second notice, Cooper became insolvent, and the two first defendants only appeared to defend the cause at the trial. A verdict was given for the defendants generally, and costs were taxed for the two defendants, who appeared at the trial, Cooper's attorney declaring that he would not be concerned for him. I infer that Cooper had notice, for his attorney had refused to act for him, and had abandoned his defence, and, therefore, the plaintiff might well suppose that the costs before the Master were the costs of all. [*PARKE, B.*—How can one defendant insist on another defendant bringing in his bill of costs? He referred to *Watson and Others v. Boyes*, 13 M. & W. 635: because one has been paid is that a reason why the other should not be? There would have been no difference if both had been present. I contend that the plaintiff and Blandford were colluding together with the case in the C. P. in view, and the Court will not, on this loosely reported case, deprive this defendant of his costs.

*M. Smith* in support.—There can be no collusion, or Blandford's attorney makes an affidavit for the other side. It was not necessary to give notice to the defendant Griffin. Much inconvenience would arise if parties were allowed to attend before the Master to tax at different times; the Master might be induced to allow more when taxing the costs of one defendant than if he had the whole facts of the case, the papers, and briefs before him; he might find that on the second taxation he could not avoid allowing certain charges which he had allowed on the first. There is no other case than that cited, and that is adopted in Archbold's Practice, by Chitty. The judgment is an entire thing, and the costs are a part of the judgment. [*Lush.*—They may give us notice, and compel us to bring in our costs for taxation. *PARKE, B.*—No writ of error could be obtained and no execution issue until the judgment is complete, which it is not until the costs of the defendants are added.] The case is not distinguishable from that cited.

*PARKE, B.*—I do not see why two defendants who have appeared by separate attorneys should not attend to tax their costs separately. The Master informs me, that according to the general rule in the office, it is not necessary that the attorneys of both defendants should be present at each taxation. The case in the C. P. which has been cited, is not a binding authority, and there there may have been some special circumstances which would account for our arriving at a different conclusion in this case. According to the general rule, then, we think the defendant is entitled to have the money in question paid over to him; at the same time I may observe, that if any special circumstances should arise in any case which would cause inconvenience, if the costs of the attorney of one of the defendants should be taxed in the absence of the other, that might be made a ground for a special application that the costs of both should be taxed together.

*PLATT, B.*—I think it would be found more desirable, as well as more economical, that the costs of the two defendants should be taxed separately, for if both attorneys attend on both taxations, there would be an unnecessary increase of expense. The plaintiff's attorney is present on both occasions, and if more is allowed on the second taxation than is proper, he can come to the Court to have it reviewed. *Rule discharged with costs.*

## BUSINESS OF THE WEEK.

## Thursday, May 8.

*NICKOLLS v. JONES.*—*Crompton* (with him) shewed cause against a rule to set aside an award herein. *Watson and Spinks*, in support.

*Rule discharged with costs.*

*COOPER v. GRAY AND ANOTHER.*—The plaintiff in person moved for a rule to shew cause why the order to discontinue should not be rescinded. *Rule nisi granted.*

*BLAIR v. JONES.*—This was a similar case to the last. *Rule discharged with costs.*

*WALSTON v. THE PATENT FUEL COMPANY.*

*Rule refused.*

*SAME v. SAME.*—*Crompton* had obtained a rule nisi to enter judgment *sum pro tunc.* *Rule absolute.*

*BEARCROFT v. GREGOR.*—*Honeyman* shewed cause. *Mason*, in support of rule. Application too late. *Rule discharged with costs.*

*v. v.*—*Unthant* moved for a *distringas* to compel appearance. *Granted.*

*v. v.*—*Honeyman* moved for a *distringas* to compel appearance. *Granted.*

## Friday, May 9.

*SALAMAN v. COHEN* (used as one of the Directors of the Britannia Life Assurance Company). *M. Smith* shewed cause against a rule obtained for a commission in the nature of a *mandamus* to issue for the purpose of examining witnesses abroad *videlicet*. *Lush*, contra.

*Rule absolute. Heads of examinations to be given.*

*SPRADBERRY v. GILLAM.*—*Bramwell* shewed cause against a rule obtained to set aside the defendant's verdict, and to enter it for the plaintiff on all the issues, with nominal damages. It was an action in debt; the defendant pleaded, 1st. Never indebted; 2nd. A general plea of set-off; and 3rd. As to 3l. 19s. payment after action brought of 4l. in discharge of 3l. 19s. *Henry v. Earl*, 8 M. & W. 228, was an authority to shew this plea was good. *Tuck v. Tuck*, 5 M. & W. 109, and *Moore v. Bullin*, 7 A. & E. 600, were also referred to. *Lush*, contra, not heard. The Court said a plea of set-off to several counts is not divisible, and the plaintiff is entitled to a verdict generally, unless defendant proves a set-off equalising the whole of the plaintiff's aggregate demand, which had not been the case here.

*Rule absolute; the plaintiff undertaking that it should be for 1s. only.*

*THE GREAT WESTERN RAILWAY COMPANY v. BUDD AND OTHERS.*

*Part heard.*

## NEW TRIAL PAPER.

*THE GREAT WESTERN RAILWAY COMPANY v. BUDD.*

*Part heard.*

## Saturday, May 10.

*FALK v. THOMPSON.*—*Henderson* shewed cause against a rule to change the venue of this action. *Atherton* in support.

*Rule discharged with costs.*

*MORGAN v. NASH.*—*White* shewed cause against a rule to shew cause why the *cognovit* herein, and judgment entered up in pursuance thereof, should not be set aside. *J. Gray* in support.

*Rule absolute on payment of costs.*

*HOWE v. SMITH.*—*Whately* moved for a rule to shew cause why the verdict herein should not be entered for the defendant, or as the Court should direct.

*Rule nisi granted.*

*MAULE v. GREGORY.*—*P. Taylor* moved for a *distringas* to compel appearance.

*Granted.*

*LEAH v. FOX.*—*Atherton* moved for a *distringas* to compel appearance.

*Refused.*

*Don dem. BRAY v. ROY.*—*Horry* shewed cause against a rule to shew cause why judgment herein should not be set aside, and possession restored.

*Rule absolute on payment of costs.*

*JOHN PRARS*, administrator, v. *JAMES WILSON*, executor.—Prohibition to County Court of Durham. *Granted.*

*BRIDSON v. LEUTHALL.*—*Pearson* shewed cause against a rule calling on the defendant to shew cause why the verdict should not be set aside, and a new trial had, or why the damages should not be increased to 21l. 5s. and the venue changed from Hertford to Middlesbrough. *Prohibition* action on a bill of exchange for 21l. 5s. drawn against acceptor. The damages were laid at 16l. and a verdict returned for 21l. 5s. *Rule absolute on payment of costs.*

*WHEAT v. WILSON.*—*Providence* shewed cause against a rule for a new trial herein. *D. D. Keane* in support.

*Rule discharged with costs.*

*ENGLAND AND OTHERS v. SMITH.*—*Joyce* shewed cause against a rule for judgment as in case of a nonsuit. *Obse* in support.

*Rule discharged with costs.*

*DELANEY v. CAVELL.*—*H. Hill* shewed cause against a rule to shew cause why a rule for judgment as in case of a nonsuit herein, and judgment in pursuance thereof, should not be set aside on payment of costs and the peremptory undertaking enlarged. It was objected, that the plaintiff should have come to the Court on the first day of Term, and before the judgment was signed, instead of *deferring* it until the 25th or 30th of April, when this motion was made. (*Patric and Another v. Cullen*, 8 Scott's N. R. 705; *Clearly v. Poole*, 1 C. M. & R. 531; *Baldwin v. Padwick*, 19 L. J. Q. B. 15.) *Hance*, in support.—The delay had occurred in consequence of the motions for new trials. Notice of this motion had been given on the 23rd of April, and judgment was signed on the 28th. The plaintiff was a poor man, his attorney had refused to go on with the action, and had commenced an action for costs, and the plaintiff could not get the papers out of his hands. Now he had changed his attorney, and had got the papers. (*Joyce v. Elliot*, 7 Scott's N. R. 490; *Lumley v. Duboury*, 14 M. & W. 295.)

*Rule absolute on payment of all costs within a week after taxation.*

*THOMAS v. ROBINSON.*—*Hurdstone* shewed cause against a rule for judgment as in case of a nonsuit. The defendant's attorney had told the plaintiff that his client was insolvent and would take the benefit of the Act, whereupon the plaintiff withdrew his notice of trial. *D. D. Keane*, in support.

*Rule absolute unless the defendant consents to a stet processus in a week.*

*PLUS v. HOWELL.*—*Lush* moved for rule for judgment as in case of a nonsuit after a peremptory undertaking.

*Granted.*

*v. v.*—*Kerr* moved for a rule to shew cause why the service of the writ herein, and all subsequent proceedings, should not be set aside for irregularity.

*Refused.*

*GREAT WESTERN RAILWAY v. BUDD.*

*Cur. adv. val.*

## Monday, May 12.

*TOMLIN v. GAZLAND.*—*Humfrey, Q.C.* and *Bohn* shewed cause against a rule obtained for the purpose of the plaintiff's getting his costs upon a question under the Tithe Commutation Act—the plaintiff having succeeded upon the trial. *Mellor and Mainstay*, contra.

*To stand over.*

## BANKRUPTCY.

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**THE SHROPSHIRE UNION JUNCTION RAILWAY AND CANAL COMPANY v. CHARLES EDWARD COOKE.**—Sir F. Theobald moved to set aside the verdict, and for a new trial. It was an action for calls; and the object of this motion really was, to get the special case settled between the parties: a case in which the above plaintiffs were plaintiffs and Anderson defendant, 6 Railway Cases, 58, was cited.

*Rule nisi.*

**SMITH v. HAMMOND.**—*Referred to the Master.*  
**CHAFFELL v. PAPANTOLOS.**—Miller, Serjt. showed cause against a rule nisi for an attachment against Mr. Lewis, an attorney herein, for non-performance of his undertaking. PARKER, B.—You have shown no cause of fraud or misrepresentation here, and your client is bound to perform his undertaking. The rule must be absolute, but it may remain in the office a week. The rest of the Court concurring, *Hawkins*, contra, not called upon.

*Rule absolute, with costs.*

**ROBSON v. WEINGAARD.**—*Altherton* moved to set aside an award on the ground of misconduct in the arbitrator for proceeding *ex parte*, without giving a due seven days' previous notice, that the defendant was not allowed to be present at a meeting held on the 10th April, and for taking evidence also on the 3rd April when one of the parties was not present,—for proceeding, in fact, *ex parte*.

*Rule nisi.*

**WOOD v. ROWCLIFFE.**  
**JOHN BEVAN v. WILLIAM BEVAN.**—Sir F. Theobald moved to set aside an award herein, on the ground that it does not embrace all the matters in difference between the parties, and is not a final determination between them, and is not therefore binding. The cause, and all matters in difference, were referred to the arbitrators; but although defendant had required the arbitrators to take into their consideration a sum of 1,258l. odd, which he alleged should be accounted for, they did not appear to have done so; and without determining all the matters in difference, contented themselves by saying, there were no other matters in difference between the parties.

*Rule nisi.*

*Tuesday, May 13.*

**THE MARQUESS OF CHANDOS v. THE COMMISSIONERS OF INLAND REVENUE.**

*Judgment.*

**BALL v. DENNISTOWN.**  
**BLAKELY v. THE GUARDIANS OF THE POOL OF HUNDREDFIELD UNION.**—H. Hill showed cause against a rule to show cause why a writ of *certiorari* obtained herein should not be quashed, and a *procedendo* issued. A. W. Higgins, in support, cited *Porter v. The Bristol and Exeter Railway Company*, 20 L. J. 112.

*Rule discharged with costs.*

**HOWARD v. KERRAW.**—*Altherton* showed cause against a rule to show cause why a judgment of outlawry should not be reversed.

*Rule absolute.*

**OULLENFORD v. BROMAGE.**—On the application of *Simon*, the peremptory undertaking herein was enlarged for a week further.

*Granted.*

**MORRIS v. JONES.**—*Welsh* applied to enlarge a rule therein to the first day of next Term.

*Granted.*

**COBBETT v. GARY.**—*Welsh* showed cause against a rule to show cause why certain orders, which had the effect of disapplying the plaintiff, should not be rescinded. The plaintiff appeared in person to support.

*Rule discharged with costs.*

**CAKES v. MALINS.**—*Willes* showed cause against a rule calling on the defendant to show cause why the writ, declaration, and subsequent proceedings herein, should not be amended, by adding the names of eight other plaintiffs. *Mr. Smith*, in support.

*Cur. adv. vult.*

**WALMAN v. THE PATENT FUEL COMPANY.**—*Shaw*, Serjt. showed cause against a rule to show cause why the verdict herein should not be increased from 47l. by adding 1,231l. 14s. and for a new trial.

*Rule absolute.*

**WATERFORD AND WEXFORD RAILWAY COMPANY v. BERNARD.**—*Phipps* applied to discharge a rule obtained for a commission to examine witnesses.

*Rule nisi granted.*

**EDWARDS v. THE CAMERON COAL COMPANY.**—*Peacock* showed cause against a rule, calling on the Messrs. Hallett to show cause why an execution should not issue against them, under 7 & 8 Vict. c. 110, s. 68.

*Bovill*, in support.

*Rule enlarged.*

**EDWARDS v. THE CAMERON COAL COMPANY.**  
**SMITH v. MOORE.**—*Bovill* moved for a *distringas* to compel appearance.

*Granted.*

**DURELL v. KHANNA.**—*Hawkins* (Barnard with him) showed cause against a rule, to set aside an order to review the Master's taxation herein.

*Laish*, in support.

*Rule absolute.*

**WOOD v. ROWCLIFFE.**  
**SOLOMON v. MOORE.**—*Hawkins* showed cause against a rule, to set aside the interlocutory judgment herein, and all subsequent proceedings.

*Peacock*, in support.

*Referred to the Master.*

## BANKRUPTCY.

**VICE-CHANCELLOR KNIGHT BRUCE'S COURT**, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.  
**COURT OF BANKRUPTCY, LONDON**, reported by JOHN A. FONBLANQUE, Esq. Barrister-at-Law.  
**COURT OF BANKRUPTCY, DUBLIN**, reported by J. LEVY, Esq. Barrister-at-Law.

(Before the LORD CHANCELLOR.)

Friday, May 2.

*Ex parte* WOODS, re WOODS.

Construction of sec. 198.

The commissioner has jurisdiction to adjourn a certificate meeting, in order to enable a creditor who has failed to give notice of opposition, an opportunity of giving such notice, and of being heard to oppose the certificate at the adjourned sitting.

This matter came before his lordship by way of appeal on a special case, on behalf of the Bankrupt Law Consolidation Act, sec. 16, from an order of his Honour the Vice-Chancellor, to whom matters in bankruptcy are referred, confirming the decision of the commissioner, under the circumstances stated in the petition, viz. — A public sitting was appointed

for the allowance of the bankrupt's certificate under sec. 198; at such sitting one Baker, a creditor of the bankrupt, who had proved his debt, prayed to be heard against the allowance of the certificate, although he had given no notice to the registrar of his intention to oppose. The bankrupt, by his solicitor, objected to Baker being heard; but the commissioner was pleased to make the following order:—

"Memorandum, that this being the day appointed by me, and duly advertised in the *London Gazette*, for the allowance of the certificate of the said bankrupt,—Mr. Laurence appeared as solicitor for the bankrupt, and prayed that the said certificate might be allowed, and Mr. Wilkinson appeared as solicitor for the assignees, and Mr. Cooke, of counsel, appeared for George Baker, a creditor of the said bankrupt. And Mr. Laurence objecting to the right of Mr. Cooke to oppose on behalf of the said George Baker, by reason that he had not given the registrar notice in writing of his intention to oppose; and it appearing by the statement of George John Parsons, solicitor for the said George Baker, that the omission to give such notice was accidental; this Court doth order that this sitting be adjourned generally, and doth appoint a public sitting for the allowance of the bankrupt's certificate, to be held on Friday, the 31st day of January next, at half-past eleven o'clock in the forenoon precisely, of which sitting due notice is to be given in the *London Gazette*. And this Court doth order that the said George Baker do pay to the assignees and to the bankrupt, or their respective solicitors, the cost of and occasioned by the adjournment of the said sitting; and the solicitor of the said George Baker is to verify by affidavit, to be filed with the proceedings, his statement that the omission to give notice of opposition was accidental," &c. &c.

That on the 3rd day of January, 1851, an affidavit was filed with the proceedings in this matter, of which the following is a copy:—

"In the Court of Bankruptcy.—In the matter of William Woods, of No. 15, Prospect-place, Wandsworth-road, late of Devonshire-road, Wandsworth-road, Surrey, builder, a bankrupt.

"George John Parsons, of Haslemere, in the county of Surrey, gentleman, solicitor for George Baker, of Hilland, in the parish of Northchapel, in the county of Sussex, gentleman, a creditor of the said bankrupt, who hath duly proved his debt under the fiat in bankruptcy issued against the said William Woods, maketh oath and saith that he was instructed by the said George Baker upwards of two months since, to oppose the allowance of the said bankrupt's certificate; but not being aware of the necessity for giving notice of such opposition to the registrar of the honourable Court, no notice was given, and that the omission to give such notice arose solely from this deponent's ignorance of the law in that respect, and from no other cause whatever; except such last-mentioned affidavit, no affidavit has been filed in this matter by George Baker, pursuant to the said order; that the bankrupt, feeling aggrieved by the said order, on the 3rd day of January, 1851, presented his petition of appeal to the Right Hon. the Vice-Chancellor, and prayed that the said order might be rescinded, and that his certificate might be granted, and such petition was heard on the 4th day of March, 1851, when, after hearing counsel for the bankrupt in support thereof, and for the said Baker, in opposition, and counsel for the said assignees also appearing, but not opposing the said petition of appeal, his Honour dismissed the said petition with costs."

The bankrupt feeling also aggrieved by the last-mentioned order, and conceiving the same to be erroneous, appealed therefrom to this Court.

The petition prayed that the order of the 4th day of March, 1851, and also the said order of the 21st day of December, 1850, may be discharged, and that the bankrupt's certificate might be granted.

*Russell and Willer*, for the bankrupt, relied on the 198th section of the Bankrupt Law Consolidation Act.

*Swanston*, for Baker, contra.  
*Fonblanque* for the assignees.

The LORD CHANCELLOR, after reading sec. 198, said,—The construction of this section must be governed by the intention of the statute taken as a whole. My opinion is, that all that is required is that the question of certificate should be heard on some day, to be appointed by the Court, of which certain notices are to be given. The commissioner is to judge as to the most proper day to be appointed; but if on that day it should happen that the question could not be properly brought before the Court, I see nothing in the statute to prevent the commissioner from appointing a new day, subject only to the provisions as to notice. The commissioner, from having had the whole case before him from the commencement, is best able to judge as to the necessity of postponing the hearing of the certificate. I cannot, therefore, interfere with the discretion he has exercised. The appeal must be dismissed with costs.

The costs of the assignees were ordered to be paid out of the estate.

## COURT OF BANKRUPTCY, BASINGHALL-STREET.

Thursday, March 6.

(Before Mr. Commissioner FONBLANQUE.)

Re DAWSON.

Seamen's wages.

Where an insured ship was lost, and the insurance recovered by the owners: Held, that the seamen were entitled to be paid in full out of the insurance money.

The bankrupt had been owner of the bark *Camberland*, which was lost on her voyage. The underwriters having refused to pay, the assignees of the bankrupt brought an action and recovered 2,000l. The bankrupt this day applied for his certificate, which was granted of the first class.

Previously to the verdict against the underwriter, a seaman applied to prove, and to be allowed three months' wages as a servant. The Commissioner recommended him to suspend his claim till it should be ascertained whether the assignees should recover under the insurance; as, in that case, he was of opinion that the seamen would have the same rights as against the produce of the ship as they would have had against the ship herself.

The COMMISSIONER now stated, that though he had been unable to find any direct authority on the subject, probably arising from the recent change in the law, by 7 & 8 Vict. c. 112, s. 170, which gave to seamen a right to their wages in cases of wreck, he retained his opinion, in conformity with the general rules of equity, that as the seamen had a lien on the ship, and special remedies for the recovery of their wages, which the statute appeared to be specially framed to preserve to them, they had a right to follow the produce. The wages, therefore, must be paid in full out of the money received from the underwriters.

## COURT OF BANKRUPTCY, DUBLIN.

April, 1851.

Re CLENDENNING.

Filing petition and schedule in Insolvent Court — Bankruptcy.

Where a petition and schedule are filed in the Insolvent Court, and after the expiration of two months, and before adjudication there, a commission of bankruptcy issues against the insolvent, the Bankrupt Court will not administer his estate and effects until the petition in the Insolvent Court is dismissed and the vesting order vacated.

The 3 & 4 Vict. c. 107, s. 27 (English analogous 1 & 2 Vict. c. 110, s. 39), enacts that the filing of a petition of every person in actual custody, who shall be subject to the law concerning bankrupts, and who shall apply by petition to the said Court for his discharge from custody according to this Act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition, and that any commission of bankruptcy issuing against such person, and under which he shall be declared bankrupt before the time appointed by the said Court, and advertised in the *Dublin Gazette*, for such prisoner to be brought up to be dealt with according to this Act, or at any time within two calendar months from the time of making such vesting order as aforesaid, whether upon the petition of any such creditor as aforesaid, shall have the effect of divesting the said real and personal estate and effects of such person out of the said provisional assignee; provided always that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be declared bankrupt within such two calendar months as aforesaid, &c. In the present case, although the insolvent had not been discharged by the Insolvent Court, his petition and schedule had been filed upwards of two months, when a commission of bankruptcy had been sued out against him. It appeared that there was chattel property to a considerable amount, which had not been taken out of insolvent's possession pending the proceedings in the Insolvent Court, and upon adjudication in the Bankrupt Court.

*Creighton*, for the petitioning creditor, asked his Honour the Commissioner if he would authorise the property to be removed by the messenger and disposed of before the petition in the Insolvent Court was dismissed. The dismissal would, he supposed, be a matter of course, inasmuch as the bankrupt had not been discharged an insolvent; if he had been so discharged, the dismissal could only take place upon a rehearing. (*Re Walsh*, 17 Law T. 56.)

The COMMISSIONER said, he would not permit the property to be disposed of until the vesting-order in the Insolvent Court was vacated, as he was of opinion that, inasmuch as more than two months had elapsed since it had been filed, and although the insolvent had not taken his discharge, still the Bankrupt Court could not administer his estate as long as it remained in force.

On a subsequent day, the bankrupt appeared in the Insolvent Court, when his petition was dismissed, as of course, and the vesting-order vacated.



## LORD CHANCELLOR'S COURT.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Monday, April 28.

Re WILKES' CHARITY.

Charity—Breach of trust—Local objects of charity—Costs.

Where the trustees of a charity for the education of boys, to be selected by the trustees from certain parishes named, had chosen a boy who was only occasionally resident, and then not with his parents, in one of the specified parishes, it was held to be a proper choice, though a constant resident in the parish offered his own son as a candidate; and that the trustees were not bound to disclose their reasons for not appointing the rejected candidate.

This was an appeal from an order of the late Vice-Chancellor of England, which directed the election of a boy named Joyce to the benefit of this charity should be vacated, and that the trustees should proceed to a new election. The charity was founded by Mr. Wilkes in 1722, who directed the rents of hereditaments in Gloucestershire to be received for ever by the rectors for the time being of three parishes in that county, and to be applied by them to the maintenance and education of a boy as a clergyman of the Church of England, to be selected by the trustees from boys belonging to one of those parishes, and whose parents might not be in circumstances sufficient for his education. Joyce was the son of parents resident in Ireland, where he was born, but he had been living in Buckinghamshire with his brother, a clergyman, there receiving his education, and during his vacations he lived with his aunts, who resided in one of the three specified parishes. His brother had applied on his behalf to one of the trustees, on whose recommendation his co-trustees made the election. Application was also made on behalf of a boy named Gale, by his father, who resided in one of the parishes, and he was told that his son was not eligible to the benefit of the charity. The order of the Vice-Chancellor was appealed from on behalf of Joyce.

Malins, R. Palmer, and Harrison, for the appellant.

Bethell and Schomberg supported the Vice-Chancellor's order.

The LORD CHANCELLOR.—The case comes before me under circumstances which cast great responsibility on me, and causes me much anxiety to come to a right conclusion without taking more time to consider the case. But as he was able to come to a conclusion satisfactorily to himself, he considered it better at once to dispose of the case than keep the parties longer in anxiety. The petitioners complaining of the election of Joyce, did not impute improper motives to the trustees, but said that there was a miscarriage in electing Joyce, because he was not qualified to be elected; and if he was qualified, Gale was equally or better qualified. It was also said that they had not given notice to the families in the parishes, that there was a vacancy on the foundation, and that they were about making an election. It was also said that they had laid down an arbitrary rule, that the sons of farmers were not eligible; and he brought all the farmers in the parish to make common cause with Mr. Gale. But I cannot find any such rule was ever laid down, or avowedly acted upon. On the contrary, I observe that some have been elected to the charity were no more than farmers' sons. It is indeed absurd to lay down such a rule, in appointing to a charity in an agricultural district, in which there might be any persons desirous to bring up a son to the education of a clergyman, but in circumstances sufficient to enable him so to do. Then with respect to the want of notice of the vacancy, the parties in making affidavits in support of Mr. Gale's petition, though alleging the want of notice, none of them allege that if he had notice he could apply to the trustees on behalf of his son. The endowment was to be for maintenance and education of a youth whose parents were not content to bear the expense of educating him for the church, but it was not stated what was to be the state of his competency. Mr. Gale, the father, in his affidavit, first, to meet the supposed aristocratic objection to his eligibility, that farmers' sons were not eligible, swore that he had freehold and leasehold property, and money in the funds, without saying how much; and he and others who made affidavits said, he mixed with the gentry of the district. To meet the other objection to his son's eligibility, on the ground of the father's competency to educate him, his affidavit stated that he had eight children, and was not able to bring up one to an expensive education without injustice to the others. I have no test or means to judge of the gentleman's competency, nor do I see how the trustees could judge about inquiries which might be deemed improper. The best way would be, and such probably was the

opinion of the founder of the charity, to leave the choice to the good sense and good feeling of the trustees, who, being the clergymen of the three parishes, would be likely, without any improper inquiries, to know enough of the circumstances of the families in these parishes to enable them to choose the proper object. If the eligibility of the youth Gale depended on his father's circumstances, I have no means of knowledge of them, and cannot, therefore, say the trustees miscarried in not electing him. All I can say is, that there must be an absence of improper motives in their choice; there must be honesty, integrity, and fairness and faithfulness to the trust reposed in them. It appears to me that these trustees did not intentionally fail in their duty if they failed at all. Some inferences against them were drawn from the circumstances of the correspondence between the Rev. Mr. Joyce and one of the trustees, requesting the latter to use his influence for the former's brother. There was nothing improper in that. Again, it was said that there was no entry in the book kept by the trustees of the grounds of the ineligibility of young Gale, and that it was only communicated to Mr. Gale that his son was not eligible, or that the endowment was not applicable to him. There may be sufficient reasons for the trustees not stating the reasons of the lad's ineligibility either in the book or in the communication to his father without imputing any improper motives to the trustees in withholding these reasons. The question depended first on the competency of the father's circumstances, and secondly, on the fitness of the son to be elected, and in both respects the trustees may feel a delicacy in stating their reasons. The reasons might give offence if stated, and the trustees were not bound to state them. The three trustees stated in the affidavit that they had considered the cases of both the lads, and elected Joyce. They further stated that they inquired into the circumstances of all the families in those parishes, in respect to the filling up of this vacancy, and they found none. If Gale was ineligible they were clearly bound to elect Joyce, because no one else offered. They certainly ought not to have made their choice in secret and without notice to the parishioners. On the whole, I cannot come to the conclusion that there was any impropriety or even miscarriage on the part of the trustees, and being of that opinion I cannot charge them with costs (which the Vice-Chancellor did on the ground that they had committed a breach of trust); and being also of opinion that the petitioners were justified in what they did, I cannot make either side pay the costs of the other, or of the trustees, I will therefore discharge the Vice-Chancellor's order, direct the trustees' costs to be paid out of the trust property, and leave the other parties to pay their own costs respectively.

Malins said it was very desirable to prevent all bad feelings between all these parties, and in that view perhaps his lordship would direct all the costs to be paid out of the trust property.

The LORD CHANCELLOR.—If there be enough to pay all the costs after making the usual allowance for the education of the boy, then the costs may be paid.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

March 18 and 19.

QUENNELL v. TURNER.

Will—Construction—Exoneracion of personal estate—Misdescription of fund—Copyholds, whether included in "estate"—Charge on freeholds and estate, whether including copyholds—What included in residuary bequest.

A testator being entitled for life to the dividends and interest of certain stock standing in the names of trustees, and to a beneficial interest on remainder as to one moiety, the whole being subject to a charge of 500l., and being also entitled to certain copyhold estates, covenanted on his marriage, to provide an annuity for his wife; and by his will he makes this disposition:—I confirm the settlement made on my marriage, securing 200l. a year to my wife, "and I do hereby charge and make liable all and every my freehold hereditaments and estate in the county of S., and moneys standing in my name in the public funds, with the payment of the said annuity to my wife;" and subject to the payment thereof, "I give, devise, and bequeath the same freehold hereditaments and estates, and moneys in the funds, to my niece S. Q., her heirs, executors, administrators, and assigns," with remainder to her two sisters in case of her death leaving them surviving. "All the rest and residue of my real and personal estate, subject, as to my personal, to payments of my debts, funeral expenses, and the legacies hereinafter bequeathed, I give, devise, and bequeath to my wife, her heirs," &c. absolutely.

Held, that by "moneys in the public funds standing

in my name," the testator meant the stock standing in the name of the trustees.

That the personal estate was the primary fund for payment of the annuity, and was not exonerated by the charge on the freeholds.

And that the copyholds did not pass by the will.

By indentures of lease and release of the 3rd and 4th of June, 1796, being the settlement made on the marriage of the Rev. George Turner, of Spelsbury, in the county of Oxford, and Sally Clifton, certain freeholds situate in the county of Surrey, belonging to Miss Clifton, were vested in John Hilton, John Peyto Shrubbs, and John Roberts, their heirs, &c., on the trusts thereafter declared. And it was thereby also covenanted to surrender certain copyholds in the same county of Surrey, also belonging to Miss Clifton, upon the same uses and trusts, and certain leaseholds belonging to her were also thereby assigned to the said trustees upon the same trusts. And a bond therein recited, and bearing date the 24th day of August, 1787, and all moneys thereby secured, and also the sum of 1,017l. 0s. 11d., secured by a certain indenture of mortgage of the 2nd July, 1783, recited in the said indenture of settlement, were thereby also covenanted to be assigned to the said trustees upon the said trusts. And it was thereby also covenanted that a sum [of 2,725l. Five per Cent. Consolidated Bank Annuities, standing in the name of Sally Clifton, in the books of the Bank of England, should be transferred into the names of the said trustees on the said trusts. And it was thereby declared that the said freeholds, copyholds, and leaseholds, and the said bond and the moneys thereby secured, and the said sums of 1,017l. 0s. 11d. and 2,725l. should be and remain vested in the said trustees upon trust, to pay the rents, profits, dividends, and income thereof to the said George Turner for life, then upon certain trusts for a son or daughter of the marriage, if any, as therein mentioned; but in case there should be no such son or daughter, nor any issue of such son or daughter, living at the time of the decease of the survivor of the said George Turner and Sally Clifton, then that the said trustees should, after both their deceases, convey, surrender, assign, pay, and dispose the said freeholds, copyholds, leaseholds, bond, mortgage, stock funds, moneys, and premises, and the rents, dividends, issues, interests, and profits thereof, to such person or persons as the said Sally Clifton should at any time, by any deed or deeds executed as therein mentioned, or by any writing, or by her last will and testament executed, &c. as therein mentioned, direct, limit, or appoint. The indenture of settlement also contained a power of sale and exchange with the consent of Mr. and Mrs. Turner and the survivor, and a declaration that the moneys produced by the sales should be laid out in the purchase of lands to be settled to the same use, and upon the same trusts. The marriage took effect, and by her last will and testament, dated the 2nd January, 1797, and duly attested by three witnesses, Mrs. Turner, reciting the power contained in the settlement of June 1796, bequeathed the sum of 500l. sterling, to be raised out of the said sum of 2,725l. Five per Cent. Consolidated Bank Annuities, to her cousin Charlotte, daughter of Dr. James Weller; and the residue of the said sum of 2,725l. stock, together with the said sum of 1,017l. 0s. 11d. due on mortgage, she directed (after the deaths of herself and her husband, and there being no such issue of the marriage as in the settlement mentioned) to be transferred to her husband and her cousin Cory Hampton Weller, their executors, &c. in equal shares and proportions; and she appointed all and singular the freeholds, leaseholds, and copyholds, to and for the only absolute use and benefit of her said husband and her said cousin C. H. Weller, their heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants. In the month of November 1797, the trustees received 500l. 0s. 9d. part of the 1,017l. 0s. 11d. and invested the same in the purchase of 697l. 19s. 8d. Five per Cent. Bank Annuities in their own names; and in April 1798 they received 511l. 0s. 2d. the residue of the said sum of 1,017l. 0s. 11d. and invested the same, after deducting expenses, &c. in the purchase of 690l. 11s. 6d. Five per Cent. Bank Annuities, in their own names. In May 1799, certain parts of the premises were sold for 950l. and that sum was invested in the purchase of 1,696l. 8s. 7d. Three per Cent. Reduced Annuities, and other parts of the premises were sold at various times subsequently, and the produce invested, and in 1803 certain parts of the premises were exchanged for other lands. On the 9th of May, 1819, Mrs. Turner died, without leaving any issue of the marriage, and without having revoked her said will. On the 19th of May, 1819, C. H. Weller made his will, and thereby gave and bequeathed all his freehold estates, and all the rest and residue of his real and personal estate, after payment of his debts, to his sisters, Mary Weller and Charlotte Weller, and died on the 20th of May, 1819, without having revoked his will. On the 17th of December, 1820, a settlement in contemplation of the marriage of the said George Turner with Ellen

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Meliora Hilton was made, whereby Mr. Turner settled 200*l.* a-year, secured by his bond, on his intended wife if she should survive him, in lieu of dower and thirds. The marriage took effect. On the 24th of July, 1835, Mr. Turner made his will, and thereby confirmed the settlement made on his second marriage, "And I do hereby charge and make chargeable all and every my freehold hereditaments and estate in the county of Surrey, and moneys standing in my name in the public funds, with the payment of the said annuity to my wife free from all expenses and deductions, and subject to the payment of the said annuity I give, devise, and bequeath the same freehold hereditaments and estate, and money in the public funds, to my niece and godchild Sarah Quennell, her heirs, executors, administrators, and assigns, provided that in case my said niece and godchild, Sarah Quennell, shall depart this life, leaving her sisters, Mary Quennell and Elizabeth Calhoun, or either of them, her surviving, then I give, devise, and bequeath the same freehold hereditaments and estate in the county of Surrey, and money in the public funds, unto her sisters, the said Mary Quennell and Elizabeth Calhoun, and the heirs, executors, administrators, and assigns of the survivor." The testator then gave certain freeholds in Sussex to his three nieces, and bequeathed to his wife, heirs, executors, &c. all the rest of his real and personal estate, "subject as to my personal estate to the payment of my just debts, funeral and testamentary expenses, and the legacies hereinafter bequeathed." He then gave certain legacies; and after his death, on the 1st of December, 1840, his will was duly proved by his wife, then sole executrix. At the date of Mr. Turner's will there were no moneys standing in his name in any of the public funds, nor were there any moneys at any time subsequently standing in his name. But at the date of his will, and at his death, he was tenant for life in possession of several sums of stock, and was entitled to the reversion expectant on his own death to one moiety of the capital thereof, subject to the payment of 500*l.* to Charlotte Weller. Under these circumstances three questions arose; first, whether Sarah Quennell was or not entitled to one moiety of the moneys in the funds to which the testator was entitled in reversion expectant on his death; secondly, whether the personal was exonerated from the payment of the annuity of 200*l.* to the testator's wife by reason of the charge thereof under his will on the freehold hereditaments and estate in the county of Surrey and moneys in the funds, and also whether the charge extended to copyholds; and thirdly, whether the copyholds were included in the word "estate." To determine these points the bill was filed by Sarah Quennell.

Turner and Piggott for the plaintiff, as to the first point, cited *Doer v. Geary*, 1 Ves. sen. 255; *Dobson v. Waterman*, 3 Ves. sen. 308; *Gallini v. Noble*, 3 Mer. 692; *Hewson v. Read*, 5 Madd. 451; *Pentecost v. Lee*, 2 Jac. & W. 207; *Setwood v. Mildmay*, 3 Ves. 306; *Lindgren v. Lindgren*, 9 Beav. 358. On the second point, *Boughton v. James*, 1 Coll. 26; 1 H. L. Cas. 406; *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35; *Booth v. Blundell*, 1 Mer. 220; *Miller v. Little*, 2 Beav. 259.

Walpole and S. Clarke for Elizabeth Calhoun, a defendant in the same interest as the plaintiff, cited on the first point *Mackintosh v. Sison*, 8 Sim. 561; *Sheffield v. Von Donop*, 7 Hare, 42. On the second point, *Onusley v. Anstruther*, 10 Beav. 423; *Ryall v. Herman*, 10 Beav. 536; *Davies v. Ashford*, 15 Sim. 42. On the third point, *Carr v. Ellison*, 3 Atk. 73; *Edwards v. Barnee*, 2 Bingh. N. C. 252.

Roupell and Amphlett, for the defendant, Mrs. Turner, the widow and residuary legatee, cited on the first point *Dean, &c. of Christchurch v. Barrow*, Amb. 641; *Miller v. Twiss*, 8 Bing. 244. On the second point, *Hancox v. Abbey*, 11 Ves. 179; *Day v. Trig*, 1 P. N. 296; *Brown v. Groombridge*, 4 Madd. 498; *Choat v. Yeats*, 1 J. & W. 102; *Welby v. Rockliffe*, 1 R. & M. 571; *Evans v. Cockeram*, 1 Coll. C. C. 428. On the third point, *Wild v. Holtzmeier*, 5 Ves. 811; *Doedem. Smith v. Galloway*, 5 Bar. & Ad. 51; 1 Jarm. Wills. 365.

Turner, in reply.

THE MASTER OF THE ROLLS.—It may be said that every case of this kind is necessarily attended with a good deal of trouble and a good deal of anxiety, because there is such a variety of views that may be taken of the case and the words which are used, and capable of so much qualification, that it is very hard for the mind to get into that state of satisfaction in which it ought to be before the decision is pronounced. In such a case, however, it does appear to me that I can come to such a conclusion. I cannot say that it is likely to be satisfactory to the parties, because, in truth, it never can be in such a case satisfactory to them. They see so much doubt hovering over the matter, that they never can feel satisfied that the right view has been taken of it. This testator was entitled for his life to the dividends and interest of three sums of stock which were standing in the names of trustees. He was entitled to a

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beneficial interest in remainder as to one moiety, and the whole was subject, I think, to a charge of 500*l.* I think that was the precise interest to which this person was entitled. He has contrived to make as many blunders in his will as can well be imagined in such a case. Being entitled to this interest in the stock, and being entitled to certain copyhold estates, and having entered into a covenant by his marriage settlement to provide an annuity of 200*l.* a year to his wife, he expresses himself thus:—"I confirm the settlement made on my marriage with my present dearly-beloved wife, Ellen Meliora Turner, whereby an annuity of 200*l.* is secured to my said wife during the term of her natural life; and I do hereby charge and make liable all and every my freehold hereditaments and estate in the county of Surrey, and moneys standing in my name in the public funds, with the payment of the said annuity to my said wife; and I do declare my will to be that the same annuity shall be paid to her free from all expenses and deductions whatsoever; and subject to the payment of the same annuity, I give, devise, and bequeath the same freehold, hereditaments and estate, and moneys in the public funds, to my niece and godchild, Sarah Quennell, her heirs, executors, administrators, and assigns for ever;" and then it is provided, "that in case my said niece and godchild, Sarah Quennell, shall depart this life, leaving her sisters, Mary Quennell and Elizabeth Calhoun, or either of them, her surviving, then I give, devise, and bequeath the same freehold hereditaments and estates in the county of Surrey, and moneys in the public funds, unto her said sisters, Mary Quennell and Elizabeth Calhoun, to hold to them," and so on. Now, then, these several questions arise. He had certainly no moneys in the funds standing in his own name; no "moneys standing in my name in the public funds." He had not then. The question is, whether he is to be considered as having meant here to refer to money in the public funds which he might acquire at a date subsequent to the date of his will. That is the first question; or whether he is to be considered as referring to moneys which he supposed he had in the public funds in his name at the time of the date of his will. Now the words are, to a certain extent, no doubt, ambiguous: "All and every my freehold hereditaments and estates in the county of Surrey, and moneys standing in my name in the public funds." Now it has been argued, and urged very much indeed, that this means a general legacy; that it would have been perfectly well satisfied by means of moneys which he had acquired and procured to be standing in his name in the public funds after the date of his will. I confess I cannot so read it. I think what he meant here was this: my moneys standing in my name in the public funds. Now, if this were so, then it would be considered as a specific legacy. Well, then, he intended therefore to give something that was standing, or supposed to be standing, in his name in the public funds at the time of the date of his will. What was that? He had none, except that which was subject to the limitations that I have mentioned; he had got an estate for life; he had got an interest in remainder as to one moiety, subject only to the charge; and I think that must be considered as the subject that he intended to give. Now if these cases are satisfactory, as I have stated before, they always leave a certain degree of doubt and ambiguity in the mind; but I think upon the authority of the several cases that have been referred to, I ought to consider that he intended to give an interest in that particular fund,—the amount of it can be ascertained just as well as anything else can be ascertained. Upon the next point, whether there was an exoneration of the personal estate, I confess I have more doubt than upon the first. I think it clear he intended only to charge the personal estate, which is here introduced as a charge, and that he cannot be considered, on the authority of the late cases particularly, as having intended to exonerate the personal estate from that which is considered to be its natural burden; but it is the primary fund which is applied in this Court for the satisfaction of debts, and I think that there was no more meant than to make that charge. As to the remaining point, I confess that I am quite of opinion with the argument of the defendants. I think that the words which are here used in the gift do not at all apply, and do not necessarily lead us to infer that he meant to give the copyhold estates, "freehold hereditaments and estates." Now, these words of themselves no doubt would be strong enough to carry them all, provided there was a manifestation of the intention. I think that there is not such a manifestation of intention, and therefore my opinion is, that the copyholds do not pass by the will. There will be a declaration to that effect, and I suppose this is a case in which the costs of all parties ought to come out of the estate, that is, out of the residue.

## V. C. KNIGHT BRUCE'S COURT.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLWITT, Esq. of the Middle Temple, Barrister-at-Law.

Tuesday, Jan. 28.

DELARUE v. CHURCH.

Construction of Act of Parliament.

In 1816, for the purpose of raising 5,000*l.* for the repairs of a church, an Act was passed, by which certain persons were appointed trustees, with power to levy rates and to raise the money required by granting life annuities by simple annuity, or on the lives of two or more persons, or the survivor; but it was provided, that no annuity should be granted for a single life at a higher rate than 8*l.* 3*s.* per cent. where the life should be under thirty-five. In 1817 the trustees, in consideration of 2,500*l.*, granted an annuity of 225*l.* to A. and B. and the survivor of them; A. being then fifty-six, and B. thirty-three years of age. In 1819 another Act was passed, reciting that the 5,000*l.* had been raised, and annuities to the extent of 297*l.* were then charged on the rate; these sums included the 2,500*l.* and the annuity of 225*l.* before mentioned; and it was enacted, that the annuities already granted should be paid out of the rates in the first place. The annuity of 225*l.* was paid until 1845 (at which period A. had died, leaving B. surviving him), when the trustees refused to continue the payment to B., alleging that the grant had been void in consequence of B.'s age being under thirty-five, and the rate at which the annuity was granted being 9*l.* per cent.

Held, that if there had been a defect in the original grant, it had been cured by the Act of 1819.

The bill in this case was filed by Susanna Delarue against the clerk of the trustees of the church of St. George the Martyr, in Bloomsbury, praying that it might be declared that she was entitled to receive an annuity of 225*l.* during her life, and that the trustees might raise the amount by rates, and pay the same accordingly. By the 56 Geo. 3, c. 28, which was passed on the 21st of May, 1816, for repairing and altering the parish church of St. George the Martyr, and for making further provision for the rector, the rector and churchwardens for the time being, and certain persons therein named, were appointed trustees, with a provision for a perpetual succession; and power was given to them to levy rates; and it was declared that the clerk for the time being of the trustees should sue and be sued in the name of the trustees.

By the 17th section of the Act it was enacted that it should be lawful for the trustees, and they were thereby authorised and required, to raise, by the granting and sale of life annuities to any person or persons, either by way of simple annuity, or by way of jointure upon any two or more lives, or the life of the survivor of them, or by way of loan upon bonds to be entered into or given by or by the order and direction of the said trustees, any sum or sums of money not exceeding in the whole the sum of 5,000*l.*

Part of the 18th section of the Act was as follows:—"And for preventing improvident grants under this Act, be it further enacted, that no annuities shall be granted by virtue of this Act for any single life at any higher rate than the following (that is to say): where the age of the annuitant or person for whose life the annuity shall be granted, shall not exceed thirty-five years, the annuity to be granted shall not exceed the rate of 8*l.* 3*s.* for every 100*l.* of the consideration money paid for the purchase thereof; when the age of such person shall not exceed 40 years, the annuity to be granted shall not exceed the rate of 8*l.* 10*s.* for each 100*l.* of such consideration money; when the age of such person shall not exceed 45 years, the annuity shall not exceed the rate of 9*l.* for each 100*l.* of the consideration money."

The 21st section provided that "all the annuities, or annuity, so to be purchased and secured, under or by virtue of the Act as aforesaid, should be charged upon, and made payable, from time to time, out of the moneys arising by or from the rates and assessments by the Act directed to be made."

By a deed-poll, dated the 13th of May, 1817, in consideration of 2,500*l.* paid by J. M. Delarue, the trustees granted to J. M. Delarue and Susanne, his wife, an annuity of 225*l.* payable half-yearly to J. M. Delarue and Susanne, his wife, and the survivor of them, his or her assigns. At the date of this deed Mrs. Delarue was 33, and Mr. Delarue was 56 years of age. The annuity was granted at the rate of 9 per cent.

In 1819, further sums being required for the parish, the Act of the 59 Geo. 3, c. 11, was passed, and in this Act the following recitals were contained:—"And whereas the said trustees appointed by the said Act have proceeded to carry the purposes thereof into execution, and have raised the sum of 5,000*l.* on the credit of the said rates, in the manner by the said Act directed, and have caused the said parish

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rich to be well and substantially repaired, altered, improved."

And whereas a rate of 6d. in the pound upon said parish, as authorized by the said Act, will produce the annual sum or income of 800*l.* and upwards, and the annuities charged thereon under the Act, amount together to the annual sum of 297*l.* no more."

By the 9th section of this Act, it was provided that all the clear moneys to be from time to time after produced by or from the rates and assessments to be from time to time made or levied as aforesaid, shall, by the said trustees for the time being, or by any seven or more of them, be from time to time disposed of and applied as follows, that is to say, in the first place, in and for keeping down, paying, and discharging, from time to time, as the annuities already granted as aforesaid respectively, while subsisting respectively," &c. It admitted that the annuity of 225*l.* granted to and Mrs. Delarue was part of the annual sum 97*l.* and that the 2,500*l.* paid by Mr. Delarue in 1817, was part of the sum of 5,000*l.* mentioned in the 59 Geo. 3, c. 11. Mrs. Delarue survived her husband, and the annuity was regularly paid until year 1848, when the trustees declined making further payment; and accordingly the present was instituted.

*Vigram and Craig*, for the plaintiff, contended that the annuity had been properly granted, the 11th section of the 56th Geo. 3, c. 28, not being applicable to an annuity granted on two or more persons (*Kerrison v. Cole*, 8 East, 231), but that if the 11th section did apply, the defect in this grant had been cured by the subsequent Act of the 59 Geo. 3, c. 11. They cited also *Griffiths v. Vere*, 9 Ves. 127; *Nicholls v. Leeson*, 3 Atk. 373.

*Palmer and Archibald Smith*, for the trustees, contended that the Court had no jurisdiction in the matter. (*Drewry v. Barnes*, 3 Russ. 94.) They contended also that the grant was void, as the annuity granted at a higher rate per cent. than was allowed by the 18th section. They cited *Knap v. Leams*, 4 Ves. 430, n.; *Mellish v. Brooks*, 3 Bea. Rep. v. St. Margaret's, Leicester, 8 Adol. and 389; *Res v. The Inhabitants of Grovesend*, 11 Adol. and 240; and *Res v. The Justices of Chester*, 7 Barn. and Cres. 6.

**THE VICE-CHANCELLOR** (without hearing a jury) said.—The case of *Drewry v. Barnes* was a special and particular case, and does not, in my opinion, govern the present, in which I think the Court has jurisdiction. To what extent it shall be decided is another question. Whether the annuity within the prohibitory clause—if it is a prohibitory clause—which constitutes the 18th section of the Act of 1816, I give no opinion; but for every present purpose I assume that point in the defendant's favour. The next question is, whether the 18th section is directory merely, or has the effect of avoiding every grant or contract which infringes its provisions. My impression is, that it is directory only, and does not avoid any grant or contract infringing its provisions. But that point also, it is, in my opinion, not necessary to decide. I think it right, however, not to let it pass without expressing what is present, is my opinion upon it. However that may be, this annuity was granted fairly, I believe, on all sides at the time when it was granted, and under every good advice, at least on the part of those who granted it, so long ago as the month of May, 1817, and granted by persons representing a wealthy and respectable body. From the month of May 1817 the annuity has been regularly paid up to some time in the year 1848—a period of more than thirty years—without opposition or observation, during which time those who have received it have regulated their habits and mode of life upon the faith of this provision. Now, considering that there are thirty years, during which this property has been peaceably enjoyed, it is consistent with the whole course of authority, and with all the analogies of our law to presume almost anything capable of supporting such a grant. I am not quite sure that there has not been sufficient length of time to presume an Act of Parliament. It is sufficient to go the length to which Courts go in some instances, and to which they went in Lord Mansfield's time. It is sufficient to say that almost anything ought to be presumed, after such a length of enjoyment, capable of supporting the grant. I do not, however, rest there; for this grant having been made fairly, honestly, openly, and under good advice—two of the names appended to the grant being the highly respected names of Mr. Godfrey Sykes and Mr. John Hodgson,—an Act of Parliament is passed in 1819, nearly two years after the grant—a public Act, as the former was, and obtained, I must take it as probable, or I must suppose, by the very grantors of the annuity. That Act recites that the trustees appointed by the said Act have "proceeded to carry the purposes thereof into execution, and have raised the sum of 5,000*l.* on the credit of the rates in the manner by the said Act directed, and have caused the said parish church to be well and substantially repaired, altered, and

improved," and so on; "and whereas the sum of 5,000*l.* raised as aforesaid, has been by the said trustees applied (as far as the same would extend) for the purposes and in manner directed concerning the same in the said Act, but the same has been found inadequate for those purposes" (this lady's money formed part of it); "and whereas a rate of 6d. in the pound upon the said parish, as authorised by the said Act, will produce the annual sum of 800*l.* and upwards, and the annuities charged thereon under the said Act, amount together to the annual sum of 297*l.* and no more." It has been stated, and either proved or admitted, that that annual sum includes the annuity now in question, and that without it the proposition would be untrue. On the footing of this preamble the enactment proceeds, and, after authorising more money to be raised, the 9th section provides, that the rates and assessments to be levied shall be disposed of "in the first place in and for keeping down and paying and discharging from time to time as well the annuities already granted as aforesaid respectively," and so on, this annuity being one of those annuities already recognised as subsisting. It is in the face of these facts—in the face of plain justice and common honesty—that this most creditable defence has been made. In my opinion, it fails in law and in equity not less than in every other consideration that ought to regulate the actions of mankind, and that this ill-used lady is entitled to the benefit of this suit, and to all the costs which the Court can give. To what extent the relief can go is another question—a question rather of form than of substance: for if the decree to be made in this suit shall not give her at once all she is entitled to, she will be justified in instituting another, and so from time to time as shall be necessary. At present it appears there are funds in the hands of these trustees applicable—upon every ground applicable—formally, legally, and equitably applicable—to the payment of the demand of this annuity so far as it has hitherto accrued due. Let a sufficient sum be so applied. Declare that Mrs. Delarue is entitled to have the annuity kept down from time to time, in the manner prescribed by the Act of Parliament, and let there be liberty to apply. I do not appoint a receiver, as it is not necessary; and let the defendants pay all the costs of the suit.

March 24 and April 16.

WALTER v. SELFE.

**Private nuisance—Brickburning—Injunction.**  
Prior to the year 1829, A. B. erected a dwelling-house on land belonging to him, and laid out other part of the land as a garden and pleasure ground, and in 1849 he let the property to C. D. for a term of seven years. In the spring of 1850 E. F. the owner of adjoining land, began to manufacture bricks of the clay or earth of the same land, by burning in clamps. The clamp was erected within 48 yards of the windows of the said dwelling-house. Upon a motion for an injunction by A. B. and C. D. it was held, that the brickburning was a private nuisance, and (both parties declining to have an action tried at law, or a case sent for the opinion of a Court of law) an injunction was granted to restrain E. F. from burning bricks on his ground so as to occasion damage or annoyance to A. B. and C. D. or either of them, as owner or occupier of the dwelling-house, or injury or damage to the messuage, shrubberies, &c.

This case was heard upon a motion on behalf of the plaintiffs, William Walter and Charles Presely, for an injunction to restrain the defendant, John Selfe, his servants, workmen, and agents, from making or continuing, or causing to be made or continued, a clamp of bricks, or collecting cinders, breeze, and other materials for the purpose of burning the same on the strip of ground in the bill mentioned, or so near to the plaintiffs' premises as to occasion damage or annoyance to the plaintiffs or either of them, or burning or causing to be burnt bricks on his the said defendant's strip of ground so as to occasion damage or annoyance to the plaintiffs, or either of them, or to the plaintiff, W. Walter's tenants, or injury or damage to the messuage, coach-house, stable, wood-house, and trees, shrubberies, and plantations, erected and growing on the plaintiffs' premises in the bill mentioned, or to the messuages, trees, and shrubberies, erected and growing on such parts of the said premises as are in the occupation of the plaintiff, W. Walter's tenants, as aforesaid.

From the statements in the bill and the affidavits, the following appeared to be the circumstances under which the present motion was made:—The plaintiff, William Walter, was seized in fee of several pieces of land, and the houses and buildings thereon situate at Surbiton-hill, Kingston, Surrey; and amongst others of a piece of land abutting east on the high road from Epsom to Kingston, south and south-west on other land of William Walter, and north partly on the land of Mr. Thomas Taylor, and partly, towards the end thereof, on the land and

ground of the defendant John Selfe. Many years since, and before the defendant purchased the said land and ground, the plaintiff, Walter, built a messuage, coach-house, woodhouse, and other out-buildings on part of the piece of land before described, and laid out the other parts thereof as a garden, lawn, and pleasure ground, and planted trees and shrubs thereon. By an agreement dated the 2nd of May, 1849, and made between the plaintiff Walter and the plaintiff Charles Presely, Walter agreed to let to Presely the said messuage, coach-house, woodhouse, and buildings, garden, and pleasure-ground, for a term of seven years from the 24th of June then next at the yearly rent of 150*l.* This rent was afterwards, in consideration of Walter's expending further sums upon the premises, and of an additional piece of ground let to Presely, increased to 172*l.* 10*s.* About six years since the defendant, John Selfe, purchased a strip of land of about one acre and a half, running from east to west of the width, at the east and west ends of about eighty feet, the same abutting towards the east on the high road from Epsom to Kingston, and in part towards the south and south-west, on the premises let by Walter to Presely, and in other part towards the south on the grounds of the said Thomas Taylor, and towards the north on premises of the plaintiff Walter, in the occupation of his tenants. On this strip of land there was, facing the said high road and about 100 feet therefrom, a messuage or dwelling-house, and the remainder of the strip of land was, at the end of May or beginning of June 1850, used partly as a garden attached to the messuage and partly as meadow land. The defendant Selfe was a brick and tile maker, and carried on his business at a field containing about seven acres, situate about a mile distant from the said strip of ground. At the end of May or beginning of June 1850, the defendant commenced digging up the earth at the lower or west end of the said strip of ground for the purpose of making bricks and burning them thereon, and he had since made considerable quantities of bricks, and set them out for drying on the said strip of ground, and had drawn in some bricks, already burnt, and placed them for the formation of a clamp of bricks, and had drawn in and placed there considerable quantities of large ashes to be used in such clamp, for the purpose of firing and burning the same. The part of the said strip of ground whereon such burnt bricks were placed to form the said clamp, abutted on the said coachhouse and woodhouse on the premises let to Presely by Walter, and the coachhouse, &c. were only fifteen feet from the said dwelling-house occupied by Presely, in which he had furniture and property of the value of about 2,000*l.* Notice had been given by the plaintiffs to the defendant that application would be made for protection to a Court of law or equity, as they might be advised, in case his proceedings were persisted in. It appeared that on land also belonging to the defendant, and situated to the south-westward of the plaintiff's property, there was a brick-kiln, and still further westward a brick-clamp, of which no complaint was made. The affidavits filed in support of, and in opposition to, the motion on the question of the salubrity or insalubrity, the inconvenience and the annoyance occasioned by the process of brick-burning, were conflicting.

*Roll and G. W. Collins*, in support of the motion, cited *Aldred's case*, 9 Co. 57; 1 Roll. Ab. 88, No. 6; 2 Roll. Ab. 141, No. 13; *Res v. White*, 1 Burr. 333; Vin. Ab. tit. Nuisance, 33; *Duke of Grafton v. Hilliard*, mentioned by Lord Eldon in *The Attorney-General v. Cleaver*, 18 Ves. 219; *Barwell v. Brooks*, 1 Law T. 75 & 454; and *Haines v. Taylor*, 10 Bea. 75.

*Moline, Shesbears*, and *E. G. White*, for the defendant, cited *The Attorney-General v. Cleaver*, 18 Ves. 219; and *Res v. Davey*, 5 Esp. 217.

*Roll* in reply.

**Wednesday, April 16.**—The VICE-CHANCELLOR said, in this case the motion of which he had to dispose sought an injunction in these terms. [His Honour read the notice of motion.] The wording might not be very correct, but the substance of the application was plain enough. One of the plaintiffs sued as the owner, and the other as tenant and occupier, of a parcel of land at Surbiton, in Surrey. The plaintiff's dwelling-house, with out-buildings appurtenant to it stood on part, the other part consisted of a garden or pleasure ground, or both, also belonging to the house. It was admitted that the house was built before the year 1829, and had been used and occupied as a dwelling-house continually, from a time preceding that year. The land on its north-eastern part adjoined a portion or parcel of land containing more than an acre, but less than two acres in the whole, which belonged to the defendant, and on which, in the spring or early summer of the year 1850, he began to manufacture bricks of the clay or earth of the same land by burning, in what his Honour believed was a common mode of manufacturing, by means of a clamp. It did not appear that before 1850 any manufacture or process of that sort, or of any offensive, objection-

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able, or disagreeable kind, had been begun on any part of this portion of land, or carried on there. The plaintiff's dissatisfaction with the defendant's proceedings in this respect produced the present suit, and the motion to be decided, which was argued in March last, and upon which certainly he should (whether granting or not granting a provisional injunction) have directed an action or issue for the purpose of trying the material questions of facts and law raised by the bill, and the affidavits, but that the counsel for each party requested him not to do so, and also requested him not to send a case for the opinion of a Court of law. He consented to decide it without that assistance; and this, after consideration, and after having had an opportunity of viewing the place himself, he now did, premising that the clamp which the defendant had set up was nearer to the stable of the dwelling-house which he had already mentioned as belonging to one, and occupied by the other of the plaintiffs, than to the dwelling-house itself, but was within less than 48 yards of some, if not all, of the windows of the dwelling-house. The first point disputed, or not conceded, was the question whether, as between the defendant, in his character of a person owning, using, and occupying his parcel of land that had been mentioned, on the one hand, and the plaintiffs, in their character of owner and occupier of the house, offices, and gardens occupied by the plaintiff, Mr. Presely, on the other, Mr. Presely was entitled to an unobstructed and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there for the ordinary purposes of breath and life an unpolluted and unobstructed atmosphere; and there could, he thought, be no doubt, in fact or in law, that this question must be answered in the affirmative; meaning by "unobstructed and unpolluted" not necessarily air as fresh, free, and pure as at the time of building the plaintiff's house the atmosphere there was, but almost rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence; a phrase to be understood, of course, with reference to the climate and habits of England. It was next to be considered whether the defendant had intercepted or purposed to interfere materially with this right of the plaintiff, Mr. Presely. That the process of manufacturing bricks in the manner begun and now continued by the defendant, must communicate smoke, vapour, and floating substances of some kind to the air, was certain. He thought it plain, also, from the relative position of the two parties, that this smoke, and this vapour, and these floating substances (the burning being to the westward of the defendant's own house), must wholly, or to a great extent, in fact, become mixed with the air supplied to the plaintiff's house, and part, at least, of the garden or pleasure-ground belonging to it, and this without being previously so dispersed or attenuated as to become imperceptible, or to be materially impaired or diminished in force. He conceived that the plaintiff's house, and at least part of the pleasure-ground or garden, must in general or often, if the manufacture should proceed, be subjected substantially, as far as the quality of the atmosphere was concerned, to the original and full strength of the mixture produced. He said this without forgetting the trees that stood along the line of the boundary, and without assuming their continuance, or the contrary. The question then arose whether this was or would be an inconvenience to the occupier of the plaintiff's house, as occupier, a question which must, his Honour thought, be answered in the affirmative, though whether to the extent of being noxious to human health, to animal health in any sense, or to vegetable health, he did not say, nor did he deem it necessary to intimate any opinion, for it was with a private and not a public nuisance that the defendant was charged. The important point next for decision might properly be thus put: ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness? or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people? and he was of opinion that this point was against the defendant. As far as the human frame, in an average state of health at least, was concerned, mere insalubrity, mere unwholesomeness, might possibly be out of the case; but the same might perhaps be asserted of melted tallow, and other such inventions less sweet than wholesome. That did not decide the dispute. Smell might be sickening, though not in a medical sense. Ingredients might, he believed, be mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely; a man's body might be in a state of chronic discomfort, still retaining its health, and perhaps suffer more annoyance from impure or fetid air, from being in a hale condition. Nor did he conceive it essential to show that vegetable life, or that health, either universally or in particular

instances, was noxious affected by contact with vapour and floating substances proceeding from burning bricks; for they had, he thought, established that the defendant's intended proceeding would, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence of the occupier and inmates of the plaintiff's house, whatever their rank or station, or whatever their state of health might be. It had been suggested, that a kiln and clamp, which were in the neighbourhood independently of the defendant's property, precluded the plaintiff from complaining against him. His Honour did not, however, so view the matter. That clamp had not, nor had the kiln ever been treated by the plaintiffs as unlawful or a grievance. They were considerably more remote from the plaintiff's house than the defendant's clamp, and, if a nuisance, did not form a reason why the defendant should set up an additional nuisance. There was no ground, he thought, for inferring a licence to him or for saying that the inconvenience to which his Honour had referred must not, if not wholly occasioned anew, be much increased by the course taken or proposed to be taken by him. Nor did he consider as material what had been urged by the defendant, whether, with or without accuracy in point of fact, as to the aspect or position of the windows of the plaintiff's house, which had windows looking, as far as he could judge, nearly east, south-east, and west-north-west. It had been suggested as a ground for not interfering against the defendant, that in making and burning bricks on his land he was only using his own soil in a manner at once common and useful, and in a convenient way for himself; and the case had been compared to that of a mine. The argument, if adopted, would prove too much. There were notorious instances of various kinds in which the rights of a neighbouring occupier, or a neighbouring proprietor, prevented a man from using his land as, but for those rights, he properly and lawfully might use them. A man might be disabled from building on his own land as he might wish, by reason of his neighbour's rights. So the proprietor on whose land a spring arose might be unable to stop, divert, or toll it by reason of the rights of proprietors of neighbouring land. It might be one of the most convenient things in the world for the owner of a mine to manufacture or smelt the mineral at its brink, but there might be the rights of others which made it unlawful for him to do so. The case of a chalk kiln, or a lime kiln, was an acknowledged case in point of law, and his Honour was not aware that it made a difference whether the limestone or chalk was obtained from the same land or not. The paucity of authority on the subject of brick-burning was a circumstance not unfavourable to the defendant, but his Honour was not aware of any authority for saying that it could not be a private nuisance. He did not consider the case of the *Duke of Grafton v. Hilliard* noticed in *The Attorney-General v. Cleaver*, by Lord Eldon, and more fully in Mr. Blunt's Edition of *Ambler*, to have so decided. Lord Hardwicke's order of the 11th of June, 1736, which his Honour had read, seemed to have proceeded upon the special circumstances of that case, and did not, he thought, govern the present or affect it in the defendant's favour, seeing that he and the plaintiffs concurred in desiring not to go before a jury or to be referred to a court of law in any way. The question, it appeared was decided recently in an arbitration by a distinguished member of this bar (a), whose accuracy and learning were universally acknowledged. He determined between two neighbouring proprietors, that brick burning, the clay being the clay on the land of one, was a private nuisance to the other. His decision was probably correct in fact, and certainly correct in law. It was considered by Vice-Chancellor Shadwell, before whom and Lord Lyndhurst it had been previously, to be so, and two judges now on the bench, whose opinions his Honour estimated very highly, had informed him that they considered a private nuisance to be committed by a man who burnt bricks on his own land, made of his own clay, if he did it so near to the house of his neighbour as to cause him substantial inconvenience and material discomfort. In the absence of special circumstances disabling the occupier from complaining, it appeared in the present instance the defendant, as well as the plaintiff, declining to go before a jury, and asking the Court of Chancery to decide between them, without assistance in any shape from a Court of law, that he ought to grant an injunction. The order might be in these terms:—The defendant and the plaintiff, by their counsel, declining to try an action as to the alleged matters in the bill mentioned, and requesting the decision of this Court upon the motion without any assistance from a jury or a Court of law, let the defendant, his servants, workmen, and agents be restrained, by injunction, from burning, or causing to be burnt, bricks, on the defendant's strip of ground, in the bill mentioned, so as to occasion damage or annoyance to the plaintiffs, or either of

them, as owner or occupier of the messuage in the bill mentioned to be occupied by the plaintiff, Charles Presely, or injury or damage to the messuage, coach-house, wood-house, shrubberies, and plantations, in the bill mentioned to be occupied by the plaintiff, Charles Presely, until further order.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BATTLESTON and PAUL PARKER,  
Esqrs. Barristers-at-Law.

Saturday, April 26.

REG. v. BRESSELL.

Registration of designs—*Concession under 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65—Shape and configuration.*

*The inventor of a design for an article called a window ventilator, the separate parts of which were not new, but which were new in regard to the combination of certain parts, exclusive of the other parts:*

*Held, not entitled to register under 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, the benefit of the design not depending upon shape or configuration.*

A rule nisi had been obtained for quashing a conviction by an alderman of London, convicting the defendant of an offence against the 5 & 6 Vict. c. 65, s. 3, in having, without the licence or consent of William Dixon, the proprietor thereof, for the purpose of sale, unlawfully made a certain article of manufacture, called a window ventilator, having reference to a purpose of utility, according to a certain new and original design, so far as the said design was for the shape or configuration of the said article.

The rule was obtained on the ground, along with others, that the justice had not had jurisdiction to convict, because the alleged design was not capable of registration, nor any design at all within the meaning of the Acts of Parliament relating to designs; and that the alleged design was not a design for the shape or configuration of any article of manufacture. The design showed a glass pane in a metallic frame, and a combination of screws and pulleys for opening the pane to any extent within the range of their power. A section of the design was annexed to the affidavits, and contained the statement:—"The parts of this design which are not new or original, are all the parts if considered *per se* and apart from the purposes thereof. What is claimed as new is the original configuration and combination of certain parts, exclusively of certain other parts."

*Hindmarsh and Locke* showed cause.—The question is, whether this design is the subject of registration within the meaning of the 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65. It is not less the subject of registration because it may also be the subject of a patent, if the inventor chooses to give to the public the patentable part of his invention. (*Shane v. Driver*, 30 L. J. 31, Q. B.) Configuration, which is the adaptation of parts to one another, and not shape or external form, is claimed here.

*Webster and Hunter* contra.

PATTERSON, J.—This statement on the main is *felix de se*. What is claimed as new is the configuration and combination of parts, which ought to be something visible to the eye. What is new, in fact, is an adaptation of means for producing a result, which shape or configuration is wholly unimportant. If the inventor does not show that shape or configuration make out the benefit, he is not entitled to be protected by this Act of Parliament.

WIGHTMAN and EALL, JJ. concurred.

*Rule absolute.*

Friday, May 2.

DON DON. DAVIES v. DAVIES.

*Will, construction of—Conditional limitation. A testator devised his estate Z: "to his heir-at-law John, provided John should, when requested by David and at the expense of David, faithfully convey unto David, free from incumbrances, an estate called X: but if John should, when required as aforesaid, refuse to execute such a conveyance to David," then the testator gave the estate Z. to David. John survived the testator many years, during which he kept possession of both estates, X. and Z.: X. being all the time let to a yearly tenant. After the death of John, David tendered a conveyance of the estate X. to John's legal representative, which she refused to execute:*

*Held, that David had no title to recover estate Z.*

This was an action of ejectment to recover an estate called Llanypell, which was tried before Tuford, J. at the Summer Assizes, 1850, for the county of Merioneth, when a verdict was found for the defendant, subject to the opinion of this Court upon the following case. There were two deaths stated in the declaration; one on Jan. 1, 1848; the other on Dec. 1, in the same year.

(a) Mr. Swanton.



## QUEEN'S BENCH.

Gabriel Davies being seised in fee-simple of certain premises in the parish of Llany Cil, in the county of Merioneth, by his last will and testament, bearing date the 30th day of July, 1828, after charging the same with an annuity of 50*l.* payable to his daughter, Ann Roberts, devised the same as follows:—  
 "And subject to the payment of the said annuity, and all costs and charges attending the receiving thereof, and provided my said son John Davies shall, when requested by my son, the Reverend David Davies, and at the expense of the said David Davies, feoffment convey and assure unto him the said David Davies, his heirs and assigns, for ever, free from all manner of incumbrances, all that messuages, lands, and hereditaments called by the name of Caenyngyllid, situate and being in the parish of Caenyngyllid aforesaid, in the said county of Merioneth, lately purchased of Wilson Jones, esquire:—  
 "I give and devise all and singular the aforesaid messuages, tenements, lands, hereditaments, and premises out of which the said annuity or rentcharge is to be issuing as aforesaid, unto him the said John Davies, his heirs and assigns, for ever;—  
 "If the said John Davies shall, when required as aforesaid, refuse to execute such a conveyance unto the said David Davies, and his heirs, then I give and devise the said messuages, lands, and hereditaments, so made liable to the payment of the said annuity, unto my said son David Davies, his heirs and assigns for ever." The said Gabriel Davies died on the 2nd of August, 1828, seised of the said Llany Cil estate as aforesaid, and at that time the said John Davies was seised in fee of the said Caenyngyllid estate; he continued so seised thence up to the time of his death, demising the same to one Ephraim Griffiths, as tenant from year to year, and dealing with the same in every way as his own. Griffiths occupied the said estate as such tenant for twenty years next before the death of the said John Davies. On the death of the said Gabriel Davies, the said John Davies entered into possession of the said Llany Cil estates, and continued so possessed up to the time of his death, which took place on the 11th day of June, 1849; and by his last will and testament, bearing date the 9th of October, 1840, he devised as follows:—  
 "I give, devise, and bequeath all my real, and all my personal estate, unto my wife Jennett Davies, my heirs, executors, and administrators." Upon the death of the said John Davies, the said Jennett Davies, the defendant, entered into possession of the said Llany Cil estates, and also into possession of the Caenyngyllid estate, and is now so seised. The jury found that the said David Davies, the lessor of the plaintiff, never requested the said John Davies to convey to him the said Caenyngyllid estate, but they found that the said David Davies did, on the 29th day of July, 1838, under to the said Jennett Davies a conveyance of the said Caenyngyllid estate to him, and that she refused to execute it.

The question for the opinion of the Court was, whether, upon the construction of the will of the said Gabriel Davies, and under the circumstances hereinbefore stated, the said David Davies, the lessor of the plaintiff, was at the date of either of the devises hereinbefore stated, seised of such an estate in the said Llany Cil estates as to entitle the plaintiff to recover in this action: If this Court shall be of opinion that he was, then the verdict found as to be set aside, and instead thereof a verdict to be entered for the plaintiff. But if this Court shall be of a contrary opinion, then the verdict was to stand.

*Shapter* (with him *Beavan*) for the plaintiff.—The plaintiff took a determinable estate in fee simple in the premises. It was meant that the heir-at-law should only have it in certain events which have not happened, and that under all other circumstances the property should pass to David Davies. The Court will not construe strictly as conditions what may be optional limitations, but will give effect to the primary intention of the will which here manifestly was to keep the two estates separate. (*Phipps v. Pether*, 9 Clk. & Fin. 583; *Bromfield v. Crowder*, B. & P. 313; *Lusford v. Cheeke*, Fearn, Conting. Rem. 239; *ibid.* 233-247; *Jeffreys v. Reynolds*, 6 Brown, P. C. 260; *Bradford v. Foley*, Doug. 63.) Next, David has the whole period of his life in which to make a tender of a conveyance. The tender, therefore, to John's legal representative was sufficient. (*Fuzerley v. Ford*, 1 A. & E. 897.) Lastly, is tender of a conveyance was altogether unnecessary, because the acts of John showed that he disencumbered with it. The case finds that the estate was continually demised to a tenant, so that John could at no time have executed such a conveyance as the will requires, i.e. a conveyance of the estate free from all incumbrances. John put it out of his own power to comply with any request for such a conveyance, and therefore must be taken to have waived a tender of it. (Co. Litt. 221, a; Com. Dig. Condition, M, a; *Cole v. Sewell*, 2 H. L. 186.)

Lord CAMPBELL, C.J.—The lessor of the plaintiff cannot recover either under the demise in John's

life, or under that after his death. It is clearly contrary to the testator's intention that the estate should vest immediately, for he intended to allow John an option of keeping the land if he thought fit. If the estate were to vest at once, John would lose that option, and the heir-at-law be disinherited. Then it can hardly be contended that a tender of a conveyance to the devisee of John would be sufficient, for it is upon John's refusal that the estate is to go over. Then, it is said, that a tender was unnecessary, for that John was disqualified from conveying. That would plainly have been so had there been an absolute disqualification. But the estate was in the hands of a yearly tenant, as before and after the death of Gabriel Davies. Co. Litt. has been cited; but the passage referred to relates only to feoffees upon condition, and is, I dare say, true concerning them. But the mode of construing the same expressions in documents of so different a nature is very different, and for aught that appears John might have, at any time, obtained a surrender of the yearly tenancy.

PATTESON, J. concurred.

WIGHTMAN, J.—John was *primâ facie* entitled to this estate as heir-at-law. In a certain event he was to take also as devisee, but he was to be deprived of the estate only if he refused, upon request, to execute a conveyance of another estate to David Davies. He was never requested, and never refused, to convey; nor did he put it out of his power to convey by a mere demise from year to year.

ERLE, J.—John neither dispensed with the tender of a conveyance nor disqualified himself from executing one. Had a conveyance been tendered, he would have been entitled to a reasonable time in which to get rid of all incumbrances.

Judgment for the defendant.

Saturday, May 3.

REG. v. WELCH.

Registration of designs—Informal conviction—Amendment.

A conviction under 5 & 6 Vict. c. 100, ss. 7 & 8, for exposing to sale an article of manufacture to which a registered design had been applied, did not state that the defendant had received knowledge that the consent of the proprietor had not been given to such application.

The conviction and depositions taken before the magistrate were removed into this court by certiorari. The depositions left it uncertain whether it had been proved before the magistrate that the defendant had received the notice required by the statute, or only notice that the proprietor had not consented to the exposure of the article for sale; but it was stated in the affidavits that a sufficient notice was, in fact, proved before the magistrate.

Held, that the conviction was bad; and that there were no satisfactory materials to enable the Court to amend the conviction under stat. 12 & 13 Vict. c. 45, s. 7.

A rule nisi had been obtained to quash a conviction under stat. 5 & 6 Vict. c. 100, ss. 7 & 8, for exposing to sale an article registered under 6 & 7 Vict. c. 65, ss. 2 & 3. The registered design in question was for an improved portmanteau, to be made of a single piece of leather, for the shape or configuration of which the inventor claimed the privilege of registration. The conviction, however, did not state that the defendant had received knowledge that the consent of the proprietor had not been given to the application of the registered design to the article exposed for sale. The depositions taken before the magistrate were returned with the conviction; and it did not appear from those depositions whether the defendant had notice or not, it being left doubtful whether the consent spoken of was a consent to the exposure of the article for sale, or a consent to the application of the design in the construction of the article. The affidavits in answer to the rule stated that the witness whose deposition had been returned, did, in fact, prove before the magistrate a notice that the consent of the proprietor to the application of the design had not been obtained.

*Locke and Hugh Hill* showed cause. 1. This is a design, which is the subject of registration under the stat. 6 & 7 Vict. c. 65. They referred to *Reg. v. Bessell*, *supra*; and *Rogers v. Driver*, 20 L. J. 31, Q. B. 2. The conviction is good upon the face of it; but if not, there were materials before the convicting justice sufficient to have warranted a formal conviction; and this Court will therefore amend it by inserting a statement of a proper notice. (12 & 13 Vict. c. 45, s. 7.)

*Aspland*, *contra*, was not called upon.

Lord CAMPBELL, C.J.—The objection to the form of this conviction is insurmountable. It could only be supported by being in the form given by the Act of Parliament 5 & 6 Vict. c. 100, s. 8; but in that form there are the words "here describe the offence;" and this conviction does not describe the offence; for the offence consists not in selling, but in selling after notice that the proprietor of the design has not consented to its application to the article. But an amendment is sought under the Act called *Baines's*

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Act; and that Act does in large terms authorise the amendment of a conviction, if it be shewn to the satisfaction of the Court, that sufficient grounds were in proof before the justice to have authorised the drawing up of the conviction free from the omission or mistake; but I cannot say that that has been proved to my satisfaction in the present case. The depositions returned by the magistrate are not sufficient for the purpose, and affidavits are used to supply the deficiency. Now, without laying down any general rule, that affidavits are not to be received for the purpose, I can only say that in the present case they are not satisfactory to my mind.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred. Rule absolute.

Monday, May 5.

REG. v. HEWITT AND OTHERS.

Indictment removed by certiorari—Costs—Prosecutor—Party grieved.

An indictment for a conspiracy to prevent A., a workman, from accepting work with B., and also in some counts from obtaining work generally, was removed by certiorari by the defendants. The party prosecuting the indictment was C., another master, for whom A. had worked; and it appeared that the reason of the combination against him was his having worked for C.: Held, that although no count in the indictment charged an intention to injure C., that he was nevertheless a party "grieved or injured" within the meaning of 5 & 6 W. & M. c. 11, s. 3, and therefore, upon a conviction of the defendants, entitled to his costs.

Warren moved for a rule to shew cause why this sidebar rule for the taxation of the costs of the prosecutor should not be set aside, on the ground that Messrs. Rosenberg and Montgomery, the parties who had obtained the rule, and had employed the attorney for the prosecution, were neither the prosecutors nor the parties "grieved or injured," within the meaning of the 5 & 6 Wm. & M. c. 11, s. 3. The defendants had been indicted at the Central Criminal Court for a conspiracy to prevent one Evans, a workman, from getting employment with a master of the name of Richard Turner, contrary to the stat. 6 Geo. 4, c. 129, sec. 3. The indictment contained many counts, some describing Turner, and others Evans, as the person injured; and the defendants had removed it by certiorari into this Court. It was tried before Lord Campbell and a special jury on the 7th of February, and all the defendants were convicted and forthwith sentenced to various terms of imprisonment, which have expired. The defendants were members of a Provident Society, to which Evans also belonged. In November, 1850, Evans was working in the yard of one Richard Turner. He left Turner's and went to work in the yard of Rosenberg and Montgomery, at Brompton; he worked there for three or four days, and then returned to Turner's; on his return he was fined 10*l.* by the defendants for going to work at Rosenberg and Montgomery, and was required to pay this fine to the society by instalments of 10*s.* a week; and he was told that the fine would not be taken off unless he promised not to work again at Rosenberg and Montgomery's. He refused, and the man in Turner's employment left his yard one by one, and the reason of this being known, Evans was at last forced to leave the yard, and then the other men returned. Evans then applied to a magistrate to protect him against what appeared to be a scheme to keep him out of employment, and the magistrate directed that this prosecution should be instituted. Upon his examination he said, he did not think he was the prosecutor of this indictment, and that he did not know who was the prosecutor.

ERLE, J.—There are counts for preventing from working generally.

Lord CAMPBELL, C.J.—The Master informs us that the rule need not contain the names of the prosecutors, who in fact employed the attorney; at the first Evans was the nominal prosecutor only; and now it appears that Evans, in his examination, said that he was not the prosecutor, and he did not know who was. It is clear that Rosenberg and Montgomery, the persons who applied for this sidebar rule, were most deeply interested in the subject of the prosecution. They were parties grieved and injured by the conduct and conspiracy of those defendants; and there is, therefore, no ground for this application.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred. Rule refused.

Tuesday, May 6.

LLOYD v. BLACKBURN.

Guarantee—Construction of.

In an action upon a guarantee in this form:—"In consideration of your supplying A. B. with goods, as he may order them from time to time, to the extent of 300*l.* I guarantee the payment of the same at two months from the date of the invoices:"

Held, that the refusal of the plaintiff to supply

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## QUEEN'S BENCH.

## QUEEN'S BENCH.

*A. B. with further goods at a time when less than 300l. was due to him for goods was no answer to an action upon the guarantee for the sum due at that time.*

This was an action of *assumpsit* upon a guarantee given to the plaintiff by the defendant and John France, which was in the following form:—

"In consideration of your supplying Mr. Samuel France, of Bradford, with goods as he may order them from time to time, to the extent of 300l. we hereby jointly and severally guarantee you payment of the same at two months from the dates of the invoices."

The declaration averred the delivery of large quantities of goods from time to time, the lapse of two months from the respective invoices, and the non-payment by Samuel France.

The defendant pleaded as to so much of the causes of action as related to 262l. parcel, &c. (in substance), that after the delivery of goods to that amount, and before the expiration of two months from the date of the invoices in respect of such delivery, the said Samuel France ordered more goods of the plaintiff, to the extent of 10l. only, yet that the plaintiff did not, nor would, supply Samuel France with the same. Verification.

To this plea there was a demurrer and joinder.

*Bevill*, for the defendant, was called upon to support the plea. The question turns upon the meaning of the guarantee. The consideration for the defendant's promise is not the supply of any goods, nor is the consideration capable of being apportioned to each supply; but it is single, and it is the supplying of 300l. worth of goods. A man may much more readily guarantee the solvency of another, if the other be furnished with a sufficient stock for carrying on his trade, than if furnished with an insufficient stock. The order of the words in the guarantee clearly shows the intention. It is not "we guarantee the payment to the extent of 300l." but, "in consideration of your supplying goods to the amount of 300l." The object of the guarantee was to secure that the trade should be carried on, and the requisite materials for that purpose be supplied. (*Whitcher v. Hall*, 5 B. & C. 269.) The whole consideration must be performed, or there is no right of action.

*Crowder*, in support of the demurrer, was not called upon.

*LORD CAMPBELL, C.J.*—If parties really intend their guarantees to be construed as here contended for, it will be easy for them to frame them so as to make such an intention obvious. This is not such a case. The parties here do not contemplate a single transaction, one supply of goods, but a continuing supply from time to time, and continually accruing periods of payment, each at the expiration of two months from the dates of the respective invoices. Clearly, a mode of dealing is intended, which is to go on from time to time. It could not be said that payment was not to be enforced at the end of each two months, because goods to the amount of 300l. had not been ordered at that time. The mention of 300l. is merely introduced as the limit to the liability of the surety. There must be judgment for the plaintiff.

*PATTESON, WIGHTMAN, and ERLE, JJ.* concurred.  
*Judgment for the plaintiff.*

Monday, May 12.

Re LONGHORNE.

*Criminal lunatic—Property of—Overseers—Mandamus—Stat. 3 & 4 Vict. c. 54, s. 2.*

*Somble*—That stat. 3 & 4 Vict. c. 54, s. 2, applies only to property of which the overseers of a parish can take manual possession; and that it would not authorise them to recover from a third person a debt due to a criminal lunatic. Under that section overseers obtained an order of two justices directing them to seize the property of the lunatic in their parish; and then applied to this Court for a mandamus to compel a mortgagee, who had sold the mortgaged property, and held a balance after payment of his own debt, to pay over that balance to them, though it was also claimed by trustees under a deed of assignment executed whilst the lunatic was in prison.

The Court refused to issue the writ.

A rule had been obtained, calling upon Mr. Longhorne to shew cause why a writ of *mandamus* should not issue commanding him to hand over to the overseers of a township in Westmoreland the sum of 134l. 18s. 6d. belonging to one Richard Simpson, a lunatic. In Feb. 1842, Mr. Longhorne had lent Simpson a sum of 500l. upon the mortgage of an estate, which he had since sold to satisfy his debt. The proceeds of that sale, after satisfaction of his debt, left a balance of 134l. 18s. 6d. in his hands, which he had offered to pay to the overseers upon receiving from them a legal indemnity or discharge. On the 9th of Aug. 1845, Simpson was tried upon a charge of murdering his mother, and acquitted upon the ground of insanity. A few days before his trial he had executed a deed assigning all his property to trustees for the benefit of his family; and the trustees

under that deed also claimed the balance in Mr. Longhorne's hands. Since his trial, Simpson had been conveyed to the Gateshead Lunatic Asylum by order of the Secretary of State, upon a certificate of his continued insanity, under sec. 1 of 3 & 4 Vict. c. 54. In November 1850, two justices of Westmoreland made an order, under sec. 2, directed to the overseers of a township in that county, requiring them to seize the money, goods, and chattels of the lunatic in that township; and under that order the overseers had called upon Mr. Longhorne to pay over to them the money which he held.

*Crompton* shewed cause.—It is very doubtful whether the 2nd section of the Act applies to such a case; and, at all events, the Court will not throw upon Mr. Longhorne the burthen of supporting the order of the justices. [*PATTESON, J.*—The Act seems to authorise the overseers to seize things of which manual possession can be taken, not to sue for a debt.] (*Robinson v. Peace*, 7 Dowl. 93; *Harrison v. Painter*, 6 Me. & W. 387.) If the overseers think the order valid, they should act upon it, and seize,—not apply for a *mandamus*.

*A. W. Hoggins* appeared for the trustees.  
*Cowling*, in support of the rule.—The property of the lunatic ought to be applied to his maintenance; and the deed of assignment is certainly void, even if the man was sane when he executed it, because it was obviously drawn to avoid the consequences of a conviction. (*Jones v. Ashurst*, Skinn. 357.) [*LORD CAMPBELL, C.J.*—But Mr. Longhorne is only a debtor to the lunatic. *PATTESON, J.*—And as the debt follows the person, if Mr. Longhorne came into St. Pancras parish, an order to seize the debt might be made upon the overseers of St. Pancras, supposing the Act to apply.]

*LORD CAMPBELL, C.J.*—This case seems not to be brought within the Act; at all events, whether there is any other remedy or not, it is not a case in which we ought not to interfere by *mandamus*.

*PATTESON, J.* (a)—The Act is certainly not all clear. *Rule discharged.*

DOE dem. DAVID v. JONES.

*Costs—Taxation—Payment of witnesses after taxation commenced—Affidavit of increase.*

Upon taxation of costs the affidavit of the attorney's clerk of payment to certain witnesses being unsatisfactory to the Master, the taxation was adjourned. Upon inquiry, it appearing that the witnesses had in fact not been paid, the plaintiff's attorney paid them, and made an affidavit of that fact.

The Court directed that the plaintiff should be allowed the costs of those witnesses.

A rule nisi had been obtained for a review of the Master's taxation, the Master having disallowed certain payments made to witnesses. Upon the attendance of the parties before him for the purpose of taxing the plaintiff's bill of costs, an affidavit of a payment made by a clerk to the plaintiff's attorney was produced; but that affidavit being unsatisfactory to the Master, the taxation was adjourned for the purpose of obtaining a more satisfactory affidavit. The plaintiff's attorney upon inquiry found that the clerk had not in fact paid the witnesses; and he then paid them himself, and made a distinct affidavit of that fact; but the Master still disallowed those costs.

*W. H. Cook* shewed cause.—The matter was entirely in the discretion of the Master. (*Trent v. Harrison*, 14 L. J., N.S. 210, Q.B.; *Richardson v. Kennitt*, 13 L. J. Q.B. 17.)

*Phipson*.—There is no rule of practice that all the costs of witnesses must be paid before the commencement of the taxation; and the plaintiff ought not to suffer for a fault committed by his attorney's clerk.

*LORD CAMPBELL, C.J.*—We think that would be a hardship, and that these costs should be allowed.

*PATTESON, J.*—The money had been paid to the witnesses before the allocutur. *Rule absolute.*

REG. v. THE SOUTHAMPTON DOCK COMPANY.

*Costs—Certiorari—Order of sessions—Rate appeal.*

Upon appeal against a rate the Sessions amended the rate, subject to a case. A case was afterwards stated, in which objections to the decision of the Sessions were raised by the respondents as well as the appellants. The certiorari to bring up the case was obtained by the appellants; and it was sworn that the respondents had resolved not to impeach the judgment of the Sessions, unless the appellants did.

Held, that the certiorari was to be considered as having been obtained by both parties, and that the respondents were not entitled to recover their costs from the appellants under 5 Geo. 2, c. 19, s. 2.

A rule nisi had been obtained to set aside the side bar rule obtained herein, for payment by the South-

(a) *Wightman, J.* was in the Bail Court; *Erle, J.* at Nisi Prius in London.

ampton Dock Company, of the costs incurred in the Court by the guardians of the poor of Southampton. The dock company had appealed against a rate, and the Recorder of Southampton had amended the rate, but granted a case for the consideration of this Court, if either party should desire to take it up. The dock company did desire to do so; and a case was then stated, in which objections to the decision of Sessions were raised by both parties. The case was removed by a writ of *certiorari*, obtained by the dock company, but, upon the argument, at the points stated in the case were argued and insisted on. By the judgment of this Court, the order of Sessions was confirmed; and the question was, whether under 5 Geo. 2, c. 19, s. 2, the guardians were entitled to recover their costs from the dock company.

*Sewell* shewed cause upon affidavit, stating that the guardians had come to a resolution not to impeach the judgment of the Recorder, unless the appellants chose to do so.

*C. Saunders*, contra, was not called upon.  
*LORD CAMPBELL, C.J.*—The guardians had the benefit of the *certiorari*, which they might have declined; but having thought proper to bring up for the consideration of this Court their own points of objection, the *certiorari* must be considered as having been obtained by both parties; and therefore there can be no costs. *Rule absolute.*

Tuesday, May 13.

SHEPHERD v. THE MARQUIS OF LONDONDERRY.

*Replevin—Avowry for tithe-rent charge—Plea of nonpayment for sixty years and thirty years.*

In replevin, the defendant avowed the seizure of the goods as a distress for tithe-rent charge.

The Court refused the plaintiff leave to add pleas in bar, setting up the enjoyment of the land for sixty years and thirty years, without payment of rent-charge.

*Replevin*.—General avowry under the Tithe Commutation Act, that the defendant had seized as a distress for tithe-rent charge.

*Pleas in Bar*.—1. That the close in the declaration mentioned was not chargeable with the rent-charge. 2. That no part had been in arrear for twenty-one days. 3. That defendant was not entitled to the rent-charge.

*Aikerton* now moved for leave to add two other pleas in bar, under the Prescription Act, 2 & 3 Wm. 4, c. 100,—one, alleging that the land had been enjoyed for sixty years without payment of rent-charge; the other, that it had been enjoyed for thirty years.

*LORD CAMPBELL, C.J.*—Can these questions be raised in replevin? All claims of exemption from tithes ought to be raised before the Tithe Commissioners; no titheowner or landowner could be safe, if upon a proceeding for a tithe rent-charge under the Commutation Act all these matters could be mooted again.

*WIGHTMAN, J.*—Such pleas as these could not be entertained without unsettling all that the commissioners have done.

*Manisty* was to have shewn cause in the first instance. *Rule refused.*

MOSLEY v. HIDE.

*Conditions of sale—Recovery of deposit.*

Upon a contract for the sale of an estate, one of the conditions of sale disclosed that the estate was limited to the use of Mrs. C. for life, with remainder to trustees to sell for the benefit of her children; and "there being three only of such children, all of whom had attained the age of twenty-one," it was stipulated that each children, or their assigns or trustees, should, if required, join in the conveyance to the purchaser; but that no objection should be taken to the title by the purchaser on account of the sale taking place in the life-time of Mrs. C. It appeared that two of the children of Mrs. C. were married women with children, and that they had settled their funds in trust for themselves for life, with remainder to their children.

Held, that as the grandchildren of Mrs. C. were minors, and neither they nor their trustees could effectually join in the conveyance, the condition of sale was not fulfilled, and the purchaser was entitled to recover back his deposit.

*Assumpsit* for money had and received, to recover back the deposit paid by the plaintiff on the purchase of an estate. At the trial before *PATTESON, J.* at the last Staffordshire Assizes, it appeared that the defendants were trustees under the marriage settlement of a Mrs. Chawnor, to whose use the estate was limited for life, with remainder to the trustees, to sell for the benefit of her children. The 14th condition of sale disclosed that fact, and then proceeded thus: "and there being three such children only, all of whom have attained the age of twenty-one, each children, or their trustees or assigns, &c. shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. Chaw-

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son." It was also proved that two of the children of Mrs. Chawnor were married women, having children, who were minors; and that they had settled their funds arising out of the estate in trust for themselves for life, with remainder to their children. Under these circumstances, the purchaser objected, that as neither the grandchildren nor their trustees could join in the conveyance, the condition was not fulfilled. The vendors, on the other hand, contended that the objection was, in substance, an objection on account of the sale taking place in Mrs. Chawnor's life-time, which was precluded by the 14th condition. It was also said that the objection had not been made in time. A verdict was found for the plaintiff, by direction of the learned judge, who gave leave to the defendants to move for a nonsuit. Accordingly, in the present term, a *nisi* was obtained.

*Peacock and Paterson now shewed cause.*

*Whateley, Keating, and Grey, contra. (Corrall v. Cattell, 4 Mee. & W. 734; and Thornhill v. Hall, 1 Cl. & Fin. 36, were referred to.)*

LORD CAMPBELL, C. J.—I think that the view which my learned brother took at the trial was perfectly correct. The question is, for what title was the present plaintiff stipulated? Now it is clearly disclosed that the sale was to take place during the life of the tenant for life, and that to objection was to be made on that ground; but then, what is the meaning of the other words, that the children, or their trustees or assigns, should join in the conveyance? I think it means that they should join, and that they should have such an interest and power as would enable them to join effectually. But as it now turns out, he minors cannot join, nor can their trustees, without a breach of trust; and, therefore, they cannot join in the sense stipulated for; and the purchaser has not got the title for which he contracted. I am also of opinion that the conveyancer's opinion, enclosed in the letter of the plaintiff's solicitor, pointed out the objection in time.

PATTERSON, J.—I had a strong opinion upon this case at the trial, and that opinion is now strongly confirmed. The conditions of sale did not disclose the fact that Mrs. Chawnor's children were married women, with children, who had settled their property; and I think that the stipulation that the children should join in the conveyance of necessity involves this, that they were in a capacity to join. It seems to me tantamount to a warranty, that those who might be prejudiced by a sale in the lifetime of the tenant for life should join, and that they had the capacity to join, and it now appears that they cannot.

WIGHTMAN, J. concurred. *Rule discharged.*

Tuesday, May 13.

PUGH V. CARTER.

*Covenant—Legality—Sale of office—Bankruptcy. The defendant being coroner, covenanted with plaintiff to pay him a sum of twenty per cent. out of the clear profits of every fee paid to defendant for every inquest which he should hold during nine years, and to make the payment immediately after the receipt of the fee from the county:*

*Held, that the covenant was not illegal; and that to a declaration founded upon the breach of it, the bankruptcy of defendant was no plea.*

*Covenant.*—The declaration alleged that the defendant was one of the coroners for the county of Kent; and that by indenture between the plaintiff and defendant, the defendant covenanted with the plaintiff that he would for a period of nine years from a day named in 1832, pay to the plaintiff a sum of twenty per cent. out of and from the clear profits of each and every fee which should be allowed and payable to the defendant, as such coroner, for each and every inquest which he should hold during that period; and that he would make the payment immediately after his receipt of the fees from the county.

*Breach,* the nonpayment of money which had become due by virtue of the covenant.

*Plea.*—Bankruptcy of the defendant after the causes of action accrued.

*Demurrer thereto.*

*Bovill* appeared in support of the demurrer; but the Court called upon

*Pearson, contra.*—1. The declaration is bad, because the covenant which it sets out is illegal, and contrary to the statutes against the sale of offices. (5 & 6 Ed. 6, c. 16, s. 2; and 49 Geo. 3, c. 126, s. 3; *Lee v. Colleshill*, Cro. Eliz. 529; *Hopkins v. Prescott*, 4 C. B. 579; *Sterry v. Clifton*, 19 L.J. 237, C. P.; *Arbuckle v. Cowtan*, 3 Bos. & P. 321; *Wells v. Foster*, 8 Mee. & W. 151; *Davis v. The Duke of Marlborough*, 1 Swans. 74; *Ex parte Baithe*, 4 B. & Ad. 690; *Abbott v. Dutton*, 3 Jones & Lat. 609; *Palmer v. Bate*, 2 Brod. & B. 673.) Secondly, if it be a valid covenant, it is discharged by the defendant's bankruptcy. This is a debt payable upon a contingency, contracted by the bankrupt before his bankruptcy; and was therefore provable under the bankruptcy, by virtue of s. 177

of 12 & 13 Vict. c. 106, which follows the language of 6 Geo. 4, c. 16, s. 56. The value of the debt may be ascertained by calculation, quite as easily in this case as in *Ex parte Tindal*, 8 Bing. 402, where it depended on the duration of life. [LORD CAMPBELL, C. J.—The defendant must continue to be coroner; and he continuing to be coroner, the profits would not pass to his assignees. It would therefore be a fraud on his part to continue in receipt of the fees, and nevertheless to say that he was discharged of the covenant.]

*Bovill* was then heard in support of the declaration and demurrer.—1st, This is a mere personal covenant to do an act, the breach of which confers an action for damages. It is not a sale of the office, or the fees of the office; nor is it a charge, equitable or legal, upon the fees. (He referred to Co. Litt. 42, a, b; and to *Sterry v. Clifton*, and *Palmer v. Bate*.) 2ndly, The bankruptcy is no answer. This is not a matter capable of valuation, so as to be proved under the bankruptcy.

*Pearson* in reply.

LORD CAMPBELL, C. J.—I think that the plaintiff is entitled to our judgment. It is first objected that the declaration is bad, and the covenant illegal; but I do not think that this is a covenant for the sale of an office under either of the statutes referred to; it is a mere personal covenant to pay a sum of money measured in a particular manner. [His Lordship read the covenant.] Now, that is no sale of the office, nor any charge upon the office; but the defendant is with one hand to receive the fees of his office, and then, after paying the expenses, to pay with the other a sum measured by 20 per cent. upon the clear profits. Upon that covenant no court of equity would dream of appointing a receiver, or giving any specific remedy against the fees. The case of *Sterry v. Clifton* is expressly in point; and the other cases cited by Mr. Pearson do not apply. As to the plea of bankruptcy, there are two objections to it—first, that this is not a debt payable on a contingency within the meaning of the Act; because I do not see how it would be possible to estimate the value of the debt to be proved under the Act; and, further, that the covenant contemplates a payment out of profits to accrue after the bankruptcy, the defendant still continuing coroner, and personally receiving the fees. If, therefore, we were to hold this plea good, this injustice would result. The bankrupt would get the benefit of his bankruptcy, and he would still receive the profits of his office; but the plaintiffs, the trustees of his creditors, would have no remedy upon the covenant.

PATTERSON and WIGHTMAN, JJ. concurred.

*Judgment for the plaintiffs.*

BEAULIEB V. FOOKS.

*Error to reverse outlawry—Practice—Costs—Security.*

*Upon a writ of error coram nobis to reverse an outlawry for error in fact, the Court refused to require the plaintiff to give security for costs, the defendant not appearing to be entitled to costs in that proceeding.*

*Error, Coram nobis to reverse outlawry for error in fact; the plaintiff having been out of the jurisdiction of the Court when the writ of *exigent* issued.* On the 23rd April last Coleridge, J. made an order staying the proceedings until the plaintiff gave security for costs, and a rule nisi had been obtained to rescind that order.

*T. Jones* now shewed cause.—Where a plaintiff is delayed by a writ of error, the stat. 3 Hen. 7, c. 10, entitles him, at the discretion of the Court, to recover his costs. It is true that a writ of error, *coram nobis*, is not a *superedeas* in itself; and the statutes as to bail in error do not apply; but still there is a delay, because after the allowance of the writ the plaintiff cannot take out execution without leave of the Court; and the Court may of course impose terms. (*Knight v. Thynne*, 9 Dowl. 984; *Newlands v. Holmes*, 4 Q. B. 858; *Lewis v. Owens*, 5 B. & Ald. 265.)

*Bovill, contra.*—This is the first order that has been made for security for costs in case of error to reverse outlawry. *Knight v. Thynne* has no application to outlawry. Several of the judges considered this point in the private room of the Court of Ex. and refused the application, because no costs are given in outlawry. It is said, however, that the stat. Hen. 7 gives them, because there is a delay of execution; but, in truth, there is no delay of execution upon the judgment of outlawry—no delay of the writs of *exigent* or *capias* *utlagatum*.

LORD CAMPBELL, C. J.—I think this rule must be made absolute. It seems admitted that the practice is not to require costs on a writ of error to reverse an outlawry; and I should be sorry to introduce a new practice throwing any impediment in the way of reversing an outlawry. At all events, if the practice was to be altered, it is highly inconvenient to alter it by an indirect application for security for costs.

PATTERSON, J.—Of course, if no costs are pay-

able, there can be no security required; and that appears to be so according to the practice. It is expressly laid down that costs are not recoverable by either party upon a writ of false judgment. (*Longden v. Croots*, 7 Scott, 377; *Archbold*, 525.)

WIGHTMAN, J. concurred. *Rule absolute.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

THE ELECTRIC TELEGRAPH COMPANY v. BRETT. *The electric Telegraph patent—The construction of Cooke and Wheatstone's of June 1837—Metallic circuits.—The Needle—Communicating with intermediate stations.*

*Case for the infringement of a patent.*

The plaintiffs claimed as assignees of a patent, granted in 1837 to William Fothergill Cooke and Charles Wheatstone, "for improvements in giving signals and sounding alarms in distant places, by means of electric currents, transmitted through metallic circuits."

The declaration recited the letters patent, and several indentures of assignment, whereby the plaintiffs became assignees of the letters patent; and alleged infringements by the defendants in using and counterfeiting the invention.

The defendants, after setting out an *oyer*, the letters patent, and indentures of assignment, pleaded certain pleas, denying the plaintiffs' title as the assignees of the patent, and also a plea of not guilty, and pleas denying that the patentees were the first inventors of the improvements, denying that the invention was new, and admitting the utility of some parts of the invention claimed in the specification.

Issues being joined on these pleas, the case was tried before Wilde, C.J. at the sittings after Hilary Term, 1850; when a verdict was found for the plaintiffs, and also certain special matters (set out in the judgment) in answer to questions put to the jury by the Lord Chief Justice, subject to leave, on the part of the defendants, to move. Accordingly in Easter Term 1850 (April 20), a rule was obtained calling on the plaintiffs to shew cause why the verdict should not be entered for the defendants, on the plea of "not guilty,"—or why a nonsuit should not be entered; or why there should not be a new trial.

May 23 and 24.—The Attorney-General, Martin, M. Smith, Grove, and Chance, shewed cause against this rule, and Cockburn and Webster supported it. *Cur. adv. vult.*

## JUDGMENT.

Saturday, April 26.—CHESWELL, J. after stating the pleadings and facts, as above, proceeded as follows:—The arguments, on shewing cause, turned on the question, what was the proper verdict to be entered in respect of the special matters found by the jury, in answer to the questions of the Lord Chief Justice? Those answers, so far as it is material to state them, are to the third question; "that the magnetic ring and indicator of the defendants is a different instrument from the needle claimed in the plaintiffs' specification." In answer to the fourth question (that of sending signals to intermediate stations),—"that it was new to the plaintiffs;" by which expression it is to be understood, that it was a new invention of the patentees. In answer to the fifth question,—"that the angular motions of the needles in vertical planes conjointly with stops were new to the plaintiffs," meaning, as before, that it was a new invention of the patentees. In answer to the sixth question, "that, as a whole, the system of connecting with one wire and two needles (which it appeared was the system of the defendants), is not the same as the system of the plaintiffs." In shewing cause it was insisted for the plaintiffs, that they were entitled to retain the verdict in respect to the answers to the fourth and fifth questions. The defendants, it was said, were guilty of an infringement within the terms of the declaration, in having used the matters referred to in those answers, those matters having been duly specified, and being fit subjects for a patent, and comprehended within the terms of the patent itself. Some discussion took place as to whether the defendant had been shewn to have used the matters referred to in the fourth and fifth answers; and in the result it appeared that the defendants had used the sending of signals to intermediate stations, by means of duplicates at those stations. As to the fifth answer, it appeared the defendants had used an instrument, moving in a vertical plane, which they call a magnetizing or indicator, producing the same, or very nearly the same, results as would be produced by the needle described in the specification. But, as the jury found in answer to the third question, that the magnetic ring and indicator of the defendants was a different instrument from the needle claimed by the plaintiffs' specification, it was insisted, for the defendants, that the use of the ring and indicator was no infringement of the patent. This objection applies only to so much of the alleged

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infringements as consisted in using an instrument, or portion of the machinery moving in a vertical plane, and is of a much less general and important nature than the objections made to the plaintiffs' right to a verdict in respect of either of the two alleged infringements. The first of these objections, and that which was mainly relied upon by the defendants was, that the patent of the plaintiffs being described in the title, and also the invention patented being described in the whole of the specification, wherever mentioned, as an invention "for improvements in giving signals and sounding alarms in distant places, by means of electric currents transmitted through metallic circuits," would protect the improvements of the patent only where such improvements are applied to metallic circuits; and that no use of such improvements would be an infringement of the patent if the electric current acting on the improved machinery was not wholly transmitted through a metallic circuit; or if, as it no doubt appeared by the evidence, the electric current used by the defendants had been transmitted through a circuit not wholly metallic, but through a circuit which, in its larger portion, was not a continuous wire throughout, but was made up in a proportion which, although it must be less than half of the whole circuit, might be a very large one by using the earth as the connection between the two portions of the wire; it was insisted that no infringement had been made by the defendants, or, indeed, could be made, so long as the circuit they used was not metallic throughout, but was to a substantial extent non-metallic. This objection was one of a grave character, and well deserving of consideration; but we are of opinion that, considering it with reference to the specification, and to matters which appeared in evidence at the trial, it ought not to prevail. It appeared in the evidence that, at the time of the granting of the patent, the transmission of the electric current through metallic circuits was known; and it was also known that the power of the current might be increased by means of coils in the wire, by which it was transmitted so as to deflect the magnetic needle, and thereby give the signals. It also appeared that after the grant of the patent it had been discovered that a large portion of the wire through which the current returned to the battery might be dispensed with by plunging into the earth the two ends of the wire, which would have been joined by the part left out, and the electric current, it was discovered, would thus pass from one end of the wire to the other, and so complete the circuit as effectually as if the continuity of wire had been kept up. A circuit on this principle would not be wholly metallic; it ought to be so in its greater part, and, in all that part which contains the coils, and operates on the needles by which the signals are given. Now the patentees, by the specification, do not make any claim to metallic circuits: what they claim is, "improvements in giving signals by means of electric currents transmitted through metallic circuits;" and the improvements, as appear by the specification, consist entirely in the methods and instruments for using the electric current, assuming it to be transmitted by means open to the public, and in respect of which the patentees make no claim. The circuit used by the defendants is metallic in all that part which operates in giving signals, and in all the parts to which the plaintiffs alleged improvements apply, and it is no condition necessary to the existence of the improvements that the circuit should be metallic in any other part than that which contains the coils, and operates on the needles; and there is no doubt that the patentees might, without any alteration of the description of their invention as contained in the specification, have removed all colour for this objection if they had used words in speaking of the transmission of the current which could not be contended, as those words now used are, to be applicable only to currents through circuits wholly metallic. The objection in question may be considered as it regards the specification, and as it regards the title to the patent; and with respect to the specification, it is to be observed that the claim of the patentees being for improvements not all immediately connected with or dependent upon each other, but all applicable to giving signals, &c. by means of electric currents, the plan adopted in the specification was to give an account of the whole system or mode of transmission of the electric current, for the purpose of giving signals, and the mode of giving those signals, specifying afterwards the parts claimed as improvements, and either expressly disclaiming or leaving unclaimed all that was not expressly claimed. It is obvious in such a specification that a part which describes the matter claimed is to be much more strictly construed than that which, though necessarily mentioned, is not spoken of as a new matter, or as the subject of a grant, but only as something known and necessary to be referred to for the purpose of explaining the claim. Considered in this view, we think the specification in speaking of metallic circuits may properly be considered as comprehending all circuits which are metallic, so far as it is

material to the improvements claimed that they should be so, and that the expression in question is not to be construed with more strictness and precision than is necessary to enable it to fulfil the purpose of explanation for which it was introduced. With reference to the use of the words "metallic circuits" in the title of the patent, it was agreed that the patentees, in using those words, would mislead a person who was in possession of an improvement identical with the plaintiffs', but which he intended to use in giving signals by non-metallic circuits, and who might have opposed the grant of a more comprehensive title, but who would have acquiesced in one confined to metallic circuits. But it appears to us (whatever might be the case, supposing currents transmitted in the manner used by the defendants to have been known at the time of granting the patent), that on giving notice of the application for the patent, the title did, in the actual circumstances of the case (that is to say, the earth's circuit not being then perfectly known), give quite sufficient notice to any person secretly acquainted with that discovery, or thinking it probable that some such discovery might be made, and having also invented improvements like those of the patentees, to put him on his guard and inquire as to how far the proposed patent might interfere with his. It appears to us reasonable to hold that a claim for a patent for improvements in the mode of doing something by a new process is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries not known at the time of the claim, so long as it remains identical with regard to the improvements claimed and their application. The second objection was not less extensive than the first, and would allow the full use of all the patentees' improvements, supposing them to be used only in such an apparatus as the defendants used. That objection was in substance, that the plaintiffs' patent was for a system of giving signals by means of several wires and converging needles pointing to letters; whereas the defendants had used one wire only, and had made signals by counting the deflections of a needle, or needles, which was found by the jury to be a different system from that of the plaintiffs. This objection appears to us to be founded on a wrong construction of the specification, which, we think, shews the patent not to be for a system of giving signals, but for certain distinct and specific improvements comprehending those now in question, the system being described only for the purpose of explaining the improvements claimed. Another objection, somewhat connected with that last mentioned, was urged for the defendant, that the breaches in the declaration being that the defendant had used and counterfeited the invention of the patentees was not supported by the evidence of the use of, and the counterfeiting of a part only. But on looking to the specification which explains what the invention is, it appears to consist of nine specified improvements; and the declaration, in speaking of the said inventions, is to be considered as if it charged the using, &c. of the said nine improvements, and is sufficiently proved by shewing that one has been used. It appears to us, therefore, that none of the objections which apply to both grounds on which the plaintiffs claim the verdict ought to prevail. With respect to the objection before adverted to, as to the claim of a verdict regarding the vertical needles, on considering the finding of the jury with reference to the defendants' instrument in conjunction with the claim in the specification at page 23, and paragraph 123, and taking, as we are bound to do, on the present inquiry, the finding of the jury to be correct, it may be doubtful whether the plaintiffs can claim the verdict on this ground; but it appears to us that the use of a duplicate apparatus at intermediate stations, which the jury have found to be a new invention, and which was undoubtedly used by the defendants, entitles the plaintiffs to retain their verdict. There was, indeed, an objection particularly applying to this part of the case, which it is proper to mention. It was insisted that the giving duplicate signals at intermediate stations was not the proper subject of a patent, being an idea or principle only, and not a new manufacture. But we think the patentees not only communicated the idea or principle that duplicate signals might be given, but shewed how it might be done, namely, by duplicate apparatus at each station; and that this is a fit subject for a patent. It was, indeed, contended, as is obvious and self-evident, that a circuit having a distinct coil could have intermediate ones also, which would operate in the same manner. But it appears to us, that although it might be probable *a priori* that such would be the case, it was matter of experiment that it could practically be done, and that the invention of the patentees, although simple, was one for which a patent might or ought to be granted. If, as was mentioned in the argument, the defendants have enabled intermediate stations to send as well as to receive communications, it is a very important improvement, for which the inventors may probably be

entitled to a patent, although they may not be entitled to use it, unless by the licence of the patentees of the less perfect invention on which their own is grounded. For these reasons we think the rule must be discharged. *Rule discharged.*

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## ERRORS FROM THE EXCHEQUER.

Reported by FREDERICK BAILLY, Esq. of the Inner Temple, Barrister-at-Law.

Saturday, May 17.

(Before CAMPBELL, C.J.; PATTERSON, MR. WIGHTMAN, CRESSWELL, ELLIS, and LIAMBS, JJ.)

CLEAVE v. JONES.

*Statute of Limitations—Evidence—Lienholder's Act (9 Geo. 4, c. 14).*

In an action upon a promissory note which the defendant pleaded the Statute of Limitations, the plaintiff tendered in evidence an account of the defendant containing an entry, purporting to be an entry of a disbursement in form,—"1843, Cleave's int. on 350L—12 10s and contended it was sufficient to enable him to find the issue upon the Statute of Limitations for plaintiff, if they were satisfied that he had paid the 17l. 10s. to the plaintiff for use on the note in question within six years before action. The learned judge, at the trial, upon authority of *Willis v. Newham*, 3 Y. & J. 518, held, as the entry was not signed, it was not sufficient, and rejected it.

Verbal evidence of acknowledgment of payment of principal or interest, is sufficient to take a case out of the Statute of Limitations.

Upon a bill of exceptions to that ruling: Held, by the Court of Error, that such evidence was admissible to take the case out of the Statute of Limitations, and should have been read and submitted to the jury.

*Willis v. Newham*, 3 Y. & J. 518, overruled. This was an action brought by the plaintiff against the defendant, Sarah Jones, upon a promissory note bearing date the 2nd May, 1840, whereby she had promised to pay to the plaintiff 350L. with interest, on demand.

The defendant pleaded (amongst other pleas) the Statute of Limitations.

*Replication.*—That the causes of action in the declaration mentioned, and each of them, did accrue to the plaintiff within six years next before the commencement of the suit, whereupon issue was joined. The cause was tried at Hereford, before Mr. James Rolfe, at the Summer Assizes, 1849, when the plaintiff then and there gave in evidence to the jury in order to shew an acknowledgment of the debt within six years, so as to prove his replication to the plea of the Statute of Limitations, a certain account-book in the hand-writing of the defendant, containing, among other entries, an unsigned entry, purporting to be an entry of a disbursement by her in the year 1843, in the words and figures following, that is to say,—"1843, Cleave's int. on 350L—12 10s." Whereupon the counsel for the plaintiff submitted that such entry was sufficient evidence in law to enable the jury to find the issue upon the plea of the Statute of Limitations in favour of the plaintiff; if a jury were satisfied that the defendant had paid to the sum of 17l. 10s. to the plaintiff for interest on the sum of 350L. in the first count of the declaration mentioned, within six years next before the commencement of the action (the action having been commenced on the 30th October, 1849); but the learned judge then held, and so informed the jury, that the said entry, not being signed by the defendant, was not sufficient evidence in law for them to find that issue in favour of the plaintiff, but that they were bound in point of law to find that they were bound in point of law to find the issue for the defendant; no further evidence in support thereof having been given by the plaintiff. The jury accordingly gave a verdict for the defendant upon that issue, and the plaintiff tendered a bill of exceptions to the above ruling or direction to the jury by the learned judge, assigned as error that the judge declared his opinion to the jury that the said entry, not being signed by the defendant, was not sufficient evidence in law for them to find the said issue in favour of the plaintiff; but that they were bound in point of law to find the issue for the defendant, no further evidence in support thereof having been given by the plaintiff; and that, therefore, the said defendant was entitled to a verdict. Whereas the said entry not being signed by the defendant, the plaintiff's counsel assigned as error that the judge declared his opinion to the jury that the said entry, not being signed by the defendant, was not sufficient evidence in law for them to find the said issue in favour of the plaintiff; but that they were bound in point of law to find the issue for the defendant, notwithstanding no further evidence in support thereof by the plaintiff. *Keating, Q.C. (Horse with him).*—The point in this case turns upon the construction of the



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Geo. 4, c. 14, s. 1. (commonly called Lord Tenterden's Act), entitled "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements." It begins thus: "Whereas, by an Act passed in England in the twenty-first year of the reign of King James the first, it was, among other things, enacted, that all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants, all actions of debt grounded upon any ending or contract without specialty, and all actions of debt for arrears of rent, should be commenced within three years after the end of the then present session of Parliament, or within six years next after the cause of such action or suit, and not after: and whereas a similar enactment is contained in an Act passed in Ireland, in the tenth year of the reign of King Charles the First: and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, be enacted, That in actions of debt, or upon the case founded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, thereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by, or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractors, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, or as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of any principle or interest made by any person whatsoever," &c. What, then, is the evidence required by which an acknowledgment must be proved in order to its taking a case out of the statute? The statute requires that in acknowledgment or promise by words only shall be in writing, and signed by the party chargeable; and the present case is brought before this Court for the express purpose of considering *Willis v. Newham*, 3 Young & Jer. 518. That case is not satisfactory, and the object is now to review that decision. That was an action upon a promissory note, to which the Statute of Limitations was pleaded. The plaintiff, having proved the handwriting of the defendant to the note, called two witnesses, who proved verbal acknowledgments by the defendant that he had made payments in respect of the note within six years. The learned judge was, however, of opinion that, although proof of actual payment of interest would be an answer to the Statute of Limitations, within the provisions of the 9 Geo. 4, c. 14, yet evidence of an acknowledgment of payment was within the mischief that statute was intended to prevent, and nonsuited the plaintiff, giving him leave to move to enter a verdict for the amount of the principal and interest due upon the note. A rule was afterwards obtained, and the matter argued; but the Court discharged the rule, on the ground that the evidence was not sufficient, under the 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations. The statute 9 Geo. 4, c. 14, made no difference in proving payment; and the object of the Act was to prevent a verbal acknowledgment of the debt. A payment must appear to be the payment of a debt and a part payment for a larger sum, or a less for a greater amount, and to the party to whom it is due. *Waters v. Tomkins*, 2 C. M. & R. 723, somewhat narrows that of *Willis v. Newham*; here part payment having been proved otherwise than by admissions, it was held that oral declarations were receivable to shew that the payment when made had been appropriated to the debt in question. [CAMPBELL, C.J.—The learned judges who decided the case of *Willis v. Newham* seemed to think that there must be evidence of payment under the hand of the defendant, signed by him.] Yes; but in many of the subsequent cases the judges have thrown doubts upon its correctness. In *Bayley v. Ashton*, 12 A. & E. 493, Lord Denman said, "If I were now for the first time called on to put a construction upon this Act, I should be of opinion that any proof of part payment was sufficient—that was my first impression; but *Willis v. Newham* and *Waters v. Tomkins* have established a different doctrine." [CRESSWELL, J.—Have not the Court of Ex. acted recently upon the former decision of *Willis v. Newham*? Yes, they appear, in fact, to have done so, because the case has not been overruled. In *Mayhew v. Yell*, 7 M. & W. 531, it was so, although strong

opinions there also were expressed that the case of *Willis v. Newham* was wrong. Parke, B. says, "My feeling certainly is, that those decisions (*Willis v. Newham* and *Bayley v. Ashton*) have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot over-rule the judgment of the Court of Queen's Bench." He intimated, however, that the plaintiff might, in a fresh action, bring error; and he added, "If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases." And Lord Abinger said, "If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord Tenterden's Act to be proved as at common law; but we are not sitting here as a court of error." "My impression, however, is, that the Act of Parliament has been pressed beyond its intention." In *Bevan v. Gething*, 3 Q. B. 740, an action upon a promissory note, to which the Statute of Limitations was pleaded. Plaintiff gave evidence that defendant had paid 5s. on account of the note. He then offered to prove that defendant, on a subsequent occasion, admitted orally that he had made such payment on the above account; it was held that the latter evidence was not excluded by the 9 Geo. 4, c. 14, s. 1. In *Hodsdon v. Harridge*, 2 Wms. Saunders, 64, n. (f), there are remarks upon the unsatisfactory nature of the decision of *Willis v. Newham*, and the construction of the Act as put upon it by that case is uncalled for. In *Clark v. Alexander*, 8 Scott's N. R. 158, some doubt is also thrown upon the case. In *Eastwood v. Saville*, 9 M. & W. 615, Rolfe, B. at the trial, ruled adversely to *Willis v. Newham*, but the Court of Ex. confirmed the case, at the same time Alderson, B. observing, he did not concur in that decision of *Willis v. Newham*, but felt bound by the authorities, until they were corrected by a superior court." Suppose, for instance, a delivery of part goods as payment were to take place, and a notification of it to the other side that such part payment had taken place in that way, it would not be sufficient, according to the decision of *Willis v. Newham*; that case has, however, met with disapprobation from nearly every judge who has had any occasion recently to remark upon it; there are no words in the statute which will authorize or justify such a construction as that case has put upon it; and the question being now raised for the opinion of a Court of Error, this Court will overrule it.

Greaves, Q.C. (Gray with him), for the defendant in error.—The ruling of the learned judge at Nisi Prius, in this case was quite correct, it was in accordance with the case of *Willis v. Newham*, and the subsequent cases upon the subject; that case was decided more than twenty years ago, and has been followed and acted upon ever since. The case, it appears, was fully argued, and time taken to consider the judgment of the Court, which was subsequently delivered. [CAMPBELL, C.J.—It is nothing extraordinary to call upon a Court of Error for the first time to reconsider or overrule a case that has, like *Willis v. Newham*, been so often doubted.] Still this case is clearly within the statute, when it comes to be looked at. The statute is directed against the proof and the effect of the thing proved; the first clause of the 9 Geo. 4, c. 14, relates to the mode of proof and the proviso to the effect of proof (he here read the recital of the 9 Geo. 4, c. 14, in sec. 1, and the enacting clause referred to *ante*), and contended that the clause distinctly pointed to the proof, and that this case fell within the terms of the recital, and that the proviso did not in any way alter its effect or the evidence necessary to establish the proof required by the clause. As Mr. Baron Garrow observes, in delivering the judgment of the Court in that case: "To prevent such questions, and to give effect to the existing enactments, this Act was passed, which contains a particular provision,—that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Upon this part of the statute it is impossible to raise a doubt. The Act says, if a debt be of more than six years' standing, it shall not be taken out of the Statute of Limitations by a loose and vague conversation, which may be misrepresented, but only by a written promise or acknowledgment, signed by the party to be charged thereby, which cannot be misrepresented, and cannot deceive. But it is said that a subsequent part of the Act expressly contemplates a case like the present, and leaves this case untouched. The proviso is in these words:—"Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." This proviso leaves the case as the former part of the clause left it. Payment of

principal or interest is evidence of the subsistence of the debt, and shews that the payee has a demand against the party who makes the payment. But what is there in this proviso to exempt this case from the general operation of the statute? It is not that nothing therein contained shall alter the mode of proving by words only the acknowledgment of payment, but that it shall not lessen the effect of any payment if properly proved. It appears, therefore, that the previous enactment must be engrafted upon this proviso, and that the whole must be taken together, namely, that the payment must be proved, not by a verbal acknowledgment, but by evidence of the actual payment, or by a writing such as the Act requires, and that, being so proved, it shall have the same effect it had before the passing of the Act. Mr. Baron Garrow proceeded. "In the course of the argument the case of an account current was put, in which the party charges himself, and takes credit for payments made by him; and it was said shall not this be evidence to take the case out of the Statute of Limitations? I answer, no, because the Act says the defendant shall not be charged except by an acknowledgment in writing signed by him. It must be a writing with the solemnity of a signature, and nothing short of that can bind the party." The judgment then proceeded to state, that the case was within the mischief equally as the case of a promise or acknowledgment which it was admitted would be unavailable unless in writing signed by the party. [EASEY, J.—If part payment is proved by words only, is that any acknowledgment?] It would not be enough to prove that a defendant merely said so, there must be a written document; the cases of *Waters v. Tomkins*, 2 C. M. & R. 723, and *Bayley v. Ashton*, 12 A. & E. 493, are both cases in favour of the defendant in error, and confirm the case of *Willis v. Newham*; the latter was in *assumpsit* for money lent to defendant for his father's benefit, and an entry made by defendant as clerk of the plaintiff, in the plaintiff's ledger, wherein plaintiff gave defendant credit for a part payment within six years by his father, was held not to be a sufficient writing signed by the party within the 9 Geo. 4, c. 14, to rebut a plea of the Statute of Limitations. [CAMPBELL, C.J.—My brother Patteson's judgment there is in effect directly contrary to *Willis v. Newham*. MAULE, J.—Suppose the case of a written paper signed by the party to be charged, that party acknowledged payment, and it was afterwards clearly shewn that no payment was ever in fact made, do you contend that would be good, or within the Act? No, I should say it would not. In *Eden v. Duffield*, 1 Q. B. 307, the Court said it was indeed contended that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance, for that to admit it would let in all the inconvenience which the statute was intended to prevent. No case, however, warrants the holding the rule so strict, nor does convenience require it, for where there is the foundation of an Act alone to build upon, the admission of declarations to explain that Act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable. Upon this principle stat. 9 Geo. 4, c. 14, s. 1, is a very analogous matter, has been construed in the Court of Ex. For whilst in *Willis v. Newham* it was held that part payment, to take a case out of the Statute of Limitations, could not be proved by a verbal acknowledgment only, it was held in *Waters v. Tomkins*, that where a sum had been paid without any statement on what account, declarations were admissible to explain on what account. In *Baldwin v. Walton*, 1 Ex. 617, this question was much discussed in this Court, but the point was not decided, and the arguments there used for the defendant in error I might well adopt here. In *Webster v. Keyman*, 1 Ex. 118, Alderson, B. said; *Bayley v. Ashton*, and other cases, have established that the acknowledgment of payment must be in writing, signed by the party, or the fact of payment must be proved. Lord Abinger's judgment in *Hyde v. Barnard*, 1 M. & W. is also in the defendant's favour. This case, therefore, falls within the intent and object of the Act, and neither the words nor the terms of the Act have been complied with, the authorities upon the construction of that statute, from the time it passed until now, have been uniform, and in accordance with *Willis v. Newham*, and the Court will not lightly depart from it.

Reading, in reply.

CAMPBELL, C.J. said,—I am of opinion that the time has come when the decision of the Court of Ex. in the case of *Willis v. Newham*, must be overruled. The question upon this record is, whether in an action on a promissory note, an entry in an account-book of the defendant's, in her own handwriting, but not signed by her, that she has paid interest within six years, be receivable as evidence to go to the jury, to take the case out of the Statute of Limitations (21 Jas. 1, c. 16), by reason of the enactments in 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act. Is that evidence for the jury? It was held by the learned judge, at the trial, in as-

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cordance with the decision in *Willis v. Newham*, that it was not; and if that case is good law, the judge was right in deciding that it was not receivable as evidence, to go to the jury to take the case out of the Statute of Limitations. Now, does the Act say that the entry must be signed by the party? or that a defendant shall not be charged except by an acknowledgment in writing signed by him. Does the Act say so or not? In my opinion the Act says no such thing; and we must be careful not to extend what the Act really does say. The Act, 9 Geo. 4, c. 14, in the preamble says, that questions have arisen as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking the case out of the operation of the enactments and the statute, is to go on so as to guard against such questions afterwards arising. Before this statute passed, under the old Act (21 Jas. 1), there were three modes in practice to take a case out of the statute:—1st. An acknowledgment by words. 2nd, A promise by words. 3rd. Payment of part of the principal or part of the interest. We shall see whether this statute does not confine itself to the two first, leaving the third precisely as it was. The words of the Act of Geo. 4 are, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party to be chargeable thereby." Do those words meet the case of proving the payment of principal or interest, or lessen the effect of the payment of the principal or interest, or the acknowledgment that either has been paid? I think it does not, because it is confined to promises or acknowledgments by words only. Then we have the proviso that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest. Does not that allow the proof and fact of payment to remain as it was before the Act of Geo. 4 passed, and leave the proof of payment on account exactly as it was before? It seems to me that the construction of the Act of Parliament is plain, and that it cannot be sustained by any other construction. There is no case which decides that such an entry as this is not evidence, excepting *Willis v. Newham*, and the cases which are decided upon it, and there are many dicta of judges against the decision there. But judges at Nisi Prius and elsewhere have not felt bound to reverse the solemn decision of a full court, without having the opinion of a court of error. We think that this was evidence which should have been submitted to the jury to take the case out of the statute. It would have been very extraordinary if Lord Tenterden had intended to make inadmissible such evidence as this, and I do not think he did, or that the words of the Act warrant such a decision. The effect of our decision will be to let in verbal evidence of an acknowledgment of payment of part of the principal or interest; but the legislature must have supposed that more mischief would arise from excluding such evidence than from admitting it, otherwise it would have used words that would apply to that case, as well as to a mere promise or acknowledgment in words only. The judgment will therefore be for the plaintiff in error, and there must be *venire de novo*.

*Judgment for the plaintiff in error.*

## IN ERROR.

*Saturday, May 17.*

*BOOSEY v. JEFFREYS.*

*Copyright—Right of foreigner to, in this country.*

*A foreigner resident abroad may acquire copyright in this country in a work first published by him as author, or as author's assignee in this country; which has not been made publici juris by a previous publication elsewhere.*

*So also does a British subject, to whom such work is assigned by the foreign author, gain such right.*

*Boosey v. Purday, 4 Ex. 145, overruled.*

*Case.*—The declaration stated, that at the time of the committing by the defendant of the grievance thereinafter mentioned, the plaintiff was, and from hence has been and is, the proprietor of the copyright in certain books, being musical compositions, &c. in the opera of *La Sonnambula*, of Bellini, which said several books had each of them been first published in that part of Great Britain called England, and which had each of them been first published within twenty-eight years then last past, and which said several copyrights were subsisting at the several times of the committing by the defendant of the said grievances, &c.: yet the defendant, not being the proprietor of the said copyrights, &c. heretofore after the passing of the 5 & 6 Vict. c. 45, and within twelve months before the commencement of the suit, &c. unlawfully, &c.

Defendant pleaded, first, that plaintiff was not proprietor of the copyright, as in the declaration

mentioned. Secondly, that there was not, at the time of the committing of the said supposed grievances, a subsisting copyright in the composition, whereupon issue was joined.

At the trial of the case before Rolfe, B. the following facts appeared:—Bellini, a foreigner, composed the opera of *La Sonnambula*, in the year 1831, when it was performed with much success at Milan. In February 1831, a Signor Ricordi purchased the opera of Bellini and the managers of the theatre, under an instrument which, according to the law of Austria, was sufficient to transfer the copyright, but there was no attesting witness to it. On the 9th June, 1831, Ricordi assigned the opera by deed to the plaintiff, who caused certain airs to be entered at Stationers' Hall; copies were also deposited at the British Museum. The plaintiff procured the airs to be duly entered under the 5 & 6 Vict. c. 45. Subsequently the airs alleged to be an infringement of the plaintiff's copyright were purchased at the defendant's shop in London. The circumstances were similar to those in *Boosey v. Purday*, 4 Ex. 175; and Rolfe, B. having ruled in accordance with the decision of the Court of Ex. in that case,—that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright therein. Neither does a British subject, to whom such work is assigned by the foreign author, gain any such right.

A bill of exceptions was then tendered to that ruling, in order to take the opinion of a Court of Error upon the subject.

*Bovill* appeared for the plaintiff in error.—This case comes before the Court by way of a bill of exceptions to the ruling of Baron Rolfe. The object is to bring under review the decision of the Court of Ex. in the case of *Boosey v. Purday*, 4 Ex. 145, to raise the question whether there can be any copyright for a foreigner in this country, or whether such a right could be vested in any person who purchased of that foreigner. There is another question—whether there could be any assignment by a foreigner of a portion of the copyright to be confined to Great Britain, and whether an assignment made in Milan ought to have been attested by two witnesses. The facts were these:—Boosey was an English subject; he had purchased the copyright in *La Sonnambula* of a foreigner, and having purchased that right was the first person to publish it in this country. He had thus a *prima facie* title against the world; that title was sought to be impeached by the defendant, and his ground for doing so was that the work which he had purchased, and was the first to publish here, was originally composed by Bellini, a foreigner, out of the British dominions. Bellini had transferred his interest in the work to Ricordi, at Milan. Ricordi came to England and transferred the right which he had so acquired to Boosey, so far as regarded the copyright in the British dominions. The main question was, whether an English subject could acquire from a foreigner the copyright of a work which was first published in this country. If a foreigner could acquire a copyright, he could transfer such right, and if he had no right, could he not give such permission to an English subject as to enable the Englishman to acquire the right to protection? On the other side it was said there was no property in the foreigner or in the English subject; but it was now submitted that such a work was property before the statute of Anne, and by the common law. The 8th Anne was the first statute passed for the protection of property of this description—of literary property. [MAULE, J.—Suppose Homer had a copyright, he could go about and recite his works. CAMPBELL, C.J.—And might have had an injunction.] If there was the copy of one effusion of a man's brain he might withhold it or lend it or dispose of it. The statute of Anne was declared to be for the encouragement of learning by vesting the copyright in the author of literary works, and it enacted, that after 1710 the author of any book, who had not transferred it to any other, or the bookseller who had purchased it, should have the right. If the right existed in the author, an alien was entitled equally with a natural born subject. If it was property, it was self-evident an alien was entitled. [CAMPBELL, C.J.—In personal property the law made no distinction.] By 7 & 8 Vict. c. 66, aliens might hold any description of personal property. If foreigners had a right by common law, how were they affected by the statute of Anne? One question here is, is it property at all in an English subject or a foreigner? I contend it is, and that it existed at common law before the passing of the statute of Anne. [CAMPBELL, C.J.—Why do you wish to go to the common law?] Because it will be said on the other side, that the statute applies only to British-born subjects; either the statute does or does not apply; if it should be held to do so it will be sufficient for the plaintiff; if not, then the right exists at common law, and is equally entitled to protection. [CAMPBELL, C.J.—A court of equity will grant an injunction against the publication of a letter by him to whom

it is addressed—there is no statute for that.] What then is the language of the statute of Anne, it assumes that property existed in it from the title. In *Miller v. Taylor*, 4 Burr. 2303, the law is clear upon that subject; *Willis*, J. at pp. 230, 232, and *Aston*, J. at pp. 2340, 2345-6, are decisive. And the statute of Anne is in affirmance of the existence of copyright at common law, though it controlled the common law right; and in *Miller v. Taylor*, the special verdict finds that before the statute of Anne, it was usual to purchase from authors the perpetual copyright of their books. The first publication gives the exclusive right, the only exception being, that, if there was a prior publication in another country, the work becomes publici juris. Such being the true foundation of copyright, it follows that the right must exist as well in a foreigner as a native. An alien friend may, equally with a native, enjoy every species of property; and the same protection is afforded to his person and reputation. (*Pisani v. Lawson*, 6 B. & C. 90; Com. Dig. "Alien" (C. 5.); *Cocke v. Purday*, 5 C. B. 860.) This view is confirmed by the International Copyright Acts, 1 & 2 Vict. c. 85, 1 & 11, and the 7 & 8 c. 12, s. 19. The 5 & 6 Vict. c. 65, is not confined to authors, but is general in its terms. It recites, that "it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." The 15th section, which provides a remedy by action, is also general, and applies to all cases of a subsisting copyright. The plaintiff being a British subject, who acquired the right from a foreigner by legal title, has the exclusive property in the work. The last Act, 7 & 8 Vict. c. 66, by sec. 4, enacts, that also may hold every species of personal property except chattels real. In *Cocke v. Purday*, 5 C. B. 862, *Wilde*, C.J. in delivering the judgment of the Court, said, "No legal principle was suggested as the foundation of the argument that an alien friend is not to have copyright in a work composed by him and first published in England. There are, indeed, some dicta in the books that a foreign author is not protected against a publication of his work in England. Probably these dicta were intended to apply only to cases where a foreign author has published his work abroad, and not in England." In *D'Alesandre v. Boosey*, 1 Y. & C. 281, Lord Abinger said, that the law as regarded the common law right was settled by *Miller v. Taylor*; and in *Prince Albert v. Strange*, 1 Hall & T. 1, the Lord Chancellor, in delivering judgment, says, "The property is in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disposed of after the many decisions in which that proposition has been affirmed or assumed." Being property, it becomes liable to transmission, and an alien can be entitled to it; there is no difference as regards personal property (*Brook's Abridgment*, title "Inventor," pl. 10; although he cannot maintain real actions, because he cannot hold land. (*Pisani v. Lawson*, 6 B. & C. 90). Applying, then, these facts to this case, it is clear the plaintiff is entitled to protection in his copyright. The plaintiff being a British subject, who acquired the right from a foreigner by legal title, has the exclusive property in the work. The transfer to Ricordi, although not attested by two witnesses, was valid according to the law of Austria, and so, by the law of nations, was valid every where. (*Story's Conflict of Laws*, a 2d.) The statute of Anne, it will be said, applies only to British-born subjects, but there is nothing whatever in the title, recitals, or enactments of that Act so to confine or limit it. It seems to be conceded by the other side, that if a foreigner who is here makes a composition, he would be entitled to copyright. [MAULE, J.—What is the difference between writing it abroad, bringing it here, and then publishing it, and writing and publishing it here? Suppose he had thought of it, and the whole was in his mind before he came, and on his arrival committed it to paper, would that make any difference?] Surely not; how could it? [CAMPBELL, C.J.—Suppose a foreigner came over to see the Great Exhibition, he wrote a poem, would he not have a right to that poem? Or, De Lolme had written his work abroad and published it first here, would he not be entitled to the benefit of it? CRESSWELL, J. also mentioned *Story's works*.]

*Peacock*, Q.C. (who appeared for the defendant in error) said—"The difference was as to the place in which he wrote it."

*Bovill*.—If the foreigner had the right, what difference did it make whether he wrote it here or elsewhere? If the test were property or no property, it could make no difference; and it could not alter his right, whether he brought it here himself or gave it to a deputy; and if he could do that, he might transfer it to another, and give him the same right which he himself possessed. But it was said that the statute of Anne had been passed for the encouragement of native talent; yet it was of equal advantage to this country that we should have the

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benefit, not only of the publication of works of British subjects, but of the literature of the world. [MAULE, J.—A book written by a foreigner may be published with as much benefit as if written by an Englishman. The enactments were for the encouragement of learning, to be applied to the public. I can find no reason why the right should be confined to British subjects.] Whenever a benefit is to be conferred on British-born subjects, the Legislature always uses words that are not ambiguous, but express; and accordingly, in the 13 Eliz. c. 7 (a Bankrupt Act), the language is clear upon the subject; so also in the 1 Jas. I. c. 15, s. 1. In the Statute of Monopolies, 21 Jas. I. the words there are without imitation, but foreigners and others continually take out patents under it; so also the 13 & 14 Chas. I. c. 33, s. 6, applies in the same way. *Bach v. Longman*, Corp. 623, decided that a foreigner publishing in England can sue in this country for a breach of his copyright. Bach was a musical composer, who had come into this country from Germany; he sued Longman for pirating a sonata which he latter had published in England, and was successful in his suit. There are four cases, —*D'Almaine v. Boosey*, 1 Y. & C. 280; *Bentley v. Foster*, 0 Sim. 329; *Cocks v. Purday*, 5 C. B. 860; and *Boosey v. Davidson*, 18 Law T. 174, Q. B. in which it has been expressly held that a foreigner composing work abroad, and first publishing it in England, as a copyright, and is protected. The cases of *De Landre v. Shaw*, 2 Sim. 237, and *Page v. Townsend*, 5 Sim. 395, are no authorities the other way. In the first, the observation of the Vice-Chancellor, that the Court does not protect the copyright of a foreigner, was unnecessary to the point in the case; and in *Page v. Townsend*, an application was made for an injunction to protect the supposed copyright in certain engravings executed and published abroad. The question turned on the meaning of certain statutes, which were held to have been passed only for the protection of prints engraved, etched, drawn, or designed in Great Britain; the last of which, 17 Geo. 3, c. 57, is in express terms so limited in its operation. All the authorities are uniform, and it is now too late to overturn them or to warrant a contrary doctrine, as the decision of the Court of Exchequer in *Boosey v. Purday*. The result heretofore has been that foreign authors might have the benefit; and if it is admitted that these works are property, then there is no difference between the benefit to a foreigner and an Englishman. It is clear, upon principle and authority, this is property at common law, that a foreigner had a right to the copyright, and that the plaintiff in error is entitled to judgment.

*Peacock, Q.C.* for the defendant in error. A foreigner may, under some circumstances, be entitled perhaps to copyright in this country, and enforce it, or seek for protection; but in this case the plaintiff has no right. The question depends on the first publication. Now Bellini was here the first publisher; these works had been published abroad previously to their publication in this country, and had, therefore, become the right of the public. My first proposition is, that if a person, a foreigner residing abroad, writes a book, and sends it over here for publication, and it is first published in this country by his consent, the foreigner being at that time abroad, he has no copyright here, and is not an author within the meaning of the Act. Second, such an author cannot confer upon an assignee a greater title than he has himself; it would not be disputed that a portion of a copyright might be sold, or that a foreigner might be entitled to copyright in this kingdom, or that a foreigner, if he had a copyright, might recover damages for its infringement; but I should contend that, under the particular circumstances of this case, the plaintiff had not a copyright. That a foreign author, residing abroad, and not coming to this country, had no right, so long as he resided abroad at the time of the first publication, to claim protection. In this case where was the first publication, and where was the author at that time? [MAULE, J.—A foreign author, not having published it, assigns it to an Englishman, and the Englishman publishes it in England after the assignment, the foreigner still living abroad, you say that the Englishman has no remedy for the infringement.] That the foreign author could not assign a right which he did not possess. A foreign author, who was residing abroad at the time when the first publication of his work took place in this country by his consent, had no copyright, and that an author in that situation could not transfer to an assignee any greater title than he had himself. [MAULE, J.—Suppose an actual inventor abroad sent over and obtained a patent in this country, would not that be a good patent? CAMPBELL, C.J.—When I had the honour of being Attorney-General, I believe I granted many patents to persons abroad.] Foreigners might perhaps have their agents here to obtain patents for them if necessary, and your lordship would most probably have granted such patents to those agents, persons residing in this country. If a person introduced his invention abroad, he could not afterwards

come here and obtain a patent for that invention. The Court of Ex. in deciding the case of *Chappell v. Purday*, 14 M. & W. 302, did not intend to throw any doubt upon the right of an alien friend to acquire copyright here, but that of an alien residing abroad. If a foreigner wishes to acquire such a right he must do so by first publishing his work in this country; if it has been first published abroad, he can acquire no title here, whether as author or as assignee. In *D'Almaine v. Boosey*, Lord Abinger says: "The Acts give no protection to foreigners resident abroad in respect of works published abroad." This case rather falls within that of *Clementi v. Walker*, 2 B. and C. 861. There an author published his work in a foreign country in 1814, and afterwards agreed to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. published the work in September 1814, in England. In 1818 B. published the same in England. In 1822, the author, by an agreement in writing, assigned to A. the exclusive right of printing the work in England; and it was held, first, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England; secondly, that that could not be deemed a publication by the author,—not being made on his account or for his benefit; thirdly, that the publication by B. in 1818, was a lawful publication; and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A. enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed. It may be collected that the Court there thought that foreigners were not entitled to the benefit of the statutory right, although the case does not amount to a decision to that effect. Bayley, B. in delivering the judgment of the Court, says—"The stat. of Anne not only gives protection to authors as to books thereafter to be published, but to books previously printed; but the British Legislature must be supposed to have legislated with a view to British interests, and the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to shew an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in this kingdom; and, instead of there being any such clear words to shew that intention, there are provisions which strongly imply the latter." The Vice-Chancellor of England, in *Page v. Townsend*, on the construction of several Acts protecting engravings, one only of which was expressly confined to plates engraved in Great Britain, intimated that the foreigner might have a copyright, but he directed the question to be tried at law, in the case of *Bentley v. Foster*, 10 Sim. 329. In *Guichard v. Mori*, 9 L. J. 227, Ch. the same learned judge expressed an opinion against the right of a foreigner. In *De Landre v. Shaw*, 2 Simons, 237, the plaintiff had invented a valuable chemical preparation of Peruvian bark, called sulphate of quinine, and had employed the other plaintiff, Pelletier, a chemist, and a native of France, to prepare the medicine, which he, De Landre, was to vend in England, for his own sole benefit. For the purpose of insuring the genuineness of the medicine, De Landre caused a seal to be engraved, after a device invented by Pelletier, with certain words and emblematical figures thereon, with which seal the bottles containing the preparation were stamped. Upon a bill filed by De Landre and Pelletier against the defendants for engraving and printing seals and labels in imitation of the plaintiff's seal and label, a demurrer was allowed, on the ground that the parties were not entitled to joint relief. The Vice-Chancellor says:—"The plaintiffs do not shew that they are entitled to an account from the defendants; for I cannot understand from this bill that Pelletier has any interest in these labels and seals. The circumstance that he was the inventor of the seal, will not justify the Court in interposing in his behalf; for he was a foreigner, and the Court does not protect the copyright of a foreigner." A man was not the author of the work until it was published; nor yet then if being a foreigner he was abroad at the time, and he freely granted and allowed it to be published here at the time he was not in this country. The question of the transfer is the only question remaining, and the defendant contends that the assignment from Bellini to Recordi was invalid. Recordi could not have brought an action unless he had complied with the rule laid down by the statute, and according to the statute of Anne an assignment must be by writing, in the presence of two witnesses. In *Davidson v. Bohn*, 6 C.B. 456, it was held, that to entitle a party to maintain an action as assignee for the infringement of copyright in a song under the 8th Anne, c. 19, s. 1, there must have been an assign-

ment of the copyright by an instrument in writing, attested by two witnesses.

*Bovill*, in reply.

*Curr. adv. vult.*

Tuesday, May 20.—CAMPBELL, C.J. now delivered judgment.

## JUDGMENT.

LORD CAMPBELL, C.J.—This was an action for pirating a musical composition, entitled "A Cavatina from the Opera of *La Sonnambula*," by Bellini. The declaration, which is in the common form, alleges that this musical composition had been first published in England within twenty-eight years last past; that the plaintiff was and is the proprietor of the copyright therein; and that the copyright was subsisting at the time when the grievances complained of were committed. The defendant pleads, first, that the plaintiff was not the proprietor of the copyright in the declaration mentioned; secondly, that there was not at the time of the committing of the said supposed grievances a subsisting copyright in the said composition. The trial coming on before Lord Cranworth, then Mr. Baron Rolfe, evidence was given on behalf of the plaintiff that the opera of *La Sonnambula*, of which the composition in question is a portion, was composed by Bellini, an alien at Milan, in February 1831; that he then resided and had ever since resided at Milan; that by the law of Milan he was entitled to the copyright in this opera, and to assign it to any one he pleased; that on the 19th of February, 1831, by an instrument in writing, signed and executed by him at Milan, he did, according to the law of Milan, assign the copyright to Giovanni Ricordi, also an alien, then resident at Milan; that such copyright and the right to assign the same lawfully, according to the law of Milan, became vested in Giovanni Ricordi; that on the 9th of June, 1831, Giovanni Ricordi, in England, duly made, signed, sealed, and executed, in the presence of, and attested by, two witnesses, an indenture between him and the plaintiff, whereby for a valuable consideration, he assigned to the plaintiff the copyright of the opera of *La Sonnambula*, and in Great Britain and Ireland only; that the plaintiff is a native-born British subject, resident in England; that he published the opera of *La Sonnambula* in London on the 10th of June, 1831; that there had been no prior publication of it either in the British dominions or any other country; that on the 10th of June, 1831, the plaintiff made the usual entry at Stationers'-hall in respect of it; that he had deposited copies of the work at the British Museum and other institutions, as by law required; and on the 13th of May, 1844, he caused further entries to be made at Stationers'-hall, according to the statute 5 & 6 Vict. c. 45. The learned judge, in conformity with the decision of the Court, from which the record comes, namely, in "*Boosey v. Purday*," directed the jury that that evidence was not sufficient to entitle the plaintiff to a verdict on the issues joined, and that they ought to find a verdict on both issues for the defendant. To this ruling a bill of exceptions was tendered, upon which the present writ of error was brought. After listening to a very learned argument, and considering the authorities cited on both sides, we are all of opinion that the evidence was sufficient to entitle the plaintiff to a verdict on both the issues, and that the direction being erroneous, therefore there ought to be a *venire de novo*. The first question discussed was, whether authors had a copyright in their works at common law. That is not essential to our determination of the present case. If it were, we are strongly inclined to agree with Lord Mansfield and a great majority of judges, who in *Miller v. Taylor*, and *Bach v. Longman*, declared themselves to be in favour of the common law right of authors; but we rest our judgment on the statutes respecting literary property, which we think entitled the plaintiff to maintain this action upon the evidence he adduced at the trial. The Court of Ex. in *Boosey v. Purday*, 4 Ex. R. 145, overruling the prior decision of that Court, on the equity side, of *D'Almaine v. Boosey*, in Young and Collier, the decision of the C. P. *Cocks v. Purday*, 5 C. B. and the decision of the Q. B. *Boosey v. Davidson*, 18 L. J. authorities all directly in point, expressing an opinion that in such an action the right of the plaintiff must depend on the statute law of this country; that the laws of foreign nations have no extra-territorial power; that the plaintiff had no right at common law, and the proper construction of the statutes of 8 Anne and of 54 Geo. 3, c. 156, was, that a foreign author residing abroad, (or his assigns or their assigns), was not an author within their meaning, and could not have the benefit of those acts which were intended for the encouragement of British talent and industry, by giving to British authors a monopoly in their literary works, dating from the period of their first publication here. The learned judges of that Court therefore held, that a foreigner, by sending to and first publishing his work in Great Britain, acquired no copyright. If these premises are sound, the inference drawn from them is incontrovertible, that "a British subject who purchases from him

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such right as he had in his own country, which could not extend beyond it, cannot be in a better condition than the foreigner." But, with great deference to an opinion which must have been so strongly entertained, we see no sufficient reason for thinking that it was the intention of the Legislature to exclude foreigners from the benefit of the statutes relating to literary property. The British Parliament has no power, and cannot be supposed to intend to legislate for aliens beyond the British territory; but for any thing within that territory it has the power to legislate for aliens as well as natural born subjects, and, as we conceive, by these general words must be presumed to do so. The monopoly which the statutes confer is to be enjoyed here, and the conditions which they require for enjoyment are to be performed here. What is there to rebut the presumption that aliens are entitled? The 8th Anne, c. 19, which the others follow, is entitled "An Act for the Encouragement of Learning," by vesting the copyright in printed books in authors and purchasers of such copies. Assuming the Legislature intended this necessarily for the encouragement of learning in Great Britain, without any general regard for the encouragement of it in others, may it not be highly for the encouragement of learning in this country that foreigners should be induced to send their works, composed abroad in English or foreign languages, to be first published in London? If Rapin and De Lolme had written their valuable works, illustrative of the British Constitution, without ever visiting this country, could it be contended that they should be debarred from assigning and selling their property to an English publisher? It would ill become us to offer opinions upon how far free-trade should be allowed in agricultural produce or articles of manufacture, but, looking at the Statute-Book, we may without impropriety observe that it has been the uniform policy of Parliament to facilitate the importation of foreign literature. Although printing had been introduced and carried on by Caxton in the time of Edw. 4, when the stat. 1 Rich. 3, c. 91, passed, to restrain Italians and other foreigners from carrying on trade in England and to protect our trade and manufactures from foreign competition, a proviso was added by sec. 12, that that act should not extend to prevent any trader, of whatever nation he might be, from bringing into this realm, for selling by retail or otherwise, any books written or printed. The question really is, whether a foreigner, by sending to and first publishing his work in Great Britain, acquires a copyright. Upon this entirely depends his power to transfer such right to a purchaser. It is freely admitted, that a foreigner, domiciled in England, though neither naturalised nor made a denizen, if he composes a literary work here, may acquire a copyright in it; and Mr. Peacock, during his remarks, would not deny that if a foreigner, being here for a temporary purpose, while he wrote a poem, he might publish it and acquire a copyright in it here. If he had composed it in his own country and brought it over in his memory, reducing it into writing here for the first time, or if he had written it in his own country, and brought the manuscript with him, would it have made any difference as to his rights as an author? Can his personal presence within our realm be at all essential to his right as an author, if he does that by an agent which it cannot be disputed he might do in his own proper person? The right which he has in England is the right of acquiring, under certain conditions, a monopoly in England for a certain number of years by the sale of his work; but this right, which is incorporeal, and is in the nature of personal property, he carries with him wherever he is, and all that is to be done, fully to enjoy it, he can effectually do by another. Where, then, can be the necessity of crossing from Calais to Dover before giving instructions for the publication of his work, and entering it at Stationers'-hall? The law of England will protect his property, and recognise all his rights, and give him redress for wrongs inflicted upon him within our territory, though he never set foot upon it. In the 6th of Henry VIII. the C. R. held that aliens residing in France might maintain an action of debt here, for, notwithstanding he is an alien, he shall receive protection in all personal actions if he be within this realm, and the kingdom to which the alien belongs, although it be otherwise with real actions, for no alien can have land within the realm unless he be a denizen. (Dyer, 2 b.) So in 8th Scott, 102, it was held that an alien, although he had never been in this country, might maintain an action in our courts for an injury to his reputation contained in a libel—and that great judge, Chief Justice Tindal, had observed that it would waste in the minds of foreigners an unfavourable impression of the justice of our laws if we held that aliens could not maintain an action of this description; and my brother Maule likewise points to the fact of our Courts going still further in allowing actions to be brought by foreigners residing abroad for running down ships upon the high seas. If Mr. Gibbon, after writing the latter volumes of

the "Decline and Fall" at Lausanne, had continued to reside there, can it be doubted that while domiciled there he might have caused them to be published in London, acquiring the same rights as an English author, as if he had returned to this country, or that he might have sold the copyright to another residing at Lausanne, who might have published it through a publisher in London, or have assigned the right to a London purchaser? For such a purpose what difference can it make whether the author be an alien or a natural born British subject, domiciled in a foreign country? In the present case I suppose it is admitted that the defence would have been done away with, if Bellini, without coming to England, had received letters of denization, or had been naturalised by Act of Parliament. For these reasons we think that if an alien residing in his own country were to compose a literary work there, and continued to reside there without having first published his work—nay more, should cause it to be first published in England, in his own name and on his own account, he would be an author within the meaning of our statutes for the encouragement of learning, and he might maintain an action in our courts against any one who in this country should pirate his work. We wish to be understood as speaking of the rights of an author who first publishes his work here. I understand that in America and on the continent of Europe, when a literary work is once published, the author can only claim the copyright vested in him by law, by the law of the country where he publishes; as to all others it becomes *publici juris*. This is the doctrine of our courts, and the Legislature must be considered as having adopted and sanctioned it by the enactments of international copyright statutes. (1 & 2 Vict. c. 89; and the 7 & 8 Vict. c. 12.) Mr. Peacock contended that though an alien residing abroad, by causing his work to be first published in England, might thereby acquire a copyright here, he cannot transfer this right to another. But if, by the law of a foreign country in which he resides, the right may be assigned by the author to a publisher, when the right is again assigned, the assignee of the author becomes the owner of a valuable property, which the law of every civilized country must respect. This property consists in the right of acquiring a property for the sale of a work in the country where it is first published. Whatever right Bellini the author of this composition had to publish it in England, under the protection of the statutes, was transferred by him to Ricordi, and by Ricordi to the plaintiff. The Court of Ex. seem to have thought that this consequence would necessarily follow, if Bellini, residing at Milan, had not parted with his copyright to another, that he might himself have caused it to be published in London as if he were a native born British subject. We have now to refer briefly to the authorities cited, to show that foreigners residing abroad can have no benefit from the law for the protection of literary property in England. Reliance has been placed on *Clementi v. Walker*, 2 B & C. 861, and having myself been counsel for the defendant in that case, I can testify to the accuracy of the report, which shows that the objection now considered fatal to the right of foreigners and those claiming under them was not there taken or supposed to be fit to be put forward. Lord Thurlow, when at the Bar, arguing for the defendant in a copyright case (*Townson v. Collins*, 1 W. Bl.), then said, "It is of no consequence whether the author is a natural born British subject or not; because the right of copyright, if any, is personal, and may be acquired by any one." And in *Bach v. Longman*, Cowp. 623, although the plaintiff was a foreigner, Baron Wood, counsel for the defendant, was contented with arguing, unwillingly, that a musical composition cannot be the subject of copyright. As far as I am aware, the origin of the doctrine which the defendant here contends for is to be traced to a dictum of the late Vice-Chancellor Shadwell, in *Guichard v. Mori*, 9 L.J. 227, Chan. the case relied upon by Mr. Peacock. His Honour there observes—"The circumstance that he was the owner of the seals will not justify the Court in interfering, for he was a foreigner, and the Court does not protect the copyright of a foreigner." If that dictum went to the full extent that a foreigner residing abroad, who did not publish his work, could not acquire a copyright by publication in England, it would not be entitled to much weight, for it is merely thrown out *obiter*. The case had no connection with the law of copyright, the application being for an injunction to restrain the defendants from fraudulently using certain labels and seals alleged to have been used by the plaintiff in his business of a medicine vendor. Looking to the context, there is reason to believe that the Vice-Chancellor merely meant that the Court does not protect the copyright of a foreigner who has published his work abroad; and we afterwards find that this must have been the reason, because in the subsequent case of *Bentley v. Forster*, 10 Simons, 320, he expressly held the doctrine for which the plaintiff here contends. Seeing, then, if an alien friend wrote a book when

abroad, or in this country, and gave the British public the advantage of his industry and knowledge by publishing his book here, he was entitled to the protection of the law relating to copyright in this country; the only other case relied upon by the defendant was *Page v. Townson*, 5 Simons, 35; but this really has no application, for it turned on the construction of some Acts of Parliament passed for the protection of prints engraved, etched, drawn, or designed in England. Then came *Chappell v. Perry*, in which the doctrine was first solemnly enounced that a foreign author, residing abroad, who composes a work abroad, has not at common law or under the statutes any copyright in this country. But it was not necessary then for the Court to affirm this doctrine, as there was really a good defence to the action, on the ground that the musical composition in question had been published in Paris several months before it was published in England. This doctrine against the rights of foreigners was very deliberately considered in *Bole v. Purday*, where the contrary doctrine which had been laid down by the Court of Ex. in the case of Lord Abinger, was admitted and acted upon by the unanimous opinion of the judges of the C. R. This decision, as I am informed by my colleagues of the Court of Q. B. was not only followed, but was fully considered and entirely approved of by Lord Denman and all his brethren. I may likewise mention, that in *Holburn v. Black*, 20 L. J. 165, Vice-Chancellor Knight Bruce afterwards intimated a strong opinion in favour of the right of a foreign author who first publishes in England. We may perhaps, therefore, be justified in thinking the weight of authority is really in support of the doctrine on which our judgment is founded. One point still remains: Mr. Peacock objected that there is upon the evidence, as well assignment by Bellini to Ricordi, there being an allegation that it was attested by two witnesses. Looking to the statement in the bill of exception it might perhaps be fairly presumed that we had an assignment executed by Bellini to Ricordi as would have been sufficient if it had been executed in England; but, at all events, we think the dictum sufficient upon the statement that Bellini assigned to Ricordi, according to the law of Milan, where he had the right of using it. This is not like a conveyance of real property in England, or an assignment of personality with a locality in England, which, by the laws of England, must be assigned in a particular form. When this assignment was made it had no reference to England, more than to any other country in the world, and it was simply sufficient to the clothe Ricordi with all the rights of property in the opera of *La Sonnambula* which the vendor had. The assignment by Ricordi to the plaintiff in England was made according to all the forms of English law respecting copyright. Upon the whole, we think that the learned judge ought to have directed the jury, if they believed the evidence adduced, to find a verdict on both issues for the plaintiff, and therefore we direct a venire de novo.

Judgment, that plaintiff's exception is allowed, and a venire de novo awarded.

#### ERRORS FROM THE QUEEN'S BENCH.

Wednesday, May 14.

**THE SOUTH-EASTERN RAILWAY COMPANY v. THE QUEEN.**—Error upon a judgment of the Q. B. awarding a permanent injunction, requiring the company to carry coaches highway over their railway by means of a bridge, in the case of *Channell, Serjt.* with him, for the plaintiff in the case of *Needham (Raymond with him)*, contra. *Cur. adv. vult.*

**HENDERSON v. EASON.**—Error upon a judgment of the Q. B. awarding an account against the defendant, who was one of two tenants in common against the other, *Watson (Cleasby with him)*, for the plaintiff in the case of *Channell, Serjt.* (*Borrow with him*), contra.

Adjourned to sittings after next Term.

#### INSOLVENT COURT.

Reported by DAVID CATO MAURER, Esq. of the Middle Temple, Barrister-at-Law.

Friday, May 9.

(Before Mr. Commissioner LAW.)

Re RICHARD BRITNELL.

Friendly arrest—Fictitious debt.

Where, upon a friendly arrest, the debt upon which the insolvent is arrested is fictitious, and the account between the parties for the purpose of the arrest, the Court has no jurisdiction.

Cooke opposed.

Nichols for insolvent.

Cooke submitted that there was a friendly arrest, and no debt. The insolvent admitted, in his examination, that the I O U upon which he was arrested was given for the purpose of the arrest.

Nichols said that the attorney seemed to have supposed, that because a friendly arrest where there was a debt might be no ground of opposition, a friendly arrest where there was no debt might also be sustained.

Mr. Commissioner LAW.—I have no jurisdiction. Petition dismissed.



## ROLLS COURT.

## Equity Courts.

## ROLLS COURT.

Reported by J. MAGAULAY, Esq. of the Inner Temple,  
Barrister-at-Law.

Jan. 27 and 28, and Feb. 8.

*Ex parte BAGGE, re THE NORTHERN COAL  
MINING COMPANY.*

*Joint Stock Company—Contributory—Winding-up  
Acts, 1848, 1849.*

The deed of partnership of a joint-stock company provided for the sale of shares, and for the transfer thereof in the manner and form therein particularly directed; and it also provided that the directors should, if they refused to accept as transferees or proprietors, the proposed purchaser, themselves purchase out of the partnership capital the shares so offered for sale, at a price to be determined, in manner and form as therein mentioned. The means of making the transfer according to the deed were not provided for by the directors till long after the establishment of the company. A proprietor of 1,000 shares, who had paid calls thereon, and received one dividend, sold 260 shares to the directors, but without observing the forms prescribed by the deed, the means of doing so, in fact, not existing at the time; and he afterwards sold the rest of his shares, and ceased to be a partner. The company existed for eight years after the sale of the 260 shares; but an order being made for winding-up its affairs under the Winding-up Acts, it was desired to place the proprietor in question on the list of contributories in respect of the 260 shares, on the ground of the invalidity of the transfer to the directors:

held, that the company, after having dealt with a shareholder, could not treat a transaction which their own irregularities had rendered it impossible to observe as a transaction void for defects in point of form, though those defects were not immaterial; and a motion for a reference back to the Master to review his report, finding the party not to be a contributory, was refused with costs, to be paid out of the estate.

The Northern Coal Mining Company was established by deed, bearing date the 1st of June, 1838, for the purposes of working coal mines, and for the produce thereof; and the deed of partnership was executed by several persons, who covenanted with each other to the effect stated, in the several clauses of the deed. Mr. William Bagge was one of the original promoters of the company, and he executed the deed as stated for 100 shares, and thereby became partner, and as such became entitled to and interested in the capital or joint-stock property and effects of the copartnership in proportion to the number of his shares. The shares were to be paid as called for by the directors under the provisions of the deed and the number of shares belonging to any proprietor was to be entered in a book, which the directors were to cause to be kept for that purpose, to be called the "Share Register Book," and the directors, when required so to do, were to cause to be delivered to every proprietor a certificate stating the number of shares held by each proprietor in the capital of the company, and the specific number of every such share. Any proprietor, before selling any share held by him, was to give notice of his intention to sell, and if the directors accepted the proposed purchaser, the shares sold were to be transferred to him in a form to be prescribed, and no person was to be admitted a proprietor unless approved by a board of directors; and if the directors declined to accept the person proposed as a proprietor, they were empowered, out of the capital of the company, and on behalf of the company, to purchase the shares mentioned in the notice at such price per share as should be equal to the aggregate average of the prices mentioned in the ten transfers of shares actually sold and registered in the transfer-register book of the copartnership next immediately preceding such purchase, and then all future liability of the previous proprietor was to cease. The deed contained a subsequent clause, whereby the directors were required to act in strict conformity with the rules thereby established in all cases thereby provided for, and in all cases or the time being not provided for, the directors were empowered to act in such manner as should appear to them best calculated to promote and increase the business and welfare of the company. The business of the company was commenced and carried on, but the provision in the deed, that a share register book should be kept, was wholly neglected for three years, and consequently no transfer of shares was or would be made in the formal and careful manner directed by the deed. Some books, however, the nature and effect of which were very imperfectly explained in the pleadings, were kept, and these contained some entries shewing who were, or might be entitled to shares at the time, when the entries were made, and shareholders, or persons who

## ROLLS COURT.

were entitled to be shareholders, instead of receiving certificates stating the number of shares held by them, and the specific number of every sub-share received, what were called scrip certificates, purporting that the holder thereof (no name being mentioned) was entitled to so many shares in the company, subject to the conditions indorsed thereon, and stating in the indorsement that the affairs of the company were to be under the controul of the directors, subject to the conditions of the deed of settlement.

Various calls were made upon persons holding scrip certificates claiming to be or to become proprietors, and two dividends were paid. Mr. Morgan, who was the first secretary of the company, stated in his evidence, that the scrip was required to be produced at the time of the payment of the dividend, and on the production of it and payment of the dividend the stamp was affixed. He further stated, that when a person produced scrip for payment, he, the secretary, looked into the books he had to see whether the person applying for payment was a proprietor; and on payment of the calls he also referred to the books, to see whether the parties paying them were proprietors of the number of shares upon which the calls were paid. Mr. Harrod, who became secretary about July 1841, in his evidence stated that the books had not previously been kept regularly; that however they did shew the quantity of scrip but not the number thereof; so that it did not appear how Mr. Morgan was able to ascertain from the books whether the holders of scrip who were not named in the certificates were or were not proprietors. But Mr. Harrod further stated that after he became secretary the books and papers of the company were searched with a view to ascertain who were the shareholders, and inquiries were made in every direction, and advertisements were published, calling upon the scrip-holders to bring in their scrip. The first share register book was begun to be made up about June 1843. The evidence upon the mode in which the names were entered was, according to Mr. Harrod's statement, thus:—The scrip was sent in by the holders or their solicitors, and whoever was the holder was registered as the proprietor, and a new certificate was then issued to the party who had brought in the scrip, and this new certificate was in the following form:—"These are to certify that [the person named] is a proprietor of [so many] shares in the Northern Coal Mining Company, being numbered [ ] to [ ], subject to the rules and regulations of the said company, as provided in the deed of settlement." And this form of certificate was followed by the date thereof, and the signatures of the secretary and directors. Such appearing to be the state of the case as to the registration of shares until the year 1842, the transactions as respected Mr. Bagge appeared to be as follows:—In 1838 he had executed the deed of settlement for 100 shares, and was entitled to, or interested in a share; that is, as would appear, an unallotted and undivided share of the capital of the company, in proportion to that number of shares. At the end of a year after the date of the deed no shares had been in any manner allotted to Mr. Bagge; but his rights and liabilities rested on the covenants in the deed alone. In June and September he applied for certificates, but there was at that time no share register book, and no allotment of shares was made to him; and there being no share register book, and no proper number attached to each share, there could be no such certificates as by the 12th clause of the deed the directors were, when required, to cause to be delivered to the proprietors. At that time, and for long afterwards, only scrip certificates were delivered, certifying that the holder [not named] was entitled to shares. Mr. Bagge received such certificates for 400 shares on the 13th of June, and for 600 shares more on the 12th of September, 1839. He continued for a year, or thereabouts, to be the holder of these certificates, and in respect of the shares comprised therein, he paid a certain number of calls, and received one dividend. In August, 1840, a fourth call having become payable, he wished to part with some of his shares, and through the medium of Mr. Seppings he proposed to the company, or to the directors, to return to them a certain amount of the shares which had been granted to him; and his proposal was complied with as to 260 shares, part of his 1,000 shares. The operation was effected, or intended to be effected, by means of a purchase made by the company of 260 shares from Mr. Bagge for 2,860*l.* the amount of three calls paid, and 1,060*l.* the amount of the fourth call then due, making 3,920*l.* The scrip for the 260 shares was thereupon given back to the company. The transaction was entered in the journal book of the company, under the head of shares bought in the market on the 29th of September, 1840, and in the book called the Share Book, the 260 shares are entered as bought back by the company. These transactions, relating to the 260 shares, and the sale of 55 shares by Mr. Bagge to a Mr. Webber, were previous to the formation of any share register book,

## ROLLS COURT.

and to the issuing of any certificates, such as those which are described in clause 12 of the deed. Mr. Bagge had remaining in his possession scrip certificates for 685 shares at the time when the scrip was called in (in 1841), for the purpose of ascertaining who were the holders, and for the purpose of forming a share register book; and in 1842 he became a duly registered holder of the 685 shares, and proper certificates were delivered to him of his being the holder of those shares. Of these 685 he afterwards disposed, and no question was on this occasion raised either as to the 685 registered shares or as to the 55 shares which were sold to Mr. Webber. In June 1842, Mr. Bagge was memorialised as a proprietor under the 5 & 6 Vict. c. xxi. and on the 19th of January, 1843, he was memorialised as having ceased to be a proprietor, before which time it would consequently appear all his registered shares had been disposed of.

The company having got into difficulties, an order was made under the Winding-up Acts, referring it to the Master to wind up the affairs of the company. The Master, in settling the list of parties liable as shareholders to contribute to the payment of the company's debts and liabilities, held, that Mr. Bagge was not subject to any liability, or to be considered as a contributory in respect of the 260 shares sold back to the company in September 1840. This conclusion to which the Master had come not being satisfactory to the official manager for winding up the company, notice of motion to discharge the order so made by the Master, or that it might be referred back to the Master to review his report was served by him, and the motion now came on to be heard.

Turner and Daniel for the motion, contended that the directors could not purchase from Mr. Bagge shares held by him in the company of which he was not the complete owner, and as to which he had never been registered; and that a shareholder could not determine his liabilities by a sale of his shares to the company, in a form not authorized by the deed of settlement. Mr. Bagge had paid calls, and therefore had a right to sue, and though the company's acts did not say that those not memorialised, were not liable *inter se*, the memorial of having ceased to be a shareholder could not determine any existing liability. They cited *Ex parte Morgan*, 1 Macn. & G. 225; *Ex parte White*, 1 De G. & Sm. 157; *Ex parte Stanhope*, 19 L. J. (N.S.) 389, Ch.

R. Palmer and Kenyon, contra, contended, that as Mr. Bagge had not concurred in the company's going on, with a knowledge of a partial subscription of the share list, he was not bound. As to the shares sold, he was in the situation of never having been a proprietor; but even suppose he was not as to the 260 shares in question, the directors were empowered to purchase them, and by doing so, they relieved the holder from all further liability. The formalities, indeed, were not complied with, nor could they, for there was no share register list, nor other document of title, except scrip certificates, till the year 1842. The want of a formal transfer is therefore immaterial, more especially as the directors, under their general powers, had a discretion as to the management of the company. The Act of Parliament makes the memorial of ceasing to be a partner conclusive against all the world as to that point, and, supposing an irregularity to have taken place, it was waived by the acquiescence of the directors of the company. Besides the company was in a flourishing condition at the time of the sale, and the shares were therefore at a premium; and the company continued for eight years afterwards, and then failed through extravagance and negligence. Every shareholder must be considered to have had notice of the transaction, and they should have impeached it long since; and no company could carry on business if their transactions were allowed to be impeached at any time. They cited *Taylor v. Hughes*, 2 Jon. & L. 24; *Walford v. Adie*, 5 Hare, 112; *Crellin v. Brook*, 14 Me. & W. 11; *Geddes v. Wallace*, 2 Bligh, 270; *Const v. Harris*, Turn. & R. 496; *Barnes v. Parnell*, 2 H. L. Cas. 497, 522; *Ex parte Beresford*, 2 M. & G. 197; *Ex parte Cockburn*, 20 L. J. (N.S.) 137, Ch.

Turner, in reply, referred to *Jackson v. Cocker*, 4 Beav. 59; *Blundell v. Winsor*, 8 Sim. 601; *Harrison v. Heathorn*, 6 Man. & Gr. 81.

Saturday, Feb. 8.—THE MASTER OF THE ROLLS. —This is a motion made by the official manager of the Northern Coal Mining Company, to discharge an order made by the Master, who held that William Bagge was discharged from liability in respect of 260 shares purchased by the company from Mr. Bagge. The case is brought before me in such a manner, and with such evidence, that I confess I now doubt, as I did at the hearing of the motion, whether I have understood as correctly as I ought the facts of the case, and I desire that the statement may be considered as open to the observation and correction of the parties. [Here his Lordship stated the facts of the case at length, and as to the form of certificate observed]—Here, then, we have a certificate answering the directions contained in the

## V. C. KNIGHT BRUCE'S COURT.

clause of the deed which directs these certificates to be given of the number of shares held by the proprietors, and containing the number of each share specifically. To that form of certificate follows the date of the certificate, and the signatures of the secretary and directors. And as to the effect of holding the certificates, paying the calls, and receiving a dividend, his Lordship further observed:—Here, then, was a member of the company who had executed the deed, paid calls, and received a dividend, and there was no doubt of his being subject to some liability. His Lordship then proceeded:—The Master has held that Mr. Bagge is not subject to any liability, or to be considered as a contributory in respect of the 260 shares sold back to the company in September, 1840. In support of the motion made by the official manager to discharge the Master's order, it is alleged that the sale of the 260 shares to the company was altogether void, because it was not conducted in the manner pointed out by the 25th clause of the deed of settlement, and that consequently Mr. Bagge ought now, and after the lapse of ten years, to be considered as the owner of the same shares. It is true that the purchase by the company was not made according to the specific directions contained in the deed, neither could it have been so at that time, for at that time there was no share-register book,—the shares had no proper number,—there had not been any certificate delivered to any proprietor stating the number of shares held by him, and the specific number of every such share. Now, I am of opinion that the scrip certificates were not the certificates meant by the 12th clause of the deed of settlement; and then the question became whether the transaction such as it was was not valid,—whether the scrip holders could not assign or alienate their scrip shares by delivery of the certificates or otherwise, even to the directors or to the company itself. The company now making this claim against a person alleged to be a shareholder, ought to be able to shew that their business was so conducted that individual shareholders dealing with them could act in the manner directed by the deed. Having neglected to keep a share register-book,—not having delivered out any certificate of the shares held by the shareholders, as directed by the deed,—having afterwards dealt with a holder of scrip as a shareholder for the purpose of purchasing his shares,—having bought the shares mentioned or referred to in the scrip certificates,—and having afterwards treated the same person as having ceased to be a proprietor—I think that they are not entitled to treat the transaction as void, merely because there had not been an observance of those forms which their own irregularity and neglect had made it impossible to observe. I am far from thinking that the forms were in themselves immaterial. I presume that they were meant, and they were, to some extent at least, calculated to protect the company against fraudulent and collusive purchases from shareholders; but I think that the regulations had reference to a state of things which, in consequence of the neglect of the directors, did not exist, and after the decisions which have been made on the subject of scrip shares as inalienable even to the company itself, in any ordinary mode of transfer. I am therefore of opinion that the motion must be refused with costs, which must be paid out of the estate.

**R. Palmer.**—The subject of costs was before Lord Cottenham, who said that, by an omission of the Legislature, the Court was so situated that however justice might require that costs should be paid at all events, yet the Act of Parliament disabled the Court from giving them, except out of the estate.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. B. ALFORD, Esq. of the Middle Temple,  
Barrister-at-Law.

Saturday, Jan. 11.

POTTS v. THE THAMES HAVEN, DOCK, AND  
RAILWAY COMPANY.

Practice—Amendment of claim.

Claim ordered to be amended after it had been set down for hearing.

This was a claim for specific performance, and had been set down for hearing.

Hallett now moved for leave to amend the claim. A claim was set down almost immediately, and therefore, if it could not be amended after that step had been taken, it would very seldom be amended at all.

The VICE-CHANCELLOR inquired how the defendant would be made aware of the amendment?

Hallett replied that notice should be given.

The VICE-CHANCELLOR then directed that the usual formalities adopted in orders for the amendment of bills should be observed and made the order.

Dec. 16 and 17, 1850, and Jan. 14, 1851.

MORGAN v. MORGAN.

Will—Construction—Contingent legacies—Accumulations—Thellusson's Act.

## V. C. KNIGHT BRUCE'S COURT.

A. by her will gave specific legacies to B. and directed her executors to pay over to C. and D. (B.'s daughters) 5,000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of A.'s death, and gave to her executors all the residue of her property in trust for E. for life, and after her death to be equally divided between F., G. and H. A. died in 1825, and the executors set apart stock to answer the legacies of 5,000*l.* and accumulated the dividends. B. died in 1838; D. died in 1849 without having been married; the twenty-one years from A.'s death expired in 1846; C. was living and unmarried.

Held, 1st, that the legacies of 5,000*l.* were contingent on the marriage of C. & D.; secondly, that the accumulations on D.'s legacy between the death of the testatrix and the death of E. the tenant for life, belonged to E.'s estate; and, thirdly, that the case was within the operation of the Thellusson Act, although there was no express direction to accumulate.

The testatrix, in this case, by her will, dated the 22nd of May, 1825, after making certain specific bequests to her sister Sarah Gyles, proceeded as follows:—"I appoint my brothers Thomas Morgan and Francis Morgan, and my bankers Sir Srope B. Morland, Bart. and Sir George Duckett, Bart., my executors and trustees of all my money in the funds or elsewhere, to pay over to my sister Sarah Gyles's two daughters, Frances Sarah Gyles and Georgina Anna Gyles, 5,000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of my death. I give to my brother Thomas Morgan 1,000*l.* India stock, standing in my name, and I give to my four executors in trust all the rest of my funded property, or elsewhere, to pay my sister Harriet Hanham the dividends quarterly, independent of her husband, for her natural life; and after her death the whole to be equally divided between the grandchildren of my late father James Morgan, to be made over to such as are of age when my sister Harriet dies, and the interest of the minors to be laid out in the Three per Cents. till such time as they have attained the age of 21." The testatrix died on the same 22nd of May, 1825, Mrs. Gyles being then a widow, and her daughters Frances Sarah and Georgina Anna being infants. To answer the two legacies of 5,000*l.* the executors set apart stock, and accumulated the dividends. On the 22nd of February, 1838, Harriet Hanham died, and on the 12th of April, 1849, Georgina Anna Gyles died without ever having been married. The period of twenty-one years from the testatrix's death expired on the 22nd of May, 1846. Frances Sarah Gyles was living and unmarried. The present suit was instituted by some of the residuary legatees for the purpose of having the estate administered under the direction of the Court. The cause coming on to be heard several questions were raised, the first of which was whether the two legacies of 5,000*l.* each had vested.

Russell and Goldmid, for the plaintiffs, contended that the legacies had not vested, and they cited *Garbut v. Hilton*, 1 Atk. 581; *Atkins v. Hiccocks*, 1 Atk. 500; *Batford v. Kibbell*, 3 Ves. 363; *Vawdry v. Geddes*, 1 R. & M. 203; *Taylor v. Bacon*, 8 Sim. 100; and *Watson v. Hayes*, 5 M. & C. 125.

Wigram and Cotton, for Miss F. S. Gyles, argued that the legacies had vested, and referred to *Booth v. Booth*, 4 Ves. 399; *Branstrom v. Wilkinson*, 7 Ves. 421; and *Saunders v. Vautier*, Cr. & Ph. 240; *Vize v. Stoney*, 1 Drur. & War. 337; and *Greet v. Greet*, 5 Bos. 123.

Rolt, Wickens, R. Palmer, and Fellows, for other parties.

The VICE-CHANCELLOR said that the testatrix had a right to say that the legatees should not take either interest or principal unless they married, and he thought that she had said so with sufficient distinctness. The language was the same as if she had said neither shall have anything unless she marries.

The next question was, whether the dividends of the stock set apart to answer the legacy to Georgina Anna Gyles, and which accrued between the death of the testatrix and the death of Mrs. Hanham, the tenant for life, belonged to Mrs. Hanham's estate, or passed to the residuary legatees in remainder.

Russell and Goldmid contended that the whole fund, principal and interest, belonged to the residuary legatees in remainder.

R. Palmer and Fellows, for Mrs. Hanham's representatives, contra.

The cases of *Crawley v. Crawley*, 7 Sim. 427, and *O'Neill v. Lucas*, were cited on this point.

The VICE-CHANCELLOR.—A testatrix gives contingent legacies, not without interest, but with the interest; a gift, however, both of principal and interest to take effect on the happening of a future uncertain event. She does that, and there she leaves it. She gives the residue of her personal estate to a certain person for life, and, after the death of that person, to others. The executors set apart the

legacies, because the event was, humanly speaking, possible to happen at the death of the tenant for life. No person could tell whether it would happen or not. They appropriated the legacies, and invest the interest from time to time; and, after a certain number of years, the tenant becomes impossible. At the mean time, the tenant for life of the residue died. The question is, whether the tenant for life during a portion of the period of accumulation, lose all the income of the legacies this accretion for the purpose. The accumulation was not done with a view to the residue or the interest, which should bear, but in reference to an event which was sons claiming under the will considered public; having become impossible, at a certain time at the death of the tenant for life, it would be unjust to make the tenant for life suffer loss by being withdrawn from her that which, if matters had been foreseen, would not have been withdrawn. The estate must be compensated. She must have had substantially which she would have had if it had been known to be impossible at the time of her death. The principle of my decision is, that Hanham's estate must have all that she would have had if Miss Gyles had died in the testatrix's life.

A third question was whether the period of accumulation of the legacy of 5,000*l.* to Miss F. S. Gyles terminated on the 22nd of May, 1846 (twenty-one years from the testatrix's death), or whether accumulation was to continue until the marriage of Miss F. S. Gyles.

Russell and Goldmid argued that the case was within the operation of the Thellusson Act, and that therefore the accumulation must cease.

Wigram and Cotton said, that as there was no express direction to accumulate, the Thellusson Act did not apply.

The cases of *Shaw v. Rhodes*, 1 Myl. & C. 25; *McDonnell v. Bryce*, 2 Keen, 276; and *Ellen v. Good*, 14 Sim. 165, were cited.

The VICE-CHANCELLOR said that, subject to his observation, he thought that this case was within the Act, because the accumulation was the inevitable result of what the testatrix had directed. The accumulations having proceeded up to the expiration of 21 years, the income of the fund after the 21 years became a part of the residue, until Miss Gyles's marriage or death. The observation to which he had alluded was this, might not the legacy in question be a portion within the meaning of the Thellusson Act? He wished to call the attention of counsel to this point, and to have it argued.

Tuesday, Jan. 14.—This case came on again for argument on the point mentioned by his Honour at the last hearing, viz. whether the legacy of 5,000*l.* to Miss Gyles was a portion within the meaning of the Thellusson Act.

Russell and Goldmid appeared for the plaintiff.

Wigram and Cotton for Miss Gyles.

The 2nd section of the Act in question (3 & 4 Geo. 3. c. 98) provides that nothing in the Act "shall extend to any provision for payment of debts of any grantor, settlor, or creditor, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if the Act had not passed."

The following authorities were cited: *Shaw v. Rhodes*, 1 Myl. & Cr. 135; *Evans v. Hillier*, 1 Cr. & Fin. 114; *Beech v. Earl St. Vincent*, 19 L. J. N. S. Ch. 130.

The VICE-CHANCELLOR said that, independently of the case, in the House of Lords, of *Evans v. Hillier*, he should have thought this case one of great doubt and difficulty on the point which had just been argued, and for this reason mainly, that what was given to the mother, Mrs. Gyles, consisted entirely of specific legacies. Mrs. Gyles was a specific legatee, and nothing more; whereas these ladies were either mere general legatees, or if not mere general legatees, so legatees that the gift to them could neither affect nor be affected by the clear gift to the mother. Independently of the difficulty thus created, or thus introduced, there was the case in the House of Lords, to which he had just referred, and he could not take upon himself to ascribe that decision to the mere point of illegitimacy, whether that was accurately or inaccurately supposed to exist in the case. If the case of *Evans v. Hillier* was decided by the House of Lords on the point of illegitimacy, it afforded an additional reason, not an unanswerable reason, against deciding in favour of the validity of this bequest as to the accumulations, in favour of which therefore he could not venture to determine. He must declare the bequest to be affected by the Act.

V. C. LORD CRANWORTH'S COURT.

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**V. C. LORD CRANWORTH'S COURT.**  
Reported by W. H. BARNES, Esq. of Lincoln's Inn, Barrister-at-Law.

Jan. 10, 11, and 12.

UTTERMARE, v. STEVENS.

*Statute of Limitations—3 & 4 Wm. 4, c. 27—Mortgage and mortgagee—Right to redeem after twenty years—Account with rests.*

*The title of a mortgagee to the mortgage-money, will prima facie pass to his executor;*

*But if the executor permit the legatee of the mortgagee to take possession and enjoy the fruit of the mortgage, in that case the legatee will thereby become the party entitled within the meaning of the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 28, to be the party claiming under the mortgagee.*

*A letter from a party, representing himself as deriving title under the mortgagee, admitting the right of the mortgagee, or his representative, to redeem a mortgage, and written within the twenty years:*

*Held, to be an acknowledgment in writing within the meaning of the statute.*

*An account against a mortgagee in possession will not be ordered to be taken with rests, unless it satisfactorily appears that he took possession of the mortgaged property when there was no arrear, or no material arrear, of interest due, or that the annual rents greatly exceeded the annual interest on the mortgage-money.*

*Scilicet, that if the Master, in taking the account, shall find that the annual rental received greatly exceeded the interest, the Court may, on the order on further directions, direct the account to be again taken with rests, from the time when the principal and interest was thereby paid off.*

*This was a suit instituted against the representative of a mortgagee for the redemption of the mortgage after twenty years' possession, and the facts are so well recapitulated in the judgment, that it has been thought unnecessary further to state them.*

*Stuart and Toller, for the plaintiffs.*

*Bentley and Rogers, for the defendants.*

*Ellis, for the personal representative of the mortgagee.*

JUDGMENT.

THE VICE-CHANCELLOR.—The plaintiffs in this case are parties deriving title under the will of a gentleman named James Harvey Pierce, to his real estates, and the object of the suit is to redeem an old mortgage made by him to Wm. Guise Stevens, so long ago as the year 1810. At the time of the mortgage Stevens was the solicitor of Pierce, and he also acted as his agent in the receipt of the rents. Such being the relation subsisting between the parties by indentures of lease and release, dated the 12th and 13th of June, 1810, Pierce, in consideration of the sum of 500*l.* then advanced to him by way of loan, conveyed to Stevens and his heirs certain houses in Hemmings-street, and other adjoining streets, in the parish of St. George in the East, in the county of Middlesex, by way of mortgage, for securing the sum of 500*l.* so advanced, with interest at 5 per cent. By a deed of 27th August, 1811, Pierce charged the same premises with the payment of a further sum of 500*l.* therein stated to have been then advanced and lent; and on the 6th July, 1815, he made a further charge of 150*l.* in consideration of a further loan to that amount, making the whole sum charged amount to 1,150*l.* With the concurrence of Stevens, a part of the mortgage property was sold in 1816, and the purchase money, or a part of it, was then paid to Stevens towards the liquidation of his mortgage debts. On the 27th of June, 1816, Pierce made a general charge on a public-house in Wapping, called the "Union," with a landing-place and stairs adjoining, as well of the sums then already secured by the former deeds, as also of all other advances which Stevens might make. Pierce, by his will dated 28th March, 1818, devised his real estates to his executors, James Miller, John Miller, Thomas Gisborne, and Charles Peers, and their heirs, on certain trusts for the benefit of his children, and of the children they might have, and he died on the 24th April, 1818, leaving Henry Miller Pierce his eldest son and heir. Chas. Peers alone proved the will, and the other three executors and trustees, James Miller, John Miller, and Thos. Gisborne, executed a deed of disclaimer, renouncing the devise made to them by the will. Chas. Peers, who, it should be noticed, was himself one of the parties beneficially interested under the will, having married a daughter of the testator, alone acted in the trust; and in 1845 the plaintiffs, Thos. Banfield Uttermare, Thos. Bagshot, and Geo. Stuckey, were under a decree of this Court appointed new trustees of Pierce's will in the place of Peers; and by a deed of 28th July, 1845, Peers conveyed all the trust property there remaining vested in him, including the equity of redemption of the mortgaged premises, to the new trustees and their heirs, on the trusts of the will. Such is the state of the title of

the mortgage, Wm. G. Stevens, the mortgagee, died on the 3rd of June, 1818, intestate as to the legal fee of the mortgaged premises, having duly made a will, by which he appointed Wm. Beckford Davenhill and Mr. Hogarth his executors, and gave all his residuary personal estate to Eleanor Esther Elderton. Davenhill alone proved the will, and Hogarth renounced probate. The legal fee in the mortgaged premises descended on Mr. Stevens, brother and heir of Wm. G. Stevens; and soon after the death of the testator, Wm. G. Stevens, Francis Stevens, another brother, married B. E. Elderton. The money due on the mortgage does not appear to have been required for discharging any of the debts or legacies of the testator William G. Stevens, so that Eleanor Esther Elderton, and afterwards Francis Stevens, in her right, became entitled to it beneficially. In 1823 Francis Stevens being thus beneficially entitled to the mortgage money, took possession of the property comprised in the securities, and which had not been sold; and he continued in possession up to the year 1838, when a commission of lunacy issued against him, under which he was duly found to be a lunatic, and his brother John Stevens and Samuel Stevens were appointed committees of his estate, and they as such committees have been in possession ever since. Eleanor Esther, the wife of the lunatic, died some years since, and on the 23rd of November, 1847, letters of administration of her personal estate and effects were granted to John and Samuel Stevens, the committees, for the use and benefit of the lunatic. The present bill was filed on the 19th October, 1846, by the three trustees Uttermare, Bagshot, and Stuckey together, with all the parties interested as children or grandchildren in the real estate of Pierce the mortgagee, or as parties claiming through such children or grandchildren, except Charles Peers. The defendants are Francis Stevens the lunatic and his committees and also Charles Peers. The object of the bill is to redeem the mortgage created in 1810, with the further charges afterwards created thereon; and for this purpose, after stating among other things the title of the plaintiffs to the equity of redemption, and the title of the defendants to the mortgages, and stating that the mortgagees had long been in possession of the property, it prays that an account may be taken of what, if anything, is justly due to the defendants Francis Stevens, John Stevens, and Samuel Stevens, or any of them (Francis and John were the committees, and Samuel the party beneficially entitled), for principal and interest on the said mortgage sections, or any of them, that a proper account may be decreed to be taken of the rents of the mortgaged premises, comprised in the several mortgage securities received by, or come to, the hands of William George Stevens in his lifetime, of Davenhill his executor in his lifetime, and Samuel Stevens, or any of them, by the order or for the use of the parties, or which, but for their wilful default, might have been received; that the like account may be decreed to be taken of what moneys were respectively, actually, and *bona fide*, advanced at interest by William G. Stevens, to John Harvey Pierce on the security of the mortgage; a like account of all moneys received by, and paid by W. G. Stevens, on account of Pierce and of all other dealings and transactions between the parties; that the bill of costs of Stevens may be properly taxed, that the balance due on either side may be paid, and proper inquiries directed to ascertain under what circumstances the mortgage securities were given and executed, what were the considerations for the same, what were the real and actual amounts or balances, if any, exclusive of bills of costs due by or to Pierce to or from W. G. Stevens, at the dates of said mortgage securities; that it may be decreed for what amount the mortgage securities ought to stand as security, and that annual rests may be ordered to be made in taking such mortgage accounts as aforesaid, and that the amount beyond the interest due thereon in respect of the mortgage debts may be ordered to be applied in reduction of the principal money from time to time; and that, if necessary, the pretended contract for sale of the remaining mortgaged premises may be declared not to be binding, and that the parties may deliver up all title deeds. The defendants, the committees, by their answer, admit the mortgage, and also admit their possession of the mortgaged property, so that *prima facie* the right of the plaintiffs to redeem is clear; but the defendants insist that all right of redemption is gone, and that on two grounds: first, by lapse of time; then, secondly, by reason of an arrangement which they say was come to between the trustees in 1835, and Francis Stevens, then mortgagee in possession, under which they say it was agreed that Francis Stevens should become absolute owner of the property, and accept it in lieu of all the money then due on the mortgages. The first objection of the defendants is grounded on the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 28. By that section it is enacted, "that when a mortgagee shall have obtained the possession or receipt of the profits of any land comprised in his mortgage, the mortgagee or any person claiming through him shall not

being a suit to redeem the mortgage but within twenty years next after the time when the mortgagee shall have obtained such possession, or receipt, unless in the meantime an acknowledgment of the title of the mortgagee, or his right to redeem shall have been given to the mortgagee or some persons claiming his estate, or to the agent of such mortgagee, or other person in writing, signed by the mortgagee or the person claiming through him. And where there is more than one mortgagee or person claiming through the mortgagee, then such acknowledgment made to any one shall be as effectual as if made to all." Now here the original mortgage was in 1810; the mortgagee died in 1818, and the mortgagee in June 1818; and in 1823, possession of the mortgaged premises was taken by the parties deriving title under the original mortgage. The bill in this case was not filed till 1846, twenty-three years after possession taken by the mortgagee, so that the right of those claiming under the mortgage to redeem was certainly barred, unless within twenty years next before the institution of the suit; there was such an acknowledgment of their right to redeem, as is required by the section of the Act to which I have referred. The first question, therefore, for decision is, whether there was such an acknowledgment. I think there was, and without discussing whether any of the other documents in proof in the cause would have been sufficient for the purpose, I put my hand on the letter of Francis Stevens, addressed to Mr. Peers, the only acting executor and devisee in trust of the mortgagee, and also one of the parties having a beneficial interest in the equity of redemption of the mortgaged property, and which letter bears date the 8th day of February, 1831, and was, therefore, far within the required period of twenty years from the institution of the suit, being, in truth, not quite twenty years from the present time. That letter was written in answer to an application from Peers, asking Stevens to produce certain deeds relating to the property mortgaged. Peers's letter is as follows: it bears the date of February, 1831. It is addressed from Peers to Francis Stevens:—"Dear Sir,—I understood that Mr. Lye (who was Francis Stevens's agent) held Pierce's deeds, &c. and as he was ill, and could not attend the office, when I called, I left a memorandum, requesting that you might be applied to for direction as to Mr. Lye, to exhibit the principal deed, Southwood to Harvey, 1736, and the probates to Mr. Nelson," and so on, asking, in short, for the production of several of the deeds. In answer to this letter Stevens writes as follows. This is from Stevens to Peers, dated the 8th day of February:—"Dear Sir,—Your letter of the 7th inst. I received at the instant of my leaving Sidmouth for this place, consequently I had no opportunity of ascertaining whether the deeds you mention were in my possession or not. I shall always entertain a feeling of consideration and respect for the late Mr. Pierce and his family; but you will allow me to say that the present is a pure question of business, and I have uniformly considered it imperative on the part of a mortgagee never to disclose his title-deeds, except under an actual arrangement for a liquidation of such securities; thereby, I shall therefore be ready to attend at any time to adjust our account, and to arrange with you for its settlement, either by receiving the amount due, or by taking a release of the equity of redemption and paying the difference. This, I apprehend, will be the correct course on your part, and certainly the only one to enable you to obtain the production of the title-deeds." Now, I consider this to be in all respects an acknowledgment of the right of the mortgagees to redeem. The writer speaks of himself as mortgagee; and, sustaining that character, he insists that he ought not to be called on to produce his deeds unless under an arrangement for a liquidation of his securities. He offers to adjust the accounts, and to settle it either by receiving the amount due, or by taking a release of the equity of redemption and paying the difference. This letter was addressed to Peers, one of the parties entitled to redeem; and the only question raised as to its being or not being a due compliance with the statute was on the point whether Stevens, the writer, was a person claiming through the mortgagee within the meaning of the statute. On the part of the defendants it was argued that the mortgagees, or parties claiming through Wm. G. Stevens or his heir, on whom the legal fee in the mortgaged property had descended, and Wm. Beckford Davenhill, his only acting executor. Possession, it was said, was taken, not by Francis Stevens, but by John Stevens and Davenhill, and the rents were received for them, and not for Francis Stevens; and so a notice by Francis was a notice not given by a party contemplated by the statute, as a party claiming through a mortgagee. But I think this argument as altogether unfounded. In the present place, the principal defendant here is Francis Stevens himself, or, which is the same thing, the committees. Now, he certainly represented himself as Charles Peers, the devisee of Pierce, the mortgagee, as being the mortgagee, and on the faith of that



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representation Peers dealt with him. It surely, therefore, cannot now be in his mouth to say that he does not and never did fill the character which he said he filled. But I should be sorry to found my judgment on this narrow ground, thinking as I do that, independently of this argument derived from his conduct, he clearly was a party claiming under William G. Stevens, the original mortgagee, within the true intent and meaning of the statute 2 & 3 Wm. 4, c. 27, s. 28. By the first section of the statute a legatee and a husband are expressly enumerated among the class of persons who are said to claim through or under another. Now, here the interest of Francis Stevens arose from his being the husband of the residuary legatee. It does not indeed follow that every legatee of a mortgagee will be a party who, within the true intent and meaning of the statute, claims under the mortgagee. *Prima facie* the title of the mortgagee to the mortgage-money will pass to the executors. But if the executors permit the legatee of the mortgagee to take possession, and enjoy the fruits of the mortgage, then the legatee may thereby become the party entitled within the meaning of the statute. And this was clearly the case here. For though on formal occasions the name of Davenhill, the executor of John Stevens the heir, was used, yet that was plainly matter of mere form. The accounts made out and delivered to Peers in 1820 and 1833, were both made out by Stevens, without, so far as appears, their having ever been submitted to or approved by Davenhill; nor is there any thing to shew that he knew even of their existence. The rents of the mortgaged property were all received by Lys, the London agent of Francis Stevens, and were accounted for to him alone, and not to Davenhill. When a lease of part of the mortgaged property was made to a new tenant in 1832, the demising parties were Charles Peers, as representing the equity of redemption, and Francis Stevens, as representing the mortgagee. In short, Francis Stevens all along acted as the party who had acquired a title to the mortgagee; and I must infer, as a matter of fact, that this was all with the assent of the executors, and under these circumstances I think that he correctly represented himself as filling the character of mortgagee; and so that his letter of the 8th of February, 1831, was an acknowledgment in writing of the right of the mortgagee to redeem, signed by the party claiming through the original mortgagee, and given to a party claiming under the mortgagee. It follows that the statute does not apply to this case, and therefore the plaintiffs are entitled to redeem. But then it was contended secondly, that all right to redeem was gone by reason of a contract entered into in 1835 between Peers, the acting trustees under the will of Pierce, the mortgagor, and Francis Stevens, the mortgagee, whereby the latter agreed to take, and the former agreed to give, a release of the equity of redemption in full discharge of the balance then due. And no doubt if such a transaction really took place, it would afford a complete defence to the present claim. But the evidence does not, when clearly examined, shew that any such agreement was ever finally come to. It is clearly proved that in January, 1833, Francis Stevens, who had then been nearly ten years in possession as mortgagee, rendered an account to Peers, made up to the end of 1832, in which he made out a sum of 1,060*l.* to be still due on the securities. I think it may be taken as established further, that in 1835 he rendered another account, whereby he represented the sum due to be 1,067*l.* Taking this to be so, the facts tending to prove the agreement relied on by the defendants are these: by a letter of the 1st of January, 1835, Peers asked Francis Stevens if he would be willing to take an absolute conveyance of the mortgaged property on a valuation, to which proposition I think it pretty clear that Stevens assented, provided only the account he had delivered should be taken to be correct, and the amount of it should be allowed wholly or in part discharge of the purchase-money, namely, of the purchase-money to be settled by a valuation. What passed during the greater part of that year does not appear, the negotiations having passed in great measure by personal interviews; but in the result Stevens certainly caused to be prepared the drafts of a conveyance from himself to Peers, and other necessary parties, together with the draft of a bond of indemnity from Peers, by way of guarantee against an annuity of 16*l.* payable during the life of one Lydia Waters, which, under an old will, was payable out of the mortgaged premises, together with other property. Both these drafts had certainly been submitted to Peers, as he appears to have made several alterations in them, and in particular in the draft of the conveyance as prepared by Stevens, the amount due on the mortgage and which is the consideration for the release, is stated 1,067*l.*; but this sum is struck out by Peers, with a note in the margin, stating that he had not yet had time to examine the account. Annexed to the draft of the bond of indemnity was a paper signed by Peers, in which he says he should not object to execute, but at the same time he suggested that on

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various grounds such a bond was not necessary. No date appears to this paper; but it must have been written before the 12th of August, 1835, for on that day we find a letter from Peers to Stevens, in which he says he has left the drafts in Lincoln's-inn-fields, namely, with the agents of Stevens, and he desires him to get the deeds engrossed and executed in the country, suggesting, that he might leave the consideration stated at the sum he had proposed, namely, 1,067*l.*; but, adding, that he would go through the accounts in a day or two, and if any error appeared, "we," namely, Peers and Stevens, "can put it right." Now, it appears to me clear on this, that there never was a final agreement come to with respect to the consideration for the release of the equity of redemption. If Peers bound himself to anything, it was not to release the equity of redemption in consideration of the balance due on the mortgage, as is represented by the answer, but to execute a release in consideration of a nominal sum of 1,067*l.* leaving it open to further discussion and arrangement what was the real sum due. So that if less than 1,067*l.* was due he was to receive, if more, he was to pay the balance. On any other hypothesis, the suggestion that he would look through the accounts, and that any error should be put to rights, would be unintelligible. It follows, that Peers and Stevens never came to the same agreement. Peers agreed, if to anything, to execute a release subject to a future settlement of the account. Stevens, on the other hand, meant to accept the release in discharge of the balance, whatever it might be; and that Stevens did not consider Peers as having bound himself to release in consideration of 1,067*l.* as an admitted balance, is greatly confirmed by the fact, that he did not, so far as appears, even proceed according to the letter of Peers, to get the deeds executed by the parties in the country. In this state of things, therefore, neither party was bound, and so it is unnecessary to consider whether, if Peers had agreed unconditionally to release the equity of redemption in consideration of the balance due on the mortgage, such agreement would or would not have been binding on the plaintiffs. I am, therefore, of opinion that neither of the grounds suggested to the defendants displace the *prima facie* right of the plaintiffs to redeem. The next question is, on what terms am I to decree a redemption? Mr. Bethell, for the plaintiffs, contended that I ought to direct the accounts with half-yearly rents from the very commencement of the mortgages, for that from the very beginning Wm. G. Stevens, the mortgagee, was in receipt of the rents, and was in the habit of rendering half-yearly accounts to Mr. Pierce, the mortgagor. But I think it a sufficient answer to this argument to say, that upon this evidence W. G. Stevens does not appear to me to have been in possession or receipt of the rents and profits as mortgagee at all. It is true that all the rents were in fact received by him, that is to say, they all passed through his hands, but merely as agent of Mr. Pierce, his principal. It was a mere accident that the same persons who stood to each other in the relation of mortgagor and mortgagee, also filled the characters of employer and employed in the collection of the rents. And all the early accounts shew that the balances due from W. G. Stevens on his rent account were treated as balances to be accounted for as money in his hands belonging to Pierce, and not as sums applicable to the liquidation of the mortgage. How far the documents shew the due appropriation of these balances is not the matter now to be decided. It is sufficient to say they satisfy me that W. G. Stevens never was in possession as mortgagee, and so that there is no pretence for directing any account with rents during his life-time. The same observation applies with respect to the period which elapsed between the death of Stevens in June 1818, and the year 1823, when Davenhill and John Stevens took possession, or rather, as I understand the effect of what took place, put Francis Stevens into possession. From that date, however, namely, from March or April, 1823, the rents were certainly received by Francis Stevens, not as agent or bailiff of the mortgagors, but on his own account as mortgagee; and the question is, whether under these circumstances I ought to direct the account to be taken with rents from that period. I think not. An account is not generally directed with rents against a mortgagee in possession, unless it appears either that he took possession when there was no arrear, or no material arrear of interest, or that the rents greatly exceed the interest. This, it must be admitted, is a very unsatisfactory ground to act upon. What is the ratio between the amount of rent and the amount of interest which ought to induce the Court to direct the rents? I find no principle or decision enabling me to answer this question. I confess that if the point were now to be decided for the first time, I should be much inclined to say that justice would be best answered by directing in all cases periodical rents corresponding with the ordinary time of receipt of rents, so that the excess of

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rent, if any, might always go in liquidation of the principal debt. But this certainly is not the rule of the Court, and I cannot say that in this case either there was no arrear of interest when possession was taken, or that the rents greatly exceeded the interest accruing due on the mortgages. But such a compassion throws no light whatever on the probability of there being or not being an arrear of interest unliquidated by the rents in a case where it is not shewn that the rents came to the hands of the mortgagee in such a manner as to be applicable to the discharge of the interest, and I can discover no ground for considering that either W. G. Stevens in his life-time, or his representatives after his decease, prior to 1823, received any rents as mortgagee, and so it becomes necessary to consider how far it would or would not be a legitimate inference that the rents, if so received, would have been more than sufficient to keep down the interest. With respect to the period subsequent to 1823, when the mortgagee must be considered to have been in possession, the only question is, whether rents are to be directed, on the ground that the rents so much exceeded the interest as to make such a deduction a matter of course, according to the ordinary practice of the Court. I think not. By a letter of Lys to Francis Stevens, dated the 8th of August, 1823, about the time when he took possession, the yearly rents of the three then remaining houses included in the mortgages were stated to be 21*l.*, 18*l.*, and 12*l.*, in all 51*l.*; and these are the rents for which Stevens accounts, as having come to his hands in the accounts rendered by him to Charles Peers, in January, 1833, except that the rent of 21*l.* appears to have been reduced in 1824 to 16*l.* 16*s.*, and the rent of 18*l.* to 14*l.*, so that the gross rental was 42*l.* 16*s.* Now the principal sum due, according to the representation of the mortgagor, was only 630*l.*, the interest on which would be 32*l.* 10*s.* The mortgagee represents it to have been much more, viz. that the principal sum due was 852*l.*, and so that the interest was 42*l.* 12*s.* But taking the account of the mortgagor to be correct, I cannot think that an excess of 10*l.* 6*s.* in the gross rental of three houses in Wapping, requiring of course a constant outlay for repairs and insurance, is such an excess as to warrant a direction to the Master to make rents in the accounts. I am aware, that in the last year of the account rendered, namely, the year 1832, the rental was increased by the addition of 16*l.* 5*s.*, for the Turk's Head public house, but that does not seem to me to vary the case. There does not, therefore, seem to me to be any reason for directing rents at all, nor for making any inquiry on the subject of the state of the accounts at the time when possession was taken. If, indeed, on the Master's report it shall appear that all principal and interest has been liquidated, it will still be open to the Court, if justice should seem to require it, to direct a further account, with rents from the time when the debt was paid off, as was done by Lord Lyndhurst when at the Rolls, in the case of *Wilson v. Metcalfe*, 1 Russ. 530; but I do not think fit to direct any prospective inquiry with reference to such contingency. Having thus stated my opinion, that the decree ought not to contain any special directions in favour of the plaintiffs, the mortgagee, it remains to be considered whether there ought to be any special directions in favour of the mortgagee. For the defendants it was contended that there ought, and that the mortgagors having in 1833 received an account from Francis Stevens, of his receipts and payments up to the end of 1832, from the time of his taking possession in 1823, or to be bound by that account. That having made no objection to it, he ought to be deemed to have acquiesced in its propriety. I do not at all dispute the proposition that where there are mutual dealings between parties which lead to the delivery of accounts from one party to the other, there the party receiving the accounts so delivered may, by mere silence, and by keeping the accounts without objection, be assumed, under the circumstances of the case, to have admitted their correctness; but such an inference never can be made where there are circumstances shewing that neither party understood any such recognition or adoption to have taken place. And here there clearly are such circumstances. The account was sent, not indeed to Mr. Peers himself, but to Mr. Broadmead, his solicitor, in January 1833, and on the 3rd of January, 1835, after Mr. Peers had opened the negotiation with Francis Stevens for selling to him the mortgage property at a valuation, Francis Stevens wrote to Mr. Peers as follows—"With regard to taking the mortgaged premises at a valuation, I should not be disinclined to do so, provided the accounts which I have forwarded to Mr. Broadmead, and to which there can be no reasonable objection, be allowed in part or in all of the purchase money." This letter shews that Stevens, though he represented with confidence that no objection could be made to his accounts, yet clearly did not understand that Peers had bound himself not to object to them. Peers wished to induce Stevens to become a pur-



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chaser, and Stevens says what amounts to this, "I shall have no objection to purchase, provided only you adopt as correct the account I delivered two years ago." This altogether negatives the notion that the account had been already adopted as correct, or that Stevens supposed it to have been so. The negotiation for the purchase continued all through the years 1835 and 1836, but was never completed; and in 1837 Francis Stevens became a lunatic. In the course of that negotiation Peers applied to Stevens for a continuation of the accounts; it was argued that this was an adoption of the former accounts. But this would, I think, be a very forced inference from what then passed—what was then in treaty was in truth a sort of compromise. Peers, as representing the mortgagees, said to Stevens the mortgagees what amounts to this, "Will you purchase the property comprised in your securities at a valuation?" to which Stevens replies in substance, "Yes, if you will accept my accounts, as I have made them out and taken them as correct;" to which Peers replies, "I have the accounts as you have made them out up to the end of 1832, send me the continuation of them." It would be most unfair to deduce from this an inference that Peers meant to say that under all circumstances, and whether the negotiation for the purchase was successful or not, he adopted the former account as correct; so that it is unnecessary to consider whether if Peers had unequivocally assented to and adopted the accounts delivered, that would have been binding on the plaintiffs. I am, therefore, of opinion that the accounts to be directed by the decree must be directed in the ordinary way, and without at all binding the plaintiffs by any of the accounts heretofore delivered. The only remaining point is as to the costs, and on that subject I think that so far as the costs have been occasioned by the defendants' resisting the plaintiffs' rights to redeem, those costs must all on them. Principle requires, as a general rule, that each party shall bear the costs which he occasions. Now, here the plaintiffs had a right to redeem; and on filing a bill to assert that right they are met by a defence denying it. That defence occasions great cost, and I see nothing to induce me to depart from the general rule, which throws in such a case on the defendants the costs of a defence which fails. The decree must, therefore, be the ordinary decree for a redemption against a mortgagee in possession, with so much of the costs to the hearing as the taxing officer shall find to have been occasioned by the defendants' disputing the right to redeem.

*Usual decree for redemption, with directions as to costs as above.*

Tuesday, May 13.

KEMP v. SOBER.

*Injunction—Covenant in lease.*

*A covenant contained the words, "that the lessee should not carry on any trade, business, or calling" on the premises in question:*

*Held, that keeping a school for young ladies was a calling within the terms of the restrictive covenant, and injunction granted from using the premises for such purpose.*

This was a motion for an injunction to restrain the defendant from carrying on, or permitting, or suffering a school to be carried on, at No. 23, Sussex-square, Kemp Town, Brighton, or from using the said house and premises in any manner, contrary to the covenant after-mentioned; and also from granting an under-lease to some other defendants, who had entered into an agreement for that purpose. From the bill it appeared that Mrs. F. M. Kemp, in 1847, was seised in fee of two houses in Sussex-square, numbered 22 and 23, and by an indenture of 28th Dec. 1847, between Mrs. Kemp and the defendant Mrs. Sober, these houses were conveyed absolutely to the defendant, Mrs. Sober. By an indenture of the same date, Mrs. Sober entered into a covenant with the plaintiff, which stipulated amongst other things, "that the said Ann Sober, her heirs or assigns, would not at any time thereafter alter, or suffer to be altered, the then present elevation of the said messuage or tenement (being No. 23), or put, or suffer to be put, any shop window in any part of the said messuage or tenement, or carry on any trade, business, or calling whatsoever in or upon any part of the said hereditaments and premises thereinbefore described, or otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses at Kemp Town aforesaid." And it was declared that such covenant should run with the land, &c. Mrs. Sober was still the owner of this house, and in January last the plaintiff first discovered that she had agreed to grant a lease of this house to two ladies of the name of Wilmshurst (mother and daughter), for the purpose of a school for ladies. The plaintiff finding this, gave notice to these ladies that such a school could not be permitted to be carried on, as being contrary to the covenant. In reply, a letter was written by the daughter, which stated that "she thought she should be able to satisfy the

agent of Mrs. Kemp that no annoyance should arise to her from the young ladies, and that the writer would enter into any arrangements that she could to prevent Mrs. K. from being in any way disturbed. That the number of pupils was small, and the plans were all conducted with the greatest order and regularity, quite as much as a private family could be." The plaintiff by her bill charged that the keeping such school would be a great annoyance, and a serious injury to her said house, and would considerably lessen its value. The affidavits in opposition to the motion admitted generally these statements. From them it appeared that T. Read Kemp, esq. had become the owner of the land upon which the houses of Kemp Town had been built; and although in his dealings with persons who had purchased the land and built houses thereon, he had taken from them similar covenants as the one in the present case, yet he having lived himself in this particular house, quitted it in 1838, and then let both these houses to one Mrs. Everard, who used and occupied the same for several years as a school for boys. Numerous houses in Kemp Town had also been used as schools and no interference had been made by Mr. T. R. Kemp in his lifetime.

*Temple and J. H. Taylor*, in support of the application for the injunction, contended that keeping a school was a clear breach of the covenant. That the keeping of a school was a calling, within the restrictive words of that covenant; and although other houses in Kemp Town might have been used for similar purposes, the plaintiff had a strict right to the benefit of this covenant. (*Dee dem. Bish v. Keating*, 1 Man. & S. 95.)

*Malins and Piggott*, in opposition, relied mainly on the circumstances attending the permission given by the original owner of the property to allow houses in Kemp Town to be used as schools, although he had taken from the purchasers or lessees similar covenants to the one in the present case. That the founder of the covenant by so doing had put his own construction upon that covenant, and that the case was precisely within the principle laid down by Lord Eldon, in the *Duke of Bedford's* case against the *British Museum*, 2 My. & K. 552. That no injunction would be granted where there was no injury, as in the present case (*Attorney-General v. Leeds Railway Company*, 1 Rail. Cases, 457), and that an action at law on the covenant was the proper remedy. (*Elmhurst v. Spencer*, 1 M. & G. 58.)

*Wilmscoke*, for the defendants, Wilmshurst, said that the mother, Mrs. W. had no interest whatever in the question, only living with her daughter, and that the covenant was only a qualified one, and the scope of it was to prevent any trade or business being carried on on the premises. He cited *Moskay v. Twike*, 2 Phil. 774.

*Temple*, in reply, said that the word "calling" in the covenant was as strong as if the word "school" had been therein inserted, and that there was clearly no waiver of the exigency of the covenant, by what the original owner had thought proper to permit.

#### JUDGMENT.

The VICE-CHANCELLOR said—The only doubt he had, was whether the carrying on a school was an infringement of the covenant. He then read the covenant. He thought, under these words, there clearly was a breach of the covenant, by the contemplated keeping of a school, which was not denied. That the interpretation put upon the words of the covenant by the plaintiff's counsel was the right one; that it must be considered that the keeping of a school, whether for boys or girls, was a calling within the terms of the covenant. That the case in M. & S. 95, was a clear authority for so holding. As to the annoyance, the Court could not speculate upon what would be the amount of the annoyance,—it was sufficient that from the nature of the calling, it might create it. That this case was wholly distinguished from the *British Museum* case, as in that case the Duke of Bedford had himself completely altered the state of the land from the time when the covenants in that case were entered into. Upon the whole, he was of opinion that the plaintiff was entitled to the relief which she sought, and that she was entitled to her injunction. As against the defendants, the Wilmshursts, the motion must be refused, and no interference was to take place with her keeping a school until Christmas next, if she thought proper to do so. The costs generally to be reserved. — *Order accordingly.*

May 2, 5, and 28.

*Re JOINT STOCK COMPANY WINDING-UP ACTS, 1848 and 1849, and the DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY.—UPFILL'S CASE, No. 2.*

*Winding-up Acts—Contributory—Call.*

*The Master has not authority, under the Winding-up Acts, to make an order for a call on the contributories of an association to provide for the general outstanding debts and liabilities of that association, without having first ascertained in respect of what debt or debts the particular contributory is liable.*

This was a motion on behalf of Mr. Upfill, who had been declared by the Master to be a contributory to the liabilities of this company (and the decision of the House of Lords in whose case has caused so much discussion); that the order, direction, or certificate of Master Brougham in this matter, dated the 20th Dec. 1850, whereby he had ordered or directed that a call of 2l. 12s. 6d. per share should be made upon the said Mr. Upfill as a contributory of the said company, might be discharged or varied, and for payment of the costs by the official manager out of the estate of the said company. At the meeting before the Master on said 20th Dec. 1850, he made the following report: "*Re Direct Birmingham, Oxford, Reading, and Brighton Railway Company*. I, William Brougham, Esq. the Master of the High Court of Chancery, charged with the winding-up of this company, do peremptorily order that a call of 2l. 12s. 6d. per share be made on the following contributories of this company, in Class No. 1, Part No. 1, and numbered as follows:—1. Wm. Aumsinch; 2. Alex. Andrew; 3. Admiral Lyscough; 5. H. S. Bright; 8. John Bond; 13. Wm. Cooper; 15. John H. Cottle; 16. W. H. Cooper; 21. John Griffith Frith; 26. Thos. Gates Hunt; 28. Rev. T. R. Hall; 37. Sir Wm. Ogilvie; 31. Sir Wm. Lowthrop; 32. Wm. Kirkpatrick; 43. Edw. Smith, R.N.; 46. *James Upfill*, and Richd. Fallows Walond; No. 44, in Class No. 1, Part No. 2. And I do peremptorily order each contributory, on the 15th day of January, 1851, at eleven o'clock in the forenoon, at No. 46, Moorgate-street, in the city of London, to pay to the official manager of this company the balance, if any, which shall be due from him, after debiting his account in the company's books with such call.

"W. BROUGHAM."

*Rolt and Daniel*, in support of the application, contended generally, that the Master under the statutes had no authority to make any call until it was first known in what capacities and for what amounts the contributory could be said to be a debtor, or contributory to the association or company.

*Bethell and Rosburgh*, for the official manager, in support of the Master's order for a call.

*Rolt* in reply.

The VICE-CHANCELLOR took time to consider his decision, and on the 28th of May gave

#### JUDGMENT.

The VICE-CHANCELLOR, after referring to the 83rd sect. of the Winding-up Act of 1848, and the 28th sect. of the one of 1849 (a), said that in his opinion the scope of the Acts of Parliament was not to give authority to the Master to make a call on the contributories before it was well ascertained and defined in respect of which debts in particular the individual contributories had made themselves liable. The Master had absolute power to make a call on any contributories to the full extent of the amount to which the contributory might be made liable at

(a) Sect. 83 of the Winding-up Act, 1848: "And be it enacted, that at any time before the whole of the assets of such company shall have been collected or converted, and if the assets remaining to be collected or converted shall not be capable of being immediately realised, although such assets may not appear to be insufficient, and also after the assets of the company shall have been wholly exhausted, it shall be lawful for the Master from time to time to make calls on the contributories, or on such individual contributories or classes of contributories as he may think proper (but so far only as such contributories respectively shall be liable at law or in equity to pay the same), as well as for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same, as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the company, whether such claims shall have arisen since or before the date of the petition for dissolution and winding up, or for winding up, as the case may be, and the amount to be raised by means of such cases, and also the residue of the assets and estate of the company, after the payment of all debts and liabilities, costs, charges, and expenses shall be paid and distributed by the official manager, under the directions of the Master, so and in such manner as shall (as far as possible) satisfy all such claims, and shall finally wind up and settle the affairs of the company." It may here be observed, that the 84th section of this Act required the Master to apportion the amount of call according to the liabilities of the several contributories; this was repealed by the Winding-up Act of the following year, the 28th section of which is as follows:—"And be it enacted, that so much of the said recited Act as is contained in the section thereof, numbered 84 in the copy of the said Act, printed by the Queen's printer, shall be and the same is hereby repealed, and in lieu thereof that when the Master shall think proper to raise any money by means of a call, he shall make such call from time to time upon the contributories of the company, or any of them, appearing for the time being on the list of contributories, although it may then be under consideration, or uncertain whether other persons ought or ought not to be included in the list; and in making any such call it shall be lawful for the Master to fix such an amount per share for the same as shall in his judgment be likely to supply and bring in the whole sum for the time being intended to be raised, after taking into consideration the probability that some of the contributories upon whom the same call shall be made, should partly or wholly fail to pay their respective proportions of the same."

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law, in addition to the costs. But the Legislature never could have intended to allow the Master to make a party liable for what he would not be liable at law. His lordship said he would be anxious to torture the meaning of the Act as far as possible to prevent such injustice, but he did not think this was at all necessary, since the 83rd section of the first Act authorised the calls, and indeed the right to make the calls, so far only as the liability at law or in equity extended in respect of the debts of the company—any other construction would be a gross injustice. It might perchance happen, that if a contributory knew in respect of what debt he was liable, he might elect to pay off that debt, to spare himself from further litigation and trouble. He must, therefore, discharge the Master's certificate or order directing a call. The Vice-Chancellor was at first disposed to add thereto a declaration that no call ought to be made by the Master on any contributory found to be such unless it was first ascertained in respect of what debt or debts the contributory had become liable; but on the suggestion of Mr. Bethell, for the official manager, that a declaration of the Court could not be correctly made on a motion of this nature, he directed that the declaration which he had proposed to be added to the order should be considered as his reasons for the decision at which he had arrived.

*Order to discharge the Master's order directing a call on Mr. Upfill as contributory. Costs out of the estate of the Company.*

#### VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOK, Esq. Barrister-at-Law.

Wednesday, April 23.

SMALLWOOD v. RUTTER.

*Breach of trust—Suit by next friend—Motion to dismiss—Rights of fathers of infants—Suit by claimants—Trustees Relief Act.*

*A motion was made to dismiss a bill, which had been filed on behalf of infants by their next friend, on the ground that the suit was instituted at the instigation of the father of the infants from improper motives; the motion sought in the alternative, that a reference should be made to the Master, to inquire whether it was for the benefit of the infants, and as to whether the next friend was a proper person to act as such, and, if not, to appoint another next friend:*

*Held, that the circumstances under which a person is named next friend, although suspicious, are not sufficient, there being no proof against his character or solvency, for his removal or for a reference; that the father of infants is entitled to institute a suit on behalf of his children bona fide, and a reference will be refused unless mala fides is shown; and that the question whether the suit should be by claim, or whether the case should have been brought forward under the Trustees Relief Act, were subjects for the hearing of the cause, and not to be considered on motion.*

This was a motion made on behalf of the defendants (except the father and mother of the infants) for the dismissal of a bill filed by a next friend, on behalf of the infants; that the costs of the suit should be paid by the next friend, or that it should be referred to the Master to inquire whether it was for the benefit of the infants that the suit should be further prosecuted; that if he should find in the affirmative, then that he should inquire whether the next friend was a proper person to be such; and if he should find in the negative, then that he should affirm of a next friend, and that all proceedings in the meantime might be stayed. The bill was filed by Henry J. Stevens, as the next friend of five infant children of Mr. and Mrs. Smallwood, against Rutter and Thomson, the trustees and executors of the will of Mrs. E. E. M. Richards, and against other persons interested under the same will. Under this will Mrs. Smallwood was entitled to an estate for life in one moiety of the residue of the testatrix's estate, for her life, for her separate use, without power of anticipation, with trusts over for the benefit of her children. The other moiety was given in a similar manner to Mrs. Graham and her children. Under the will the trustee Rutter was authorised to make professional charges as an attorney, for business done in the trust, in the same manner as if he were not a trustee. The bill, after charging wilful neglect against the trustees and executors in not getting in part of the estate, misapplication of the trust funds, neglect in investment according to the trusts of the will, the entire control of Thomson by Rutter, and the overcharges made by Rutter for professional business, prayed that the trusts of the will might be established and carried into execution under the decree of the Court; that accounts might be taken, and that a receiver might be appointed, and for other purposes. In support of the motion, affidavits were sworn denying the matters charged in the bill, and alleged that it was filed at the instigation of the father of the infants, Edward

Smallwood, who had become bankrupt, lived apart from his wife, and did not in any way contribute to her support; that the bill was not filed for the benefit of the infants; that the next friend, H. J. Stevens, was merely the nominee of Smallwood, a stranger to the family, and had no apparent means of living; that the solicitor for the next friend and of the infants was also the solicitor of Smallwood; and that the bill was filed without any application having been made to the executors and trustees for an account of the assets, and the mode of its application or investment. The principal points in the affidavits filed on behalf of the plaintiff, in opposition to the motion, were that in the instructions laid before Counsel for preparing the bill, Smallwood had proposed to be the next friend, but counsel had advised the appointment of some other person, on the ground that Smallwood was a necessary party as a defendant in respect of his wife's interest in the property; that the suit was instituted under the apprehension that the fund would be misapplied, and that the next friend was both solvent and otherwise respectable.

Rolt and Cole, for the motion, argued that under the circumstances of the separation of Smallwood from his wife, his bankruptcy, and his then not having ventured to swear affidavits in support of the charges against the executors and trustees, the bill ought to be dismissed. The next friend was a stranger and the mere tool of Smallwood, and the suit could not be for the benefit of the infants. They cited *Nader v. Hawkins*, 2 M. & K. 243. If any proceeding had been needed it should either have been by claim in an application to the defendants Rutter and Thomson to pay the money into Court under the Trustees Relief Act.

Bethell and Kinglake opposed the motion on the ground that the father was the most proper person to protect the interests of his infant children, and he had only consented to forego his right and duty on the advice of counsel, and the suit was instituted bona fide, and with a view to the interests of the infants. (*Stevens v. Stevens*, 6 Madd. 97; and *Sale v. Sale*, 6 Beav. 586 were cited.)

Rolt replied. TURNER, V. C.—This motion seems to me to call upon the Court to exercise a very delicate and a very difficult jurisdiction. On the one hand, we all regret the enormous expense incident to the prosecution of suits in this Court; but, on the other hand, those who are best acquainted with the forms of the Court know the protection thrown around the property of infants, by having it administered under the jurisdiction of the Court. The Court has to consider on the one hand the great benefit which the infants derive from the protection thrown around their property; and, on the other hand, to take care that expense is not thrown upon the infant's estate, either from malicious motives, or from a motive of benefit to any parties who may be interested in the prosecution of suits. The primary question, therefore, in all these cases seems to me to be, whether the suit is or is not instituted with any sinister motive; and the Court must, I think, be extremely delicate in interfering in any case—in the short mode in which it is now called upon to interfere—unless it is perfectly satisfied that there has been some sinister motive leading to the institution of the suit. I think that the more strongly, because I apprehend that in all questions with reference to suits for the administration of estates, the question of costs is in the discretion of the Court at the hearing of the cause; and if the Court thinks the suit has been improperly or imprudently instituted, it may refuse to give costs out of the estate, and thus the infants will have the benefit of the protection of the Court thrown around them, without having to bear the expense of the suit. Applying these principles to the present case, let us see what are the facts. It is undoubtedly here that the suit was instituted by the direction of the father of the infants. The father must be considered as having the legal guardianship of the infants. That cannot be denied. Having that guardianship vested in him, he has exercised his discretion in determining that it is for the benefit of these infants that the suit should be instituted, and their property secured under the direction of the Court. This motion, in truth, calls upon the Court to exercise its own discretion against the discretion of the father. Now, what has been the conduct of the father in this case? I pass by the observations which have been made, which seem to shew a state of unfortunate embarrassment. He is separated from his wife, not apparently from any misconduct or imputation of misconduct, but in consequence of the difficulties he has been in. Being involved, he applied to a solicitor, by whom he is told that the only mode in which the property can be protected is by the institution of a suit in this Court. Now, it is said, that this protection might have been given to the infants, either by filing a claim, or by the trustees being required to pay the fund into court under the Trustees Relief Act. It is quite true that, under the particular circumstances of the case, as they are suggested in the bill, either of these pro-

ceeds might have afforded adequate protection; but it is quite in the power of the Court to judge of these questions at the hearing of the cause. If it should think at the hearing, that a claim, instead of a bill, would have been effectual for the purpose, the Court may, under the orders, if I recollect them rightly, prevent costs being allowed out of the estate beyond those which would have been incident to a claim. I say again, the Court may consider whether the costs shall come out of the estate, with reference to the consideration that the trustees might have been applied to to bring the fund into court under the Trustees Relief Act. Now, has there been any *fides* on the part of the father in the institution of this suit? One circumstance very much struck my mind, which has not been particularly commented upon, namely, that in the instructions laid before counsel for filing this bill, those instructions were, that the father should be named as next friend. It is impossible to say he did not intend *bona fide* to act for the benefit of the infants in the institution of the suit, when he himself was to be named as next friend, subject to all the liabilities and consequences to arise out of the institution of the suit. I think, therefore, so far as relates to general principle, there is no ground on which I can dismiss the bill, or refer it to the Master to inquire whether the suit is for the benefit of the infants. It has been said the bill contains a variety of allegations against the trustees, of breaches of trusts, of wilful defaults, and allegations on the subject of costs incurred, having regard to the particular clause introduced into the will for the indemnity of trustees. It is a sufficient answer to this, that all the allegations will be to be dealt with by the Court at the hearing. It will be quite in the power of the Court to dismiss the bill, with costs, so far as these charges are concerned, at the hearing, in case these charges are not established as matter of fact. So far, as to the first object of the motion. With regard to the next friend, after considering the affidavits very carefully, and all the statements on the subject of the next friend, I do not find any imputation cast on his solvency or his character; the circumstances under which he was named as next friend are open to some degree of suspicion, but I do not think there is any substantial case made, either against his character or against his conduct. Therefore, on that ground, I think the motion cannot be supported, and that I am justified in refusing it, but without costs.

April 23 and 30.

JOHN V. MASON.

*Claims—Evidence—Allegations.*

*The orders of April, 1886, were not intended to affect or alter the ordinary rule of the Court, requiring parties to proceed in the establishment of their case secundum allegata et probata, and the strict rules of pleading are to be observed in proceedings upon claims.*

In this case the claim was filed by the plaintiff, which set forth that the defendant from their agent bought wool to the amount of £804, and gave the agent a cheque for the amount; but the agent enclosed the cheque in a letter addressed to the plaintiff, and forwarded the same by post, but it was lost. It was alleged that the cheque was no payment of the money, which was therefore still due, but that at law no action could be brought, the cheque having been given; and it was prayed that the purchase money might be paid to the plaintiff, the cheque never having been presented, on their giving an indemnity, which they offered to give. Evidence was entered into on both sides. The agency was denied. Several points were argued, but the only one on which it seems needful to report the case is, as to the practice on claims.

*Rolt and Biggs for the claim.*

*The Solicitor-General and Blundy for the defendant.*

The VICE-CHANCELLOR was of opinion that the evidence adduced by the plaintiffs was insufficient to prove their case; but the claim was deficient in allegations necessary to establish their right to relief in equity; and that no consideration was shown to support an alleged promise to give a fresh cheque. His Honour then proceeded, As, however, this claim was filed by leave of the Court previously obtained, I have felt reluctant to dismiss it as a claim, and I have carefully considered whether it can properly be put in a train for further inquiry. By reason, however, of the imperfect state of the evidence, I have been unable to see my way to the direction of any further proceedings, without, in effect, recommencing the cause, and recommencing it in a manner which will lead the parties to an unnecessary litigation far beyond what is necessary in the regular course of a suit by bill and answer. The orders of April, 1886, enabling parties to proceed in this Court by claim, were not, in my opinion, intended to apply to cases like the present. I am satisfied that leave would not have been given to file this claim, and that it would not have been valued as if the defence set up would have been anticipated. It



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any opinion that the claim ought to be dismissed, and that the plaintiffs, who have not brought forward the whole case on their part, and have kept back material evidence which it was in their power to produce, have no right to complain if the Court refuses to give them the benefit of the summary course of proceeding under these orders. . . . In the course of the argument observations have been thrown out as to the inconvenience of holding parties to the strict rules of pleading in proceedings upon claims. As to that I think it right to say, that I think the orders on claims were not at all intended to affect or alter the ordinary rule of the Court requiring parties to proceed in the establishment of their case *secundum allegata et probata*. The proper order, therefore, is to dismiss the claim, and, having regard to the fact that material evidence has been withheld on both sides, without costs; this order to be without prejudice to any other proceedings the parties may be advised to take.

Tuesday, May 6, 1851.

GRIFFITH v. VANHEYTHUYSEN.

Breach of trust—Pleading—Parties—Misjoinder—Costs—Objection by answer.

Two trustees gave a power of attorney to a third, enabling him, on a misrepresentation made by him to them, to sell out a trust fund, which he applied to his own use, and died insolvent—A bill was filed by the cestui que trust, one of whom had become the administrator of the deceased trustee, against the representatives of two other trustees, who had both died, for the restoration of the fund:

Held, that there was a misjoinder as to the cestui que trust, who represented conflicting interests—one a beneficial interest, and the other as administrator of a trustee primarily liable:

Held also, that those defendants who took the objection by their answer, were entitled to their costs on the bill being dismissed.

By the will of the testator in this cause, the sum of 915*l*. Three per Cent. Consols were bequeathed to three trustees, named Smith, Plaister, and Vanheythuyson, and the survivors or survivor of them, and the heirs, administrators, and assigns, of the survivor, upon certain trusts, under which the plaintiffs, Griffith, and others, were beneficially entitled. The same trustees were appointed executors of, and proved the will. In 1829 Vanheythuyson made representations to his co-trustees that part of the money was required for payment of the testator's debts, and they at his instance executed a general power of attorney to him, under which he sold out the whole 915*l*. and applied the produce, not in payment of the debts, for none appeared to be due, nor in any manner upon the trusts of the will, but to his own use. After this he became insolvent, and died in that state intestate. Smith, the trustee, made his will, of which he appointed executors, and died. Plaister then, under a power in the will, appointed two new trustees jointly with himself, and afterwards made his will, of which he appointed executors, and died. The fund never was transferred to the new trustees. Griffith, as a creditor of Vanheythuyson, took out letters of administration to his estate, and then he and the other persons beneficially interested under the testator's will, filed their bill against the executors of Smith, the executors of Plaister, and against the two new trustees, alleging that if Smith and Plaister had not executed the power of attorney, the money could not have been lost, and that doing so was a breach of trust by them: that the two new trustees had refused to institute a suit against the executors of those two deceased trustees, and that Griffith had reserved no assets of his intestate Vanheythuyson, the other trustee, and praying the administration of the estates of Smith and Plaister, and that the fund might be made good thereout. The executors of Smith took as an objection to the bill the misjoinder of interests in the plaintiff Griffith, he being entitled, as one of the *cestui que trust*, and liable, so far as his intestate's estate, if any, was concerned, to make good the fund. The objection was not taken by the other answers. For the executors of Smith the objection was insisted on, and it was contended that no accounts could be taken when Griffith represented adverse interests. Had he been sole plaintiff he could not have been heard to charge, in his character of representative of the delinquent trustee, the innocent trustees with payment of a fund, when he might actually as administrator have the money in his hands. (*Padwick v. Platt*, 11 Beav. 503; *Fulham v. McCarthy*, Ho. of Lords Cases, 703.) On behalf of the executors of Plaister it was argued that as it was plain that Griffith, as administrator, could not sustain the suit as sole plaintiff, the mere addition of another character, that of *cestui que trust*, could not give him a better title. (*Jacob v. Lucas*, 1 Beav. 436; and *Lambert v. Hutchinson*, Id. ib. 277.) In answer to this objection, it was said that, in fact, Griffith sued as a *cestui que trust*, and that as the estate of his intestate was insolvent, his representative character could

not clash with the other. Had Vanheythuyson not died intestate, but had by will appointed an executor, who, dying, had appointed Griffith his executor, and he had accepted the office, not knowing that his testator was executor of the delinquent trustee, he would not have lost his right to sue. Such a right accruing to him would not have debarred him, so neither could the course he had adopted have that effect.

Bethell and Follett, for the plaintiff.

Roll and Giffard, for the executors of Smith.

The Solicitor-General and Piggott, for the executors of Plaister.

Bagshawe and Davidson, for the new trustees.

THE VICE-CHANCELLOR.—This bill is filed by co-plaintiffs claiming a beneficial interest as *cestui que trust* in the subject-matter of the suit, but one of whom, at the same time, represents the estate of one of several trustees, who was primarily liable, or jointly liable with his co-trustees, for a breach of trust. In all cases of that character, what the Court has to consider is, what the decree is to be. Of course, in the case before me, the decrees will involve an account of the estate of Vanheythuyson received by the plaintiff Griffith. How can such an account be taken as between Griffith and his co-plaintiff in the suit? There is a direct conflict of interests between Griffith as representative of Vanheythuyson and his co-plaintiff, to whom he is bound to account in his character of representative. The principle of the objection of misjoinder is, that the suit is so constituted as that the accounts cannot be taken. In the event of a question arising in taking the accounts of Vanheythuyson's estate, as to fixing Griffith with liability, it might happen that every item of the account might be disputed, and in that case it would become the interest of Griffith to defend his intestate's estate against the other plaintiff. How, I ask, in such a case, could the contest be maintained between the plaintiff interested in recovering against Vanheythuyson's estate, and the other plaintiff, who would have to account? In such a state of the record, and having regard to the authorities which have been cited, and particularly the case of *Jacob v. Lucas*, I think this suit cannot be sustained. That case is not distinguishable from this. With the ingenious argument raised by Mr. Bethell, founded on the supposition of a suit by a sole plaintiff, uniting in himself both a beneficial interest and a representative character, it will be time to deal with when such a case shall arise. Probably when that occurs the case may not be found open to precisely the same difficulty as the one before the Court; for the sole plaintiff, if he were liable also to account in his representative character, might submit, by his bill, to account for the whole fund received by him, and thus would be accounting to the defendants for all his receipts. That case, should it ever arise, may be found not to be governed by the same principles as are applicable to that now before the Court, in which others are joined with Griffith as co-plaintiffs, and the accounts cannot be taken between plaintiff and defendants. I think, then, the objection must be allowed, and that the bill must be dismissed, and it will be dismissed as against those who have taken the objection by their answer, with costs; as against the others, without costs.

April 29 and May 1 and 3.

SQUIRE v. FORD.

Judgment—Priority—Statute 1 & 2 Vict. c. 110—Release with restrictions—Suit on behalf of plaintiff and all other creditors.

A was indebted to B. and C. B. obtained a judgment for his debt, and in August, 1848, registered the same. C. then obtained a judgment, and in November following registered it. In December, A. conveyed and assigned all his real and personal estate to trustees upon trust to sell and divide the proceeds rateably among the creditors named in the schedule. The deed contained a covenant by the creditors, that the deed might be pleaded as a release of all actions, judgments, &c. then or thereafter claimed against A. or his estate, with a proviso, that it should not operate to destroy any specific security which any creditor then possessed in respect of his debt; and, further, that if before the deed should be discharged from the proviso, any creditor should sue A. (except for making any specific security available) for any debt, the same debt should be forfeited, and the covenant should operate as a discharge of such debt. It was also provided that nothing therein contained should extend to prevent any creditor from enforcing the benefit of any charge or lien they had on the estate of A. or any person liable (except A.) as drawer or acceptor, or indorser of any bill or note, or jointly or severally on any bond. In June, 1849, B. assigned his judgment to the trustees of the deed of 1848, to receive the debt and costs, and were the same absolutely as trustees of the deed of 1848. B. filed a bill on behalf of himself and all other creditors of A. except such as were

defendants, praying a declaration that B.'s judgment, was a charge in priority of C.'s judgment, and any judgment of the other defendants: and seeking a sale of the real estate, and payment of the proceeds to the trustees of the deed of 1848: Held, that B.'s judgment was not released by the deed of 1848, nor merged by the deed of 1849: That the deed of 1849 was an assignment of B.'s judgment for the benefit of the creditors: That B. was entitled to sue on behalf of himself and the other creditors: and That the judgment of B. was a charge in priority of the judgment of C. and of the other defendants.

The bill in this case was filed by a judgment creditor, who had assigned his debt to certain trustees of Mr. W. A. H. Arundell, on behalf of himself and all other creditors of that gentleman, who had executed a certain deed dated the 27th of Dec. 1848, except such as were defendants; and it prayed a declaration that the plaintiff's judgment was a valid charge on the real estates of the debtor, and in priority over the judgment of the defendant Ford, and that the real estates might be sold, and the plaintiff's debt, interest, and costs paid to the trustees of the deed. The facts of the case, so far as necessary to be stated on the points desired, were, that in Trinity Term, 1848, the plaintiff Squire obtained a judgment against Mr. Arundell for 605*l*. and costs, which was duly registered on the 19th of August, 1848. The defendant, Ford, also obtained a judgment against Mr. Arundell for 3,000*l*. but as a security only for 1,495*l*. 18s. 8d. and interest, and the judgment was registered on the 1st of November, 1848. On the 27th of December, 1848, the defendant, Mr. Arundell, by a deed of that date, and made between himself of the first part, and Reignedford Arundell, William Henry Cotterell, and Samuel Rowles Pattison of the second part, and the several persons who were creditors of the third part, reciting the seisin in fee of certain property subject to a mortgage, and subject to all the hereditaments and costs due and to become due to Mr. Cotterell, and the charges due to Messrs. Hoggart and Co. in respect of an attempted sale of, and otherwise relating to the hereditaments; and reciting, also, Mr. Arundell's title to the furniture and fixtures; and reciting that he had become indebted to various persons in various sums of money; and had proposed and agreed to execute an assignment of the real and personal estate and effects to the parties of the second part, in trust, for the benefit of his creditors, to which the creditors had agreed; and to accept the same in full discharge of their respective debts, and to enter into the covenants thereafter contained: he then conveyed the real estates to the trustees, upon trust, to sell and dispose of the real estates; and there was an assignment, also, of the personal estate; and the trusts which were declared of the money to arise from the sale were to pay the costs of the deed, and also other costs; and in the next place to pay and satisfy rateably and proportionably, and without any preference or priority, to the creditors, the several debts or sums mentioned in the fifth schedule. The deed also contained a release by creditors, with various provisos attached to that release. On the 13th of June, 1849, after the execution of the deed, the plaintiff, Mr. Squire, by another deed of that date, assigned his judgment to the trustees.

The following questions at the hearing were raised on the part of the defendant Ford:—First, that the plaintiff Squire's judgment was released by the deed of the 27th of December, 1848. Secondly, that it was merged by the deed of 1849; and, thirdly, that the suit could not be maintained by the plaintiff for and on behalf of the plaintiff and the creditors under the deed of the 27th of December, 1848. The solution of these questions depended upon what were the rights of the plaintiff Squire at the time of the execution of the deed of the 27th of December, 1848, and upon the construction of that deed; that is, whether at the time of the execution of that deed he had a valid charge upon the estate under the stat. of the 1 & 2 Vict. c. 110, s. 13. The arguments offered in opposition to the right of the plaintiff are noticed in the judgment of the Court, as are the principal clauses of the deed of December, 1848.

The Solicitor-General and C. M. Roupell were for the plaintiffs.

Toller, for the defendant Ford.

THE VICE-CHANCELLOR, after recapitulating the facts, and stating the points, and referring to the 13th clause of the statute before mentioned, proceeded thus:—Now that being so, there was, at the date of the deed of the 27th day of December, 1848, an existing charge upon the estate in favour of Mr. Squire, but it could not be enforced in equity at the time, a year not having elapsed; the point therefore to be considered is, whether the charge was released by the deed. In determining this question, it is first, I think, to be considered, what was the intention of the parties to the deed?—for the Courts, I think, are bound, in determining questions of this nature, to pay very great regard to the intention of the parties. That doctrine was clearly laid down in the

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case of *Solly v. Forbes*, 2 Bro. & Bing. 38; and that case appears to me to have so important a bearing upon the present question, and so strongly confirms the view which I entertain upon it, that I shall read some parts of the judgment in it. *Solly v. Forbes* was this: A release was given by plaintiffs to A. one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B. the other partner, and that in order to enforce the claims against B. it should be lawful for plaintiffs to sue A. either jointly with B. or separately. In an action by plaintiffs against A. and B. this release having been pleaded by A. and set out on over in the replication, with an averment that the action was prosecuted against A. jointly with B. for the purpose of enabling plaintiffs to recover payment of moneys due from B. and A. to plaintiffs, either out of the joint estate of B. and A. or from B. or his separate estate; the replication was demurred to, and the demurrer overruled. Chief Justice Dallas, in giving judgment in that case, went very fully into the effect which is to be given to a general release, with reference to restrictive clauses which are put upon the release; he says, "The general question which arises is, whether the release, as set forth, constituted a bar to the action. Of the intention of the parties no doubt can be entertained. It was meant to release Ellerman as to person and effects, but not Forbes; and therefore to retain against Ellerman every right and remedy necessary to enforce payment from Forbes. But so to construe the release as to make it a release of both, which it would be if no action could be brought against Forbes, because Ellerman could not be joined, would make it operate, not to effectuate, but to defeat the intent of the parties." [His Honour then proceeded to read the judgment at length, making various comments on it as he went on.] The Lord Chief Justice said, in *Payler and Others v. Homersham*, 4 M. & Sel. 423, Lord Ellenborough adopts the position, that the general words of a release may be restrained by the particular recital. "Common sense (said his lordship) requires that it should be so, and in order to construe any instrument truly, you must have regard to all parts, and especially to the particular words of it." The case in Rolle to this effect, though said to have been denied by Lord Holt to be law, "seems to me (said Lord Ellenborough) as sound a case as can be stated." And Mr. Justice Bayley adds "there is no doubt but a particular recital in a deed will restrain the general words." There we get the principle very distinctly laid down which is to govern the Court in construing releases with exceptions. I have then to consider, following the principle laid down in that judgment, the intention of the parties to this deed with reference to the release of the charges; and I think the intention is principally, and indeed almost wholly, to be collected from the releasing clause, with the several provisions which are attached to it. The releasing clause runs thus:—"That the parties covenant that this present covenant" (it is rather singular; I suppose it means this present deed) "shall operate and endure, and may be pleaded in bar as a good and effectual release and discharge of all and all manner of actions, &c., debts, &c., judgments, extents, &c., claims and demands, both at law and in equity, or otherwise howsoever, which they now have or hereafter may have against the said Arundell, his heirs, &c., or his or their estate or effects, &c.; but so, nevertheless, that this present covenant shall not operate upon or destroy any mortgage, pledge, lien, or any other specific security which any creditor now possesses in respect of his debt or claim." You observe that the deed draws the clearest distinction, releasing all claims and demands which the parties now have or hereafter may have; the saving applies to existing claims. "And further, that if in the meantime and before these presents shall be discharged from the said proviso, the said creditors, &c. shall commence any action, &c. against Arundell, his heirs, executors, or administrators (except for conformity or for making available any such mortgage, charge, lien, or specific security as aforesaid available), for or on account of any debt or debts now due by Arundell to them, such debts or debt shall become absolutely forfeited, and this present covenant shall operate and endure, and may be pleaded in law as good and effectual release and discharge of such debt or debts respectively: provided, &c. that nothing herein contained shall extend to prevent the creditors from enforcing or otherwise obtaining the full benefit of any charge they have upon any estate or effects, or from suing any person or persons other than Arundell, who is, or are, or shall, or may be liable, for the payment of all or any part of the said respective debts." Now that clause, therefore, has three branches; the first releases all actions, &c. including judgments, claims, and demands, which creditors, parties to the deed, have or may have in respect of their debts, and, no doubt, if that clause had been uncontrolled, it must have released those judgments; but it terminates the proviso that it shall not operate upon

any mortgage, pledge, lien, or other specific security, which any creditor now possesses in respect of his debt or debts, distinguishing between existing and future rights. The second branch applies to the case of proceedings by any of the creditors, before the deed became absolute, in which event the debts are to be forfeited, but that clause contains an exception, which refers to existing rights, "that if the creditor sue or take any proceedings against Arundell, his heirs, executors, or administrators, except for conformity or for making available any such mortgage, charge, lien, or specific security as aforesaid." The third branch of the clause, as I have mentioned, is a general saving, which also applies to existing rights "of any charge or lien, which they, or any of them, now have or hath upon any estate or effects whatsoever." It is clear, therefore, that some existing rights were meant to be saved, and those rights are variously defined in the different branches of the clause, being in one case called "mortgages, pledges, liens, or any other specific security," that is in the first branch; in the second branch of the clause being described as "mortgages, charges, liens, or specific securities, as aforesaid;" and in the third branch being described as "any charge or lien." Reliance was placed in argument upon the words "specific security," as limiting and controlling the effect of the proviso. But it is to be observed that the security, which is referred to by the deed, is security in respect of the debts; and the lien, therefore, which is referred to, must be lien in respect of the debts. Then do the provisos mean to save only specific liens in respect of the debts created by the actual holding of the property?—is that the meaning of it? The generality of the words themselves is against that construction, and I think the context is against it too; for I observe that the deed distinguishes between rights against the person and rights against the property. There is in the first branch of the clause the proviso which applies to property, that it shall not destroy "any mortgage, pledge, charge, or lien." There is in the second branch of the clause a direct distinction taken between proceedings "against the debtor, his heirs, executors, or administrators," and "proceedings for effectuating claims against the property," the expression being to take "any proceedings against Arundell, his heirs, executors, or administrators, except for conformity or for making available any such mortgage, charge, lien, or specific security as aforesaid." There is in the third branch of the clause the power to sue persons liable other than Arundell, his heirs, executors, or administrators. And I think, therefore, that the deed leads to the distinction of proceedings against the person and proceedings against the property; and the nature of the transaction carried out by the deed tends to favour that distinction. Some argument was addressed by Mr. Toller upon the terms of the recital, that the property was subject to mortgages, and subject to costs due and to become due to Cotterell, and the charge due and to become due to Hoggart & Co. The charges are provided for under the general trust for payment of costs; but whether they are or not, I think it is quite clear you cannot construe the words of the provisos by the recital which is contained in that part of the deed. I am of opinion, therefore, that the plaintiff Squire's judgment is not released by the deed of the 27th of March, 1848. As to the second point, whether the judgment has been merged by the deed of June, 1849, several cases were referred to upon that point (*Toulmin v. Steere*, 3 Mer. 210; *Parry v. Wright*, 1 Sim. & Stu. 369; and *Brown v. Stead*, 5 Sim. 525); but I confess it does not appear to me those cases apply to the present case. There is no doubt whatever that the purchaser of an estate which is subject to a mortgage, whose mortgage is paid off out of the purchase-money, cannot afterwards set up that mortgage as against the subsequent mortgagee,—that is the decision of *Toulmin v. Steere*; and there is equally as little doubt, that a prior mortgage may be so dealt with by a subsequent incumbrancer in his dealings with the estate, as to prevent its being afterwards set up by him, which is the case of *Parry v. Wright*. *Brown v. Stead* seems to me to lie half way between *Parry* and *Wright* and *Toulmin v. Steere*. Then the question to be considered with reference to *Toulmin v. Steere* is, whether or not this debt is paid off. It is clear that it is not. It is not payment of the debt by a trustee, but it is an assignment of it, not to the trustees who held the estate, but to the three trustees who are the assignees of the present property. Well, but besides that, it would be going a monstrous length to say that these trustees for creditors, under the original deed of the 27th of December, 1848, are to be considered as owners of the estate to bring them within the principle of the case of *Toulmin v. Steere*; they are, I think, in the character of mortgagees or creditors upon the estate, having a charge upon the estate for the payment of their debts; and they are, therefore, as I conceive, not at all in a position in which, by paying off that charge, they would be considered as not being entitled to the benefit of it. I think, therefore, that this case is out of the principle of

*Toulmin v. Steere*; and I am quite clear it is out of the principle of *Parry v. Wright*, because I think it perfectly clear that this has not been so dealt with as that it has been actually extinguished by the mode in which it has been assigned. I think, therefore, that those cases do not at all govern the present case, and I am of opinion, therefore, that the plaintiff Squire's judgment is not merged by the deed of June 1849. With regard to the third point, the frame of the suit, the judgment as assigned by the deed of 1849 to the trustees is, I think, in trust for the benefit of the creditors, because when we look at the deed of assignment,—the deed of assignment recites the deed of the 27th of December, 1848, and recites "that all the real and personal estate and effects of Arundell were by that deed assigned and transferred to the parties thereto of the second part in trust for the benefit of such of the creditors of Arundell as should set their names or co-partnership firms or sales to the now recited indenture." It then recites the judgment, and then it recites that Squire has consented and agreed to transfer to the three trustees as such trustees for the creditors of Arundell, the judgment and all moneys and securities in consideration of the debts payable and to be paid thereunder; and then the assignment is to those three parties to have and receive the said judgment debt and costs, sum and sums of money, or other the premises, to them and the survivor or survivors of them, absolutely as such trustee or trustees as aforesaid. Now, what can that mean, except as trustee or trustees for the general benefit of the creditors, which by the early part of the deed they are said to be? The result, therefore, of the examination of this deed is, that the judgment is by that deed assigned to those three persons as trustees for the creditors. The plaintiff is one of those creditors, and he has a right, therefore, as I conceive, to sue on behalf of himself and others, and that he has properly framed this suit for the purpose of having the judgment debt raised. Now, I am not sure what the parties consider the frame of the decree should be. I go with the prayer of the bill to this extent,—declare that the judgment constituted a valid lien and charge upon all the real estates before described. In priority of the judgment of Ford, and his claim in respect thereof, and in priority of the lien and charge claimed by the other defendants, those two declarations, I think, will be quite right. Then it prays that the real estate may be sold by and under the decree and direction of the Court. Now that I take it can only be to the extent of the plaintiff's claim upon the judgment, therefore it must be raised by the sale of the estates comprised in this deed.

Thursday, May 8.

PENNY V. PENNY.

*Claim orders, 8th and 13th of April, 1850 — Parties—Representatives of a deceased executor—Accounts.*

*The executors of a deceased executor are necessary parties to a suit by claim for a legacy when the general accounts of the testator's estate are involved. Where such accounts are involved the suit should be by bill, and not by claim.*

*The Court has a discretion by the orders of April, 1850, either to give or refuse relief at the hearing. The meaning of the words "in the first instance," in the 8th order (a).*

The claim in this case was filed by a legatee to recover payment of one-seventh part of a legacy of 400l. The will was a very long one, and the facts stated in the claim, but in several respects denied by the affidavits filed by the defendant, who was the surviving executor of the testator's will, the other executor having proved and died. The principal point in dispute was as to the carrying on of a farm pursuant to the directions of the will, and the outlay thereon, and that there were no means at the disposal of the defendant for that purpose, and that the accounts, as he alleged, had been taken and settled long since.

*Rolt and Westoby, for the plaintiff.*

Bailey objected to the hearing on two grounds, first, that the case, being contested as to facts, was not a proper one to be heard by claim, and secondly, that the suit was defective for want of parties. On the first point, the complicity and contest of facts were sufficient to show that such a case was never intended to be brought forward by this new species of practice. The second point, however, is of more material consequence. The personal representatives of the deceased executor ought to have been brought before the Court, for the accounts must necessarily involve the general administration of the estate of the testator. This was obvious from the directions for the carrying on of the farm, and the conflicting allegations of the plaintiff and defendant as to the means of doing so. It is plain that where such accounts are involved, the estate of every person liable to account must be represented. The case of *Kellaway v. Johnson*, 5 Beav. 319, and *Parry v. Knott*, *id.* 293, have decided that 32nd order of

(a) *Parry v. Knott*, 5 Beav. is observed on in the judgment.



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August, 1841, enabling parties to proceed against one of several parties jointly and severally liable, does not apply to an administration suit. And the same was held by Vice Chancellor Wigram in *Biggs v. Penn*, 4 Hare, 368.

*Roll* upon this objection. This claim being for such small amount, ought to be permitted to proceed; the form of suit by bill would be most oppressive, and indeed ruinous. The object of instituting this new mode of proceeding, was to obviate this injustice, and to enable persons to obtain redress, and in many instances claims had had that effect. On the second head of objection, it is to be observed, that the 8th order of April, 1850, only renders necessary, as a party in the first instance, that person against whom direct relief is prayed. Here the surviving executor is the only person against whom direct relief is prayed, and he is a party. He is in possession of the assets, he is primarily liable. True, he may shew that assets have been received by the deceased, and not accounted for, and if so, he may recover even against him or his estate; but the plaintiff has a right to elect at his option to sue the surviving executor if he pleases; and if it should so happen that no relief could be got against this single defendant, others may be afterwards added to the record as defendants to the suit. The language of the 18th order of the same year, which enables the plaintiff to get at other parties liable to account by a writ of summons, is that the record can be perfected at any time.

TURNER, V.C. said he had no intention to lay down any general rule as to what cases fell within the general rule of suits by claim. To do so would be inconvenient, as it would tend to fetter the discretion which it was the intention of the framers of these orders to reserve to the Court. The language of the 13th order shewed, that a reservation of such discretion was intended, and left it to the Court at the hearing to grant or refuse relief, or to direct inquiries as the facts disclosed, and the justice of each case required. He was of opinion that the orders did not enable a plaintiff to proceed against a surviving executor in the absence of a formal representative of the deceased executor. Had such been the intention, he believed that intention would have been more pointedly expressed. With regard to the decisions on the 32nd order of August 1841, he might observe that, before the issue of the orders instituting suits by claim, the question had often been considered whether a suit under that order could be maintained against one of several executors in the absence of others, or the representatives of deceased co-executors. In some cases it had been decided that this order did not apply to such a suit; and if the orders of 1850 had been intended to alter that, they would have explicitly said so. He considered the defendant at full liberty to take and insist on the objection at the hearing. It appeared that the accuracy of the conclusion at which Lord Langdale had arrived as to the applicability of the 32nd order of August, 1841, to the case of trustees jointly liable, had been doubted by Vice-Chancellor Knight Bruce, and he concurred in that doubt. Those decisions had proceeded uniformly on an impression entertained by his lordship that there were very few instances in which questions of contribution could arise, and he said that there had scarcely been a single instance within his recollection where one trustee having been made liable, he had sued his co-trustees for contribution. On that ground Lord Langdale said the proper construction to put upon that order was, that it was most necessary that all the trustees should be made parties; and he said that the remedy might always be enforced against one only of several trustees, and that the only reason for having them all as parties in a suit in this Court was, that they might be bound by the accounts, and that it might not be necessary to open the accounts in any subsequent suit for contribution. As suits for contribution were extremely rare, his lordship thought that the proper construction of the orders was to dispense with the presence of all the trustees, and to allow one out of several to be sued in the first instance. The question before the Court was, whether the objection was well founded concerning the absence of the personal representative of the deceased executor; and his Honour was of opinion that it was. As to the course to be adopted with the claim: was leave to be given to amend by adding this party? Or was the proper form of proceeding that by bill? He thought the amendment by adding this party would not perfect the claim, because the testator having directed legacies to be paid out of his estate, and that the residue should be employed in carrying on the farm till a stated time, and then to be valued, and this particular 400*l.* to be divided, the general accounts of the personal estate would not be enough, for there must be an account of the personal estate employed in carrying on the farm; and in doing this questions would arise as to what assets were employed in so doing, and also what allowances were to be made in respect of such employment, and to whom. It was, therefore, evident

that there must be inquiries in respect of these matters, and it was equally clear that for such purposes a proceeding by bill was the proper one to be adopted. The proper course would be to dismiss the claim without prejudice to a bill being filed; as in his opinion the orders of 1850 were not intended to apply to such a case. With respect to the words "in the first instance," in the 8th order of April 1850, he could observe, that, without intending to give a conclusive opinion, he considered that the meaning was, that the claimant should be able to proceed against one party in the first instance, and then if the Court required the presence of other persons, it might give then directions at the hearing; as, for instance, in the simple case of a claim for a legacy against one out of several executors, or against a surviving executor, on being served he might say, "I admit assets," and in that case a decree might at once be made. If, on the other hand, he said, "I do not admit assets for payment of the legacy," the Court might at the hearing require the presence of the other executors, or of the representatives of the deceased executor, that he considered to be the meaning of the words "in the first instance." As the orders seemed to have misled the parties, although his own opinion was that they were never intended to apply to a case like this; justice could be administered by dismissing the claim without costs, without injustice to the filing of a bill.

Friday, May 9.—His Honour, having been compelled to rise, in consequence of parties not being ready, in claims, said, that it would be desirable to have twenty causes and claims placed in each day's paper, but no decree or order should be made in cases below the twelfth. It was also desirable that some rule should be laid down as to the time within which, answers and affidavits should be filed, in claims, so as to prevent the postponement of them, on the ground that parties were taken by surprise.

## COMMON LAW COURTS.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL PARFELL,  
Esqrs. Barristers-at-Law.

Tuesday, April 29.

EARL OF CHICHESTER v. HALL AND ANOTHER.

*Copyhold—Heriot—Quit-rent—Statute of Limitations—Presumption.*

*In trover for a heriot, it was proved by entries in the court-rolls of a manor, that down to the year 1804 the land, in respect of which the heriot was claimed, was freehold land, held of the lord by heriot, quit-rent, relief, &c. On the death of a tenant in 1804 a heriot was seized. In 1824 the next tenant died; but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826 the present lord came into possession; and in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804 no quit-rent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor:*

*Held, that the lord's right of action was not barred by sec. 2 of 3 & 4 Wm. 4, c. 27; and that there was no ground for presuming that the tenure of the lands had been changed, or even that the heriot had been released by the lord.*

*Semble, that the right to the quit-rent was barred by the statute.*

This was an action of trover for certain horses; to which the defendants pleaded that the plaintiff was not lawfully possessed of the same as of his own property, as in the declaration alleged; on which issue was joined.

The action was commenced on the 7th day of January, in the year of our Lord 1849, and came on for trial at the Lent Assizes in the same year for the county of Sussex. At the trial a verdict for the plaintiff was taken by consent for the damages mentioned in the declaration, subject to the opinion of the Court on the following case:—

The plaintiff is lord of the manor of Southmalling Lindfield, in the county of Sussex, and was so at the time of the death of Mr. Commerell, hereinafter mentioned.

The said manor of Southmalling Lindfield comprises freehold, copyhold, and leasehold tenements. The court rolls of the said manor describe the freehold tenants of the said manor as holding freely of the lord by fealty, suit of court, heriot, and relief, when they shall happen, and a yearly quit-rent for every freehold tenement. The heriot is due on the death of a tenant of the lord dying solely seized, but no heriot is due on alienation. Relief is due on the entry of a new tenant of the lord whether upon death or alienation. The heriot is the best or such other beast belonging to the deceased tenant at the time of his death as the lord chooses to take, and where no dispute has arisen, has usually been compounded at two-thirds of its

value. The relief is the amount of one year's quit-rent. The quit-rent is a small sum for such tenement. The defendants are the legal personal representatives of the late Mr. J. W. Commerell. The said Mr. Commerell, at the time of his death, was seized in fee of a freehold estate in the parish of Worth, in the said county of Sussex, containing about 140 acres, usually known by the general name of the Bower-place Farm, all of which is within the said manor of Southmalling Lindfield.

The Bower-place Farm consists of, besides a few acres of leasehold, five distinct tenements, which are described in entries down to 1804 in the court rolls of the said manor as freehold of the said manor, and by the following description:—

	Paying yearly quit-rent.	Supposed to contain
	s. d.	a. r. p.
Part of Burby .....	0 7 .....	17 1 13
Bower Place .....	1 7 .....	41 1 2
Park Field and Tilt Wood .....	0 11 .....	31 2 28
Mays .....	0 9 .....	21 1 9
Beldams Croft .....	0 9 .....	3 2 26

These five tenements were anciently held by different freehold tenants of the manor, but a little before the year 1735 they were all held by a freehold tenant of the name of Charles Goodwyn, from whose descendant they passed to a person of the name of George Bethune, who, down to and at his death in 1804, was tenant thereof under the lord of the manor. George Bethune was tenant for life. His wife, and their son, George Maximilian Bethune, who was entitled to the reversion in fee, in the year 1802, for a nominal consideration, conveyed the same tenements to certain trustees for sale in fee, with the consent in writing of the said George Bethune during his life. In 1811 the surviving trustee sold by public auction in London, and conveyed the same tenements to Richard Baker in fee, and he continued seized thereof in fee, and in receipt of the rents, and in the enjoyment of the same until his death. On the 22nd of December, 1847, Mr. Commerell, by his will, devised the same five tenements to his grandson in tail. Mr. Baker did not at any time reside in the county of Sussex. On the property being conveyed to him, there was no change of occupation, nor was there any act done to bring it to the knowledge of the lord that the property had changed owners. But Mr. Baker was mentioned as the owner in the assessment to the land-tax for several years. At the time of his death the said Mr. Commerell was possessed of certain horses, including those in the declaration mentioned, which were seized as heriots as next mentioned. On the 27th of December, 1847, the reeve of the said manor of Southmalling Lindfield, in the name and by the authority of the lord of the said manor, seized at the residence of the said late Mr. Commerell, as heriots, in respect of the said five freehold tenements, thus claiming them to be tenements of the said manor, five horses of the said late Mr. Commerell. The defendants, who are the legal personal representatives of the said late Mr. Commerell afterwards obtained and kept possession of the horses that had been so seized, and on their refusal to give them up, or to pay any composition for them to the lord of the manor, the present action was brought.

No fealty or suit of the Court was rendered by the trustees of George Bethune's conveyance for sale by Richard Baker, by the trustees of his will, by the late Mr. Commerell, or by his devisee; nor was the fealty of any of these parties ever respited, rendered, compounded for, or demanded; there is no entry in the court rolls in respect thereof, nor do the titles of these parties, nor any of them, appear; nor is there any entry in the court rolls of the alienation to them, or acknowledgment of their tenure, nor do their names, or any of them, appear in the court rolls; and with respect to fealty and suit of court generally, no entry of their having been rendered appears in the court rolls for 100 years and upwards, by any tenant of the manor.

At Mr. Richard Baker's death, in 1824, no heriot was seized, rendered, compounded for, or demanded in respect of the said five tenements, or any of them, nor is there any entry in the court rolls in respect thereof.

It does not appear whether he died solely possessed of any live animal, nor does it appear whether, supposing him to have died solely possessed of some live animal, such live animal might not have been seized by the lord of some other manor, or *bona fide* disposed after his death, before the lord of the manor of Southmalling Lindfield could seize.

Upon the entry of Richard Baker in 1811, and the entry of Mr. Commerell in 1825, a relief became payable by him to the lord, if he was at that time tenant of the said five tenements under the lord, but no relief was taken, rendered, paid, or

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demand from or by him, nor is there any entry in the court rolls in respect thereof.

No quit-rent has been taken, rendered, paid, or demanded from 1804 to the present time in respect of the said five tenements or any of them, nor is there any entry in the court rolls in respect thereof. Heriots had been seized for these five tenements in various instances on the death of persons recorded on the court rolls as dying seized thereof previously to the tenancy of the Goodwyns, on the death of Charles Goodwin in 1735, and on the death of George Bethune in 1804.

The lord of the manor who seized the heriots for the said five tenements in 1804 was Thomas first Earl of Chichester, who was then tenant for life of the said manor, with remainder to his eldest son Thomas, afterwards second Earl of Chichester, for life, with remainder to his eldest son in tail. Thomas first Earl of Chichester died in 1805, Thomas second Earl of Chichester died on the 4th of July, 1826, whereupon the plaintiff, the present Earl, as his then eldest son, became tenant in tail in possession of the said manor.

The defendants contended, on these facts, that the plaintiff had no right to seize heriots for these tenements on Mr. Commerell's death. The plaintiff contended that he had such right.

If the Court should be of opinion, on these facts, that the plaintiff had no right to seize heriots for these tenements on the death of Mr. Commerell, the verdict which has been entered for the plaintiff is to be set aside, and a verdict entered for the defendants.

If the Court should be of opinion that the plaintiff had such right, the verdict for the plaintiff is to stand, but the amount is to be reduced to 177, which is agreed to be the value of the five horses that were seized.

In considering this case the Court is to be at the same liberty to draw inferences, and presumptions from the facts that a jury would be.

*Creasy (Channell, Serjt. with him)* for the plaintiff.—This action is not barred by the statute 3 & 4 Wm. 4, c. 27, s. 2, for, in the first place, that statute applies only to heriot service, which may be recovered by distress, and not to heriot custom, which lies in *prendre* only; and in this case the heriot claimed appears to be heriot custom. (*Lanyon v. Carne*, 2 Wms. Saund. 166; *Scriven on Copphold*, c. 8, p. 445; *Damerell v. Protheroe*, 10 Q. B. Rep. 20.) [ERLE, J.—If heriot custom lies in *prendre* only, it seems not to be within sec. 2, which only prohibits the making of an entry or distress, or the bringing of an action after the time limited.] In *Grant v. Ellis*, 9 Me. & W. 113, it was held that that section does not apply to rent reserved on a demise. But, secondly, if the statute does apply to heriot custom at all, the limited period has not expired. Heriots can only become due at irregular and generally long intervals; so that the twenty years do not begin to run from the last receipt, which was in 1804. [PATTERSON, J.—In *De Beauvoir v. Owen*, 19 L. J. Ex. 177, which was the case of a quit-rent, the Court of Ex. Ch. was compelled to hold that the period began to run from the last payment.] That was a case to which that provision in sec. 3 would apply; but sec. 3 is to be taken distributively, according to *James v. Salter*, 3 Bing. N. C. 544; and in this case the right would first accrue at the time of dispossession. Upon the death, in 1824, even if there was any evidence of a dispossession against the last lord of the manor; still, as the plaintiff only succeeded to the lordship in 1826, that evidence does not affect him. He asserts his right on the first occasion which presents itself, and has never been dispossessed; but, in 1824, it does not appear whether the tenant died solely seized of any live animal which could be seized as a heriot, and in the absence of any evidence on that point the omission is of no weight.

*Bovill*, contra.—During forty-five years not one single incident of this supposed tenure has occurred; and the Court will from that circumstance presume an extinguishment of the tenure. That might be done by a release either of the whole right of the lord, or of some particular incidents of the tenure. [LORD CAMPBELL, C. J.—There might be a release of certain particular incidents without any extinguishment of the tenure.] There is authority for the position that a release of the heriot would change the tenure. (*Doe dem. Reay v. Huntington*, 4 East, 270; *Bradshaw v. Lawson*, 4 T. R. 443.) [LORD CAMPBELL, C. J.—Those were cases of customary freeholds, which are held by a different tenure altogether. (a)] The right to the quit-rent is clearly barred by the statute. (*Doe v. Sumner*, 14 M. & W. 41; *De Beauvoir v. Owen*, 16 M. & W. 547; S. C. in Error, 19 L. J. Ex. 177.) But it is said that the statute does not apply to heriot custom: the answer in this case is, that this is heriot service; for the case states that the land is held of the lord by quit-rent, heriot, fealty, &c. Then the last receipt of a heriot is, according to *De*

*Beauvoir v. Owen*, the point from which the time begins to run, and that was in 1804. The omission to take a heriot in 1824 is not explained by saying that the tenant at his death may not have been possessed of any live animal which could be seized; for the jury, if asked, would presume that fact; and if that was the reason for the omission, it ought to have been entered on the court roll. [ERLE, J.—In 1804, the present Lord Chichester had only an estate in remainder. In 1826 his right accrued, and he claims the first heriot that he could. LORD CAMPBELL, C. J.—So no relief has been due since 1825.] It is difficult to contend that the right to the heriot is barred by the statute; but the quit-rent is, and then the Court will presume from all the circumstances, a release of the heriot. The doctrine of presumptions has been carried very far in many cases. (*Roe v. Ireland*, 11 East, 299; *R. v. Mynaghan*, 4 B. & C. 598; *Edridge v. Knott*, Cowp. 214; *Hewke v. Ducon*, 2 Taunt. 156; *Creech v. Whitton*, 1b. 160.)

*Creasy* in reply.—There is no ground for the presumption suggested. At the most there has been but a single omission to take a heriot. (He cited *Taylor*, *Evid.* 135; *Doe v. Cook*, 6 Bing. 159; *Doe v. Owsdown*, 7 Me. & W. 131.)

LORD CAMPBELL, C. J.—I am of opinion that the plaintiff is entitled to our judgment. Mr. Bovill has properly admitted that the statute does not operate as a bar. His argument, therefore, rests upon this: that we ought to presume a release; but upon what ground are we to presume a release of the heriot? In 1824, upon the death of Richard Baker, no heriot was seized; but it is clear that the land was liable down to that time; and the then Earl of Chichester was only tenant for life. His *lackes*, therefore, affords no ground to presume a release by him, because being only tenant for life, he could not grant a release. The present Earl came into possession in 1826; the first heriot fell due in 1847; and then he seized; so that there has been no *lackes* on his part. But Mr. Bovill calls in aid the non-payment of any quit-rent for forty-five years as a ground for presuming a release of the lord's rights; and there is certainly strong reason to suppose that the quit-rent is barred by lapse of time; but it is barred by virtue of the statute, if at all; and why then should we, from that fact, presume a release of the heriot, which is not barred by the statute. The same observation applies to the relief, and I think that there is no ground for calling them in aid to raise the presumption, which we are asked to make. Neither is there any ground for saying that the tenure of this land is changed. It is freehold land held of the lord, and though the right to a quit-rent has been lost by lapse of time, the land is still freehold land held of the lord by such services as remain.

PATTERSON, J.—I quite concur. The tenure of this land down to the year 1804 is most distinctly proved; and the nature of the tenure will continue unchanged unless something is shown to have altered it. That may be by acts of the lord and tenant, or by presumption, or by an Act of Parliament. This seems to be probably heriot service; and it is said that heriot custom would not be within the Limitation Act: that may be so; but it is unnecessary to decide that point, because assuming it to be a heriot service, it is impossible that the statute can apply in this case. The 2nd and 3rd sections cannot be put together so as to make the last receipt of a heriot, which only falls due at long and irregular intervals, the point of time from which the period of limitation begins to run. The twenty years, must, I suppose, run from the time when the right to have the heriot accrued; but there are great difficulties in the way of commencing the calculation in this case, from the year 1824; the present lord, at that time, had only an estate in remainder; and it is not clear that there was any live animal to be seized. It is said that there ought to be entries on the court rolls, and so there ought; but, supposing that it had not been taken for twenty years, are we to presume that it is gone? I think that, considering the nature of a heriot, no such presumption can be raised. But, it is said that that inference is to be drawn from non-payment of the quit-rent and relief; it is certainly difficult to say that the quit-rent is not barred by the operation of the statute; but, assuming that, I cannot see what ground it affords for presuming that the right to the heriot has been lost independently of the statute.

WIGHTMAN, and ERLE, JJ. concurred.

LORD CAMPBELL, C. J. expressed his regret that this relic of Danish invasion should have been allowed so long to remain a reproach to the law of England. He had himself made several ineffectual attempts to induce the Legislature to pass some measure for an equitable commutation of copphold tenure.

*Judgment for the plaintiff.*

Saturday, Feb. 22.

BROWN v. CLEGG.  
Local Improvement Act—Construction.

By one clause of a local Improvement Act was given to commissioners "to cause the pavement and footways, &c. and other public ways to be paved, &c. and the ground on which to be raised, lowered, or altered, from time to time, and in such manner as they shall think fit." By other clauses the commissioners were directed to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag same, and in case of their neglecting to do so, then the commissioners were empowered to pave and flag the same, and to recover the expenses from the owners or occupiers, and to lay the streets so paved to be highways, and to lay themselves the future paving of such streets, no power was given in those sections to the level of the streets.

The commissioners had given the notice under the latter sections with regard to a street which was built upon, but had never been paved or flagged; and upon the neglect of the owners or occupiers, proceeded to do the work himself. Instead, however, of merely paving in the street down a steep ascent, and gradually the level of the street opposite the plaintiff's houses.

Held, that they were not justified in so doing, and were liable in trespass.

Trespass quare clausum fregit, which is plaintiff's houses were injured. The declaration contained two counts.

The 5th and 10th pleas were the same, but pleaded to the 1st and 2nd counts respectively. The alleged substance that the close in the declaration mentioned was a public street within the township of Oldham, called Green-street; and that the commissioners under a local Act (7 Geo. 4, c. 64) had thought it proper and necessary to cause the said street to be paved and flagged, &c. and the ground and soil thereof to be levelled.

Replication—*De injuria*, and new assignment.

At the trial, which took place before GUMFRIED, J. at Liverpool, during the last Summer Assizes, a verdict was found for the defendants on the issues raised upon the 5th and 10th pleas. The plaintiff was the owner of houses in Green-street, in the town of Oldham, and the defendant represented the improvement commissioners of that town. Green-street had been partially built upon for many years, but some of the houses had been only lately built; it was not a thoroughfare, and the street had not been regularly paved or flagged, though the owners had put down flag-stones in front of their own houses. The commissioners had given notice to the owners and occupiers of the houses in Green-street to pave it and put it in good order; and upon their neglecting to do so, the commissioners had entered into for the purpose. In the execution of that work, in order to get rid of a steep ascent, the level of the street had been lowered in some places as much as 3 feet 6 inches; and the soil of the plaintiff in front of his houses had been cut away.

A rule nisi having been obtained to set aside the verdict for the plaintiff, with 40s. damages, on the 5th and 10th issues, on the ground that the commissioners had exceeded their powers.

Knowles and Cuninghame showed cause on the 16th of February, before PATTERSON, COLERIDGE, WIGHTMAN, and ERLE, JJ.

WATSON, CROMPTON, and SPILKE, contra. The following authorities were cited:—*Drake v. Greenoak*, 2 B. & C. 703; *Leader v. Mearns*, 1 W. 461; *Casler v. Holmes*, 2 B. & Ad. 592; *The Mayor of Salford v. Ackers*, 16 Me. & W. 58. The 10 & 11 Vict. c. 34, was also referred to.

The following are the material sections of the local Act:—

Sect. 53. And be it further enacted, that it shall and may be lawful to and for the said commissioners, and they are hereby authorized, empowered, and required, from time to time, when and so often as it shall appear to them necessary, to cause the present and the future streets, highways, lanes, passages, and other public ways, as well carriage as foot ways, within the said township, and each and every of them, and each and every of any part or parts thereof respectively, to be paved, flagged, or otherwise constructed, repaired, amended, supported, and kept in good order and condition, and the same, and the pavements, flagging, and other materials thereof, to be taken up, relaid, and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner and with such materials as they, the said commissioners, shall think fit.

Sect. 54. Power to declare new streets to be highways, provided they are of certain widths.

Sect. 55. And be it further enacted, that it shall and may be lawful to and for the said commissioners, and they are hereby required, at any meeting to be by them held under this Act, to cause all such parts of the public streets, ways, and passages within the said township, which are now built upon, but not

(a) See *Vaughan v. Atkins*, 5 Burr. 2764.

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paved, flagged, and cleansed, and all such other public streets, ways, and passages within the said township which are now making, or being built upon, or which may hereafter be made or built upon, and all other streets, lanes, avenues, ways, or passages within the said township, which are now making or being built upon, or shall or may hereafter be made or built upon, but not laid open to the public, which now have or shall hereafter have messuages or other buildings erected at the respective sides thereof, which buildings, with the respective yards, courts, gardens, and other conveniences thereto belonging shall be fronting to the said last-mentioned respective streets, avenues or passages, to the extent of two third parts of the aggregate length of such last mentioned streets, avenues, ways, or passages, either in a continued line or not, and whether inclosed or not, to be made, paved, set, flagged, and cleansed, or otherwise repaired, amended, supported, and put in good order and condition, in such manner and with such materials, and with such and so many sewers, gutters, drains, or water-courses, in, through, over or under the same, as to them the said commissioners or their surveyor or surveyors shall seem meet and necessary; and the charges or expenses attending, or in any manner relating to such new pavements, flaggings, cleanings, drainings, or otherwise putting into good repair and condition, shall be paid and reimbursed to the said commissioners by the owners or occupiers of the houses, buildings, courts, yards, gardens, ground, or land within or adjoining the said streets, ways, and passages so to be new made, paved, flagged, drained, and cleansed, or otherwise repaired, amended, supported, and put in good order and condition as aforesaid, each and every such owner or occupier paying an equal share or proportion thereof, according as such new making, paving, flagging, draining, cleansing or repairing, is or shall be either before, behind, or at the side of his or their house or houses, building or buildings, courts, yards, gardens, ground or land as aforesaid; and such share shall be ascertained by the surveyor or surveyors of the said commissioners, to be appointed under and by virtue and in pursuance of this Act; and if any such owner or occupier shall at any time neglect or refuse to pay such charges and expenses within fourteen days after the same shall have been demanded by or on behalf of the said commissioners, the same shall and may be levied by distress and sale of the goods and chattels of such owner or owners, or occupier or occupiers, in like manner as the rates hereinafter mentioned to be raised and levied are directed to be recovered; the overplus (if any) of the monies to be thereby, after deducting such charges and expenses as aforesaid, and the costs and expenses attending such distress and sale, being returned to such owner or occupier.

Sec. 56. Provided always and be it enacted, that before the said commissioners shall cause the said public streets, ways, and passages within the said township which are now built upon, but not made, paved, flagged, cleansed, or otherwise put into good order and condition, and all such other streets, avenues, ways, and passages within the said township which are now making, or being built upon, or may hereafter be made, laid out, or built upon, or such thereof respectively as may require the same, to be so made, paved, flagged, cleansed, or otherwise repaired, amended, supported, and put in good order and condition in such manner and with such materials, and with such and so many sewers, gutters, drains, or watercourses, as to them, the said commissioners, shall seem meet and necessary as aforesaid; they shall, in the first place, cause their surveyor or surveyors to give or leave a notice in writing under his or their hand or hands to or at the usual place of abode of the owner or owners, or occupier or occupiers, of each and every house, building, tenement, parcel of ground, lands, or hereditaments within the said streets, avenues, ways, or passages so to be paved, flagged, and cleansed, or otherwise put in good order and condition as aforesaid, requiring him, her, or them, to make, pave, flag, cleanse, drain, or otherwise repair, amend, and put the same into good order and condition, in such manner and with such materials as they shall direct, either before or behind, or at the side of his, her, or their house, building ground, land, hereditaments, and premises (as the case may be or require), and in case any such owner or occupier shall neglect or refuse for the space of six calendar months next after the receipt of such notice, or the same being so left as in manner aforesaid, to make, pave, flag, cleanse, or otherwise repair, amend, and put the same into good order and condition, in such manner and with such materials as the said commissioners shall direct, either before, behind, or at the side of his, her, or their house, building ground, land, or hereditaments as aforesaid; that then and in such case it shall and may be lawful to and for the said commissioners, and they are hereby required to cause the same to be done, in such manner and with such materials as they shall direct, and to recover the costs, charges, and expenses thereof from such

owner or occupier, in case of refusal to pay the same, in any manner in which any rates or penalties may be recovered under this Act.

Sec. 57. Occupiers may retain expenses of paving from rent.

Sec. 58. And be it further enacted, that when the said commissioners shall have caused any of the public streets, ways, and passages within the said township which are now built upon, but not made, paved, and cleansed, or otherwise repaired, amended, supported, and put in good order and condition, and any other public streets, or other streets, roads, ways, and passages within the said township, now making or being built upon, or hereafter to be made or built upon, to be made, paved, and cleansed, or otherwise repaired, amended, and put in good order and condition, as aforesaid, to the satisfaction of the said commissioners, and the charges and expenses attending the same shall have been paid and satisfied by the owners or occupiers of the houses, buildings, grounds, or land within the said streets, it shall and may be lawful for the said commissioners, or any seven or more of them, at any meeting to be held by virtue of this Act, upon the application of the owner or owners of the soil, of such streets, ways, and passages, or of the greater part in value of such owners to declare such streets, ways, or passages to be public highways, and thenceforth the same and every of them, and every part thereof shall be deemed and taken to be public highways to all intents and purposes, and be cleansed, maintained, and kept in repair by the said commissioners out of the rates to be levied by virtue of this Act. *Curr. adv. null.*

## JUDGMENT.

PATTEKSON, J. now delivered the judgment of the Court.—It appeared by the evidence that Greaves-street, in which the plaintiff's premises were situated, had not, before the time in question, been paved or flagged. Part of the houses in the line of street had been built recently, and the evidence as to the state of the street was such as to give a jurisdiction to the commissioners to proceed under secs. 55 and 56 of the Act of Parliament, but as those sections were not taken to justify the act that had been done by the defendant, they resorted to sec. 53; and the fifth plea raised the question whether the 53rd section applies to a street in the circumstances of Greaves-street, and we think that it does not. The meaning of the statute would be less doubtful if the order of the sections was transposed. Sec. 56 enacts that the commissioners, before they pave a street in the state of Greaves-street, which we may call a new street, must give notice to the occupiers or owners to do the paving in a sufficient manner. Sec. 55 enacts that if the owners make default for six months after such notice, the commissioners may do the paving and charge the expenses on the occupiers or owners.

Sec. 54 enacts that when a new street has been made complete as to paving and some other requisites, the commissioners may declare it a highway, and take upon themselves the repair of the paving for the future. Sec. 58 enacts that when a new street has been completed as to the paving and the other requisites by the commissioners, and the owners and occupiers of land have paid the expenses, the commissioners may declare it a highway, and take the repair of the paving for the future. The provision in these sections applies specifically to a new street, such as Greaves-street, and the commissioners intended at first to act under them, and they gave the notice under the 56th section, and proceeded to do the work themselves shortly after the expiration of the six months from the notice. And if they had kept within the provisions of the sections they would have been justified. But in cutting down in the street the steep ascent, and lowering the level of the way, they went beyond the powers given them under that provision. They have therefore adapted their plea to the 53rd section, which enacts that the commissioners may from time to time cause any present or future streets to be paved and repaired, the ground or soil thereof to be raised, lowered, or altered in such manner as they think fit. We think this section does not apply because it is general and applicable to all streets; and it is followed by a special clause applicable to new streets such as Greaves-street, which would be inoperative if the general clause included the streets specified and provided for. For a new street the commissioners are to give notice, and in case of default in pavement to charge the expense to the owners, and when it has been paved by the owners, they may undertake the pavement for the future. These provisions do not consist with a discretionary power of paving all new streets without giving any notice. It seems to us the 53rd section applies to old streets and streets that are declared highways under the sections above cited, and to streets to which the other sections do not apply; and even if the 53rd section had applied to Greaves-street, it seems to us they would not be justified in lowering the level for a purpose unconnected with the repairing and pavement. The power of raising or lowering the level is mentioned, and united by the context with paving and repairing, and the manner of, and materials for,

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paving and repairing. Also, as there is no power for compensating individual losses where the level is altered for the public benefit, it seems improbable that general powers of altering levels to an unlimited extent should have been intended: and as damage resulting therefrom may be very serious, if an unlimited power was intended, the context leads to the conclusion that the power was limited to the requirements for paving and repairing pavement, and if the power is so limited, it will not afford a justification in the present instance. The result will be that the plaintiff is entitled to a verdict, which is to be entered as the parties have agreed.

Rule absolute.

Thursday, May 1.

DOX DEM. PAGE v. PAGE.

*Will—Construction of—Word "Business."*  
A testator devised to his wife "all my land and shop, stock in trade business, and everything that I have," and after his wife's death, he "willed and bequeathed the business to his son, for his sole use and benefit; but with an earnest request to do all in his power to assist those of the testator's children who might require it," and "all the rest of his property which might remain after his wife's death, he gave to his executors in trust for his daughter."

*Held, that the son did not take under the word "business" the land upon which the shop was built, in which the business was carried on.*

This was an action of ejectment tried before ERLE, J. at the second sittings for Middlesex in Hilary Term last, to recover possession of a shop, and the land upon which it was built, from the defendant. The lessor of the plaintiff claimed as residuary devisee in remainder, under the will of John Page her father, the defendant Henry Page as devisee under the same will. The will, so far as is material, was in the following words:—"I leave to my wife, Ellen Page, my land and shop, stock in trade, business, and everything that I have for her sole use and benefit, with power after my death to dispose of the business, or any part of my property, according as she may think best; then after my wife's death I will and bequeath the business to my son, Henry Page (the defendant), for his sole use and benefit; but with an earnest request to do all in his power to assist those of my children who are unable to get their own bread, and all the rest of my property which may remain after my wife's death, I give to my executors in trust for my daughter." The daughter was the lessor of the plaintiff. The question was, whether, under the word "business," the defendant, Henry Page, was entitled to the shop and land, in and on which the business was carried on, and for the recovery of which this action was brought. The learned judge directed a verdict for the plaintiff, but reserved to the defendant leave to move to enter the verdict for himself. A rule nisi having been accordingly obtained.

Watson and Atherton now showed cause.

H. HILL argued in support of the rule.

LORD CAMPBELL, C.J.—It is possible that the testator may have used the word "business" with the intention to include real estate, but that suggestion must be made out by the defendant unequivocally from the context. Now in the earlier part of the will, the word "business" is used in its general and ordinary acceptation, and is carefully distinguished from the testator's land, shop, or stock in trade. The word is used again without such clear marks of distinction, in the clause which gives the wife a power of disposing of it during her life. But how can it be said to include the house and land in the bequest to the son, when the land and shop had been before distinguished from it as not included in it? It is said that unless the shop and land were to pass, the testator would not have requested the son Henry to assist the other children; but that would depend upon the value of the business, which the testator may have considered sufficient to enable the defendant to comply with the request.

PATTEKSON, J.—There is no reason for supposing the word "business" to be used in two different senses in the different parts of the will.

WIGHTMAN, J.—The testator enumerates the things of which his property consists, land, shop, stock in trade, business, and so on. Then he leaves one specific portion of it, "the business," to his son. That expression has a clear and intelligible meaning, without any reference to real estate.

ERLE, J. concurred.

Rule discharged.

Tuesday, May 6.

COLLETT v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

*Negligence—Case—Public servant.*

A railway company is liable to an action at the suit of a servant of the Post-office sent by the railway in charge of the post letters, under stat. 1 & 2 Vict. c. 98, for personal injury sustained by him by reason of negligence in the mode of carrying them upon the railway.

This was an action upon the case. The declara-







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Now, the introductory part of the plea is somewhat ambiguous. It professes to be confined to "so much and such parts of the libel as relate to and charge the plaintiff with the keeping, &c. of the nuisance, and the causes of action in respect thereof." It may be that the mere charge of keeping and continuing the nuisance is not the part of which the plaintiff complained as a libel, but the mode of his keeping it, and the conduct imputed to him in respect thereof, and yet all that "relates to" the keeping, &c. of the nuisance, so that the plea may extend to very much beyond the justifying of the mere assertion that the plaintiff kept and maintained a nuisance. Now, did the defendant intend to justify every thing in the libel that, in the extended sense just mentioned, relates to the keeping of the nuisance? The other allegations in the plea are the best answer to that question, and they contain a justification of every part of the libel. In that view, it seems to me that the defendant cannot have the verdict upon this finding of the jury.

**ERLE, J.**—The rule of law is admitted on both sides, that if a material part of a plea of justification fails, the plea fails altogether. This matter, therefore, depends upon how much the plea professes to justify. The libel alleges a great many applications to the plaintiff to remove the nuisance, and a great many proceedings in respect to it, all which are detailed with disrespectful and injurious observations upon the plaintiff's alleged conduct. I think that all that part of the libel "relates to the continuing of the nuisance;" that the plea, therefore, professes to justify it, and that upon the finding of the jury, the plaintiff is entitled to the verdict.

**PATTERSON, J.**—I quite adhere to the opinion which I formed at the trial that the verdict upon this plea should be entered for the plaintiff. No doubt it is a very tricky plea, and looks as if framed for this very purpose, that it might now be contended that nearly all of it is utterly immaterial, and may be struck out, because of the introductory words "so much of the said libel as relates to and charges the plaintiff with the keeping and continuing the nuisances therein mentioned." Now, there are no such words from the beginning to the end of the libel as "making, maintaining, keeping, or continuing the nuisances." That is only the substance to be collected from reading every part of the libel, the very words of which the body of this plea affects to justify. As it is only from reading the whole libel that we can collect what is charged against the plaintiff with respect to these matters, I think the plea must be treated as a plea of justification of the whole libel, and that, therefore, it fails. It would be trifling with common sense to allow the defendant to succeed.

*Rule discharged.*

Wednesday, May 14.

## APPEALS FROM THE COUNTY COURTS.

**WATSON v. THE AMBERGATE, NOTTINGHAM, &c. RAILWAY COMPANY.**

*Liability of railway company as carriers—Agent.*  
In an action for not duly delivering goods at C. it appeared that when the goods were received by the office-keeper of the defendants, properly directed for C. the plaintiff wished to pay the carriage for the entire journey; but the office-keeper said that he could not receive the money, as he had no rates of payment for a greater distance than N. where the defendants' line joined another railway, but that the things would go well enough. The goods arrived in the regular course at N. but were afterwards delayed upon their journey between N. and C.

*Held, that as the office-keeper, being the agent of the company, had not expressly limited their liability, they were responsible for the proper delivering of the goods at C.*

This was an appeal from the County Court of Lincolnshire, held at Grantham.

The plaintiff was brought in the County Court to recover damages from the defendants, as common carriers, for not delivering at Cardiff certain plans and models in proper time, so that they were too late to compete for a prize of 100 guineas, offered by the Glamorganshire Canal Company for the best plan and model of a vessel or machine to load colliers from coal barges. They were delivered to the office-keeper of the defendants at the Grantham Railway station, properly directed for Cardiff; and the plaintiff's servant who delivered them wished to pay the carriage for the entire journey; but the office-keeper declined to receive the money, as he had no rates of payment for a greater distance than Nottingham, where the defendants' line of railway joins the Midland Railway. It was suggested that perhaps a special messenger should be sent with the goods, to ensure their arrival in time; but the office-keeper said that there was no necessity to do so, the things would go well enough. The carriage, therefore, was paid to Nottingham, but no further; the goods were despatched in the usual course; but were delayed at Bristol, and did not reach Cardiff until the day after the adjudication of the prize. The goods had since been returned to the plaintiff. The judge gave judg-

ment for the plaintiff, and assessed the damages at 20*l.*, as being the amount of loss occasioned by the nondelivery of the plans and models in time to compete for the prize. Two questions were raised by the case: first, whether the defendants were liable at all for the delivery of the goods beyond Nottingham; secondly, whether, if at all, for more than nominal damages. (a)

**S. C. DENISON** for the appellants.

*Lush contra.*—**MUSCHAMP v. LANCASTER AND PRESTON RAILWAY**, 8 M. & W. 421, and the cases there cited, were referred to.

**PATTERSON, J.**—I have no doubt that the office-keeper was the defendants' agent for this purpose; and, as he received the goods to be conveyed to Cardiff without expressly limiting the liability of the company, the company were responsible for their safe and proper delivery there. Then as to the damages. By the non-delivery in time, the model, which was valuable for a particular purpose, lost its value for that purpose; the learned judge has done his best to ascertain the amount of that loss; and I see no reason to be dissatisfied with it.

**ERLE, J.** concurred.

*Judgment affirmed with costs.*

## BLOWERS v. RACKHAM.

This was an appeal from the County Court of Norfolk; but, as it appeared that the amount claimed was under 20*l.*, and the appellate jurisdiction of this Court is confined to cases where the amount is between 20*l.* and 50*l.* by 13 & 14 Vict. c. 61, s. 14, the appeal was at once dismissed.

**BRAMWELL** for the appellant.

**WILLES** for the respondent. *Appeal dismissed.*

## BUSINESS OF THE WEEK.

TRINITY TERM.

Tuesday, May 27.

**CORT v. THE AMBERGATE, &c. RAILWAY COMPANY.**—*Humphrey and Williams* showed cause against a rule for a new trial. *Macaulay and Denison contra.*

*Cur. adv. vult.*

**DON DEM. PRAYER v. DASHWOOD.**—Ejectment for a forfeiture by erecting more than four houses on the land demised. The lessors of the plaintiff knew what was going on, and did not object; and the jury found that they so far sanctioned the erection as to allow the defendant to go on and finish it. *Crowder and Barston* showed cause against a rule to enter the verdict for the defendant. *Butt, Kinglake, Serjt. and Wiles, contra.*, were stopped. *The Court* thought that there had been a waiver of the forfeiture.

*Rule absolute.*

Wednesday, May 28.

**REG. v. THE LORD MAYOR OF LONDON, vs DE HARA v. THE QUEEN OF PORTUGAL.**

*Rule absolute for a prohibition.*

**THE SAME, vs WADSWORTH v. THE QUEEN OF SPAIN.**

*Rule absolute for a prohibition.*

**REG. v. THE GOVERNORS AND DIRECTORS OF THE POOR OF THE PARISH OF ST. JAMES'S, WESTMINSTER.**—*Tomkinson* moved for a mandamus to the defendants to admit Dr. Wright to the exercise of his office of chaplain to the Union Workhouse.

*Rule nisi.*

**COOPER v. BALL.**—*Crowder, Butt, and Arney* showed cause; *Kinglake, Serjt. Barston, and M. Smith*, in support of the rule.

*Rule absolute.*

**DON DEM. NEWMAN v. RUCKAM.**—*M. Smith* showed cause; *Crowder and Barston* in support of the rule.

*Cur. adv. vult.*

**WATSON v. THE MIDLAND RAILWAY COMPANY.**—*Hall* showed cause; *Atherton*, in support of the rule.

*Rule discharged.*

**SCHOLEFIELD v. ANDREW.**—*Watson, Addison, and Price* showed cause; *Willes, Serjt. Atherton, and Anderson*, in support of the rule.

*Argument adjourned.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Tuesday, April 29.

## COLBOURNE AND OTHERS v. DAWSON.

*Guarantee—Past credits and future supplies.*  
**B. and Co. being indebted to the plaintiffs for goods, and desirous of further supplies, referred them to the defendant for a guarantee. An application to defendant was thereupon made by the plaintiffs as follows:—**

"Sir,—We are doing business with Messrs. B. and Co. and we require a guarantee to the amount of 200*l.* and they refer us to you for one. Trusting you will not fail to furnish us with one, we remain, &c."

"C. G. and T."

*The defendant replied by letter and document as below:—*

"Gentlemen,—In reply to yours, I beg to say I have no objection to become security for Messrs. B. and Co. and subjoin the following memorandum to that effect:—

"200*l.*

"I hereby engage to guarantee to Messrs. C. G. and T. ironmasters, the sum of two hundred pounds, for iron received from them for Messrs. B. and Co. as annexed."

"T. D."

(a) This case was drawn by the learned judge, and some comments being made by the appellant's counsel upon the mode in which the facts were stated, **FAYREBORN, J.** observed, that the case ought not to be drawn by the judge unless the parties are unable to agree upon a statement of the facts. (See sec. 15.)

## COMMON BENCH.

*The declaration on the above guarantee stated the consideration and promise thus:—*

"For that, &c. in consideration that the plaintiffs, at the request of the defendant, would sell and deliver certain goods and chattels, to wit, &c. to one J. B. and one W. B. on certain credits, then agreed upon by and between the plaintiffs, and the said J. B. and W. B., the defendant then promised the plaintiffs to guarantee to them the price of the said goods and chattels, to the amount of 200*l.*" &c.:

*Held, first, that this was a good guarantee, the correspondence shewing that it applied to future as well as to past credits.*

*Secondly, that the consideration and the promise, as alleged in the declaration, were well supported by the guarantee.*

This was an action of *assumpsit*. The declaration contained a special count, alleging the consideration and promise as follows:—"For that heretofore and before, &c. to wit, on, &c. in consideration that the plaintiffs, at the request of the defendant, would sell and deliver certain goods and chattels, to wit, 1,000 tons of iron, to one Joseph Ivey Baker, and one William Bennett Baker, on certain credit, then and there agreed upon by and between the plaintiffs and the said Joseph Ivey Baker and William Bennett Baker; the defendant then promised the plaintiffs to guarantee them the price of the said goods and chattels, to the amount of 200*l.*" &c. Breach, averment of request to pay, and non-payment.

*Plea—Non assumpsit.*—Issue joined.

The cause came on for trial before Lord Campbell, C.J. at Gloucester Summer Assizes, 1890, when a verdict was entered for the plaintiffs for 92*l.* subject to the opinion of the Court on the special case stated as follows:—

"On the 24th of November, 1848, Messrs. Baker and Company were indebted to the plaintiffs in the sum of 59*l.* 8*s.* 7*d.* for certain quantities of iron before then sold and delivered by them to Messrs. Baker and Co. between the 11th of October, 1848, and 24th of November, 1848. On the last-mentioned day the plaintiffs wrote the defendant the following letter:—

"Mr. Thomas Dawson.

"Bankfield Iron Works, Birston.  
"Sir,—We are doing business with Messrs. Baker and Co. of St. John's-street, Wolverhampton, and we require a guarantee to the amount of 200*l.*, and they refer us to you for one. Trusting you will not fail to furnish us,

"We remain, &c."

"COLBOURNE, GROWCUTT, AND TURLEYS.

"24th November, 1848."

To this letter the defendant replied on the 27th of the same month, by sending a letter, and document subjoined thereto, of which the following is a copy:—

"Midland Railway Engineer's Office.

28, London-road, Derby, Nov. 27, 1848.

"GENTLEMEN,—In reply to yours of the 24th instant, I beg to say that I have no objection to become security for Messrs. Baker and Co. of St. John's-street, Wolverhampton, and subjoin the following memorandum to that effect:—

"200*l.*

"I hereby engage to guarantee to Messrs. Colbourne, Growcutt, and Turleys, iron masters, the sum of two hundred pounds, for iron received from them for Messrs. Baker and Co. as annexed."

"THOMAS DAWSON."

After the receipt of the foregoing letter and document, the plaintiffs supplied Messrs. Baker and Co. at various times with iron, amounting in the whole to 92*l.* The last delivery was on 5th of February, 1849. The plaintiffs would not have supplied Messrs. Baker and Co. with any iron after the 27th of November, 1848, if they had not had what they thought to be a good guarantee in law from the defendant for the sum of 200*l.* and the iron sold and delivered to Baker and Co. after the 27th November, 1848, was so sold and delivered upon the faith of the letter and document sent by the defendant to the plaintiffs on that day being a good guarantee in law for the debts of Messrs. Baker and Co. to the extent of 200*l.* After the 5th of February, 1849 (when the last delivery of iron was made), and before the commencement of this action, Messrs. Baker and Co. became bankrupt. At the time of commencing this action 124*l.* was still due for the iron so sold by the plaintiffs to them. If the Court shall be of opinion that the letter and document of the defendant, dated the 27th of November, 1848, constitute a guarantee for so much of the debt as was incurred after the 27th of November, 1848, and that they prove the first issue, then the verdict for the plaintiffs for the sum of 92*l.* is to stand. If the Court should be of opinion that the letter and document do not constitute a guarantee for the debt of Messrs. Baker and Co. or do not prove the first issue, then the verdict is to be entered for the defendant."

*Verdict, Q.C. (with him Kettle), for the plaintiffs.*

## COMMON BENCH.

## COMMON BENCH.

## COMMON BENCH.

The terms of this guarantee, it is confessed, are ambiguous, and some of them in the past tense; nevertheless the Court, it is submitted, will see reasons for construing it as a prospective guarantee. (*Haigh v. Brooks*, 10 A. & E. 313.) The words in the guarantee, "received for Messrs. Baker and Co." must be read as "received by Messrs. Baker and Co." Clearly what the defendant meant to say, was, that he would be guarantee for such iron as Baker and Co. should thereafter receive. [JAMES, C. J.—If the words are ambiguous we must look back into the correspondence for their meaning. There the words, "doing business," are material to be considered.] By those words, and the letter generally, it must be taken the plaintiffs meant that they were supplying iron to Baker and Co. and must cease to do so, unless they receive a guarantee. [JAMES, C. J.—The Court must understand what you mean by "guarantee." Does the word apply to past supplies as well as future supplies? It means prospective supplies. [JAMES, C. J.—Might it not be read, "In consideration of your supplying iron in future, I will guarantee 200l." meaning for iron already supplied? That would be a reason for construing it as meaning for a future advance. (*Goldshede v. Swan*, 1 Ex. 154; *Butcher v. Stewart*, 11 M. & W. 857; *Steele v. Hoe*, 19 L. J. 89, Q. B.) The mere using words having a past signification must not preclude the Court from looking into the correspondence to discover the real meaning of the instrument. It has sometimes been said that words of guarantee should be taken most strongly against the party guaranteeing. But this has been doubted, and indeed Parke, B. has expressed himself otherwise, remarking, that if any weight of the kind was given it should rather be against the party giving the guarantee. (*Meyer v. Isaac*, 6 M. & W. 610.) It is submitted that the words in this case are to be taken in connection with the correspondence, and altogether they form a guarantee for prospective dealing. Judgment, therefore, should be given for the plaintiffs.

*Crompton and Gray, contra.*—The words of the guarantee are not at all ambiguous; the Court, therefore, must not look into the correspondence, or any further than the document itself. The Court must collect from the instrument the consideration for the promise. Confining itself to the document it is hard to see how the Court can put an interpretation of the future upon a word of the past tense. There is no case in which the Courts have gone so far as to say that the word "received" means a future thing. It is unambiguous, and must not be strained from its simple meaning. In all the cases cited by the plaintiffs, the point has turned upon the word "having," which it has been held is capable of concurrent meaning. [WILLIAMS, J.—You must not violate the rules of grammar. "Received" means a thing gone by.] Just so. It means here—in consideration of your act having been done my act shall be done now. Neither can anything be gathered from the correspondence (if that be looked at) which shows that the parties put a future meaning on the word "received." If the Court looks at the letters, it must not look further, or regard anything else. In all the cases cited the parties knew that nothing previous had been done, and the guarantees given were present acts, with a prospective intention. Here the parties knew that business had been transacted and credit given. [WILLIAMS, J.—As to the consideration for the guarantee, that is not doubtful; but the difficulty is as to the promise, the Statute of Frauds requiring that to be in writing. JERVIS, C. J.—Do you say this is a guarantee for 200l. only, or a continuing guarantee? It is difficult to make out what it is;—what is the consideration, or what the promise. (*Bentham v. Cooper*, 5 M. & W. 621.) Can the Court say that the consideration stated is the real consideration, or the promise stated the real promise? [CRESSWELL, J.—How can you say there is any past consideration in this guarantee and the letters? We do not say there is; all we say is, that it cannot be made out what was the consideration. The Court, surely, cannot say, on the face of this document, that the supply of the future goods was the consideration for the guarantee. (*Bell v. Welch*, 19 L. J. 184, C.P.) Not only the consideration, but, by the Statute of Frauds, the promise must appear. The facts proved do not support the declaration, which alleges, that in consideration that the plaintiffs would sell iron to Baker and Co. the defendant then promised to guarantee 200l. If this is not a continuing guarantee, the case is at an end. In the event of its being considered that the guarantee was for iron previously supplied to the extent of 200l. then it cannot be held a guarantee for goods to be supplied after. If, as we contend, it is not a continuing guarantee, then the contract is not proved, as laid in the declaration. The defendant, it is submitted, is entitled to judgment of the Court on this record.

*Kettle*, in reply, relied on the cases cited, and particularly on *Steele v. Hoe*.

JERVIS, C. J.—I am of opinion that in this case the plaintiff is entitled to the judgment of the Court. If it were necessary in deciding this case to confine

our judgment simply to the paper on which the guarantee is written, I think the authorities cited by Mr. Keating would be sufficient to shew that we might, in construing the words "for iron received," look to the knowledge of the parties at the time, for the purpose of ascertaining the meaning of those words; because I can see no difference between receiving evidence *de hors* the contract to explain the word "received," in the past tense, and receiving it as in the case of *Butcher v. Stewart*, and *Goldshede v. Swan* (in which evidence was admitted to shew that the words used in them were used prospectively). It is unnecessary to consider whether this is merely a question of law for the Court. As I understand the case, it is not necessary to refer to any authority at all. It is admitted that if these documents by reference embodied each other, we must take the whole as forming one contract, and explain the one by referring to the others. Now it is plain the papers do refer to each other. [His lordship here read the letter containing the guarantee as above.] This means, "I, on behalf of Thomas Baker, engage to guarantee as annexed—that is to say as on the fly-leaf adjoining,"—therefore we must look to that paper so referred to and see what is said there. Then for the purpose of knowing what induced defendant to become security, we must look to the application made to him, which was this:—"We are doing business with Baker, and wanting a guarantee are referred to you." The whole matter then, taken together, is this. As "you are doing business with Baker and Co. I guarantee the sum of 200l. for iron supplied to them." What is the meaning of doing business? It is not "you were before doing business," but "you are doing and continuing business" (that is supplying goods for the future), therefore I guarantee 200l. If so, that is a good consideration. We must next look to see what is the promise. "I guarantee you the sum of 200l. on account of iron received." That either is a past or a future consideration. If it is a future consideration it is a continuing guarantee; therefore it is a guarantee to pay in consideration of "doing business" or supplying goods; in fact, the promise to pay for goods supplied and for goods to be supplied in future. A party is not bound to state the full promise. Here it is stated correctly to be "in consideration of my supplying goods in future you promise to guarantee me 200l. for goods supplied before or to be supplied after." He is not bound to say both. Therefore there is a good consideration and a good promise which is sufficient to entitle the plaintiffs to maintain their action.

CRESSWELL, J.—I am of the same opinion. If the consideration and promise are considered apart from each other, all difficulty will vanish from the case. It appears by the letters that the plaintiffs applied for a guarantee, alleging that they were carrying on certain business transactions with Baker and Co. and required a guarantee for 200l.—that was because they were "doing business" with them—"and they have referred us to you." The rest of the letter is mere matter of civility. Then in reply defendant answers that he has no objection to give one; and then the memorandum says, "in consideration of the letter received from you, and the circumstances stated in it, I have no objection to be security." That means, "In consideration of your doing business for Baker and Co. as you are doing it at present, I have no objection to be a guarantee for 200l.," not for any existing amount, nor for any particular goods to be supplied, but generally to give security for business transactions to the amount of 200l. All this is entirely apart from what he promises to do. In consideration of what is doing or to be done by the plaintiffs, the defendant promises something, and that is to guarantee the plaintiffs 200l. for goods supplied by them. Then he guarantees for Baker and Co. "as annexed"—the probable construction of which is that, as mentioned in defendant's letter, he has no objection to give security for them. It seems to me that whether that includes goods already supplied or otherwise, is not material to this question; for undoubtedly it includes goods to be afterwards supplied, and therefore the promise alleged in the declaration is fully justified by what the defendant promised. He may have promised something more, but he certainly promised that. Both the promise and consideration, therefore, appear to me good, and I think our judgment should be for the plaintiffs.

WILLIAMS, J.—I am of the same opinion. I think that without doing more violence to the grammatical construction of these documents than the authorities will warrant, we may hold that the plaintiffs are entitled to judgment.

TALFOURD, J.—I agree with my learned brethren. It appears to me it must not be taken for granted that the word "received" has reference solely to the past or future. It is in itself equivocal. But when we look at the whole of the documents which form the entire contract between the parties, I think there cannot be a doubt the guarantee was one for the past and also for the future.

—*Protes to the plaintiffs.*

May 9 and 10.

(Before JERVIS, C. J. CRESSWELL, WILLIAMS, and TALFOURD, JJ.)

DOR DEM. RICHARDS v. LEWIS.  
RICHARDS v. LEWIS.

*Voluntary conveyance—Effect of secret settlement made by woman about to marry—Application of rule in Barrell's case—What is a sufficient search to admit secondary evidence of lost deed.*

C. on the eve of marriage to D. secretly conveyed leasehold property to trustees for the benefit of herself for life, remainder to her son R. by a former marriage, and his issue, remainder to her illegitimate son J. This deed was at first retained in the settlor's possession, then delivered to T. a stranger, and then returned to the settlor, but was never afterwards heard of. Many years after this the settlor joined her husband D. and her son R. in setting the same property on other trusts: but having survived both D. and R. she executed a mortgage of the property to L. for valuable consideration, and R. having had no issue, J. conveyed to the same party, also for valuable consideration.

Held, 1st, that the secret ante-nuptial settlement made by C. could not, in a court of law, be deemed fraudulent and void.

2ndly, That there was sufficient evidence of its delivery.

3rdly, That to let in secondary evidence of its contents, proof was required of search for the missing deed among the papers of both the trustees and of the personal representatives C., D. and R.

4thly, That the conveyance by J. the remainderman, gave a good title at law against those claiming under the settlement made by D. and wife.

5thly, That the mortgage by C. had no effect.

The first of these cases was an action of ejectment to recover certain leasehold property, filed before Mr. Justice Talford at the last Michaelmas Assizes, in which a verdict was found for the plaintiff. The second was an action of debt for the title-deeds of the same property, tried at Swansea before Mr. Justice Williams, in which a verdict was found for the plaintiff.

The facts of the two cases were as follows:—Mrs. Catharine Joseph, of Morthyr Tydvil, who had been twice previously married, being in the year 1829 on the eve of a third marriage, secretly conveyed by a deed, dated 28th of May in that year, certain freehold and leasehold estates to trustees for the use of herself for life, with remainder to Rhys Morgan, her son by her first husband, but life, remainder to the children of Rhys Morgan, remainder to Llewellyn Jenkins, an illegitimate son born before marriage. Thirteen days after this deed was executed, the settlor married David Saunders, who was never apprised of its existence. The deed was retained in the possession of Mrs. Saunders for a short time, and then delivered to a Mr. Thomas for safe custody, who many years afterwards restored it to Mrs. Saunders, and it was never afterwards heard of. In 1837 Saunders and wife and Rhys Morgan all joined in conveying the same property to trustees for the use as regards the leasehold property in dispute for Saunders and wife for life, remainder to Rhys Morgan and his wife Emma for life, remainder to Rhys Morgan's children, remainder to the appointee of the survivor of Rhys Morgan and his wife. In 1840 Saunders died, and shortly after, Mrs. Saunders executed a mortgage to the defendant; and Mrs. Saunders and Rhys Morgan having both died in the year 1841, the defendant obtained from Llewellyn Jenkins an absolute conveyance of the property, and entered into possession. In the same year the widow of Rhys Morgan married Richards, the plaintiff, and afterwards executed the power of appointment in his favour.

At the trial of the action of debt for the title-deeds, the only evidence of the settlement of 1829 was that of Mr. Thomas, who deposed from memory to its contents, but the learned judge rejected such evidence, on the ground that proper search had not been made among the papers of the two trustees and the representatives of David Saunders and Rhys Morgan. At the trial at Swansea, evidence was given of proper search having been made for the lost deed, and the secondary evidence was admitted; but the learned judge held that the deed was not found to have been properly delivered. Leave was given in each case to the defendant to move to enter a verdict; and on the former day Keating, Q.C., moved for, and obtained, a rule in each case to enter a verdict, or for a new trial.

Alexander, Q.C., and Grey, in the ejectment last case, and Keating, Q.C. and Peeling in the second, now shewed cause. 1st. The deed of 1829 was fraudulent and void *ab initio*. A court of equity would have set aside such a deed at the prayer of the husband Saunders at any time. (*Drover's case*, 2 Broom's Reports, 29; *Howard v. Foster*, 2 Reports in Chancery, 81.) And it is submitted that the fraud vitiated the transaction altogether, and that a court of law should not give validity to the deed.



COMMON BENCH.

(*Dord, Mansfield, Cadogan v. Kennett*, Cowp. 434.) Though one voluntary deed cannot avail against a previous voluntary deed, yet the circumstances attending the execution of the settlement of 1837 made the parties deriving interests thereunder purchasers within the statute of Elizabeth. (*Scott v. Bell*, 2 Lewin, 70; *Fitzmaurice v. Sadler*, 9 Ir. Eq. Rep. 595; and *Vin. Abr. Vol. Conveyance*, c. 3.) 2ndly. There was not sufficient evidence of the delivering of the deed. (*Doe dem. Garnous v. Knight*, 5 H. & C. 671; *Com. Dig. Faint. A. 3; Bowker v. Burdett*, 11 M. & W. 147.) 3rdly. There was not sufficient search to let in secondary evidence of the contents. (*Orwin v. Clancy*, 6 Ir. Eq. Rep. 552-556.) 4thly. The estate and interest of Llewellyn Jenkin, under the deed of 1829, if the deed should be held to be found, and to have been valid in its inception, was effectually barred by the deed of 1837, inasmuch as Rhys Morgan, the quasi tenant in tail under the former deed was a party to the latter deed. 5thly. The mortgage to the defendant by Mrs. Saunders was wholly invalid, for if the settlement was good, she had nothing but her life estate to mortgage; and if it was not, then Saunders, the husband was entitled *jure mariti* to the leasehold property, and he did reduce it into possession by executing the deed of 1837.

*Keating, Q.C. Grove, and Phipson, contra.*  
JERVIS, C.J. in delivering the judgment of the Court, said, that with respect to the 1st point, it was not competent for a court of law to declare a secret deed made by a woman about to marry void, as in derogation of the marital right of her future husband—relief could only be obtained in Equity against such a transaction, at law it must prevail. Then one voluntary settlement could not be set up against another voluntary settlement, and the first must prevail. Next with regard to the delivery of the deed of 1829, the Court was of opinion sufficient evidence was given of its being completely delivered. It appeared to him duly entered, signed, sealed, and delivered, and the case of *Hope v. Harman*, 11 Jurist, 1,097, had clearly settled that the circumstance of its not being given over to the trustees did not invalidate it. With regard to the question of search, however, the Court was of opinion that the learned judge at the Swansea trial was right, and that sufficient search to admit secondary evidence had not been made. A new trial would therefore only be granted in the *definitive* case on payment of costs. With regard to the 4th point, it had been ingeniously argued by Mr. Pulling, that as Rhys Morgan was the quasi tenant in tail of the leaseholds under the deed of 1829, he might effectually convey the property by a simple assignment, so as to bar the remainder over to Llewellyn Jenkin, and that such was the effect of the deed of 1837. On looking to the evidence, however, it would be found that the legal estate was at that time in the trustees, and the assignment by Rhys Morgan could not, therefore, have the effect contemplated. With regard to the mortgage by Mrs. Saunders, it was clear that no title passed to the defendant, and therefore, but for the conveyance by Llewellyn Jenkin, the verdict for the plaintiff would be right. The rules must be made absolute to enter a nonsuit in the 1st case, and for a new trial on payment of costs in the 2nd case.

Rule accordingly.

TRINITY TERM, 1881.

Tuesday, May 27.

(Before JERVIS, C.J. MAULE, CRESSWELL, and TALFOURD, JJ.)

EAST ANGLIAN RAILWAY COMPANY v. THE EASTERN COUNTIES RAILWAY COMPANY.  
*Covenant—Setting aside judgment signed on non-issuable plea.*

Crowder, Q.C. moved for a rule calling upon the plaintiffs to shew cause why interlocutory judgment signed herein on the 25th of March last should not be set aside with costs. This was an action of covenant, brought on a deed made and executed for the leasing and amalgamation of the East Anglian and other lines with the Eastern Counties Railway. The main covenant in the deed on which the action had been brought was a covenant that the Eastern Counties railway should pay the East Anglian the costs of certain bills then before Parliament. The sum sought to be recovered was 28,000*l.* The defendants pleaded three pleas, and the plaintiffs assuming that those pleas were non-issuable, signed judgment, which this motion seeks to set aside. The pleas were—1. *Non est factum*. 2. That the said indenture was made after the passing of a certain Act of Parliament, 8 & 9 Vict. c. 96, the purpose of which was to restrict the powers theretofore possessed for leasing railways, and that this lease had been made unlawfully. [MAULE, J.—The object of pleading is usually is this, that you shall not entangle your opponent by matter not material to the substance of the case.] 3. That the indenture was made after the passing of the said Act; and that the East Anglian Railway Company were unable to obtain the said Acts of Parliament, and had abandoned further

endeavours to obtain them. 4. That the shareholders never consented to the lease or amalgamation, though their consent was necessary. It is contended that these companies were never incorporated for the purpose expressed as that to be carried out by the indenture. In the next place, to make the indenture valid, the assent of all the shareholders is necessary. (He cited a MS. case, *Jackson v. The Charing-cross-bridge Company*.) [JERVIS, C.J.—You may take a rule to shew cause, but only on payment of costs.] I move on the ground of irregularity, and therefore ought to have the rule otherwise. The question is, whether the plaintiffs ought to have signed judgment? They might, perhaps, have demurred; and the question arises, they not having taken that course, whether what they have done is not irregular. The Court, therefore, on these considerations, should give the rule without attaching such a condition.

By the COURT.—If you have an affidavit of merits you may take the rule generally.

Crowder.—We have an affidavit of merits.

Rule nisi.

Wednesday, May 28.

WILSON v. FRANKLIN, Executor, &c.

County Court—Excess of jurisdiction—Set off. Where the plaintiff's account exceeded the limit of the County Court jurisdiction, and he sought to bring it within, by proving an agreement that cross accounts were to be set off between him and the defendant's testator (the defendant being sued as executor), and the judge of the County Court proceeded on that view of the case, and found for the plaintiff, but there being no evidence of any binding agreement to that effect, this Court granted a prohibition to restrain all further proceedings in the County Court.

Gray shewed cause against a rule nisi for a prohibition to the judge of the Shropshire County Court, obtained on the ground that the sum claimed exceeded the jurisdiction, and that it had in fact been brought within the jurisdiction by a set-off. (*Bewick v. Copper*, 7 C.B. 699.) It appeared that the defendant was sued as the executor of George Franklin, and the particulars attached to the plaint shewed a sum due to the plaintiff of 96*l.* 19*s.* 6*d.* and at the foot thereof was written, "1850, Jan. 30. Received by cash, 5*l.*; ditto by Mr. Franklin's bill, 45*l.* 18*s.* 6*d.*" There was a further charge of 10*l.* 10*s.* for attendances, but that amount was abandoned to bring the case within the jurisdiction. The defendant's affidavit stated that there never had been since the testator's death, nor to the belief of the defendant, during his lifetime, any agreement that the two bills should be set off, nor any balance struck; and that at the trial the plaintiff admitted that no balance had been ascertained or agreed upon, and proved an existing debt of 102*l.* 9*s.* 6*d.* due to him. It was objected, that the judge of the County Court had no jurisdiction in the case, and that the debt could not be reduced by set off, to give jurisdiction; but the judge overruled the objection, and gave judgment for 40*l.* 17*s.* 11*d.* The plaintiff produced affidavits to shew that there had been a previous agreement between the plaintiff and the testator to set off their respective accounts against each other, and to shew that this question had been discussed before the judge, and that he had determined it in favour of the plaintiff, and that his adjudication proceeded upon this view of that fact.

Phipson, in support of the rule.

The argument was mainly confined to the point whether the affidavits on the part of the plaintiff established the fact of an agreement between the plaintiff and the testator, that their respective claims against each other should be set off. The case of *Thompson v. Ingham*, 19 Law J. 189, Q.B. was cited.

JERVIS, C.J.—It is unnecessary to consider what ought to be the rule where the judge of a County Court has determined the fact of the existence of such an agreement on conflicting evidence, for in this case there was no conflicting evidence at all. The plaintiff's account exceeded the limit of the jurisdiction of the County Court, and there was no evidence of any binding agreement for a set off.

Rule absolute.

BUSINESS OF THE WEEK.

TRINITY TERM.

Tuesday, May 27.

(Before JERVIS, C.J. MAULE, CRESSWELL, and TALFOURD, JJ.)

JAMES v. WHITEHEAD.—This was a feigned issue, tried at the sittings for Westminster, in Easter Term, before Maule, J. Verdict for the plaintiff. Miller, Serjt. now applied to the Court to allow the case to stand over till Thursday, the other side consenting. It was necessary to mention the case, as the rule was returnable to-day.

Stand over.

LAVINIE v. HEATHWAITE.—Giffard moved to enlarge a peremptory undertaking to carry down the cause to trial, on the ground of the absence of a material witness in Ireland. JERVIS, C.J.—You may take a rule to shew cause.

Rule nisi.

JOHNSON v. WILTON.—Joyce moved herein for leave to

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enlarge a peremptory undertaking. A witness had been sought in vain, under the name of Bull, and it had just transpired that his name was Bullock. There was no doubt he would now be found. JERVIS, C.J.—Take a rule to shew cause.

Wednesday, May 28.

ROSEPORT v. PAPANTHOLOS.—Wordsworth moved for a rule nisi to discharge the rule for a special jury herein. (*Palpa v. Kelley*, 4 So. N.C. 376.)

GRANHAM v. ERSKINE.—Pocock moved to postpone the trial, on the ground of the absence of a material witness for the defendant. The Court advised the defendant to go to chambers for a peremptory summons for the following day, as the case was for trial on the 30th.

DEWS v. RILEY.—Humphrey and Skinner shewed cause, and W. H. Watson and Manisty supported the rule to set aside the verdict herein.

Cur. adv. vult.

COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HETSLEY, Esqrs. Barristers-at-Law.

Friday, Jan. 17.

RALLI v. DENNISTOUN.

Bill of Exchange—Agreement before its circulation between drawer and acceptor that bills should be cancelled.

In an action upon a bill of exchange defendant pleaded that before circulation of the bill it was agreed between the drawer and acceptor of it, that the bill should be cancelled, and that the then holder, who accepted the part of the bill for the drawer, should return it to the acceptor for the purpose of being cancelled, and therefore the accepted part was returned cancelled, and the bill became wholly void. The jury found the plea proved, and gave their verdict for the defendant. Held by the Court they were right in so doing, and that the evidence warranted the verdict.

This case was tried before the Chief Baron at Guildhall, when some of the issues were found for the plaintiff, and others for the defendant; it was arranged to come before the court as a special case upon the facts, which appear so fully set out in the following judgment, that it becomes unnecessary to state them here.

Crowder, Q.C. argued for the plaintiff, and referred to 1 & 2 Geo. 4, c. 78; *Pearson v. Dunlop*, and *Mason v. Hunt*, Doug. 297, 235.

Crompton, for the defendants, cited *Grant v. Hunt*, 1 C.B. 44; *Byles on Bills*, 184; *Fairlie v. Herring*, 3 Bing. N.C.; *Rees v. Warwick*, 2 B. & Ald. 113; and *Archer v. Bank of Ireland*, 11 M. & W.

Cur. adv. vult.

Tuesday, May 13. — POLLOCK, C.B. delivered judgment.—This was an action of *assumpsit* upon six foreign bills of exchange. The bills of exchange were all drawn by one Alexander Shiras on the defendant in the month of November, 1841, for various sums, from 300*l.* upwards to 835*l.* There was also a count upon an account stated. As to the first bill, the defendants pleaded payment into court of the full amount of that bill together with interest, which the plaintiff accepted. There were 38 other pleas to the different counts of the declaration, denying the drawing, the acceptance, and the indorsement of the bills respectively. The sixth plea, which is a plea as to the second count, averred that before the circulation of the bill of exchange in that count mentioned, it was agreed between the drawer and acceptor that the bill of exchange should be cancelled, and that Glyn and Co. who accepted the part of the bill for the drawer, should return it to the acceptor for the purpose of being cancelled, and thereupon the accepted part was returned cancelled, and the bill became wholly void. A similar defence was somewhat differently, but more specially, stated in the 7th plea, but no evidence of this plea was given. The 12th and 13th pleas were similar pleas to the third bill; the 18th and 19th to the 4th bill; the 25th and 26th pleas to the 5th bill; and the 32nd and 33rd to the 6th bill. There were also some pleas of set off, and a special set-off payment to which it is not necessary further to advert. The replication to the 6th, 7th, and 12th, and other pleas above particularised, was *de injuria*. It was admitted that the plaintiff was answered as to the 5th bill, and the material question in the cause arose from the several pleas before mentioned to each of the other bills; it is in effect the same as to all. The case states, that in the year 1844, Alexander Shiras, the drawer of the bills in question, carried on business as a merchant at Trieste, partly on his own account and partly as the agent and correspondent of Messrs. Dennistoun, of Liverpool and Glasgow, the defendants, with whom he was engaged in large mercantile transactions, and he was in the habit of making remittances to them from time to time, and of drawing on them for large amounts. The bills in the declaration were part of a series of bills which Shiras drew upon the defendants at the latter end of 1841; at the time of drawing these bills the defendants were in advance to Shiras to the amount of upwards of 30,000*l.* and had no funds in their hands to meet the said bills in the declaration mentioned. The first part of these series

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of bills was presented by the drawer to the defendants for acceptance, with directions to send them to Messrs. Glyn, Halifax, and Co. in London, the defendants' bankers, to be held by them at the disposition of the holder of the seconds; the seconds were negotiated at Trieste, Paris, and elsewhere; and for the greater facility of negotiation and convenience of the holder, they were addressed at the foot to Messrs. Dennistoun, payable in London, the first with Messrs. Glyn, Halifax, and Co. The bills purporting to be the second part on which the action was brought, were negotiated by Shiras with Arnstein and Eckes, of Vienna, and others with Messrs. Luzzatto, merchants at Trieste, and another with an insurance company at Trieste. Each of these bills was indorsed to the above parties by Shiras for value received by him. At the time of the negotiation of them, Shiras represented to each of the above parties that the first part had been already accepted by the defendant, and each of the above parties took the above bills as the seconds of bills of which the first had been remitted to England for acceptance. The defendants, by letters of the 3rd and 8th of December, addressed to Shiras, announced that they had honoured all the drafts that came to hand, and that they should honour the others which might be presented, and a memorandum of acceptance was written across them, and they were transmitted to Glyn and Company to be held at the disposition of the holders of the seconds; the seconds, in some of the counts mentioned, were indorsed by Shiras on the 21st of December, others upon the 22nd and 23rd of December, to the intermediate indorsees mentioned, who had no knowledge of the correspondence beyond the representation of Shiras, that the first parts of the bills had been accepted, and the bills were afterwards indorsed as mentioned in the declaration. At the time of remitting the firsts to the defendants, Shiras had remitted the seconds to Foulds and Company, of Paris, indorsed to them for the purpose of discount; these seconds were returned by Foulds and Company, who did not discount them: some were received by Shiras on the 8th of December, and some on the 13th of December, and were cancelled by Shiras before he remitted the seconds which were so indorsed, as before mentioned, to the plaintiffs. On the 4th of December, Shiras wrote the following letters, one to Messrs. Glyn and Company, the other to the defendant; that to Messrs. Glyn was as follows: "Trieste, 4th December, 1841. Gentlemen,—I beg you will, upon the receipt of this, hand to Messrs. Dennistoun and Company, of Liverpool, all the firsts of exchange in your hands drawn by me on the said gentlemen, and handed by them to you, to be held at the disposition of the seconds." That to the defendants was as follows:—"Since addressing you, there has been no change in business, the parties to whom I sent seconds of my drafts on you to your own order inform me that they will not negotiate more of them, and I have merely to request that you will instruct Messrs. Glyn and Co. to return all firsts drawn by me which may remain uncalled for in the hands of said bankers." On the day of the date of this letter, or the day previously, Shiras received intelligence that Messrs. Foulds and Oppenheim had refused the acceptance of his bills on them, as after mentioned. On the 7th of December, Shiras again addressed the defendants, as follows:—"Learning that the parties to whom I have indorsed several of my drafts on you were much committed with Rogers and Co. of Havre, and Bequerre, of Bordeaux, as a measure of precaution I wrote last post to Glyn and Co. to return you immediately all bills in their hands which remained uncalled for; knowing to-day that my fears were groundless, I address Messrs. Glyn and Co. to annul those instructions, and should they have returned you any of your acceptances, kindly replace them in their hands to be held at the disposition of the seconds." Messrs. Glyn and Co. received the letter of Shiras on the 15th of December, and in pursuance of it upon that day remitted to the defendant the bills in question; they were received by the defendants at Liverpool on the 16th of December, and on the same day they received the above letter from Shiras, dated the 4th of December, 1841. On the same 16th of December, the defendants wrote to Messrs. Glyn, acknowledging the receipt of the bills, and informing them of the cancellation. On the 18th of December, they received Shiras's letter of the 7th of December, as above set out, and replied to it on the 18th, as follows:—"We had this pleasure yesterday, and have to-day received your favour of the 7th inst. As we stated on the 16th, the first of your drafts which Glyn and Co. returned to us, were immediately cancelled, and it would hardly do, therefore, to reissue them in their present state; but we have to-day written to Glyn and Co. explaining this, and requesting them to refer the holders of the seconds to us when they are presented to them. In no instance but that of Baring, Brothers, and Co. have the holders of seconds protested

them on presentation to Glyn and Co. and not finding the firsts there, so we hope that no additional expense may be incurred from the cancelling the firsts." On the argument before us it was contended, on the part of the plaintiff, that the defendants had accepted the bills of exchange, as undoubtedly they had, and that the facts which were stated did not justify the finding of the jury that they were afterwards cancelled, for that it was agreed, first, that the letter of the 4th of December did not authorize the defendants to cancel their acceptances, which they did on the 16th of December; and that although they did cancel the acceptances on the face of the bills, they did not and could not cancel the acceptances by the letters of the 3rd and 8th of December, which were in themselves a complete acceptance. Secondly, it was contended that the acceptances could not be revoked with respect to the plaintiffs, who were holders for value, and without notice; and, thirdly, that the letter of the 18th of December above mentioned was a new acceptance, and that that acceptance had never been revoked. We are of opinion that the finding of the jury, that the two letters of the 4th of December, 1841, were sent by the drawer for the purpose of the acceptances being cancelled by the defendants, was fully warranted by the evidence. We have no doubt on the meaning of those letters, that the acceptances should be cancelled; and they having been so cancelled, the obligation of the acceptors, and the bills themselves, were put an end to with respect to Shiras, and all persons claiming subsequently under him. As to any persons who had thus acquired an interest in those bills, the owners of the then existing seconds, the act of the defendants and Shiras in putting an end to the acceptances would have no effect; but neither Foulds and Co., nor any other person then, had any interest in those bills, and it was perfectly competent for the defendants and Shiras, to put an end to the obligation, which the defendants had contracted by their acceptances. The letter of the 4th of December refers only to the firsts of the bills, and by implication directs the acceptances on the face of them to be cancelled, and does not refer to the letters of the 3rd and the 8th, which could not possibly be known to the writer; but these letters, as Mr. Crompton contended, are rather the narrative of the previous acceptances than the acceptances themselves, and the cancellation of the acceptances in the bills to which they refer, put an end to the obligation as between Shiras and the defendant altogether. With respect to the suggestion on the part of the plaintiff that the bills were again accepted by the letter of the 18th of December, it is sufficient to say that the original acceptances being answered by the sixth plea, it is not competent to the plaintiff to resort to a second acceptance without a new assignment, which would give to the defendants an opportunity of presenting any defence they might have to such second acceptance. We much doubt whether the letter of the 18th of December was written under such a full communication of all the facts of the case, as would have rendered it available as an acceptance; but whether that be so or not, the question cannot be raised upon the pleadings in their present shape, as the only acceptance stated in the declaration is one averred in the pleas, and proved by the evidence, and found by the jury to have been cancelled. Nor is it necessary to say, whether, if the letter had so operated, the drawing of the new seconds by Shiras, and the indorsement to the plaintiff of those seconds would have given a valid title to sue. We do not think the defendants can avail themselves of the 36th, 37th, 38th, and 39th pleas, and upon the whole our judgment is, that the verdict be entered for the defendants upon the 7th, 13th, 19th, 26th, and 33rd pleas, and for the plaintiff on the residue.

Tuesday, May 3.

(Before ALDERSON, B. sitting alone in the Exchequer Chamber.)

FRY v. WHITTLE.

County Court—Suggestion—Form of affidavit.

The affidavit to found a motion for a suggestion to deprive a plaintiff of costs, under the County Courts Act (9 & 10 Vict. c. 95, secs. 128 and 129), must allege with certainty and precision that the plaintiff did not at the time of the commencement of the action dwell more than twenty miles from the defendant; and where the affidavit stated that the plaintiff at the time of the commencement of the action dwelt at Birmingham, which is within twenty miles from Wolverhampton, the place where the defendant dwelt and carried on his business at the time this action was commenced:

Held insufficient, as not shewing distinctly that the plaintiff and defendant dwelt within twenty miles of each other at the time the action was commenced.

This case is fully reported at page 98, col. 3, but the title of it having been then accidentally omitted, it has been deemed desirable, for the sake of reader reference, to repeat the head-note here.

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For the report, the reader is referred to page 98, col. 3.

Monday, May 5.

THE MARQUIS OF CHANDOS v. THE COMMISSIONERS OF INLAND REVENUE.

Stamp Act (13 & 14 Vict. c. 97)—Appeal from the decision of the Commissioners to the Court of Ex. By deed of conveyance or settlement, dated 27th May, 1847, between A., B. and C., A. conveyed his life interest in some estates, and his reversion in fee in others, to B. and C. subject to mortgages and other incumbrances of nearly 1,500,000*l.* (B. having before cut off the entail of a large portion of the estates of which he was tenant in tail in remainder for the purpose of raising a large part of that sum); no price or purchase-money was stipulated to be paid by B. or C. to A. but the debts of A. were to be paid off out of the rents and profits by B. and C. The Commissioners were of opinion that as the estates were conveyed subject to the mortgage, &c. the deed ought to be stamped with an ad valorem stamp upon the amount of those charges as if the purchase-money had been to that amount:

Held, by the Court of Ex. upon appeal from the determination of the Commissioners, under the 13 and 14 Vict. c. 97, s. 15, that the determination of the Commissioners was wrong; that in the clause which is to define what is the consideration or purchase-money, the terms "to be paid by the purchasers" mean where it is stipulated that he is to pay it; the provision applies only to those cases where, in consideration of the conveyance of the estate, the vendee agrees to pay a certain sum to the mortgagee, or other incumbrancer; where the purchaser does not bind himself to pay it, but is left to pay it or not, as he pleases, it cannot be a part of the consideration money.

In an appeal from the determination of the Commissioners, under the above Act, the appellant has the right to begin. *Per Parke, Platt, and Martin, B.B. Pollock, C.B. dissentiente. And (by the whole Court) that the Crown is entitled to a general reply.*

This was an appeal by the Marquis of Chandos against the determination of the Commissioners of Inland Revenue, under the 13th and 14th Vict. c. 97, entitled "An Act to repeal certain stamp duties, and to grant others in lieu thereof, and to amend the laws relating to the stamp duties." The 14th section for removing doubts as to the sufficiency of stamp duty paid on deeds, enacts that when any deed or instrument liable to stamp duty, whether previously stamped or otherwise, shall be presented to the Commissioners of Inland Revenue at their office, and the party presenting the same shall desire to have the opinion of the said commissioners as to the stamp duty with which such deed or instrument, in their judgment, is chargeable, and shall tender and pay to the said commissioners a fee of 10*s.* (which shall be accounted for, and paid over as part of her Majesty's revenue arising from stamp duties), it shall be lawful for the said commissioners, and they are hereby required to assess and charge the stamp duty to which in their judgment such deed or instrument is liable, and upon payment of the stamp duty so assessed and charged by them, or, in the case of a deed or instrument insufficiently stamped, of such a sum as, together with the stamp duty already paid thereon, shall be equal to the duty so assessed and charged, and upon payment also of the amount, if any, payable by way of penalty on stamping such deed or instrument, to stamp such deed or instrument with the proper stamp or stamps, denoting the amount of the duty so paid, and thereupon, or if the full stamp duty to which in the judgment of the said commissioners such deed or instrument shall be liable shall have been previously paid and denoted upon the same in manner aforesaid, the said commissioners shall impress upon such deed or instrument a particular stamp to be provided by them for that purpose, with such word or words, or device or symbol thereon as they shall think proper in that behalf, and such last-mentioned stamp shall be deemed and taken to signify and denote that the full amount of stamp duty with which such deed or instrument is by law chargeable has been paid, and every deed or instrument upon which the same shall be impressed shall be deemed to have been duly stamped, and shall be receivable in evidence in all Courts of Law or Equity, notwithstanding any objection made to the same as being insufficiently stamped; save and except that such last-mentioned stamp shall not be impressed upon any deed or instrument chargeable with *ad valorem* duty under or by reference to the head of bond or mortgage in the schedule to this Act where the same is made as a security for the payment or transfer or re-transfer of money or stock without any limit as to the amount thereof; and provided always, that nothing herein contained shall be deemed or construed to extend, to require, or authorise the said commissioners to stamp, as last aforesaid, any probate of a will or letters of administration, or to



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stamp, as last aforesaid, any deed or instrument after the signing or execution thereof in any case in which the stamping thereof is expressly prohibited by any law in force. Section 15 enacts, that if the party presenting such deed or instrument to the said commissioners, as aforesaid, for their opinion as to the stamp duty with which the same is chargeable, shall declare himself dissatisfied with the determination made by them in that behalf, it shall be lawful for such party, upon paying the amount of the stamp duty according to such determination, and depositing with the said commissioners the sum of forty shillings for costs and charges, to be paid by him in the event, hereinafter provided for, to require the said commissioners to state specially, and to sign the case, on which the question with respect to such stamp duty arose, together with determination thereupon, which case the said commissioners are hereby required to state and sign accordingly, and to cause the same to be delivered to the party making such request, as aforesaid, in order that he may appeal against such determination to Her Majesty's Court of Ex. at Westminster; and upon the application of the said party (due notice thereof being given to the solicitor of inland revenue, to the end that counsel may be heard on behalf of the said commissioners), it shall be lawful for the said Court of Ex., and the said Court is hereby required to hear and determine the said appeal, and to decide as to the stamp duty, with which such deed or instrument is chargeable, and according to such decision the stamp duty and penalty (if any), which shall have been the subject of such case, shall be deemed to have been payable by law; and if no excess of stamp duty or penalty shall have been paid to the said commissioners by the said appellant, over and above the sum, which, according to the decision of the said Court, ought to have been paid upon, or in respect of, such deed or instrument, the said sum of forty shillings deposited or costs and charges, as aforesaid, shall be applied to the use of Her Majesty's revenue; but if any such excess, as aforesaid, shall have been so paid by the said appellant, the same, together with the said sum of forty shillings, deposited, as aforesaid, shall be repaid by the said commissioners to the said appellant; and if the sum paid for stamp duty or penalty, upon or in respect of, such deed or instrument, shall fall short of the amount which, according to the decision of the said Court upon any such appeal, is chargeable, or ought to be paid upon, or in respect of, such deed or instrument, the deficiency of such stamp duty, or penalty, or both, as the case may be, shall be paid by the said appellant to the said commissioners, and the Court shall order and enforce the payment thereof accordingly. A deed of settlement of the family estates of the Duke of Buckingham had been made between the duke, the Marquis of Chandos, and Mr. Roberts; and was, in effect, a conveyance of the duke's life interest in some estates and his reversion in fee in others, subject to mortgages, annuities, and other charges, to the amount of about one million and a half sterling; the marquis having previously cut off the entail of a large part of the estates, of which he was tenant in tail, remainder for the purpose of paying a large part of that sum. The commissioners were of opinion that, although no price or purchase-money was stipulated to be paid by the marquis, yet as the estates were conveyed subject to mortgages, &c. the deed ought to be stamped with an *ad valorem* stamp upon the amount of those charges, as if the purchase-money had been actually paid to that amount; and for which the stamp at that time would have been 1,000*l.* The Marquis of Chandos being dissatisfied with the determination of the commissioners upon that point, appealed now to this Court against their decision under the 15th section, above recited, of the 13 & 14 Vict. c. 97.

*Peacock, Q.C.* for the appellant, claimed the right to begin.

The *Solicitor-General* (Sir P. Wood) for the Crown, objected.—As the appellant thus sought to have a benefit by asking for an opinion of the commissioners, and then being dissatisfied with that opinion, applied to this Court against it.

*MARTIN, B.*—You may call it a benefit, but it is a right under the Act of Parliament.

Held by *Parke, Platt, and Martin, BB.* that the appellant had the right to begin.

*POLLOCK, C.B.* dissentiente.

*Peacock* then began.—This deed is dated 27th May, 1847, and the object of it was to assign 50,000*l.* a year for the benefit of the Duke, to pay off debts. His son, the Marquis, did not purchase absolutely, and the question is, what was the consideration for the conveyance, as the duty is imposed by the 55 Geo. 3, c. 184, Schedule Part 1, it. "Conveyance." There is no personal undertaking to pay the debts, but the powers are to apply the rents of the estates, joining the father's and son's interest in the property together, to discharge the father's debts out of the rents. Is this "a conveyance upon sale," as the schedule says, "where

the purchase or consideration money is 100,000*l.* or upwards? In fact, no money at all was paid as a consideration, for the conveyance by the duke of his interest under this deed. Suppose the case of an estate worth 100,000*l.* in mortgage for 90,000*l.*, and a conveyance of the equity of redemption was bought, the purchaser would only have to pay 25*l.* *ad valorem* duty. Or again, an estate liable to a legacy, the vendor is not bound to pay the legacy the party buys subject to it, and the legacy is not to be added to it, so as to increase the stamp duty.

The *Solicitor-General* contra.—The question is one of some importance, and if the construction of the other side be correct, it will be contrary to the practice, and be the means of avoiding the Act by which it was intended to impose the duty, and evading that duty. According to the argument on the other side, a person may buy the equity of redemption for a small sum, pay the duty only on that small sum, then pay off the mortgagee or incumbrancer, take a release, and thus obtain the fee, and so avoid the stamp duty; but there is a provision in the Act expressly to meet such a case. The duke has here parted with his estate altogether; and why, therefore, should not the duty be paid as upon a sale for the amount? Is there any difference between paying the purchase-money out of his own pocket, down at once, or out of the rents and profits? This is not the case of a trust here; the word trust is carefully avoided throughout. The marquis may compound for his father's debts; and if so, the son is to have the benefit of the composition. In the ordinary case of a trustee and *cestui que trust*, the latter and not the former would derive the benefit of such a composition. The covenant for further assurance is absolute, which shews the object and effect of the instrument.

*Peacock* in reply.—The mere purchase is wholly immaterial; the Court will look to see from the transaction whether it is a purchase or not. (*Doctem. Merrett v. Merrett*, 1 C. & M. 820.)

*PARKE, B.*—The consideration money agreed to be paid seems to be the true mode of construction, and of reconciling all the clauses together. If the mortgage is agreed to be paid off, then it is part of the consideration money; otherwise not. (*Doctem. Langford v. Diamond*, 4 B. & C. 243.)

The *Solicitor-General* claimed, on behalf of the Crown, the right to a general reply; and mentioned the *Attorney-General v. Trueman*, 11 M. & W. 690.

*Peacock* opposed it, and referred to the *Lord Advocates v. Lord Douglas*, 9 Clk. & Fin. 200, and *Dreke v. the Attorney-General*, 10 Clk. & Fin. 257.

*POLLOCK, C.B.*—It was admitted at the bar of the House of Lords, to be the practice universally in this Court that the Crown was entitled to a general reply; in another case in the Court of Q. B. on motion, I contended for the right; it was conceded by Lord Denman, that this was the case on motion in the Court of Ex.; he also said it was so in the Court of Q. B. on prosecutions, but not on motion. In this Court the practice is universal—whether on motion, pleading, or argument of a case, the Crown has a general reply.

The *Solicitor-General* replied generally.

*Cur. adv. vult.*

*Tuesday, May 13.*—*POLLOCK, C.B.*, delivered judgment.—This case comes before us on an appeal under the late Stamp Act, 13 & 14 Vict. c. 97, against the determination of the Commissioners of Inland Revenue as to the proper stamp to be imposed upon a deed of settlement of the family estates made between the Duke of Buckingham, the Marquis of Chandos, and Mr. Abraham George Roberts, bearing date the 27th of May, 1847. The deed was in substance a conveyance of the Duke's life-interest in certain large estates and his reversion in fee simple in others, subject to mortgages and annuities, and other charges, to the amount of nearly 1,500,000*l.* The Marquis of Chandos having before cut off the entail of a large part of the estates of which he was tenant in tail in remainder, for the purpose of raising a large part of that sum. The commissioners were of opinion that, although no price or purchase money was stipulated to be paid by the marquis, yet as the estates were conveyed subject to mortgages, &c. the deed ought to be stamped with an *ad valorem* stamp upon the amount of those charges as if the purchase money had been to that amount, and for which the stamp at that time would have been 1,000*l.* and now four times that amount. We are all of opinion that the determination of the commissioners was wrong. It is a well established rule in the construction of revenue Acts, that a duty cannot be imposed upon the subject except by clear words. The meaning of the Legislature must be distinctly made out from the terms of the statute; and we think that that cannot be done in this case. The duty is imposed by the 55 Geo. 3, c. 184, sched. part 1, under the head of "Conveyance," whereby on the sale of lands, where lands are conveyed to or vested in a purchaser, the conveyance is rendered liable to an *ad valorem* duty in proportion to the purchase or consideration money therein or thereupon expressed,

wholly irrespective of the real value of the land. If the enactment had stopped there, there could have been no question in the case: the indenture proposed to be stamped could not be considered as a sale, as there is no purchase or consideration money expressed. The purchase or consideration is the money paid or to be paid by the vendee to the vendor or to another, at his request, as the price of the subject conveyed, and is the consideration which causes the vendor to part with it. The difficulty in this case is caused by the subsequent provision, and the question turns upon the true construction to be given to such an enactment in the Revenue Act. It is as follows: "And where any lands or other property shall be sold and conveyed in consideration wholly or in part of any sum of money charged thereon, by way of mortgage, wadset, or otherwise, and then due and owing to the purchaser, or shall be sold and conveyed, subject to any mortgage, wadset, bond, or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser." The *Solicitor-General*, on the other hand, contended, on behalf of the Crown, that the meaning of the words in the clause is, that, wherever the charge is not to be paid off or discharged by the vendor, it is to be considered as "to be afterwards paid by the purchaser," and that in such cases the latter obtains the power of acquiring the full value of all the estate by paying the charge whenever he pleases, and was therefore meant to be made liable to pay the duty on the full value of the estate; and that, if it were otherwise the Crown might be defrauded of part of the tax justly due to it on the sale of incumbered estates. It appears to us, that according to the ordinary meaning of the words used, the appellant's construction of the clause is right. That in the clause which is to define what is the consideration or purchase-money, the terms "to be paid by the purchaser," mean, where it is stipulated that he is to pay it, the provision applies only to those cases where, in consideration of the conveyance of the conveyance of these state, the vendee agrees to pay a certain sum to the mortgagee or incumbrancer. Where the purchaser does not bind himself to pay it, but is left to pay it or not, as he pleases, it cannot be a part of the consideration money. It is true that the consequences of this construction may be, that a person may buy the equity of redemption of a mortgaged estate, or an estate charged with a legacy, for a certain sum, and pay *ad valorem* duty only on the value, or rather on the price of the estate subject to the mortgage or legacy; and may afterwards pay off the mortgage money, or charge, without paying a further *ad valorem* duty on that account. Why should he not do so? Why may not a man acquire the equity of redemption of an estate, or an estate subject to a charge, and allow the mortgage or charge to continue, taking the benefit of the surplus rents and profits, and why should he pay the duty for the entire property, which he may never choose to acquire, and which he is not bound by his contract with the vendor to acquire? The argument, in truth, is founded upon the fallacy that the duty is imposed upon the value of the estate to the purchaser, and not on the price or consideration to be paid for it. We are of opinion, therefore, that, according to the ordinary rule of construction, the clause in question does not apply to this case, it being clear that the Marquis of Chandos did not, by this indenture, agree to pay off any of the mortgage or charges upon the conveyed estates. But when we bear in mind that this clause charges the subject with a duty, we think it does not admit of a doubt that the words are not sufficiently clear on that account. The *Solicitor-General* informs us that the commissioners have acted according to the usual course of practice at the Stamp Office in this respect. But it is to be recollected that, until the passing of the 13 & 14 Vict. c. 97, there was practically no power of testing the propriety of that practice, as there was no appeal. The only appeal that was given, was by omitting to stamp the instrument, and then running the risk of an objection being taken, and the whole proceeding being void,—and, indeed, as the *ad valorem* stamp duty cannot, I believe, be afterwards imposed—certainly it generally cannot—running the risk of the whole transaction being utterly void. Practically, therefore, there was no appeal, and it would have been dangerous to have had an *ad valorem* stamp imposed upon a deed of less value than that required by the commissioners, as the error, if it turned out to be one, could not be corrected. We are satisfied that the Crown has not made out the right to impose any *ad valorem* duty in this case, and therefore our judgment is in favour of the appellant.

**ERRATA.**—Page 108: *Cleave v. Jones*. The paragraph in the head note, "Verbal evidence of acknowledgment of payment of part of principal or interest, is sufficient to take a case out of the statute of limitations," should have come in at the end of that head note.—Page 111: *Boosey v. Jefferys*. In the judgment, for *Back v. Longman*, read *Donald*.

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*sons v. Becket.*—Page 112: for *Guichard v. Mori*, read *DeLondre v. Shaw*; for *Holdworth v. Black*, read *Ollendorf v. Black*.—The case of *Warner v. Nabrie*, page 53 of *LAW TIMES*, vol. 17, should be *Wagner v. Imbrie*. Rule was not disposed of on that day, but the rule was made absolute on the 23rd of April.

## BUSINESS OF THE WEEK.

Tuesday, May 22.

*ROBERTS and UXOR v. JONES.*—Widely showed cause against a rule obtained for leave to issue an attachment for non-performance of an award. *Atherton* contra. The Court intimated that the award had better be enforced, if at all, by action.

*EDWARDS v. CAMERON'S COALBROOK, & CO. COMPANY.*—*Proctor* showed cause against a rule obtained for leave to issue execution against a member of the above company. [*MARTIN, B.*—This is a precisely similar case to *Corder v. The Universal Gas Light Company*, 6 C. B. 190 and 504, and that case must decide this.] *Bovill* contra.

*TURNER v. CAMERON'S COALBROOK, & CO. COAL COMPANY.*—*Proctor* and *Hopkins* showed cause against a rule obtained for leave to issue execution against a Mr. News, a former registered shareholder of the company. They contended it was not shown that the present shareholders, or the company's property, had been sufficiently sought for. The party here sought to be charged was not now a shareholder, but when he was he had paid up all his calls; and the 9 & 10 Vict. c. 40, s. 5, of the local Act, provided that individual shareholders should not be liable beyond the amount or extent of the calls which could be made upon them in respect of the number of their shares taken. [*MARTIN, B.*—There are here two companies; first, the Parliamentary company, or company for making the railway; and, second, the present coal company. The action was for use and occupation against that coal company. If you can show your client had nothing to do with the coal company, but only the Parliamentary company, your arguments may perhaps apply.] He referred to 7 & 8 Vict. c. 100, s. 25, and *Merton v. Lunn*, 20 L.J. 190, Q.B. *Bovill*, contra, not heard.

*BERRY v. BROWNE.*—*Watson, Q.C.* moved in this case, tried before *Martin, B.* at Westminster, to set aside the plaintiff's nonsuit, and enter a verdict for the plaintiff for 187l. 8s. or for a new trial. There was an alleged variance in setting out the guarantee.

*GRAHAM v. BUNNEY.*—*Sir F. Thesiger* had obtained a rule to set aside plaintiff's verdict, on the general issue in an action of libel against the *John Bull* newspaper, tried before the Chief Baron in London, and to enter the verdict for the defendant. *Keating, Q.C.* had obtained a cross rule to set aside verdict, and for a new trial. The Court directed the verdict to be entered for defendant on the first count, and plaintiff on the second, unless *stet prosequere* consented to in ten days.

*GRAHAM and ANOTHER v. ISMONGER.*—*O'Malley* and *Bull* showed cause against a rule obtained to set aside the defendant's verdict, and enter it for the plaintiffs for 284l. pursuant to leave, or for a new trial. *Crowder, Q.C.* and *O'Malley*, contra, called upon to support the rule. The question was entirely of fact.

*MORGAN v. WHITMORE.*—Tried in London before the Chief Baron, when the defendant obtained a verdict. It was an action of trover. *Pleas*—Not guilty and not possessed. And a rule having been obtained to set aside defendant's verdict, and for a new trial, *Jones, Q.C.* and *C. Pollock* showed cause. *Watson, Q.C.* and *Hopkins*, contra, not heard. The Court said they were bound by the decision of *Potes v. Glossop*, 2 Ex. 191, and the other cases cited in it, upon which that case was determined, and as those cases governed this, the rule must be absolute.

*Wednesday, May 23.*  
*C. Pollock* moved for a *distringas* to compel appearance.

*PALMER v. RICHARDS.*—*Prentice* moved for a rule to show cause why the plaintiff herein should not have his costs under the last County Court Act. He contended that, notwithstanding the late decision in *Jones v. Harrison*, 17 Law T. 41, that the Courts would lay down some certain rules to guide them in coming to a decision on applications for certificates for costs. In the present case, the plaintiff resided in London and the defendant at Chatham, more than 20 miles distant; the Court would therefore look to the 128th sec. of the first Act, which gave a concurrent jurisdiction when the parties lived more than 20 miles apart, and judging from that the intention of the Legislature, would grant this application. The application had already been refused at chambers. By the Court.—The Court are to exercise their discretion, but are to be bound by rules in exercising it. It is for that you contend.

*JOHN v. DAVIES.* Postponed till Friday.  
*GRAHAM and OTHERS, Assignees, v. MASON.*  
Rule absolute to enter verdict on the 5th plea.  
*BURCHSTER*, one of the Public Officers of the London and Westminster Bank, v. *NORRIS*, Official Manager of the German Mining Company. *Cur. adv. ult.*

*Thursday, May 29.*  
*SMITH v. STEVENS.* *Cur. adv. ult.*  
*JACKES and ANOTHER (Executors) v. WHITE.* *Cur. adv. ult.*

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## ERROR FROM THE QUEEN'S BENCH.

Reported by A. BITTLESTON, Esq. of the Inner Temple, Barrister-at-Law.

Tuesday, April 29.

*REG. v. THE MAYOR, & C. of LICHFIELD.*  
Compensation for office of town-clerk—Jurisdiction of Lords of Treasury—Award of compensation for a period during which the claimant continued to hold the office.

Upon appeal to the Lords of the Treasury, under the Municipal Corporations Act, they awarded to

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a person who had been removed from the office of town-clerk, an annuity, to commence from a day named. By the Treasury minute it was directed that an order should be drawn up pursuant thereto, and that copies of the minute and the order should be transmitted to the parties.

The minute disclosed, though the order did not, that compensation had been awarded for a period during which, in fact, the claimant continued to hold the office.

Held, that the order and the minute were to be read together, and that the order was bad for so much as had been awarded in respect of that period.

This was a mandamus to the mayor, aldermen, and citizens of Lichfield, which recited a previous peremptory mandamus to the council of that city, stating that at the passing of the Municipal Corporations Act, the 5 & 6 Wm. 4, c. 76, Charles Simpson, the prosecutor, held the office of town-clerk of the borough of Lichfield; that he was reappointed to the office, and that after the passing of the Act he continued to hold such office until the 20th of January, 1844, when he was removed, and was entitled to compensation, to be assessed by the council. That the council took into consideration his claim, and disallowed it; and the recited writ then commanded them to assess an adequate compensation to be paid to him. That the council assessed as a compensation the annual sum of 50l. 4s. 3d.; that the prosecutor appealed to the Lords Commissioners of the Treasury, who heard the appeal on the 31st of March, 1849, and ordered that the said Charles Simpson should receive the sum of 50l. 18s. 2d. per annum,—such annuity to commence from the 9th of September, 1835. That the order was duly signed, and became valid, and was transmitted to the mayor, and notice thereof was given to the prosecutor. The mandamus then commanded the mayor, aldermen, and citizens to execute and deliver to the prosecutor a bond and obligation in a sufficient penalty, for the payment to him of the said last-mentioned annuity, commencing on the 9th of September, 1835. To this mandamus the Corporation returned that, before any order was made by the Lords Commissioners on appeal, namely, on the 23rd of March, 1849, a Treasury minute was made, which was set out at length, and which stated the average of five years' profits of the office, prior to the passing of the Municipal Corporations Act, on which they calculated the annual amount to be 76l. 7s. 4d. and, making a deduction for disbursements, they gave two-thirds as the annual compensation, being equal to 50l. 18s. 2d. and ordered an annuity to that amount to be paid, to commence on the 9th of September, 1835; and that an order should be drawn to that effect, and delivered to the mayor, with a copy of that minute. The order was also set out; and the return averred that the minute and order did not truly express the true intent and meaning of the Commissioners in making the same, and that the date of the 9th of September was inserted by the mistake and inadvertence of the Commissioners, and with intent that the prosecutor should receive such annuity from the day he ceased to hold the office of town clerk; and that the date was inserted under the belief that the 9th of September was that day. The return then stated that on the 31st of March a copy of the said minute was transmitted to the prosecutor, Mr. Simpson, and also a copy of the material part of it to the Mayor. It then stated, that on the 10th of April, 1849, the Lords Commissioners discovered their error, and the said Lords Commissioners made a second minute, which was set out, correcting that error, and ordering the annuity to commence from the day of the prosecutor's quitting office; and that a letter was sent to Mr. Simpson, notifying that correction. The return then went on to state, that on the 20th of April, 1849, at a meeting of the council, it was ordered that the amount of 50l. 18s. 2d. should be granted and secured by a bond or obligation under the common seal of the corporation, commencing on the 20th of January, 1844, the day when the prosecutor ceased to hold the office, and that they had always been ready to execute that bond. *Special demurrer* to that return.

This case was argued on Monday, February 3, before Parke and Alderson, BB. Maule, Cresswell, and Talford, JJ. and Martin, B.

*Whateley*, for the plaintiff, in error.—The first order was a perfectly valid order upon the face of it. The 5 & 6 Wm. 4, c. 76, s. 66, gives the Lords of the Treasury a complete discretion as to the mode in which the compensation shall be directed to be paid; and the first order was complete; it was issued and served upon the parties several days before the supposed amendment was made. [*MAULE, J.*—Can any three Lords of the Treasury at any time reverse the order of any other three? Certainly not; yet, unless that be so, the second order is good for nothing. A judgment even of a Superior Court can only be altered during the same term; or a judgment of Quarter Sessions during the same Sessions. If an amendment is to be allowed after thirteen days, why not after thirteen years?

[*MAULE, B.*—I must then dissent from the reversal of a judgment, upon a subsequent order to make it consistent with the original one.] By the first order the Lord of the Treasury was *functus officio*, and that order is his conclusive. [*He referred to Palmer v. Russell, 1 C. B. 180; & W. 509; Palmer v. Russell, 1 C. B. 180; Ward v. Dean, 5 B. & Ad. 264; Evans v. 18 East, 54; Attertree v. Bromley, 6 East, 27; Amory, 1 Anstr. 173.*]

*Keating, contra.*—The first order was not out of jurisdiction. The appeal to the Lords of the Treasury was as to the amount of money, the Lords not only increased the amount to 50l. but extended the payment to a new time; and in that they amended that part, I could not charge the annuity upon [*CRESSWELL, J.*—The same principle will apply to the prospective charge. We said previously pay for the luxury enjoyed by the council of appointing their own firm.] *J.*—The Act seems to contemplate a penalty; but if there is the alternative of paying down, or charging an annuity, on penalty, easy to see which is likely to be chosen. I can well understand how it happens that it is generally agreed that there is the alternative; was, at all events, competent to the last as a mere mistake. The first order was not what they intended to make; and it was not altered; for it was not communicated to the Mayor. The rectified order was, in truth, the binding order. [*PARKER, B.*—How you averred that the amendment took place in violation of the order? Sending it to one of the clerks is publication enough.] It is a complete amendment within a reasonable time. [*MAULE, B.*—The power of the Courts to amend their judgments is a power to do so forthwith; but then it is indivisible, and the whole term being under the Court, has, in fact, the whole term.] There was no fresh exercise of judgment.

*Whateley*, in reply, cited *Re Jones v. Dowd & L. 688*. This is not the case of a decree. [*PARKER, B.*—Certainly not.]

*PARKER, B.* now delivered the judgment of the Court.—In the argument in the Court of Queen's Bench, my brothers Patteson and Wightman gave a decisive opinion on the question whether it was competent for the Lords Commissioners of the Treasury to alter their order after it was made, by correcting a mistake which had been made by the prosecutor in the presentation of the petition, that the original order was validly made, and that the Commissioners had no power under the 5 & 6 Wm. 4, c. 76, s. 66, to give a compensation of annuity for loss of office before the time that the prosecutor was actually removed from the office. On that judgment a writ of error was granted. The argument it was contended, first, that the order was valid; secondly, that the Lords of the Treasury having once made and published it, they were bound by it, they were *functus officio*, and could afterwards vary it, though for the purpose of correcting a mistake of fact; the order was not being binding on all parties by the time it was made. Upon the latter question we think it necessary to give any opinion, because, after full consideration of the first question, we are in the judgment of the Court of Queen's Bench, in the judgment of the Lords Commissioners of the Treasury, so far as relates to making the annuity payable prospectively beyond the 21st Jan. 1844, was valid. We look at the order itself, as set out in the return, and to that alone, we should not think that we are bound by it. By sec. 66, c. 76, of the 5 & 6 Wm. 4, "By whom who shall be in any office of profit at the time of the passing of the Act, who shall be removed under its provisions, shall be entitled to have an adequate compensation, to be assessed by the council, such salary, fees, and emoluments of the office which shall cease to hold, regard being had to the nature of his appointment to the office, his term and interest therein, and all other circumstances of the case; and, in the event of an appeal, the Lords Commissioners of the Treasury may thereupon make orders to them shall seem just," and such orders, made by three or more, shall be binding on all parties. Under this provision the Lords of the Treasury may make an order to pay a sum in gross, by way of compensation, or an annuity for life, or for a limited term, or an annuity to commence at a future or specified time. They are left with a complete discretion as to the subject, to be exercised with a view to the circumstances, including the state of the claimant's funds, and the position of the parties, and in such cases it may be just to both parties, and more convenient to one or both, to receive or to pay a capital sum, in others an annuity; and the compensation and the continuation of the annuity, and the amount may be varied with perfect equity in any particular case. The order itself, set out in the return, appears to us, therefore, to be valid, and it commences from the 9th of September, 1835.

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plaintiff in error was not removed until January, because, instead of awarding a sum in gross, compensation the Lords Commissioners may be said to have thought they could distribute the same more equally, by making the compensation by way of annuity, yet not altogether so, partly by a sum in gross, namely, the arrears are payable instant, and partly by annual instalments. Such an arrangement would be within the scope of the power given them by the Act, and therefore be legal and valid. But it is clear the Legislature never intended the Lords of the jury to have power to make a compensation to officer for the loss of the salary, fees, and emoluments of an office during the time when he had not it, but continued in the full enjoyment of its title, and therefore, if the order had, on the face expressly stated, that the Lords thought fit to the appellant 50*l.* 18*s.* 2*d.* for the loss of office eight years and upwards, from September, 1835, to January, 1844, that part of the order would be *in vires* and bad. Though they may exercise discretion as to the quantum and mode of payment of the compensation for loss of the profits of office, they have no right to give a compensation for title that are not lost. The question in the case is, whether the order is valid, looking to the very minute of the 23rd of March, 1849, set out in the return, and made before the order. It contains the resolution of the Lords of the Treasury to the order, and the order is averred to have been made in pursuance thereof, and a copy of the order, as well as the order itself, is by the memorandum ordered to be transmitted to the mayor, and a copy of the minute was in fact transmitted to the appellant. Two questions then arise; first, we read the Treasury minute in conjunction with the order, and explain one by the other? And, secondly, so reading it, what is the effect? We find it was clearly intended by the Lords of the Treasury that one document should explain the other, as there is an order to transmit a copy of it to the order itself; and we do not see any reason that intention should not be carried into effect. It might not to require strict technical formality in a proceeding. The two instruments being read together, it appears that the Lords ascertained the average profits for five years before the making of the Act to be 76*l.* 7*s.* 4*d.* and they decreed one-third (no doubt in respect of the expense of the appellant hereafter of all further trouble and loss of time, which the actual exercise of the same would have cost him), and they fix the annual amount at 50*l.* 18*s.* 2*d.* which the Lords direct to be the amount of the annuity. We do not feel doubt from the language of the minute that the Lords considered 50*l.* 18*s.* 2*d.* a year to be the full pension due to the appellant for the loss of 1 year's profit respectively, and, therefore, as they have awarded that sum for each year from the September, 1835, they have awarded compensation for a time during which the appellant held the office and enjoyed the profits of it. Taking the title and order together, it is equivalent to an order by the Lords of the Treasury, that for the loss of his profits of the office from September the 9th, 1835, to January 23rd, 1844, being eight years and months, he should have at the rate of 50*l.* 18*s.* 2*d.* per year, and an annuity of the same amount for following year. For the period of time between 9th of September, 1835, and January 20th, 1844, he had no power to make any compensation at all, *pro tanto* their award is bad. We, therefore, think, for these reasons, that the judgment of the Lords is right, and ought to be affirmed.

*Judgment affirmed.*

Reported by U. J. B. FRYBELL, Esq. of the Middle Temple, Barrister-at-Law.

ERRORS FROM THE EXCHEQUER.

Friday, May 18.

Before PATTERSON, MAULE, WIGHTMAN, ERLE, and WILLIAMS, JJ.)

LISON v. THE BIRKENHEAD, LANCASHIRE, AND CHESTER RAILWAY COMPANY.

Debt for calls—8 & 9 Vict. c. 16, s. 20—Declaratory—Debt for railway calls.

A declaration alleged that the defendant was the holder of its shares in the said company, and was indebted to the said company in 1861, in respect of calls, &c. whereby an action had accrued, &c.

Id. good, under 8 & 9 Vict. c. 16, s. 20.

This was an action of debt for railway calls. The declaration stated, "that the defendant is the holder of the shares in the said company, and is indebted to the said company in 1861, in respect of a sum of 10*l.* on each of the said shares, whereby an action had accrued to the said company by virtue of the Company's Statutes Consolidation Act, 1845, Birkenhead, Lancashire, and Chester Junction Railway Company's Act, 1844; and the Birkenhead, Lancashire, and Chester Junction Railway, and other and Birkenhead Railway Amalgamation Act,

1847, to demand and have of and from the defendant, the last-mentioned sum of 100*l.* parcel of the said sum," &c. To this declaration there was a special demurrer, and on the argument, judgment was given for the plaintiff.

*Willis*, for the plaintiff in error, the defendant below. The whole question is, whether the allegation that the defendant is the holder of the shares is sufficient. It is true that this declaration is according to the 26th section of the Company's Statutes Consolidation Act (8 & 9 Vict. c. 16), but that is not a form intended for the purposes of pleading. It has been held that an averment of a fact must be taken to mean that the fact existed at the time when the action was commenced; a contrary rule was applied to subsequent pleadings, but it never has been decided that an averment in a declaration can be taken to refer back to a time anterior to the commencement of the suit. The case of *Owen v. Waters*, 2 M. & W. 91, was an action on a bill of exchange by the drawer against the indorser. The declaration alleged that the bill was made on the 29th March, payable four months after date, "which period has now elapsed;" and it was held, that the declaration was sufficient, and that it was not necessary to aver that the four months had elapsed "before the commencement of the action;" but that case is wholly inapplicable. Does this averment mean that the defendant below was a holder of the shares at the time of the call, or when it became due? The 26th section does not justify this averment. No special form of words is given; but the section merely states what shall be sufficient to prevent the necessity of setting forth all the special matters. It does not appear when the defendant became a shareholder. The 10th section enacts, that a transfer of shares shall not be made until all the calls are paid; and by the 27th section evidence of the defendant being a holder of shares at the time of the call made is to be sufficient, and proof of his being a shareholder is not requisite with reference to the commencement of the action.

MAULE, J.—The statement that the defendant is the holder of the shares, means that he was the holder at the time the calls were made; and the Act expressly points out that the subject-matter of the 26th section shall be sufficient.

*Judgment affirmed.*

(Before PATTERSON, MAULE, WIGHTMAN, ERLE, and WILLIAMS, JJ.)

STEINER v. HEALD AND OTHERS.

Patent—New invention—Application of old—*Rule.*

Action for the infringement of a patent. It appeared that before the date of the patent, certain colouring matter had been obtained from fresh madder by boiling, and an article called garancine had been also obtained from fresh madder by the application of acid and heat. The plaintiff's invention was for obtaining the same result, viz. garancine, from the spent madder (madder already boiled). At the trial the learned Judge had directed the jury, as a matter of law, "that the said alleged invention was not, and is not, any manner of manufacture for which letters patent could lawfully be granted according to the statute."

Held (in error), that the ruling was wrong, that the question was a matter of fact, which should have been left to the jury, and that the plaintiff was entitled to a venire de novo.

This was an action on the case, for the infringement of letters patent for an invention of "a new manufacture of a certain colouring matter, commonly called garancine." It appeared that the invention consisted in manufacturing a certain colouring matter called garancine from spent madder, or madder which had been previously used in dyeing, such madder having prior to the said invention been ordinarily thrown away, as spent and of no value; and garancine having theretofore been produced from fresh or unused madder.

The declaration alleged, that the plaintiff, before and at the time of the making of the letters patent, was "the true and first inventor of a certain new manufacture within this realm, to wit, a new manufacture of a certain colouring matter, commonly called garancine." The defendant pleaded:—1. Not guilty. 2. That the plaintiff was not the true and first inventor. 3. That the invention was not new as to the public use thereof in England. 4. That the specification did not sufficiently describe the invention. 5. That the invention was not any manner of manufacture. 6. That the invention was not a new manufacture of a certain colouring matter, called garancine, as in the declaration alleged. The evidence showed that the invention consisted in obtaining the residue of the colouring matter, called garancine, which remained in the spent madder after the madder had undergone the usual process of boiling, to extract the amount of colouring matter which could be obtained in that way. A person well acquainted with the process of dyeing had stated in evidence that he had become acquainted with the

colouring matter called garancine in 1842, which was then made from fresh madder, but he never knew of its being extracted from spent madder until after the date of the patent in 1843. It was also stated that fresh madder contains a portion of free colouring matter, which may be extracted by boiling in water, and that it contains a further and considerable quantity of colouring matter, which cannot be obtained by such boiling. That this further quantity of colouring matter proceeds chiefly from the vegetable fibre of the root, and in the lime and magnesia which the root contains; and that by submitting the madder to the action of acid and heat, the residue of the colouring matter may be obtained. To obtain garancine from fresh madder, it had been usual to subject the madder to the action of sulphuric acid and heat. Dr. Lyon Playfair also stated, that he never knew of garancine being produced from spent madder before the date of this patent in 1843, but was well acquainted with the old process of obtaining it from fresh madder. It appeared that the processes to obtain the garancine were precisely similar, the old method being to apply acid and heat to fresh madder, and that of the plaintiff to apply them to spent madder; and further, that by applying the process to fresh madder the whole of the colouring matter might be obtained from it at once, but otherwise the dye from the fresh madder must be first obtained by the simple boiling, and the garancine by this process of acid and heat afterwards applied to the spent madder. The colour obtained from the fresh madder by the simple application of boiling water was of a brownish hue, that from the garancine was a bright red. On these facts Pollock, C. B. who tried the cause, directed the jury upon the fifth plea "that the said alleged invention was not and is not any manner of manufacture for which letters patent could lawfully be granted, according to the true intent and meaning of the statute in such case made and provided," and a verdict was returned for the plaintiff on the second, third, and fourth pleas, and for the defendants upon the fifth and sixth pleas; and the jury was discharged from giving any opinion on the first plea. To this above ruling of the Chief Baron a bill of exceptions was tendered.

Cleasby (with him Hindmarsh) for the defendants now contended that this was not a valid patent. The first patent did not expire till 1846, and at the time the second patent was taken out, that patent was still subsisting. The garancine process, it was true, had not been applied to spent madder when the first patent was taken out, but no one could take out a patent whilst the first patent remained in subsistence. It had been usual to apply acid to spent madder before, but not heat. The garancine process only adds heat, and would have been no infringement of the first patent; by the process of applying heat you obtain, from spent madder, a powder which contains a valuable colouring power. He cited *Key v. Marshall*, 4 Bing. N.C. 492; *Report of Proceedings in that case in Chancery*, 1 Boswan, 535; in the House of Lords, 8 C. & F. 245. It is said, on the other side, that that was a case that turned on a defective specification; but the point decided was what could be the subject of a patent. There a patent had been obtained for new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power. The improvement as to the spinning consisted in placing the retaining and drawing rollers nearer to each other than they had ever been used before in flax spinning; the shortening of the reach being rendered practicable by the maceration of the flax in the new machinery for preparing it. It appeared that spinning machines varying in the distance of the each according to the length of the fibre of the substance to be spun, had been in use before the patent was obtained, and it was held that the machinery for spinning was not a new invention, and that the patent was not valid in point of law. It was, in fact, a mere novel application. It does not appear on the bill of exceptions, but it is in fact so, that the present defendants paid the plaintiff for a license to use this patent up to 1846, when the first patent expired. The discovery of Steiner was that spent madder could be made to yield colouring matter by the application of acid and heat. True it was very little used, for it was found to be very impure when applied, the colours being fugitive; but the mere application of heat with the acid, which made the original invention perfect and rendered the dye permanent, would not prevent its being an infringement of the patent. There is, to a certain extent, a similarity between fresh and spent madder; the same properties reside in both, and may be reached by proper means. This is a stronger case than *Key v. Marshall*: there the same process was applied to different substances; here it is the same process applied to the same substance, and producing the same results. The authority of *Key v. Marshall*, shows this to be no infringement of a patent. The case of *Cronin v. Price*, on which the other side mainly rely, reported 4 M. & G. 560, was decided in 1842. In that case a bill of exceptions was tendered for the use of a machine that the



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furnaces. B. subsequently took out a patent for "an improvement in the manufacture of iron," which consisted in "the application of anthracite or stone coal, combined with a hot-air blast in the smelting of iron." The hot-air blast was used by B. under a licence from A.; the use of it with anthracite was new; and the iron produced in consequence was greater in yield, cheaper in cost, and better in quality, than that produced by the ordinary method, and it was held that such a combination was a new manufacture, and it appears in a passage in the judgment that the ground of that judgment was, that a new substance, viz. the anthracite, was introduced. The anthracite and hot blast had never been used together before; they had been used separately, but not in conjunction, and a better and different species of iron was produced. In the judgment of that case, Tindal, C. J. said—"The only question to be considered is, was the iron produced by the combination of the hot air blast and the anthracite a better or a cheaper article than was before produced from the combination of the hot air blast and the bituminous coal?" Again he says—"The question, therefore, becomes this, whether, admitting the use of the hot air blast to have been known before in the manufacture of iron with bituminous coal, and the use of anthracite or stone coal to have been known before in the manufacture of iron with the cold blast, but that the combination of the two together (the hot blast and the anthracite) was not known before in the manufacture of iron, such combination can be the subject of a patent. We are of opinion that if the result produced by such a combination is either a new article, or a better article, or a cheaper article, to the public than that produced before by the old method, such combination is an invention or manufacture intended by the statute, and may well become the subject of a patent." But there the result produced was different, here it is the same; there the combination was a process before unknown, here the process is similar. They rely on a passage in that judgment where the learned Chief Justice is reported to have said—"There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, and the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public;" and then five instances are given: the first is Hall's Patent. (1 Webst. Pa. Ca. 97.) It was a patent to singe lace by gas instead of oil; by the statement of that case, as commonly found in the text-books, it would appear that, in fact, the invention there was a mere substitution of gas for oil; but upon looking to the case, it will appear that it was for forcing a jet of flame through the lace by the production of a current of air by means of a narrow chimney above the line of flame, between which and the flame the lace was passed, and thus the flame was forced through the interstices of the lace, burning away the fibres on their sides. The second case referred to is Derosne's patent (Webst. Pa. Ca. 152); but that was not a patent of things already known acting in a manner already known, and producing effects already known; but it was a patent for a particular apparatus for applying charcoal to refine sugar. It was true charcoal had been used for that purpose before, but there were great objections to its use until this invention, as a considerable quantity of charcoal was lost and adhered to the syrup, which was in consequence in an impure state. The next case is that of Hill's patent (Webst. Pa. Ca. 225), which was an invention for rendering available the iron contained in the slags or cinders produced in the manufacture of iron; but it is extremely doubtful whether any invention, in fact, existed in that case which could be considered new; and it was held bad, because it proved that the same result might arise from different proportions; and on considering the other case mentioned in the judgment, it will be found that none of those cases warrant the conclusion for which they are referred to. The case of Crane v. Price differs materially from the present; and, undoubtedly, if the passage quoted from that judgment, and on which the other side rely, warranted the position for which those cases are referred to, it would unquestionably greatly strengthen their case; but, on a strict examination, it will be found that that is not so, and the Chief Baron was right in thinking that this was no patent.

*Watson*, for the plaintiff.—In the process of dyeing ordinary madder is still in use. Madder and garancine are distinct matters, producing different colours. The garancine produced a much more brilliant colour than the original madder. Dung was used with the spent madder; up to this time the spent madder was useless; the evidence shewed it could not be used for manure. It was known to contain colouring matter, but no process had been discovered by which it could be made available until this invention of the plaintiff's. Dr. Lyon Playfair's evidence was, that garancine had before been produced from fresh madder, but not from spent madder;

and that this invention was new and highly valuable and unknown before. [PATTERSON, J.—Although the spent madder was thrown away, it was known to contain certain valuable properties, although it was not known how they were to be extracted.] Yes; and we now use the known process which has been applied to fresh madder to obtain the same result from this refuse madder. Pollock, C.B. told the jury, that if they believed the witnesses, they would find for the defendant. The other side have attempted to apply mechanical cases to those which are purely chemical; they are in no respect alike, and the same arguments do not apply. If a man makes garancine from fresh madder, he loses the madder dye, and makes nothing but the garancine; but, by this invention, he first avails himself of the madder dye, and can afterwards extract the garancine from the refuse matter which remains, and which would otherwise be useless. [WIGHTMAN, J.—Still, this is the old process which used to be applied to the fresh madder to obtain the garancine. MAULE, J.—The dyer dyes his cloth in a dye-bath, with fresh madder, and the refuse is called spent madder; but he does not produce any thing that could be sold as an article of commerce: nothing beyond the colour imparted to the cloth. We cannot say that ginger beer and spruce beer are subject to the excise merely because they are called beer; and what is here called spent madder had better be called refuse; it, in fact, no longer possesses its original properties. WIGHTMAN, J.—But is it not the same minus something which it has lost in the course of the original dyeing?] The case must be taken as if the world were ignorant of there being any colouring matter left in the refuse. (Darcy v. Allen, Noy. Rep. 182.) It is laid down, that where any one, by his own industry or invention, brings a new trade into the realm, he may have a patent. In this case, the plaintiff has introduced a new trade into the country. It was always supposed, before this invention, that spent madder was incapable of producing garancine, and the means of producing it were never found out until this invention by the plaintiff. Crane v. Price is the strongest possible authority in the plaintiff's favour, and I rely with confidence on the language there used, which has been before referred to. The case of Key v. Marshall was one where a patent had been obtained for machinery for preparing flax; the mode of spinning was old, and the patent was claimed for the machinery, which was old. It was its application to the spinning of flax that was the novelty. If the specification in that case had been properly prepared, the patent might have been sustained. In the case of Saunders v. Aston, noticed Webst. Pa. Ca. 75, the plaintiff failed on account of a similar defect in the specification. This is producing garancine from a new subject matter, and whether it is the same or a different subject matter is a question for the jury. The plaintiff, therefore, is entitled to a *verdict de novo*. Cur. adv. vult.

## JUDGMENT.

Monday, May 20.—PATTERSON, J.—We are all of opinion in this case that there should be a *verdict de novo*. The issues in question were whether the invention of the plaintiff was a manner of manufacture for which letters patent could be lawfully granted, and whether it was a new manufacture of garancine. The learned judge told the jury that if they believed the evidence, they must find these issues for the defendant, thereby treating the conclusion to be drawn from that evidence as matter of law, whereas the counsel for the plaintiff contended that the issues should be left to the jury as a question of fact, thereby treating the conclusion to be drawn from the evidence as matter of fact, or, at all events, mixed matter of fact and law. It appeared in evidence that the common mode of using madder for dyeing was by grinding it into powder and putting it into the dye bath with the cloth and other things to make the cloth take up the colouring matter; when the cloth was taken out of the bath there remained a substance which was called spent madder. It was known to dyers that this spent madder still contained colouring matter; but no mode of making use of it for dyeing purposes was known before the plaintiff's patent. Attempts were made to use it for manure, but they appear to have failed, and the spent madder was always thrown away as useless. Subsequently it was discovered that by the application of heat and acid to fresh madder, the whole colouring matter might be extracted, and when so extracted it formed a substance called garancine, and this process was known and commonly used. Afterwards the plaintiff discovered that, by the same process of heat and acid, garancine could be extracted from spent madder, as well as from fresh madder. There is here no new contrivance, for the process used under the plaintiff's patent with the spent madder is the same as that previously used with fresh madder; neither is the product new, for garancine produced from the one and the other appears to us to have precisely the same quality. If, therefore, the patent be good, it must be on account of the old contrivance being applied to a new object under such circumstances as to support the patent. Now spent

madder might be a very different thing from fresh madder in its property, chemical and otherwise, or it might be in effect the same thing as fresh madder in its property, chemical and otherwise, with the difference only that part of its colouring matter had been already extracted; again, the properties, chemical and otherwise, of both, might, or might not, have been known to chemists and other scientific persons, so that they could tell whether fresh madder and spent madder were different things, or substantially the same thing. These points appear to us to be questions of fact, and material to affect the validity or invalidity of the patent, and to be questions of fact to be found by the jury, by way of inference or conclusion of fact, from the evidence adduced on the trial. We think, therefore, that the learned judge was wrong in treating the conclusion to be drawn from the evidence as matter of law; and the exception is well pointed in treating it as matter of fact, which should have been left to the jury, with such observations, of course, as the learned judge might think proper to make for their assistance. There must, therefore, be a *verdict de novo*.

Monday, May 19.

(Before CAMPBELL, C.J. PATTERSON, COLERIDGE, MAULE, WIGHTMAN, and CRESSWELL, JJ.)

Doe dem. PAULWICK v. WITTCOMB.

*Ejectment—Evidence of parcels—Entry in book.*  
In an action of ejectment to recover twenty-two acres of land, parcel of the manor of Hayling, the lessor of the plaintiff, who claimed through one Sir Ed. Cresswell, in order to prove a lease to one Henalow, who assigned to Papington, who assigned to Sir Ed. Cresswell, and that the land included in those assignments was parcel of the manor, offered in evidence an old book, purporting to be the book of one Robert Spiller, who it was attempted to be shown was steward of the manor, and which had been found in the manor room of the Duke of Norfolk, to whom the manor belonged up to 1825, when he conveyed the same to the lessors of the plaintiff. This book amongst other entries contained one of the lease in question, and a minute that "Henalow's widow had assigned to Sir Ed. Cresswell, who yet claimed ten years to come." An ineffectual search had been made for the originals, and notice given to the defendants to produce them:

Held, in error (affirming the judgment of the Court below), that the entries in the book were not admissible in evidence, either as a matter of reputation of the extent of the manor, or as entries made by the steward in discharge of his duties, or as secondary evidence of the leases which could not be found.

In this case an action of ejectment had been brought to recover certain houses and land at Portsmouth, which were claimed as parcel of a larger class consisting of twenty-two acres called Howard Parlong, and parcel of the manor of Hayling. The lessor of the plaintiff in 1825 had purchased the manor of Hayling of the trustees of the Duke of Norfolk, under the authority of an Act of Parliament. The action was tried in 1848 at the summer assizes for the county of Devon. It appeared that in 1559 the Earl of Arundel leased the manor of Hayling to Lord Lumley for 100 years, the reversion being entailed by the same deed; and by a statute passed in the reign of Chas. I. in 1627, the property of the Earl of Arundel was rendered strictly inalienable, and so remained until the year 1825, when the plaintiff purchased under the before-mentioned Act. Whatever, therefore, was in the Duke of Norfolk originally remained in him till 1825, when the conveyance was made to the plaintiff. In order to establish the title of the plaintiff, it was necessary to shew that the land in question was part of the manor of Hayling in 1627, the date of the Act of Charles I. The lease to Lord Lumley expired in 1659, and an underlease by him to Thomas Stowton and Humphrey Lord was proved, and it was then sought to be proved that they had demised twenty-two acres as parcel of the manor of Hayling (alleged to be the land now sought to be recovered) to Robert Henalow for fifty-one years from 1570; that those twenty-two acres were on the 22nd April, 17 Eliz. (1574), assigned to one Papington, whose widow, by special conveyance, dated 22nd November, 1610, assigned them to Sir Edward Cresswell, through whom the lessor of the plaintiff traced his claim. In order to prove this lease and assignments, and so to establish the identity of the lands now claimed with those included in the original lease of 1559, a manuscript book found in the manor room of the Duke of Norfolk, purporting to be the book of Robert Spiller, was offered in evidence. This book contained an entry in *articulo de* the underlease from Stowton and Lord to Henalow, and a memorandum dated 1610, to the effect "that Henalow's widow had assigned to Sir Edward Cresswell, who yet claimeth ten years to come." Receipts of Spiller for rent, dated in 1617, 1618, and 1619, were put in to shew that he was deputy-steward at that time; and that in that capacity it would be a



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rt of his duty to take a note of the assignments by which the property had been from time to time disposed of. The original lease could not be produced, but the lessor of the plaintiff had given notice to reduce all the originals, and it being proved that an effectual search had been made for them, he claimed right to read the entries of Spiller in this book as evidence. It was objected on the part of the defendant, that at all events it could only be read as secondary evidence; and that, as the existence of the original could only be proved by the entry itself, it was not admissible in that way. The learned judge tried the case ruled that this evidence was inadmissible; and to this ruling the plaintiff tendered bill of exceptions.

**Reader**, for the plaintiff, now contended that the evidence was admissible on three grounds; first, it might be received as evidence of reputation to the extent of the manor of Hayling; secondly, it was an official entry made by Spiller, as steward of the manor, in discharge of his duty; and, thirdly, it ought to have been received as secondary evidence of leases which could not now be found. There was everything to prove that Spiller held the office of steward of this manor, and to connect this book with him receipts were produced signed by Robert Spiller; and at the commencement of this book was a name "Robert Spiller" in the same handwriting as the receipts. They may therefore be taken to be the same person. The witness's evidence about the handwriting was not positive, but he testified it to be about the time of James I. These entries are, in fact, abstracts of the several leases and underleases; then appeared a list of the names of the copyhold tenants and of the copyhold tenements; a memorandum of the investiture of the manor of the Duke of Norfolk. The book was, on the face of it, an authentic account of the several matters it professed to refer to, and ought to have gone to the jury at least as the handwriting of the period in question in a certain book belonging to one Spiller, he, Spiller, being steward of the manor, and giving given receipts for rent in that capacity up to 1722. This was good evidence of reputation that the 22 acres of pasture, called Howard's Furlong, which the house now sought to be recovered, built, was part of the manor of Hayling.

**MAULE, J.**—But what is reputation? after all, it is at thinking. I repute a man to be good or bad; at is, I think him to be so. **CRESSWELL, J.**—his seems to be a mere entry of something that was a lease; there is no expression of Spiller's opinion.—[In the case of *Chapman v. Cowan*, 13 East, 3, ascertain parchment writings preserved amongst the examinations of a manor, dated 1698 and 1717, reporting to be signed by many of the copyholders of the manor, stating an unlimited right of common to the commoners, which, having been found inconvenient, they had agreed to stock the common in a certain restricted manner were received as evidence of reputation as to the general right sufficient to destroy the restricted right set up by the plaintiff, a copyholder, in an action against a freeholder, for overstocking the common beyond such limit; and that, although it was objected that the instrument was not proved to have been signed by a majority of the then copyholders of the manor, nor that the plaintiff held the copyhold tenement of any one of those who had signed it, and Lord Ellenborough then said "Is not the instrument evidence at least of the reputation of the manor at the time as to the prescriptive right of common, against the right now set up by the plaintiff?" **MAULE, J.**—What you want to prove is, that the evidence of reputation is admissible, not to shew the boundary of the manor, but the existence of the lease referred to in this book.] Spiller made a note of a certain lease, which we may presume was before him, and shows his opinion of the document. **LORD CAMPBELL, C.J.**—He was making an abstract of the lease, and gave no opinion whether it was true or not. **MAULE, J.**—If a lease is found, and certain property is therein described, it may be evidence of reputation that the parties thereto thought the property was as therein described, but this is a lease and underlease unconnected with the lord of the manor.] Baron Parke himself in refusing a rule or a new trial on the ground of the rejection of this evidence, said, "to a certain extent, indeed, it is evidence of reputation; because what concerns a manor is evidence of reputation as to the history of the manor, and what the extent of the manor was." Then, assuming that Spiller was steward, these entries were made in the course of business, and as a part of his duty. **COLERIDGE, J.**—I observe that there are only receipts of rent of four cottages due to the Dowager Countess of Arundel; had you no other evidence of Spiller being steward? It seems that the only other evidence is, that the corporation still continue to pay rent, but that rent is in no way connected with these four cottages.] The Dowager Countess is referred to in a deed of 1623, her claim arose out of the original grant, and it was Spiller's duty as steward to enter documents when they came to his notice. (*Dec. dem. Pattenhall v. Twiford*, 3 B. & Ad. 896; *Stead v. Heston*, 4 T. R. 669.)

Then these entries are admissible as secondary evidence of these documents. They were made with a view to preserve the contents of the originals in a form easy for reference, such an entry as this ought at this time to be received in evidence, search having ineffectually been made for the originals. **MAULE, J.**—A copy of a copy is not admissible, and these entries may be even less, they may be an abstract of a copy; there is nothing whatever to connect them with the original documents.]

**Butt** was not called upon.

**LORD CAMPBELL, C.J.**—I do not think that this entry is admissible in evidence on any of the grounds taken by Mr. Crowder, although if the original lease had been forthcoming I think it would have been. Even supposing Spiller to have been the steward of the manor, or deputy steward, I do not see how these entries can be taken as an historical account of what had taken place in relation to different parts of the property; there is nothing to shew that these entries were not made from mere verbal information. However, although Spiller is said to have been steward, I do not think there is any sufficient evidence to shew that he was so; and even admitting that he was, it surely was no part of his duty in that capacity to make these entries; that part of the argument I therefore think is not sustainable. Then as to the third point. There is no evidence that the lease in question ever actually existed, and therefore it is impossible to contend that these entries can be received as secondary evidence. The fact itself must first be substantiated, before secondary evidence of that fact can be adduced; neither can these entries be regarded as an abstract of the deeds to which they profess to refer. I mean an abstract of title as between vendor and purchaser. It is possible that an abstract of title under such circumstances might be received as secondary evidence, as a memorial under the Middlesex Registration Act, which is an abstract, has been admitted. But this book and the entries it contains can in no respect resemble an abstract of title. **Judgment affirmed.**

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

## TRINITY TERM.

Wednesday, May 28.

(Before Mr. Justice WIGHTMAN.)  
**REG. v. THE PRINTERS AND PUBLISHERS OF THE "BUCKS CHRONICLE" NEWSPAPER.**  
*Rule nisi for a criminal information.*

**JAMES, Q.C.** moved for a rule calling upon the above parties to shew cause why a criminal information should not be filed against them for a libel published in the *Bucks Chronicle* newspaper of the 3rd of May instant, imputing to Mr. John Straut, an attorney of this court, criminal misconduct in reference to a petition presented by him to the House of Commons, relative to the late Aylesbury election.

*Rule nisi.*

Thursday, May 29.

**REG.** on the prosecution of **KENNEDY v. ALLEYNE and OTHERS.**

*Certiorari to remove an indictment from the Central Criminal Court.*

**Huddleston** moved, on the part of the defendants, for a *certiorari* to remove into this court an indictment found at the Central Criminal Court against the defendants, for obtaining money by false pretences, and conspiracy. The indictment, which was founded upon some supposed fraud with reference to a horse-race, whereby the prosecutor lost 7,000*l.* would involve, it was said, many difficult points of law, and it was desirable it should be tried by a special jury.

**JAMES, Q.C.** who appeared on the part of the prosecutor, consented to the removal of the indictment.

**WIGHTMAN, J.** in granting the writ, directed that each of the parties should enter into his own recognizance to the extent of 200*l.* with two sureties of 100*l.* each.

## BUSINESS OF THE WEEK.

**HURST v. HANWAY.**—*Altherton* moved for a rule calling upon the plaintiff to shew cause why the warrant of attorney and all the proceedings thereon should not be set aside, upon the ground that at the time of the execution, no attorney was present on behalf of the defendant.

*Rule nisi.*

**HANSELL v. HACKING.**—*Altherton* moved for a rule calling upon the plaintiff to shew cause why he should not carry in the roll and enter satisfaction, or why it should not be referred to the Master to ascertain what is now due upon the judgment.

*Rule nisi.*

## BANKRUPTCY.

**COURT OF BANKRUPTCY, LONDON**, reported by JOHN A. FOWLER, Esq. Barrister-at-Law.

**COURT OF BANKRUPTCY, DUBLIN**, reported by J. LEVY, Esq. Barrister-at-Law.

(Before Mr. Commissioner GOULBURN.)

*Re CLAY.*

In cases of disputed adjudication under the 12 & 13 Vict. c. 106, s. 104, the general rule is, that

## BANKRUPTCY.

the petitioning creditor must begin, and establish any of the requisites disputed, before calling on the alleged bankrupt to shew cause. (a)  
This was a question of disputed adjudication under the Act 12 & 13 Vict. c. 106, s. 104.

**Perry**, counsel for the bankrupt.

**Bagley**, counsel for the petitioning creditor.

A preliminary discussion took place as to the obligation of the parties to begin. On the part of the alleged bankrupt it was insisted that the petitioning creditor was bound, in the first instance, to examine his witnesses and establish the three requisites necessary to sustain the adjudication, precisely as if there had been no previous adjudication *ex parte*. On the other side it was suggested, that by the express terms of the 104th section, the alleged bankrupt was to shew cause against the original adjudication to the satisfaction of the Court, and if he failed so to do within the period specified in the Act, the original adjudication became absolute without more; and from this provision it was argued, that the petitioning creditor had already established a *prima facie* case, and could not be required in the first instance to produce any evidence. It was admitted at the Bar that the practice in reference to this question was not settled.

**MR. Commissioner GOULBURN** thought the question so important, as matter of practice, that he consulted with his brother Commissioners, Evans and Holroyd, and subsequently announced that they had come to the unanimous conclusion, that in ordinary cases, and as a general rule, the petitioning creditor upon a disputed adjudication should be called upon to begin and adduce all the evidence on which he means to rely, in order to establish the trading petitioning creditor's debt and act of bankruptcy. The Court, however, reserved to itself the discretion of allowing the petitioning creditor to adduce further evidence at any subsequent stage of the proceeding, if further evidence was deemed necessary.

**Bagley**, for the petitioning creditor, then called the attesting witness to a deed of assignment for the benefit of creditors, which was the act of bankruptcy relied upon, and the witness was cross examined by **Perry**, with a view to establish the objection relied upon.

## IRISH BANKRUPTCY COURT.

*Re RONALDSON, Assignee.*

Money paid to a bankrupt for a specific purpose, immediately before his bankruptcy, will not vest in his assignees, if clothed with a trust.

The bankrupt had been a trader in Dundalk, who had dealings with Messrs. Peele and Co. of Bradford, in Yorkshire; and in the month of March last he wrote to that firm for the loan of 50*l.* to assist in taking up his bill to them for 150*l.* which was then running due; the 50*l.* was accordingly remitted to him in a letter of credit for that specific purpose; but before its arrival Ronaldson had absconded, and his clerk, in his absence, opened the letter containing the 50*l.* but finding that its contents could not be applied to the purpose for which it was intended, he remitted back to Peele and Co. a half-note for 50*l.*; but before its receipt could be acknowledged, a commission of bankruptcy issued, and the corresponding half-note was seized by the messenger, and on falling into the hands of the agent to the assignee, he claimed the corresponding half from Peele and Co. inasmuch as the money had been in the possession of the bankrupt, and vested in his assignee.

**Barry**, for Peele and Co. applied for a direction to the assignee to transmit back the half-note in his possession, instead of seeking to obtain the corresponding half from his clients. The money was sent for a specific purpose, to which it was impossible to apply it—it was clothed with a trust, and did not vest in the assignees. (*Yeates v. Hope*, 15 Law T. 25, and cases there cited.) The bankrupt had not taken up the bill towards the payment of which Peele and Co. had sent the 50*l.*; they would be obliged to prove on a very deficient estate. They were clearly entitled to have the money returned; it would be a great injustice if they should be obliged to prove for it as a debt.

**HIS HONOUR** thought that the 50*l.* did not vest in the assignee, and directed that the half-note should be returned to Peele and Co.

(Before Mr. Commissioner MACAN.)

*Re CHARLES JENNINGS, Esq. parte THE BELFAST AND COUNTY DOWN RAILWAY COMPANY.*

*Proof for railway calls—Payments by instalments—Sale of shares for benefit of creditors.*

All calls upon railway shares regularly made and due before bankruptcy, are provable upon the bankrupt's estate. Calls made payable by instalments are not provable. Where a railway com-

(a) The practical effect of this decision is, that upon a disputed adjudication, the petitioning creditor is required to produce the same witnesses, already examined before the commissioner, together with any other evidence that may be deemed requisite to establish the petitioning creditor's debt, trading, and act of bankruptcy.

## BANKRUPTCY.

*pany is allowed to prove for calls, the shares must be bought in and sold for the benefit of the estate.*

The bankrupt in this matter had been a trader in Newry, and upon the formation of the Belfast and County Down Railway Company, he became an original subscriber for twenty shares at 50*l.* each. He paid up one or two calls on foot of these shares, and then became in arrear for all the subsequent calls, the whole of which became due before his bankruptcy, and now the company sought to prove for the amount of the arrears to the extent of upwards of 700*l.*

*Hamilton Smythe*, for the railway company, put forward the proof, and contended that the company were clearly entitled to rank upon the bankrupt's estate as ordinary creditors, the calls having become due before the bankruptcy.

*M'Beane*, for the assignees, resisted the proof on three grounds: 1. The solicitor of the company had, before the bankruptcy, written a letter to Jennings on the part of the company, offering to forego all claims on foot of the calls in question on payment of fifty pounds in cash. 2. That certain of the calls which had been made payable by instalments were not legally proveable. 3. That inasmuch as the whole capital had not been subscribed, and half of it paid up before the undertaking was commenced, and only a portion of the undertaking completed at the present time, the shareholders were not liable for calls, and the proof against the bankrupt's estate could not be sustained. *Cohen v. Wilkinson*, 12 Beav. 125; *Ambergate, Nottingham, Boston, and Eastern Junction Railway Company v. Couthard*, 14 Jur. 625, 19 L.J. 311, 6 R. Cas. 218; *Ex parte Marsden*, 2 Dea. 245; *Ex parte Connell*, 3 Dea. 201; *Wordsworth on Railways*, 5 edit. 91, 92; *Chambers and Patterson on Railways*, 494; *London and Brighton Railway Company v. Wilson*, 1 R. Cas. 531, 535, were cited.

His HONOUR held that, with regard to the first objection, it was not well founded, inasmuch as it did not appear that the solicitor of the company had their sanction for writing the letter in question; but that, even if he had, the condition contained in it was not fulfilled by the payment at the time of the 50*l.* in cash. With regard to the second objection, he thought, upon the authority of the *Ambergate Railway* case cited, and the Companies Clauses Consolidation Act, 8 & 9 of Vict. cap. 16, it was not legal to make calls on shares payable by instalments, and that the calls contained in the present proof which were so made payable should be rejected. As to the third objection, although there seemed upon the authority of some of the cases that there was some ground for it, yet, if it were to be held good law in all respects, no railway ever could be proceeded with whilst any of the original capital remained unsubscribed for, and no outstanding call could be enforced whilst any portion of a railway remained unfinished, or, in other words, a railway never could in point of fact be completed, because, in point of law, the means of completing it could not be enforced. With regard to the calls that were regularly made, and not divided into instalments, the company were clearly entitled to prove, as they had all become due before the bankruptcy; but another question, and an important one, remained to be decided, namely, what was to be done with the shares? If there was any one proposition in bankruptcy better established than another, it was, that every creditor claiming to prove against a bankrupt's estate, who held any property or security belonging to the bankrupt, should either place a value on it, deduct that value from the amount of his proof, and prove for the difference, or bring in the security and have it sold for the benefit of the general creditors; and there did not appear any cause why railway companies should be exempt from that rule. He would admit the proof to the extent of the calls regularly made, that is, such as were not made payable by instalments, but, in so admitting the proof, the company would be bound to bring in the shares, and have them disposed of for the benefit of the general creditors (a).

Friday, March 1.

Re HAVIN and CAVANAGH.

Bankrupt lunatic.

*A commission may be sued out against a trader who is a lunatic, provided that he was sane when the act of bankruptcy was committed; and his being incapable of furnishing a schedule, or being examined touching his estate and effects, will not prevent the working of the commission.*

*Lynch Q.C.* applied for an adjudication against *Havin and Cavanagh*, traders, in Waterford, the act of bankruptcy being the execution of a trust deed. The parties were co-partners in trade.

*Creighton* opposed the adjudication on the ground that *Havin*, one of the partners, was a lunatic for some two or three months past, and was confined in a lunatic asylum. He admitted that a commission might be sued out against a lunatic, during an interval

(a) The learned Commissioner delivered a very able and elaborate judgment, but the points ruled are accurately given.

of sanity, upon an act of bankruptcy within the same period; but where he was still a lunatic, and incapable of furnishing a schedule or undergoing any examination, a commission would be useless; it was evident, the Legislature did not intend that such persons should be subject to the operation of the bankrupt laws, as no provision was made in those statutes for cases of lunacy, whereas in the insolvent acts they were provided for. A commission of bankruptcy against a person who still continued a lunatic would be a nullity.

*Lynch* in reply, Lord Eldon decided that lunacy was no defence to an action, so neither was it to a commission of bankruptcy, which was a species of action for the benefit of all a trader's creditors, 3 Ves. 590. The execution of a trust deed was the act of bankruptcy. There was no question that the man was sane when he executed the deed, and it was his state of mind at that period that the Court was to consider, and not his present state of mind, with which the Court had nothing to do. All the requisites to sustain a commission existed, and he called on the Court to adjudicate.

His HONOUR said he was not called upon to decide whether a commission of bankruptcy against a lunatic was valid or not—that was a question for the Lord Chancellor—nor was there evidence produced before him to shew that the trader was a lunatic—even if such evidence were produced, he did not think he would be bound to receive it. There was an act of bankruptcy when the trader was admittedly sane. There was a trading and a debt, and although inconvenience might arise for want of a separate schedule, and from the inability of the bankrupt to be examined, still the commission should proceed. The inconvenience, however, would not be so great, as there was a partner supposed to be conversant at least with the joint estate.

Adjudication accordingly.

(Before Mr. Commissioner MACAN.)

Tuesday, March 25.

Re DONALDSON.

Arrest of bankrupt.

*The Commissioner will grant a warrant to arrest a bankrupt under the 4th sect. 12 & 13 Vict. c. 107, after adjudication. [English analogous, 12 & 13 Vict. c. 106, s. 99.]*

The sections above cited enact that a trader against whom a commission issues, or a petition for adjudication has been filed, may be arrested upon the commissioner's warrant, if about to remove or conceal his goods, or quit England or Ireland, and held in custody until the expiration of the time allowed for opening the commission or adjudging the trader bankrupt; and it has been held in the case of *Orampton*, a bankrupt, who was brought by *Abbeas corpus* before Mr. Justice Moore, shortly after the present Irish Bankrupt Act came into operation, that the warrant was spent upon adjudication, and the bankrupt was accordingly discharged from custody. The Irish Commissioners, however, on considering the 4th and 6th sections of the Irish Bankrupt Act, which are perfectly analogous to the 99th section of the English Bankrupt Law Consolidation Act, are of opinion that a warrant to apprehend an absconding bankrupt can be granted, and that if such a power did not exist, the sections would be almost nugatory. It appeared, in the present case, that the bankrupt was a trader in Dundalk, and had contracted debts to a considerable amount with *Todd and Co.* of Dublin, and with Manchester merchants. He turned a large portion of his stock into cash, packed up the remainder, and left Dundalk. He was declared bankrupt in two or three days afterwards, and it having been discovered that he was in Liverpool, on his way to America, a warrant was granted for his apprehension, and also for the seizure of the goods he had with him. The messenger was fortunate enough to seize the goods, but the bankrupt himself had sailed by the mail boat to New York a few days previously. The case is important, as it has been hitherto held, that the power to arrest or imprison the trader ceases upon adjudication. Mr. Wise, in his comment on the English Consolidation Act, is of the same opinion, but if the power do not exist there is nothing to prevent a fraudulent bankrupt who has sold all his property, and has the money in his pocket, absconding at any time between adjudication and the day for surrender.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Tuesday, April 15.

(Before the Chief Commissioner REYNOLDS.)

PROTECTION CASE.

Re JOHN FREEMAN EDWARDS.

Petition—Name of insolvent.

*All the names in which an insolvent has contracted debts must be set forth in his petition.*

This insolvent had accepted a bill in August 1850, in the name of *John Edwards*. The petition was filed on the 22nd March, 1851.

## INSOLVENCY.

## INSOLVENCY.

*Nichols* objected that the insolvent should be described by all the names in which he had contracted debts.

*Horry* for insolvent.

The CHIEF COMMISSIONER dismissed the peti-

Monday, May 19.

(Before the CHIEF COMMISSIONER.)

Re RICHARD PENNYFATHER.

This insolvent was committed on the 19th March, 1849. A creditors' petition was filed the 19th of October, 1849, by the Hon. J. Ward Chichester, a creditor (No. 61,666). An affidavit accompanying the petition was sworn at the city of Dublin, Ireland, this 15th day of October, 1849, before me, a Master attending for Ireland, of the High Court of Chancery in England. The Act (1 & 2 Vict. c. 112) enacts that all affidavits used in the Court made in Ireland or in Scotland shall be sworn before a magistrate of the county, city, town, or place in which the affidavits are taken. The *Messrs. Lewis & Co.*, looking at this petition, doubted the validity of the order or discharge upon a petition so sworn would be valid. The point was mentioned to the Commissioner Law, who directed Mr. Lewis to see an affidavit of the fact, after which a rule nisi issue giving leave to the insolvent to file a new petition, notwithstanding the one on the file in Court. A new petition was filed on the 30th April 1850; a schedule was filed on the 19th April 1851 and the insolvent was finally discharged on the 15th May, 1851. The learned Commissioner did not miss the first petition, probably as the Act (1 & 2 Vict. c. 110, s. 37) directs that such petition shall be dismissed without the consent of the petitioner creditor. (*Hollis v. Bryant*, 4 M. & G. 578.)

## INSOLVENT COURT, DUBLIN.

Reported by J. LEWIS, Esq. Barrister-at-Law.

April 1851.

(Before Mr. Commissioner BALSWICK.)

Re DOBBIN.

Joint consors—Principal and surety.

*A release of the demands of a joint consor by a joint creditor will not release the other consor, although he is merely a surety, when he is a consenting party to the arrangement by which the principal is released.*

A judgment creditor of the insolvent named *Maclure* had execution issued against him, upon which he was detained in custody; and having filed his petition and schedule, when the case came to be heard, he disputed *Maclure's* debt, and thereupon a reference was had to the chief clerk to inquire and report into the circumstances connected with it and the amount due. From the chief clerk's report it appeared that one *Thomas Irwin* and the insolvent were jointly liable by judgment to *Maclure*. *Irwin* had been discharged as an insolvent in the year 1847, and had returned this joint debt in his schedule. At this time certain lands in his possession were under ejectment for non-payment of rent, and the time for redemption about to expire; the attorney for *Maclure* took proceedings against *Dobbin* on the judgment, but he proceeded for time until *Irwin's* estate should be made productive, and proposed that the judgment creditors should contribute to make up the rent due, and redeem the lands; that then the lands should be sold, and the creditors should arrange amongst themselves how they were to be paid out of the proceeds of the sale as far as they would go. The purchaser could be had unless the judgment creditors consented to release the estate; and *Dobbin* stated that he would abide the result of such proceedings, and pay whatever balance might remain due to *Maclure*. The lands were accordingly sold at a fair value, and the purchase-money applied, as far as it went, to pay the judgment creditors the sums advanced, including a sum advanced by *Dobbin* himself; and a Mr. Stevenson, as to whose judgment *Dobbin* was the principal debtor, was paid his demand in full. The report further found that this arrangement was for the benefit of *Dobbin*, and entered into with his consent; that the judgment creditors who were not paid off in full, including *Maclure*, joined in a deed of conveyance to the purchaser discharged from their judgments. It further appeared by the report, that in the schedule of both *Irwin* and *Dobbin*, it was stated that the latter was merely surety, and that *Irwin* was the principal debtor. This being the state of facts, it was contended on the part of the insolvent that there being a release of the lands of the joint consors, and for whom the insolvent was merely surety, he too was released from the debt, and his liability had ceased. The learned Commissioner observed that the point, how far a release of land by a judgment creditor operated upon the liability of a joint consor had been the subject of frequent discussions and conflicting opinions. There was the case of *Handcock v. Handcock*, not yet reported, which had been before the Common Pleas in February last, where it was held that a release executed by judgment creditors, expressed to be merely of certain assets

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estates, operated in point of law as a release of certain settled estates, which were also originally covered by the judgments. That decision was affirmed by the Lord Chancellor, but the circumstances of that case differed from the present, and the judgment of his lordship could hardly afford a guide in the present instance. It appeared from all the facts set forth in the chief clerk's report in the case now before the Court, that there being two co-tenants, one of whom was the insolvent, the estate of the other was sold chiefly by his procurement, he obtaining the advantage of having the judgment for which he was liable paid off, and the cash he advanced towards the redemption of the lands re-vented to him; he at the same time undertaking to pay the remainder of the debt. It was no doubt well established law, that if the creditor discharge the principal, or enter into any agreement with him, by which the surety's situation is altered for the worse, or which would render a proceeding against the surety a fraud upon the principal, he discharges the surety—for instance, if he agree to give time to the principal; for then if he forbear proceeding during the time thus given, he wrongs the surety by prolonging his responsibility; while on the other hand, if he proceed against the surety he gives him a remedy against the principal, and thus exposes the latter to proceedings contrary to the faith of his agreement. (*Baillie v. Stobie*, 18 Ves. 20.) There were however equitable circumstances in the present case which would make it unjust to discharge Debbin. It was competent to enter into a stipulation reserving the remedy against the surety, and although the principal was discharged, yet when the surety was a party to the arrangement by his consent, he was bound in equity to pay the deficiency, and that Court having an equitable jurisdiction was bound to exercise it. His decision was, that although the insolvent was the joint co-tenant, and a mere surety for Irwin, and Irwin's estate was released by the judgment creditor, yet as the insolvent was a consenting party to that arrangement, he was not released, but was bound to pay what the principal was deficient. The chief clerk's report, finding that a certain sum was due to Macure, should be confirmed.

## CROWN CASES RESERVED.

Reported by ADAM BITTLETON, Esq. of the Inner Temple, Barrister-at-Law.

Saturday, April 26.

(Before Lord CAMPBELL, C. J., ANDERSON, B. COLERIDGE, J., PLATT, B. and TALFOURD, J.)

## REG. v. POYSEL.

## Larceny—Determination of bailment.

A. employed B. to sell clothes for him; B. received for that purpose a parcel of clothes, a separate price being fixed by A. upon each article. B. was to be paid a per-centage upon the amount received, and to bring back the clothes not sold. Instead of selling any, he fraudulently pawned some and kept the rest for his own use.

Held, that as there was but a simple bailment of all the articles, the misappropriation of part determined the bailment as to the rest; and that B. was properly convicted of a larceny of the articles which he had kept.

This case was reserved by Alderson, B. at the last Leicester Assizes. The prisoner was indicted for larceny of clothes and convicted. He had been employed to sell clothes for the prosecutor, who fixed the price at which each article might be sold. The prisoner was paid 3s. in the pound on the money which he received, and his duty was to return all the clothes which remained unsold. On the 12th Feb. he received a parcel of clothes on these terms; but instead of disposing of them according to the arrangement, he fraudulently pawned part for his own benefit, and then misappropriated the residue to his own use. The learned judge told the jury that the fraudulent pawning of part put an end to the bailment as to the residue, and that the fraudulent appropriation of the residue would amount to larceny. The question was, whether the direction was right.

O'Brien, for the prisoner.—In this case the bailment was not determined by the misappropriation of part, because the contract was separate as to each article. (2 East, P. C. 627, 661; *R. v. Steer*, 1 Den. C. C. 349.)

Lord CAMPBELL, C. J.—In this case there was but a single bailment, and upon that the whole question depends. If there had been a separate bailment of each article, the misappropriation of one would not have determined the contract as to the others; but the bailment being single, it is well settled, that the first tortious act inconsistent with the contract puts an end to it; and a subsequent misappropriation, *animo furandi*, is larceny.

The other judges concurring.

Conviction affirmed.

## REG. v. DAVIS.

Indictment—Variance—Prosecutor's name—Idem sonantia.

This Court refused to say that *Dartford* and *Tynes*

were idem sonantia, the question not having been left to the jury.

This was reserved by the Dorsetshire Sessions.

The prisoner was indicted for stealing the goods of Darius Christopher. The evidence proved the prosecutor's name to be Tryus Christopher. The chairman ruled that, in Dorsetshire, Darius and Tryus were idem sonantia, but requested the opinion of the judges upon the correctness of that ruling. When that case first came on to be heard, the Court intimated that it was a question for the jury, and directed the case to be sent back, in order that it might be stated whether the question had been left to the jury. The case was now returned, with a statement that the question was not left to the jury.

Lord CAMPBELL, C. J.—This conviction must be reversed. If it is put as a matter of law, it is quite impossible for this Court to say that the two words are idem sonantia.

Conviction reversed.

## REG. v. FEAD.

Cross-examination by prisoner's counsel—Use of deposition.

The counsel for a prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand for the purpose of refreshing his memory without giving it in evidence.

This case was not argued by counsel. The learned judge who tried the prisoner refused to allow the prisoner's counsel to put into the hands of a witness whom he was cross-examining, his deposition, and then to ask him whether he persisted in the statement which he had previously made in court, without putting in the deposition as his own evidence.

Lord CAMPBELL, C. J.—The judges are all of opinion that the course which the prisoner's counsel wished to take ought not to be allowed. Indeed, it appears from a manuscript note furnished to me by Mr. Baron Parke, that the matter is "*res judicata*." The note is as follows:—"Some cases occurred before my brother Colman, at York, and myself at Liverpool, in which the counsel for the prisoner, in cross-examining a witness for the prosecution, offered to put into his hand his deposition before the magistrate; and then proposed to ask him whether, having looked at the paper, the witness still persevered in the statement already made in his examination in court. We had some doubt as to the propriety of this course; but it having been permitted by some judges, we thought it right to allow it. As it is very desirable that uniformity should prevail in the practice in this respect, I have to request the opinion of the judges whether we were right.—Dated the 23rd of April, 1845."

Answer.—"The judges are of opinion that the course pursued in this case is improper, and ought not to be allowed for the future."

(Signed) DENMAN, WILLIAMS,  
TINDAL, COURTMAN,  
PARKES, HENKINS,  
ALDERSON, ROYCE,  
PATHEON, CHAMBERS.

Conviction affirmed.

## REG. v. MARY ANN BENNETT.

Indictment for perjury—Averment of materiality—Certainty.

An indictment for perjury charged that the defendant, upon a trial for rape, falsely swore that she never got a Mr. M. W. (he said M. W. being then present in Court during the said trial) to write a letter for her; and that averment was prefaced by an allegation that it was a material question whether she ever got one M. W. to write a letter for her. The evidence proved, that upon the trial for rape Mr. M. W. was pointed out to her, and that she swore that she did not get him to write for her a letter, which was produced and shown to her; and that that was false: Held, that the allegation of materiality was sufficiently alleged; and the identity of M. W. sufficiently shown.

The following case was reserved by Talfourd, J.—Mary Ann Bennett was tried before me at the last assizes for the county of Gloucester, on an indictment charging her with wilful and corrupt perjury, committed on the trial at the Gloucester Spring Assizes, 1850, of Shadrach Lewis and Isaac Hopkins, for a rape upon herself. The indictment against Mary Ann Bennett, after stating the trial and the oath taken by the prisoner as a witness in the usual form, proceeded thus to allege the materiality of the matters assigned as perjury, and the prisoner's evidence, to which the assignments were applicable:—"That upon the trial of the said indictment the following questions became and were material, and each of them respectively became and was a material question, whether or not the said M. A. Bennett ever got one Milo Williams to write a letter for her, and whether or not she the said M. A. Bennett saw the said Milo Williams at the house of the father of the said prisoner, Shadrach Lewis, when the said letter was written; and whether or not she ever saw the said Milo Williams at the house of the said father of the prisoner, Shadrach Lewis, and whether or not

she ever saw the said Milo Williams in any house, and whether or not she ever saw the said Milo Williams more than once; and whether or not the said Shadrach Lewis, and the said Isaac Hopkins, or either of them, violently, feloniously, and against the will of the said M. A. Bennett, ravished her. That said Mary Ann Bennett being so sworn, and then and there on the said trial, upon her oath aforesaid, falsely, corruptly, and wilfully, &c. did depose and swear, amongst other things, in substance, and to the effect following; that is to say, that she (meaning the said M. A. Bennett) never got a Mr. Milo Williams (he the said Milo Williams being then present in court during the said trial) to write a letter for her; and that she (meaning the said M. A. Bennett) did not see the said Mr. Milo Williams at the house of the father of the said prisoner, Shadrach Lewis, when the said letter was written; and that she (meaning the said M. A. Bennett) never saw the said Mr. Milo Williams at the said house of the said father of the said prisoner, Shadrach Lewis; and that she (meaning the said M. A. Bennett) never saw the said Milo Williams in any house; and that she (meaning the said M. A. Bennett) never saw the said Milo Williams more than once; and that the said Shadrach Lewis and Isaac Hopkins violently, feloniously, and against the consent of the said M. A. Bennett, ravished her." The indictment then proceeded to negative the truth of the matters sworn in these terms:

"Whereas in truth and in fact, the said Mary Ann Bennett did get the said Milo Williams to write a letter for her," &c.; and concluded in the usual form. It was proved that, at the trial of Lewis and Hopkins, the prisoner, then the witness, was asked, on her cross-examination, whether she ever got Mr. Milo Williams (who was pointed out to her in court) to write a letter for her? That she replied, "No, I did not." That a letter was then exhibited to her, and the question was repeated as to "this letter," that she repeated her denial. She was then asked "Did you not get Mr. Milo Williams to write this at Lewis's father's house?" She replied, "I did not." She was then asked if she ever saw Williams at Lewis's father's house? She said, "I never did." Again, whether she ever saw Williams? She replied, "Once at Chepstow;" never but once. She was then further asked, whether she ever saw Williams at her father's house. She replied, "Not in any house." The questions were afterwards in substance repeated to her by the judge, but she persisted in the same denials. She deposed to the perpetration of a rape upon her person by both prisoners in succession, each assisting the other. Upon the trial of the indictment for perjury, the letter in question, which had been given in evidence to contradict, on the trial for rape, was sworn by Milo Williams to have been written at the house of the father of Lewis, after the committal for rape, by himself, upon her suggestion, read over to her by him, signed by her with her mark, and by him taken away for transmission to Lewis in Gloucester gaol. It was as follows: [The letter was set out.] Confirmatory proof of the truth of Mr. Williams's statement was given; and the jury found the prisoner guilty on all the assignments of perjury except on that assigned on the allegation that she never saw Williams but once (which there was no proof to negative), and the assignment on the allegation of rape itself, the sufficiency of which, therefore, it is not necessary to consider. For the prisoner it was objected, that the materiality of the matters assigned as perjury was not sufficiently alleged in the indictment. That the reference to the letter was too vague and general, and not properly pointed to the particular letter in question. That the reference to Milo Williams and to Lewis's father's house were not properly introduced by an averment. That the letter produced in evidence was not sufficiently identified with the statements on the record to support them. It was also contended that the whole transaction of the letter was not sufficiently material to the charge of rape, but I thought it clearly was so under all the circumstances in proof before me, and I did not reserve this objection. I repeated the judgment, and reserved the other objections for the opinion of the Court of Criminal Appeal.

M'Mahon argued the case for the prisoner.

Powell, contra.

Lord CAMPBELL, C. J.—I am of opinion that the conviction is right. It appears to me that the identity of Milo Williams is sustained throughout the indictment as the person who was present at the trial for rape, and the person who was present at the trial for perjury. So it is distinctly alleged that the question, whether the prisoner did procure Milo Williams to write a letter for her, was a material question; and that being so, it is unnecessary that the materiality should appear upon the face of the indictment. It is enough if the evidence shows it, as it was properly held to do in this case.

The other judges concurring.

Conviction affirmed.

## CROWN CASES.

## REG. v. HALLETT.

*Perjury before an arbitrator appointed under the County Court Act.*

*An arbitrator appointed under sec. 77 of 9 & 10 Vict. c. 95, has no authority to administer an oath.*

The prisoner was indicted for perjury at the last Gloucester assizes; and the alleged perjury was charged to have been committed before an arbitrator appointed by order of a County Court judge, under sec. 77 of 9 & 10 Vict. c. 95. It was objected at the trial that the arbitrator had no authority to administer an oath, either by virtue of that section or by sec. 41 of 3 & 4 Wm. 4, c. 42; Talfourd, J. overruled the objection, but reserved the point.

*Skinner*, for the prisoner.

*P. McMahon* contra.

LORD CAMPBELL, C.J.—I think that the arbitrator had no power to administer an oath, and that the conviction is wrong. The power to administer an oath must be expressly conferred by statute, except where the proceedings follow the course of the common law, and that power is incident to the authority to hear and determine. In the case of arbitrations under the authority of the Superior Courts, sec. 41 of 3 & 4 Wm. 4, c. 42, does confer that power; but there is nothing in the County Courts Act which can have a similar effect.

The other judges concurring.

*Conviction reversed.*

## REG. v. WILLIAM POTTER.

*Indictment for breaking and entering a counting-house—What is a counting-house, within 7 & 8 Geo. 4, c. 29, s. 15?*

*A place called the machine-house, at chemical works, where a weighing machine was kept, goods weighed, and an account of weights kept in a book; where the account of the workmen's time was taken and entered in books not kept there, but brought there for the purpose; and where their wages were paid.*

*Held, properly described as a counting-house in an indictment for breaking and entering that building, and stealing therein, under 7 & 8 Geo. 4, c. 29, s. 15.*

The following case was reserved by CRESSWELL, J.:

The prisoner was indicted for breaking and entering the counting-house of David Gamble, in the parish of Prescott, and stealing therein 500 pennies, &c., the monies of David Gamble. It appeared in evidence on the trial, before me at Liverpool, that David Gamble was the proprietor of extensive chemical works at Prescott, and that the prisoner broke and entered a building, part of the premises of David Gamble, which was commonly called the machine-house, and stole therein a large quantity of copper money. In this building there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building, and their wages were paid there. The books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected for the prisoner, that the building broken and entered by him, was not properly described as a counting-house. The jury found the prisoner guilty; and I abstained from passing any sentence, wishing to have the opinion of this Court on the question, whether the prisoner can be punished for breaking and entering a counting-house, and stealing therein, or for simple larceny only. In the meantime he remains in custody.

The case was not argued by counsel.

LORD CAMPBELL, C.J.—We have considered this case, and are of opinion that the conviction is right. There was abundant evidence to shew that this building was a counting-house; and that being so, the case comes within the statute 7 & 8 Geo. 4, c. 29, s. 15.

The other judges concurred.

*Conviction affirmed.*

*Saturday, May 3.*

REG. v. CLEMENTS.

*Deposition of witness absent from illness—Grand jury—11 & 12 Vict. c. 42.*

*The deposition of a witness, who is prevented from attending by illness, may be used before the grand jury as well as the petty jury.*

*Quære—Whether this Court has any jurisdiction to decide such a question; and whether the improper reception in evidence of a deposition before the grand jury would invalidate a conviction.*

No counsel were instructed in this case.

LORD CAMPBELL, C.J.—In this case our opinion is asked whether a deposition taken under the 11 & 12 Vict. c. 42, s. 17, where a witness is unable to appear from illness, can be made use of before the grand jury. Now we entertain considerable doubt whether the question can pro-

perly be adjudicated by us under the authority by which we sit here; and we likewise entertain some doubt whether such an objection would be sufficient to invalidate the conviction. But, as our opinion is asked, we have no difficulty in saying that, in our opinion, upon a just construction of the Act of Parliament, the deposition may be made use of before the grand jury as well as before the petty jury after the indictment is found; for the Act of Parliament says: "If upon the trial of a person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution." Now we think that "the trial," as it is here used, coupled with the word "prosecution," shews that the deposition may be made use of before the grand jury as well as before the petty jury, and that such must have been the intention of the Legislature. Therefore, upon every consideration of the case, the conviction must be affirmed.

ALDERSON, B.—It is very doubtful whether you can take an objection at all as to what passed before the grand jury, seeing that the prosecutor was bound by the grand jury to give the evidence. Suppose there were only one witness before the grand jury on a charge of perjury, and they found a bill, if it was tried before the petty jury how are you prevented from proving the case?

## REG. v. ODDY.

*Felonious receipt of stolen goods—Evidence of guilty knowledge—Possession of other stolen goods.*

*Upon a charge of feloniously receiving stolen goods, the possession of other stolen goods, not connected with the immediate charge, is not admissible as evidence of guilty knowledge.*

This case was reserved by the Recorder of Leeds.

The indictment charged the prisoner with larceny of fifty yards of woollen cloth, and also with feloniously receiving the same property, knowing it to have been stolen. The property, mentioned in the indictment, was stolen on the night of the 2nd of March from the prosecutor's mill, and was found in the defendant's possession on the 10th March. It was also proved on the part of the prosecution that two other pieces of cloth were found in the prisoner's house within an hour after the property named in the indictment had been found in his possession, that two other pieces had been in his possession on the 13th of December, and that all four had been stolen on the night of the 4th of December from another mill not belonging to the prosecutor. Those facts were left to the jury as evidence of guilty knowledge under the third count, upon which alone the prisoner was convicted; and the questions were, whether the evidence was receivable and the direction right.

PICKERING, for the Crown, contended that the evidence was properly received and left to the jury, upon the principle which enabled a prosecutor to give in evidence previous utterings of forged instruments to prove the guilty knowledge. He cited *Dunn's case*, 1 Moo. C. C. 146; *R. v. Davis*, 6 Car. & P. 177; *R. v. Mansfield*, Car. & M. 140; *Wyllie's case*, 2 Leach, 983; 1 New Rep. 92; *Ball's case*, Russ. & Ry. 132; *Kirkwood's case*, Lewin, 103; *R. v. Balls*, 1 Moo. C. C. 470; *R. v. Hough*, Russ. & Ry. 531; *R. v. Clewes*, 4 Car. & P. 221; *R. v. Voke*, Russ. & Ry. 531; *Gibson v. Hunter*, 2 H. Bl. 288.

No counsel appeared for the prisoner.

LORD CAMPBELL, C.J.—I am of opinion that the evidence was as little receivable on the count for receiving as upon the counts for stealing. It would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offence; but by the law of England one offence is not allowed to be given in evidence to prove another. How can the possession of other stolen goods shew any knowledge that the particular goods mentioned in the indictment were stolen? It can lead to no such conclusion. With regard to the admission in evidence of proof of previous utterings, upon indictments for uttering forged notes, I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally; but certainly evidence of that description shews the prisoner skilful in dealing with forged paper; and that may lead to the inference that he knew the particular notes to be forged; but there is no ground upon which, from evidence like this, the *scienter* can be inferred upon a charge of feloniously receiving stolen goods. A similar point was properly decided by my brothers Alderson and Talfourd, in *Sirrell's case*, at Liverpool; and I think this evidence was improperly admitted, and that the conviction must be quashed.

## CROWN CASES.

ALDERSON, B.—This evidence, which shews prove a guilty knowledge on this occasion, is consistent with the supposition that on the occasions the prisoner himself stole the goods. The other judges concurring.

*Conviction affirmed.*

## REG. v. UNSELL and OTHERS.

*Night poaching—Stat. 9 Geo. 4, c. 6, s. 1. Indictment—Land described by name of an entering particular closes.*

*If an indictment under sec. 9 of Geo. 4, c. 6 (Night Poaching Act), describes the land as a certain land in the occupation of A. B. and C. D. in the parish, &c. it is not valid if three of one party are proved to have entered any land answering such description, if they were all in the same close, if the defendants of the offence are established.*

The following case was reserved by this Court.

The prisoners were tried before me at the assizes at Hertford for night-poaching, at which they were found guilty on 9 Geo. IV. c. 69. The prisoner Unsell and Parking were not sufficiently indicted and therefore acquitted. Eaton was found guilty. He was one of the three persons who went into the close mentioned in the indictment, called the Spring, which had been in it, for the purpose of destroying game in the close; but the whole three were not there. They all, however, at the time of the same company with that common purpose. There is one count in the indictment, the fourth, stating that the prisoners were in inclosed land occupied by Charles White, the Spring and the Thirteen Acres were contiguous, separated by a fence, and were both in the occupation of Charles White. There is a question whether it will make any difference. I required the judgment in order to take the opinion of the judges on the unsettled question. (*Visdel Russell on Crimes*, Mr. Greaves's note, 476; and *Res v. Whitaker* 1 Den. C. C. 310.)

No counsel were instructed to argue the case. LORD CAMPBELL, C.J.—Upon the fourth count we think that the conviction is right, and ought to be affirmed. I may add that the confusion which has arisen upon this head of law, seems to me to have proceeded from not referring to the very words of the Act of Parliament. It seems to have been held several times, that the three persons must be entered the inclosed fields described in the indictment, in order to take game there; but the Act of Parliament (9 Geo. 4, c. 69, s. 9) says that "if three persons, to the number of three or more together, shall by night unlawfully enter or be in any such whether open or inclosed, for the purpose of taking or destroying game, any of such persons being male, &c. each and every of such persons shall be guilty of a misdemeanour." A practice has been introduced of naming a particular close, as Blackacre and Whiteacre, in indictments upon this statute; but that is quite unnecessary. It has been properly held to be sufficient to say merely "a certain piece of land in the parish of A.," there must be something to identify the land. But it is quite enough to allege the entering upon certain land in the occupation of A. B. and then if three persons together and armed with any part of that land for the purpose of destroying game, they may be convicted, though there are three fields, and one of the three was in Blackacre, one in Whiteacre, and the third in Greenacre. The act got rid of all that subtlety of discussion about one being on one side of a hedge and some on another. If all are on any part of the land described in the indictment for taking game on the land, and they are one party, the statement in the indictment is proved, and so we think the fourth count of this indictment is proved.

PARKER, B.(a)—I am of the same opinion. It is enough if three of one party are in any land described in the indictment, even though it be in different occupations, and whether open or inclosed. The word "open" in the statute was probably intended to apply to common or waste land. It is an elaborate and able note of Mr. Greaves proceeds to the wrong assumption, that all three must be in the same close. At one time I was rather inclined to take a different view of this case; but now I think that the prisoners, who were all upon land in the occupation of White, described in the fourth count, may be convicted upon that count.

ALDERSON, B.—The land must be described; but if it is alleged that they entered two pieces of land, one open and one inclosed, that would do.

The other judges concurred.

*Conviction affirmed.*

(a) His lordship came into court to assist in the decision of this case only.



## LORD CHANCELLOR'S COURT.

## LORD CHANCELLOR'S COURT.

## V. C. KNIGHT BRUCE'S COURT.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WALFORD, Esq. of the Inner Temple, Barrister-at-Law.

March 13 and 14 and May 29.

**THE DIRECT EXETER, PLYMOUTH, and DEVON-PORT RAILWAY COMPANY, ex parte W. H. BESELEY.**

**Second re-hearing—Winding-up Act—Contributory—Payment after abandonment does not create liability.**

**Person who consented to be named as one of the provisional committee of a projected railway company, but who never in fact acted, and afterwards resigned his position, which resignation was accepted by the managing committee, is not liable as contributory under the Winding-up Acts.**

**Or does the attending a meeting of the provisional committee after the project had been abandoned, and agreeing to contribute towards the expenses and debts incurred, to an amount not exceeding a specified sum, or the actual payment of such contribution, render the party a contributory under the Acts, or liable to the creditors of the project, or to indemnify the other committeemen. The decision of Lord Cottenham in Ex parte Beasley, 2 Macnaughten & Gordon, 176, reversed on re-hearing.**

This case, as decided by Lord Cottenham (2 Macnaughten & Gordon, 176) having been considered consistent with the decision of the Lords Commissioners in *Roberts's* case (Ibid. 192), and of the House of Lords in *Cottle's* case, 2 House of Lords cases, 669, an application was made *ex parte* on behalf of Mr. Beasley to have this matter reheard. The Lord Chancellor consented to rehear the case, in the first instance, on the question of a second rehearing, and in the event of his holding at a case for second rehearing had been made out, then to rehear the case upon the merits.

**Rolt and Karlake**, for Mr. Beasley, supported the application for a rehearing. They referred to Vice-Chancellor Knight Bruce's judgment (May 30, 1850), when he ordered Beasley's name to be removed from the list of contributories, the case before Lord Cottenham, 2 Macn. & Gor. 176; *Re Roberts*, *ibid.* 192.

**Roxburgh**, for the official manager, contended that this case is the same as *Cottle's* case, and that the party must therefore go to the House of Lords.

The LORD CHANCELLOR.—There are several grounds for rehearing, and it will be sufficient to state one of them. I do not think I am authorised to refuse to rehear this case, because it may possibly go by appeal from my decision to the House of Lords. It is always probable that a party whose interests are injuriously affected by a decision of this Court may go to the House of Lords. Lord Cottenham, in this case, dealt with the fact of Beasley being a provisional committee-man, but did not stop to consider whether, as a committeeman alone, he became liable, because there were other facts, such as attending meetings and payment of money towards expenses; and Lord Cottenham gives his view of what would be the effect of being a provisional committeeman, and that view would have justified a decision against Mr. Beasley. I find that view quite different to those which have been adopted in a subsequent case. Lord Cottenham held, that being a provisional committeeman caused him to incur certain liabilities; but that view having now been decided at law to be erroneous, I am not at liberty to say what effect that would have upon Lord Cottenham's judgment. I should think that quite enough to induce me to rehear this case. I think, too, that this case, standing as it does, might form a precedent calculated to mislead. I will, therefore, rehear this case on the merits.

**Rolt and Karlake**, for Beasley, contended that Mr. Beasley's name ought not to have been placed on the list of contributories. The facts are shortly these. The company was registered provisionally by D'Urban, Flood, and Curling, as promoters, in October, 1845. On being applied to by one of the provisional directors, Mr. Beasley consented to have his name added to the list, to which he assented on the assurance that he would not thereby incur any responsibility or be expected to take shares. His name was added at a meeting of the provisional committee on the 4th of October; and on another meeting of the 7th of October a committee of management was appointed. Mr. Beasley was not present at the latter meeting. On the 3rd of November a resolution was passed as to the allotment of shares to the provisional committee, and a copy of that resolution was sent to Beasley. He wrote on the 6th of November to the secretary of the company, informing him that he was not convenient to be allotted to him, and requested that he should be removed from the list of contributories. On the 13th of November, there was

a resolution by the managing committee, directing the secretary to inform Mr. Beasley, and other persons who had desired their names to be withdrawn, that their wish had been complied with. No such communication was made to Beasley, and his name continued on the list. It having become obvious that the project could not be proceeded with, a meeting of the provisional committee was called on the 31st of December, 1845, when it was resolved to abandon the project, and that each member of the provisional committee should pay 3s. per share on 100 shares. Mr. Beasley's name was entered as having been present at that meeting, but by his affidavit he stated that he came in after the resolutions had been passed. He, however, paid 15l. the amount required by the resolution, and on the 19th of January he signed an agreement, by which the members of the provisional committee agreed for their mutual protection. On the 2nd of March Beasley was present at another meeting of the provisional committee, when it was resolved that an additional contribution of 50l. would be required from each member. This sum Mr. Beasley paid; and at a subsequent meeting in August 1846, he agreed to a resolution, "That the members who are here present agree to pay the sum of fifty pounds, or such other sum as will make up, with previous payments, 115l. and they determine, by every influence and power they possess, to resist or prevent any further demand being made upon such persons as have contributed that sum," and that the solicitor "be requested to cause the creditors of the company to apply to such provisional committeeman, and enforce payment from such as have not paid their respective contributions, in order to wind up the undertaking as soon as possible." Mr. Beasley paid 50l. in pursuance of that resolution.

**Roxburgh**, for the official manager, contended that the name of Mr. Beasley was properly included in the list of contributories. He cited *ex parte Hollingsworth*, 3 Rwy. cases, 623, and 3 De Gex. & Sen. 7; *ex parte Cook*, *ibid.* 148; *Parbury's* case, 3 De Gex. & S. 43; *The Earl of Mansfield's* case, 2 M. & G. 57; *Ex parte Morgan*, 1 M. and G. 225; *Re Barber*, 1 M. & G. 176; *Re Matthews*, 16 Law T. 255; *Uphill's* case, 2 House of Lords cases; *Young v. Smith*, 4 Rwy. cases, 185.

**Rolt and Karlake** cited *Reynell v. Lewis*, 15 Mee. and W. 517; *Bell v. Mesborough*, 5 Rwy. cases, 149; *Newton v. Beldier*, Q. B. 25th Nov. 1846; *Bailey v. Macaulay*, Q. B. 11th July, 1849; *Cottle's* case, 2 House of Lords cases, 669; *ex parte Roberts*, 2 M. and G. 192.

## JUDGMENT.

**Thursday, May 29.**—The LORD CHANCELLOR (after stating the facts and the proceedings upon the rehearing, his lordship said)—In order to see whether Mr. Beasley's name has been rightly placed on the list of contributories, it will be necessary to ascertain the ground of his legal or equitable liability (if any) either to the creditors of the company, or to indemnify others who are liable to the creditors. In order to make him so liable, he must have entered into some contract, either express or implied. Now, all the facts of this case are known, there is no doubt or dispute about them, and the case must be decided by an application of the principles of law to those facts. The liability must depend upon facts before the debts were contracted. The evidence of the case showed that Mr. Beasley never attended any meeting of the provisional committee until after it was resolved to abandon the undertaking. The question resolved itself into two parts, namely, first, whether Mr. Beasley incurred liability at law to the creditors of the company; and, secondly, whether he incurred any liability to his fellow committeemen to indemnify them for any liabilities incurred by them,—inasmuch as he did not act, and attended no meeting, until after debts or liabilities were incurred and the scheme abandoned, he could not be held liable to them. He was not, therefore, liable to any creditors of the company. That was established by the cases of *Reynell v. Lewis* and *Wyld v. Hopkins*; both will be found in 15 M. & W. He never acted with the provisional committee or committee of management in any of the contracts or acts. His name happened by some mistake to have been left on the list of committeemen, but he did not act with them. It appeared that he did attend meetings held after the abandonment of the undertaking, for the purpose of seeing how the liabilities incurred could be discharged, and he made a payment of 15l. and two sums of 50l. in pursuance of these resolutions, and to protect himself from further demands. No liability to other demands could arise from his making these payments, no more than in the case of *Roberts*, decided by the Lords Commissioners, and reported in 2 Mac. & Gor. in which it was held that a payment of a sum to avoid the cost of a threatened action was immaterial. The payments made by Mr. Beasley were made as matters of favour, and in good faith, to the committeemen, and did not make him liable to them for further contribution. He had never acted with them, did not sanction any of these contracts; he was

merely a provisional committeeman in name only, as was *Cottle's* case, 2 House of Lords cases. The conclusion at which I have arrived makes it unnecessary for me to give an opinion whether this project is within the Winding-up Acts; the last Act is certainly very general. But here it is difficult to say who is the company, and it might be well said to be only an attempt to form a company. He never attended meetings until after all the expenses had been incurred; and if either he became liable to the creditors or to indemnify those liable to the creditors, it must be by some express or implied contract, and I am unable to discover how any such liability can attach to Mr. Beasley. There was no authority in the provisional or managing committee to contract on his behalf. Then, if there be no evidence of a previous contract, had the facts not been known, the subsequent transactions might lead to an inference that the payments he made were made under liability. But all those payments were made in ignorance of the fact that the managing committee had accepted his resignation. Small payments made to avoid litigation would not render him liable. I think, therefore, that Mr. Beasley was not properly placed on the list of contributories; the order of Lord Cottenham placing him there must be discharged, and the order of Vice-Chancellor Knight Bruce confirmed.

**Rolt.**—The costs of the rehearing will be paid by the official manager.

**Roxburgh** said, the practice, no doubt, was, that the official manager should pay the costs of his unsuccessful appeal out of the estate. But there was, in this case, a rehearing of an order made in favour of the official manager, and there were also costs incurred upon the application for that rehearing. Surely all these costs should not be paid by the official manager.

The LORD CHANCELLOR.—The costs of the application to rehear were caused by the official manager, for when the case came for rehearing, you, on behalf of the official manager, objected that he was taken by surprise, for that he had notice that leave to rehear was granted; and upon that preliminary objection taken by you, there was a protracted argument whether the case should be reheard.

**Rolt** observed, that the order for the costs should be made against the official manager personally.

**Roxburgh** said, that could not be, for the Winding-up Act indemnified the official manager personally. He was an officer appointed by the Court.

The LORD CHANCELLOR.—He is the nominee of the solicitor to the petition for the winding up, and whose object is to bring in on his list as many contributories as he can to secure his costs.

**Roxburgh.**—But surely he was bound to come before the Court on the rehearing, to defend the order made by the Lord Chancellor. This is the acknowledged practice in every court of appeal—he ought not, at all events, be called on to pay the costs of the other side, especially when a rehearing is granted as a matter of indulgence.

The LORD CHANCELLOR.—As indulgence for cause shown, he was inclined to think that this rehearing was only a continuance of the hearing before the late Lord Chancellor, just as if no order was made, but the case stood over for further consideration or argument.

**Rolt** again repeated his demand of the costs against the official manager, in which the Lord Chancellor seemed to concur.

**Roxburgh** referred to the section in the Winding-up Act, which declared that all the expenses and costs of the official manager in all the proceedings instituted by him should come out of the estates over which they were placed.

The LORD CHANCELLOR.—I am inclined to think that the words in the section referred to costs of the proceedings taken before the Master. However, I will look into the Act, which I have more than once pronounced to be ill drawn, and decide whether these costs should be paid by the official manager personally or out of the estate; but the order I now make is, that Lord Cottenham's order be discharged, with costs to be paid by the official manager, and the order of the Vice-Chancellor for striking Mr. Beasley's name out of the list be restored.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLWOTT, Esq. of the Middle Temple, Barrister-at-Law.

Friday, Feb. 14.

CRAFTON v. FRITH.

Will—Construction—Mortmain Act.

A testator gave the residue of his property to trustees, to be purchased into the funds for the purposes hereinafter mentioned, viz. for opening new schools, subscribing to those already opened in England, Ireland, Scotland, or elsewhere, and in purchasing land to let out to the poor at a low rent, and the rent to be applied to any benevolent purpose the said trustees might think proper:

## V. C. KNIGHT BRUCE'S COURT.

*Held, that the residue was to be divided into two equal parts, one to be applied to the purposes of education, and that the other must go to the next of kin, the second purpose of the testator being made void by the Mortmain Act.*

Philip Frith, by his will dated the 13th of August, 1842, after certain devises and bequests, proceeded as follows:—

"The remainder and residue of my property I give and bequeath to my friends R. Sterry, R. Barrett, and J. Barrett, in trust, to be purchased into the funds for the purposes hereinafter mentioned, viz. for opening new schools, subscribing to those already opened in England, Ireland, Scotland, or elsewhere, and in purchasing land to let out to the poor at a low rent, and the rent to be applied to any benevolent purpose the said R. Sterry, R. Barrett, and J. Barrett may think proper."

In March, 1844, the testator died. The present suit was instituted for the administration of the testator's estate, and a question was raised as to the effect of the residuary bequest, it being contended by some of the parties that it was void for uncertainty.

*Wigram and Sidney Bell* appeared for the plaintiffs.

*Cooper and S. James, Maltus and Nicholls, Bacon and Rogers, W. M. James, J. Parker Metcalfe, Messiter, R. Palmer, W. P. Wood, Chickes-ter and Waley*, appeared for the several defendants.

The following cases were cited: *Foy v. Foy*, 1 Cox, 163; *Blandford v. Thackerell*, 4 Bro. C. C. 394; *Chapman v. Brown*, 6 Ves. 604; *The Attorney-General v. Dawson*, 8 Ves. 106; *Morice v. The Bishop of Durham*, 9 Ves. 408; S.C. 10 Ves. 532; *James v. Allen*, 3 Mer. 17; *Henshaw v. Atkinson*, 3 Madd. 306; *The Attorney-General v. Hinsman*, 2 Jac. & W. 270; *Pritchard v. Arbouin*, 3 Russ. 458; *The Attorney-General v. Mill*, 3 Russ. 328; *Williams v. Kershaw*, 1 Keen, 276, n.; S.C. 5 Clk. & Fin. 111; and *Mather v. Scott*, 2 Keen, 172.

The VICE-CHANCELLOR said, the first question was, whether the testator had given any discretion to the trustees as to the proportions in which they were to apply the residue for the several objects mentioned in the will, or a discretion to the extent of excluding any one of those objects. The testator had specified several objects. He did not think that any intention or wish could be attributed to the testator of putting it in the power of any one to exercise a discretion so as to effect the exclusion of any of the purposes which had been mentioned. But here there was something more than silence; because, when the testator intended discretion to be exercised, he had said so; for he provided that the small rents, which the poor were to pay, were to be applied to any benevolent purposes which the trustees might think proper. His Honour was of opinion that, construing the will as it would have been construed if the Mortmain Act had not passed, discretion was excluded in the sense which he had mentioned, and that the trustees, therefore, would have been under the obligation of dividing the fund into two or three shares, and applying them in the manner directed. The question had been very properly and very fairly argued, whether the division was to be into two or into three shares, and he was, upon the whole, of opinion that the two first purposes, although apparently two, were in reality but one. The whole was a single purpose, namely, charitable education, although the testator had used the expressions, "for opening new schools, or subscribing to those already opened in England, Ireland, Scotland, or elsewhere." He thought, therefore, that the division which the trustees would have been bound to make (supposing the case to be without the Mortmain Acts) was a division into two, and that they would not have had a discretion to the extent of taking half from the purposes of education. He was of opinion that the first purpose had not been made unlawful by the Mortmain Acts. He thought that it was clear that (whatever was the meaning of the word "benevolent") the second purpose had been made illegal by the Mortmain Acts, the purpose being to purchase land, to be let out to the poor at a low rent. The result of his judgment was, that half the residue belonged to the next-of-kin, and that the other half must be applied to the purposes of education. There must be a reference to the Master to settle a scheme. His Honour added, if the parties wished it, he would settle the scheme himself.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BARNET, Esq. of Lincoln's Inn, Barrister-at-Law.

May 3, 5, and 28.

*Re JOINT-STOCK COMPANY WINDING-UP ACTS, 1849 and 1849, AND THE DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY.—ONION'S CASE.*

*Winding-up Acts—Contributory—Provisional Committee Man.*

*Quare, whether a provisional committee-man,*

## V. C. LORD CRANWORTH'S COURT.

*who never acted, or accepted shares, except by asking, in reply to the usual circular of allotment, that "the shares should be reserved for him," is a contributory or not?*

This was a motion to take off from the list of contributories, as settled by the Master (Brougham), the name of the appellant Mr. Onion. He was named as a provisional committee-man, as it was alleged, without his knowledge, but never acted in that character. The letter of the secretary of the company was as follows:—

"Direct Birmingham, Oxford, Reading, and Brighton Railway, 10th Oct. 1845.

"Sir,—I am requested to inform you that the Committee of Management has apportioned 100 shares in this company to each member of the provisional committee, you will please inform me, on or before Wednesday morning next, whether you will take that or any less number. Should you not reply by that time, the committee will consider you decline taking any.

"Yours, &c.

"J. R. Rayner, Sec."

In answer to this Mr. Onion wrote as follows:—

"Broseby, 14th Oct. 1845.

"Sir,—In reply to your circular of the 10th inst. which only came to hand this morning informing me that I am entitled to 100 shares in the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, requesting an answer on or before to-morrow morning, I have to request that number of shares may be reserved for me."

The usual letter announcing the allotment, dated the 18th Oct. 1845, was sent by the secretary to Mr. Onion, requiring the deposit to be paid. No deposit was paid, nor anything further done by Mr. Onion towards an interference in the proceedings of the provisional committee for a further acceptance of shares. The case was fully argued by

*Roll and Daniel*, for the motion to expunge the name of Mr. Onion from the list of contributories.

*Rosburgh* for the official manager.—On the 5th May the matter was again mentioned, and the Vice-Chancellor was of opinion that he ought to direct three issues at law, which should state that certain expenses had been incurred towards the formation of the company by the provisional committee before the 14th of October, 1845 (the date of Mr. Onion's letter), that since that date other expenses had been incurred, and certain other liabilities to other creditors; and then there ought to be three issues:—1. Whether Mr. Onion was liable to indemnify the committee of management in respect of any portion of the previous expenditure. 2ndly. Whether he was liable to indemnify them in respect of any portion of the subsequent expenditure. And 3rdly. Whether he was liable to an action at the suit of any subsequent creditor of the committee of management. The Vice-Chancellor said he could not agree with the argument for the official manager, that it was so perfectly clear that "reserve me the shares" meant the same thing as accepting the shares. That, he thought, would depend upon what a jury should consider to be the mercantile meaning of saying, "reserve me" a number of shares. The Vice-Chancellor afterwards said,—"I have long thought that this is the course it ought to have taken, and two or three times an uncomfortable feeling has passed my mind that I have not in these cases sent an issue, as it is admitted to be a question of law. When the House of Lords decided *Upfill's* case, they in effect decided this, that if somebody I do not know who, had brought an action against Mr. Upfill, that somebody must have succeeded. That is the decision of *Upfill's* case. If it did not decide that it decided wrongly. I have turned in my mind often by whom such an action could be brought, and it must have been brought by one of three classes of persons; either by a creditor subsequently to the acceptance of shares, which would be the proper view of the case if the House of Lords meant to say, that by accepting shares he authorised the provisional committee from the date of his accepting the shares to incur debts on his account, and any creditor afterwards becoming a creditor would be entitled to sue him, or it may be that the House of Lords considered that he took the acceptance of shares, and as a consideration for the shares being allotted to him, agreed to indemnify the persons who had been acting in respect of all the expenses they had incurred in respect of certain shares. There is great difficulty in this, because there you have persons who are or may be jointly liable to pay these expenses, but between whom there is no ratio to see the proportions in which they contribute,—for if a man has given orders he must be liable, and yet he may not have taken any share. It may mean that he undertook to indemnify them in respect of all by-gone expenditure as well as expenditure to come, or it may be only expenditure to come. I say by-gone, for though by no means could he make himself liable to a creditor for by-gone expenses, he might make himself liable to contribute, taking as a consideration, for the shares being allotted to him, the liability to indemnify them, and to contribute to the by-gone expenses.

*Rosburgh* pressed for his lordship's judgment as to the effect of the word "reserve."

The VICE-CHANCELLOR.—How am I judicially to construe that word? It is obvious one cannot disguise that from one's self, that it is not only my opinion (I should be very sorry to set up my judgment against the ultimate Court of Appeal), but it seems to be the opinion of the Court of C. P. and I know it is the opinion elsewhere entertained, that it is very difficult to sustain that judgment (*Upfill's* case), and, therefore, of course the decision in that case must not go beyond what the facts of that case properly warrant, and whether this word "reserve" has not a different meaning is a matter I think the parties are entitled to have tried.

*Daniel*.—Your lordship referred to a case in the C. P. That perhaps was the case of *Collins v. Lord Londesborough*, tried before the Lord Chief Justice of the C. P. since *Upfill's* case. Mr. Collins was put upon the list of contributories as a party. Notwithstanding that he has brought an action against Lord Londesborough as one of the managing committee, and notwithstanding *Upfill's* case, under the direction of Lord Chief Justice Jervis, he has been declared entitled to recover, my Lord Chief Justice being of opinion that *Upfill's* case did not conclude the legal rights between the parties.

The VICE-CHANCELLOR.—It is very difficult to see how any decision of the House of Lords can decide that which in every case is a matter of fact.

On the 28th May the Vice-Chancellor, having delivered his judgment in *Upfill's* case No. 2 (17 Law T. 117), said he had allowed this case to stand over to consider the form of the issues to be directed. He now considered one issue would be sufficient, viz. whether the letter written by the secretary of the company, and the answer of Mr. Onion of the 14th Oct. 1845, taken together was an acceptance of shares or not.

Order accordingly.

## Re THE SAME COMPANY.

## THORNE'S CASE.

In this case, in which precisely the same point arose, Mr. Thorne, in his letter in answer to the circular (stated in the last case), having said, "I beg you will reserve" the shares, the same order for an issue as above was directed, but to stand over to abide the result of the issue in *Onion's* case.

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Wednesday, April 16.

## EASTERBY v. FENWICK.

*Power of appointment—Will—Construction.*  
By a settlement, lands in Black Acre and White Acre were conveyed to trustees upon various trusts, and subject thereto upon trust for several children as A. B. should by deed or will appoint, and in default, among such children equally as tenants in common in fee. Two of the trustees never acted; the other sold the lands in White Acre and purchased lands in Brown Acre with part of the money, and (in a suit) invested the remainder in Consols. In the same suit the lands in Black Acre and in Brown Acre, and the Consols, were declared to be the trust estate, and subject to the settlement. A. B. by will, reciting the settlement and all the facts relating to what was the property, subject to the trusts of the settlement, appointed pursuant to her power therein, and devised and bequeathed "all the real and personal estate mentioned and comprised in the said recited settlement, and all other her real and personal estate," to C., D., E. and F. four of the children:

*Held, that the lands in Brown Acre and the stock passed, by the appointment, to these four children absolutely.*

This case came on upon a petition. By indentures dated the 1st and 2nd days of October, 1812, being the settlement made previously to the marriage between John Easterby and Jane Young, the latter conveyed to two trustees all that one undivided moiety of her of and in all those messuages and tenements, part whereof was then used as a public-house, called the "Grey Horse," and a granary, situated on the quay side, in the town and county of Newcastle-upon-Tyne, and then in the occupation of James Harding and others; and also of and in all that tenement situate on the quay side aforesaid, then in the occupation of Messrs. Hord and Ryle, and used as a wharfinger's warehouse; and of and all other messuages, hereditaments, and premises which the aforesaid Jane Young was entitled to under the will of George Adams, upon trust, after the marriage to pay and apply the rents and profits to her sole and separate use, during the said intended coverture; and after the decease of the survivor of the husband and wife, and in default of any first appointment by them upon trust for all and every, or such one or more in exclusion of the other or others of the children of the marriage, or of the issue born of any

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uch child or children born in the life-time of the husband and wife, as the survivor of the husband or wife should by deed or will, as therein mentioned, point, among the children of the marriage, and in default thereof, in trust for the children of the marriage, in equal shares as tenants in common in fee.

And it was provided that no child should take any of the unappointed part of the property without leaving his or her appointed share into hotchpot, and accounting for the same accordingly. There were also contained powers of sale and exchange, none of the trustees ever acted, and the other trustees committed divers breaches of trust. The marriage took effect, and the husband died in the lifetime of the wife, but no joint appointment was ever made by them. There were issue eight children of the marriage. A bill was filed against the trustee on account of the trust property, for the investment by him of the money he had obtained by improperly taking any part thereof on real estate, and removing him from being trustee, and for the appointment of new trustees. The Master reported at the "Grey Horse" public-house, and the granary had been sold for 5,000*l.* and that 2,500*l.* part thereof, had been invested, and several transfers had been made by Fenwick, the trustee, and particularly that he had purchased a copyhold messuage and hereditaments at Barnes Common, Surrey, and the copyhold houses in Great Arthur-street, Goswell-street, Middlesex; and that the trust property consisted of the moiety of the wharfinger's warehouse which, together with the other moiety not included in the settlement, was subject to an annuity of 80*l.* a year to Elizabeth Couitt Adams, 71*l.* 10*s.* Bank Annuities, and 26*l.* a year for terms of years ending 8th Jan. 1860. By another report the Master found that Fenwick had transferred the sum of 1,043*l.* 8*s.* 8*d.* Consols. into the name of the Accountant-General, amounting together, after all deductions, to 1,043*l.* 8*s.* 8*d.* Consols. in replacement of the moneys he had used belonging to the trust estate. By a decree, it was declared that the trust property consisted of the "Grey Horse" public-house, the moiety of the wharfinger's warehouse, the copyhold hereditaments at Barnes Common, and the two freehold houses in Great Arthur-street, and 1,043*l.* 8*s.* 8*d.* Consols.; and that Jane Easterby was entitled for her life to the rents, profits, and dividends thereof. The stock was afterwards, by payment of costs, reduced to 790*l.* 0*s.* 4*d.* Consols. on April 1846, the Richmond Railway Company bought part of the copyhold property at Barnes Common for 60*l.* and 62*l.* 0*s.* 3*d.* Consols. was purchased with the same, making 852*l.* 0*s.* 7*d.* Consols. The annuity of 80*l.* ceased by the death of the annuitant. Jane Easterby, by her will, dated the 3rd of January, 1850, after reciting the settlements of 1812, and that there had been issue of the said marriage eight children, whom she enumerated, and no more; and that Tatham and Gray had been appointed trustees of the settlements, and that the property then subject to the trusts and powers contained in the settlement then consisted of a moiety of the said premises at Newcastle, of the said copyhold estate at Barnes, the said two freehold houses in Great Arthur-street, the said sum of 790*l.* 0*s.* 4*d.* Consols. and 62*l.* 0*s.* 3*d.* Consols.; the former then standing in the name of the Accountant-General of the Court of Chancery, and the latter in the name of the trustees of the said settlement; and after reciting that she was desirous by her said will, and in exercise of the power for that purpose in the said indenture of settlement, of making the appointment in her said will contained, she proceeded thus:—"Now, therefore, I, the said Jane Easterby, by force and virtue and in exercise and execution of the power and authority to me given or reserved in and by the said indenture of settlement, and of all other powers or authorities in me vested or in anywise enabling me in this behalf, do hereby direct, limit, and appoint, give, devise, and bequeath all and singular the real and personal estate mentioned and comprised in the hereinbefore in part recited indentures of the 1st and 2nd days of October, 1812, and all other my estate and effects real and personal, of what nature or kind soever I may die possessed, unto my daughters Mary Jane Easterby, Sarah Ostle Easterby, Agnes Easterby, and Rebecca Easterby, their heirs, executors, administrators, and assigns respectively, and to be equally divided between them as tenants in common, and not as joint tenants; provided always, that in case of the decease of any or either of my said daughters, leaving issue her or them surviving, such issue shall be entitled to the shares of the parent or parents so dying." The testatrix then appointed executors and trustees. She died on the 14th of February, 1850, and her will was proved by the executors. The rents, profits, and income of the whole property were paid to her up to her death.

The present petition was presented by these four daughters, praying an order, directing the trustees of the real estate to convey the same to them as tenants in common, and after a sale of so much of the stock as would be sufficient to pay the costs of

the petition, an order thereon might be ordered to be transferred to the petitioners in four equal parts, or as to one of them to a party named to the account of Rebecca Easterby, an infant. The other four children of Mr. and Mrs. Easterby were John, Anthony, Thomas, and Robert Ostle Easterby. John died, leaving all his real and personal estate by will to his wife.

The question raised was, whether the property at Barnes Common, in Great Arthur-street, and the stock, passed by the will under the description of "all and singular the real and personal estate mentioned and comprised in the indenture of settlement." The case made by the petition for the four daughters, the petitioners, it was contended, that they did pass; for that, although they were not actually mentioned in the settlement, they were "comprised" in it, being subject to the trusts therein contained, and that the recital in the will must be taken to be in favour of the intention to deal with all. In a legal sense these were comprised in the settlement, though had the word "mentioned" alone been used, there might have been some difficulty.

The widow of the son and the three other sons insisted that the appointment extended only to the moiety of the wharfinger's warehouse, as being the only property "mentioned and comprised in the settlement;" that the copyholds, and the houses in Great Arthur-street, and the stock, were neither mentioned nor comprised in the settlement, although they were held subject to the trusts; and they, therefore, claimed on behalf of themselves, to be entitled to the whole of the unappointed property, unless the four sisters should consent to bring the appointed Newcastle property into hotchpot, and then they, the widow of one son, and the other three sons, claimed only each one-eighth. For these parties it was argued that the property, to pass by the appointment, must satisfy the double description of being both "mentioned" and "comprised" in the settlement.

*Roll and Selwyn* for the petitioners.

*Teed and Craig* for the respondents.

*Kenyon Parker and F. S. Williams* for the trustees of the settlement.

The VICE-CHANCELLOR.—The first question is, in what sense the words "comprised in" are used. I think it means, at any rate, affected by the settlement. The will contains a full recital of the property, and I cannot see any good reason why the testatrix should have referred to any other property, excepting that which actually existed in specie, unless it had been for the purpose of disposing of it. She says, "All and singular the real and personal estate mentioned and comprised." Now the settlement itself comprised nothing but real estate, nor was anything but real estate mentioned in it. I think the whole passed by the appointment. I think, also, that the four appointees take an absolute interest; the word "dying," used by the testatrix, means dying in her lifetime. The plaintiffs, the petitioners, must be declared entitled absolutely to the whole property, including the dividends, on the true construction of the appointment, and the costs of all parties, including costs, charges, and expenses of the trustees, properly incurred, will be paid out of the fund.

Friday, May 2.

*Re WATTS'S SETTLEMENT.*

*Trustee Act, 1850—13 & 14 Vict. c. 60—Vesting order.*

*In a settlement there was a power to appoint a new trustee in the place of any trustee being "incapable to act;" one of the trustees became bankrupt, and not surrendering, was indicted, but went abroad:*

*Held, that the person could not be examined, and that section 10 of the Trustee Act, 1850, did not apply to a case where one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the other trustees continuing to act as such.*

By indenture of settlement certain property was vested in trustees, and it was declared that the successive tenants for life during their lives, and after their deaths, the trustees thereby appointed, or to be appointed as thereafter mentioned, and all trustees for the time being might appoint one or more trustee or trustees in the place or stead of any trustee or trustees who should die, or be desirous of being discharged from, or refuse, or decline, or become incapable to act in the trusts thereof. A petition was presented under the Act 11 Wm. 4, c. 60, for the appointment of a new trustee; and therefore a reference was sent to the Master to inquire whether T. Bentall, therein named, was a trustee of the estates comprised in the settlement in which he and two other persons were named as trustees, and if he should find in the affirmative, then to inquire whether he was out of the jurisdiction, and if so, to inquire and state whether there was a power in the settlement to appoint a trustee in his place; and if not, then to approve of a proper person to be a trustee in his place, and also to approve of a proper person

to convey and assign, or join in so doing, the trust estate vested in him to the continuing and new trustees. The Master made his report, finding that Bentall was a trustee; but he had become bankrupt, and not having surrendered, he had been outlawed and had absconded and was living abroad. He certified that there was no power, under these circumstances, to appoint a new trustee, and that he had approved of a proper person to be a trustee, and of a proper person to convey and assign the trust estate. A petition was now presented, praying the confirmation of the Master's report, a direction that the party approved might be appointed trustee, and that the party approved might be directed to convey, or that the Court would make an order under Mr. Headlam's Trustee Act, 1850, vesting the trust estate in the continuing and new trustees. In support of the prayer for a vesting order, it was contended that the bankruptcy and absconding did not amount to incapacity within the words of the power, because a power of attorney might be executed by Bentall, or he might surrender, or at any rate return. (*Withington v. Withington*, 16 Sim. 104.) On the other hand, the cases of *Wilson v. Wilson*, 6 Scott, 540, and *Re Roche*, 2 Dru. and War. 287, were cited to show that bankruptcy was such incapacity, as was contemplated by the author of the settlement.

*Skepter* for the petition.

*Roll and Thring* for the respondents.

The VICE-CHANCELLOR.—I think the term "incapable," used in the settlement, has reference to personal incapacity, and that the absence of Bentall, and his situation with regard to the bankruptcy, does not constitute personal incapacity. In *Wilson v. Wilson*, the question was as to capacity as a committee-man. In the case of *Re Roche*, the question was as to fitness. Seeing, therefore, that the other trustees cannot appoint a trustee in lieu of Bentall, the Master's report will be confirmed. With regard to the order to be made, the better course will be not to make a vesting order, but an order that the party appointed to convey for Bentall shall join with the two continuing trustees in conveying the trust premises to the three, viz. the two continuing trustees and the new trustee approved of by the Master. A vesting order appears to be inapplicable. It is enacted by section 107 of the recent Act, 13 & 14 Vict. c. 60, "That a vesting order shall have the same effect as if the trustee out of the jurisdiction had duly executed a conveyance or an assignment of the lands;" where, as in the case before me, there are several trustees, one of whom is out of the jurisdiction, such a conveyance by the absent trustee will operate as a severance of the joint tenancy.

*Skepter* said he would take the order in the form suggested by the Court.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL, Esqrs. Barristers-at-Law.

Thursday, May 1.

LORD SEYMOUR v. MORRELL.

*Stat. 1 & 2 Vict. c. 43—Dean Forest Mines. The commissioners appointed under stat. 1 & 2 Vict. c. 43, for regulating the working of the mines and quarries in the Forest of Dean, by their award directed that a tonnage duty of 2*d.* per ton should be payable by each free miner, so that there should be wrought and gained by him annually no less than 1,200 tons, but that if a less quantity than 1,200 tons were got, then the free miner should pay the sum of 10*l.* annually: Held, that they had power to make such an award, and that an action of debt would lie by the gaveler against a free miner for the galeage rent so due in respect of a mine out of which the free miner had neglected to get anything within the year.*

This was an action of debt, brought by the plaintiff as gaveler of the Forest of Dean, to recover from the defendant the sum of 1,269*l.* for various arrears of galeage rents for different collieries in the forest of Dean. The defendant pleaded *nonquam indubitatus*, and at the trial before Lord Campbell, C.J. at the Summer Assizes, 1850, for the county of Gloucester, a verdict was taken for the plaintiff, subject to the opinion of the Court upon a special case. The plaintiff's title to recover rested upon stat. 1 & 2 Vict. c. 43 (an Act for regulating the opening and working of mines and quarries in the forest of Dean and hundred of St. Briavels, in the county of Gloucester), and the award of the "Dean Forest Mining Commissioners," made under the directions and powers of that Act.

The defendant had been a free miner of the Dean Forest many years before the Act was passed, with certain rights, which need not be set out in detail. The preamble of the statute recited that "certain privileges were claimed by certain persons calling

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themselves 'Free Miners' to open mines and quarries in the open lands of the said forest, and to work the said mines and quarries according to certain alleged usages and customs; and "that the said alleged usages and customs were uncertain and undefined." Certain persons were then appointed the "Dean Forest Commissioners." And by sec. 24, the commissioners were required within three years to make an award, and thereby to ascertain what persons, whether as free miners, or as claiming through or under free miners, were at the time of the passing of the Act in possession of or entitled to gales for coal, or iron mines, or stone quarries, &c. and to point out the situation of all gales, pits, levels, &c. and to specify the mode in which the same should be worked, and to set forth general rules, orders, and regulations.

By sec. 29, upon breach of any of the general rules made by the commissioners specifying the mode in which the gales, &c. were to be worked, the gales, &c. were to be forfeited, as in the case of a condition broken in a lease.

By sec. 41 it was provided that the commissioners should determine by their award the amount of the galeage, rent, royalty, tonnage duty, or other payments payable and to be paid to her Majesty for or in respect of coal to be got by means of the several gales, pits, levels, or works, &c. which were to be ascertained and set forth in the award, so that such galeage, rent, royalty, tonnage duty, &c. should not in any case exceed 4d. per ton. By sec. 46 the royalty was to cease at the end of every twenty-one years, and a new royalty to be ascertained as provided in the Act to become payable for the next twenty-one years.

By sec. 52 it was enacted that all the powers of taking, suing for, and recovering the said share rents and payments now in force should continue to be in force; and that the said powers, as far as the same should be applicable, should apply to any galeage, rent, royalty, tonnage duty, or other payment hereafter to be ascertained, fixed, and determined, either by the said award, or by any other means: provided that in case the commissioners for the time being of Her Majesty's Woods, Forests, &c. should at any time thereafter think fit to agree with the person entitled to any gale, &c. for a fixed annual rent in lieu of galeage for any term not exceeding twenty-one years, it should be lawful for the commissioners, &c. so to do; and in every such case such fixed rent should be recoverable by the same means as the galeage (in lieu of which it was agreed upon) was authorised to be recovered.

The plaintiff, as gaveler, represented the Commissioners of Woods and Forests, and was, by virtue of the Act, the proper person to sue for galeage.

The award of the "Dean Forest Mining Commissioners," so far as it was material, directed that the galeage for every gale should be 2d. per ton as tonnage, payable half-yearly, "so that there shall be wrought or gained annually not less than 1,200 tons from each gale." There was a further provision that if the tonnage payable for any gale, upon the computation of 2d. per ton, should not amount to 10l. in a year, the occupier of the gale should make it up to the sum of 10l.

The sum sought to be recovered was claimed as galeage at the rate of 10l. per gale per annum in respect of certain gales belonging to the defendant as free miner thereof, but which he had altogether neglected to work during the period for which the galeage was claimed.

For the defendant, it was contended that the award of the commissioners was beyond their jurisdiction, so far as it directed payment to be made for coal that was not got from the gale, for that by sec. 41 of the stat. they were only to determine the tonnage duty payable for coal to be got; that the commissioners might, by ss. 24 and 29, have required 1,200 tons to be got annually for each gale, and have evicted the free miner, as for a forfeiture, if less were got, but that they could not impose a penal rent recoverable by action of debt; that the only mode of imposing an annual fixed rent upon the occupier of any gale was that pointed out by the latter part of sec. 51.

For the plaintiff it was urged, that this provision that 1,200 tons should be raised per gale was one absolutely essential to the due working of the mines; and that if the commissioners had power to order 1,200 tons per gale to be raised, they had power also to impose as a remedy upon the free miner a payment not exceeding that which would be made if no remedy were required.

*Keeping for the plaintiff.*

*Phipson for the defendant.*

Lord CAMPBELL, C.J.—I think the plaintiff is entitled to recover. By sec. 24, the commissioners had power to direct how much coal should be raised from each gale: by sec. 41, they were to direct how much per ton should be paid for it. Then they may say, if the free miner raises nothing, or less than the minimum quantity, he must pay as for the minimum.

PATTESON, WIGHTMAN, and ERLE, JJ. concurred.

*Judgment for the plaintiff.*

May 28 and 30.

SCHOLEFIELD v. ANDREW.

*Right of common—Description—Inclosure Act.*

In an action for disturbance of a right of common, the declaration alleged the plaintiff's right to be for "two aged cows, or one horse," and to extend "from old May-day to old Michaelmas-day in each year." At the trial it appeared that the right was "for two aged cows or two horses," and that it extended from "old Lady-day until some weeks later in the year than old Michaelmas-day."

Held, that the allegations in the declaration were sufficiently proved.

*Construction of "The Skelton Inclosure (LOCAL) Act."*

This was an action on the case for a disturbance of the plaintiff's alleged right of common over a place called Skelton Broad Lanes, in the township of Skelton, in the North Riding of Yorkshire. The declaration alleged that the plaintiff was possessed of a message, &c. and by reason thereof of right ought to have had common of pasture for his commonable cattle, levant and couchant, &c. that is to say, three 2-year old cows, or four 1-year old calves, or two aged cows, or one horse, from old May-day to old Michaelmas-day in every year, in a certain waste or common, &c. and that the defendant inclosed a certain part of the said waste, common, &c.

*Plea.—Not guilty, and issue thereon.*

At the trial, before Cresswell, J. at the last Assizes for the county of York, it appeared in evidence that the plaintiff's right of common was for three two-year old cows, or four one-year old calves, or two aged cows or two horses, and that the period of its enjoyment extended from old May-day to such period in the winter as the commoners thought proper, the cattle being always sent on for at least some weeks after old Michaelmas-day. The defendant contended that there were two fatal variances, and that the plaintiff must be nonsuited. The learned judge, however, directed the jury that this evidence sustained the allegations in the declaration. The defendant further contended that the plaintiff's right of common had been extinguished by a local Act of Parliament (not printed) passed in 46 Geo. 3, for inclosing lands in the township of Skelton, and an award made thereunder. The learned judge, however, directed the jury that neither this statute nor the award had the effect of extinguishing the plaintiff's right, and the plaintiff accordingly obtained the verdict.

A rule nisi was subsequently obtained for a new trial, upon the ground of misdirection upon both points, against which

*Watson, Addison, and Price* now shewed cause. *Atherton and Anderson* were heard in support of the rule.

For the defendant it was contended that the variance was fatal, as occurring in a matter of description, and that the excess of proof was indivisible, and *Bushwood v. Pond*, Cro. Eliz. 722, was relied upon. Here to an action of trespass for seizing cattle, there was a plea of justification as a distress for damage feasant, and a replication justifying under a right of common for 100 sheep as appurtenant to a certain messuage. And it is said,—

"Note.—The jury found here that the plaintiff had common for 100 sheep and six cows, and yet it was held by the Court, that the plaintiff had not failed in his prescription alleged. But it was said by *Walsley*, if the jury had found that he had common for 120 sheep, and so more of the same kind than he had alleged, he had failed." 2. It was said that all rights of common were extinguished by the Inclosure Act; and that the plaintiff was not within the saving clause which protected the rights of all those to whom no allotments were made, he being under the award entitled to an allotment of certain open lands in Skelton, which were inclosed by virtue of the Act.

For the plaintiff it was said,—1. That the right of common was laid as matter of inducement, with more particularity than was necessary, but that enough was proved to support the allegations in the declaration, and it was argued that, to prove a prescription more largely than it was laid, could never prejudice the party. 2. It was shewn that the Inclosure Act was passed to inclose lands in Skelton, in which different parties had certain rights of soil, and that the lands inclosed were not lands over which there was any right of common at all. That the place over which the plaintiff's right was claimed was an open tract called Skelton Broad-lanes, which had never been inclosed, nor intended by the Act to be inclosed. And that even if the Act applied at all, the plaintiff was within the saving clause, for that he had no allotment in his own right, the allotment in the award being expressed to be made to him in respect of his having purchased the interest of another person in the lands inclosed, and being in no manner connected with the message to which the right of common now claimed was appurtenant.

Reference was also made to stat. 41, Geo. 3,

c. 109, s. 14; *Ricketts v. Sakeoy*, 2 B. & A. 2; *Beadworth v. Torkington*, 1 Q. B. 782; *Brown v. Hall*, Ibid. 792; *Giles v. Groves*, 17 Law J. 3 Q. B.; R.G.H.T. 4 Wm. 4, tit. Trespass, R.6; *Ton v. Litheby*, 2 Saund. 113 a, note 11; *Ton v. Cooper*, 5 Bing. 116; *Bristow v. Right*, 2 De G. 665; 1 Chit. on Pleading, 421; *Parrell v. Marmara*, 9 East, 157.

Lord CAMPBELL, C.J.—I think this rule should be discharged. As to the supposed variance between the declaration and the proof, both of right rest on the same ground, it is to be observed as to both of them, that less is alleged than was actually proved, but enough was proved to support the allegation. But it is said that the excess is an indivisible? Two horses do not make one animal, and one may well be divided from the other. May again, the period after Old Michaelmas is as well be divided from the period before. If the plaintiff had been entitled to common from May to December, and that right had been lost in June, it would have been well enough in the plaintiff's declaration that he was entitled to common from May to July. As to the other variance upon the Inclosure Act, I think the Act does not contemplate the inclosure of any waste lands in which there was a right of common in the ordinary sense, and in point of fact these waste lands were inclosed. The argument that this is within the description in the Act of a public road fenced on both sides, utterly fails. It is a large tract of land, through some part of which the road happens to run. But even if the Act had a deep implication than I am disposed to attribute to it, a saving clause saves the rights of all parties to whom no allotments are made in pursuance of the Act, and the plaintiff is protected by that clause in the enjoyment of rights which are older than the Act itself.

PATTESON, J.—The case of *Ricketts v. Sakeoy* is not in point for the plaintiff. But here all that is stated in the declaration was proved at the trial, and something more. It is a matter of addition that was proved, so that the doctrine about divisible allegations does not apply. In such cases, whether as regards pleas or declarations, it is always competent for the parties to prove what is laid, and something more. I cannot agree with the language which is ascribed to Justice Walsley, in the case that has been so much relied upon. Then upon the other point, no allotment was made at the time of the award in respect of any rights of common over these broad lanes, nor were they inclosed, which shews that the Act was not considered at the time to apply to them, nor do I think it does apply. Besides, the plaintiff having had no allotment in his own right under the Act, is protected by the saving clause.

COLERIDGE, J.—As to the first point, the plea corresponded with the allegation, for all that was alleged was proved, and something more. As to the second point, the defendant is in this dilemma. Either the Inclosure Act applied to the spot in question, in which case the plaintiff is protected by the saving clause,—or it did not apply at all, in which case *cadit quæstio*. I am inclined to think that the latter is the more probable.

ERLE, J. concurred. — Rule discharged.

Thursday, May 29.

Re THE GUARDIANS OF ST. MARTIN'S-IN-THE-FIELDS.

*Mandamus—Quo warranto—Clerk to guardians, created by order of the Poor Law Commissioners under 4 & 5 Wm. 4, c. 76, is an office for the purpose of obtaining information in the nature of a quo warranto may be maintained: an application therefor, for a mandamus to guardians to elect a clerk on the ground that the election which had taken place was void, was refused.*

A rule had been obtained calling upon the guardians of St. Martin's-in-the-Fields to shew cause why a writ of mandamus should not issue, commanding them to elect a clerk in the room of Mr. La Breton, who had resigned. By the affidavits it appeared that at a meeting of the guardians in February last, held pursuant to notice for that purpose, they had proceeded to the election of a clerk, and that there being four candidates, the choice of the guardians had fallen upon Mr. Griffiths, who had since filled the office. There were twenty-one guardians present besides the chairman, who did not vote; and eleven of the twenty-one voted for Mr. Griffiths, ten for Mr. Dangerfield. Various objections were taken to the validity of that election, but the judgment of the Court proceeded upon another ground. The office of clerk to the guardians was one which the Poor Law Commissioners had included in their order made under sec. 46 of the Poor Law Amendment Act, wherein they directed the guardians to appoint various paid officers; and that the duties of which they had prescribed. (For the nature of them, see the general order of the 21st April, 1842—Archbold's Poor Law, p. 50, 2nd ed.)



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*Sir F. Kelly and Pashley* showed cause.—Independently of the validity of the election there is a fatal objection to this proceeding.—viz. that the office being full, the remedy is by *quo warranto* and not by *mandamus*. This is a public office created by Act of Parliament; and, therefore, according to *Darley v. The Queen*, 12 Clark & Fin. 520, an information in the nature of a *quo warranto* is maintainable. [PATTERSON, J.—In *R. v. Hall*, 1 B. & C. 120, the clerk to the Court of Requests at Bristol was held to be such an office.] So of paying commissioners. (*R. v. Beadle*, 3 Ad. & Ell. 467.) (They also referred to 7 & 8 Vict. c. 101, s. 68, and were stopped as to the preliminary objection.)

*Sir F. Thesiger and Bramwell*, contra.—Even if *quo warranto* would lie, it does not follow that *mandamus* will not. (*R. v. The Rector and Churchwardens of Birmingham*, 7 Ad. & Ell. 254, 260.) [LORD CAMPBELL, C.J.—There the office was that of churchwarden, for which *quo warranto* will not lie.] Nor will *quo warranto* lie in this case. This office of clerk to the guardians is not even created by the Act. It depends upon the commissioners whether such an officer shall exist or not; and there is no distinction between this and any other of the paid officers, whom, under sec. 46, the commissioners may order the guardians to appoint; so that if *quo warranto* will lie for this office, it will lie also for the office of master or matron of the workhouse. The clerk is only the servant of the guardians; and even for the office of guardian *quo warranto* would not lie. (*R. v. Ramsden*, 3 Ad. & Ell. 456; *R. v. Hanley*, ib. 463, n.; *Re The Aston Union*, 6 Ad. & Ell. 784.) [COLERIDGE, J.—The guardians are elected for a year only by the rate-payers; the clerk holds during good behaviour.] Many corporate offices for which *quo warranto* indisputably lies are only annual. This office of clerk is not of an independent character. If there were no clerk, the guardians would themselves do the duty. Besides, parochial duties are not public duties. (*R. v. Edmonston*, 1 Moo. & R. 24.) [PATTERSON, J. referred to *The Governors of the Bristol Poor v. Wait*, 5 Ad. & Ell. 1; and COLERIDGE, J. to *R. v. Badcock*, 6 Q. B. 787.] In *R. v. Thatcher*, 1 Dow. & Ry. 426, an information against the person filling the office of clerk to the Commissioners of the Land-Tax was refused; and in *R. v. Dawbney*, 2 Stra. 1196, a *quo warranto* for the office of churchwarden was refused.

LORD CAMPBELL, C.J.—I think that this rule must be discharged on the ground that this is not the proper mode of proceeding. It appears that an election has taken place, and that the office is full. Now that being so, if the office is one for which *quo warranto* would lie, it is settled by a long course of practice, which I consider very convenient, that the proceeding ought to be by information in the nature *quo warranto* and not by *mandamus*. If this case had arisen before *Darley v. The Queen*, I should have been much perplexed; but that case lays down a rule by which we are bound; and that rule is, that if an office be created by an Act of Parliament, and be of a public nature, an information in the nature of a *quo warranto* will lie for the usurpation of it, although no usurpation upon the Crown is directly involved. Now, I think that this is an office created by Act of Parliament, because, although it may not be expressly named in the Act, the commissioners are authorised by the Act to create it; and they have done so, and appointed the duties to be attached to it. The tenure is during good behaviour; but the question remains,—is it of a public nature? Now, without attempting to define what is an office of a public nature, let us look at the functions of this office, and compare them with those of the office in *Darley v. The Queen*, which the House of Lords declared to be a public office; and it does appear to me that this office is just as public in its nature as that of treasurer of a county; for I really cannot understand what distinction can be made between a parish and an union of parishes, or between an union and a county. I do not regret this decision, because the questions may be more conveniently raised and more quickly decided upon on information than by *mandamus*.

PATTERSON, J.—Certainly I, and several other judges, formerly considered the remedy by *quo warranto* limited to cases where there had been an usurpation upon the Crown; Lord Tenterden and my brother Taunton agreed with me upon that subject; but my brother Parke differed from us, and afterwards Lord Deaman was also inclined to a contrary opinion. In the end I was satisfied that I had been wrong; and I concurred with the other judges in the case of *Darley v. The Queen*. Since that decision I have taken it to be quite clear, that where an office is created mediately or immediately by Act of Parliament, and is of a public nature, the remedy is by *quo warranto*. How far that decision has overruled the previous cases there mentioned, it is not necessary to consider; but it certainly must be taken that their authority is to some extent shaken. Now, in this case I think that the office is at all events mediately created by the Act of Parliament; but if it could be made out that the clerk is a mere servant to the guardians, this might come within some of the cases

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cited; but I think it clear that he has independent duties, some of which the guardians themselves would not discharge, as for instance, that of countersigning the orders of the guardians. It is said, that if this is an office for which *quo warranto* will lie, so is that of master or matron of the workhouse. I do not admit that; but it is unnecessary for us to go beyond the present case. For some purposes, no doubt, a parish has not been considered a public body—not for example to entitle it to exemption from rates. (*The Governors of Bristol Poor v. Wait*); but it is not necessary that the office should be strictly a public office, if the duties are of a public nature; and hence the duties are such as materially affect a large body of persons, so that *Darley v. Reg.* applies. I have no doubt that if *quo warranto* will lie, *mandamus* will not. In *R. v. The Rector of Birmingham*, we proceeded upon the assumption that *quo warranto* would not lie.

COLERIDGE, J.—It may perhaps be found that *Darley v. The Queen*, not only broke through an impression which had previously existed, as to the law on this subject, but also laid down a rule somewhat difficult of application; but we are certainly bound by that case; and, after some hesitation and doubt, I think that this case falls within it. The tenure of this office is during good behaviour; and although to some extent it is a parochial office, the duties are very large and general. The clerk is to conduct all the elections of guardians; to be the channel of communication with the commissioners, and with other boards of guardians and parish officers throughout the kingdom: and it is therefore very difficult to say that these are not duties of a public nature.

ERLE, J.—The attempt to give a definition of duties of a public nature has generally failed; and we can only take *Darley v. The Queen* as a guide. There the officer was one whose duty it was to secure the due application of a fund in which a portion of the public was interested; and I think that the clerk to the guardians is an office of a public nature for this purpose, not only for the several reasons already mentioned, but also because one of his duties is to countersign the cheques drawn upon the fund which is raised by the poor-rate, and in which the rate-payers of the parish are interested. If he neglects that duty, the funds of the parish may be misapplied. Then, can there be any distinction between that section of the public which is comprised in a parish, and that which is comprised within a county? I certainly think not; for we know that in fact many parishes have a larger population than some counties.

LORD CAMPBELL, C.J.—I quite agree that offices of a menial nature, such as nurse or matron, would not be within the rule; though it may be difficult sometimes to draw the line. Rule discharged.

Thursday, May 29.

LATHOM v. SPEDDING.

County Court—Jurisdiction—Trespass—Plea of "Not possessed"—Title—Costs.

Sec. 13 of 13 & 14 Vict. c. 61, enabling the Court or a judge to order that the plaintiff shall recover his costs, upon shewing that the cause was one for which no plaintiff could have been entered in a County Court, does not apply to every action of trespass to which the defendant has pleaded "Not possessed."

In order to oust the jurisdiction of the County Court, the plaintiff must shew that the title to the premises did in fact come in question.

A rule had been obtained to rescind an order of Patterson, J. directing that the plaintiff should recover his costs in this action, under sec. 13 of 13 & 14 Vict. c. 61. This was an action of trespass, to which the defendant had pleaded, "Not guilty, by statute," and "Not possessed." At the trial before Lord Campbell, C.J. on the 5th of February, the plaintiff obtained a verdict with 40s. damages, and the learned judge refused to certify for costs, under the County Court Acts. Subsequently, application was made to Patterson, J. at chambers, under the above section, on the ground that this was a cause for which no plaintiff could have been entered in any County Court; and that learned judge made the order.

Monday, May 12.—*M. Chambers and Wood* shewed cause. This Court will not control the exercise of a discretionary power given to a judge. [PATTERSON, J. I cannot say I exercised any discretion in this case; because I thought the statute was imperative in the cases to which it applied. But the Court of Ex. has since held differently.] Yes; in *Jones v. Harrison*, 20 L.J. Ex. 166; but Martin, B. there said that if it were shewn that the action could not be brought in the inferior Court, every judge would make an order for the costs. Here the jurisdiction of the County Court was ousted; the defendant by pleading *not possessed* chose to put the title in issue, according to *Jones v. Chapman*, 2 Ex. Rep. 803, and he therefore cannot complain, if s. 58 of 9 & 10 Vict. c. 95, is held to apply to the case. [LORD CAMPBELL, C.J. Because title may come in ques-

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tion, does it follow that it must?] In *Timothy v. Farmer*, 7 C. B. 814, it was expressly held, under the original County Court Act, that where *not possessed* is pleaded to an action of trespass, the jurisdiction of the County Court is ousted.

LUKE, contra. Whether title will come in question cannot be ascertained before the trial. Here upon the trial there was no question of title; and the case was a proper one for the County Court, (*Lilley v. Harvey*, 5 D. & L. 648.)

Cur. adv. vult.

LORD CAMPBELL, C.J. now delivered the judgment of the Court. (a)—This was a case respecting the jurisdiction of a County Court upon which arose a question of title to costs where the action is brought in this court. The application is to set aside an order of my brother Patterson, allowing the plaintiff's costs; and we are of opinion that the rule must be made absolute. The learned judge made an order for costs on the plaintiff, considering that the statute 13 & 14 Vict. c. 61, s. 13, was imperative on him to do so, if the cause was one which could not have been brought before a County Court; and treating the plea of *not possessed* as conclusive upon him that the title had come in question, and therefore that the County Court could not have entertained jurisdiction over it. By the decision in the case of *Timothy v. Farmer*, it seems that the initiative as to depriving the plaintiff of costs lies on the defendant by the 9 & 10 Vict. c. 95, and as title might have been in issue, by pleading *not possessed* he was concluded from asserting that the title did not come in question; but by the last Act the onus as to costs for the plaintiff is thrown upon the plaintiff, and we think it clear that he is bound to shew that he could not sue in the County Court by establishing that the title did really *bond fide* come in question, not merely that the defendant has pleaded so that it possibly might have come in question. The words of the 58th section of the 9 & 10 Vict. c. 95, are—"that the Court shall not have cognizance of any action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question." We hold that these words mean shall really *bond fide* be in question. Now, the affidavits in this case clearly shew that the title was not in question. The plaintiff, therefore, might have sued in the County Court, and the attempt at ousting the jurisdiction of the Court by a pretence of this nature must fail. The order, therefore, cannot be supported, and the rule will be absolute.

Rule absolute.

JACKSON v. THE CHARING-CROSS BRIDGE COMPANY.

Practice—Order to elect between two actions for the same cause—Effect of.

An action of debt and an action of covenant were brought by the same plaintiff against the same defendant for the same cause. A judge ordered the plaintiff to elect with which he would proceed. He proceeded with the action of debt, and recovered the principal sum and the full amount of damages laid in the declaration. He then proceeded in the action of covenant for the purpose of recovering some interest which he still claimed to be due.

Held (Erle, J. dissentiente), that the effect of the order was to prevent him from doing so.

A rule had been obtained to set aside the replication and demurrer delivered herein, and to stay all further proceedings.

This was an action of covenant, and it appeared that an action of debt for the same cause had also been brought by the plaintiff against the defendant. Erle, J. had made an order requiring the plaintiff to elect with which of the two actions he would proceed; and under that order he proceeded with the action of debt. In that action he had recovered the principal sum of 10,000*l.* and 500*l.* for interest. Between the trial and the judgment a further sum of about 500*l.* had accrued for interest, but the damages in the declaration were laid at 500*l.* only, and the plaintiff was now desirous of recovering that sum in the action of covenant. He also sought to recover a sum which he alleged to be due to him for interest prior to the written demand which entitled him to recover it in the action of debt. He had accordingly delivered a replication and demurrer in the action of covenant.

The Attorney-General and Cowling shewed cause, and contended that the order meant only a suspension, and not an abandonment of the action, which was not chosen.

Sir F. Kelly contra.—The order was clearly a stay of proceedings until the Court should make a further order; and here there is no ground for interfering. The plaintiff might have laid the damages in the declaration in a larger amount, or made his demand of interest earlier.

LORD CAMPBELL, C.J.—I think that the meaning of the order is this: that the plaintiff might proceed with the one action or the other; but that when he selected one he was to abandon the other, if he suc-

(a) Lord Campbell, C.J. Patterson and Wightman, JJ.



## COMMON BENCH.

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**REG. v. SOAIVE and ANOTHER.**—*Hunter showed cause. Deceit in support of the rule. Rule absolute.*

*Tuesday, June 3.*

**COOK v. CUNLIFFE.**—*Moline (with him Joliffe) for the plaintiff. Peacock (with him C. Hall) for the defendant. Judgment for the plaintiff.*

*Wednesday, June 4.*

**CORT v. THE AMBERGATE, &c. RAILWAY COMPANY.** *Rule discharged.*  
**Re WILLIAM HENRY BARBER.** *Rule refused.*  
**REG. (on the Prosecution of the Great Western Railway Company) v. THE INHABITANTS OF TILBURN.**—*Argument concluded. Car. adv. ult.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

*Tuesday, May 13.*

**CHARLWOOD v. ELLIOTT.**

**County Court—9 & 10 Vict. c. 95, ss. 128 & 129—Practice—Ruling suggestion.**

An affidavit for a suggestion to deprive a plaintiff of costs under secs. 128 & 129 of the County Courts Act, 9 & 10 Vict. c. 95, stated "that the plaintiff at the time dwelt, resided, and carried on his business at T. in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex, and that during the period within which the goods were sold, and before the commencement of the suit, the defendant dwelt and carried on his business at B. in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; that the plaintiff dwelt less than twenty miles from defendant; that the cause of action arose and the goods were sold and delivered within the County of Middlesex, and within the jurisdiction of the County Court of Middlesex; and that at the time of the commencement of the action, the defendant dwelt and carried on business within the Brompton District of the County Court of Middlesex, and that the greater part of the goods were sold and delivered to him at his dwelling-house, within the Brompton District of the County Court of Middlesex."

*Held, sufficient to entitle the defendant to a suggestion to deprive the plaintiff of costs.*

This was an action of debt for goods sold and delivered, commenced on the 28th June, 1850, and tried before the Secondary of the city of London, on the 25th April, 1851: verdict for the plaintiff for the full sum claimed, 8l. 3s. 4d. Judgment was signed the next day, and MAULE, J. ordered stay of proceedings for one week, in order that defendant might apply for a suggestion.

T. Jones, on a former day, obtained a rule calling on the plaintiff to shew cause why the judgment should not be set aside, and why the Roll should not be carried in and a suggestion entered thereon to deprive the plaintiff of his costs. The affidavit of the defendant, on which the rule nisi was obtained, stated, "That the Secondary of the city of London, being the judge who tried the action, had not certified that it was fit to be brought in that court; that the plaintiff is a seedsman, and at the time of the sale of the goods, and the time of the commencement of the action, dwelt, resided, and carried on his business, and still does dwell, reside, and carry on his business, at No. 14, Tavistock-row, Covent-garden, in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; and that during the period within which the said goods were sold, and at the time of the commencement of the suit, the said defendant dwelt and carried on business at Brompton, in the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; that long before and at the time of the commencement of the action, plaintiff dwelt less than twenty miles from him, the defendant; that the cause of action accrued and arose, and the goods were sold and delivered wholly within the county of Middlesex, and within the jurisdiction of the County Court of Middlesex; and that, at the time of the commencement of the action, he, the defendant, dwelt and carried on business within the Brompton District of the County Court of Middlesex, and that the greater part of the goods, for the price of which the action was brought, were sold and delivered to him at his dwelling-house, within the Brompton District of the County Court of Middlesex," &c.

*Wordsworth* now shewed cause.—The first question is, whether there is any such court as that described in the defendant's affidavit; and the next, whether it is not shewn that the goods were ordered and supplied in the jurisdiction of the Court within which the defendant dwells. With respect to the first point, we say no such Court exists as the County Court of Middlesex. The effect of the 1st and 2nd sections of 9 & 10 Vict. c. 95, coupled with that of an Order in Council, set out in the plaintiff's affidavit, is to give existence to certain courts in the metropolitan districts for the recovery of debts under 20l. which are to be called by the name of the district over which the several jurisdictions lie; for in-

stance, as the Brompton County Court of Middlesex; and we say there is no such Court as the County Court of Middlesex, nor any such Court as the Brompton district of the County Court of Middlesex, as stated in the affidavit on which this rule was moved. The proper name should have been "The Brompton County Court of Middlesex." The defendant must shew that there is such a County Court as he has described, and that the plaintiff might have sued there, neither of which has here been done. It is perfectly consistent with this affidavit that the Brompton County Court of Middlesex includes within its ambit some parts not within the jurisdiction of the Court, and the defendant does not positively shew that he lived within the jurisdiction of the Brompton County Court of Middlesex. But assuming that the description of the Court be correct, it is not true that the cause of action arose wholly or in some material part within the jurisdiction of the Court within which the defendant dwelt or carried on his business at the time of action brought.

JERVIS, C.J.—That is matter of fact, and not a ground for suggestion.

Jones, in support of the rule.—The question is, whether the cause of action arose within the jurisdiction of the Court within which the defendant dwells. We have stated that there is a County Court of Middlesex, that plaintiff resides within its jurisdiction, and that at the time when the goods were sold, and at the commencement of the suit, the defendant dwelt and carried on his business at Brompton, in the County of Middlesex, and within the jurisdiction of the County Court of Middlesex, and that plaintiff dwelt less than twenty miles from the defendant. That is surely enough. [CRESSWELL, J.—You have to shew that the jurisdiction extends to the part where the defendant dwells. Read any part of your affidavit which shews that the goods were delivered within the Brompton County Court of Middlesex.] The affidavit shews they were delivered within the Brompton district of the County Court of Middlesex. It also states that the cause of action accrued and arose within the County Court of Middlesex, which must comprise the Brompton County Court of Middlesex; for it must be taken that the jurisdiction of the County Court of Middlesex is co-extensive with the ambit of the court. It has not been shewn by the plaintiff that the jurisdiction is not co-extensive with the ambit of the court, and the Court will, therefore, presume it is. No human being can doubt that the court we describe is the same as that described in the order in council. A *prima facie* case has been made out by the defendant's affidavit, and that is sufficient to entitle him to this rule. [CRESSWELL, J.—Looking at defendant's affidavit, it is stated that plaintiff and defendant both resided within the jurisdiction of the County Court of Middlesex.] I shall contend, if need be, that all these district courts are branches of one County Court. The plaintiff has an opportunity of shewing that there is a district within the Brompton County Court of Middlesex, which is not within the jurisdiction. [CRESSWELL, J.—The question is whether we are to take judicial notice that the jurisdiction is co-extensive with the district.] If it can reasonably be inferred that it is so, the defendant has a right to enter his suggestion. The plaintiff would not be prejudiced thereby; he can traverse the suggestion. For these reasons it is submitted that this rule should be made absolute.

JERVIS, C.J.—I am of opinion that this rule should be made absolute. It is unnecessary to enter on a discussion of the last point urged by Mr. Jones. I admit that during the discussion I entertained considerable doubt whether Mr. Jones was entitled to make the rule absolute; but he has convinced me to the contrary. I think we are bound only to take a fair, proper, and common sense view of the statement in the affidavit; and, doing so, I think it is sufficiently certain where it says that the defendant resided within the Brompton district of the County Court of Middlesex, there being no averment to the contrary in the affidavit filed on behalf of the plaintiff. This rule for a suggestion must, therefore, be made absolute.

CRESSWELL, J.—I am of the same opinion. I think enough has been shewn to entitle defendant to a rule absolute in this matter.

WILLIAMS, J.—I also am of like opinion. It is much to be regretted that where it is so easy to frame a clear and certain affidavit, the Court should be compelled to resort to astuteness in order to give defendant his due. The only way in which it can be done is by coupling together the two averments on which the defendant has a right to rely. It is quite consistent that the residence of the defendant may be within the ambit of the County Court, and yet not be within its jurisdiction. But that is negated by the other averment, which shews that the cause of action did arise within the jurisdiction of the County Court of Middlesex.

TALFOURD, J. concurred.

*Rule absolute.*

*Thursday, May 29.*

**LEACHMAN v. MANSEY.**

**Agreement to pay costs—Certificate and allocatur.**

The declaration was in *assumpsit*, and contained a special count upon an agreement entered into between the plaintiff and the defendant, bearing date the 16th March, 1842. By the agreement an appeal, to the Hertford Quarter Sessions, against an award of arbitrators under certain inclosure Acts on the part of the plaintiff, was withdrawn, and certain exchanges of land were agreed to be made. The defendant was to pay all the costs. The only parts of the agreement, which were discussed, were the following. In the recitals "the said James Phillip Manser (the defendant) hereby consenting to pay all costs of the inclosure and fencing of the said allotment, and all costs and expenses whatsoever, which have been or shall be incurred or expended by or on the part of the said Sophia Ann Leachman (the plaintiff), by reason of the said inclosure, and award, and her objections, and appeal thereto, and of this agreement, and carrying the same into effect." And in the operative part, "and the said J. P. Manser shall bear and pay all such, the costs and charges and expenses, as are hereinbefore mentioned, or referred to, and all other, the costs and charges in anywise incidental or relating thereto, as contemplated by this agreement, the same to be upon a just and reasonable scale as between attorney and client, and to be taxed by Thos. S. Mott, Esq., or W. S. Jones, Esq., of the Crown office, or either of them at the option of the said S. A. Leachman, it being agreed that such account shall not be delivered in detail to the said J. P. Manser, the same being deemed confidential; but that the amount be certified by the said T. S. Mott, Esq., or W. S. Jones, on whose certificate thereof the same shall forthwith be paid, by the said J. P. Manser;" "and so soon as, and upon, or immediately after, the said J. P. Manser shall have made, &c., and shall have paid expenses, so far as the same shall have been certified, as aforesaid."

The special count contained an averment that the plaintiff incurred costs to the amount of 134l. 16s. 6d.; that the sum of 52l. 13s. 10d. parcel, had been certified by Jones and paid by defendant, that the further sum of 82l. 2s. 8d. had been certified by Jones. *Breach, non-payment by defendant.*

The defendant pleaded several pleas. The only plea discussed was the third "That W. S. Jones did not certify pursuant to the agreement."

The case went down to trial at the last Hertford assizes, and was tried before Lord Campbell.

For the plaintiff it was proved that the costs, amounting to 134l. 16s. 6d. were fairly incurred under the agreement, and the following allocaturs or certificates were put in:

"I have examined this bill with the vouchers, and I consider the same to be upon a just and reasonable scale, as between attorney and client, and I certify that the same amounts to the sum of 52l. 13s. 10d."

"WM. SAM'L JONES.

"Crown Office, April 1, 1842."

"Amount of bill delivered by Mr. C. R. N. Palmer (the plaintiff's attorney), to Mrs. S. A. Leachman, for further costs, charges, and expenses, mentioned or referred to in her agreement with Mr. J. P. Manser, of the 16th of March, 1842,

"£96 3 0

"Taxed off ..... 14 0 4

"Allowed ..... £82 2 8

"WM. SAM'L JONES.

"Crown Office, April 3, 1844."

On cross examination of the plaintiff's witnesses, it appeared that the defendant had objected to the taxation of the further costs, and that Mr. Jones had thereupon declined to interfere, upon which the plaintiff's attorney engaged another attorney to take out a summons to tax the further bill as between attorney and client, and an order was thereupon made. Upon this order the taxation of the further bill proceeded, and the allocation or certificate was given. [JERVIS, C.J. directed a verdict for the plaintiff, reserving the right to move to enter a verdict for the defendant.

Channell, Serjt. having obtained in last Hilary Term a rule to shew cause why the verdict should not be entered for the defendant on the third issue.

M. Chambers, Q.C. Byles, Serjt. and Joyce, now shewed cause.—This is a taxation within the terms of the agreement. It was said there can be only one certificate. [JERVIS, C.J.—That is not the real point. MAULE, J.—I have no doubt there may be more than one certificate; the only question to discuss is this, is this certificate for further costs a certificate under the agreement?] It is submitted the agreement is substantially complied with, and that the certificate is a certificate within the meaning of the agreement. This is an ordinary contract, and not an agreement of reference. The contract must be construed so as to affect the intent of the r The defendant is bound to pay all the cc costs are not to be delivered to him. The de security is the taxation,—the certificate is

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they were accused of



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the name of the Vauxhall-bridge Company, were authorised to purchase land for the purposes of the bridge and the roads leading to it, and to raise among themselves money for the payment of the purchase-money and the expenses of the erection of the bridge and its approaches. By the 89th section they were authorised to erect turnpike-gates across the bridge and across a road leading to it, and other side gates and turnpikes, and to take and receive from the persons using the bridge certain specific tolls, which are the tolls in respect of which the land-tax is demanded. By the 3rd section the shares of the proprietors are declared to be personal estate, and not in the nature of real property. The first question to be determined is, what is the true legal character of the tolls? It is quite clear that the tolls are the property of the body corporate, and not of the individual shareholders. The shareholders are entitled to their respective proportions of the profits when they become divisible, but the land on which the bridge is built, and the bridge itself, and the roads leading to it, are real property, and belong to the company, and no individual shareholder has any direct or personal interest in the *corpus* of the property itself. Then what are these tolls? They are a profit or payment received by the company in respect of the use, by the passengers, of their bridge and roads. They are paid in respect of a user of land, and they therefore fall directly within the definition of a tenement, to be found in Co. Lit. 9 B. & 20 A.; and 2 Bl. Com. 20; and of course they are within the definition of a "hereditament," which is a more general word, and includes lands, tenements, and certain other descriptions of property. (Co. Lit. 6 A.; and 2 Bl. Com. 16 and 17.) In the year 1797, by the statute 38 Geo. 3, c. 5, an Act passed for granting to his Majesty a land tax to be raised in Great Britain for the service of the year 1798, and by the 4th section, to the end that the full and entire sum by this Act charged on the several counties, and so forth, shall be raised, all manors, messuages, lands and tenements, quarries, mines of tin, lead, and so on;—all fisheries, tithes, tolls, annuities, and all other yearly profits, and all hereditaments of what manner or kind soever they may be, situate, lying, and being, or arising within the several and respective counties, are made subject to the land-tax. In the following year, by another statute, an Act passed for making perpetual, subject to redemption or purchase in the manner therein stated, the sum or sums charged in Great Britain, the land-tax; by which it was enacted that the several and respective sums of money charged by virtue of the Act of last year on the counties in Great Britain, in respect of manors, messuages, lands, tenements, and hereditaments in the said Act mentioned, and to be raised within the space of one year from the 25th of March, 1799, shall, from and after the expiration of the said term, continue to be raised and paid yearly, after the 28th of March in every year for ever. A great number of other sections of the Act were referred to in the course of the argument, and in all of them the subject matter upon which the tax is to be raised, is described as "manors, messuages, lands, tenements, and hereditaments;" and the argument was, that inasmuch as tolls were specifically mentioned in the one Act and omitted in that making the tax perpetual, that the tax was not imposed upon them by virtue of the well-known and established rule that every charge upon the subject must be imposed by clear and unambiguous language, which was settled in the case in 4 B. & C. 243, *Denn v. Diamond*. We think it impossible to read the first section of the second statute without being satisfied that it was the clear intention of the Legislature to continue permanently an annual tax on this description of property, and on both kinds of property, and to make both perpetual, and we think this is expressed in clear and unambiguous language. It was contended that an argument in favour of the exemption arose from the circumstance that in point of fact these tolls have never been taxed. We do not think that this circumstance ought to be of any weight whatever. The 21st section of the 42nd Geo. 3, c. 116, clearly shows such works as the Vauxhall-bridge Company's were contemplated by the Legislature as being the subject of a tax. It was also argued that the exception in respect of tolls contained in the 122nd section of the 38 Geo. 3, c. 5, extended to the tolls in question. We are, however, clearly of opinion that the tolls therein mentioned do not apply to tolls of this description. We are therefore clearly of opinion that the Vauxhall-bridge Company are liable to be rated to the land-tax in respect of their tolls, these being tenements and hereditaments within the meaning of the statute 38 Geo. 3, c. 40, and there will therefore be judgment for the defendant.

*Judgment for the defendant.*

Wednesday, May 29.

SMITH v. STEVENS.

*Bargain for an article to be of a particular description for a specified purpose—Article delivered not*

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*answering purpose or description required—Necessity of specially pleading fraud—Sale by sample.*

*Humphrey, Q.C.* and *G. Atkinson* showed cause against a rule obtained to set aside defendant's verdict, and for a new trial. It was an action of *assumpsit* for goods sold and delivered, and the defendant pleaded, except as to a certain sum, *non assumpsit*. And as to that sum, payment into court. The cause was tried before Martin, B. and a verdict found for the defendant.

It appeared that defendant wished to buy of the plaintiff some refuse animal charcoal; one quarter, or 25 per cent. to be phosphate of lime, and agreed with him for some at 50s. per ton. Defendant saw what the plaintiff wished to sell, but knew not then whether it was that which the plaintiff represented it to him to be, or what he himself wished; the plaintiff afterwards sent it to the defendant, but it turned out to be useless for the purposes he required, and was, in fact, not what the plaintiff had represented, but only slack coal or coal dust, never burnt at all. *Street v. Blay*, 2 B. & Ad. 463, applied, and a plea of fraud was unnecessary.

*James, Q.C.* and *Prentice*, for the plaintiff, contended that it was a sale by sample; at all events, there was no plea of fraud upon the record, and the present defence was unavailable without. (*Fenwick v. Laycock*, 1 Gale & Dav. 27; *Leaf v. Tulon*, 10 M. & W. 393; *Woodhouse v. Swift*, 2 Car. & P. 310; *Murray v. Mann*, 17 L. J. Ex. 256; *Spotts v. Sparrow*, 1 Bing. N.C.; *Martin v. Smith*, 4 Bing. N.C.)

*POLLOCK, C.B.*—In this case we very much regret that we are compelled to make the rule absolute; as, therefore, the matter must be argued, and must come on again: it may be as well to say nothing about the facts of the case. We fear the direction which prevented a division among the jury, whatever may be the effect of the evidence afterwards, would really be that of making the verdict an improper one.

*ALDERSON, B.*—You are at liberty, Mr. Humphrey, to put a plea of fraud upon the record.

*MARTIN, B.*—It appears it was a sale by sample, and the jury gave a verdict on that supposition. The bulk was of the same article as the sample, and the consequence was, if it was a sale by sample, the article was delivered which the defendant agreed to buy, so that there was a contract and a delivery in pursuance of that contract; and in such a case the defendant became indebted to the plaintiff for the amount of the contract price.

*POLLOCK, C.B.*—It will prevent any difficulty elsewhere to put that plea on the record, as it may be that a bill of exceptions may be tendered, if the judge should say this is not a defence notwithstanding the fraud. It will be the authority of the Court for putting it there.

*ALDERSON, B.*—Make it part of the rule that a plea of fraud is to be added.

*POLLOCK, C.B.*—But certainly not on payment of costs. *Rule absolute.*

Friday, May 30.

READ v. LEGARD.

*Husband and wife—Husband lunatic—Contract for necessities for wife—Husband's liability.*

*A husband a lunatic, and confined in an asylum, is liable for necessities supplied to his wife during his confinement.*

This case was tried in Middlesex before Martin, B. The facts of the case were as follow: the action was brought to recover the value of meat, drink, &c. supplied to the defendant's wife. Plea, never indebted. The plaintiff's particulars of demand described it to be 20l. for one quarter's board, &c. from the 25th of March to the 24th of June, 1850. The defendant was a benefited clergyman, holding a living in Yorkshire stated to be worth about 1600l. a-year. It had been necessary to engage a curate, who was paid 50l. a-year out of the income. The defendant had no other means. In 1843 he became a lunatic, and was kept in confinement for some six or seven months. In March, 1844, he married his present wife; and in 1849 he was again a lunatic; and in January, 1850, was confined as a dangerous maniac, and was not released until August in that year; so that these necessities were supplied to her during the time he was actually under restraint. Twelve shillings a week had been paid to her by defendant's brother for her support. At the trial a verdict was returned for the plaintiff, leave being reserved to move to set aside that verdict and enter a nonsuit. In Hilary Term last *H. Hill* had obtained a rule accordingly.

*Watson, Q.C.* (Ball with him) now shewed cause. The learned judge's ruling was strictly correct. Lunacy is no defence under the circumstances of this case. Here is a wife left without any provision, and she enters into a contract for necessities, the husband being a lunatic; she is not the less his agent. By her marriage the law takes all she has from her, and gives her an irrevocable authority to pledge his credit for necessities. If that were not so,

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lunacy would act as a divorce. [*PLATT, B.*—The authority is just as irrevocable as a warrant of attorney,—subsequent lunacy cannot affect it.] A lunatic can contract for necessities for himself. (*Barter and Another v. The Earl of Portsmouth*, 5 B. & C. 170.) The law says, that if he make a contract for necessities he shall be liable, and if he is a married man he is bound to protect his wife, and she goes forth to the world as his agent. [*ALDERSON, B.*—He has contracted a connexion when he was sound, to which the law annexes a contract.] *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17; 2 Smith's Leading Cases, 233, 249, 254; *Williams v. Wentworth*, 5 Beav. 325; *Howard v. Digby*, 2 C. & F. were also cited.

*H. Hill*, in support.—It is a question of very considerable importance, as affecting an important principle; it has never yet been decided that the implied authority to a wife was irrevocable. [*ALDERSON, B.*—Suppose the wife had contracted for necessities for the lunatic himself, would he not then be liable?] The liability then arises from his having used the goods contracted for. (1 Fitz. Nat. Bre. 120 G.) The principle is this, that the assent or authority of the husband must be proved, to pledge his credit. (*Evington v. Parrott*, 1 Salk. 118; *Montague v. Benedict*, 3 B. & C. 631; *Calverley v. Plumley*, 2 Lev. 16; 2 Smith's L.C. 261, 262.) There must have been some act of the husband before this implied authority to pledge his credit arises; he must either have turned his wife out of doors, or have rendered the house so intolerable that she could not remain in it. (*Seaton v. Benedict*, 5 Bing. 28, and *Tarback v. Bishop*, 2 M. & W. 8, were also cited.) [*PLATT, B.*—The question is simply this, the husband is liable for the wife's debts; and does lunacy absolve him from that liability.] The result will be, that in all such cases actions must be brought to assess what really are necessities in each particular case.

*POLLOCK, C.B.*—This is undoubtedly a very important case, and I am of opinion that the rule for a new trial which has been obtained ought to be discharged. The question is, whether an action can be maintained against a lunatic for necessities supplied to his wife, and it certainly appears to me that such an action can be maintained. The action is founded on this, that at the time of his marriage the husband contracted to become liable to support his wife, and if he fail she has an authority to pledge his credit, which she has done in this case. It may be that this precise point has never arisen before, but all the expressions in the cases that have been cited may be in one way or another explained. In some cases they were not necessities that had been supplied, and in that case the assent of the husband must, without question, be proved. The true principle, however, is this, when a man marries he contracts an engagement to supply his wife with necessities, and authorises her to pledge his credit for that purpose if he neglect to do so, and that authority cannot be, in my opinion, revoked by his subsequent lunacy.

*ALDERSON, B.*—I am of the same opinion; there are certain rights given to the wife, one of which is, that if by the omission or misconduct of the husband the wife is unprovided with the necessities of life, he thereby confers upon her an authority to pledge his credit, which means, that in such a case, the law gives her authority,—she is not to perish because of such omission; here he was by the act of God rendered unable to contract, and omitted in consequence, and she had full power to pledge his credit for necessities.

*PLATT, B.*—If this defendant had executed a deed or a warrant of attorney to sign judgment, and had afterwards become insane, such insanity would not revoke his previous act and the authority given. So here, when he married, he was of sound mind, and he then contracted a liability which his subsequent affliction cannot relieve him of.

*MARTIN, B.*—Concurred. *Rule discharged.*

Saturday, May 31.

DOE dem. BENSON v. FROST.

*Landlord and tenant—Tenant at will.*

*A landlord has a right to distrain upon his tenant at will.*

*After the tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made and signed between the parties; rent had been paid, and a receipt given for a quarter's rent, and a distress also had been put in by the landlord upon the tenant.*

*Held, not sufficient to alter the original tenancy at will into a tenancy from year to year.*

This was an action of ejectment, to recover possession of a house in Russell-square, and was tried before Martin, B. in Middlesex, on the 16th of May, when a verdict was found for the lessor of the plaintiff.

*James, Q.C.* moved to set that verdict aside, and the question to be raised was, whether the tenancy

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alleged to be subsisting between the parties was a tenancy at will only, or a tenancy from year to year, so that if it should be the latter, the defendant would have been entitled to a proper notice to quit in the usual way. There had been an agreement made for a lease of the premises, but no lease was ever prepared. The defendant was in possession of the premises from the year 1848 until 1850, when this ejectment was brought; a draft lease was prepared but not signed, and on the back of this draft lease was an indorsement made containing terms, and subsequently signed. In March, 1850, Benson required security for the rent, and asked for a deposit of title deeds; this had been given, and 40l. paid for a quarter's rent, as due to the month of December previous; the defendant was originally a tenant at will no doubt, but the question is, whether these facts subsequently occurring, are not evidence for the jury to draw an inference that there was a tenancy from year to year created. The landlord, too, had put in a distress, in December, 1850, for rent, and there appears to be no authority to shew that a tenant at will merely, can be distrained upon as such by his landlord. [MARTIN, B.—Surely there must be. He referred to Coke Litt. sec. 69, title, "Tenant at Will" where it says, "If a woman make a lease at will, reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will, reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt, or distress them for the rent." In Hargrave and Butler's note to that sec. it says, "Also in 1 Sid. 339 it is said to have been agreed by the Court that if land be leased at will, and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent day, because that would be a fraudulent determination."] *Rule refused.*

**POLLOCK, C.B.**—There will be no rule in this case; the defendant was originally a mere tenant at will, and so continued; none of the circumstances mentioned by Mr. James as having subsequently taken place, appear to me to have altered that, so as to convert the terms of holding into a tenancy from year to year.

**ALDERSON, B.**—I am of the same opinion, there is nothing done afterwards inconsistent with the original agreement of a tenancy at will.

**PLATT, and MARTIN, BB.** concurred.

*Thursday, June 5.*

**WHITEHOUSE v. HOWELLS.**  
*County Court—Prohibition.*

*Should a judge at chambers grant an order for a writ of prohibition, to be directed to a County Court judge upon an ex parte application?*

**PHIPSON** moved to set aside an order of Platt, B. and a writ of prohibition directed to a judge of the County Court of Monmouth, on the ground that the application for it should have been by a summons to shew cause, and not made, as it was made, *ex parte* in the first instance. The 13 & 14 Vict. c. 61, s. 22, gives power to the learned judges to hear and determine applications for writs of prohibition, either in Term or vacation, with liberty to the party dissatisfied to apply to the Court, and for the Court to vary or discharge the order as they may think right; but that Act contemplated a summons being issued, calling upon the parties to appear to shew cause. It could not have been intended that any person dissatisfied with the determination or interference of a judge of a County Court, should go before a learned judge at chambers, make an *ex parte* statement of his own, and thus obtain a writ of prohibition without any opportunity of explanation at all from the other side. The subject was discussed in *Re the Hammersmith Rent-charge*, where the judges of the court differed in opinion; but that case was distinguishable from this. There was also an objection here to the affidavit, it being entitled in the County Court instead of in this Court, and it was sworn before a commissioner of the Court of Q.B. instead of a commissioner of this court. There was, also, an objection upon the merits, as in fact the title did not, as alleged by the other side, come in question. *Rule nisi.*

**BUSINESS OF THE WEEK.**

*Friday, May 30.*

**SMITH v. STEVENS.**

*Rule absolute.* **G. F. Pollock** moved for a *distringas* to compel appearance.

**PROBT v. PARKER.**—Tried before the Lord Chief Baron at the last sittings for Middlesex. Verdict for the plaintiff, damages 800l. **Watson, Q.C.** moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds of misdirection, excessive damages, and surprise, and on an affidavit. *Granted.*

**HATCH v. CHAMBERS.**—**Hodgson** moved for a rule to compute. *Granted.*

**CHERRINGTON v. CLARKE and UXOR.**—**Leach** moved for a rule to shew cause why the judgment, *scire facias*, and all subsequent proceedings herein, should not be set aside. It appeared that the defendant, Mrs. Clarke, in 1840, then being a widow named Walker, had permitted her name to be used by her brother-in-law, one Jackson, in carrying on

his business for the purpose of protecting the property from his creditors. In 1843 Jackson died, and the business was still carried on in Mrs. Walker's name, for the benefit of Jackson's children, whose mother was the plaintiff's sister, and an agreement was entered into between Mrs. Walker and the plaintiff, who claimed an interest in the business, that he should commence an action against her, so that the whole of the property might be protected for the benefit of Jackson's children. The action was commenced, and judgment obtained, although the female defendant stated she knew of no proceeding beyond the writ. In 1847, Mrs. Walker married the defendant Clarke, and they still continued to carry on the business as before. In 1849 the business was sold, and now the plaintiff had obtained a *scire facias* to enable him to have judgment against the husband; no doubt the whole transaction was fraudulent, with a view to defraud the creditors, but Clarke, the husband, was innocent of all participation in it, had advanced and lost considerable sums of money in the business, and had also lent money to the plaintiff. The Court thought that the husband was liable for a judgment obtained against the wife, although the whole transaction might have been founded in fraud, and refused the rule accordingly. *Rule refused.*

**LAMBERT v. STEINER.**—**Martin** moved for a new trial, on the ground of misdirection, and that the verdict was against evidence. *Rule nisi granted, unless the plaintiff consent to a nonsuit.*

**BLAIR v. JONES.**—**Spinks** moved for a rule to shew cause why the master's taxation herein should not be reviewed. *Granted unless the parties can agree to arrange.*

**CATNEY v. BROOKER.**—**Field** moved for a *distringas*. *Refused.*

**FLIGHT v. LLOYD.**—**Prentice** moved to rescind an order of Platt, B. to enter an appearance. *Rule nisi granted.*

**LIDGERS v. COOK.**—**J. Thompson** moved to set aside verdict herein, and for a new trial. *To be mentioned to-morrow.*

**LISLEY v. CLARKE.**—Tried at Guildhall on the 26th May. Verdict for the plaintiff, damages 25l. **Needham** moved for a rule to shew cause why the verdict herein should not be set aside, and a new trial granted. *Rule nisi granted.*

**JONES v. DAVIES and OTHERS.**—**Trover** for cattle. Plea, not guilty. Verdict for plaintiff, damages 88l. **Grove** shewed cause against a rule nisi obtained herein for a new trial. **Stans, Q.C. and H. Davison**, in support. *Cur. adv. vult.*

**WILLIAMS v. HOLDSWORTH.**—**Welsby** moved for a rule to shew cause why an order of the judge of the County Court of Merionethshire, brought up on a writ of *certiorari*, should not be quashed. There were certain plaints issued against Holdsworth, the defendant, and a ship belonging to him had been seized under a *fieri facias*. A bill of sale of the ship had previously been given to the National Bank, as security. Notice was given by Williams of this equitable mortgage to the Bank, and subsequently a summons was obtained treating him as an interpleader claimant, and an order made against him for the payment of 63l. 15s. costs. *Rule nisi granted.*

**SMITH v. HOWELL.** *Postponed.*

**GRAY v. VIVIAN.**—Tried before Martin, B. Verdict for the plaintiff, damages 98l. **Humphrey** moved for a rule to shew cause why the verdict should not be set aside, and a new trial had. *Refused.*

**BURT v. KELLY.**—Tried in Middlesex, before Lord Chief Baron. Verdict for the defendant. **Humphrey** moved for a new trial, on the ground of misdirection. *Part heard.*

*Saturday, May 31.*

**BURT v. KELLY.**—**Humphrey, Q.C.** moved in this case, tried before the Lord Chief Baron, for a new trial, on the ground of misdirection, the question being, whether there was any right of way, under an agreement to certain houses. *Rule nisi; not to go into the new trial paper.*

**SLOCUMER v. LYALL.**—**J. Brown** shewed cause against a rule obtained to set aside defendant's verdict, and for a new trial; the cause was tried before the Chief Baron in Middlesex, and was an action of trespass for breaking and entering the plaintiff's house; and secondly, for an unlawful distress, it being alleged that one joint tenant could not alone distrain, and that there was no evidence produced by defendant that any rent was due when that distress was taken. **Humphrey, Q.C.** in support of the rule, not called upon. *Rule absolute.*

**PAGE v. WATKINS.**—**James, Q.C. and Field** appeared to shew cause against a rule obtained to set aside the verdict found for defendant on the 2nd issue, and to enter same for the plaintiff for a new trial. No counsel appearing to support the rule. *Rule discharged.*

**HUDSON v. ROBERTS.** *Cur. adv. vult.*

*Monday, June 2.*

**SPECIAL PAPER.**

**MICKLETHWAITE v. WINTER.**—*See report.*

**MENNE v. BONE.**—The Court said the facts, as stated in the case, were too doubtful for the decision of the Court, and there had better be a new trial. *New trial.*

**CLAY and OTHERS v. RUFFORD and OTHERS.**—By order of Vice-Chancellor Wigman.

*Referred back to Vice-Chancellor, unless the parties can arrange.*

**CARMAN and OTHERS (Assignees) v. THE SOUTH-EASTERN RAILWAY COMPANY.** *Postponed.*

**THE GREAT NORTHERN RAILWAY COMPANY v. THE MANCHESTER, SHEFFIELD, and LINCOLNSHIRE RAILWAY COMPANY.** *Struck out.*

**THE SWANSEA DOCK COMPANY v. LIVEN.** *Postponed till Wednesday the 11th.*

**DICKINSON and ANOTHER v. THE GREAT JUNCTION CANAL COMPANY.** *Stand over.*

**PANFRENK v. BENDING.**—**Prentice** moved for a rule to shew cause why a rule of 31st January should not be made absolute, provided the defendant paid within one week the costs which the Master, by his report, dated the 17th May last, was of opinion he ought to pay, or in default, why the rule should not be discharged. This was an undefended action of slander, and a verdict passed for the plaintiff, damages 15l. A rule for a new trial, on the ground that the defendant had not instructed counsel, was then moved for, and it was referred to the Master, to inquire into the facts of the case, who had reported that there should be a new trial, on payment of the costs of

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the first by the defendant, and that the defendant entitled to have such costs repaid to him by certain days of the Court. *Rule nisi granted.*

*Tuesday, June 3.*

**THE AMBERGATE, NOTTINGHAM, BOSTON, and LONDON JUNCTION RAILWAY COMPANY v. PATTISON.**—The action brought to recover 322l. 10s. for four calls, and instalment of a fifth. It was tried before Platt, B. at Nottingham, when the plaintiffs obtained a verdict, and rule nisi had been obtained to reduce the amount to 24l. 10s. **Whitehurst, Q.C. and Leach** shewed cause. *Rule nisi granted.*

**SAME v. SAME.**—The plaintiffs had obtained a rule to increase the verdict by 140l. 15s. the amount of the fourth call, and 63l. 15s. the first instalment of the fifth call, or as the Court should direct.

**SAME v. HODGSON.**—A rule nisi had been obtained in this to increase the verdict by the sum of 112l. 10s. the amount of the fourth call, and 112l. 10s. the amount of the first instalment of the fifth call, or as the Court should direct. The Court, after hearing arguments, was of opinion that the judgment of *Stans* of Q.B. delivered by Patteson, J. in *Ex parte Smith*, Q.B. was quite correct, and must govern and serve cases; therefore, in the first case, *Rule denied.*

The two others, *Rule denied.*

**WHITE and ANOTHER, Assignees, v. MILLER and OTHERS.**—**Q.C. and Brownell** appeared to shew cause against a rule obtained to set aside the plaintiff's verdict, and to try a new trial; but the Court called upon **Miller, Esq.** to support their rule. The plaintiffs, as assignees of a bankrupt, sought to recover from the defendant the value of certain goods which the defendant had obtained from the bankrupt after his bankruptcy, and had not paid for. The bankrupt not having obtained his certificate, he was defendant wishing to set up the right of another to be a party in question, in opposition to the alleged right of the bankrupt, or his assignees, but there was no evidence that other party in any way interfering, or attempting to claim his supposed right. **POLLOCK, C.B.** **ALDERSON** and **PLATT, BB.** were of opinion the rule should be refused. **MARTIN, B.** entirely concurred, and thought the case precisely similar in principle to *Oughton v. Supple*. *Rule denied.*

**SMITH v. HOWELL.** *Part heard.*

*Thursday, June 5.*

**THOMES v. TAYLOR.**—**Humphrey, Temple, and Phipson** shewed cause against a rule obtained to set aside the plaintiff's verdict, on the ground that it was against evidence. **James, Q.C. and Haichin**, called upon by the Court to support the rule. *Rule discharged.*

**STOCKTON and DARLINGTON RAILWAY COMPANY v. FOX.**—*Part heard.*

**FEENE and ANOTHER v. BITTLETON.** *Adjudged until Tuesday.*

*Wednesday, June 6.*

**STOCKS and OTHERS v. THE MAYOR, ALDERMEN, and BURGESS of THE BOROUGH of HALLOW.** *Cur. adv. vult.*

**KIRK v. URWILL.**—This was a demurrer to a declaration in an action upon an award. **Peacock, Q.C.** argued in support of the demurrer; there were four points: 1st. Whether the agreement was sufficient with reference to the enlargement of the time. 2nd. The declaration, says the award, was made by James, whereas the reference was to Joseph. 3rd. As to the condition on which the title is ordered to be given up, it is ordered to be done by a stranger, which cannot be enforced. And 4th. As to the mode of stating the breach. **Paschley** contra.

*Judgment for the plaintiff on the first branch; for the defendant on the second, as to the validity of the award, enlarging the time for making the award.* *Cur. adv. vult.*

**CALLOW v. JERKINSON.**—**Leach**, in support of the demurrer to the replication. **Baddley** called upon to support his replication. *Leach to stand.*

**NICHOLS and OTHERS v. DIXON.** *Part heard.*

## EXCHEQUER CHAMBER.

Reported by C. J. B. HESTLEY, Esq. of the Middle Temple, Barrister-at-Law.

## ERBOR FROM THE EXCHEQUER.

(Before Lord CAMPBELL, C.J. PATTISON, CARRIDGE, MAULE, WIGHTMAN, and CRESSWELL, JJ.)

**THE AMBERGATE RAILWAY COMPANY v. NORCLIFFE.**

*Action for calls—Instalments.*

*A joint-stock company having power to make calls upon its members, may make a call payable by instalments, provided the whole amount does not exceed the sum for which the company is authorized to make a single call.*

*Seizure of shares for nonpayment under the 10th section of 8 Vict. c. 16, until the last day for payment of the last instalment.*

*This was an action of debt for railway calls. Pleas—Never indebted; that the defendant was not a holder of shares; and that the calls were not made *modo et forma*.*

At the trial the plaintiff proved that a call of 1l. 15s. per share on each of the ten shares held by the defendant in the company had been made by the company, and made payable by instalments. The calls had been made as follows:—the 4th call of 1l. 15s. per share, made 11th January, 1849, payable by two instalments, 15s. per share, on the 24th of February then next, and 1l. per share on the 24th of May then next; the 5th call of 1l. 10s. per share, made the 22nd of August, 1849, payable by two instalments of 15s. per share, on the 6th of October then next, and 15s. on the 8th of January then next. At the trial the learned judge, in defence

## BAIL COURT.

A case in the Court of Ex. which was supposed to be decided that calls made payable by instalments be illegal, directed the jury to find a verdict for defendant. To this ruling the plaintiffs tendered bill of exceptions.

*Whitehurst*, for the plaintiffs.—This question has already been decided. In the case of *The Architects' Fire and Life Office v. Wilson* the Court of Ex. decided that calls in this form were legal. A call there was made upon a clause in the deed, *quod verbatim* from the statute, and Campbell, C.J. said that the calls were good, and on a motion for a writ of trial the Court refused the rule.

*Wilmore*, for the defendant.—Would not refer to any of the grounds that have been brought under the title of the Court in the previous cases. He contended that the call and the action upon it was a feature of the 8 Vict. c. 16, and could be good unless it possessed all the ingredients, and was subject to the incidents which the Legislature, at the time making the Act, contemplated should belong to it. c. 21 of 8 Vict. c. 16, gives the railway company a power to make the calls. In the case of the *Architects' Fire and Life Office v. Wilson*, there is no question of the sort; it was impossible the Court should come to any other conclusion than it did, taking sec. 21 by itself. It says that a call shall be made at such a time, and in such proportions, as the company shall think fit. The company in that case took the words of that section, but it took nothing further. There are subsequent sections of the Act operating on the question. Secs. 23, 25, & 29 cannot come into operation at all; they will be quite superfluous, supposing the payment is to be made at more times than one. In sec. 23 there is a provision to this effect: that if before or on the day pointed for payment of the call any shareholder do not pay the amount to which he is liable, such shareholder shall be liable to pay interest for the time at the rate allowed by law from the day appointed for the payment thereof to the time of the actual payment. It is quite obvious that that section contemplates but one payment; for, assuming the directors have the power of splitting calls into instalments, they may do it to an indefinite extent; and how is to determine which is the amount on which the default accrues.

MAULE, J.—It applies to each instalment.

LORD CAMPBELL, C.J.—I see no difficulty in applying these sections. The words are, "do not pay the amount of any call," not "the portion of any call." It is the whole call for which he is liable.

MAULE, J.—The words are, "the amount of the call for which he is liable." It is the amount for which he is liable. The same difficulty arises in sec. 25, and sec. 29, the latter section provides, that "if any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued hereon, the directors at any time, after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was payable, forfeited." Now, how is it possible to distinguish what is the day appointed for the payment of the call? It may be the last day for payment of the last instalment.

LORD CAMPBELL, C.J.—Yes; it may be that there is no forfeiture until the last day for payment of the last instalment has arrived. If you give it that interpretation, of which it is clearly susceptible, the difficulty is removed. There is no difficulty in this case; there must be a *Venire de novo*.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Justice WIGHTMAN.)

Friday, May 30.

REG. v. BOOTH.

*Procedendo after the decision of this Court upon a case reserved from the Sessions.*

Upon an appeal to the Sessions against a summary conviction, the conviction was quashed, subject to a case. Upon the argument upon the case, this Court affirmed the conviction, whereupon upon motion a *procedendo* was directed to carry back the case to the Sessions, in order that the conviction may be enforced pursuant to the 11 & 12 Vict. c. 43, s. 27.

In this case an appeal had been tried at the Sessions against a conviction of justices, under the 17 Geo. 3, c. 26 (Worsted Act), upon which the conviction was quashed, subject to a case. Upon the case being brought up and argued, this Court confirmed the original conviction. By the 11 & 12 Vict. c. 43, s. 27, it is enacted, "that after an appeal against any such conviction, or order, as aforesaid, shall be decided, if the same shall be decided in favour of the respondents, the justice or justices who made such conviction, or order, or any other justice of the peace of the same county, riding, division, liberty, city, borough, or place, may issue such warrant of distress or commitment as aforesaid for execution of the same as if no such appeal had been brought."

## BAIL COURT.

*Pickering* now moved for a rule for a writ of *procedendo*, to take the case back again to the Sessions, in order that the conviction may be enforced pursuant to the foregoing enactment. (*Reg. v. Rushworth*, 2 New Sess. Cas. 415.) *Rule absolute.*

Monday, June 2.

(Before Mr. Justice WIGHTMAN.)

REG. v. THE GREAT NORTHERN RAILWAY COMPANY, *ex parte* WARD.

*Rule nisi* for a *mandamus* to a railway company, commanding them to affix their corporate seal to a deed, or to make a road.

*Hoggins*, moved for a rule for a *mandamus* to be directed to the Great Northern Railway Company, commanding them to make a certain road. It appeared that this company requiring for their line certain portions of land belonging to Mr. Ward, they gave the requisite notice, and it was agreed that they should pay for the same the sum of 1,385*l.* and make a certain road to the Boston station. A deed was prepared embodying these terms, which, however, has never had the seal of the company affixed to it; and to which they have declined affixing their seal, on the ground that there are certain difficulties with reference to the road which prevent their complying with their arrangement in reference thereto. The land of Mr. Ward was taken possession of, and duly paid for, and he now seeks by this motion to compel the company to perform their undertaking with reference to the road.

WIGHTMAN, J.—The making of the road appears to have been a part of the private arrangement with Mr. Ward, for the breach of which he may have his action; it is hardly within the scope of a *mandamus*.

*Hoggins*.—The difficulty with reference to an action is, that the company have never affixed their corporate seal to the deed.

WIGHTMAN, J.—The *mandamus* might then be required to them to affix their seal. The writ may be in the alternative, either to make the road, or to affix their seal to the deed.

*Rule nisi accordingly.*

REG. v. WILSON AND ANOTHER, Justices of Kent.

*Rule nisi* to justices to adjudicate upon a complaint.

*Raymond* moved for a rule (under sec. 5 of the 11 & 12 Vict. c. 44), calling upon two justices of Kent to proceed to convict the South-Eastern Railway Company under sec. 57 of the 8 Vict. c. 20 (Railway Clauses Consolidation Act). It appeared that an information had been laid against the company by a Mr. Davis, who claimed to have a right to do so as being a person within the meaning of the said 57th section. At the hearing the facts of the case were not disputed, but it was argued that Mr. Davis was not a person within the meaning of the above section, and therefore not empowered to lay the information. The justices having doubts upon this point, refused to adjudicate.

WIGHTMAN, J.—I have no power to direct the justices to decide the case in a particular way. If they had refused to hear, I could have ordered them to do so.

*Raymond*.—The facts were not disputed. They refused to adjudicate, it being represented to them that, if they declined to do so, the case could be argued in this court. *Reg. v. Charlsworth*, 2 Low, M. & P. 117, is in point.

WIGHTMAN, J.—That was an application to compel justices to adjudicate. I think in this case you may have a rule calling upon the justices to adjudicate.

*Rule nisi accordingly.*

Tuesday, June 3.

(Before Mr. Justice WIGHTMAN.)

*Ex parte* The Trustees of THOMAS LOVELAND, Esq. *Rule* for a *mandamus* to parishioners to assemble in vestry, and do certain acts.

*Watson*, Q.C. on a former day moved for a rule calling upon the trustees and the vestry of St. Mary, Islington, to shew cause why a *mandamus* should not issue, commanding them, in case they have funds in hand, to pay over to the trustees under the will of the late Thomas Loveland, Esq. the interest due upon certain church debentures, or, in the event of their not having such funds, to take all necessary steps to levy a rate to raise the amount. It appeared that, under the 5 Geo. 4, c. 125 (local), powers were given to the parish of St. Mary, Islington, to build a church, and to raise for that purpose the sum of 12,000*l.* upon security of certain rates to be raised for the purposes of paying the interest. Mr. Loveland, in his lifetime, had lent for the above object the sum of 7,000*l.* the interest in respect of which for the last half-year has remained unpaid, the vestry refusing to make any rate for its payment.

His LORDSHIP upon these facts feeling some difficulty in directing a *mandamus* to so uncertain and undefined a body as the inhabitants generally of a parish, whom, in the event of disobedience to the writ, could not effectually be proceeded against, desired the motion to be renewed, that some authority (if any exists) might be adduced for the application.

## BAIL COURT.

*Watson* accordingly to-day renewed his application, and cited *Res v. Wis*, 2 B. & Ad. 197 (and the authorities in note c, 199), in which the Court granted a *mandamus* to the inhabitants of a parish liable to contribute to the church-rate to meet and assemble together with the minister to elect churchwardens.

Upon this his Lordship granted a rule for a *mandamus* for the inhabitants to meet in vestry, and to take all necessary steps to pay the amount due.

*Rule nisi.*

Wednesday, June 4.

(Before Mr. Justice WIGHTMAN.)

*Ex parte* RALPH HULSE.

*Exhibition of articles of the peace.*

*Cleasby* moved, on the behalf of Mr. Ralph Hulse, for leave to exhibit articles of the peace against Mr. William Spencer Tollemache, a justice of the county of Hereford, for using threatening language towards him, from which he has reason to fear future violence.

*Articles exhibited.*

REG. v. THE MAYOR AND COUNCIL OF THE BOROUGH OF SALTFORD.

*Mandamus* to a town-council to elect aldermen.

*Crompton* moved for a rule calling upon the town-council of Saltford to shew cause why a *mandamus* should not issue, commanding them to elect four aldermen in the place of four who should have gone out of office on the 9th of November last. The facts of the case were similar to those stated in the case of *Reg. v. The Town-council of Bradford*, 16 Law T. 372.

*Leeming* appeared on behalf of the corporation to consent.

*Rule absolute.*

*Ex parte* HYDE.

*Rule* for a *certiorari* to remove a conviction in order to quash same.

*Hawkins* moved for a rule for a *certiorari* to remove into this Court a conviction of justices, and also an order of Quarter Sessions confirming the same. The conviction in question was before certain justices of Kent, under sec. 3 of the 1 & 2 Wm. 4, c. 32, and the defendant was fined 5*s.* Against this conviction the defendant appealed, and at the trial the conviction was affirmed. The conviction adjudged the defendant to pay the fine of 5*s.* "to be paid and applied according to law." By sec. 21 of the 5 & 6 Wm. 4, c. 20, it is enacted that the penalty imposed by the first-named statute should thus be applied—one-half to the informer, and the other half to the overseer of the poor, or some officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, &c.

It was now contended that the conviction was bad, inasmuch as it did not specify to whom the penalty was to be paid. (*Chaddock v. Wilbraham*, 5 C.B. 645.)

*Rule nisi.*

Saturday, May 31.

REG. v. THE REV. — SALE.

*Ex parte* TREVOR.

*Rule nisi* for a *mandamus* to a vicar to admit a chaplain duly appointed to his office.

*Cowling* moved for a rule calling upon the Rev. Mr. Sale, the vicar of the parish of Sheffield, Yorkshire, to shew cause why a *mandamus* should not issue commanding him to admit the Rev. Mr. Trevor to the office of one of the chaplains of the parish church. By a charter of Mary, certain church burgesses were empowered to elect three chaplains, and as often as they should die or be removed, such burgesses were to elect others. In April 1850, one of these chaplains died, whereupon the church burgesses proceeded to elect another, namely, Mr. Trevor, who was duly licensed by the Archbishop of York, and who presented himself to the then vicar, the Rev. Mr. Sutton, to officiate in the parish. Mr. Sutton, however, from some difference upon a point of doctrine, refused to permit him to officiate. Some time since Mr. Sutton died, when the present vicar, the Rev. Mr. Sale, was inducted into the living, whereupon Mr. Trevor again presented himself as ready to perform the duties of his office, but was likewise prohibited from so doing upon the same supposed ground. Under these circumstances the present application was made. (*Burn's Eccles. Law*, tit. "Chapel," pp. 305, 306.)

*Rule nisi.*

## BUSINESS OF THE WEEK.

Friday, May 30.

BRADCLIFFE v. HOOK.—In error. T. Jones moved for a rule calling upon the plaintiff in error, to shew cause why an order of a judge should not be rescinded. *Rule nisi.*

RICHARDSON v. PILLAY.—*Atterton* moved for a *mandamus* to examine certain witnesses at Madras, and for a commission to examine other witnesses at the Mauritius and Barbadoes.

*Rule nisi.*

REG. on the Prosecution of WINTER v. CHILCOCK.—*Huddleston* moved for a *procedendo*, to carry back this indictment to the Central Criminal Court, on the grounds, 1st, that insufficient bail had been put in; and, 2nd, that the learned judge had been induced to grant the *certiorari* upon a statement of facts which were untrue.

*Rule nisi.*

*Ex parte* ALLCOCK.—*Seymour* moved for a writ of *men-*

## BANKRUPTCY.

## NISI PRIUS.

## NISI PRIUS.

*Jones* to be directed to the York, Newcastle, and Berwick Railway Company, commanding them to issue their warrant to the Sheriff of Durham, to summon a jury to assess compensation.

*Re HERBERT.*—*Hastings* moved for a rule for a writ of prohibition, to be directed to the judge of the County Court at Whitechapel, restraining him from further proceeding in a certain plaint, under sec. 123, of the 9 & 10 Vict. c. 96, on the ground that the title to land came into question.

*Re* on the Prosecution of *SMITH v. THE EASTERN UNION RAILWAY COMPANY.*—*Jones*, Q.C. moved for a rule to set aside the award herein, on the ground that the award is not final, and does not adjudicate upon all matters in difference between the parties.

Tuesday, June 3.

*Ex parte THE LONDON GASLIGHT COMPANY.*—*H. Hill* moved for a rule calling upon the judge of the Middlesex County Court, holden at Brompton, and also upon Thomas Lenstead, to shew cause why a *warrant* should not issue, commanding the said judge to adjudicate in a certain action brought by the said company against the said Thomas Lenstead. It appeared that the defendant had agreed with the plaintiffs for the supply of a certain quantity of gas at a certain price, and a sum of 3*l.* having become due, the plaintiffs brought an action for its recovery in the Brompton County Court. At the hearing the defendant set up as a defence want of jurisdiction in the judge to hear, inasmuch as the private Act of the gas company empowered the company to recover debts under 20*l.* before a justice. The judge being of opinion that his jurisdiction was thereby ousted, refused to adjudicate. It was now contended that he was wrong, and that the clause in the Act did not deprive the company of their common law right of bringing an action, but gave them an accumulative remedy.

Wednesday, June 4.

*WILLIAMS v. DYE.*—*Francis* moved for a rule under the 48 Geo. 3, c. 56, s. 4, calling upon the defendant to shew cause why he should not pay the costs of this action. This was an action brought upon a judgment, the debt in the original action being under 20*l.* The defendant had pleaded *non est* record. (*Slater v. Mackey*, 19 Law J. 86, C.P.)

Thursday, June 6.

*BROWN v. COLLIER.*—*Jones*, Q.C. moved for a rule to enlarge the time for making the award herein, or that the award may be referred back to the arbitrator, he having omitted to enlarge the time for making his award, and having made it after the time had expired.

## BANKRUPTCY.

VICEROY-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.

COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FOWLER, Esq. Barrister-at-Law.

COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

## COURT OF BANKRUPTCY, BASINGHALL-STREET.

Thursday, May 29.  
(Before Mr. Commissioner GOULBURN.)

*Ex parte BEDFORD, re BEDFORD.*

Jurisdiction—Discharge of bankrupt.

The Court of Bankruptcy alone has jurisdiction to order a bankrupt's discharge from custody. A bankrupt who was arrested by virtue of a *ca. sa. sued out by a creditor who obtained a certificate of proof under sec. 257, is entitled to his discharge after he has been in prison twelve months, although he has not passed his last examination:*

*Seem, that at the expiration of the twelve months the gaoler ought to take notice of the statute and discharge the prisoner.*

At the last examination the bankrupt was adjourned *sine die* without protection; on that occasion a creditor applied for a certificate of proof under sec. 257. (Sched. B. Bankrupt Law Consolidation Act.) He then sued out a writ of *ca. sa.* in the Ex. under which the bankrupt was arrested, on the 22nd of April, 1850. There was no other detaining creditor, and the bankrupt, having been in prison up to the present time, he now applied for his discharge.

*Naylor*, for the bankrupt, relied on sec. 259, (a) and quoted *Walker v. Edmondson*, 20 L. J. 186, Q. B.

*Coles*, solicitor, contra.—The bankrupt has as yet furnished no accounts to his assignees, though he has had ample time to do so. He is in the same position as when he was arrested, and is therefore not entitled to his discharge.

Mr. Commissioner GOULBURN (after having consulted Mr. Commissioner HOLROYD).—This case is to be discussed wholly on sec. 259, which must be construed to mean, that where a bankrupt has been in prison for a less period than a year, he shall not be discharged without the order of this Court, but that after the year has expired he is entitled to be set at liberty; and it is questionable whether the gaoler ought not to take notice of the statute, and discharge his prisoner when the period of imprisonment set forth in the statute has expired, without any order from this Court. My opinion is founded on the following reasons:—1. This Act ought to be construed *in favorem libertatis*, in conformity with the opinion

(a) "If any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full of one year, except by order of the Court."

expressed by Lord Tentorden in *Lewis v. Morland*, 2 B. & A. 64. 2. This is the first enactment in which the general principles of the bankrupt law have been interfered with. Up to the time when this statute came into operation, a creditor was obliged to elect whether he would prove under the bankruptcy, and abandon all other remedies against the bankrupt; but now having proved, and even received a dividend, he can, under certain circumstances, arrest the bankrupt. The power of detaining the bankrupt in prison ought to have a limit. 3. The process under which the bankrupt is in custody, in fact, commences in this Court by virtue of the certificate of proof, although the intervention of another Court is afterwards required. This Court is, therefore, the proper tribunal to order the discharge when the terms of the statute have been satisfied. 4. It has been decided in *Walker v. Edmondson*, that the Consolidation Act transfers all the jurisdiction as to the bankrupt's discharge when he has been taken in execution to this Court. I will, therefore, order the discharge. No injustice can follow, for this Court has now the power to compel him to furnish satisfactory accounts.

Ordered that the bankrupt be discharged.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Wednesday, May 14.  
(Before the Chief Commissioner REYNOLDS.)  
PROTECTION CASE.  
*Re HENRY HERRICK.*

Costs of opposition.

A petition being dismissed at insolvent's request the costs of opposition were allowed out of money in Court belonging to the estate.

This insolvent, an officer of the defunct Palace Court, came up upon an adjourned examination upon his interim order for his final order.

*Cooke* opposed on behalf of a creditor. The petition was filed so long ago as February 1849, when the insolvent proposed to set aside 50*l.* a-year for his creditors. He, under that arrangement, paid into Court 25*l.* The one half-year's instalment of the amount. The case stood over from time to time to await the result of the application to the Lords of the Treasury for compensation for the loss of his situation. In January, this year, the insolvent had received 53*l.* as the amount of one year's compensation. He had not inquired whether he was to receive 53*l.* a-year regularly. He was unable to obtain a situation, and had a wife and four children to support. He was not willing to offer anything to his creditors. The insolvent asked for the dismissal of his petition. *Cooke* had no objection, but doubted whether, as there was money in Court, it could be done.

The CHIEF COMMISSIONER thought he had the power to dismiss the petition, granting upon *Cooke's* application the costs of opposition out of the 25*l.* in Court.

Petition dismissed: costs of opposition allowed out of money in Court.

## NISI PRIUS.

## COURT OF QUEEN'S BENCH.

Reported by W. PATTERSON, Esq. Barrister-at-Law.

SITTINGS IN LONDON AFTER EASTER TERM.

Tuesday, May 20.  
(Before Mr. Justice ERLE.)

FENNELL v. PINDER.

Sale by sample—Broker's bought and sold note—Parol evidence of sale.

Where the parties to the contract have not constituted the bought and sold notes the contract: Held, that the contract may be proved by parol, and the bought note signed by the broker may be evidence of the contract to satisfy the statute of frauds.

This was an action on the case for breach of warranty. The declaration alleged that the defendant sold to the plaintiff twenty tons of chichory, warranted to be equal to sample, whereas the chichory was of an inferior description, and not equal to the sample. Pleas: first, not guilty, and second, a traverse that the plaintiff bought the chichory of the defendant, *modo et forma*. Issues thereon: it appeared from the evidence that the defendant, who resided at York, wrote the following letter to Mr. Burgon, a broker in London:—

"York, 26th June, 1850.

"Sir,—Messrs. Butterfield and Clarke have handed your letter over to me respecting chichory. I can offer you any quantity, from five to fifty tons, at 22*l.* 10*s.* per ton, delivered free on board vessel or railway station, which is a price worth notice. I send you a sample per railway, which you will receive shortly after this. You will please see your friend, and get him to decide as soon as possible, as I have not offered at this price before. I shall keep the offer open until Saturday morning's post. I have

several inquiries for it. Nearly all the merchants are out of stock. This is offered on the terms met in yours.—Signed,

"G. E. FINDER."

"To Mr. T. C. Burgon."

After receipt of the sample, Burgon took a note of it to the plaintiff, to whom he then sent a chichory, the subject of the action, on the understanding that it was to be equal to the sample. The sale was made by word of mouth, and on the day the sale the following bought note was delivered to Burgon to the plaintiff:—

"July 1, 1850."

"MR. SAMUEL FENNELL.—I have this day by your order, and for your account, of Mr. G. Pinder, of York, twenty tons of chichory, 2*l.* 10*s.* f.o.b. a sailing vessel for London, at 2*l.* 10*s.* per ton, and remain, Sir, yours obediently,

"THOS. CLARKE."

"Customary allowance."

The words "as per sample" were inserted when delivered, but the plaintiff, on receiving, requested that those words might be inserted in the sale was by sample, Burgon said he would insert these words. The only advice of a broker or sold note which Burgon sent to the defendant was the following letter:—

"London, June 28, 1850."

"Sir,—I am duly in receipt of your note, which I beg to thank you. I will take twenty tons at 22*l.* 10*s.* per ton, 2*l.* discount, free on board sailing vessel for London, payable to your order on landing. I could not see my man yesterday; I would have addressed you sooner. I am obliged to Butterfield and Co. for their introduction.

"I remain, yours truly,

"T. C. Burgon."

The following invoice and letter were sent to the defendant in reply to the last letter:—

"York, July 1, 1850."

"C. Burgon, Esq."

"Bought of G. E. FINDER, Tea, Coffee, and Spice Merchant,

"Terms, cash."

Twenty tons of fine chichory root, at 22*l.* 10*s.* ..... £440 0  
Cr. discount, 2*l.* ..... 11 5

£428 5

"Per sailing vessel."

"Sir,—I beg to hand invoice of root as per yours of the 29th ult. which is now shipping, and will thank you for a remittance. We have to pay in cash on delivery for root at these prices. The market has gone up a pound per ton since offering here under 23*l.* per ton. We have the 2*l.* discount according with yours, and have arranged with the wharfinger for 12*s.* 9*d.* delivered in London.

"If you don't send the whole, send on account and oblige per return.

"Yours, &c."

"G. E. FINDER."

"Don't sell any more at the price; when you want again we will give you latest market-price."

There were subsequent letters from the defendant to the plaintiff treating the sale through Burgon as a sale by the defendant to the plaintiff, but not referring to it as a sale by sample. Burgon kept a broker's book. At the end of the plaintiff's case

*Hugh Hill*, for the defendant, submitted that there was no evidence of any contract for sale by sample. If Burgon was the broker between the parties, there was no such contract for sale by sample, as the letter of 29th June was silent about a sale by sample, and there was no written contract binding on both parties for such a sale, and if Burgon was the plaintiff's agent only, then the sale was upon the terms of the letter from the defendant to Burgon of 1st July, which was also silent about a sale by sample.

ERLE, J.—I think that where the parties agree that the bought and sold notes shall be the contract, then such notes are the contract; but in other cases where the parties have not so agreed, and that the broker is competent to contract by parol, and that the bought and sold notes may constitute the memorandum in writing of such contract. In the present case there being no bought and sold notes which agree, I think that a contract of sale may be proved by parol, and that the jury may infer, that what was orally taken place was the contract, which, but for the statute of frauds, would be good. It being, however, a sale within the statute of frauds, there must be part payment in earnest, or an acceptance of the goods, or a memorandum in writing, signed by the parties or their agent, in order to satisfy that statute. Here there was a bought note signed by the agent of the defendant, and there was also a delivery, so that there is sufficient here to satisfy the statute of frauds. I shall therefore leave to the jury whether they believe there was a sale by sample, and then whether there has been a breach of such contract.

The defendant then gave evidence to shew that there had not been any breach of warranty.

The jury, however, found a verdict for the plaintiff, damages 56*l.*

*E. James*, Q.C., *M. Dawson*, and *Patterson* for plaintiff.

*Hugh Hill* and *Brewer* for the defendant.



## LORD CHANCELLOR'S COURT.

## LORD CHANCELLOR'S COURT.

## ROLLS COURT.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRAYSON WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Thursday, Dec. 12, 1850.

BENTON v. NETTELFOLD.

*Demurrer—Discovery—Immoral consideration—Trusts—Future cohabitation.*

The plaintiff having granted an annuity to the defendant as trustee for a single woman, by a deed valid on the face of it, on being sued at law for the annuity, filed his bill, alleging, that the consideration for the annuity was a prospective illicit cohabitation, and praying for discovery, and to restrain the action at law; a general demurrer by the defendant was overruled.

This was an appeal from an order of the late Vice-Chancellor of England, allowing a general demurrer by the defendant, William Nettefold, to a bill by the plaintiff, alleging that the plaintiff had executed indenture as therein mentioned.

By this indenture, dated 14th of December, 1847, and made between the plaintiff of the first part, Caroline Nettefold, spinster, of the second part, and the defendants of the third part, after reciting that the plaintiff being minded and desirous to make a provision for C. Nettefold, had lately agreed with the defendants to grant an annuity, or yearly sum of 200*l.* to be paid to C. Nettefold, free from taxes, and clear of all other deductions whatsoever, for and during the natural life of C. Nettefold; it was witnessed, that in pursuance of the said agreement, and in consideration of 10*l.* the plaintiff granted unto the defendants, their executors, administrators, and assigns, for and during the natural life of C. Nettefold, one annuity, or clear yearly sum of 200*l.* to be paid half-yearly, it being clear that the defendants should pay the said annuity unto C. Nettefold for and during her natural life, for her separate use, independent of any husband she might at any time marry, and that without power of anticipating, charging and assigning, or incumbering any future payments thereof; and that the receipts alone of C. Nettefold should be good and valid, whether she should be covert or sole, to the defendants for the payment of the said annuity, or any part thereof; and the plaintiff covenanted in the usual way with the defendants for the due payment of the annuity, and the indenture contained the usual provisions for the appointment of new trustees by C. Nettefold, and for the indemnity of the trustees, and also a proviso that if it should at any time happen that C. Nettefold should become a bankrupt, or take the benefit of any Act for the relief of insolvent debtors, the grant, and every thing therein contained, should cease, determine, and become absolutely void. The bill then stated that the said indenture was valid on the face thereof, and that the consideration for the same, as stated and appearing by the said deed, is free from legal objection. However, the plaintiff shews, and the fact is, that the consideration of the said deed was a prospective illicit cohabitation and improper connection subsequently had between the plaintiff and the said C. Nettefold, and that the said deed is invalid; and the plaintiff shews that after the execution of the said deed, the plaintiff, seeing the impropriety of the said connection, and finding himself duped, broke off and discontinued the same altogether. And the bill, after setting out applications made to the plaintiff for payment of the annuity, and his refusal to comply with such applications, proceeded as follows:—That the said defendants well knew that the consideration for which the said deed was executed by the plaintiff was immoral and illegal; nevertheless, the said W. Nettefold hath recently, without any previous communication with the said J. P. Beavan, and contrary to his wishes, commenced an action at law, in her Majesty's Court of C. P. in the joint names of the said W. Nettefold and J. P. Beavan, to recover a half-year's annuity upon the said deed, alleged to have become due on the 1st January, 1849; and the plaintiff hath put in a plea to the said action, to the effect that the said deed was executed and delivered by the plaintiff to the said W. Nettefold and J. P. Beavan, in consideration of the said C. Nettefold then agreeing with the plaintiff unlawfully and immorally to cohabit and commit fornication with the plaintiff, and for no other value or consideration whatever; that in order to enable the plaintiff to prove the truth of his said plea and defend the said action, it is necessary that the defendants should discover and set forth whether the said indenture of the 14th December, 1847, was not executed by the plaintiff for some immoral consideration, and whether or not, in consideration and in contemplation of a prospective or contemplated cohabitation or immoral connection between the plaintiff and the said C. Nettefold, and whether at and before the execution thereof, it was not agreed, understood, or implied, that a future illicit cohabitation or immoral connection was to take place between the plaintiff and the said C. Nettefold; and the said defendants ought to set forth the real, true, and

*bona fide* consideration for the said deed, and the full and true particulars of all and every the consideration given for the same, and whether an illicit cohabitation and immoral connection did not afterwards take place between the plaintiff and the said C. Nettefold; and that the said defendants ought also to set forth whether at or shortly previous to the execution of the said deed some discussion or disagreement had not arisen between the plaintiff and the said C. Nettefold respecting some alleged and pretended marriage of the said C. Nettefold; and whether frequent communications and correspondence and interviews did not take place between the plaintiff and the defendants and the said C. Nettefold respecting the execution of the said deed, and the particulars and effect thereof; and whether the said defendants have not had conversations with each other and the said C. Nettefold and others, in which they have admitted the immoral consideration given for the said indenture and the matters hereinbefore alleged, and that the plaintiff had been duped.

*Wood and Bird*, for the plaintiff, contended that the bill was not for relief, but only for discovery in aid of a defence at law. They cited *Collins v. Blantem*, 2 Wils. 341; *Walker v. Perkins*, 3 Burr. 1568; *France v. Bolton*, 3 Ves. 368; *Batty v. Chester*, 5 Beav. 103; *Lounder v. Taylor*, 1 Madd. 423; *Albrecht v. Supman*, 2 Ves. & Bea. 323; *Hawkins v. Hall*, 1 Beav. 73; *Thorpe v. Macaulay*, 5 Madd. 218; *Wilmot v. Maccabe*, 4 Sim. 263; *Macaulay v. Shackell*, 1 Bli. N. S. 96; *Kaye v. Moore*, 2 Sim. & S. 260; *Tisney v. Eley*, 17 Sim. 1 and 13 Jurist, 480.

*Rolt and Hare* supported the Vice-Chancellor's order allowing the demurrer, and referred to *Rea v. Delacai*, 3 Burr. 1434; *Claridge v. Hoare*, 14 Ves. 59; *Bodly v. —*, 2 Ch. Ca. 15; *Whaley v. Norton*, 1 Vern. 482; *Priest v. Parrot*, 2 Ves. 160; *Bainham v. Manning*, 2 Vern. 242; *Spicer v. Hayward*, Prec. in Chan. 114; *Dillon v. Jones*, 5 Ves. 290; *Smythe v. Griffin*, 13 Sim. 245 & 1 Phil.; *Armandale v. Harris*, 2 P. Wms. 432; *Hall v. Palmer*, 3 Harl. 532; *Clarke v. Periam*, 2 Atk. 336; *Matthew v. Hambury*, 2 Vern. 187; *Robinson v. Cox*, 9 Mod. 263; *Gray v. Rooke*, Forest. Ca. t. Talb. 153; *Hill v. Spencer*, Amb. 641; *Gray v. Matthias*, 5 Ves. 286; *St. John v. St. John*, 11 Ves. 535; *Harrington v. Duchatel*, 1 Bro. C. C. 124; *Neville v. Wilkinson*, 1 Bro. C. C. 543.

*Wood*, in reply, referred to Mit. Pl. 4th edit. 185.

## JUDGMENT.

THE LORD CHANCELLOR.—It appears to me that this demurrer must be overruled, both on principle and authority. The plaintiff coming here for discovery, one question which has been raised by the defendant is, whether the matter referred to as a ground of defence is good at law or not. This point, I think, is quite clear, and therefore cannot consent, on the suggestion that it may open to doubt, to send it for the determination of a Court of law. It is competent to any one who is sued at law on a deed, to shew that it is founded on an invalid consideration. This is laid down in *Collins v. Blantem*, 2 Wils. 341, and other cases. The bill in the present case states with sufficient clearness, the defence proposed to be set up, and shewing that there is a good defence at law, it seeks discovery with respect to it, the defence being that the consideration for the deed on which the plaintiff is sued is an immoral consideration. Any objection, therefore, to the discovery, founded on the alleged insufficiency of the allegations in the bill, must, I think, fail. A good deal has been said as to the principle to be applied to cases of this kind, and as to how far a defence of the nature just referred to should be favoured. It must, however, be inferred that the law in sanctioning such a defence, does not do so out of favour to the party urging it, but on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection. It is very easy to see the evil which would arise from allowing bonds in cases similar to the present; and that there is a wide difference between a man binding himself to make a compensation for the enjoyment of such an intercourse as that which comes under notice here, and from upholding contracts made in contemplation of such intercourse. It is also of great importance to public morality that those entering into such contracts should not in any way be made subjects of sympathy and pity. It is not, however, necessary to deal with this view of the matter, as the authorities are quite sufficient to decide the case. It is said that the Court will not afford relief against a bond of the description referred to; but I need not enter into this question, as it is only used as the foundation for the next position, namely, that this Court will not in a like case grant discovery. Now, however similar bills for relief and discovery and for discovery alone may be, yet there is in many respects a clear distinction between discovery and relief, and among others in that which we have to do in the present case. The defendant here is seeking to keep from the court of law facts which the plaintiff in equity alleges are necessary for his de-

fence, and necessary for the court of law to know in order to a due performance of its duty. Suppose this had been the case of the party coming for relief here instead of at law, the defendant would clearly have been entitled to discovery; and he is equally entitled in aid of his defence at law. As the case of *France v. Bolton* was read in the argument, sufficient attention was not paid to the concluding sentence of the judgment, which explains why the discovery was not there given; it was because the discovery sought would have exposed the party to penalties. All the cases shew, that though a bill for a discovery and relief founded on a contract such as that under consideration, might have been demurrable, yet that to a bill for discovery alone, a demurrer would not lie. There is in the bill here no allegation as to which the defendant by answering could subject himself to any penalty. The case is that of a bond given to a trustee for a woman, the transaction being an arrangement with the woman for future illicit cohabitation, and the woman, by her trustee, now seeking to enforce the bond at law. Even if the trustee knew the real nature of the agreement upon which the bond was given, who can say that being a trustee under these circumstances would expose him to any penalty? When a defendant is sued at law, and has a good defence founded on the illegal nature of the contract, he has a right to a discovery to establish that defence, unless there are special circumstances of exemption. There are none such in this case, and the demurrer must be overruled.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

April 16, 17, and 23.

Re GEDYE.

*Costs—Taxation—Unsigned Bill—Delivery of—Special circumstances—Stat. 6 & 7 Vict. c. 76.* Where a solicitor delivers an unsigned bill of costs to his client, he cannot take advantage of the want of signature to withdraw the bill if the client should require it to be taxed, and then deliver a signed bill; but the client who receives an unsigned bill of costs, has a right either to treat it as a nullity, or mere piece of waste paper, or to take it as a bill delivered under the authority of the statute, according as it may suit his purpose to consider it, the provision of the statute respecting signature being intended for the protection of the client, which he has the option to insist upon or not as he pleases. Where, however, the client treats an unsigned bill in the first instance as a duly signed bill, and finds afterwards that it does not answer his purpose so to do, he cannot then turn round and treat the bill as a nullity; he cannot first treat it one way, and then, if that does not answer, treat it in another, but must abide by the election he makes in the first instance. Where an unsigned bill is delivered, if the client obtains an order of course for taxation thereof, he thereby elects to treat it as a bill delivered under the authority of the statute; but semble the proper course in such a case, is to apply for an order of course for delivery of his solicitor's bill of costs, and for taxation thereof.

Where the client being himself a solicitor, and conducting or assisting in conducting his own business under terms of agreement with the actual solicitor in the cause, to assist him generally in that particular department of his business, makes a mistake with respect to practice, he cannot throw the consequences of it on the actual solicitor in the cause.

Under such circumstances, therefore, an amended bill being by mistake filed as an original bill, the actual solicitor was held not liable to the costs of taking it off the file for irregularity; and shorthand writers' notes, the taking of which the client had suggested, and had referred to, and had also used in getting up instructions for counsel, were held properly chargeable against the client.

This was an application to the Court for the taxation of five bills of costs for business done in the suit of *Toulmin v. Copland*, for the principal plaintiff Mrs. Toulmin. There were also two other bills delivered subsequently to the former, which the petitioner sought to have taxed, but upon which no question arose. It appeared that Mr. Toulmin (who was the son of the plaintiff Mrs. Toulmin) had acted originally as solicitor for the plaintiff, and continued so to do down to the year 1844, when he sold his business to the respondent, Mr. Gedye, it being agreed between them at the time of sale, and as one of the conditions thereof, that Mr. Toulmin should manage the business relating to Chancery matters, and particularly to this suit of *Toulmin v. Copland*. He did accordingly continue to manage the business and attended to the suit of *Toulmin v. Copland* down to its close. Mr. Gedye delivered the five bills of costs in question to Mr. Toulmin some time, how long it did not clearly appear, before August 1849, and in January 1850

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these bills were delivered by Mr. Toulmin to Mrs. Toulmin. On the 21st of November, 1850, an order of course was obtained for taxation of the bills, and this would have been quite regular if the delivery in January 1850 was to be considered the first delivery to Mrs. Toulmin; but it was insisted by Mr. Gedye that the delivery before August 1849 to Mr. Toulmin was a delivery to him as the agent of his mother, and consequently that the order of course, being obtained more than a year after delivery of the bills, was irregular. An application was accordingly made to discharge the order, and on the 29th of January last Lord Langdale discharged the order, on the ground that Mr. Toulmin was to be considered the agent of Mrs. Toulmin, and delivery to him was equivalent to delivery to her. On the 4th of July, 1850, Mrs. Toulmin died, and on the 20th of February last the present petition was presented for taxation of the bills, and the grounds relied upon were, first, that the bills were unsigned, and therefore that the clients were entitled to have them taxed, though they should not make out any such special circumstances as would be requisite in the case of a bill signed under the Act; and, secondly, special circumstances. As to these latter, two only were stated; one of them being that an amended supplemental bill in the cause of *Toulmin v. Copland* was, by mistake, filed as an original bill; the other that had reference to short-hand writers' notes taken in the same cause. With regard to the first, it was answered that Mr. Toulmin himself, with Mr. Lott, Mr. Gedye's clerk, had charge of the cause; and as to the latter, the notes were taken at the suggestion of Mr. Toulmin, who referred to them, and used them in preparing instructions for counsel. Under these circumstances the petition now came on to be heard.

*Freeling*, for the petitioners, contended, that as Mr. Toulmin alleged he had no authority to receive the bills for Mrs. Toulmin, and that she, so far as he was aware, did not know of the delivery, she ought not to be bound; but if that should not be conceded, then he contended the special circumstances justified taxation. He cited *Re Pender*, 2 Phill. 69; *S. C.* 8 Beav. 299; *Billing v. Coppock*, 1 Ex. 14; *Re Bagshawe*, 2 Delg. & Sm. 205.

*R. Palmer and Welford*, contra, cited *Re Harpur*, 10 Beav. 284; *Smith v. Earl of Effingham*, 10 Beav. 378; *Robinson v. Rowland*, 6 Dowl. 271.

THE MASTER OF THE ROLLS.—In this case Mr. Toulmin applies to me for the taxation of five bills of costs for business done in the suit of *Toulmin v. Copland*, for Mrs. Toulmin, which the plaintiff delivered to Mr. Toulmin before August 1849. There were two other bills delivered at a later period, but as nothing turns upon them, I shall not refer to them, in stating the grounds of the decision to which I have come. Mr. Toulmin, to whom they were delivered, was not the plaintiff in the suit, nor was he the client of Mr. Gedye; and, therefore, unless Mr. Toulmin was the agent for one of the plaintiffs to accept the delivery of the bills, an order for taxation would have been a matter of course; and accordingly on the 21st of November, 1850, an order was obtained as of course, on the ground that the bill was not delivered to Mr. Toulmin as the agent of any one of the plaintiffs. An application was made to discharge this order before Lord Langdale, and Lord Langdale made an order discharging the order of course on the 29th of January, 1851, and he made it on the ground that the delivery was a good one, because, at the time of the delivery of the bill, Mr. Toulmin was agent of Mrs. Toulmin, the substantial plaintiff in the cause, and that the delivery to him was equivalent to a delivery to her. I must, then, throughout the whole of this case, consider that the delivery before August 1849 was a good delivery of these five bills to the plaintiff. On the 20th February, 1851, this petition was presented for taxation of these five bills of costs, and the grounds upon which the application is made may, I think, be divided into two. One, that which I take the first, was, that the bills are unsigned, and that the clients are entitled to taxation, although they should not make out any such special circumstances as would be requisite in the case of a bill signed under the Act; and secondly, that, taking the bill as one to which the provisions of the statute apply, the petitioner has proved such special circumstances as entitle him to have the bill taxed. In support of the first ground, it was urged that both reason and the principles of equity, and all the decided cases also settled, that the solicitor who delivers an unsigned bill shall not take advantage of this defect,—that he cannot deliver an unsigned bill, and take the chance of its being paid; and that then, if the client requires it to be taxed, it does not lie in the mouth of that solicitor to say, "This bill is a mere nullity, and I will now deliver you the real bill of costs;" and the case of *Re Pender* is cited, both in this court and before the Lord Chancellor, as an authority for this proposition. I concur fully in that view of the case, but it remains to be considered whether this view of the case will entitle the petitioner to have an order for the taxation of this bill. Now, I think it will not. The client, who receives an unsigned bill of costs, has, I

apprehend, at the utmost, a right to take it as a nullity or as a bill delivered under the authority of the statute. He may possibly, wholly disregarding its existence, say: "This bill is nothing at all, it is a mere piece of waste paper, not being signed by you, as required by the statute, it is not necessary for me to take any notice of it whatever." And as the solicitor can bring no action whatever upon the bill, the client, except upon the question for the delivery of papers (on which I will say a word presently), may treat it as a mere nullity. On the other hand, that case of *Re Pender*, since settled, that he may, if he pleases, treat it as a bill duly signed by the solicitor under the statute; that is to say, that the solicitor, by delivery of an unsigned bill, does, in truth, give his client an option either to treat the matter as a nullity, or to treat it as a bill properly delivered under the statute. Now, I apprehend the case of *Re Pender* does not, nor does any principle of equity entitle the client to consider this, that he is entitled to treat the bill first in one way, then in another, if the first does not suit his purpose,—that he cannot, for instance, first treat it as a duly signed bill, then if he finds that it does not answer his purpose treat it as a nullity. I apprehend they ought to have applied for the order of course for the delivery and taxation of the bill of costs; but, instead of doing that, they have treated it as a bill properly delivered under the statute. They have applied for an order of course for the taxation of it; and that being discharged, they have applied for an order to tax it under special circumstances. That appears to me to be a course inconsistent with treating it as a bill duly signed; and, considering that the client has a right, if he thinks fit, to waive the formality of the signature of the solicitor; it appears to me that he has, by the steps he has taken in this case, waived that formality, and treated it as a bill duly signed under the statute. It was urged by Mr. Freeling, who argued the case, certainly with great ability, that though the want of signature to the bill was not to be trusted if it did not treat the bill as a mere nullity, yet, that it might be treated as a special circumstance to induce the Court to open the taxation of the bill. I am of opinion that that argument cannot be justly followed. The want of signature cannot, I think, be treated as a special circumstance, because the statute provides that the bill, being a signed bill, it provides that certain special circumstances shall be proved, in order to induce the Court to admit the taxation of that bill. The want of signature to the bill cannot be treated as one of those special circumstances, for the very purpose is, that the bill is to be treated as a bill properly delivered under the authority of the statute. I am not therefore able to follow any reasoning, that considers that the mere want of signature to the bill is to be treated as a special circumstance, for the purpose of inducing the Court to make an order for the taxation. The result is that I am obliged, in my opinion, not to regard that first argument, which is brought forward for the taxation of the bill, but that I must treat this as if it were a bill properly delivered and properly signed according to the statute, and see whether, in the special circumstances that are alleged, there are any reasons whatever for inducing this Court to direct a taxation. The first circumstance that I should wish to have explained, and upon which I find no satisfactory explanation, is the lapse of time that has occurred. The bills were delivered—the exact date is not ascertained—but delivered certainly before August, 1849; this petition is not presented till the 20th or 21st of February, 1851. No step whatever is taken on this subject for upwards of a year. The order, of course, for taxation is not obtained till November, 1850. I was referred to the correspondence, as affording reasons to explain this loss of time; but the correspondence does not, in my opinion, appear to afford any satisfactory explanation. The correspondence consists of nothing more than in making complaints respecting certain items in the bills of costs, which are defended by Mr. Gedye, to whom they are applied. Since November, 1850, the pending proceedings have been alleged as an excuse for the time that has elapsed; but I think that the delay which has taken place before that is not sufficiently accounted for. Then I have to look at the particular special circumstances in the way of overcharges which are brought forward as reasons for requiring these bills to be taxed. My attention has only been directed to two specially—assuming, I presume, that if those do not entitle the petitioners to obtain the order required, the others would fail of so doing. I have only therefore directed my attention to those two particular items which were urged before me. One is, that in consequence of filing an amended supplemental bill, as if it had been an original bill, a motion was made to take that bill off the file, and costs to the amount of 31*l.* were incurred—that this is negligence on the part of the solicitor which he is not entitled to charge against the client. The facts relating to this matter are very clearly detailed in the affidavits, and it appears to me, taking the whole of the affidavits together, to be without any contradiction. It

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appears that Mr. Toulmin delivered the bill to Mr. Lott, the clerk of Mr. Gedye, to file, without mentioning that it was an amended bill. He assumed, and believed, I have no doubt, that that was the fact; that Mr. Lott, from his being constantly at the office, would know what had been going on, and would know that the bill was an amended one. Mr. Lott was not aware of the fact; he filed the bill as an original bill; the consequence was, that the costs of the motion were incurred. It becomes very material to consider what the position of Mr. Toulmin was with regard to Mr. Gedye. It was argued by Mr. Freeling, and I think with reason, that if a solicitor is asked by his client to take an improper step, and that that improper step creates costs, the solicitor cannot exonerate himself from the costs which he has incurred by his negligence, because the client would be naturally supposed to be ignorant of legal proceedings, and it was his duty to call his attention to that circumstance; and, without disputing that proposition, it remains to be seen how far it is applicable to this case. Till the year 1844 Mr. Toulmin was the solicitor of Mrs. Toulmin in this case. After that period he sold his business to Mr. Gedye, and it was part of the conditions of the sale that he should transact the business relating to the Chancery matters, and particularly to this suit of *Toulmin v. Copland*. He did so continue to manage it during the whole of that time. Lord Langdale, in dismissing the order for taxation, had decided that previously to the year 1849, without deciding when Mr. Toulmin was the agent of Mrs. Toulmin, he had been her solicitor down to the time when he sold this business. I am unable to find out from the affidavits any period at which the agency can be said to have ceased, and I think I must treat Mr. Toulmin as the agent of Mrs. Toulmin throughout the whole of this transaction. I therefore look at the case in the same manner as if Mr. Toulmin had been the client himself. Now, concurring in the view that Mr. Freeling stated, or at least did not dissent from, as to the duty towards a client which attaches to a solicitor, it does strike me that if the client, being himself a solicitor, who conducts or assists in conducting his own business, but under such terms of agreement as those which I have referred to as existing between Gedye and Toulmin, makes a mistake with respect to practice, he cannot throw the consequences of that mistake upon the gentleman who really was the actual solicitor in the case; and in this case, assuming that there was a mistake made, it does not appear to me that Mr. Gedye, who really knew nothing at all about the matter, who trusted the whole matter to Mr. Toulmin himself, can himself be considered as the person liable for that mistake. There was possibly some little blame upon both sides. I am far from saying Mr. Toulmin was solely the cause of the mistake, or that Mr. Lott was solely the cause of the mistake; but I think that Mr. Gedye cannot be made answerable in respect of this matter. The only other item I am referred to is the short-hand writer's notes. With respect to the item of the short-hand writer's notes, I think I am correct when I state that in Mr. Lott's affidavit, in answer to the affidavit complaining of this item, amongst other things he states that these notes were made at the suggestion of Mr. Toulmin; that Mr. Toulmin referred to them as important in the observations which he made to counsel in the case, and that no answer whatever, no reply whatever, is given to that observation. Taking that, therefore, as uncontradicted, whatever might be the propriety independently of this item, I think that this item is not one which I can consider as an overcharge, or one on the ground of which I ought to allow this bill to be taxed. It is not necessary for me to go into any further consideration as to whether, if these items had been proved, these overcharges would have been sufficient to cause the bill to be taxed. It is not necessary to go into that question, or to determine anything upon the subject. Under the circumstances of this case, I think they are not such as will entitle the petitioners to have this bill taxed. I think the time being unaccounted for will not allow me to have this bill taxed. I cannot concur in the observation, that the fact of the bill being unsigned, and the manner in which it has been treated by the petitioners, ever can entitle them to obtain an order for taxation of this bill. The result of it is, that looking at it in every point of view, I think the petitioners are not entitled to the order they ask, and that the petition must be dismissed, and dismissed with costs.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple, Barrister-at-Law.

Saturday, June 7.

Re THE 10 AND 11 VICT. c. 96, AND THE TRUSTS OF THE WILL OF P. J. A. MARSHALL, DECEASED.  
*Trustees Relief Act—Administration.*  
Upon a petition under the above Act, for distribution of a fund representing a testator's residuary estate subject to two legacies, the fund having

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been paid into court by the executors, the Court declined to make the order asked, and directed that the petition should stand over, with leave to file a claim for administration.

This was a petition by the persons entitled in reversion shares to the residuary personal estate of the late Jacques Ambroise Masselin, who died on the 14th of September, 1849, praying that certain sums stock (which, subject to two legacies of 10*l.* each the two executors, represented the residuary personal estate of the testator, and which had been transferred into court under the 10 & 11 Vict. c. 96) might be sold, and that out of the produce the two legacies of 10*l.* and the costs, charges, and expenses the petitioners, when taxed, might be paid, and at out of the residue the shares of the adult petitioners might be paid to them respectively, and the shares of the infant petitioners might be carried to their respective accounts.

Lewis appeared for the petitioners.

Appack for the executors.

The VICE-CHANCELLOR said, that he thought an administration decree could not be made upon a petition under this Act, and directed the petition to stand over, with liberty to file a claim or take any other proper proceeding for administering the testator's estate, such claim to come on with the petition.

## C. LORD CRANWORTH'S COURT.

Reported by W. H. BURNETT, Esq. of Lincoln's-inn, Barrister-at-Law.

Thursday, June 5.

THE DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON RAILWAY COMPANY, AND THE WINDING-UP ACTS 1848 AND 1849.

HUNTER'S CASE.

Costs—Contributory—Call.

The Master cannot make an order for a call on the contributories for, or on account of, the costs of winding-up the affairs of an association, until he has ascertained that the sum for which he is making the call, is costs for which (in the distribution of the costs among the different parties) the persons on whom the call is made are respectively liable.

The official manager is not entitled to any costs until the whole of the liabilities have been ascertained and apportioned.

This was an appeal motion against an order made the Master (Brougham) for a call on the contributories to raise a sum of 800*l.* towards payment the costs of the official manager incurred towards winding-up the affairs of this abandoned association.

The affidavit of the official manager made to induce the Master to make the call, stated, "that he is duly appointed by an order of the Master of the 14th day of January, 1850. That at the time of his pointment there was no money whatever which came to his hands as such official manager, nor had at any time since received any money or payment account thereof. That the settlement of the list contributories had been strongly contested, and had given rise to many appeals to the Court, and to an appeal to the House of Lords, in Uppill's case. That he had incurred expenses in the proper discharge of his duties as official manager to a large amount, and amongst others that there was due from him to his solicitor, for his costs and disbursements in and about the winding-up, a sum exceeding 1,180*l.*, and that there was also due to him (the official manager) for his own costs and charges and disbursements the sum of 700*l.* or thereabouts, making together 1,880*l.* That orders had been made by the Court for payment by him out of the estate of the company in several cases, amounting to 3*l.* 11*s.* 6*d.* That in his judgment a call of 12*s.* 6*d.* per share would realise more than 800*l.* and that such an amount at the least ought to be raised." On an affidavit the Master had directed a call of 12*s.* 6*d.* per share on the several contributories who were on the list as settled by him. The order recited that the Master found that it would be necessary, and he thought it proper to raise the sum of 800*l.* towards the payment of the costs already ordered by the Court to be paid by the official manager out of the estate of this company, and the costs and disbursements which had been already properly incurred by the said official manager. As Mr. Hunter, the appellant, was residing in Dublin, a separate order was made on him; made in respect of his shares.

Roll and Shapter, in support of the appeal motion, contended that the judgment in *Besley's* case (7 Law T. 137), was precisely in point, and that the Master, under the sections of the Winding-up Act, had no authority to make any call for costs until he had first ascertained the particular liabilities of each particular contributory in respect of the debts and liabilities of the contemplated company. It might so happen that there was not a single debt or liability to which the appellant (Mr. Hunter) could be answerable. And was the official manager to use the power of the Court to indemnify him-

self for costs and relieve himself from responsibility at the expense of parties who might be wholly innocent?

Rosburgh (Bethell with him), for the official manager, contended that the Master had full power in the exercise of the discretion referred to in the clauses of the Acts of Parliament to make orders for calls in respect of the necessary costs of winding up the affairs of the company, a duty which had been imposed upon the official manager by the Legislature, and that he might do so from time to time as occasion required. That the jurisdiction of the Master to make such a call had been fully recognised in the Court of V. C. Knight Bruce. (*Ex parte Price and Evans in the Rugby, Warwick, and Worcester Railway Company*, 17 Law T. 58.) That it was the Master who put the names of the contributories upon the list, and not the official manager; and that much of these costs had been incurred by virtue of the requisitions of the Act of Parliament. That in the present case Mr. Hunter had appealed from the order placing him upon the list of contributories, which appeal was, however, unsuccessful, and his name ordered to be continued on the list of contributories by the order of this Court.

The following are the clauses of the Acts of Parliament upon which the Master and the official manager had relied. (a)

## JUDGMENT.

The VICE-CHANCELLOR.—I need not trouble you, Mr. Roll. I am very sorry for the official manager in this case; but I cannot help it. It is in the official managers' own option whether they undertake the duty. In my opinion, I may be wrong, but it seems to be a corollary from the other principle, to which I have in my mind arrived. I am of opinion that before the Master, in the exercise of his discretion, can make a call for costs, he must have ascertained at least this,—that the very sum for which he is making the call is costs for which (in the distribution of the costs among the different parties) the persons on whom the call is made are liable. Now, it does not at all follow that because there has been 2,300*l.* costs incurred, 800*l.* is a portion in respect of which this gentleman may have to contribute. It is not necessary for me to go further than that at the present moment, because the Master has only said there will certainly be 800*l.* of costs, and he has made a call in respect of that. I very much doubt whether any call for costs can, according to the true construction of this Act of Parliament, be made till the amount of the debts to which each respective party is liable (which in the winding up of a company of this sort is really in respect of the debt to which each party is liable) has been ascertained; because what the Master has to do is,—he is to make a call it is true, not only for the debts of the company, but also for the costs; but he is to make a call

(a) Sec. 83, 11 & 12 Vict. c. 45.—And be it enacted, that at any time before the whole of the assets of such company shall have been collected or converted, and if the assets remaining to be collected or converted shall not be capable of being immediately realised, although such assets may not appear to be insufficient, and also after the assets of the company shall have been wholly exhausted, it shall be lawful for the Master from time to time, to make calls on the contributories, or on such individual contributories, or classes of contributories, as he may think proper (but so far only as such contributories respectively shall be liable at law or in equity to pay the same) as well for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such company, or any part thereof, or the costs, charges, and expenses of winding up the same, as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the company, whether such claims shall have arisen since or before the date of the petition for dissolution and winding up, as the case may be, and the amount to be raised by means of such calls, and also the residue of the assets and estate of the company, after the payment of all debts and liabilities, costs, charges, and expenses shall be paid and distributed by the official manager, under the direction of the Master so and in such manner as shall (as far as possible) satisfy all such claims, and shall finally wind up and settle the affairs of the company.

Sec. 12, 13 & 13 Vict. c. 106.—And be it enacted, that the costs of all proceedings which shall take place in and about the winding up, as to which the Court shall have made no order, shall be in the discretion of the Master, and that it shall be lawful for the Master to award a single sum or fee for any costs awarded by him, or otherwise, to settle the principle and the scale of fees upon, or according to which such costs shall be ascertained and settled.

Sec. 28, 13 & 13 Vict. c. 106.—And be it enacted, that so much of the said recited Act as is contained in the section thereof numbered 84 in the copy of the said Act, printed by the Queen's printer, shall be, and the same is hereby repealed, and, in lieu thereof, that when the Master shall think proper to raise any money by means of a call, he shall make such call from time to time upon the contributories of the company, or any of them appearing for the time being upon the list of contributories, although it may then be under consideration, or uncertain whether other persons ought, or ought not, to be included in the list; and in making any such call, it shall be lawful for the Master to fix such an amount per share for the same as shall, in his judgment, be likely to supply and bring in the whole sum for the time being intended to be raised, after taking into consideration the probability that some of the contributories upon whom the said call should be made, should partly or wholly fail to pay their respective proportions of the same.

in respect of the costs as well as the debts, so far, only, as the contributories shall be liable at law or in equity to pay the same. Strictly at law these costs would not be payable. It may be the legal consequence of the Act of Parliament, but it is rather the result of this Act which makes him subject to these costs. Then comes the 103rd section, which states this: "That the general costs of winding-up the estate and the costs of proving debts and trying issues, and of all other matters in which creditors or any particular contributory, or classes of contributories, or alleged contributories of such company, shall be interested, shall be in the discretion of the Master. Surely it is one ingredient in the exercise of that discretion, that the Master should find that Mr. Hunter belongs to a class, the whole of which is together liable only for a call of 5*l.* Mr. Somebody else belongs to a class, some of which are liable to 5,000*l.* Surely the Master has not proper data on which to exercise his discretion, till he has ascertained the fact one way or the other, how that is. It is a very unfortunate case to have to deal with; but an official manager, in a case of this sort, in a winding-up of what I have had occasion so often to repeat, that I am sorry to repeat it again, is quite erroneously called a company, to wind-up the affairs of twenty or thirty individuals, each liable to different debts. The official manager that undertakes to wind-up any concern of that sort necessarily undertakes a most onerous business, because I do not see how he can get any costs until the whole of the liabilities have been ascertained and apportioned. Till the apportionment has been made I cannot see how the Master can justly make Mr. Hunter liable to any particular amount of costs. It seems to me that the Master must proceed a great deal further, to ascertain accurately what each party is liable to; or at all events to ascertain that the party belongs to a class, in respect of which class a given quantity of costs are clearly to be apportioned. Till that is done I do not think that the Master can make reasonably any call for costs on any of the contributories. I must add further, it is quite a problem unsolvable by me, why a man is liable to more because he has a hundred shares than if he has fifty. These are not costs incurred in respect of the company; these are costs incurred, because the taking of the 100 shares was considered by the House of Lords, coupled with the fact of his being a provisional committeeman—taking these two facts together, to amount to an authority to incur costs on his account. If that be the principle, I do not see why taking the 100 shares differs the liability from that of taking 50. You make the parties your agents for incurring the actual costs, which are, after that authority, incurred by the provisional committee. But this is a speculation that I need not go into in the present case. The ground on which I rest my judgment is, that until it is ascertained that these costs are incurred in respect of some liability which attaches on this gentleman personally, or upon the class of which he is a member on the list of contributories, no order can be made for a call for costs any more than for any other contribution.

Roll.—Your lordship discharges the order, and the usual order is made for costs. I think that the form of the order is, that the costs of this application and the costs before the Master, be paid by the official manager, and he takes his costs out of the estate.

At the conclusion of the argument the VICE-CHANCELLOR said—It does not appear to me that that case before the Vice-Chancellor Knight Bruce at all governs this, because there the Master had ascertained, as I collect, that these parties came within a particular class of contributories, namely, parties who had been receiving sums of money back in respect of their script, and that seems to me to have been an ingredient that mainly influenced the mind of the Vice-Chancellor Knight Bruce, and that probably might have made the order quite right.

Order discharging the Master's order for a call, the costs of the application, and before the Master, to be paid by the official manager out of the estate.

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

May 3 and 9, and June 3.

WAYNE v. HANHAM.

Mortgagor—Mortgage of reversionary interest in Stock—Foreclosure decree.

In a suit by a first mortgagee of a reversionary interest in stock, the proper decree is the common decree for foreclosure in default of payment at a day named. There is no rule or practice of the Court which compels a mortgagee to submit to a sale.

This was a foreclosure suit. The bill stated that James Morgan by his will gave to his three executrixes and daughters, Elizabeth Morgan, Mary Morgan, and Harriet Morgan, 10,000*l.* and 10,000*l.* both of Reduced Annuities, in trust to pay the dividends

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to Sarah Giles, a married lady, for her separate use for life, and after her death, as to both sums, in trust that they should fall into the residue of his personal estate; and he bequeathed to his three daughters all the residue of his personal estate and effects, moneys in the funds, and property whatsoever, to hold the same equally between them, their executors, administrators, and assigns; and in case either of them should die in his lifetime, then the share or shares of them or her so dying to the others or other of them equally to be divided between them, and he appointed them executrixes. The testator died in 1810, leaving Mrs. Giles and all the daughters surviving, who proved the will, and after selling out sufficient to pay the legacy duty, they transferred 9,900*l.* and 9,900*l.* Reduced Annuities into their names, and paid the dividends from time to time to Mrs. Giles. In the month of November 1823, Harriet Morgan married Sir Wm. Hanham, bart. but no settlement was made of her share. She died in 1838, and her husband took out administration. In 1840, Sir Wm. Hanham borrowed 2,000*l.* of Mr. Wm. Foskett; and by deed dated 7th of December in that year he assigned all that the equal third part or share to which he was entitled in the two sums and in the dividends thereof from and after the death of Mrs. Giles, with a proviso for redemption on payment of 2,000*l.* with interest on the 7th of June, 1841, with a power of sale in case of default. The money was not paid, and a large arrear accrued. Mr. Foskett, by his will appointed his wife Charlotte Foskett and W. L. Bicknell executrix and executor, and subsequently by a codicil appointed the Rev. W. H. Wayne executor in lieu of Mr. Bicknell. Mr. Foskett died in 1843, and his widow and Mr. Wayne proved the will. The bill filed in 1849 stated that Mrs. Giles was still living, and that the plaintiffs, who were the executor and executrix of Mr. Foskett, being desirous of winding up the estate, gave Sir Wm. Hanham notice to pay, but he having failed to do so they attempted, without success, to sell the reversionary interest mortgaged by auction. The defendants were Sir Wm. Hanham, and W. Jeans and Henry Treasure Jenkins, mortgagees of the same interest. The bill prayed an account of principal and interest due to the plaintiffs, and payment, with costs, by a short day, and in default for foreclosure. The defendants, Jeans and Jenkins, by their answer, stated in the mortgage to them of the same property, dated in 1843, for securing 4,000*l.* which, with an arrear of interest, was due to their testator Mr. Bowden; they admitted their security to be subsequent to the plaintiff's mortgage, but submitted whether the same ought to be postponed. The cause was heard on 3rd of May, on bill, answer, and admissions, when a decree was made for an account of principal and interest due to the plaintiffs, and for a sale of the reversionary interest of Sir Wm. Hanham, with liberty for the defendants, Jeans and Jenkins, to bid. The bill was taken *pro confesso* against Sir Wm. Hanham.

*Friday, May 9th.*—*Kenyon Parker and Hetherington*, for the plaintiffs, stated that the form of decree taken being for a sale instead of a foreclosure, as prayed by the bill, was an error, and asked for an alteration by the substitution of foreclosure. They referred to the case of *Slade v. Rigg*, 3 Hare, 55, as shewing that the point had been settled.

*Freeing*, in support of the decree, cited Seton on Decrees, and relied on the cases of *Dyson v. Morris*, 1 Hare, 422; and *Duncan v. Chambers*, 11 Sim. 123.

*Tuesday, June 3.*—*THE VICE-CHANCELLOR.*—The question in this case is, what is the proper form of decree on a bill for foreclosure by a mortgagee of a reversionary interest in a sum of stock? Whether, on default of payment, the decree should be direct foreclosure or sale? The plaintiff, the first mortgagee, desires a decree of foreclosure, the defendants, the mortgagor, and a second mortgagee, insist upon a decree for sale. In the case of *Ponten v. Page*, 1 Madd. 529, which was the case of a mortgage of a reversionary interest in stock, the decree was for a sale in default of payment. I have been furnished with a copy of that decree, and it directs the accounts to be taken, and in default of payment a sale reserving further directions and costs; but in *Slade v. Rigg*, 3 Hare, 38, Vice-Chancellor Wigram held that a mortgagee of a reversionary interest in stock was entitled to the common decree for foreclosure in default of payment. There is no inconsistency between these decisions. It does not appear that the decree in *Ponten v. Page* was made adversely to the plaintiff, the mortgagee, whether it was so or not. I am of opinion that the proper form of decree is that which was adopted in *Slade v. Rigg*. No doubt in such a mortgage, as well as in every other, the mortgagor has a right to redeem. The purpose of a decree of foreclosure is to exclude that right, and unless by the established rule of practice of the Court the proper mode of excluding that right is by directing a sale, I think it must be excluded according to the ordinary method of the Court by foreclosure. The mortgagee may in such cases, and in some

others, be entitled to a sale, but I do not find any rule or practice of the Court which compels him to submit to it. On the contrary in those cases in which a decree for sale is made at the instance of the mortgagee, the sale seems to depend more on the will of the mortgagee than on the right of the mortgagor. A remarkable example of this occurs in the Irish cases, where, although in suits for foreclosure the decree is uniformly for a sale, it is held that the mortgagee cannot maintain a bill for a sale, but only for redemption as in *Drew v. O'Hara*, 2 Ball & B. 562, n. (b); *McDonough v. Shevbridge*, ib. 555. I fully concur in the observations of Vice-Chancellor Wigram as to what justice in such cases requires. I think there must be the common decree for an account and for foreclosure.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL FARNELL,  
Esqrs. Barristers-at-Law.

Saturday, May 31.

REG. v. HELLIER.

*Conviction—Licensing Act—Order of Sessions for Costs—Removal into this court—Setting aside proceedings.*

*Stat. 9 Geo. 4, c. 61, s. 29, is repealed by 11 & 12 Vict. c. 43, s. 27, as to the mode in which costs may be ordered to be paid by the appellant upon confirmation of a conviction by the Sessions.*

*If an order of Sessions, bad upon the face of it, is removed into this court under 12 & 13 Vict. c. 45, s. 18, and a writ of *fi. fa.* issued thereon, and the party against whom the writ is issued is not guilty of laches, the Court will, upon his application, set aside the proceedings in this court subsequent to the removal and order the money levied to be returned, although the applicant could not have removed the order of Sessions by certiorari for the purpose of quashing it.*

This was a rule to shew cause why a conviction by three justices under 9 Geo. 4, c. 61, an order of Sessions confirming the same, an order of this Court removing the order of Sessions, and a writ of *fi. fa.* issued thereon, should not be set aside, and why the money levied should not be returned to the defendant.

It appeared that the defendant was convicted on the 30th of July, 1850; he appealed, and the Sessions, on the 15th Oct. confirmed the conviction, and ordered the defendant to pay the magistrates their costs. On the 19th November the defendant paid 10*l.* on account of the costs; but he not paying the remainder, the order of Sessions was removed, on the 8th February, 1851, into this court by order of a judge, under s. 18 of 12 & 13 Vict. c. 45. A writ of *fi. fa.* issued thereon, and the amount was levied on the 3rd March. On the 21st February application was made to a judge at chambers to stay proceedings, but that application was refused, and on the 9th May the present rule was obtained in the Bail Court.

*Butt and Fooks* shewed cause. 1. This application is too late, especially after the payment of 10*l.* on account. [ERLE, J. He only paid to avoid imprisonment. COLERIDGE, J.—He could not remove the conviction or order of Sessions by certiorari for the purpose of quashing them (s. 34 of 9 Geo. 4, c. 61); and he makes his application as soon as the other side have removed it.] Then, secondly, there is no ground for the application. The order of Sessions is made under s. 29 of 9 Geo. 4, c. 61; and that is not repealed by 11 & 12 Vict. c. 43, s. 27. The two statutes are not *in pari materia*; and the latter was not intended to repeal all former provisions as to the ordering payment of costs by a Court of Quarter Sessions. Even if it were so, it is not clear that this would not be a good order under the 11 & 12 Vict. c. 43, s. 27.

*Peacock*, contra, was stopped.

*PATTESON, J.*—The order of Sessions is properly brought up; and no objection can be made to the order of my brother Erle for removing it; because by the statute any order of Sessions may be brought up for the purpose of being enforced; but the question is as to the steps taken under it. The party affected by the order could not bring it up by certiorari, because the statute 9 Geo. 4, c. 61, expressly takes away that remedy; but then, if the other side choose to bring it up, and the order appears upon the face of it to be illegal, it is competent to the party affected by it to take the objection, and this Court ought to set aside the proceedings taken for the purpose of enforcing it; but we need not go further back. Now this order of Sessions is made under 9 Geo. 4, c. 61, s. 29, and if that section was still in force, the order would be valid; because it expressly says that the Sessions may order costs to be paid forthwith, and the party to be imprisoned until the costs are paid. Then has the 11 & 12 Vict. c. 43, s. 27, and the subsequent sections repealed the section of 9 Geo. 4, c. 61? I think it

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must be taken to have done so. The object of a statute seems to have been to make a general rule in all cases of convictions and orders of magistrates exercising summary jurisdiction and orders of Sessions on appeal therefrom; and the section expressly provides that the order of Sessions shall direct the costs to be paid in the first instance the clerk of the peace, to be handed over by him to the party entitled, and on a day to be specified in the order. Then the 36th section repeals many Acts by the title of them, and all parts of any other statutes inconsistent with that Act. Now the provision for payment of the costs to the clerk of the peace upon whose certificate, in case of non-payment, a warrant of distress, or commitment for a period exceeding three months may issue, seems to me to be quite inconsistent with the provision of the former statute for the payment of costs forthwith to the litigant party; and that in case of non-payment the offender should be sent to prison until he was paid. That being so, the section, under which the order was made, is repealed, and the order void. But it is said that the defendant here is to waive the objection. However, the only thing which gives any foundation for that point is the payment of 10*l.*; there has been no laches; and the party is not estopped by the payment, because it was made under an order, which said that if he did not pay, he was to be imprisoned; and he could hardly be expected to know that the order was unauthorized; so that, therefore, that the writ of *fi. fa.* should be set aside, and that the money levied under it should be returned; and the rule being absolute so far, no case ought to be brought.

*COLERIDGE, J.*—If the objection is available at all, it certainly is so now. Then is the defendant's liberty to object to the order of Sessions? I think that a rule to shew cause why the *fi. fa.* should be issued was necessary, would it not be good cause to shew that the order was invalid? This Court will certainly not lend its aid to enforce an invalid order, and will recall process obtained *ex parte*, when issued in support of an order which appears to be bad. I also think that the objection made to the order of Sessions is fatal. The provisions in the two statutes are inconsistent; and therefore the provision in the former statute is repealed.

*ERLE, J.*—The defendant had no power to bring the conviction or order of Sessions into this Court; but when it was brought here by the other side, he lost no time in taking the objection. Now, the section in 9 Geo. 4, c. 61 is repealed; instead of being paid to the respondent, the costs are to be paid to the clerk of the peace; and in default of payment, the appellant can only be sentenced to imprisonment for three months, whereas, by the former Act, he might be kept in perpetual imprisonment, if the costs were not paid. When the order is brought up to be enforced, our duty is to enforce the legal rights of the parties, and not to issue process upon an illegal order. The proceedings, therefore, in this case will be set aside, the money must be returned, and each party pay his own costs of this motion.

*Rule absolute accordingly.*

Monday, June 2.

REG. v. SCAIFE AND ANOTHER.

*Evidence—Absent Witness—Depositions.*  
*The deposition of a witness taken before a magistrate under the 11 & 12 Vict. c. 43, against an accused person is not admissible in evidence against that person, upon his trial upon an indictment, if the witness is absent, and cannot be procured to attend, or that he is kept out of the way by the procurement of some one other than the accused person himself.*

*Therefore, when, upon the trial of three persons for a larceny, it was shewn that a witness was kept away by the procurement of one of the prisoners, and the deposition of the absent witness was received in evidence generally against all the prisoners:*

*Held, that, as regards the two prisoners who did not procure the absence of the witness, the deposition was improperly admitted.*

This was indictment against Matthew Smith, Thomas Rooke, and John Smith, found at the Quarter Sessions for the borough of Kingston-upon-Hull, and removed into this court by certiorari. The indictment contained counts of its being stolen, a large sum of money, amounting to 18*l.* the property of Robert Brown. At the trial before Cresswell, J. at the last Assizes for the county of York, a witness of the name of Ann Garnett, who had been examined before the magistrates upon the committal of the prisoners to take their trial at the Hull Quarter Sessions, was not forthcoming. It was shewn that diligent search had been made for her, but that she could not be found, and some evidence was given which satisfied the learned judge that she had been got out of the way by the procurement of the prisoner Smith. Her deposition was taken before the magistrates was then tendered in evidence, but objected to by the prisoner's counsel as inadmissible.



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sible. The deposition had been properly taken in the mode prescribed by the stat. 11 & 12 Vict. c. 42, and the learned judge received it in evidence. Two of the prisoners, Scaife and Rooke, were found guilty, Smith was acquitted by the jury. It appeared that, in summing up the case, the jury, and throughout the trial the learned judge, treated the deposition as admitted in evidence generally, and drew no distinction between its admissibility against Smith, and its admissibility against the other two. In Easter Term the Court granted a rule nisi for a new trial, upon the ground of the misreception of evidence, against which

*Hunter* now shewed cause. The deposition of a witness who cannot be found after diligent search is in all cases admissible against the prisoner, if only it have been regularly taken. The prisoner must have had full power to cross-examine, and it is the same inquiry, and between the same parties, that is conducted at the trial as at the taking of the deposition. The principles of evidence are the same in criminal as in civil cases, and it is said in Godbolt's Reports, 326, Case No. 418, "And as it was further said by the Court, that if the party cannot find a witness, then he is, as it were, dead unto him, and his deposition in an English court in a cause betwixt the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavour to find the witness, and that he could not hear of him." (See also Comyn's Dig. Testimoigne, C. 4, Buller's N. P. 239, *Green v. Galewick*, Ibid. 243; 1 Taylor on Evid. 332.) It was ruled indeed in *Morley's case*, 6 How. St. Tr. 71; Kel. 55, S.C., that if a witness, who was examined by the coroner, were absent, and oath were made that they had used their endeavours to find him, and could not find him, the depositions could not be received, unless the judges were satisfied by the evidence that the witness was detained by means of the procurement of the prisoner, but in the case of a deposition taken before the coroner there would be no opportunity of cross-examination, and this rule itself seems to have been laid down out of mercy to the prisoner. Here, however, the witness was kept away by the procurement of the prisoners, and the deposition was (a) admissible upon that ground. (*Harrison's case*, 12 St. Tr. 852.) The sufficiency of the evidence of contrivance by the prisoner was entirely for the judge at the trial, and this Court will not now review his judgment upon that question. [Lord CAMPBELL, C.J.—The deposition was admitted generally as against all the prisoners. The judge did not direct the jury that the deposition of Ann Garnett was no evidence against either Scaife or Rooke.] The three were shown to be connected together, and the act of one, in keeping the witness away, was the act of all, on the ground of their being co-conspirators. [Lord CAMPBELL, C.J.—If that were so, the confession of one of them would have been evidence against the others. I do not see how the reception of the evidence can be supported upon the ground of contrivance. There still, however, remains the other ground.] The deposition of the witness was the best evidence of which the nature of the thing admitted. (He referred to *Reg. v. Hagen*, 8 Car. and P. 167; *Reg. v. Guttridge*, 9 Cas. and P. 473.)

*Deansley*, in support of the rule.—There was no evidence that the witness was kept away by the contrivance of either Scaife or Rooke, and therefore the deposition was not admissible in evidence against either of them. Then, as to the general proposition that wherever a witness cannot be found, his deposition is admissible, whatever may be the case in civil matters, it is certainly not true in criminal cases. There may be reasons for a distinction between the two, because in criminal causes there can be no bill of exceptions. In most cases the only mode in which a prisoner can shew his innocence is by the cross-examination of the witnesses for the prosecution. It is most important for him, therefore, that they should be personally examined. Before the committing magistrates he has very little opportunity of cross-examining, and in practice is always recommended, as well by his professional adviser as by the magistrates, to reserve that till his trial. There is no authority for admitting a deposition in evidence under such circumstances. On the contrary, all the text books treat the death of the witness and the procurement of his absence by the prisoner, as the only circumstance which will render his deposition receivable. (2 Russ. on Cr. 888.)

Lord CAMPBELL, C.J.—I think this rule must be made absolute for a new trial. If it were shewn that Smith had resorted to any contrivance to get the witness out of the way, that would make his deposition admissible against Smith, but not against the others, and no distinction upon this head appears to have been made in the summing up of the learned judge, so that, in point of fact, the deposition of the absent witness was admitted against Scaife and Rooke, without any evidence of contrivance by either of them. Then, is such a document admissible against a prisoner without proof either that the deponent is dead, or that he is kept away by the

contrivance of the prisoner upon the bare ground that the witness is absent and cannot be found? No case has gone so far hitherto, and I should be sorry that we should now make a precedent, which might have the effect of depriving an accused person of the advantage of having the witnesses against him examined personally in the presence of the jury, with full liberty for the accused to cross-examine upon all matters which may be material to his defence.

PATTESON, J.—There was nothing shewn in the way of contrivance to make the deposition admissible against any of the prisoners but Smith, and it appears to have been received generally, that is, against the other two by whom no contrivance to keep the witness away appeared to have been practised. Smith being acquitted, there is now no question about him. Upon the general ground there seems no sufficient authority for the proposition that the deposition of a witness who cannot be found after diligent search may be used, in criminal cases, against the defendant.

COLERIDGE, J.—Before the recent statute (11 & 12 Vict. c. 42) the deposition of an absent witness was only admissible in case of the death of the witness, or of his absence being procured by the prisoner. All other cases were in one category, and the depositions of absent witnesses were inadmissible. The recent statute (11 & 12 Vict. c. 42) took the case of sickness such as to incapacitate the witness from travelling out of that category, and classed it with the two other excepted cases. But the statute would have been unnecessary if absence simply, even where not referable to any act of the prisoner, had been sufficient to render the deposition admissible in evidence.

ERLE, J.—As regards the two prisoners Scaife and Rooke, the admissibility of this document rests only upon the absence of the witness. There is no valid authority that is sufficient to make a deposition of this kind receivable in evidence.

## Rule absolute for a new trial.

## REG. v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

*Mandamus to make a railway—Expiration of compulsory powers—Time for application—Laches. The Court made absolute a rule for a mandamus to a railway company, who had staked out the line, but given no notices, to make and complete a railway, where it appeared that the power to take lands compulsorily would not expire for several weeks, and the period limited for constructing the line would not expire for two years, although five years had elapsed since the Act passed authorising the construction of the line.*

*But quære, whether mandamus is the proper remedy in such a case.*

This was a rule calling upon the York, Newcastle, and Berwick Railway Company to shew cause why a writ of *mandamus* should not issue commanding them to make and complete a branch railway between Malton and Thirak. The rule was obtained on the 30th April, but drawn up to shew cause on the 31st May. The Railway Act authorising the construction of the line received the royal assent on the 18th June, 1846, and by that Act the power of the company to take lands compulsorily was limited to three years, which period was by a subsequent Act extended to five years; so that as to part of the line the compulsory powers would cease on the 13th July in the present year, and as to the remainder on the 22nd of the same month. The length of line to which the rule applied was twenty-two miles belonging to about 100 owners, and in the hands of about 200 occupiers. An Act had been obtained authorising the abandonment of certain lines of the company, but it did not extend to this. The line had been staked out, and certain excavations made for the purpose of ascertaining the nature of the soil, but no notices had been given to the landowners or any steps taken towards purchasing the land; neither had the applicant taken any steps to compel the company to do so before the present year, but in January the correspondence on the subject commenced, and in March a formal demand upon the company was made. The affidavit stated a belief that the landowners were for the most part willing to sell.

Sir F. Kelly, Knowles, and Atherton shewed cause. In truth, there is no substantial difference between this and the case of *The London and North-Western Railway Company*, 17 Law T. 92. The impossibility of taking the necessary steps within the time limited is practically as great as if the compulsory powers had actually ceased. It would be quite impossible to get a compensation jury summoned within the time. [COLERIDGE, J.—That is not necessary. *Doe dem. Armistead v. The North Staffordshire Railway*, ante, p. 59; *Worsley v. The South Devon Railway*, ante, p. 60.] The Court will not issue a *mandamus* unless they can see a reasonable probability that the act commanded can be done. [Lord CAMPBELL, C.J.—Assuming it to be obligatory upon you, you must shew that it is impossible; and it

certainly was assumed to be obligatory when an Act of Parliament was obtained to authorise the abandonment of one part.]

Sir F. Theiger and P. Thompson in support of the rule. The railway company are still in time to take compulsorily the lands requisite for the formation of the railway, and they have more than two years in which to construct the railway. The landowners have always a difficulty in ascertaining the proper time at which to come to the Court. If they come soon after the railway company obtain their Act, they are told that the company are allowed a longer time; if they come shortly before the limitation of time expires, they are told that they have been guilty of *laches*, and that they are too late. The moment the company stake out the lands of the landowners, they take possession of them for certain purposes, and, at all events, a notice from the company to the landowner, offering to treat for the lands, establishes the relationship of vendor and vendee between them, so that the company, even after the statutable expiration of their powers, can enforce a sale. The notice binds from the time at which it is given. Then as the company have in their books of reference a register of the names of all the owners and occupiers of lands, the notices may be given immediately. (Stat. 8 & 9 Vict. c. 18, ss. 84, 85; *Doe dem. Armistead v. The North Staffordshire Railway Company*, 17 Law T. 59; *Worsley v. The South Devon Railway Company*, ibid. 60; *Stone v. The Commercial Railway Company*, 4 My. & Cr. 522.)

Lord CAMPBELL, C.J.—This rule must be absolute. For the present we must assume that the company have entered into a contract to make the line in question, and that it is obligatory upon them, for they are not in the position of a company which has not exercised any of the powers conferred upon it by the Legislature. Moreover, the landowners have quite a sufficient interest in the matter to entitle them to be prosecutors. Therefore, there being an obligation on the part of the company to make the line, and no other legal remedy, the Court will grant a *mandamus*. This does not break in upon the case of *Reg. v. The London and North Western Railway Company*, 17 Law T. 92, where there had been laches in the landowners. In a former case (*Reg. v. The Birmingham and Gloucester Railway Company*, 2 Q.B. 61), it had been laid down that it was no answer for a company to set up the impossibility of doing that which they at one time were bound to do. I think that case cannot be supported. Still it rests upon the company who set up the impossibility of their fulfilling their obligations to shew the impossibility conclusively. That is not done here. If due diligence be used even now, this line may be completed within the time fixed by the Legislature; as to what is said about the limited time expiring before a return to the *mandamus* can be enforced, and a peremptory writ issued, we cannot listen to that. We shall make this rule absolute in the belief that the company have at this moment no defence to justify them in disobeying the writ. We cannot presume that they will make any other return to the writ than that they have obeyed it.

PATTESON, J.—If it were clear that the powers of the promoters of the railway for the compulsory purchase of lands could not be exercised, this case would come within the authority of the recent case that has been referred to. That, however, is not proved to my satisfaction. Whether a mere notice by the company to take the lands will do, it is not necessary now to determine, for the company have time for more than that proceeding. We cannot conclude that the company are disabled altogether, or that we are within the predicament of ordering an impossibility.

COLERIDGE, J.—The only question now is, whether the company have time for the performance of an Act, which we must assume, for the purposes of this rule, that they are bound to perform? I do not think that the impossibility is made out at the present time. If the company should make a return to the writ, and we should ultimately think them bound to make the railway, they will then be able to take no benefit from the delay, because they will have been proved to be wrong. There seems to me to have been no negligence in the landowners. If time is to be taken strictly to try whether they have been guilty of *laches*, it must be taken strictly also against the company on the assumption that they have been all along evading the performance of a duty legally imposed on them.

ERLE, J.—The only question now is, whether there be time for the performance of that which is assumed to be a legal obligation. I think there is. As to the wide questions, whether this be the proper mode to enforce the making of the railway, and whether the company be bound to make it, I now say nothing. Those matters are proper to be discussed in a more solemn form. *Rule absolute.*

(c) See Foster's Crown Law, 387.

## QUEEN'S BENCH.

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Tuesday, June 3.

BOOTH v. MONMOUTHSHIRE RAILWAY AND CANAL COMPANY.

Statutory obligation—Public works—Neglect—Private injury.

If an Act of Parliament casts upon any persons the obligation to execute a public work, and the omission to execute that work inflicts an injury upon a private person, the person injured may maintain an action for the injury which he has sustained.

This was an action on the case against the defendants for not converting a tramroad, which had been constructed many years ago under a private Act of Parliament, into a locomotive railroad. The tramroad had been used for the purpose of conveying goods, &c. to a neighbouring canal; and the defendants had a few years ago obtained a new Act, enabling them to make certain lines of railway, and this Act contained a clause requiring the defendants to convert the tramroad into a locomotive railroad. This part of the Act had not been complied with, and the period to which the operation of the Act was limited had now expired; the plaintiff, who was an ironmaster in the neighbourhood, had suffered considerable loss from their neglect to perform this work, as he could not conveniently convey his manufactures to the canal. The declaration set out these facts, and alleged, as a breach of duty, the neglect to convert this tramroad into a locomotive railroad. The defendants demurred to the declaration, as not setting forth any good cause of action.

Willis, in support of the demurrer, contended that no such action could be maintained by a private individual in respect of the nonperformance of what was not a matter of contract with him, but a matter of duty towards the public. (*Bassett v. Godschall*, 3 Wils. 121; *Lowther v. Radnor*, 8 East, 113; *Harman v. Tappenden*, 1 East, 555.)

Sir A. Cockburn, Att.-Gen. (with whom was Phipson), for the plaintiff, insisted that as a private injury was the consequence of this breach of public duty, the individual injured might recover damages in respect of that injury. (*Hensley v. Lyme Regis*, 3 B. & Ad. 77; 2 Cl. & Fin. 331; *Sutton v. Johnston*, 1 T. R. 493; *Green v. Bucklechurches*, 1 Leon, 323; *Ashby v. White*, 14 Sta. Tri. 785; 2 Inst. 623.)

LORD CAMPBELL, C.J.—This is a very clear case. There can be no doubt that if a statute imposes on any persons the duty of performing any work which relates to the public at large, and if by their neglect to perform that work they inflict an injury on a private individual, he is entitled to sue the form compensation for that injury. When did the Act in this case impose the duty to perform this work? It declares that the defendants are not merely empowered or authorised, but "required" to convert this tramroad into a railroad. The defendant's neglect to do that work had occasioned injury to the plaintiff. He is therefore entitled to recover damages for that injury.

The other judges concurring,

(a) Judgment for the plaintiff.

Thursday, June 5.

EATON v. THE SWANSEA WATERWORKS COMPANY.

Basement—Watercourse—Enjoyment as of right—Effect of interruption for less than a year.

Although an interruption in the enjoyment of an easement for a less period than a year is not sufficient to prevent altogether the operation of the statute 2 & 3 Wm. 4, c. 71, s. 2, yet such interruptions are very material to be laid before the jury in reference to the question whether the enjoyment has been of right.

In case for obstructing a watercourse, an information laid by the defendant against the plaintiff's servant, and his conviction thereon, for an act done by him by the plaintiff's order, and in assertion of the plaintiff's right to the watercourse:

Held, admissible in evidence on the part of the defendants, it being proved that the plaintiff's son attended at his father's request before the magistrates, and paid the fine of 1s. imposed upon the servant.

This was an action on the case for obstructing the plaintiff's watercourse; to which there were pleas denying the right. At the trial, the plaintiff claimed under the Prescription Act, 2 & 3 Wm. 4, c. 71, a right to the watercourse in question, for the purpose of irrigating certain fields, and it appeared that the defendant, who disputed that right, had at different times dammed it up, so as to prevent the flow of water over the fields. The learned judge asked the jury whether the use of the water had been enjoyed as of right for the full period of twenty years; and the jury, who had previously inquired what would be the effect of perpetual warfare, without receiving any distinct answer, found that it had been enjoyed as of right, adding, "and without

(a) See *Ferguson v. Earl of Kinnoull*, 9 Cl. & Fin. 261, recognised in *McKenna v. Pope*, 1 H. L. Cas. 6.

interruption for a year." On the part of the defendants an information against a man of the name of Luke, at the instance of the defendants, for removing a dam which obstructed the flow of water over the plaintiff's land, and his conviction thereupon under a section of the company's Act, were tendered in evidence and rejected. With regard to them, it was proved that Luke was the plaintiff's servant, and had done the Act in question by the order of the plaintiff; that the plaintiff's son by his father's request attended before the magistrates, on behalf of Luke, and when he was convicted, paid for him the fine of 1s. which the magistrates inflicted. No appeal was prosecuted against that conviction, although there was a clause in the Act giving an appeal. The verdict was found for the plaintiff; but in Easter Term, a rule was obtained for a new trial, on the ground of misdirection, improper rejection of evidence, and upon affidavits.

*Grove and Borill* shewed cause. 1. There was no misdirection. The judge left the proper question to the jury; and explained that no interruption would defeat the operation of the statute, unless acquiesced in for a year, according to *Flight v. Thomas*, 11 Ad. & Ell. 688; 8 Cl. & Fin. 231. [ERLE, J.—Yes; that is a very strong decision; because, according to that case, it seems that user for twenty months,—that is, the first month of each of the twenty years, would be sufficient, although the enjoyment was interrupted during the remaining eleven months.] 2. The information and conviction were properly rejected. The plaintiff was not a party to the proceeding at all. [COLERIDGE, J.—The act was done in assertion of the right now in dispute.] He could not make his servant appeal against the conviction; and even if he had been the person convicted, the decision of the magistrates would not have been evidence in this case. [ERLE, J.—Not their decision; but the conduct of the plaintiff upon that occasion.] The father is not bound by the act of the son in paying the fine; and at all events, if admissible, the weight of the evidence is infinitesimal, and could not affect the verdict.

*Evans, Benson, and Willis*, contra, were not called upon.

LORD CAMPBELL, C.J.—I think that there ought to be a new trial, on the ground that the information and conviction were improperly rejected. They were not evidence to shew the adjudication of the magistrates upon the question; but they were evidence very material to be considered by the jury, as regarded the assertion of right on the one side, and the acquiescence on the other. Luke, the servant, acted under the plaintiff's order and guidance throughout, and the son represented the father before the magistrates. Then there being a right of appeal if Luke had done no more than was lawful, the plaintiff does not appeal, but pays the amount of the fine. Now, I cannot say that this evidence is of so little weight that, notwithstanding its rejection, the verdict ought to stand. I feel the less regret in coming to that conclusion, because I cannot think that the verdict of the jury upon the issue as to the enjoyment for twenty years, has been quite satisfactorily found. They asked the learned judge what would be the effect of a perpetual warfare upon the acquisition of the right under the statute, and the learned judge, as he had a perfect right to do, reserved his answer to that question, until he gave them his direction in point of law. He then told them that no interruption, unless acquiesced in for a year, would defeat the operation of the statute, and he asked them whether there had been for twenty years an enjoyment of this watercourse as of right, for the purpose of irrigating the fields; and they answered, "Yes, and without interruption for a year." It is possible, therefore, that they may have been of opinion that there had existed, as to this watercourse, a perpetual warfare, and that, although it had been claimed as of right, it had never been enjoyed as of right. I do not say that that ought to have been their conclusion; but if they had received a more distinct direction as to the law applicable to the case, it is possible they might have come to that conclusion; for although it is perfectly true that an act of interruption, not acquiesced in for a year, is no evidence of "interruption" within the meaning of that statute so as to defeat its operation altogether, I am of opinion that such acts of interruption taking place during the twenty years, are of most material importance for the jury in considering the nature of the enjoyment, whether it was or was not an enjoyment as of right. It certainly would lead to the most monstrous results to hold that no interruption, which was not acquiesced in for a year, should be of any importance upon the question whether the enjoyment was of right. It is satisfactory to me, therefore, that this case will be submitted to another jury with a more distinct direction upon that point.

PATTESSON, COLERIDGE, and ERLE, JJ. concurred.

Rule absolute—the costs of the affidavits to be costs in the cause.

*Doe dem. LORD ASHBURNHAM v. MICHAELSON Evidence—Steward's accounts—Entry of person charging himself—Presumption of fact in ejectment by landlord against tenant, steward's accounts were put in to prove the commencement of the tenancy. J. V. sen. was the steward, the entries for several years before 1795 signed "J. V. jun." and they all referred to entry in 1795 in the following terms:—"above account this day settled, and the last due thereon to J. V. sen. was paid by Lord (the landlord) to J. V. jun." That entry signed by J. V. jun. and Lord A.:*

Held, that all the entries signed J. V. jun. were admissible in evidence upon a trial in 1811 and proof that J. V. sen. was dead.

Ejectment by landlord against tenant for mesne in Brecon, tried at the last assizes for the county, when a verdict was found for the lessor of the plaintiff. In order to make out a Michaelson was duly determined by notice to quit, the lessor's plaintiff gave in evidence certain rents as produced from Lord Ashburnham's manor room. The first entry relating to the year in question was in 1781; at that time John Vernon was the steward of Lord Ashburnham, and the account was headed "the account of John Vernon, receiver of the rents, &c. from Michaelmas 1781 to Michaelmas 1782. The entry was "James Pritchard, for a cottage—2s. 6d." and account was signed John Vernon, jun. A full entry was found in the accounts for several years, all of which were signed in the name of "John Vernon, jun." but at the end of each there was a reference to a subsequent general statement of accounts in 1795, and the entry there was as follows:—"18 Feb. 1795.—The above account this day settled, and the balance due thereon to John Vernon, sen. was paid, by Lord Ashburnham, to John Vernon, jun.," signed by Lord Ashburnham, and John Vernon, jun. The entry relating to the cottage, signed "John Vernon, jun." was objected to, he not being the steward, and no evidence being given to prove who he was, or that he was dead. The evidence was received; but a rule for a new trial was obtained in Easter Term, on the ground that it was inadmissible.

*Evans and Grove* now shewed cause.—The entry in 1795 explains the previous entries, and shews that Lord Ashburnham accounted with John Vernon, jun. who by these entries charged himself. *De Rutzen v. Farr*, 4 Ad. & Ell. 53, is not applicable here, when the facts of that case are examined. [COLERIDGE, J.—Baron Gurney said to us, that the facts of that case were misstated.] They were so. This case falls within *Hippen v. Ridgway*, 10 East, 109; and proof of handwriting is unnecessary, when the document is ancient, and comes from the proper custody. (*Wynne v. Tyrnoll*, 4 B. & Ald. 376.) So the death after fifty years will be presumed.

*Allen, contra*.—In *De Rutzen v. Farr*, said the Mayor of Exeter v. Warren, 5 Q.B. 773, the death was proved; and although there is no rule of law as to the time at which death will be presumed, it is submitted that the distance of time in this case is sufficient, and the handwriting ought also to have been proved. (*Muggrave v. Emmerve*, 10 Q.B. 326.)

LORD CAMPBELL, C.J.—I think that this case ought to be discharged; and that the entries relating to the cottage, explained as they are by the entry in 1795, are admissible. Mr. Allen objects that they ought to be evidence of the death of John Vernon, jun.; but it seems to me that that is wholly unnecessary, the date of the entry being 1795; that is, fifty years before the trial. Under such circumstances, nothing to the contrary appearing, the fact is to be presumed. After thirty years the statement is to be presumed to be dead, and the witness to a deed is presumed to be dead, and the deed proves itself; and so of a will. If fifty years were held insufficient for this purpose, what the lapse of time would suffice? Then, is the entry sufficient? I do not find fault with the entry in *De Rutzen v. Farr*, considering that Protheroe, the clerk, did not by the entry seek to charge himself; but this is a different case, because here John Vernon, jun. does acknowledge by the entry that he has received money for which he is accountable; and we cannot reject the circumstance that Lord Ashburnham signs the accounts, shewing that the account was settled between him and John Vernon, jun.

PATTESSON, J.—This case depends upon its peculiar circumstances, and is not to be supposed as settling the rule to every case in which one person tends the rule to every case in which one person signs for another. It appears, upon looking at these accounts, that Lord Ashburnham treated John Vernon, jun. as authorised to account for John Vernon, sen.; and this is quite distinguishable from *De Rutzen v. Farr*. It is true, in the particular entry of 1781, John Vernon, jun. does not profess to charge himself; but he clearly charges himself with the general balance in 1795, which is made up of a settlement of the balances of the previous years; he

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when that general settlement is made, then they go back and sign each of the yearly accounts.

COLERIDGE, J. concurred.

Rule discharged.

Friday, June 6.

WILTON, Executor, &c. v. DUNN.

Use and occupation—Notice—Mortgagee and mortgagee.

To an action for the use and occupation of premises by the permission of the plaintiff, it is no answer that a mortgagee to whom the plaintiff had mortgaged the premises before their occupation by the defendant, has given notice to the defendant to pay to him the rent that has accrued due before the notice was given.

This was an action of debt for use and occupation of certain premises by the defendant, by permission of the plaintiff. The defendant pleaded, in substance, that before the occupation of the premises by the defendant the plaintiff had mortgaged them to one Louisa Smith, and that after the mortgage by the plaintiff to Louisa Smith, and while plaintiff was only the mortgagee in possession, the defendant occupied the premises by the permission and sufferance of the plaintiff, and that afterwards Louisa Smith gave notice to the defendant, and required him to pay the amount due to the plaintiff at the time of giving the said notice to her as and for the profits which Louisa Smith was entitled to recover from the defendant for the possession of the premises, and that the defendant, at the time of giving the notice by Louisa Smith, was ready and willing to pay to the plaintiff, but that he was now liable to pay to Louisa Smith. Verification.

Demurrer and joinder.

*Gleasby* (with him *Parnell*) for the plaintiff.—The point intended to be raised is whether a mortgagee, by giving notice to a tenant who holds under the mortgagee by lease or agreement since the date of the mortgage, can entitle himself to rent due before the giving of the notice. Some of the *dicta* in *Pope v. Biggs*, 9 B. & C. 245, which will be relied upon cannot now be maintained. Where a tenant comes in under the mortgagee after the mortgage, there are only two cases in which he can defend himself against the mortgagee's demand for rent:—1. Where there has been something tantamount to eviction or attornment as between him and the mortgagee; and 2. Where there has been actual payment of the money due to the mortgagee. A tenant cannot dispute his landlord's title. Nor is the liability to be sued in trespass for mesne profits (which is an action for unliquidated damages) by a third party, who claims to have a better title than the landlord any answer to the landlord's claim upon his tenant. Probably actual payment to the mortgagee might have been set up in defence as a payment by the tenant of that to which his landlord was liable; but here it does not follow that the notice will be followed up, and the defence is tantamount to this, that the mortgagee has threatened to sue the defendant. It is quite clear that the defendant is not liable to the mortgagee for rent due before the notice was given, and therefore, if he be not liable to the plaintiff, he is not liable for rent at all. (*Rogers v. Humphreys*, 4 A. & E. 299; *Beane v. Elliott*, 9 A. & E. 342; *Boodley v. Oambell*, 7 M. & Gr. 386; *Partington v. Woodcock*, 5 Treu. & Man. 672; *Moss v. Gallimore*, 1 Smith's L. C. 317, *con* notes.)

*Keating*, for the plaintiff.—It is admitted that the mortgagee cannot by notice to the tenant put himself into the position of the mortgagee to all intents and purposes, but this is an action for use and occupation, a claim which may arise without the relation of landlord and tenant. It is for the permitted enjoyment of the premises, which in law must be taken to be permitted by him who alone has a legal right to permit it, that is, the mortgagee. The plaintiff himself has only had such occupation as he has had by permission of the mortgagee. Even if the mortgagee could not sue for use and occupation before notice given, he could, at all events, recover the same thing in the shape of mesne profits after an action of ejectment against the tenant, and if the rent due before notice given to the tenant were paid to the mortgagee after notice so given, that payment would be a discharge as against the mortgagee. (*Thamder v. Balcher*, 3 East. 449; *Waddilove v. Barnett*, 2 Bing. N.C. 538, 543.)

*Gleasby* was not called upon to reply.

LORD CAMPBELL, C.J.—This is an ingenious experiment which we cannot sanction. It is a novel attempt: to set up a liability to an action of trespass at the suit of a third party against a landlord's claim for rent. A court of law cannot protect the defendant against a threat by the mortgagee that he will take proceedings against him. If the defendant had paid the mortgagee, that might be an answer to the action by way of discharge: all that is now set up is a mere threat by the mortgagee to enforce a supposed liability. There is no authority for any such plea, and there must be judgment for the plaintiff.

PATTESON, J.—I cannot see how this rent could ever have been due to the mortgagee for use and

occupation of the premises by his permission. Suppose there had been a lease under seal between the plaintiff and the defendant, the mortgagee plainly could not sue upon any covenant to pay rent contained in that. Surely, in that case, there could not have been two liabilities to pay rent, one under the lease to the mortgagee, and one to an action for use and occupation at the suit of the mortgagee. And yet, in principle, that case ought not to be distinguishable from a *parol* lease, or a tenancy at will between the mortgagee and the defendant.

COLERIDGE, J.—Concurred.

ERLE, J.—If the rent had been actually paid to the mortgagee I should have been inclined to support the defence, though upon that point the authorities are not quite clear. Here, however, there is only a supposed liability, and for aught I can see, the tenant may intend to pay neither the mortgagee nor the mortgagee.

Judgment for the plaintiff.

Saturday, June 7.

REG. v. WILSON.

*Lunatic order—Chargeability to county—Appeal.* Sec. 80 of 8 & 9 Vict. c. 126, gives no appeal against an order of justices, adjudging a pauper lunatic chargeable to a county, and directing the treasurer of the county to pay a sum of money as the costs of his maintenance in an asylum.

This was a special case stated for the opinion of this Court; and the main question raised was, whether there is any right of appeal against an order of magistrates under 8 & 9 Vict. c. 126, s. 63, directing the treasurer of a county to pay the expenses of maintaining in an asylum a lunatic pauper, who had been adjudged chargeable to the county under sec. 59.

*Pashley*, for the respondents, contended that there was no such appeal. Under sec. 59 this charge is thrown upon the county only when the settlement cannot be ascertained; and by other clauses power is given to the county to transfer the burden at any future time to the parish of settlement, whenever, as is suggested here, the settlement of the lunatic can be ascertained. However, sec. 80 gives an appeal in general terms against all orders except those adjudicating as to the settlement and ordering the maintenance of lunatic paupers; but this order is really within the exception. An order which adjudicates that the settlement cannot be ascertained contains an adjudication as to the settlement. [LORD CAMPBELL, C.J.—An adjudication as to is not an adjudication upon.] It makes no difference that in this case two orders have been made, one adjudicating that the settlement could not be ascertained, and that the pauper was chargeable to the county; the other following that up by ordering the treasurer of the county to pay the expenses. The two are, in truth, but one order. (*R. v. Tyrwhitt*, 12 Q. B. Rep. 292.)

*Peacock*, contra.—Sec. 80 gives the county an appeal against this order, because it does not adjudicate as to the settlement. [COLERIDGE, J.—Must not the parish satisfy the justices that the settlement cannot be ascertained before they can get the order upon the county. ERLE, J.—That is clear; because if a glimpse of a settlement appears the justices are empowered to adjourn in order that inquiry may be made into that settlement.] That is the case. [COLERIDGE, J.—In truth these are only interim orders until the settlement can be ascertained.]

LORD CAMPBELL, C.J.—The point is completely disposed of.

Judgment for respondents.

## BUSINESS OF THE WEEK.

Thursday, June 5.

ARMISTEAD v. WHITE.—This was an action against an innkeeper by a guest whose goods had been stolen; and the main question was whether the liability of the innkeeper had not been destroyed by the negligence of the guest himself. He was a commercial traveller, who, after publicly counting over his notes, deposited them in a box with an insecure lock, and then left the box in the travellers' room all night. The Court thought that that evidence warranted the jury in finding that the loss had been occasioned by the gross negligence of the guest; and that there was no misdirection, because the judge did not tell the jury that a traveller was always bound to take his property into his bed-room with him, and lost his claim upon the innkeeper if he did not, but commented only in his address to them upon the particular circumstances of this case. *Knowles* and *Crompton* shewed cause. *Henderson* in support of the rule. Rule discharged.

COLEMAN v. DIXON and Others.—*Hawkins* moved for a rule to shew cause why the plaintiff should not have his costs, notwithstanding the 13 & 14 Vict. c. 61, s. 11, upon affidavits tending to shew that none of the defendants resided, or carried on business, within the jurisdiction of the County Court in which the cause of action arose. The Court, however, said, that at all events this was not a case in which they would exercise the discretion given to them by s. 13 in favour of the plaintiff. Rule refused.

Friday, June 6.

SIMMS and ANOTHER v. MARYAT.—Argument concluded. Judgment for the plaintiffs.

REG. v. THE LANCASTER AND YORKSHIRE RAILWAY COMPANY.—*H. Hill* moved for a mandamus to the defendants to complete a line of railway. Rule nisi.

THE GOVERNOR AND COMPANY OF CHESAIRE WATERWORKS v. BOWLEY.—*Crowder* (with him *Brett*) for the plaintiffs. *Willes* for the defendant. Cur. adv. vult.

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DERBYSHIRE, STAFFORDSHIRE, AND WORCESTERSHIRE RAILWAY COMPANY v. TREBUTT.—*Corrie*, for the defendant, admitted that he could not support the plea. *Barlow* for the plaintiffs. Judgment for the plaintiffs.

Saturday, June 7.

REG. v. THE TITHE COMMISSIONERS.—Demurrer to a return to a writ of mandamus. *Cowling* in support of the demurrer. *Peacock* contra. Leave to amend.

REG. v. THE GREAT WESTERN RAILWAY.—LORD CAMPBELL, C.J. stated that the Court postponed its judgment in this case, in the hope that Parliament would, before next Michaelmas Term, lay down some satisfactory rule for the rating of railways. Judgment postponed.

EVANS v. GEORGE.—This was an action on the case for dilapidations. *Baddley* shewed cause against a rule to enter a nonsuit; but admitted that on the only issue raised, *Alston v. Atlay*, 7 Ad. & Ell. 289, was an authority against him. *Cowling* and *Davison*, contra. Rule absolute.

DON v. MANN.—*Knowles* and *Hawkins* shewed cause against a rule to enter the verdict for the defendant. *Chambers* and *Henderson*, contra. Cur. adv. vult.

RE THE ALDHAM and UNITED PARISHES ASSURANCE SOCIETY.—*Hawkins* moved for a rule for a mandamus to the secretary or president or clerk of this society to convene a meeting pursuant to requisition signed by a large number of the members, for the purpose of considering the expediency of altering the rules. Rule nisi.

Monday, June 9.

REG. v. GRIFFITHS.—*Sir F. Theiger* moved for a *quo warranto*. (See *Re The Guardians of St. Martin's-in-the-Fields*, 17 Law T. 140.) Rule nisi.

POWELL v. SHAW.—*Re FLEWKE*.—The Master's report having been read, *Sir F. Theiger* and *Hayes* shewed cause. *M. Chambers* and *M. Smith* in support of the rule.

Rule discharged upon payment of costs. *Mr. Flewke* to be suspended from the exercise of the office of attorney for one month.

REG. v. THE GOVERNORS and GUARDIANS of ST. MARY, NEWINGTON.—*Sir F. Theiger* and *Lush* shewed cause. *Keane* and *Pashley* in support of the rule.

Rule discharged with costs. *Mr. Bowen* v. *MAUSER*.—*Bovill* and *Hawkins* shewed cause. *M. Chambers* and *Wise* in support of the rule. Adjourned.

Tuesday, June 10.

SHERWSBURY and BIRMINGHAM RAILWAY v. THE LONDON and NORTH WESTERN RAILWAY and SHROPSHIRE UNION RAILWAY.—This was an action for a breach of a covenant relating to the use of the Shrewsbury and Birmingham line for the purpose of traffic. To the first count the defendant demurred, and pleaded to the second, and then the plaintiff demurred to the plea. Both demurrers now came on for argument. *Peacock* (*Whitmore* with him), admitted that he could not sustain the first count; but argued that the plea to the second count was bad. *Sir F. Kelly* (*Cowling* with him), contra, contended that the second count was uncertain; and offered to withdraw his plea for the present, and pay the costs if the plaintiff would amend the second count so as to render it certain, and enable him safely to take issue upon it.

Judgment for the defendant on the first count; second count to be amended, and defendant to plead *de novo*.

GRANTHAM CANAL COMPANY v. THE AMBERGATE, NOTTINGHAM, &c. RAILWAY COMPANY.—This was a special verdict, turning upon the construction of the defendants' Act of Parliament.—*Peacock* (*Pearson* with him), for the plaintiffs. *Sir F. Kelly* (*Channell*, *Serjt.* and *Wheeler*), contra. Judgment for defendant.

MARSH v. GOODALL.—*Bayley* in support of the demurrer to the defendant's plea. *Cowling*, contra. Judgment for the plaintiff.

BIDDULPH v. CHAMBERLAYNE.—*Greasers* moved for a rule to rescind the order of *Patteson*, J. disallowing the plaintiff the costs of certain witnesses. Rule nisi.

Wednesday June 11.

REG. v. HASLAM.—*Rule discharged.* HOLLOWAY v. REG.—*Flood* for the plaintiff in error. *Mellor* for the defendant in error.

Judgment for the defendant in error. REG. v. BASSETT and ANOTHER.—*Crowder* for the Crown. *Tomlinson* for the defendants.

Judgment for the defendants. REG. v. THOMAS.—*Deacon*, *Robinson*, *Crompton*, and *Tomlinson*, shewed cause. *Sir F. Kelly* and *Peacock*, in support of the rule. Adjourned.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Thursday, May 29.

JANES v. WHITEHEAD and OTHERS.

Debtor and creditor—Assignment of debtor's property—Interpleader issue—13 Eliz. c. 5.

A deed of assignment for the benefit of creditors was made by E. which contained, amongst others, a clause empowering the trustee "to employ the said E. or any other person, in winding up the affairs of him the said E., and in collecting and getting in his estate and effects, and in carrying on his trade," &c. which was that of a publican. In an interpleader issue between the trustee and a creditor, who, having obtained a judgment, had taken the property in execution:

Held, that the above clause did not create a partnership of the creditors, for the purpose of carrying on the trade of E. but amounted simply to a power to the trustee to wind up the affairs of the execution debtor, and therefore the deed was valid against the execution creditor.

Owen v. Body, 15 A. & E. 28, distinguished. This was a feigned issue, directed by Wightman, J. to be tried at the instance of the defendants, for the purpose of ascertaining whether certain goods and chattels, seized by the sheriff of Bedfordshire on the

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4th of March last, as being the property of the execution debtor, James Ellis, had, before the time of such seizure, legally become the property of the plaintiff. At the trial, before Maule, J. at the Sittings for Middlesex in Easter Term last, it appeared that Ellis, the execution debtor, was a publican, residing at "The Balloon," Caddington, in Bedfordshire. He had for several years prior to entering on that house been supplied with malt liquors by the defendants, and had incurred a debt to them of 145*l*. The defendants commenced an action for this sum in December last, and Ellis, being pressed by other creditors to make an assignment for the benefit of the general body of his creditors, on the 10th of February last, with the knowledge of several of his creditors, executed a deed, by which he assigned to the plaintiff his estate and effects, in trust for his creditors in general. On the 13th of February, the defendants signed judgment in the action against Ellis; on the 3rd of March execution issued, and a levy was made on the effects at "The Balloon" public-house on the following day. Notice of claim by the plaintiff was then served, and the sheriff thereupon interpleaded.

The deed of assignment under which the plaintiff claimed bore date 10th February, 1851, and purported to be made between Ellis, the execution debtor, of the first part, the plaintiff, as trustee for himself and the rest of the creditors of Ellis, of the second part, and the several other persons whose names and seals were thereto set and subscribed, being respectively creditors of Ellis, of the third part. It recited that Ellis had agreed to assign all his estate and effects to the said trustee for the benefit of his creditors; that in pursuance of said agreement he, by those presents, sold, assigned, transferred, and set over unto the said trustee, &c. all and every the stock in trade, goods, wares, merchandise, furniture, fixtures, &c. and all other the personal estate and effects of him, the said Ellis, in possession or reversion, &c. to have and to hold the said stock in trade, and all other the estate, effects, and premises thereby assigned, &c. unto the said trustee, his executors, &c. absolutely upon trust to collect and receive, sell and dispose of the said assigned premises, &c. and upon trust out of the moneys to be received, &c. to pay, retain, and satisfy, rateably and proportionably and without any preference or priority to himself the said trustee and his partners, and the other persons parties thereto of the third part, the several debts or sums set opposite to their respective names in the schedule annexed, subject to the covenant thereafter contained for verifying the amounts thereof, "Provided always that it shall be lawful for the said trustee to make to the said James Ellis such allowance, or return to him such part of his household furniture or effects, not exceeding the value of twenty pounds, as he may deem expedient; and also to employ the said James Ellis or any other person or persons in winding up the affairs of him, the said James Ellis, and in collecting and getting in his estate and effects hereby assigned, and in carrying on his trade, if thought expedient by him, and to allow the said James Ellis, or any other person or persons so employed as aforesaid, out of the said trust estate such sum and sums as to the said trustee shall seem proper." There then followed a power of attorney to the trustee to recover and receive debts, with several covenants and provisions which are not material to the present case. The deed was duly executed by Ellis and the plaintiff, but it does not appear that any other creditor than the trustee signed it. At the trial the learned judge directed the jury that if they were of opinion the deed was honestly made for the purpose of distributing the effects amongst the creditors of Ellis, and not for the purpose of depriving the defendants of the fruits of their execution, they would find for the plaintiff. The jury found that the deed was executed *bond fide* for the general benefit of the creditors, and a verdict was thereupon entered for the plaintiff, leave being reserved to the defendants for leave to move to enter a nonsuit or a verdict for the defendant, if the Court should be of opinion that the jury should have been directed to find for the defendants.

M. Chambers, Q.C. having on a former day obtained a rule nisi for a nonsuit, or to enter the verdict for the defendants, on the ground that under 13 Eliz. c. 5, and on the authority of *Owen v. Body*, 5 Ad. & E. 28, the deed was void in law, as containing a provision for carrying on the business for the benefit of the creditors. The rule also extended to a new trial, on the ground that the verdict was against the weight of evidence.

Miller, Serjt. and R. B. Miller now shewed cause. —The jury having found that this deed of assignment was executed *bond fide* for the benefit of the general body of creditors, it is good, and therefore should take effect. If the Court takes the whole deed together it will be seen that the intention of the parties was to enable the creditors to wind up the estate, and the assignment was avowedly executed for the purpose of preventing the defendants from sweeping off the whole of the execution

debtor's property. The clause, which it is said invalidates the deed, runs thus: "Provided always that it shall be lawful for the said trustee to employ the said James Ellis, or any other person or persons, in winding up the affairs of him, the said James Ellis, and in collecting and getting in his estate and effects hereby assigned, and in carrying on his trade, if thought expedient by him." This, it has been contended, has the effect to make the creditors and the execution debtor partners, and therefore avoids the deed. But that is not so. The clause simply empowers the trustee to do what was necessary for securing to the creditors the full value of the property (for it was the business of a public-house, which if closed would return nothing, and be of no value), and to wind up the estate for the creditors. The Court, therefore, will not hold that the clause contains anything having the effect of making the body of creditors partners. As to the case of *Owen v. Body*, 5 A. & E. 28, cited in moving the rule, the reasons given for the decision are insufficient, and should not satisfy this Court. If the words of this clause in the deed of assignment come within *Owen v. Body*, the effect will be to put an end to all assignments of this nature. (*Twine's case*, 1 Smith's Leading Cas. 1; 3 Co. 80.) With reference to the point that the verdict was against the evidence, there is nothing to shew that justice has miscarried by the verdict. (*Harland v. Binks*, 20 L. J. 126, Q.B.)

MAULE, J.—The *bond fide* was assumed in *Harland v. Binks*.

JERVIS, C.J.—No doubt, if the deed is a honest deed, the verdict is right.

M. Chambers, Q.C. and Honyman, in support of the rule.—It is submitted that a nonsuit, or a verdict for the defendant should be entered in this case, on the ground that the deed is fraudulent and void, under stat. 13 Eliz. c. 5, and at common law. The judge ought to have directed the jury that the deed was void under that statute, which, indeed, only declares what was already the Common Law upon the subject. That statute, after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, &c. to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c. by sec. 2, proceeds to declare and enact that every feoffment, &c. of lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution made for any intent and purpose declared and expressed, shall be as against that person, his heirs, successors, executors, &c. whose actions, suits, &c. are or might be in anywise disturbed, hindered, delayed, or defrauded, utterly void, frustrate, and of none effect, any pretence, colour, or feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. This deed is fraudulent within the meaning of the statute, because there appears on the face of it a trust for the benefit of the donor, and not a trust absolutely for the benefit of the creditors for whom ostensibly it is set up. The only difference between the case of *Owen v. Body* and the present is this, that there the power for carrying on the trade is expanded further than in this case. What do the words "carrying on his trade," as used in the deed, mean? They refer to getting goods as well as money; in short, they empower Ellis to do whatever is necessary for a publican's business, including getting in wines and spirits. There is no material difference between *Owen v. Body* and this case. It would be presumptuous to endeavour to support that case. It was fully argued, and the Court, taking time, maturely considered the judgment. [CRESSWELL, J.—Take the case of a public-house where the tenant has died; the executors of the deceased may sell the remaining stock without liability, but they must not incur fresh debts by taking in goods.] Looking at the face of the deed, it is submitted, the Court should regard it as fraudulent and void, because it does not give the entire property for the sole benefit of the creditors. [MAULE, J.—All these deeds are, I conceive, within the statute of Elizabeth. (His lordship read the 2nd section of the statute.) The statute seems to say there is such fraud in these deeds that we declare them all void.] The case of *Owen v. Body* is mentioned without disapprobation in the last edition of Smith's Leading Cases. It should govern this case, and the rule, therefore, on this ground should, be made absolute. [The Court intimated that there was no need for entering on the point that the verdict was against evidence.] Next as to the question of costs. In interpleader cases no costs of interlocutory proceedings are given, all abides the final result. (*Hood v. Bradbury*, 6 M. & Gr. 98.) The costs of a new trial should be left for the decision of the judge who granted the interpleader order. (*Gillingham v. Stuart*, 12 Law T. 351, C.P.; *Tyson v. Willis*, Q.B. not yet reported.)

JERVIS, C.J.—This rule was granted on two grounds. It was granted on the first point—that the deed was fraudulent and void—in order to con-

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trast it against *Owen v. Body*. But I think decision is not applicable to the present case, there was there an express power given to the trustees to carry on the business, and to maintain keep up the stock in trade by purchasing carriages, and goods,—such a power, in fact, would make the subscribing creditors business partners. But here we have merely an authority to assign for the purpose of winding up the affairs of the execution debtor, and getting in his estate effects. This case, therefore, is not at all like *Owen v. Body*, and the rule will be discharged on the first ground. Then comes the question whether the defendant is not entitled to his rule on the ground that the verdict is against the evidence. I think the rule must be absolute on this point. With regard to the costs, it is said that the case should follow the ruling of the C. B. in *Gillingham v. Stuart*. But we do not think so, for the case is distinguishable from the present; therefore a new trial will be absolute, on the ground of payment of costs.

MAULE, J.—The case of *Owen v. Body* is distinguishable from this. That was a case of an extensive business should be carried on to the benefit of creditors, whereas this is a case of winding up; and such being the object, all payments, and transactions coming within the scope of that purpose, may be properly made and carried on.

CRESSWELL and TALFOURD, JJ. consent.  
Rule discharged on the first point, and a new trial on the second.

Thursday, June 5.

LEVIEU v. HEATHWATE.

Practice—Enlarging peremptory undertaking Affidavit.

An affidavit in support of a rule to enlarge peremptory undertaking, which did not state the name of a witness on the ground of the absence of the case was not tried, and which did state that such witness was a necessary witness, but only that he was a material one, and did not shew what efforts had been made to procure his attendance since the peremptory undertaking, but only that at the time of making the affidavit such witness was in Ireland, was held insufficient, and the rule was discharged.

Byles, Serjt. shewed cause against a rule to enlarge the peremptory undertaking taken upon in Easter Term last. At that time the case for trial was the absence of a witness named, whose name was not mentioned in the affidavit. The affidavit in support of the present rule stated that the plaintiff countermanded the notice of his summons in pursuance of the peremptory undertaking, on the ground of the absence of a witness, and that the deponent was informed and believed that he was now in Ireland, and would not return till August, and that it would not be safe to go to trial without him. It was now objected that the name of the witness should be disclosed in the affidavit in support of this rule, although it was necessary to disclose it in discharging the rule, as judgment, as in the case of a nonsuit, for, in charge that rule on a peremptory undertaking, a trifling excuse is sufficient, and so the proposition stated in 2 Archb. Prac. 1312, for which *Milford Bond*, 2 Dowl. 403, is cited. The efforts made to procure the attendance of the witness since the peremptory undertaking was given, should also be stated. It is not stated that the witness is a material and necessary witness, which is the usual form.

[JERVIS, C.J.—The word necessary is important. Giffard, in support of the rule.—The affidavit states that it would not be safe to go to trial unless the attendance of the witness, and that, if the case is postponed, the plaintiff would be able to procure attendance. [JERVIS, C.J. referred to *Milford Bond*, in which the rule for enlarging the peremptory undertaking appeared to have been made absolute, although the marginal note bore out the statement in Archbold's Practice.]

By the COURT.—The affidavit is clearly insufficient. Rule discharged.

THE WEST LONDON RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Lease—Covenant—Construction. The G. W. Company had agreed to maintain a station at the junction with the W. L. Company, stop such of their trains as the W. L. Company should request. Afterwards the W. L. Company leased their line to the N. W. Company, which they also had a junction; and the latter covenanted to work the W. L. line efficiently. The lease was in pursuance of an Act of Parliament obtained for the purpose, which did not allude to in express terms or transfer the agreement between the G. W. Company and the W. L. Company. It was conceded by the N. W. Company that the not running of passenger trains on the W. L. line was a breach of the second covenant that line efficiently.



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*Held by the Court, that the agreement between the G. W. Company and the W. L. Company did not pass to the N. W. Company, and that the latter were not bound, nor had they the power to call on the G. W. Company to stop their trains at the junction according to their agreement with the W. L. line.*

*Covenant.*—The declaration was for the breach of a covenant in the lease of the West London Railway to the London and North-Western Railway Company, whereby the defendants bound themselves, amongst other things, "efficiently to work" the railway demised. At the trial a verdict was taken for the plaintiffs, subject to leave to either party to move the Court that the damages might be assessed on any principle that either party might suggest; and to the defendants to be at liberty to move for a new trial, and if the verdict for the plaintiffs was allowed to stand, the defendants to consent to a writ of inquiry before a judge.

The facts were these:—In 1836 an Act (6 Wm. 4. c. lxxix.) passed for making a railway from the basin of the Kensington Canal, at Kensington, to join the London and Birmingham and Great Western Railways at or near Holsden-green, in the county of Middlesex, and to be called "The Birmingham, Bristol, and Thames Junction Railway." By a subsequent Act (3 & 4 Vict. c. cv. s. 2) the name and style of the company was changed to that of "The West London Railway Company;" and by a later Act (8 & 9 Vict. c. clvi.), after reciting that it had "been found that the West London Railway cannot be worked as a separate and independent undertaking with advantage to the proprietors thereof, but the same might be advantageously worked and used in connection with the London and Birmingham Railway and the Great Western Railway, or either of them, by both or either of the companies to whom the said last mentioned railways belong," power was given to lease the West London Railway to the London and Birmingham (now the London and North-Western) Railway, and any agreement for a lease before entered into, if consistent with that Act, was confirmed. A lease between the parties was executed on the 10th of March, 1846, whereby it was witnessed that, in consideration of 60,000*l.* paid by the London and Birmingham Company, and of the rents and covenants reserved and contained in the lease, the West London Railway Company demised and leased to the London and Birmingham Company the West London Railway and all its appurtenances, "together with all the rights, powers, and privileges of the West London Railway Company in relation thereto," for the term of 999 years, the London and Birmingham Company to carry to the credit of the West London Company every half-year one-fourth of the gross sums received for passengers and goods carried on the railway, with this condition, that "the London and Birmingham Railway shall, at their own expense, during the continuance of this lease, efficiently work and repair the railway and works hereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway and works, but the West London Railway Company to have no control whatever over the working or management by the London and Birmingham Railway Company of the West London Railway or works." This lease having been executed, and the West London Railway delivered over to the control of the defendants, the latter soon found that they could not work it profitably as a passenger line, and accordingly they ceased to do so, but they continued to work the line as a goods line, though it appeared at the trial that the trains from the north frequently brought the goods to the station at Euston-square, and then took them back to the Holsden-green station of the West London line, and there deposited them for delivery. This was complained of by the plaintiffs as a breach of the covenant "efficiently to work" the railway, which, they contended could only be done by working the West London line as a branch of the Great Western and London and North-Western line. Inasmuch as the West London Company had obtained their Act before the Great Western Company, and in consequence of having to cross the former on the level, the Great Western Company had been obliged to contract that they would maintain a station at the point of junction, for the purpose of transferring passengers and goods to and from the said railways respectively, and would stop such of their trains as the West London Railway Company should declare their intention of meeting by corresponding trains, the plaintiffs contended that if the defendants, to whom they had demised "all their rights, powers, and privileges," would exercise this right the result would be highly profitable to all parties. The defendants refused to do this, and the present action was brought.

*Byles, Serjt. E. James, and Aspland* were counsel for the plaintiffs, and

*Sir F. Theiger, Channell, Serjt. and Bovill* for the defendants.

The case was twice argued on cross rules obtained to carry out the arrangement at the trial.

*Jervis, C.J.*—At the trial it was agreed that the verdict should be entered for the plaintiffs, and that my brother Byles should frame a motion to raise the question of the principle on which the damages should be calculated. It was admitted that the plaintiffs were entitled to recover damages from the defendants for not working the line with passenger-trains, and it was also conceded that the defendants were bound to run passenger-trains. But my brother Byles contended, for the purpose of asserting the principle of assessing the damages, that the defendants, as lessees of the West London line, were bound to work it as a branch of and in connection with the London and North-Western line; and further, that they were bound to exercise the powers and rights which the West London Railway Company were said to have acquired by virtue of their agreement with the Great Western Railway Company. Upon the discussion on a former occasion, the Court entertained no doubt whatever that the London and North-Western Company were not bound to stop their trains so as to make the West London line a branch of their own line, but some doubts having arisen as to whether they were not bound to work the West London line as a branch of the Great Western line, we requested that that point might be considered, and it has now been argued. On looking at the lease we find it recites that the West London Railway Company, as a separate and independent company, could not work the line themselves at a profit, but that possibly it might be worked advantageously in conjunction with the London and North-Western or the Great Western Companies; and it professes to lease the railway, together with all their rights and privileges in respect thereto, to the defendants. It is plain, however, to us that all that is leased is the West London Railway. There is no allusion whatever to any liability of the Great Western Company to stop their trains or to work their railway in connection with the West London Railway; and it does not follow because the London and North-Western Company have bound themselves to work the West London Railway efficiently, that they are therefore bound to alter the manner of working their own line; for if so, as has been said, they might be prevented for 999 years from stopping their own line, should they be disposed to do so, or from making such alterations respecting it as they might deem proper. The Court were, therefore, unanimously of opinion that to work the West London Railway efficiently, within the terms of their covenant, the London and North-Western Company are not bound to work it as a branch of their own railway. But then the question arises whether having taken a demise of the rights and privileges of the West London Company, and as representing that company, they are bound to work it efficiently by exercising the authority the West London Company possessed to stop the trains of the Great Western Company. I apprehend, however, that they are not placed in that position, for the agreement between the West London and the Great Western Companies, and the powers under it do not pass to the London and North-Western Company. They can only do so under the special authority of an Act of Parliament, and I do not find any words in 8 & 9 Vict. c. 156, which confer such authority. The West London Company have a right under that Act to demise the railway, and all their "rights, powers, and privileges in relation thereto;" but the agreement in question is never alluded to, and the third section of that Act, which provides that the Great Western Railway Company shall be admitted to a participation in the use of the line to be leased, contains provisions in some degree inconsistent with it. You may explain it thus—that all rights, powers, and privileges which the railway as a railway had acquired by Act of Parliament and been invested with, and those only, were to pass to the North-Western Company. If so, the plaintiffs have no power to convey or transfer to the defendants powers acquired, not by Act of Parliament, but by lease; and it would be unreasonable that they should, for the Great Western would have no power to enforce their rights and the penalties due to them under the Act against the defendants. The agreement with the Great Western Company is not referred to in the lease, and it is impossible to contend that a power to stop the Great Western trains can be so inferred from general words such as are contained in the lease that it may be enforced by action by the London and North-Western if they refuse to do so. I apprehend the Act of Parliament has not transferred this power, and therefore that the defendants are neither bound to work the West London line in conjunction with their own line, or to stop the Great Western Company's trains. I believe the real history of the agreement and lease is this:—Finding that the West London Company could not work the line by themselves, they thought that it might be worked in connection with the London and North-Western and Great Western

lines. They, therefore, lease the line, leaving it to their lessees to work it with or without these lines as their mutual interest shall dictate; but in order that the line may not be forfeited, they take a covenant from the London and North-Western Company efficiently to 'work it.' In estimating the plaintiffs' damages, therefore, I think we must reject the proposition that in order to work the line efficiently within the terms of their covenant, the defendants must work it as a branch of their own line, or must stop the Great Western Company's trains, which, for the reasons I have stated, I think they have not the power of doing.

*MAULE, J.*—The only point to which my attention has been called is, whether the Act transfers this agreement of 1837 between the West London and the Great Western Companies, and makes it binding on the North-Western Company. I do not think that it does; and if such an intention as that contended for had existed at the time of the agreement, it would have been expressed by some apt and special words suitable to so singular a purpose as the transfer of the rights and liabilities of two parties. An agreement was not transferable at common law, but its transfer might be authorised by Act of Parliament, and it was very unlikely that an Act for so special a purpose should be couched in such general words. Some qualifications and provisions applicable to that transfer would have been probably introduced, whereas nothing of the kind is found in the Act. But it is contended that this question arises under the covenant to work the West London Railway efficiently and indemnify from the consequences of not doing so. I think that covenant very distinctly points out its intent, viz. to exclude a colourable working of the railway and to prevent damage being sustained, and a forfeiture incurred in consequence of the line not being worked, and that the power assumed by the plaintiffs to compel the defendants to work the line in conjunction with their own or the Great Western line, was inconsistent with the provision that the West London Company should have no control over the line demised to the defendants which they would have if the covenant is to be construed as the plaintiffs contend.

*CRESSWELL and TALFOURD, JJ.* concurred.

## BUSINESS OF THE WEEK.

*Wednesday, May 11.*

*MOULT V. HORN.*—This cause was tried before Williams, J. at the last sittings for Middlesex; verdict for the plaintiff, damages 12*l.* It was an action on a bill of exchange, drawn by a person named Forbes on one Glenn, and indorsed by Forbes to defendant, by him to one Livingstone, who in turn indorsed to the plaintiff; so it was, in fact, an action by indorsee against indorser. The defendant pleaded many pleas, only two of which were material. The 8th plea states, that defendant indorsed the bill at the request of Forbes, and without consideration for the indorsement, that Livingstone obtained possession of the bill, with notice, and that he gave no value for it. The 8th plea stated that after the indorsement to Livingstone, and whilst he was the holder of the bill, he petitioned the Court of Insolvent Debtors, and a vesting order was made in the matter of his insolvency, by which the bill became the property of the assignees, nevertheless he indorsed the bill away. Replication to the 5th plea *de injuria*, and to the 8th a traverse that Livingstone was the holder of the bill at the time when the vesting order was made. The cases had been entered for trial, and was called on last Saturday, and a verdict taken as above stated, no defence being offered. *Byles, Serjt.* now moved for a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, upon affidavit that the defendant was unable to try the cause, owing to the absence of two material witnesses, who had mistaken the Court in Banc for the Court of Nisi Prius, held in the Sessions House of Westminster. The plaintiff swears that owing to the accidental absence of his witnesses, he would have gone to trial. [*MAULE, J.*—This case has been before me at least ten times, and always something went wrong with the defendant, either a witness was absent or something. The defendant must be the most unfortunate man in the world. If he had issued a summons it had not been served, some obstruction or another interposed.] If my affidavits be true, he is unfortunate. [*CRESSWELL, J.*—Will the witnesses themselves swear to the circumstances? *MAULE, J.*—What is the defendant himself? *An Attorney.* [*MAULE, J.*—I thought so. That makes it so odd that he should never be right on a single occasion. It appears as if he tried to be wrong.] I think the Court will find that this was his misfortune and not his fault. He was under short notice of trial; and consequently, although his affidavit states that he sat up all the previous night preparing the brief, it was only delivered to me a few minutes before the case was called on. [*JERVIS, C.J.*—Why did he not prepare, as he might, a few hours earlier. Persons often appear slovenly when in fact they are clever, and wish to throw a case over the long vacation.] That could not be the case here. I trust the Court will let in the defendant on any terms it may think fit to impose. *JERVIS, C.J.*—You may take a rule upon bringing the money into Court, and on payment of costs; the defendant to take short notice of trial, and to change the venue from Middlesex to London, so that a trial may be had before the long vacation. *Rule nisi.*

*ATKINSON V. MOTTRAM.*—*Ball* moved for leave to enter an appearance, *sec. stat.* on the sheriff's return of *nolle bona* and *non est inventus* to a writ of *distingas*. The writ was left with the daughter of the defendant, who answered then and on various occasions, that her father was from home, and it was uncertain when he would return. The messenger who left the writ swears he believes the defendant is keeping out of the way to avoid service. [*MAULE, J.*—When was the search made for an appearance? *So late as the 7th instant.* None was entered on

## COMMON BENCH.

that day. [MAULE, J.—This is the 11th; I rather think the fourth day the extremity.] By the Court.—Take your rule.

**LAYTON v. HAZELWATE.**—In this case a rule for judgment, as in case of nonsuit, had been enlarged on the first day of the present Term, on the ground of the absence of a material witness. *Byles*, Serjt. now made absolute, the rule.

**SCOTT v. DR. RICHMOND.**—*Hambins* shewed cause against a rule obtained herein by *J. Brown*. The case will be in its turn duly reported.

**LAMBERT v. SMITH.**—This case was twice called on, but not argued, owing to the absence of one of the counsel engaged in it. *Hazley* said he was ready, but his learned friend on the other side had supposed, as he had himself thought, that the case might be argued on any day which might be convenient for both sides. *Jervis*, C.J.—We will take it to-morrow.

Ordered for to-morrow.

Thursday, June 5.

**ROBERTS v. WEINSTEIN.**—*Constructive service of rule to compute on defendant's wife.* This was a rule to compute. The rule nisi was served at the defendant's abode where the process server saw the aunt of the defendant's wife, and gave her the copy of the rule, who told him that the wife was too ill to be seen. The aunt took the copy out of the room, in which the server was, and went into the adjoining room, and the server then heard the wife, whose voice he well knew, call out to him that these proceedings were quite useless, as every thing in the house belonged to the aunt, who had the receipts for them, and the aunt then returned to the server. *Ball* moved, to make the rule nisi absolute upon this service.

*Rule absolute.*

**SUGDEN v. HIGGINS.**—*H. Hill* moved to enter up judgment on a warrant of arrest of March, 1848. *Granted.*

**SMITH v. PRISTON.**—*Powell* moved to enter an appearance for the defendant after a return of non est inquest, and nulla bond to a writ of *distringas*. *Granted.*

Friday, June 6.

The Court to-day took the Special Paper.

**HELEN v. BLACKWOOD.**—This case was called on in its turn. *Peacock*, Q.C. now asked the Court to allow it to stand over, and order it for this day week, as Mr. Cowling and himself would be engaged in the Queen's Bench on Tuesday. *Jervis*, C.J.—The Court sees no objection. Let the case stand for Friday.

*Leave granted.*

**DUNKLEY v. FARRIS.**—This case being named for to-day, *Jervis*, C.J. said, "Brother *Byles* is at Nisi Prius; have you any objections, Mr. Field, to the case standing over till to-morrow?" *Field*.—None whatever; it will suit me equally well.

*Stands over.*

**ROBINSON v. Uxor v. THE MARQUESS OF BRISTOL.**—This was an action of *quare impedit*, to try the right of presentation to a moiety of the advowson of the church of Braunewell-cum-Dunby and Anwick, in the county of Lincoln. The cause was tried before *Parke*, B. at Lincoln Assizes, and a special verdict taken, which was now brought for the opinion of the Court. *Peacock*, Q.C. and *Hays* for the plaintiff; *Cowling* and *Stoddard* for the defendant. The case occupied the entire day, and *Peacock* was interrupted in reply, with an intimation that the case should be resumed on Monday.

*Part heard.*

**CROFT v. BRAL.**—In this case the Court briefly intimated that there would be a rule nisi.

*Rule nisi.*

Monday, June 9.

**ROBINSON v. Uxor v. THE MARQUESS OF BRISTOL.**—The arguments in this case, which lasted through Friday last, were resumed and concluded. *Peacock*, Q.C. and *Hays* for plaintiff; *Cowling* and *Stoddard* for the defendant. The Court gave judgment for the defendant. The case, which is of great length and importance, will be duly reported. The special verdict, setting out lengthy deeds, necessitates the use of the papers, which are not yet obtainable.

*Judgment for the defendant.*

**ABDING v. GOODACRE.**—*Jervis*, C.J. read a written judgment in this case, which will be duly reported. In the meantime it may be stated that the Court held, that the true measure of damages was the pecuniary means of the debtor at the time of his escape, and therefore the rule must be made absolute for a new trial.

*Rule absolute.*

**RICHARDS v. THE SOUTH-EASTERN RAILWAY COMPANY.**—*Channell*, Serjt. asked the Court whether the paper books in this demurrer case had been delivered. *Jervis*, C.J.—Yes; and also the paper books in *Holahan v. Blackwood*.

Saturday, June 7.

**DON JON. TWISDEN v. BOE.**—*Guth* moved for judgment against the casual ejector.

*Rule nisi.*

**DUNKLEY v. PARR.**—(See 17 Law T. 75, 96.)—The Master now stated to the Court, that having inquired into the circumstances, he felt bound to report that a fraud had been committed on the Court by the clerk of the plaintiff's attorney, by forging the writ of summons in this case; that that clerk had absented himself and never returned to the office since the institution of the inquiry, and that no blame was to be attached to the plaintiff's attorney or any one else. *Byles*, Serjt. then said that he could not resist the rule being made absolute, but he trusted without costs to be paid by the plaintiff's attorney, for this was one of those cases in which a master was not responsible either civilly or criminally for the act of his servant. *Jervis*, C.J.—The Master must be supposed to be responsible for the employment of honest servants. It is admitted that this clerk was authorised to issue a writ of summons. The master directs what he supposes to be a copy of a correct writ to be served on the defendant. The defendant finds out that the writ is incorrect, and the defendant is then obliged to come and apply to set aside the incorrect writ and the copy served. The attorney, therefore, is responsible for the service, and must pay the defendant's costs of this application. *CHANNELL*, J.—This was an act done in the prosecution of the duty of the Attorney, though done by his clerk.

*Rule absolute with costs.*

Tuesday, June 10.

**THOMPSON v. HAWORTH.**—*Crompton* moved to set down this case for argument this Term, it being of importance to depositors in Savings Banks.

*Granted.*

**RICHARDS v. THE SOUTH-EASTERN RAILWAY COMPANY.**—(To be reported.) *Judgment for the plaintiff.*

*ALDIS v. MASON.*

## EXCHEQUER.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILLY and C. J. B. HENTLEY, Esqrs. Barristers-at-Law.

Saturday, May 31.

HUDSON v. ROBERTS.

The defendant's bull, with some cows, were being driven along the highway, the plaintiff, whilst passing, took out a red pocket handkerchief which attracted and irritated the bull, so much so that the bull did the plaintiff serious injury. The defendant subsequently called to see the plaintiff, and upon being shewn the handkerchief in question, said, that was the thing that did it, the bull would run at anything red—a bull would run at anything red.

Held, sufficient evidence to go to the jury of a scienter—that the defendant knew this animal was a dangerous one.

Semble, such an animal in the public highway ought to be properly guarded and prevented from doing injury.

This was an action tried before the Lord Chief Baron in Middlesex, and was brought for damages done to the plaintiff by a bull of the defendant's. It appeared the plaintiff was passing along the public highway when the defendant's cows, and also this bull, were being driven along the same road, the plaintiff had occasion to use his pocket handkerchief when near the bull, and the pocket handkerchief being a red one it irritated the bull, as anything red usually does, and the bull tossed the plaintiff and very much injured him. The jury returned a verdict for the plaintiff, damages 20*l*. A rule nisi having been obtained to set aside that verdict and to enter a nonsuit, on the ground that there was no evidence of scienter to go to the jury.

*Hugh Hill* shewed cause.—There was evidence that all bulls would run at things red, and that the defendant knew this. Such an animal, therefore, should not have been driven along the public highway without being properly guarded. [*ALDERSON*, B.—In fields it may be he was not bound to guard the bull, as all persons are supposed to know that bulls would run at things red, but this was in the street.] (*Judge v. Cox*, 1 Stark.; *May v. Burdett*, 9 Q. B. 101; *Card v. Case*, 5 Com. B. 622, were cited.)

*James*, Q.C. contra.—There was no evidence in this case that this bull ever ran at or was before irritated by anything red, or that this defendant knew that his bull in particular would do so. It was not like the keeping of an animal *fera nature*, nor was it at all proved that the animal was of a ferocious, fierce, and vicious nature, or accustomed to attack mankind. So far from it, it was never shewn that he had before ever attempted to injure any person. [*ALDERSON*, B.—Why may you not drive a lion along the highway in the same way? *PLATT*, B.—Surely it makes no difference that this animal ever committed an injury of this sort before, or the same may be said of a lion that had been so driven, and never eaten any one before.] *Cur. adv. vult.*

JUDGMENT.

Wednesday, June 4.—*POLLOCK*, C.B.—In the case of an action for an injury done by a bull, we have considered this case, and the application to enter a nonsuit upon the ground that there was no evidence to go to the jury of a scienter. That was the precise point upon which liberty was taken to enter a nonsuit. No doubt it was necessary to give some evidence, otherwise the action would not be maintainable. It appears that the injury arose from the driving a bull among some cows in the public streets. The plaintiff was going on his lawful affairs, wearing a red handkerchief. This circumstance irritated the animal, which did him considerable injury. The defendant was proved to have said, after this accident, that the red handkerchief was the cause of it, for he knew that the bull would run at anything red. Another witness gave evidence that, on a different occasion he said he knew that a bull would run at anything red. We think that either expression was some evidence to go to the jury that he knew that this animal was a dangerous one, and the first expression was no doubt distinct evidence that he knew that a bull would run, and, indeed, it appears that this very animal had before run, after persons with garments of red colour, though those facts were not brought home to the knowledge of the defendant; but as to the circumstance of a person carrying a red handkerchief, and as it is reasonable to expect in every public street persons so dressed may not unfrequently be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, knowing its character, that if it met a person with a red garment he was likely to run at and injure him. Whether the evidence would be sufficient to justify the jury was for them, not for the Court. The learned judge who presided at the trial reports he was perfectly satisfied with the verdict. If there be any evidence of scienter, the case cannot be withdrawn from the jury. In this case they were satisfied, and found a very temperate verdict in point of damages, and we

## EXCHEQUER.

are not disposed to disturb that. The rule, therefore, for a nonsuit must be discharged.

*Rule discharged.*

Saturday, June 7.

HEWITT v. PATERSON.

County Court—Suggestion—London Sessions Act.

*Bramwell* shewed cause against a rule to leave to enter a suggestion upon the privilege of the plaintiff of costs under the London Debts Act, and contended that the County Courts Extension Act (13 & 14 Vict. c. 61) in away with the necessity of entering a suggestion well under the London Act under the County Court Act (9 & 10 Vict. c. 95). The Extension Act is a general enactment in all actions in the Superior Courts where 20*l*. is recovered, the plaintiff shall have for the sum recovered only, and no costs; suggestion becomes unnecessary.

*Prentice* in support of the rule.—The County Court Extension Act throughout replaces County Courts under the 9 & 10 Vict. only. This is seen by secs. 11 & 13. The case comes here for a suggestion as a matter under the London Act. The object of the Act is in resisting this application is to prevent a judge under the 13th section of the Extension Act to get costs under the discretionary power by that section.

By the COURT.—You may take your rule on the other side, if they think fit, *demurrer* is *non sum*.

*Rule absolute to enter suggestion.*

Monday, June 9.

DREW AND OTHERS v. COLLINS.

Bankruptcy—Pleading—Deed of arrangement.

12 & 13 Vict. c. 106, ss. 224, 245. A plea to a declaration in debt set out as alleged to be a deed of arrangement under 12 & 13 Vict. c. 106, s. 224, between the defendant and certain of his creditors in the sum of six-sevenths in number and value, as required by the Act, whereby, within one month from the date thereof, the creditors of the defendant had agreed to accept a composition of 6*l*. 6*s*. 6*d*. in the pound on the amount of their debts in full payment and satisfaction.

Held, that such deed was not within the provision of the Act, and that nothing had been done in the distribution of the estate was contemplated by the Act.

*Debt*—Goods sold and delivered, work and labour done, and materials provided, money lent and expended for defendant's use, money lent and received, and on an account stated.

3rd Plea—As to the residue of the said sum of money so accepted as aforesaid, and all cases and causes of action in the said declaration mentioned in respect thereof, the defendant says that before and at the time of the making of the indenture hereinafter mentioned, and for six months and upwards before the suspension of payment by the defendant as hereinafter mentioned, the defendant was a trader, to wit, a wholesale druggist, habile in a bankrupt laws, and within the meaning of the same hereinafter mentioned. And the defendant says that before and at the time of the making of the indenture hereinafter mentioned he, the defendant, was indebted to the parties thereto of the 1st and third parts respectively in drivers and money, which said sums of money he, the defendant, was then unable to pay in full. And the defendant further says that after the passing and coming into operation of the Bankrupt Law Consolidation Act 1849, to wit, on the 2nd day of May in the year of our Lord 1850, he, the defendant, suspended payment; and afterwards, to wit, on the day and date last aforesaid, by a certain indenture then made between the defendant of the first part, one William Pearce, one William Wells, and one William Heathfield, creditors of the defendant, of the second part, and the several other persons whose names are set out in the said indenture, being also creditors in their own right or in copartnership, being agents or attorneys of creditors of the defendant, of the third part, which said indenture, with the respective seals of the said defendant, the said William Pearce, the said William Wells, the said W. E. Heathfield, and the said several other persons, the defendant brings into court here, the date whereof is a certain day and year in that behalf aforesaid mentioned, to wit, the day and year last aforesaid. After reciting that the defendant had for some time passed carried on, and did then carry on, a trade or business of a druggist, at Oxford-court, Cannon-street, in the city of London, and that in the course of his said trade or business, and otherwise, he had become and then was justly and truly indebted to the several persons, parties to the said indenture of the second and third parts, in the several sums of

(a) We must refer to the Act, as we have not space to give the several sections at length, and extracts would be useless.

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money set or to be then set opposite to their respective names on the execution of the said indenture. And also that, by a memorandum in writing, bearing date the 26th day of February, A.D. 1850, signed by six-sevenths at the least of all the creditors of the defendant to the extent of 10l. or upwards, both in number and value, within one month from the date thereof, the creditors of the defendant had agreed to accept a composition of 6s. 8d. in the pound on the amount of their respective debts, in full payment and satisfaction thereof, upon the terms, agreements, stipulations, and conditions, and payable at the time and in the manner in the same agreement and thereinafter mentioned and contained, the said W. Pearce, W. Wells, W. E. Heathfield, and the several persons parties thereto as creditors, or attorneys, or agents of creditors, did give and grant unto the defendant full, free, and absolute liberty and license, according to his own free will and pleasure, to go, come, pass, repass, abide, and continue, to, from, and at all or any place or places he might require, and to manage, collect, get in, and dispose of all his estate, debts, and effects, under the inspection and control of the said W. Pearce, W. Wells, and W. E. Heathfield, or any two of them, and in such manner as they should judge to be most conducive to the benefit of the said creditors, from the 26th day of February, A.D. 1850, until the 26th day of February, A.D. 1852, and the said W. Pearce, W. Wells, and W. E. Heathfield, and the said several persons, parties thereto of the third part, did thereby, for themselves respectively, and for their several and respective heirs, executors, administrators, and assigns, parties and constituents, but not any of them for the other or others of them, or for the heirs, executors, administrators, or assigns, acts or deeds of any other or others of them, covenant, promise, and agree with and to the defendant that they should not, nor would, nor should, nor would any other person or persons for them, or by the order, authority, assent, consent, or procurement of them respectively within the time aforesaid, sue, arrest, prosecute, molest, attach, detain, take in custody or execution, imprison, or otherwise impede or incur him, the defendant, or his estate or effects, in any manner howsoever. And also that if any of them should do so, contrary to the true intent and meaning of the said indenture, the said indenture should operate to all intents and purposes, and might be pleaded in bar to the said respective debts, and to any prosecution, suit, action, or proceeding that should or might be brought or prosecuted against the said person of the defendant, his goods or chattels, as aforesaid, within the time aforesaid, as effectually as if he had a general release under the hands and seals of such creditors respectively for that purpose, as in and by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the defendant further saith, that before the commencement of this suit, to wit, on the 2nd day of May, A.D. 1850, to wit, at the time of making the said indenture, the same was signed and sealed by the defendant, and that divers, to wit, 100 creditors of the defendant, in their own right, signed the said indenture, and subscribed their names, and affixed their seals thereto, and divers, to wit, 100 others of the said creditors, by their agents and attorneys respectively, signed the said indenture, and subscribed their names and affixed their seals thereto. And the defendant further saith, that the said indenture, at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and his creditor, within the meaning of the provisions of the statute made and passed in the session of Parliament holden in the 12th and 13th years of the reign of her Majesty the now Queen, being the statute aforesaid. And that the said creditors, by whom and in whose behalves respectively the same was sealed as aforesaid, were six-sevenths in number and value of the creditors of the defendant, within the meaning of the said provisions of the said statute, whose debts amounted, within the meaning of the said provisions, to the sum of 10l. and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgage property and other such available securities on lives from the defendant aforesaid, to be the balance due to him. And the defendant further saith, that the plaintiffs were at the time of the making of the said indenture creditors of the defendant in respect of the causes of action in the introductory part of this plea mentioned, within the meaning of the said statute, and that at the time of the making of the said indenture the amount in the introductory part of this plea mentioned was a debt then due from the defendant to the plaintiffs, within the meaning of the said indenture. And the defendant further says, that after the said suspension of payment, and after the said indenture had been so signed, and the names of such majority as aforesaid of creditors had been so subscribed, and seals

so affixed in manner aforesaid, to wit, on the 14th day of August, A.D. 1850, the plaintiffs had notice, to wit, from the defendant, of the said suspension of payment, and of the said indenture of arrangement, and were then requested, to wit, by the defendant, to sign and execute the same, and the plaintiffs then might and could, if they would, have signed and executed the same as parties thereto of the third part. And the defendant further saith, that three calendar months from the time at which the plaintiffs had notice from the defendant of his said suspension of payment and the said deed, had elapsed before the commencement of this suit. And the defendant further saith, that he, the defendant, hath, from the time of the making of the said indenture, hitherto in all respects performed and observed the covenant in the said indenture contained, and, on his part, to be performed. And that the said W. Pearce, W. Wells, and W. E. Heathfield, parties to the said indenture of the second part, did at, and at all times after the making of the said indenture, assent to the terms thereof, and did act as such trustees and in the trusts of the said indenture. And the defendant further saith, that by reason of the premises, and by force of the statute in that case made and provided, being the statute aforesaid, the said indenture heretofore, and before the commencement of this suit, to wit, on the 14th day of November, in the year last aforesaid, became, and was effectual and obligatory in all respects upon the plaintiffs, as if they had duly signed the same. And the defendant further saith, that the said deed of arrangement still remains in full force, and that the period during which the said liberty and license therein mentioned were given and granted to the defendant has not yet elapsed, and that, by reason of the matters aforesaid, the defendant heretofore, and before the commencement of this suit, to wit, on the day and year last aforesaid, became and was released and discharged in manner aforesaid from the said causes of action in the introductory part of this plea mentioned. Verification.

## Demand of oyer of indenture.

Special demurrer, assigning for causes (*inter alia*) that the deed was not a deed of arrangement within the true intent and meaning of 12 & 13 Vict. c. 106, and that it was not alleged in the plea that the defendant was a trader, subject to the bankrupt laws, or within the meaning of the said Act, and that it was not alleged that the defendant was a trader for six calendar months before his suspension of payment, but only for six months. That the said plea was uncertain, in that it is not shewn the amount of the alleged debts, and in that it did not allege that the said creditors who signed the said deed, or the plaintiffs, were creditors, entitled to prove in bankruptcy within the meaning of the said Act, and that the said plea should have been pleaded in bar of the further maintenance of the action, and not in bar of it generally. Joinder in demurrer.

*Willes*, in support of the demurrer. This plea relies on a portion of the deed which authorizes the defendant to carry on business, and if he is molested, to plead the deed in answer. This deed is said to be signed by 6-7ths of the creditors, but it is not signed by the plaintiffs, and it is sought to bind the plaintiffs by the operation of this deed, under the provision of the Act of Parliament. If this deed is valid under the Act, the defendant has a good defence to this action. It provides for the payment of a composition of 6s. 8d. in the pound, but you cannot bind to a composition persons not parties to the deed. The deed cannot be supported unless it fall within the provisions of 12 & 13 Vict. c. 106, ss. 224, 225, 226, 227, 228, 229. The 224th section is difficult of construction, unless it be read with, and is limited by the 228th section. If the 224th section stood alone, and was to be construed literally, 6-7ths of the creditors might execute a release, even in a case where nothing had been paid. [ALDERSON, B.—I see the expression in the 228th section is "such trader," what is the meaning of that? Is it not a trader who has presented a petition?] The arrangement must be *ejusdem generis* as in bankruptcy. [POLLOCK, C.B.—It would appear to mean any trader liable to the bankrupt laws. The expression first occurs in the 56th section.] The clause at the end of the 225th section would seem to contemplate a further application to the Court. The 228th section provides "That the creditors of every such trader shall have the same rights," &c.; it does not say "except as provided by the deed." The result of these sections is, that if the deed contain provisions inconsistent with those sections, it is not within the Act. It is a positive enactment of a general rule to be applied in all cases.

*O'Malley, Q.C.* (with him *Ball*), was here called upon. He referred to the 214th section, the 224th, and 228th, and contended that the language was as comprehensive as it could possibly be, and that this latter section proved his interpretation to be the right one. The Act puts a limited construction on the deed. The statute gives to the 6-7ths of the creditors the right to manage. [POLLOCK, C.B.—I

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agree with you that apparently that is the meaning of the words, but can that be, suppose the 6-7ths chose to give the property to a charity. MARTIN, B.—Do you mean to say that the 6-7ths could make the debtor a present of his property?] The Legislature might give such a power if it pleased, and it could not have used stronger terms to accomplish such purpose. It is supposed that the 6-7ths will act for the good of all. It is not necessary that there should be any surplus, and it is fit that such a power should be in the creditors' hands. It may be that, at the time of stopping payment, the estate is worth nothing, but they may see that if it is properly worked for two years, they will be able to get 6s. 8d. in the pound, and they therefore say, "you work it, and exert yourself; and we will enter into this arrangement by way of premium to you for thus saving us something out of the wreck." It is clear that the Legislature, when framing the Act, had in view the difference between composition and distribution. [PARKE, B.—Does the Act contemplate anything more than avoiding the expense and delay of the machinery of a Court of Bankruptcy?] Yes, the object is that the debtor should have an opportunity of going on and so make further assets for the general benefit. [MARTIN, B.—I think it is perfectly clear that he should go on and yet that he should be required to distribute his estate.] In the case of *Phillips v. Surridge*, 19 L.J. 337, C.P. an objection was made that the deed did not shew the trusts. Now, if it was necessary that the deed should be in conformity with the bankrupt law, it would be important to shew the trusts, but that case decided that it was not necessary. *Stewart v. Collins*, 20 L.J. 79, C.P. was also cited.

POLLOCK, C.B.—I am of opinion that judgment should be given for the plaintiffs. The argument for the defendant is, that a deed entered into under these circumstances is binding on all the creditors; that without any application to the Court there may be an arrangement by deed, under the 224th section, in the terms of that now before the Court. Looking at the whole scope of the Act, with reference to the facts, it appears to me that these sections contemplate a distribution of the whole assets of the insolvent. The 214th section refers undoubtedly to a compromise, but I presume a compromise by payment at once; but I think if the arrangement is to be by deed under the 224th section, it must be a distribution or division of all the assets, and the giving the surplus to the insolvent cannot be supported. The arrangement must be according to law, and is intended to avoid expense and delay, and to facilitate the distribution. For these reasons I think the deed is not in conformity with the 224th section, and there must, consequently, be judgment for the plaintiffs, and if there is any doubt, the defendant can go to a Court of Error.

ALDERSON, B.—I am of the same opinion. The first arrangements contemplated in this Act are required to be confirmed by the Court. Then comes those without the interference of the Court, and when we consider that here are six-sevenths of the creditors able to deal with the whole estate and decide for the whole of the other creditors, it seems to me that such a power should be strictly watched, and I think that must have been the intention of the Legislature. He read the several sections. I think the intention clearly was, that the whole estate should be distributed.

PLATT, B.—There are several courses contemplated by the Bankrupt Consolidation Act. The Act is classed under several heads, and looking at the 228th section, it is impossible to imagine that anything but the distribution of the whole estate was contemplated. That section points out whatever is to be done. With respect to an ordinary composition deed, that has nothing to do with this Act, but is left just where it was before.

MARTIN, B.—I am of the same opinion. The effect of the plea is, that the plaintiffs' debt was extinguished by the execution of this deed. I apprehend that the real meaning is, that a certain number of creditors are entitled to enter into an arrangement to bind the whole, but they must deal with the whole estate, and cannot enter into a composition. The estate is to be distributed, and it was never intended that a surplus should be reserved for and given to the insolvent.

## Judgment for the plaintiffs.

## BUSINESS OF THE WEEK.

Friday, June 6.

NICHOLLS AND OTHERS v. DIXON. *Stands over.*  
WILLIAMS v. THE CHESTER AND HOLYHEAD RAILWAY COMPANY. *Cur. ado. vult.*  
SWANSEA DOCK COMPANY v. LEVINE. *Cur. ado. vult.*

Saturday, June 7.

TOMLIN v. GALLAND, Clerk.—HENNAGE v. SAME.—These were feigned issues, tried before Alderson, B. at the last Spring Assizes at Lincoln, and were brought to try the question whether a certain district, called Lambercroft, in the county of Lincoln, was exempt from the payment of small tithes. The cases terminated in verdicts against the vicar. Subsequently, rules were obtained on the part of the landowners, requiring defendant to shew

## BANKRUPTCY

oats, and sent the same by the Rail Road  
instructions, viz.:-



## V. C. KNIGHT BRUCE'S COURT.

"The superintendent at the March station, E.C.R. "Sir,—About 15 qrs. W oats, ex Green; 20 qrs. W oats, ex Frear. The above two parcels of oats will be delivered at your station on Monday, please inform us of quantity and weight gross of each parcel, and forward them to the order of Mr. W. Piggott, at the Cambridge station, and charge the carriage to our account. You had better make one parcel with a x with chalk.

"We remain, yours, &c.

"J. & T. Cross."

The other parcel being oats of another price and description, was sent in a similar way, with similar instructions.

Some part of the oats had been delivered to the bankrupt; but on the 17th of October Cross and Co. wrote to the railway superintendent at Cambridge reversing their original instructions, and requesting him to hold the goods on their account. At the time when such letter was written, Cross and Co. were not aware of the fact of Piggott having been adjudicated a bankrupt, although they had doubts as to his solvency. Francis Cross (one of the partners in the firm of Cross and Co.) went to the station master at Cambridge, and told him to hold the oats for the further instructions of the firm, and that the parties to whom the oats were sold would produce an order from the firm for them. There had been several previous transactions in oats between Cross and Co. and the bankrupt.

It was the custom of Cross and Co. to pay the carriage and rent for warehousing of the oats, and the expenses of carrying the same from the company's premises to the carts sent by the bankrupt for them. The assignees claimed the whole of the goods as part of the bankrupt's estate.

*Lawrence*, solicitor for Cross and Co.—The goods had not passed into the bankrupt's possession, we had a right to stop them *in transitu*. (*Whitehead v. Anderson*, 9 M. & W. 518; *Tanner v. Scovell*, 14 M. & W. 28; *Gibson v. Carruthers*, 8 M. & W. 301. See *Mason v. Lickbarrow*, and *Lickbarrow v. Mason*, 1 Smith, L. C. 3rd edit. 388, and notes; and *Wentworth v. Outwaite*, 10 M. & W. 436; *Re Gales*, 1 De Gex, 100.)

*Cole*, solicitor for the assignees.—The vendors had parted with their right to the goods, which they could not recall, and the bankrupt had the right to take possession of them, and actually did so, as to part; the taking possession of part affected the actual ownership of the whole, and from the time when the part was delivered the vendors' right to stop *in transitu* ceased.

Mr. Commissioner FONBLANQUE.—It may be taken as a general rule, that so long as there remains anything to be done by the vendor, or at his risk or charge, the transit is incomplete. In this case the corn was to be conveyed from the railway warehouses to the bankrupt's waggons at the expense of Cross and Co.; and was, therefore, *in transitu*. The only doubt is, whether the bankrupt had taken possession of the whole of the corn by taking away a part of it. I am of opinion that he had not. On the 11th of October the bankrupt signed a declaration of insolvency. On the following day he took away sixteen quarters of oats. On the 15th the declaration of insolvency was filed, and on the 18th Piggott was declared bankrupt on his own petition. Now it was bad enough that he should have taken away the sixteen quarters; but I will not on that account impute to him the intention of taking the whole forty-eight quarters, when it had become perfectly evident that he could not pay for them. The case of *Tanner v. Scovell* is much stronger than that which is now before me; I must, therefore, declare that the oats remaining in the warehouse of the railway company did not pass to the assignees.

## Equity Courts.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple, Barrister-at-Law.

Saturday, Feb. 15.

**RE COLLINS'S CHARITY; THE LONDON AND BIRMINGHAM RAILWAY; COVENTRY AND NUNEATON RAILWAY ACT, 1846; AND THE LONDON AND BIRMINGHAM, GRAND JUNCTION, AND MANCHESTER AND BIRMINGHAM RAILWAY CONSOLIDATION ACT.**

**Charity—Payment of dividends.**

Charity lands were purchased by a railway company, and the purchase money was paid into Court. On the petition of the trustees, the Court directed the purchase money to be invested, and the dividends to be paid to any two of the petitioners, as trustees of the charity, or to any two of the trustees thereof for the time being, the names of such trustees to be verified by affidavit.

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## V. C. KNIGHT BRUCE'S COURT.

This petition was presented by the trustees of Samuel Collins's charity, in the city of Coventry, and—after stating that land, the property of the charity, had been purchased by the London and North-Western Railway Company, for the purposes of their Acts, and that the purchase money (£251.) had been paid into Court, and was, together with other moneys, standing in the name of the Accountant-General, to an account, "*Ex parte* the London and North-Western Railway Company, in the matter of the London and Birmingham Railway Coventry and Nuneaton Railway Act, 1846,"—prayed that the sum of £251. might be invested in consols, "*Ex parte* the trustees of Samuel Collins's charity, in the matter of the London and North-Western Railway Company," and that the dividends might be paid to any two of the petitioners, the present trustees, or to any two of the trustees for the time being of the charity, and that such dividends, when received, might be applied for the benefit of the charity.

W. W. Cooper appeared in support of the petition.

The VICE-CHANCELLOR said that he could not direct the dividends to be paid according to the prayer of the petition, as, excepting where the trustees were themselves a corporate body, it was not usual to make the order in that form.

W. W. Cooper afterwards produced an order in the form asked by the petition, made by Sir W. Grant, on the 25th of March, 1814 (*Re the Coventry Road Trustees*), and also two similar orders made by the late Vice-Chancellor of England on the 8th of December, 1848 (*Re S. Billing's Charities*), and the 9th of February, 1849 (*Re The Bablake Boys Charity*).

The VICE-CHANCELLOR said, that he would make the order in the form required, as acting on the authorities which had been produced, but not on his own opinion. The order would therefore be, that the dividends should be paid to any two of the petitioners as trustees of the charity, or to any two of the trustees thereof for the time being, the names of such trustees to be verified by affidavit.

Tuesday, Feb. 18.

WHITFIELD v. PARFITT.

**Ship Register Acts—Indorsement on Bill of Sale—Costs.**

A. B. entitled to eight 64ths of a vessel, executed a bill of sale to C. D. of those shares, and there was an indorsement on the bill to the effect that on A. B.'s paying to C. D. 100*l.* and interest, the bill of sale should be void. A. B. subsequently paid to C. D. interest on this sum of 100*l.* C. D. registered the bill of sale, but the indorsement was not noticed in the register. C. D. afterwards sold to E. F. A. B. filed a bill against C. D. and E. F. to redeem, and the Court made the usual decree of redemption, except that as to the costs occasioned by denying or disputing the right to redeem, they were to be paid to A. B.

The bill in this case sought to redeem eight 64th shares in a certain steam-tug, called *The Stockton*, registered at the port of Bristol. It appeared by the evidence that in the month of March, 1845, the defendant lent to the plaintiff 100*l.* and it was agreed that the repayment should be secured by an assignment of the eight 64th shares in question. A bill of sale was accordingly prepared, dated the 2nd of April, 1845, purporting on its face to be an absolute bill of sale, but there was indorsed on it a memorandum also dated the 2nd of April, 1845, to the effect "that on the plaintiff repaying to Parfitt the sum of 100*l.* and interest, at 5 per cent. then and in that case the bill of sale should be null and void, and of no effect whatever." This memorandum was signed by the plaintiff, and by the wife of the defendant Parfitt for him. In the month of January 1846, the plaintiff paid to the defendant the interest due on the 100*l.* and the defendant gave him a receipt for such interest. In July, 1846, the defendant procured the bill of sale to be registered, and the entry on the certificate of registry took no notice whatever of the indorsement, but treated the instrument as an absolute transfer. The plaintiff, hearing of this, made application to the Custom-house authorities on the subject, but, being unable to produce the bill of sale which was in Parfitt's possession, without effect. In the month of October, 1846, Parfitt transferred by bill of sale to John Jones, of Bristol, the other defendant, whereupon the plaintiff filed his bill for redemption, and for an injunction to restrain the registry of the transfer to Jones. The injunction was obtained, and the cause now came on for hearing.

Swanston and Rosburgh, for the plaintiff, contended that the plaintiff's right to redeem as against Parfitt was not in any manner affected by the Ship Registry Acts, inasmuch as the transfer which had been registered was a deed which never existed; for the document which was executed, and which ought to have been registered, was to all intents a mortgage and nothing more. That the case of the de-

fendant Jones was, at all events, no better than that of Parfitt, for it was not pretended that he had completed even a legal title by registry. (*Boyson v. Gibson*, 4 Man. G. & S. 121; *Ex parte Jones*, 2 Crompt. & Jer. 513; and *Follett v. Delany*, 2 De G. & Sma. 235.) They also referred to the 37th, 38th, and 45th sections of the 8 & 9 Vict. c. 89.

C. Barber, for the defendant Parfitt, contended that although the transaction was originally a loan, it was the intention of the parties that the bill of sale should be absolute, and that the wife had no authority to sign the indorsement for the defendant. The registry was conclusive evidence of the defendant's title. He cited *Mestier v. Gillespie*, 11 Ves. 621.

Osborne, for the defendant Jones, argued that the transaction was an absolute sale, and that Jones had a right to look upon the registry, and that only, as evidence of Parfitt's title to sell, and relied on the plaintiff's laches in allowing the registry to remain unaltered between July and October. (*Battersby v. Smyth*, 3 Mad. 110.)

The VICE-CHANCELLOR (without hearing a reply) said,—The first question was, whether the bill of sale and the indorsement upon it were to be taken as contemporaneous instruments or contemporaneously signed by those who signed those instruments, if the word "instruments" could properly be used in the plural. He was of opinion that upon the evidence they must be taken to be so. The next question was, whether, inasmuch as the indorsement was signed, not by the defendant Parfitt, but by his wife, it was to be taken on the evidence (including especially the receipt) that she signed it as his agent and upon his authority. He was of opinion that the just and inevitable inference from the evidence was, that she did sign it as his agent and by his authority. That being so, the case stood in the same position in his judgment as if the memorandum or indorsement had been signed by Mr. Parfitt himself. The next consequence that followed was, that in his judgment the indorsement was as much a part of the deed upon which it was written as if it had been inserted in the front, in the middle, or in any other part of the deed. Supposing that view of the case to be correct, the instrument was, to all intents and purposes, a mortgage. It had, however, been registered and entered in the Custom-house books in such a form as not to mention whether it was a sale or a mortgage; and a bill of sale might be a description of a conveyance or assurance as applicable to a transaction which was not a sale in the colloquial sense of the expression as to one that was. And the question was, whether the circumstance that it was not mentioned in the manner that he had stated, as a mortgage or a security for money, was to invalidate the transaction. He was of opinion that that could not be contended successfully upon any part of the Act of Parliament, unless the 45th section; and he was also of opinion that the 45th section was not intended to invalidate, and did not invalidate, such a transaction. There were two views of this case, one, that the Act, not having been obeyed, the legal interest never had been effectually taken out of the plaintiff. If that was the fair view, which he did not say, the plaintiff, nevertheless, had a right to come here, he submitting to redeem for the purpose of taking the cloud off his title. If, however, the legal interest had been taken out of him, then he said it had not been so taken out of him as by law to exclude his right of redemption. The case of Jones had not a right to stand on a higher footing than that of Parfitt. The consequence was that there must be a redemption upon the usual terms, except that as to the costs occasioned by denying or disputing the right of redemption, those costs must be separated and paid to the plaintiff. The one set must be placed against the other. His Honour thought that the law had been too much for dishonesty in this case. He continued the injunction because he thought it fit in the present state of circumstances.

Friday, Feb. 21.

STANTON v. HOLMES.

Exceptions—Scandal.

A defendant in her answer said, that the plaintiff "is desirous, by annoying and harassing the defendant, to extort money from the defendant," and that "she believes the plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant in order to be relieved from being worried and harassed and put to expense by the illegal and vexatious conduct of the plaintiff." To these passages the plaintiff excepted for scandal, but the exceptions were overruled without costs.

This case came on to be heard upon exceptions to passages in the defendant's answer for scandal. The bill was filed to recover certain real and personal estate to which the plaintiff alleged he was entitled. The passages excepted to were the following:—"The complainant 'is desirous, by annoying and harassing this defendant, to extort money from this defendant'



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which belong to different proprietors; the owner of each lease is entitled to stock the common with twenty-four sheep or three cows, or two horses throughout the year. The corporation are entitled to the surplus pasturage. The green is bounded on two sides by the river Swale, a river or arm of the sea flowing between Whitstable and the river Medway, and the outer fence of the green on those two sides is a wall formed of earth, wood, and stones, about a mile in extent. It is absolutely necessary that this wall should be kept in repair, as the river at high water is above the level of the land, and the water must come in and overflow unless the wall be properly kept up. The charter of Charles I. under which the borough was governed, gave power to the mayor, jurats, and bailiffs to make bye-laws for the government of the inhabitants within the said borough, and for the management and preservation of the common lands and fisheries thereof. In exercise of that power, a bye-law was made in 1728 which enacted that for the preservation of the marsh lands of the said borough, and the sea-walls, fences, &c. thereof, it should be lawful for the mayor, jurats, and bailiffs of the said borough, to make and levy upon all owners and occupiers of sheep feedings, sheep leases, and pasturage, a rateable scot tax or assessment, according to the extent of such sheep feedings, &c.; and that all such owners and occupiers should pay such scot or assessment as the mayor, jurats, and bailiffs should from time to time judge to be fit and necessary for that purpose. From that time to the year 1824, rates designated as "wallscotts" for the repair of the said wall and fences were made by the corporation, and it does not appear that the right to make them was ever disputed. In 1824 new bye-laws were made which repealed the then existing bye-laws, but contained similar provisions for making wallscotts; and under the new bye-laws, wallscotts were from time to time made and not resisted. The 1st section of the Act above mentioned recites, that "the mayor, jurats, bailiffs, and burgesses of the borough of Quinborough, in the county of Kent, are a body corporate, and are entitled (subject to the claims of divers creditors thereon) to considerable property, and especially to valuable oyster grounds, &c.; and that the said oyster grounds and fisheries by reason of the embarrassed state of the affairs of the said mayor, jurats, bailiffs, and burgesses, have been for several years unstocked, &c. and that the property of the said mayor, jurats, bailiffs, and burgesses, is inadequate to the discharge of their debts, and a great part of such property has been extended under divers writs of *elegit*, and that a large sum of money is required to stock the said oyster grounds, &c. and that it is expedient that all the estate and property of the said mayor, &c. should be vested in trustees with powers to sell, demise, manage, and improve the same, and to appropriate the moneys to arise therefrom in the manner hereinafter mentioned;" but these objects cannot be effected without the authority of Parliament; and enacts that "from and immediately after the passing of this Act, the soil and ground of the said borough and said town of Quinborough, so far as the same is now vested in the mayor, jurats, bailiffs, and burgesses of the said borough, and all the lands, messuages, tenements, fisheries, advowsons, rents, tolls, hereditaments, and all other real and personal estate and property of the said mayor, jurats, bailiffs, and burgesses, save such as is included in the Schedule (B) to this Act, and all the estate, right, interest, and title of the said mayor, jurats, bailiffs, and burgesses in and to the same, shall become and be, and the same are hereby and by virtue of this Act, vested in A. R., R. M. &c. the trustees appointed to carry this Act, and the trusts and powers thereof, into execution, to be held by the said trustees according to the nature and quality of such estate and property respectively in as full, perfect, and ample a manner as the said mayor, &c. immediately before the passing of this Act, held or ought to have held the same." The fourth section authorised and empowered the trustees to manage the estate thereby "vested in them" in such manner as they shall think best for the benefit of the same, and for carrying the purposes of this Act into execution. The 22nd section enacts "that nothing in this Act shall deprive the said mayor, &c. or any of them of any immunities and exemptions from toll, pontage, pannage, murage, kegage, plicage, groundage, lastage, stallage, wharfage, bidge, and rive, or of any other immunities, exemptions, rights, and privileges, to which they are now entitled, and the exercise of which is not inconsistent with, or contrary to, the provisions of this Act." Section 23 enacts "that all bye-laws heretofore made by the mayor, jurats, and bailiffs of the said borough, touching or concerning the estate and property hereby vested in the trustees under this Act, or the management or government thereof, or touching or concerning the fishermen in the said fisheries, shall, from and after the passing of this Act, be void and of no effect; and that no bye-laws shall, at any time hereafter, be made by the said mayor, jurats,

and bailiffs, touching or concerning the matters and things aforesaid; and that no officer of the said mayor, jurats, bailiffs, and burgesses shall hereafter intermeddle with the estate and property hereby vested in the trustees under this Act, unless he shall be authorised so to do by the said trustees." Section 24 enacts, that when the trusts shall be fulfilled, it shall be lawful for the Lords Commissioners of Her Majesty's Treasury to certify such facts, &c.; and after the publication of such certificate "all the estate and property hereby vested in the trustees under this Act, or so much thereof as shall then remain unsold and undisposed of, shall revert to the said mayor," &c. to be held by them according to their ancient laws, charters, customs, and usages; and all the powers and provisions of this Act shall thereupon cease, except as to any acts, deeds, matters, and things theretofore done, &c. The rate in question recited the Act above mentioned, and information to the trustees by their steward, that the sea-wall was out of and required repair, and imposed contribution after the rate of 15s. by the leasee; and so in proportion on the owners or occupiers of the land "commonly called sheep's leases, or quarter leases, or other fractional parts of leases," to be paid to the steward and by him applied in repairing, &c. the sea-walls, fences, sluices, ditches, and sewers, with power to the steward to levy by distress of the goods of defaulters for six days after demand. One of the deponents to the affidavit in support of the rule, swore that "since the passing of the said Act of Parliament, the trustees for the time being acting under it have continually, without the consent of the leaseholders, turned in upon the said common, to the great loss and damage of the leaseholders, large numbers of cattle belonging to persons having no right of pasture in or upon the said common; and the said trustees have received from such last-mentioned persons, for and in respect of such depasturing as last aforesaid, divers sums of money amounting, as deponent has been informed and believes, to about 60*l.* or 70*l.* a year; but the said trustees have never on any occasion included themselves in any rate or assessment or wallscot, in respect of the said common, made by them, nor, as deponent has been informed and believes, at any time contributed any money whatever in or towards said rates, nor been rated to the poor-rate, church-rates, or land-tax, in respect of such depasturing as aforesaid, although the said leaseholders have always been and are rated to the above-mentioned rates in respect of their leases." On the other hand, in opposition to the rule, it was sworn, "that the herbage produced by the said common greatly exceeds the amount of herbage necessary for depasturing all the sheep which the various persons occupying the said leases are entitled to depasture on the said common, and that the said trustees therefore have from time to time, but without any interference with, or encroachment on the rights of the said leaseholders to the full benefit and enjoyment of the said leases, demised to strangers the right of depasturing sheep and other cattle upon the said common, and that they have derived therefrom an average profit of about 40*l.* per annum, which has been applied by the said trustees in aid of the funds of the said borough, and according to the provisions of the said Act. And that, according to information and belief, the said mayor, jurats, and bailiffs were accustomed in like manner to demise and make a profit of the surplus pasture of the said common. And that the said trustees have never charged themselves with any of the said wallscotts in respect of the surplus pasture, because the said wallscotts, before the passing of the said Act, were always charged solely upon the owners and occupiers of the said leases, and upon no other person whatsoever, and that the said trustees have never been charged with any parochial rates in respect of the said surplus pasture.

*Bovill and Couch* shewed cause.

*Peacock* contra.—*Callis* on *Sewers*, 116; the case of the *Isle of Ely*, 10 Rep. 103; *R. v. Commissioners of Sewers*, 1 B. & C. 484, were cited.

PATTON, J. (a)—I think that this rule must be made absolute. The right to tax the leaseholders is of necessity referable to this bye-law, which, under the charter, the corporation had the power to make. No commission of sewers had issued, and therefore the rate was not made under the statute of sewers. No authority to rate was conveyed by the grant of the ownership of the soil; the rate, therefore, must be referred to the bye-law. We do not know whether there was any bye-law before 1728; but there was an express bye-law in that year repealed, and renewed in 1824, and so continuing down to the passing of this Act. The corporation was in difficulties as to money; it was unable to continue the oyster grounds; and to get money so that they might be worked at a profit was a great object of the Act. The first section of the Act has words large enough to vest all the property of the corporation in the trustees, except

(a) Lord Campbell, C.J. was in the court for hearing Crown cases reserved.

that in Schedule B, which this was not, and the soil would pass to the trustees, to be held according to the nature and quality of such property. It is said that this, if it stood alone, would carry over to the trustees the power of rating which the corporation had. Perhaps that might be so but for other sections. Thus, by the fourth, the property is to be managed so as to carry the purposes of the Act into execution; these purposes are the payment of the debts of the corporation; but that section can never mean that an existing interest may be destroyed. The 22nd section merely preserves to the mayor, &c. the immunities, &c. not inconsistent with the Act which they had before. Then by the 23rd, all bye-laws touching and concerning the property and estate are thenceforth to be void and of no effect. That being so, as the usage cannot be referred to anything but the bye-law, that bye-law the source of the authority of the usage is gone; for surely this was a bye-law touching the estate and the management of the property. The relation of the parties is then the same as it was between the corporation and the leaseholders before the bye-law; the trustees are mere owners of the soil, and cannot make a rate. It would seem that they might be rated by a commission of sewers, but that is the only mode I see. It may have been an oversight in preparing the Act of Parliament.

WIGHTMAN and EARLE, JJ. concurred.

Rule absolute.

Monday, June 9.

REG. v. THE GOVERNORS AND GUARDIANS OF THE POOR OF ST. MARY, NEWINGTON.

Mandamus—Void election.

*It is no ground for a mandamus to a body corporate, requiring the members of it to elect certain officers as upon a fresh election, that at an election which has actually taken place certain votes were improperly received.*

This was a rule calling upon the defendants (who were elected under a local Act, stat. 54 Geo. 3, c. 113, and were made a corporation by another local Act, 14 Vict. c. 7) to shew cause why a *mandamus* should not issue requiring them to call a vestry meeting and proceed to elect a churchwarden and eight overseers to be members of their own body corporate, according to the statutes referred to.

It appeared that, under the provisions of the local Acts, the rector of the parish, the churchwardens, and two overseers, appointed, as required by the Act, were to constitute a corporation for managing all matters relating to the poor of the parish, under the title of the Governors and Guardians of the Poor. The churchwardens and one-third of the overseers were to go out of office yearly, and successors were to be appointed to them upon Easter Tuesday, in every year, such successors to be elected by the ratepayers in vestry assembled. It appeared that there existed in the parish a certain class called farmed ratepayers, being poor occupiers of small tenements whose rates were paid by their respective landlords. Previous to the election of last Easter Tuesday taking place, the present applicants had addressed the chairman, and had protested against the reception of the votes of the farmed ratepayers. Those votes, however, were taken, and in the result a churchwarden and eight overseers were elected to supply the then existing vacancies. The persons so elected, afterwards proceeded to act as duly appointed governors and guardians of the poor. This rule was obtained by the candidates who were defeated at the election, upon a suggestion that what had taken place was a void election, that the persons elected had no right to act, and that the corporation who had the control and management of the election were bound to proceed to a fresh election.

Sir F. Theiger and Lush shewed cause.

D. D. Keane and Pashley in support of the rule.

Several objections were taken by the defendants: among others, that the proper remedy, if any, for the prosecutors was by an information in the nature of a writ of *quo warranto*, and that there had been no demand or refusal such as to be the foundation for a rule of this kind. In the course of the argument, it was said by

PATTON, J.—There is this difficulty here: the prosecutors ask for a writ of *mandamus* to the defendants, requiring them to hold a new election. Undoubtedly, nearly all the proceedings were regular. The question is only about the legality of some votes. The mode has always hitherto been in such cases to ask for a *mandamus* to justices or the returning officer, or some other authority, to admit or swear in the person who claims to have been elected. That could hardly have been done here, for the affidavits do not state distinctly a belief that the prosecutors had the majority of legal votes.

*Res v. The Mayor, &c. of Norwich*, 1 B. & Ad. 310, was referred to.

LORD CAMPBELL, C.J.—We are quite satisfied that upon these affidavits there can be no writ of *mandamus*. If there had been actually no election upon Easter Tuesday, or an election that was an absolute nullity, *Res v. The Mayor of Norwich* is

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an authority that we might treat the statute as directory only as regards the day of election, and issue a writ enabling the proper parties to hold an election. Here there has been an election which, up to a certain point, was lawful. The only ground of objection to it is, that some illegal votes were improperly allowed. That is not a sufficient ground for a *writ of mandamus* for a fresh election.

PATTESON, COLERIDGE, and ERLE, JJ. concurred.

*Rule discharged with costs.*

Tuesday, June 10.

THE GRANTHAM CANAL COMPANY v. THE AMBERGATE, NOTTINGHAM, BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY.

*Railway—Statute—Construction—Opening of line between A. and B.*

By a Railway Act, the company were required, "from and immediately after the opening of the railway between A. and B. for public use," to purchase the property of two separate canal companies, the traffic of which would be interfered with by the opening of the railway between the points specified:

*Held, that neither of the canal companies could sue for the contract price of their canal until the whole distance between A. and B. had been substantially opened for public use; and that the opening of one-half of that distance, whereby one of the canal companies was affected, would not give a right of action to that company.*

This was an action to recover the sum of 120,000*l.* being the purchase-money of all the shares in the Grantham Canal Company; which by a local and personal Act (9 and 10 Vict. c. clv. s. 73), the defendants were required to purchase "from and immediately after the opening of the said railway between Ambergate and Grantham, for public use." The case came before the Court upon a special verdict, which found that the railway had been opened for public use between Grantham and Nottingham, but not between Nottingham and Ambergate. The part opened, which was a distance of about seventeen miles, was that which competed with the Grantham Canal; the part unopened, a distance of about twelve miles, was the part which would compete with another canal, called the Nottingham Canal, belonging to a separate company, and which the defendants were also by the Act required to purchase "from and immediately after the opening of the railway between Ambergate and Grantham for public use." The question was, whether that event had yet happened.

Peacock (Pearson with him), for the plaintiff.

Sir F. Kelly (Channell, Serjt. and Wheeler, with him), for the defendant.

LORD CAMPBELL, C.J.—This is certainly an ill-framed contract, with reference to the interests of the canal companies, whom it leaves exposed to considerable hardship; but we must put upon the words of the statute their natural interpretation. Now, upon looking at this Act of Parliament, it appears clearly that one epoch is to determine a great many events; the two canals are to be purchased at the same time; and the proprietors of each are to have various rights depending upon the happening of the same event. The Legislature must therefore have meant something which could reasonably be ascertained, something as to the happening of which no doubt could be entertained; and, looking at the words with reference to the context, I think that event is the substantial opening for public use of the whole of that part of the line which lies between Ambergate and Grantham. If only a hundred yards was left incomplete and unopened, the company would not be allowed so to evade their contract; because a jury would, under such circumstances, find that the whole line had been opened; but on this special verdict it is impossible to say that substantially the whole has been opened; and, therefore, unless the opening of any considerable part is sufficient, the defendant is entitled to our judgment. I may add that the plaintiff is not without remedy; because here is a duty on the part of the railway company to complete, in the performance of which the canal companies are interested; and if application is made in proper time to this Court, the railway company will be ordered to complete and open their line.

PATTESON and ERLE, JJ. concurred.

*Judgment for defendants.*

Thursday, June 12.

BIDDLE v. CHAMBERLAYNE.

*Costs—Distributable issue.*

If a plea, containing many separate allegations, is nevertheless indivisible for the purpose of the verdict, and the defendant fails to establish it in its entirety, but proves several of the allegations contained in it:

*Held (Erle, J. dissentiente), that the plaintiff is still entitled to recover the costs of witnesses called to disprove those allegations, although the jury, at*

*the request of the judge, have expressly found the facts so alleged.*

Greaves had obtained a rule calling on the defendant to shew cause why an order of Patteson, J. disallowing the plaintiff the costs of his witnesses, who attended at the trial to disprove the existence of a nuisance, should not be rescinded. This was an action for a libel, imputing to the plaintiff that he kept and maintained a nuisance, and that having been summoned before magistrates, he behaved discreditably before them. The defendant pleaded to the whole declaration a single plea of justification, alleging various facts, and, amongst others, that the plaintiff did keep and maintain a nuisance.

Replication *de injuriâ*.—Upon the trial which took place before Patteson, J. at the last Hereford Assizes, the defendant failed to prove the whole of the plea, and therefore the jury, by direction of the learned judge, found a verdict for the plaintiff upon that issue. The learned judge, however, asked their opinion upon several separate facts alleged in the plea; and they found expressly, amongst other things, that the plaintiff had kept a nuisance. Under these circumstances Patteson, J. had made an order at chambers, disallowing the plaintiff the costs of all those witnesses who had been subpoenaed and attended the trial for the purpose of disproving the nuisance; and to rescind that order the present rule had been granted.

Whateley and Phipson shewed cause.—Although for the purpose of entering the verdict upon the record this plea is entire, and cannot be distributed, it may for the purpose of taxing the costs as between the plaintiff and defendant. If this were not so, great hardship would be inflicted upon the unsuccessful party. Why should the defendant pay the plaintiff the costs of witnesses called to disprove a fact which the jury have found? *Prudhomme v. Fraser*, 2 Ad. & Ell. 645, is an authority in support of the order of the learned judge, which is within the principle of the Reg. Gen. 2 Wm. 4, H. T. r. 74; *Pilgrim v. The Southampton and Dorchester Railway Company*, 8 C. B. 25; *Sharland v. Loaring*, 1 Ex. Rep. 375; *Welby v. Brown*, ib. 770; *Nicholson v. Dyson*, 11 Me. & W. 545.

Greaves, contra.—If this rule should be discharged the most inconvenient consequences will follow. It will be necessary for parties to insist that the jury shall try, not the issues joined upon the record, but every separate material fact alleged in the pleadings. [LORD CAMPBELL, C.J.—May it not be left to the discretion of the judge?] If the costs are to depend upon the finding of each separate allegation, then each party would have a right to require that every separate allegation should be put to the jury. The authorities clearly shew that the plaintiff cannot be deprived of the costs of any issue upon which the verdict must be entered wholly in his favour upon the record. If the verdict cannot be entered distributively, and the plaintiff succeeds, there is no power to deprive him of any part of the costs of that issue on the ground that particular facts were or not proved. (*Daniel v. Barry*, 4 Q.B. Rep. 59; *Skinner v. Shoppee*, 6 Bing. Q.C. 131; *Twigg v. Potts*, 4 Dowl. 270; *Williams v. Great Western Railway*, 8 Me. & W. 856.)

LORD CAMPBELL, C.J.—I am of opinion that this rule ought to be absolute. The question is whether, with regard to the taxation of costs, an issue may be distributed, although it cannot with regard to the verdict. If the issue is distributable on the record, so that as to one part the plaintiff, and as to another the defendant, may have the verdict entered for him on the record, there is no difficulty; each party recovers the costs occasioned by that part found in his favour. But where, as here, that cannot be done, and the plaintiff is entitled to the verdict on an entire issue, there is great difficulty in saying that the Court are to look at the several allegations which make up the whole cause, denied by the general replication, ascertain how each ought to be or has been decided, and tax the costs accordingly. That has not hitherto been done; and if it could have been done conveniently and properly, no doubt it would have been done. But I am of opinion that it could not conveniently be done. It is not pretended that the Taxing Master could in every case enter upon an inquiry how each allegation ought to be found; but it is suggested that it may be done when the judge, in his discretion, asks the opinion of the jury upon particular facts. That would make the practice depend upon a very accidental circumstance; besides which, if any such rule were laid down, each party would often have good reason for requiring that the facts should be put separately to the jury; and the result would be most inconvenient. It is possible that justice might in some cases be advanced by distributing the costs in the way ordered by my learned brother, but I am of opinion that that order is an excess of authority, and that the practice sought to be introduced would lead to more inconvenience than good.

PATTESON, J.—This question has arisen entirely from my putting to the jury, at their request, certain specific questions of fact, instead of directing them

to find for the plaintiff, unless the defendant made out the whole plea; for if I had done so, as they had found a general verdict, this question could not possibly have arisen. Then, can my so putting the questions, not with any reference to the whole but *à l'instinct* altogether, have the effect intended for? Can it alter the legal consequences of the verdict upon the issue? It is said to the issue is distributable *quoad* the costs; but clear that that cannot be done so as to give to the unsuccessful party; but can it be done as to deprive the successful party of some of the costs which otherwise he would be entitled to? Upon the authority of the cases, I think it cannot, because none of them are precisely in point; and the convenience of the practice would certainly be great. I made the order with a view to the effect of the case; but I think I was wrong.

COLERIDGE, J.—I think it is a *salutary* practice the practice to cases in which distributivity is presented on the record. That, in effect, is the rule of 2 Wm. 4, which has been made construed to apply not merely to distinct issues to issues which may be entered distributively; now we are desired to carry that rule very much further; and I think that we ought not to press singly, at all events, to alter a rule made with the concurrence of the three Courts, for the sake of conformity; and, in order to advance the support of the case, to lay down a rule which was attended with the most inconvenient consequences.

ERLE, J.—My opinion is not important; a majority of the Court think that this rule should be absolute; but I certainly should have thought the principle laid down in *Prudhomme v. Fraser* would apply to this case. Although the replication puts in issue the entirety of the plea, there is, as a fact, separate matters of defence; for the defendant says you did keep a nuisance, and you did so discreditably before the magistrates. The plaintiff might have replied that he did keep a nuisance, but he did not behave discreditably before the magistrates; but he chooses to deny both, and the judge has perfect right to put the two questions separately to the jury, and take their verdict upon each. He might, no doubt, have left the matter with a general direction to the jury to find for the plaintiff, if they were not proved to their satisfaction; but every one knows that the failure to prove one would be taken into consideration by the jury in considering the amount of damages. Where they have found the matters of defence separately, as here, I suggested that by distributing the costs according to their finding no different principle is introduced from that which was adopted in *Prudhomme v. Fraser*, where a single issue was severed for the purpose of costs. I think, therefore, that we ought not to allow the plaintiff the costs of witnesses who were to help him to contradict an allegation, the truth of which has been found by the jury.

*Rule absolute.*

REG. v. MILLS and TWO OTHERS (Justices of Lancashire).

*Justices—Jurisdiction—Local Improvement Act—Valid order.*

By a local improvement Act, commissioners were authorised to order the removal of enclosures subject to an appeal to the Sessions. Penalties were imposed for disobeying the commissioners' orders, and the penalties were to be recovered by summary proceeding before magistrates. The commissioners having made an order, made upon the face of it, and that order having been disobeyed by the defendant, application was made to justices to convict him in the penalty provided by the statute; but they refused to convict on the ground that the obstruction ordered to be removed was not a nuisance.

*Held, that that was not an exercising of the jurisdiction entrusted to them; but that as the order of the commissioners was bad, a mandamus ought not to go to compel them to hear a complaint founded upon the disobedience of it.*

This was a rule calling on certain justices of Lancashire to shew cause why a writ of mandamus should not issue, commanding them to proceed with the hearing, and, if necessary, to rehear a complaint laid before them by the Rochdale Improvement Commissioners against an inhabitant, for not obeying an order of the commissioners which required him to remove certain railings in front of his house, as to remove certain railings in front of his house, as judged by the commissioners to be a nuisance. By the local Act of Parliament, which passed in 1844, a penalty of 40*s.* a week was imposed for not removing obstructions according to the order of the commissioners; and that penalty was made recoverable in a summary way before justices of the county; but an appeal to the Quarter Sessions was given against the orders of the commissioners. The occupier, notwithstanding, out appealing against the order, neglected to comply with it, and was summoned before the magistrates to answer for that neglect. The magistrates, however, entered upon the question whether the defendant's railings were a nuisance, and considering that they



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ere not, refused to convict, and dismissed the complaint.

**Crompton** shewed cause.—The justices have heard the case, and dismissed the complaint, and this court will not interfere. (*R. v. The Recorder of Liverpool*, 20 L. J. 35, M.C.) [COLERIDGE, J.—This was put as a wrong decision on a preliminary point. Lord CAMPBELL, C.J.—The justices have not adjudicated upon any matter over which they had jurisdiction. The question of nuisance or no nuisance was for the commissioners.] Then, secondly, the order of the commissioners was bad, for not shewing that the railings had been erected since the passing of the Act, upon which fact their jurisdiction depended under the Act of Parliament. The information sets out the order of length, and therefore the objection appears upon its face.

**Cowling**, contra.—The affidavit shews that the rails were in fact erected in October last, and the order need not be stated in the order. The Act of Parliament was passed six years ago, and the Court will not presume that rails of this sort were put up before that time.

**ERLE, J.** referred to *Ormerod v. Chadwick*, 16 L. J. 365.

**Crompton** mentioned *Christie v. Unwin*, 11 Ad. Ell. 373.

Lord CAMPBELL, C.J.—We are quite unanimous in opinion as to the construction of this Act of Parliament. It is clearly for the commissioners to determine the question of nuisance or no nuisance, subject to the appeal given by the Act. But when an appeal is brought, and an order of the commissioners is not obeyed, the magistrates who are asked to enforce it are not to sit as a court of appeal from the judgment of the commissioners; and that is what they have assumed to do here. If they had adjudicated upon the question submitted to them, we could not review that decision, whether right or wrong; but they have not done so; and if this order the commissioners had been valid, I think we might have commanded the justices to hear the complaint. The order, however, is clearly not good, and, therefore, it would not be right to grant a writ of mandamus requiring the magistrates to act upon it. **PATTON, COLERIDGE, and ERLE, J.J.** concurred.

*Rule discharged.*

## BUSINESS OF THE WEEK.

Thursday, June 13.

**BRADLEY v. FROCK**.—*Bocill* shewed cause against a rule to rescind an order of **ERLE, J.** ordering the outlaws the plaintiff to be reversed. The question was whether the defendant's plea was issuable. The error assigned was that the defendant was out of the jurisdiction when the writ was issued. The plea was, that the defendant might be returned, and that he had notice that proceedings to outlaw would be taken. **Bryon v. Wapleffe**, 5 B. & C. 14, was cited as expressly in point. **T. Jones and Field**, contra. By the COURT.—A plea which has been held bad is not issuable.

*Rule discharged.*  
**REG. v. A'BECKETT**.—*Hughes* moved for rule to require the defendant, as sitting magistrate at the Westminster Police Court, to take the recognisance of a person named as surety for the prosecution of an appeal against a conviction under the Vagrant Act. One surety has been accepted, and one rejected, without any reason; and the seven days limited by the Act for entering into the recognisance have expired. By the COURT.—If so, that is a legal objection to this application. It may be that the one surety is sufficient; and, if so, you may go on with your appeal.

*Rule refused.*  
**REG. v. JUSTICES OF YARMOUTH**.—*O'Malley* shewed cause against a rule, under the 11 & 12 Vict. c. 44, s. 5, requiring justices to issue a distress warrant to levy a poor rate.

*Palmer*, contra. *Rule absolute.*  
**ALLEN v. COLEMAN**.—*Leah* moved to rescind an order of **Vigman, J.** ordering the plaintiff to produce the potter, upon which the action was brought, the protests, surveys, g-books, &c. relating to the voyage insured.

*Rule refused.*  
**REG. v. MONK'S KIRBY**.—*Buttleston* shewed cause against rule for levying a fine upon the inhabitants of a parish, for the non-repair of a road. *Hayes*, contra.

*Rule absolute, the prosecutor undertaking to levy on a particular district in the first instance.*  
**RE GETHING v. WATSON**.—*Heath* shewed cause against a rule to set aside an award; *Keane*, contra.

*Rule discharged.*

Friday, June 13.

**THE GOVERNOR, &c. OF THE CHESAIRE WATER WORKS v. LOWLEY**.

*Doz dem. PALMER v. EYRE.* *Rule absolute.*

*Doz dem. BADDELEY v. MASEY.* *Rule discharged.*

**REG. v. AMOS**.—*Bocill* shewed cause. *Carter* in support of the rule. *Rule discharged with costs.*

**REG. v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY**.—*Sir F. Kelly, Peacock, Wilkins, Serjt.* and *Tomlinson*, shewed cause. *Sir F. Theiger, Knowles, and Liddion*, in support of the rule. *Rule absolute.*

**REG. v. AMBERGATE AND NOTTINGHAM RAILWAY COMPANY**.—*Wilkes and Wheeler* shewed cause. *Sir F. Kelly, Peacock, and Pearson* in support of the rule. *Rule absolute.*

Saturday, June 14.

**REG. v. JUSTICES OF WARWICKSHIRE**.—*M. Smith* shewed cause against a rule requiring the defendants to issue a distress warrant for the purpose of levying upon a Mr. Woodhouse the sum of 44s. as the expense of paying the botany adjoining his house and premises at Leamington. *Hayes* contra. *Rule absolute.*

**REG. v. MANSEY**.—*Wilkes and Wice* were heard in support of the rule for a new trial. *Cur. adv. vult.*

**WILTON v. DUKE**.—*Keating* shewed cause against a rule

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to deprive the defendant of the costs of the nonsuit, plaintiff suing as executor. *M. Chambers* contra.

**BRADLEY v. COMMERELL**.—*Leah* moved for a rule to set aside the side bar rule reversing a judgment of outlaws, and to require the plaintiff in error to put in special bail. *Rule nisi.*

**BREX v. BROWN**.—*Bartow* shewed cause. *Brownell*, contra.

*Rule absolute for a nonsuit, the plaintiff undertaking to bring no other action in the Superior Court, and to pay the same costs as if the rule were made absolute for a new trial.*

Monday, June 16.

**REG. v. MANSEY**.—*Judgment.* *Rule absolute.*

**REG. v. GRIFFITHS**.—*Rule for a quo warranto for the office of clerk to the guardians of St. Martin's-in-the-Fields.* *Sir F. Kelly* shewed cause. *Sir F. Theiger*, contra.

*Rule absolute, the defendant undertaking to resign in a month, and the prosecutor not to take any further proceedings in quo warranto.*

**REG. v. THE JUSTICES OF NEWBURY**.—*Hastings* for the justices, and *Dr. Binney* in person, shewed cause against a rule requiring the justices to levy a local improvement rate upon the goods of *Dr. Binney*. *Whately* in support of the rule. *Rule absolute, with costs.*

**REG. v. THE BIRKENHEAD, LANCASTER, AND CHESHIRE JUNCTION RAILWAY COMPANY**.—*Knowles* shewed cause against a rule for a mandamus to construct a bridge so as to carry a street over the railway. *Hoggins*, contra. By the COURT.—This is purely a matter of private contract. The company are not required by their Act to make this bridge. *Rule discharged.*

**REG. v. BLACKSTONE**.—*Whately* and *Dowdell* shewed cause against a rule for a criminal information for libel. *The Attorney-General, Crowder, and Gray*, contra.

*Rule discharged.*  
**REG. v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY**.—*Peacock* shewed cause against a rule for a mandamus to construct a railway. *Sir F. Theiger*, contra.

*Rule absolute.*

Tuesday, June 17.

**SIEVINGTON v. ARCHBOLD**. *Judgment for defendant.*

**TARLETON v. LIDDELL**. *Judgment for plaintiff.*

**HURST v. HANNA**.—*Watson, Cowling, and Hugh Hill* shewed cause against a rule to set aside a warrant of attorney and all subsequent proceedings. *Peacock and Hall* contra.

*Rule absolute.*  
**REG. v. GARLAND**.—*Indictment for nuisance.* *Korlake* for the Crown. *Crowder* for the defendant. No judgment was pronounced, the matter having been arranged.

**REG. v. SALT**.—*Sir F. Theiger, Dr. Bayford, and H. Hill* shewed cause. *Sir F. Kelly, Dr. Addams, Knowles, Cowling, and Overend* in support of the rule.

*Rule absolute.*

**REG. v. THE NORTH-WHARF RAILWAY COMPANY**.—*Watson, Wilkes, and H. Hill* shewed cause. *Sir F. Kelly and Plipson* in support of the rule. *Rule absolute.*

**REG. v. THE POOR-LAW COMMISSIONERS**.—*Peacock and Keane* moved for a certiorari to remove an order relating to St. James's, Westminster, for the purpose of quashing it. *The Attorney-General, Crompton, and Tomlinson* shewed cause in the first instance. *Rule refused.*

**VENNET v. THE SOUTH-EASTERN RAILWAY COMPANY**.—*Crowder* shewed cause. *Peacock* in support of the rule. *Rule discharged.*

**DUKE OF BRUNSWICK v. HARKER**.—*M. Chambers, Atherton, and H. Hill* shewed cause. *Sir F. Theiger, James, and Dowell*, in support of the rule. *Rule discharged.*

**REG. v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY**.—*Knowles and Addison* shewed cause. *Watson and W. Seymour* in support of the rule.

*Rule discharged.*  
**REG. v. CROSS**.—*Sir F. Theiger, Wilkes, and Prentice* shewed cause. *Watson and Farnell* in support of the rule. *Rule absolute.*

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Tuesday, June 10.

**RICHARDSON v. THE SOUTH EASTERN RAILWAY COMPANY.**

*Lands Clauses Consolidation Act—8 & 9 Vict. c. 18, ss. 38, 68—Compensation—Costs of inquiry by a jury.*

*The claimant gave notice of his desire to have compensation settled by a jury, and claimed 1,000l. The company afterwards offered him 60l. which was refused. The jury assessed the claim at 215l.*

*Held, that the plaintiff was entitled to his costs of the inquiry under sec. 68, which incorporated the preceding sections of the Act that were applicable, and among others, sec. 51, which expressly gives costs.*

*Debt upon statute.*

The declaration stated, that the plaintiff was seized in fee-simple in possession of an estate intersected by a railway, which the defendants were authorised, by Act of Parliament, to construct from the London and Greenwich Railway to Woolwich and Gravesend, and thereby greatly damaged and injuriously affected; that the defendants, before giving the notice hereinafter mentioned, converted a piece of the said ground to the purposes of the said Railway, and that, in consequence, the plaintiff was entitled to compensation from the defendants to an amount exceeding 50l., to wit 1,000l., and being desirous of having the compensation settled by a jury, he gave notice to the defendants, and claimed 1,000l., and desired that the question should be settled in the manner pointed out by the

*Lands Clauses Consolidation Act, unless the defendants would pay him 1,000l., and enter, within the time limited by the statute, into an agreement for that purpose; that the defendants afterwards gave to plaintiff a notice, reciting the above notice, and stating that they were ready and willing to pay him 60l. in respect of this claim; that the defendants afterwards issued their warrant under their seal to the sheriff of Kent, requiring him to summon a special jury to assess the compensation according to the Lands Clauses Consolidation Act; that the said jury assessed the damages at 215l., and the said sheriff gave judgment for the same, which still remains in full force and effect; that afterwards the plaintiff's costs of the inquiry were settled by one of the Masters of the Q.B. at 243l. 1s. 3d., of all which the defendants had notice; yet the defendants have not paid the said sums, or any part thereof.*

*Plea of payment into Court of 215l., the sum awarded by the jury.*

*Demurrer to the part relating to costs.*

**Channell, Serjt.** in support of the demurrer.—The question is, whether the plaintiff is entitled to the costs of the inquiry before the sheriff under the 8 & 9 Vict. c. 18 (the Companies Clauses Consolidation Act). The plaintiff, the claimant, initiated the proceedings according to the 68th section, and the object of this provision appears to have been to avoid a mandamus (per Lord Chancellor in *The London and North Western Railway Company v. Smith*, 19 L. J. 193, Ch.). In *Railstone v. The York, Newcastle, and Berwick Railway Company*, 19 L. J. 464, Q. B. it was held that sec. 38 applies only to cases where the company are about to take or injuriously affect land of the claimant, but that sec. 68 applies to the case of lands already taken or injuriously affected; and in the latter case, that the company are not required to give the claimant notice of their intention to summon a jury to assess compensation. Sec. 68 does not give costs in express terms, and the preceding sections only apply to costs where the company initiate the proceedings under sec. 38. In all the succeeding sections to 38, the words are "such inquiry," referring to sec. 38; and sec. 51 only gives costs on such inquiry where the verdict of the jury is for a greater sum than that offered by the company, alluding to the offer made necessary in the notice to be given by the company under sec. 38. Whereas the case above in the Q.B. decided that the company were not bound to give such notice in a case like the present, which falls under sec. 68. The present case is not provided for by the Act, and costs cannot therefore be given.

**Butt (H. Hill with him)** for the plaintiff.—The plaintiff is clearly entitled to the costs of the assessment in this case. Sec. 68 incorporates all the preceding sections that are applicable to it. It is erroneous to say that those sections only apply where the company initiate the proceedings: for in one sense they really initiate the proceedings in all cases. Sec. 21, and the subsequent sections, refer to any case of compensation to be settled by a jury. The meaning of the words "such inquiry" in the sections referred to on the other side, is any inquiry, whether at the instance of the claimant or the company. It is only by reference to the preceding sections that anything can be done under sec. 68. Then, as to the case in the Q. B.: the reasons of Coleridge J. in dissenting are entitled to very great weight, but that case has, in fact, little or no bearing upon the present. There the question was whether in a case under sec. 68, where the plaintiff had given notice to the company of his desire to have compensation assessed by a jury, the company were bound to give, under sec. 38, ten days' notice, before issuing their warrant for such jury, of their intention to cause such jury to be summoned, stating the particulars therein required. Besides, Lord Campbell, C.J. said that the preceding sections were incorporated in the 68th. The cases of *Corrigan v. The London and Blackwall Railway Company*, 6 Scott's N.C. 241; and *Walker v. The Same*, 3 Q. B. 744; 5 Q. B. 365, S. C. were then referred to.

**Channell, Serjt.** in reply.

**Jervis, C.J.**—I am of opinion that the plaintiff is entitled to recover these costs, and that our judgment should be in his favour. If the defendants had initiated the proceedings, and given notice to the plaintiff, in pursuance of sec. 38, it is plain that the plaintiff would have been entitled to the costs of the proceedings; and sec. 68 expressly provides, that if the claimant desires to have the compensation assessed by a jury, and the promoters of the undertaking are not willing to pay the amount claimed, and make default in commanding the sheriff to summon the jury, the claimant may recover the amount of compensation claimed, with costs, by action in the Superior Courts. In these two cases, therefore, the company is clearly liable to pay costs: and the question now is, whether the plaintiff, having recovered a larger sum than that offered by the defendants, is entitled to his costs. It would be strange if in this third case, where the defendants have held the plaintiff at defiance, and he has re-

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covered more than they were willing to give, they were not liable to pay the plaintiff his costs. If it had been *casus omissus*, the Court would have been bound so to construe the Act, however unjust they might think it to be; but if the words of the Act are open by a fair construction, so as to avoid the injustice, the Court will so construe them. Now, looking to the 68th section, it appears to the Court that the words, "in the manner herein provided," in the last clause, viz., "they shall issue their warrant to the sheriff to summon a jury for settling the same, in the manner herein provided," may fairly be construed to incorporate all the previous provisions relating to the assessment by the jury. The 38th, 39th, and several subsequent sections, apply to all cases of disputed compensation; for the words, in sec. 38, "before the promoters, &c. shall issue their warrant for summoning a jury for settling any case of disputed compensation," will apply to every case. I feel that to a certain extent this view of the Act conflicts with the decision in the Q. B.; but that was not an unanimous decision, and very strong reasons were urged by Coleridge, J. for dissenting from the other judges of that Court.

MAULE, J.—I am of the same opinion. This Act provides a number of general regulations which are to be applied in all cases in which they may be applicable to railways that may be established by Acts subsequently passed; and the words of the clauses of this Act are to be read by way of supplement to the clauses in such Acts subsequently passed. A considerable number of the clauses of this Act apply to the settlement of disputed claims of compensation by arbitration and assessment by a jury. Those clauses are couched in general terms, and are not restrained to particular cases, but are applicable to all such cases of arbitration or assessment by a jury. Sec. 38 applies to any case of disputed compensation, and comprehends the cases in sec. 68, without the assistance of the words "in the manner herein provided," in the latter section. But those words in sec. 68 make sec. 38 directly applicable to this case. The reasons of Coleridge, J. in the case cited, are of great weight. I think, therefore, that our judgment should be for the plaintiff.

CRESSWELL and TALFOURD, JJ. concurred.  
Judgment for the plaintiff.

## ALDIS v. MASON.

Demurrer—Traverse too large.

To a declaration that the defendant permitted and suffered the premises during the term, to wit, on the 1st of November, 1850, and thence hitherto to be and continue ruinous, prostrate, &c. the defendant pleaded that he did not during the said term suffer or continue the said premises to be or continue, nor were the same during all the said term ruinous, prostrate, fallen, &c.

Held, a bad traverse.  
The declaration stated a demise of certain premises for twenty-one years, with an obligation on the part of the defendant to uphold, maintain, and keep the same in good repair; and breach, that the defendant did not and would not uphold, maintain, and keep the said premises in good repair, but on the contrary thereof during the said term, to wit, on the 1st of November, 1850, and thence continually hitherto suffered and permitted the said premises and every part thereof to be and continue ruinous, prostrate, fallen, down, &c.

Plea.—That the defendant did not, during the said term of twenty years, suffer or permit the said premises to be or continue, nor were the same during all the said time ruinous, prostrate, fallen down, &c.

Special demurrer.

Wilkes, in support of the demurrer.—The traverse is too large. The defendant, instead of pleading performance of the covenant, pleads that the premises were not out of repair during all the term. That is no answer, because if the premises were out of repair during any part of the term, the covenant has been broken and the plaintiff is entitled to sue. The plea would be proved if there was any portion of the term, one day only, in which the premises were not out of repair. (He was then stopped by the Court.)

Pigott, contra.—The plea is a good traverse as the declaration stands. (*Palmer v. Gooden*, 8 M. & W. 890.)

By the COURT.—The plea is clearly bad.

Judgment for the plaintiff.

Friday, June 13.

HELSHAM v. BLACKWOOD AND ANOTHER.  
Libel and slander—Plea of justification—  
Demurrer—Estoppel.

A declaration in case for libel alleged that the plaintiff shot a man in a duel; that on the night before the duel he had practised pistol-firing; that he was tried for murder in respect of the duel, and was acquitted, to the dissatisfaction of the judge who tried him. The defendants pleaded that the plaintiff did shoot a man in a duel, and

so committed murder, and that he was tried for murder. The plaintiff replied, setting forth the record of, and judgment of, acquittal, and prayed judgment whether the defendants ought to be allowed to aver against the record that the plaintiff had committed murder.

On demurrer to the replication,  
Held, that the plea was bad, because it did not answer the whole declaration.

Semble.—The replication was bad, because the record of an acquittal does not estop a third party in another suit from setting up the guilt of the party acquitted.

Case for libel. The declaration stated that before and at the time of committing, by the defendants, of the several grievances hereinafter mentioned, the plaintiff was a captain of militia, and a person of good name, credit, &c. yet the defendants, well-knowing the premises, but contriving and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, therefore, &c. falsely and maliciously did publish and cause and procure to be published of and concerning the plaintiff, in a certain magazine called "Blackwood's Edinburgh Magazine," a false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, containing the false, &c. and libellous matters following, that is to say, "We ourselves were present at a remarkable trial for duelling, about eighteen or twenty years ago, at the Old Bailey, before the late excellent and very learned Baron Bayley, on which occasion he also laid down the rule of law respecting duelling with uncompromising firmness and straightforwardness. This was the case of Captain Hesham, who had shot Lieutenant Crowther in a duel at Boulogne. There were rumours of foul play having been practised; and a clergyman, the brother of the deceased, made strenuous and persevering efforts to bring Captain Hesham to trial. The latter continued for some time after the duel in France, though anxious to return to England; and after (as we have heard) taking the opinion of a well-known counsel at the criminal bar—who advised him that he could not be tried in this country for a duel fought in a foreign country not under the British Crown—he came to England, where he was instantly arrested, under stat. 9 Geo. 4, c. 31, sec. 7, which had been passed two or three years previously, viz. in 1828, and must have altogether escaped the notice of the counsel in question. That Act authorises the trial in England of any British subject charged with having committed any murder or manslaughter abroad, whether within or without the British dominions, as if such crimes had been committed in England. Captain Hesham was admitted to bail to meet the charge, and having duly surrendered, took his place at the bar of the Old Bailey at nine o'clock on a Saturday morning. He was a middle-aged man, of gentlemanly appearance, his features indicating great determination of character; but they wore an expression of manifest anxiety and apprehension as he entered the dock, and, looking down, beheld immediately beneath him the brother of the man whom he had shot, and through whose ceaseless activity he was then placed on trial for his life as a murderer. And he was to be tried by an uncompromising judge—stern and exact in administering the law, and animated by pure religious spirit, but, withal, thoroughly humane. Throughout the whole of that agitating day the prisoner stood firm as a rock—sometimes his arms folded, at others his hands resting on the bar, while his eyes were fixed intently on the judge, the witnesses, or the counsel—every now and then glancing with gloomy inquisitiveness at the jury and the judge. His lips were from first to last firmly compressed. It was understood that the counsel for the prosecution were in possession of a damning piece of evidence—viz. that the prisoner had spent nearly the whole of the night immediately preceding the duel in practising pistol-firing. However the fact might be, it nevertheless was not elicited at the trial; and probably the prisoner, who had been prepared for such evidence being produced, began, on finding that it was not so, to take a more favourable view of his chances. As the case stood, however, it looked black enough to those who knew the law, and the character of the judge who sat to administer it. That venerable person began his summing up to the jury about seven o'clock in the evening, and the scene can never be effaced from our memory. The court was extremely crowded—the lights burned brightly, exhibiting anxious faces in every direction. But what a striking figure was the central one—the prisoner! Immediately over his head was a mirror, so placed as to reflect his face and figure vividly, especially to the jury. A few moments after the judge had commenced his charge, we observed the Ordinary of Newgate glide into Court, the late Rev. Dr. Cotton, in full canonicals, and with flowing white hair, having a picturesquely venerable and ominous appearance, and take his seat near to but a little behind the judge. It was then usual for the Ordinary to be present at the close of capital cases, in order to add a solemn 'amen' to the prayer with

which the sentence of death concluded—"that God would have mercy on the soul" of the condemned. 'Gentlemen of the jury,' commenced Mr. Baron Bayley, amidst profound silence, 'we have heard several times during the course of this trial of the law of honour; but I will now tell you what is the law of the land, which is all that you and I have to do with. It is this—that if two persons go out with deadly weapons, intending to use them against each other, and do use them, and death ensue, that is murder—wilful murder.' He paused for a moment, as if to give the jury time to appreciate the dread significance of his opening. As soon as he had uttered the last two words, Captain Hesham's cheek was instantaneously blanched. We were eying him intently at the moment, and shall never forget it. He stood, however, with rigid erectness, gazing with mingled anger and fear at the judge, whom he felt to be uttering his death-warrant; and after a while bent his eyes on the jury, from whom they wandered scarce a moment, during that momentous summing up, one which, with every word, was letting fall around him, as he must have felt, the curtain of death. 'The law of honour,' said the judge, towards the close of his charge, 'is an imposture, a wicked imposture, when set against the law of the land and the law of God Almighty, claiming the right to take away human life. I tell you, who sit there to discharge a sworn duty, that a fatal duel is malicious homicide, and that is wilful murder.' The jury retired to consider their verdict; and the judge at the same time quitted the court till his presence should be required again. Captain Hesham, however, continued standing at the bar almost motionless as a statue. After a prolonged absence of an hour and forty minutes, the jury returned into court. The prisoner eyed them, as one by one they re-entered their box, with a solicitude dismal to behold, and the irrepressible quivering of his upper lip indicated mortal agitation. The verdict, however, was not guilty; on which the prisoner heaved a heavy sigh, passed his hand slowly over his damp forehead, bowed slightly, but rather sternly to the jury, and was then removed from the bar and released from custody. When the verdict was a few minutes afterwards communicated to Baron Bayley, who had remained in attendance in an adjoining room, he remarked gravely, 'I did my duty! It is well for Captain Hesham that the verdict is as it is; had it been the other way, I should certainly have left him for execution.' In that case the duellist would have died on the gallows on the ensuing Monday morning.

The declaration then stated, that by means of the grievances committed by the defendants, the plaintiff had been greatly injured, &c. and concluded by averring damages to the amount of 5,000*l*.

The defendants pleaded "that before the committing of the said grievance, to wit, on the 1st of April, 1829, at Boulogne in France, the plaintiff then being a subject of his Majesty, King of the United Kingdom, did feloniously, wilfully, and of malice aforethought, shoot off and discharge at and against one Joseph Crowther, then being a subject, &c. and a lieutenant of militia, a certain pistol loaded with powder and lead, in a certain duel then and there fought by and between the last-mentioned person and the plaintiff; and the plaintiff did then and there feloniously, &c. give unto the said Joseph Crowther a mortal wound, of which he died, and in manner and by the means aforesaid, the plaintiff did then and there the said Joseph Crowther feloniously, wilfully, and of malice aforethought, kill and murder in the said duel." The plea then averred, that at a certain session of oyer and terminer, duly holden at Justice Hall, in the Old Bailey, on the 7th of October, 1830, before Sir John Bayley, one of the Barons of the Exchequer, Sir John Bernard Bossanquet, one of the Justices of the Court of Common Pleas, and others their fellow-justices, it was duly presented by the oaths of thirteen good and lawful men, then sworn and charged to inquire of concerning the said murder, "that the plaintiff a certain pistol loaded &c. did wilfully, feloniously, and of malice aforethought, against the said Joseph Crowther shoot off and discharge, and with the bullet so shot off and discharged, the said Joseph Crowther in and upon the neck of him the said Joseph Crowther did strike, penetrate, and wound, and by such striking, &c. then and there did give unto the said Joseph Crowther one mortal wound, of which he did then and there die; and that the now plaintiff him the said Joseph Crowther feloniously, &c. did kill and murder." The plea, after averring that the grand jury found that the plaintiff killed the said Joseph Crowther at Boulogne in France, both principals being subjects of the English Crown, alleged the arrest and trial of the plaintiff at the Old Bailey before the judges before named, and went on as follows: "and the defendants further say, that the case of the plaintiff on the said trial looked black enough to those who knew the law and the character of the judge, that is to say, the Sir John Bayley who sat to administer the law, and that the said Sir John Bayley presided at the said trial,

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and summed up the case to the jury; and the defendants further say, that there were and existed before and up to, and at the said trial, rumours of foul play having been practised by the plaintiff in and about, and touching and concerning the said duel, and the fighting thereof by the plaintiff, wherefore the defendants at the said time when, &c. committed the supposed grievances in the declaration mentioned, as they lawfully might, for the reasons aforesaid." Verification.

The plaintiff replied that the defendants ought not to be permitted to aver that he the plaintiff did feloniously, &c. kill and murder the said Joseph Crowther, because he, the plaintiff, surrendered himself at the Justice Hall aforesaid, was tried by a proper jury, who found him not guilty, whereupon it was by the Court adjudged that the plaintiff of the premises in the indictment be discharged and go without day, as by record will appear, &c.

To this replication the defendants demurred, alleging as ground, that they were not stopped by the verdict of acquittal and record in the replication mentioned, they having been no parties or privies to the prosecution of the indictment mentioned in the plea.

Joinder in demurrer.

The plaintiff's points, as delivered, were—that the plea is bad in substance inasmuch as it does not answer the gist or the whole of the libellous matter set forth in the declaration; also that the replication to the plea is good, on the grounds that when a person has once been acquitted of an offence in due course of law, no one can be permitted to aver that such person was guilty of the offence of which he was so acquitted. That the objection that the defendants are not parties or privies to the record of the plaintiff's acquittal is either not well founded or has no application to a criminal case.

The defendants' points, as delivered, were—that the libel resolves itself into a charge of murder. That there are no degrees in murder. That there is no such thing known to the law as a fair murder. That there can be no such distinctions as a fair or a foul deed where it ends fatally. That it is no good replication to set up by way of estoppel the alleged acquittal in a criminal court, to a prosecution in which the defendants were neither parties nor privies. That the verdict and judgment relied on by the replication were "*res inter alios acta*," and can form no ground of estoppel.

Peacock, C. C. and Cowling, in support of the demurrer. [The judgment renders it unnecessary to state the arguments urged to shew that the replication was bad, the Court desiring attention to be directed to the sufficiency of the plea; the following cases and authorities on the point of the replication were cited: Buller's N.P. 245; Starkie, 277; *England v. Burke*, 3 Esp. 90; *Cooke v. Field*, 3 Esp. 135; *Gibson v. McCarthy*, Cas. Temp. Hardwick, 311.] (a)—As to the plea, it is said the plea is bad as not answering the whole declaration, because it says the plaintiff was guilty of murder, while the declaration says that he was not only guilty of murder, but of something more, that is to say, "that the counsel for the prosecution were in possession of a damning piece of evidence, namely, that the prisoner had spent nearly the whole night immediately preceding the duel in practising pistol-firing." The latter part of the charge is clearly matter of evidence to shew that the plaintiff was guilty of murder. The Court cannot try whether the duel was fair or not. Suppose a man said "I have murdered a man, but I did it in a fair and honourable manner," surely the Court would not try that question? [MAULE, J.—You say that in criminal suits there are not several degrees of the same crime. That may be true, but a man may be guilty of libel for imputing dishonourable conduct to another, though it does not amount to a violation of the criminal law. Suppose that in a libel you impute some disgraceful matter to a man which is not cognizable by the criminal courts, but add to it something of which those courts may take cognizance. To justify such a libel, you must justify the whole. If a man were charged with an assault, and it were added that he committed the assault in a treacherous and cowardly manner, the latter part of the charge would be a libel, but not the less so because it accompanied a criminal charge. [JERVIS, C.J.—The issue here is not murder or no murder, but libel or no libel.] Is murder a worse crime, in contemplation of law, because the murderer sat up all night practising with

the instruments he made use of. That fact is merely evidence of an intent to murder. [MAULE, J.—Malice is an essential ingredient in the charge of murder; there may be, in fact, a great deal more malice than is necessary; and when that is alleged, it must be mentioned in justification. [JERVIS, J.C.—The laudable object of the author of this article was to discourage duelling. It would be a lamentable thing in us to hold that it was no aggravation of the practice he has so well reprehended that the offender sat up all night practising with pistols. TALFOURD, J.—Suppose he had secretly drawn the charge from his adversary's pistol, that would not have been, legally speaking, a murder more than this; but would it not have been matter of aggravation?] We do not inquire whether a prize-fighter has been previously trained or not. [MAULE, J.—No; but we do whether or not he held in his hand a piece of lead to make his blows the heavier. This is a question of quantity; you put a great deal of malice in your libel, and you justify only a small portion of it. That is not sufficient.] If we prove a malicious motive, the Court will not inquire whether the motive was very malicious or not. There cannot legally be degrees in murder. [MAULE, J.—Then Daniel Goode or Greenacre were not more malicious than one who, having received a personal insult, or hearing that a gross insult has been offered to a female relative, challenges the offender, and has the misfortune to kill him?] In law it makes no difference. [MAULE, J.—Suppose your libel said in terms, "The plaintiff is a duellist, and not only so, but he has fought several duels in a malicious, spiteful, and ungentlemanly manner."—would not this be an aggravation of the charge that he was a duellist, and would it justify the libel that he had fought a duel in which he killed his adversary?] The Court cannot inquire whether a duel has been fought fairly or not, nor whether a murder has been committed in a gentlemanly manner or otherwise. [MAULE, J.—Every one knows there is a great difference in these cases; that persons are sometimes convicted of murder, and yet, with the concurrence of all the world, the extreme penalty of the law is not always executed upon them. No one says that the French law is not fit for a civilized people, because it allows of verdicts of murder with extenuating circumstances.] Suppose the libel to have been that the plaintiff committed an ungentlemanlike murder, could the judge leave it to the jury to say whether the murder was ungentlemanlike? [JERVIS, C.J.—If the libel said that the plaintiff watched behind a hedge, enticed his adversary there under false pretences, and then rushed out and stabbed him in the back, the judge on a trial for the libel might surely leave all those facts to the jury?] Peacock referred to the marginal note in *Hunt v. Bell*, 1 Bing. 1.

[MAULE, J.—The declaration here does not state that the vocation of the plaintiff was that of a duellist, and that, by reason of the libel, he was prevented from keeping the fine company necessary for the pursuit of his vocation. TALFOURD, J.—Surely the case of *Greville v. Chapman*, 5 Bing. 731, disposes of that point. JERVIS, C.J.—In that case they were bound to justify the words "infamous robbery." I say that if a person be proved guilty of an illegal act, such as murder or treason, the Court cannot inquire in an action for libel whether it was done unfairly or not. By entering into a question whether a duel was fought fairly or not, the Court would hold out to the world that a duel might be conducted in a fair and proper manner.

D. D. Keane (with him Quain), contra. There can hardly be anything added to what has fallen from the Court respecting the plea. If the plea is bad, it will not be necessary to argue the points on the replication.

JERVIS, C.J.—The course this case has taken renders it unnecessary for us to express any opinion as to the validity of the replication, although the Court has an opinion on that subject (much fortified by the form of a plea of *autre fois acquit*), because the plea professes to justify the whole of the libel, and it does not give a full answer to it. The circumstance of the libel is that the plaintiff committed a murder under circumstances of great aggravation; but the justification is that he committed simple murder. It cannot be said by the defendants that in this case it makes no difference whether the murder was committed under one state of circumstances or another, because in the libel itself it is said that "it was understood that the counsel for the prosecution were in possession of a damning piece of evidence," and then a circumstance is mentioned to shew that there was not only malice conducing to the death of the deceased, but that his murder was in the contemplation of the party who caused it, I think we should be doing a serious injury to public morals if we were to hold that it makes no difference in public estimation whether a duel has been fought fairly or unfairly. It is true it would never do for the Court to countenance any such distinction on a trial for murder by duelling; but to say on a trial

for libel that the public will not, is a very different matter. When the issue is murder, the Court will not enter into such a question; but when the issue is libel, so long as there are circumstances which are circumstances of aggravation in the public mind, they must form part of the inquiry before the Court. If not, this will follow, that after a man has been tried for a murder which he has unfortunately committed in a duel, you may use any terms detractive of his "conduct" in respect of it, and he can have no redress for the opprobrium unjustly cast upon him. I do not think the Court will lay down or be governed by such a principle, and therefore because the plea professes to justify the whole libel, and does not do so, I think the plaintiff is entitled to judgment.

MAULE, J.—I am of the same opinion. I think when an action is brought for a libel, the defendant, to make good a plea of justification, must justify everything in the libel injurious to the plaintiff. If he charges several crimes, they must all be justified; if he charges that a crime was committed in a particular manner, he must justify that it was committed in that particular manner; *a fortiori*, if he committed the crime with circumstances of aggravation, he must justify those aggravating circumstances; because, although, as in the present case, the charge of practising with pistols the night before will not make the murder, legally speaking, a different murder, yet it will make the libel a different libel. It is quite a fallacy to say that this libel only imputes that the plaintiff committed a murder; if it imputed nothing but that, it would have been sufficient to allege, with proper identification, that the plaintiff had committed a murder; but it states a great deal more than that; and if it states more which is injurious as to the plaintiff's character, on every principle of law and justice, that must be justified as well as the rest. It does not follow that because a man has done a thing, you may charge it to have been done in any way the imagination can suggest. It might as well be said that, if the libel had charged the aggravating circumstances alone, and nothing else, such a libel need not be justified. There is nothing in the plea which shews any pretence for saying that the plaintiff spent the whole night preceding the duel in practising pistol-firing, or that the prosecuting counsel had evidence of it in their possession. Then, supposing that not to be true—if it has been charged as a damning piece of evidence—it would be a thing calculated to make persons think worse of the plaintiff, and for which he could maintain an action; and, if so, it must be justified, and not the less because it is accompanied by something else.

CRESSWELL, J.—I am of opinion this plea does not justify the whole libel. For a time something struck me in the argument that the circumstance described as a damning fact was merely evidence to prove the principal offence imputed—namely, the crime of murder, and, therefore, that it was substantially justified; but on consideration—I think that it is not so, and that it must be treated as a separate matter. Suppose the libel to have been that the plaintiff got into a quarrel, and gave or accepted a challenge, but that he sat up all the night before practising pistol firing for that purpose; it would be difficult to say that that would not be a libel tending to disparage his character, and is it less so because you have added to that, that after he had done so he went out and murdered his opponent?

TALFOURD, J.—If Mr. Peacock's argument prevailed, the result must be that if any person committed an offence against the law, he would be placed out of the protection of the law as to any imputation respecting the offence. No one can doubt that, in the mind of the writer of this article at least, the circumstances mentioned did make a considerable difference in the case, because he introduces the case by describing it as "a remarkable trial." He then speaks of this circumstance as a "damning piece of evidence;" and adds that, although no evidence was given of it, "the case looked black enough" without it. It is quite evident, therefore, that it did appear to the writer of the article as a circumstance of considerable aggravation; and as I think also that it was so, and that it ought to have been justified, I am of opinion that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Saturday, June 14.

LAMBERT V. SMITH.

Insolvent—Description of creditor in schedule—1 & 2 Vict. c. 110.

If the insolvent knows the name of the payee or holder of a negotiable instrument at the time of his, the insolvent's, acceptance, he should insert it in his schedule, although filed some time subsequently; and if he does not, the discharge under the Insolvent Act is inoperative as against the claim of such payee or holder.

Action by plaintiff, the payee, upon a bill of exchange, drawn by John Simons upon and accepted by the defendant.

(a) For the benefit of those who may wish to inquire into this subject we add the following list of authorities which would have been cited by counsel for plaintiff in support of the replication if he had been called on to maintain it:—2 Smith Lead. Cas. 431; Co. Litt. 280 B, 123 b, 287 b, 332 b; Bacon's abn. "Pardon" b; *Cuddington v. Wilkins*, Hobart, 81; *Scarle v. Williams*, Hob. 298; *Ashfield v. Thornton*, 1 B. & Ald. 467; *Armstrong v. Lisle*, Keeling, C. J. Rep. 98; *Stanford v. P. Crown*, 106; *Starkie*, Crim. Pleading, 334; *Dyer*, 236 b; *Pulton*, *De Pace Regis*, 151, 155, 161, 163; *Buller's N.P.* 240; *Reg. v. Hutchinson*, 1 Leach, 185; *Beake v. Tyrwhitt*, 3 Mod. 194; *E. v. Roche*, 1 Leach, 184; *Hawkins P. C. Cases*, Appeal, "Murder," 4 Bl. Com. 336-6; 2 Hale, 263 & 304; *Brooke*, Appeal, 122.



## COMMON BENCH.

## Plan of discharge under the Insolvent Debtors' Act.

It appeared at the trial, that the bill of exchange was made payable to the plaintiff, that it was taken by the plaintiff's clerk to the defendant for acceptance, returned to him accepted, and that it had never been out of the plaintiff's possession. The bill of exchange was mentioned in the schedule of the defendant filed in the Insolvent Court, and the amount and the name of the drawer, John Simons, properly stated, but the name of the plaintiff as payee was not mentioned, nor was it stated that the name of the holder was unknown. It was objected that the name of the plaintiff, as payee, not being mentioned in the schedule, the defendant was not discharged from this debt as against the plaintiff by the 1 & 2 Vict. c. 110, s. 75, and the judge being of that opinion, the verdict was taken for the plaintiff.

A rule nisi was afterwards obtained to set aside the verdict and enter it for the defendant.

*Phipson* showed cause.—If the bill had been payable to the order of the drawer, the defendant might not have been bound to find out who was the holder, and insert his name in his schedule in the Insolvent Court. But here the plaintiff was the payee on the face of the bill, and the contract was to pay him, and he was the person to sue upon the instrument. The defendant must have known the plaintiff's name, and that he, at the time of the acceptance, was the holder, and should have inserted his name in his schedule, and by the omission the plaintiff had no notice of the vesting order, or of the defendant's being brought up to pass his examination. (1 & 2 Vict. c. 110, ss. 71, 72.) The cases of *Reeves v. Lambert*, 4 B. & C. 214; *Lewis v. Mason*, 4 C. & P. 322; *Boydell v. Champey*, 2 M. & W. 483; *Beck v. Beverley*, 11 M. & W. 845; and *Hoyles v. Blore*, 14 M. & W. 387, were then referred to. In *Pugh v. Hookham*, 5 C. & P. 376, it was held by Tindal, C.J. that if an insolvent knows to whom a bill of exchange had been indorsed some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of the filing of his schedule. The 7 Geo. 4, c. 57, s. 46, upon which that was decided, is in every material respect identical with the 1 & 2 Vict. c. 110, s. 69, and that case is an express authority in favour of the plaintiff.

*Mauks* for the defendant, in support of the rule.—All the cases cited, with the exception of *Pugh v. Hookham*, have little bearing upon the point. The question is, did the defendant know the plaintiff to be the holder at the time of the adjudication? The defendant knew the plaintiff once to be the holder of the bill; but, being a negotiable instrument, he might fairly believe that the plaintiff had indorsed it away. And then, if the holder was unknown to him, he was not bound to insert the name in the schedule. But here the insolvent being sworn to the truth of his schedule, it should be taken that he believed that the plaintiff had parted with the bill to Simons, and that Simons was the holder at the time of filing the schedule. Sec. 93, which expressly discharges debtors where there are errors in the actual amount of the debt mentioned in the schedule without culpable negligence, or fraud, or evil intention on the part of prisoners, shews that the description to be inserted in the schedule is not to be construed with minute accuracy. It is submitted, therefore, that the defendant was discharged from this debt as against the plaintiff.

*Jervis, C.J.*—I am of opinion that this rule ought to be discharged. It is not necessary to decide whether a description of a negotiable instrument in the schedule would be sufficient, although it were not an exactly accurate setting forth of it, or whether it would be sufficient to mention the name of the maker of a bill of exchange without stating that of the payee; because, even assuming the bill of exchange to have been properly stated here in the schedule, the insolvent is not discharged as against the plaintiff. Sec. 75 enacts that the prisoner shall be discharged from custody, and entitled to the benefit of the Act as to the several debts and sums of money due or claimed to be due at the time of the vesting order from such prisoner to the several persons named in his schedule as creditors, and as to the claims of all other persons not known to the prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule. The question is, on whom does the burden of proof lie of want of knowledge of the name of the holder of a negotiable security? The present plaintiff shews that at one time the defendant knew who was the then holder of this bill. How does the defendant get rid of that fact? Not at all. The case of *Pugh v. Hookham* is an express authority that the defendant should have named the plaintiff in his schedule, if he wished to be discharged from the debt as against him.

*Maule, J.*—I agree that the discharge of the defendant, under the Insolvent Act, was inoperative with respect to the claim of the plaintiff. The spirit of the Insolvent Act is, that prisoners for debt should

be discharged; but as a condition it is enacted that they must name all persons, who claim to be creditors, and describe the debts in the schedule from which they petition to be discharged. It may happen in the case of negotiable instruments, that the insolvent does not know the name of the holder; but it does not follow that he cannot give some description, but in so far as he can describe the creditor he ought to do so. He is to give (sec. 69) as full and true a description of all debts due, or growing due, and of all persons to whom he shall be indebted as he can give. We might say, that the Act requires the names of the holders of negotiable securities to be inserted in the schedule, if the insolvent knows them, and if not, then he should describe the party as holder, and his name unknown. If the name of the holder is known the insolvent can mention it as well as that of any other creditor, and then such holder would have notice of the petition, and an opportunity of saying why the insolvent should not be discharged. But, however, we may decide this point, enough appears in the case to shew that the defendant is not discharged from the debt of the plaintiff. *Pugh v. Hookham* is an express authority, and I think that case was correctly decided. It does not appear to have been questioned; and if the matter were new I should be disposed to think that the description in this schedule would not do; but that authority is supported by good reason. *CRESSWELL* and *TALFOUR*, JJ. concurred.

## Rule discharged.

## BUSINESS OF THE WEEK.

Thursday, June 12.

*WILLIAMS v. THE LORDS COMMISSIONERS OF THE ADMIRALTY*.—This was a rule nisi to set aside a writ of summons and the service on Capt. Milnes. *Roebuck* and *Byles*, Serjt. shewed cause, and *Croverder* and *M. Smith* supported the rule. *Cw. adv. vult.*

Friday, June 13.

The Court to-day took the special paper.  
*HELMHAM v. BLACKWOOD*.—The Court was occupied the greater part of the day with the arguments in this case. A full report is given *supra*.

*THOMPSON v. HOWARTH*.—This was a special case stated for the opinion of this Court, the question being, whether the private creditors of the actuary of a savings' bank, who died indebted in a large sum to the trustees of the bank, were entitled to payment before the claims of the depositors in the bank were satisfied. *Cowling* argued the case for the plaintiff. *Crompton*, for the defendant, was not called upon. The case will be reported next week.

*ASLEY v. DALE*.—The Court delivered judgment in this case, making the  
*Rule absolute.*

Saturday, June 14.

*HERON v. HAYES*.—*Henderson* moved for a *distringas* to compel an appearance. *Refused.*

*OSBURY v. ROBERTS*.—*Needham* shewed cause against a rule for judgment as in case of a nonsuit. *P. Smith* and *Barnard* appeared for several defendants.

*Peremptory undertaking to try at the first sittings in Michaelmas Term.*

*CROFTS v. BRADY*.—*Bramwell* and *Willes* shewed cause against a rule nisi for a new trial, on the ground that the verdict was against the evidence; and *W. H. Watson* and *Self* supported the rule. *Rule discharged.*

*HILL v. SPORN*.—*Byles*, Serjt. shewed cause against a rule to review the taxation. *Willes* appeared to support the rule. *Rule absolute.*

Monday, June 16.

*MOULTON v. HOPE*.—*Skinner* prayed the Court to allow the rule in this case, *ad 17 Law T. 187*, to be conditionally varied. Notice to the attorney on the other side that this application would be made to-day was duly served, and he intimated an intention to oppose it. I propose asking that this judgment be set aside, and that the defendant be given till Friday to pay the money into Court. He is ready to pay all costs actually incurred. In asking this the defendant throws himself on the mercy of the Court. Of the two the plaintiff will obtain an advantage by this motion, for if he proceeds and casts the defendant into prison he will obtain nothing, while he loses both debt and costs. The defendant should not be held to blame because his witnesses were accidentally absent. [*Jervis, C.J.*—This rule was moved on Wednesday, and you do not come here again till the last day; it is remarkable that all and every step taken has been wrong, whilst the defendant has gained time by each move. *Maule, J.*—At chambers I could not see whether the endeavours were honest or merely to gain time; I saw, however, that time was gained, although at a great expense. *CRESSWELL, J.*—There are difficulties almost insuperable in what you seek. You are asking for a new trial, the rule to be drawn up in vacation, returnable before a judge at chambers. Can that be done? I feel the difficulty, but by arrangement of the Court it may be done; it would only be necessary to delegate power to a judge in chambers for this purpose, or the rule may be made returnable here to-morrow. *Jervis, C.J.*—It is hard that you should compel the plaintiff to come here and argue a rule at only a day's notice, the default being yours. *Maule, J.*—We cannot do anything of the kind. *Rule refused.*

*DORRIS v. HUTCHINSON v. HURST*.—*Woollett* moved for an order for the discharge of the defendant from imprisonment in York Castle, grounding the motion on 48 Geo. 3, c. 123, s. 1. The defendant has been confined in York Castle for three years upon a judgment against him in an action of ejectment. Counsel being instructed to oppose this motion, it is not necessary to go at any length into the affidavits. Notice has been duly served on the plaintiff of this application. [*Maule, J.*—Does the statute apply to ejectment? Yes, there is a case which shews it does. *Hall*, for the plaintiff.—The ejectment in this case was brought to recover certain lands, of which the defendant had possessed himself as buyer without having first paid the purchase-money. The plaintiff obtained judgment in ejectment, and defendant

then filed a bill for specific performance of the contract. The defendant would have been discharged if he would have done one of two things—either paid the purchase-money or rescinded the contract. The question is, whether the Court can impose terms: there are no authorities upon the point. [*Maule, J.*—He appears the ejectment was in this Court? *Woollett*.—By the Court.—You may take a rule. *Rule given.*

*DORRIS v. HUTCHINSON v. HURST*.—*Phipson* shewed cause for a rule obtained by *Whitmore* in this case, for judgment in case of nonsuit. It was an action of ejectment, parties were uncle and nephew. The defendant executed an affidavit that he occupied the premises which were the subject of the action for more than twenty years, at which time he always received the rents. The plaintiff sent notices from time to time, the last so late as April last, to the defendant's tenants. The defendant's ejectment was served upon him, and he, thinking it a mere notice such as had been sent to the tenant, regarded it, and he was quite unaware that such an ejectment had been commenced. [*Maule, J.*—Is the plaintiff and defendant are tenants in common, and the plaintiff is the owner? Yes. The case is, whether the Court will change the possession, notwithstanding the defendant states that he has a right to the action. [*Jervis, C.J.*—Why should the Court solely on your affidavit? We should have to go to the death of a convict in Van Diemen's land, which is not an easy matter, if this be not assumed to be the Court.—The rule must be discharged, and the defendant appear and defend, on payment of costs sequent to the declaration with those of this rule.

*GASKELL v. BAINBRIDGE*.—*Pigott* moved for a rule ing on Hancock, the plaintiff's attorney, to shew why he should not pay to the defendant the costs in this case, and of the reference and award then made; but as the attorney for the plaintiff has shewn the defendant, it is submitted that this is a case where the Court will interfere and make him pay costs. It is presented that he had authority to go on with the case for the assignees, whereas it turned out that he had no such authority. *Maule, J.*—You might have got security for costs. *Jervis, C.J.*—You may take it. We will hear what the other side has to say in the next week.

*FARRELL AND ANOTHER v. CRAWLEY AND ANOTHER*.—This was an appeal from the decision of the judge of the County Court of Poole, the question being on the Statute of Limitations. *Udall* was heard for the appellants. *Barnes* and *Willes*, for the respondents. The Court shewing power under the statute to give judgment in this case, intimated that judgment should be delivered on Saturday.

*HELMHAM v. BLACKWOOD AND ANOTHER*.—*Peacock, Q.C.*—In this case an apology had been prepared, which does not satisfy Captain Helmham, and we now come to say that we withdraw every imputation on him, and that the statement with reference to the pistol-dring is a story. *D. D. Keane*, I have seen the apology, and shall recommend Captain Helmham to accept it. I think it is worthy of the generous feelings known to actuate the learned gentleman who is believed to be the author of the libel. Captain Helmham is a married man with a family, and for the sake of the latter, he felt bound to clear his character from the imputation cast upon it by the libel. [*Jervis, C.J.*—The defendant must pay costs in the matter as between attorney and client. *Order accordingly.*

*THE WEST LONDON RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY*.—*Chief Serjt.* mentioned this case to the Court, stating that *Asplund* had agreed with him that it should be argued tomorrow.

*MARSHALL v. THE YORK AND NEWCASTLE RAILWAY COMPANY*.—In this case a rule had been obtained on former day for an attachment against Lord Adolphus Vane for contempt of Court. It appears that an action had been commenced by the plaintiff, who had been his lordship's servant, to recover the value of a portmanteau, part of the luggage, which had been lost upon the line. In order to prove his case, the plaintiff found it necessary to ask Lord Adolphus Vane, who alone could speak to the delivery of this luggage into the care of the railway company. A person went accordingly to the house of Lord Adolphus, and, as his lordship passed from a cabriolet to the door, attempted to serve him with a writ *ad testificandum*, whereupon his lordship replied, "You be damned; I shall not attend." *Afterwards* it said, "Damn you, the Court and all." Subsequently, on the 7th of July, his lordship wrote to the plaintiff's attorney, stating that he could give no evidence respecting the portmanteau. To this a reply was made, stating that his lordship must attend the trial. On the 13th of May his lordship was advised by counsel that he could not proceed safely to trial unless Lord Adolphus Vane would give evidence. He therefore had his lordship called on for his attendance, and he not appearing the record was withdrawn *pans*, and he not appearing the record was withdrawn *pans*, and he not appearing the record was withdrawn *pans*. Affidavits were made by Lord Adolphus Vane, in reply to those upon which the rule nisi was obtained, in which he negatived the use of language *subpoena*, which had been stated and that he thought the *subpoena*, which had been placed by the process server on his arm, whence it fell to the ground, was no more than a mere letter, such as he had received before in the matter, it being folded in an envelope. *Peacock, Q.C.* and *Manisty*, for his lordship and Hon. G. Denman for plaintiff, on the ground that he and the Court discharged the rule, on the ground that his lordship had effectually purged himself of the contempt, though he might be liable to an action by the plaintiff for not attending on his subpoena. *Rule discharged.*

*EAST ANGLIAN RAILWAY COMPANY v. RAILWAY COMPANY*.—*Bramwell*, when the case was called on, intimated that he could not go on in the absence of *Croverder, Q.C.* who was at the time engaged in the U.K.

*WILLIAMS v. THE LORDS COMMISSIONERS OF THE ADMIRALTY*.—The Court delivered judgment in this case. *Rule discharged with costs.*

Tuesday, June 18.

*VAUGHAN v. HARRISON*.—*Gifford* moved for a *distringas* to compel an appearance. *Refused.*



## EXCHEQUER.

THWICK v. BUCHHELY.—Kingdon moved for costs of day for not proceeding to trial.

*Affidavit to be amended.*

GILLSON.—Brewer moved to change the name of Gillson on the roll of attorneys to that of Shield.

*Granted.*

UNTON v. BRALL.—Cowling showed cause, and Byles, t. appeared in support of the rule nisi.

*Peremptory undertaking to try in Michaelmas Term next.*

ON dem. HOPKINS v. PRICE.—Hawkins showed cause nisi to discharge a rule absolute for a new on payment of costs, the costs not having been paid. *Cur. adv. vult.*

RE EAST ANGLIAN RAILWAY COMPANY v. THE EASTERN RAILWAY COMPANY.—Bramwell and Wheeler wed cause, and Crowder and Bovill supported a rule to set aside the interlocutory judgment signed on the and of the delivery of non-issuable pleas.

*Rule absolute on payment of costs. The plea of non est factum to be withdrawn; and the substance of the pleas objected to be pleaded in one plea.*

KELTON v. SPRINGETT.—Byles, Serjt. and Charnock wed cause against a rule nisi to set aside the verdict entered a nonsuit, obtained on the ground of there being evidence, which the undersheriff ought to have left to jury. *Nonsuit, contra, was not called upon.*

RWE v. RILEY.—Judgment for the defendant. To be ordered.

## COURT OF EXCHEQUER.

ported by FREDERICK BAILEY and C. J. B. HERTFORD, Esqs. Barristers-at-Law.

## BUSINESS OF THE WEEK.

Thursday, June 13.

THE ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY. *Part heard.*

Saturday, June 14.

THE ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY. *Arguments continued.*

ARKER v. THE BRISTOL AND EXETER RAILWAY COMPANY. *Cur. adv. vult.*

Friday, June 13.

ARKER v. THE BRISTOL AND EXETER RAILWAY COMPANY.—(To be mentioned to-morrow.)

WIDNEY v. LLOYD.—Fretwell moved for a rule to rescind an order of Platt, B. dated 22nd May last. *Refused.*

HALE v. ROBINSON.—Birnie moved for a rule to show use why the amount awarded herein should not be paid to costs. *Granted.*

PEARCE, Administrator, v. JAMES WILSON.—*Postponed.*

WYNDHAM v. BRISTOW.—SAMES v. SAMES.—*Chapman moved for a rule to show cause why the outlary herein should not be set aside and the costs paid.*

*Rule nisi to set aside the outlary; the defendant undertaking to set off so much of his debt of £2,350l. recovered by him in an action against the plaintiff in this Court as the plaintiff should recover in these actions.*

HARVEY v. TOWERS. SAMES v. SAMES.—In this case a de had been obtained calling on the plaintiff to show cause why a verdict should not be entered for the defendant on the sixth, seventh, and eighth issues, or why the plaintiff should not be nonsuited, or what leave reserved. The action was brought a bill of exchange, the plaintiff suing as the indorsee of the drawer, the defendant being the acceptor. The 6th plea was, that the acceptance was obtained by fraud, and without consideration, and that the plaintiff was a holder without valuable consideration. The 7th plea alleged the same facts, and further, that the plaintiff had notice of the fraud. The 8th plea alleged the same facts, and further, that the bill was indorsed, and the plaintiff received to same after it became due. At the trial the jury were of opinion that the fraud was established, and the judge directed the jury that it was the duty of the defendant to substantiate his plea in all its branches, both as to the fraud and also the want of consideration, and upon that a verdict was returned for the plaintiff, with leave reserved to the defendant to move to enter a verdict for him on the above-named counts, or for a nonsuit. *Mayard (James, Q.C. with him), now showed cause. He cited Bingham v. Stanley, 2 Q. B. 117; Small v. Atwood, 6 O. & F. 232, 338. Wilkins, Serjt. and Crompton were not called upon. By the COURT.—When a plea of fraud is established, the onus of proving that it has value for the bill is cast on the plaintiff. This has always been the established rule in this Court; they referred to Smith v. Braine, 20 L. J. 201, Q.B.*

*Rule absolute for a nonsuit in both cases.*

ABDOCK v. WOOD. *Cur. adv. vult.*

GRAHAM and OTHERS, Assignees of SAUNDERS v. NEWNAM. *Part heard.*

Monday, June 16.

Motions before Martin, B. sitting alone in the Exchequer Chamber.

CARR v. JACKSON.—G. Pollock moved to change the venue from the town and county of Newcastle to the county of Northumberland. *Granted.*

PRICE v. SMES.—Bovill moved for a rule to show cause why the award herein should not be set aside. *Granted, returnable to-morrow.*

HICKS v. WATSON.—*moved for a distringas to proceed to outlary.* *Granted.*

THOMPSON v. PHILLIPS.—C. W. Lewis moved for a rule to show cause why a mandamus should not issue to the judges of Madras to examine witnesses. (30 Geo. 3, c. 3; Tidd, 814.) *Granted.*

HEWITT v. PATTERSON.—Bramwell moved for a rule to give the plaintiff herein his costs, under 13 & 14 Vict. c. 11. *Practice showed cause in the first instance.*

*Settled on payment of 5l. costs.*

MORRIS v. PHILLIPS.—Cooks moved for a rule to confirm the Master's report as regarded a certain deduction of 14l. 6s. 4d.; and further, that such deduction should be increased by 108l. the difference between 4l. and 5l. per cent. *M. Smith appeared to consent.*

*Rule absolute; form of rule to be settled by Master Walton.*

## BAIL COURT.

BENH v. SKIDMORE.—Hawkins showed cause against a rule for judgment, as in case of a nonsuit. *Rule discharged.*

THE ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY. *Part heard.*

Tuesday, June 17.

POOLS v. WARDLE. *Cur. adv. vult.*

TODD v. THE METROPOLITAN LIVE STOCK AND GENERAL PROVISION IMPORTATION COMPANY.—Martin moved for a rule to show cause why an order to tax costs of Parke, B. should not be rescinded, or why the judgment obtained should not be set aside. *Charnock, contra.* *Refused.*

THE ATTORNEY-GENERAL v. THE LONDON DOCK COMPANY.—Arguments concluded. *Cur. adv. vult.*

WILLIAMS and OTHERS v. HOLDSWORTH.—*Altherton showed cause against a rule nisi obtained to set aside an order of the County Court judge of Merioneth, which order, dated the 25th February last, had been removed into this court by certiorari, and was now sought to be quashed. It appeared there had been twenty actions, in each of which judgment was given for the plaintiff, and the above-named defendant was ordered to pay the amount by instalments; default being made, execution issued, and a vessel, or the defendant's share in it, was seized, whereupon a Mr. Griffith Jones Williams gave notice on behalf of the National Provincial Bank of England at Dolgelly that the bank had an equitable mortgage, or claimed a lien upon the defendant's interest in the vessel so seized, and twenty interpleader summonses thereupon issued. On the 21st February particulars of the claim set up were given, and the hearing was fixed for the 25th February; at the hearing, however, the claim by the bank was given up, when the judge made an order upon Mr. Williams, the attorney for the bank, to pay the costs, amounting to 60s. and upwards. This was the order brought up by the certiorari, and now sought to be quashed, as the judge had no more power to make an order upon Mr. Williams to pay than upon a person he had never seen or heard of. It was contended, notwithstanding, that such an order was not removable, either under the 9 & 10 Vict. c. 85, s. 90 and 118, or the 13 & 14 Vict. c. 61, ss. 14, 15, and 16, the other side not having availed themselves of a removal under the latter Act. *Welsby in support of the rule.—The 14th section of the 13 & 14 Vict. c. 61, refers to "either party in any cause," that is, one of the parties to the suit, not a third or an indifferent party to the suit altogether. What possible right could the judge have to make an order upon Mr. Williams to pay the costs? He is neither a party to the suit or to the interpleader summons. (He was then stopped.) *Altherton suggested that perhaps the better course might be to move to quash the certiorari. The COURT said a strong opinion upon the Bench now was that the order was clearly bad, and having been brought up by certiorari into this court, should be quashed; but the better plan at present would be to enlarge this rule until next Term, that substantial justice might be done in the meantime by all parties.***

*Rule enlarged.*

BEAVAN v. BEAVAN.—Crowder, Q.C. appeared for the purpose of shewing cause against a rule obtained to set aside an award. *Sir F. Thesiger, contra, said he had seen, and with D. D. Keene, who was with him in support of the rule, carefully examined the affidavits made in opposition to the rule nisi, and admitted that they afforded a perfect answer to the application: his client insisted that the affidavits in opposition were untrue, but whether they were true or untrue could not be shown or discussed in seeking to make this rule absolute; he therefore felt bound to state that the rule could not be made absolute upon these affidavits.*

*Rule discharged.*

WHITEHOUSE v. HOWELLS.—Lush showed cause against a rule obtained to set aside an order of Platt, B. and also a writ of prohibition. The affidavit upon which the order for the prohibition was obtained was entitled in the County Court, instead of being entitled in this Court, and was sworn before a commissioner of the Court of Q. B. He contended that, under the 1 & 2 Vict. c. 45, either or any judge at Chambers had jurisdiction under a subject matter in any of the other Courts; and the learned Baron having had sufficient material before him to satisfy him the prohibition should issue was quite enough; it is not like an affidavit in a cause, but rather like an affidavit to hold to bail. The statement of the Court at the head of the affidavit here was not intended to be an entitling of the affidavit, but as a description of the County Court where the proceedings were. *Phippon, contra, not called upon. The COURT thought the affidavit was bad.* *Rule absolute.*

## EXCHEQUER CHAMBER.

Reported by ADAM BITTLETON, Esq. of the Inner Temple Barrister-at-Law.

## ERRORS FROM THE QUEEN'S BENCH.

Wednesday, June 18.

REG. v. THE SOUTH-EASTERN RAILWAY COMPANY.—PARKE, B. delivered the judgment of the Court.

*Judgment reversed.*

KING v. THE ROCHDALE CANAL COMPANY.—*Crompton, for the plaintiff in error; Cowling, contra.*

*Judgment affirmed.*

LAVEY v. THE QUEEN.—*Willis, for the plaintiff in error. Prendergast, contra.* *Cur. adv. vult.*

Thursday, June 19.

HENDERSON v. ELSON.—Argument resumed from the sitting after last Term. *Channell, Serjt. for defendant in error. Cleasby, in reply.* *Cur. adv. vult.*

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Justice WIGHTMAN)

Friday, June 13.

Ex parte JOSEPH ASKEW.

Conviction—Master and Servants' Act—Warrant of commitment.

A warrant of commitment under the 4 Geo. 4, c. 34, s. 3, of a servant for leaving his employ-

ment without a lawful excuse, must show either that the contract was in writing, or that the servant had in fact entered into the service; and in the absence of an allegation of either fact it will be bad (confirming Lindsay v. Leigh, 11 Q. B. 455).

On a former day Huddleston obtained a writ of Habeas Corpus to bring up one Joseph Askew, who was a prisoner in the House of Correction at Stafford, under a warrant of commitment, in order that he may be discharged from custody. This was a complaint preferred at the instance of Messrs. Mayers, potters, of Staffordshire, against Joseph Askew, under the 4 Geo. 4, c. 34, s. 3, which enacts, "that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall contract with any person or persons whomsoever, to serve him, her, or them, for any time or times whatsoever, or in any other manner, or shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or having entered into such service, shall absent himself or herself, from his or her service before the term of his or her contract (whether such contract shall be in writing or not in writing) shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, or otherwise respecting the same," then it is to be lawful for any justice of the peace to hear any complaint respecting the same, and upon proof of the misconduct to commit the defendant to the house of correction for a period not exceeding three calendar months, with hard labour. Upon the hearing, the justice decided in favour of the complainant, whereupon the defendant was committed to the house of correction for one month with hard labour, under the following warrant:—

"County of } To all constables and others of her  
Stafford. } Majesty's officers of the peace acting  
in the said county, and to the keeper of the House  
of Correction at Stafford, or his deputy.

"Whereas complaint upon oath hath been made unto me, Thomas Bailey Rose, esquire, one of her Majesty's justices of the peace acting in and for the county of Stafford, by Joseph Challenor, of Dale Hall, in the said county, agent for Thomas Mayer, John Mayer, and Joseph Mayer, of Longport, potters; that Joseph Askew, late of Longport, in the said county, hath contracted with the said Thomas Mayer, John Mayer, and Joseph Mayer, to serve them as their servant in the business of potters, at the parish of Burslem, in the said county, for a certain time (to wit) for the term of one year, to commence from the eleventh day of November last, and that the term of his contract being unexpired, the said Joseph Askew did, on the 2nd day of June inst. unlawfully misdeemean and misconduct himself in his said service, by neglecting and absenting himself from his said masters' service without the leave of his said masters, without having given to his said masters any notice thereof, and without assigning any sufficient reason for so doing, contrary to the provisions of the statute in such case made and provided: and whereas the said Joseph Askew being now brought before me, the said justice, in pursuance of my warrant issued against him, to answer unto the said complaint; and I, having duly examined into the nature thereof, do adjudge the said complaint to be true, it appearing to me as well upon the examination on oath of the said Joseph Challenor, in the presence of the said Joseph Askew, as otherwise, that the said Joseph Askew having contracted as aforesaid to serve the said Thomas, John, and Joseph Mayer, in their said business, and the terms of his contract being unexpired, did on the 2nd day of June instant, misdeemean and misconduct himself in his said business, by neglecting and absenting himself from his said master's service without the leave of the said master, without having given to his said master any notice thereof, and without assigning any sufficient reason for so doing; I do therefore convict him, the said Joseph Askew, of his said offence, and do order and adjudge that the said Joseph Askew for his said offence be committed to, and he is by me, the said justice, hereby committed to the House of Correction at Stafford aforesaid, there to remain and be held to hard labour for the space of one calendar month.

"These are therefore to command you the said constable forthwith to convey the said Joseph Askew to the House of Correction at Stafford aforesaid, and deliver him to the keeper thereof, together with this warrant; and I do hereby command you, the said keeper, to receive the said Joseph Askew, into your custody in the said House of Correction at Stafford aforesaid, there to remain and be held to hard labour for the space of one calendar month from the date hereof; and for your so doing this shall be to you and each of you a sufficient warrant.

"Given under my hand and seal the fifth day of June, 1851, at Tunstall, in the said county.

"J. B. ROSE. (L.S.)"

## BAIL COURT.

The *habeas corpus* having been returned, and the defendant being in Court,

Huddleston moved that he may be discharged from custody upon the ground (*inter alia*) that the warrant of commitment is bad, inasmuch as it neither shews that the contract of service was in writing, nor that not being in writing, the defendant had, in fact, ever entered into the said service, one of which alternatives was essential to give the justice jurisdiction to convict. (*Lindsay v. Leigh*, in error, 11 Q.B. 455, 3 New Sess. Cas. 99.)

Pashley, in support of the commitment, argued that the allegation in the warrant of commitment that the defendant "did, on the second day of June instant, misdemeanor and misconduct himself in his said business, by neglecting and absenting himself from his said master's service," necessarily implies that the defendant had, in fact, entered the service of his masters, particularly as the introductory part of the warrant explains that a contract to serve had been some time before then entered into; the case of *Lindsay v. Leigh* being distinguishable in this latter particular. The misconduct must evidently mean misconduct whilst in his service by absenting himself. He also argued that as this was a doubtful question it would be better to leave the defendant to his action.

WIGHTMAN, J.—Giving all due weight to the last argument, that the question is an arguable one, and that the prisoner, therefore, should be left to his action, I can only answer that being brought before me for his discharge, if I think that he is entitled to it I am bound to discharge him. I really cannot distinguish this case from that in the Exchequer Chamber (*Lindsay v. Leigh*), a court of higher authority than this one. There there was a warrant upon the same statute, and almost in the same words, and it was held to be invalid, and in that very case I find that the prisoner had been brought before me upon *habeas corpus*, and discharged upon the same grounds. The statute provides for two cases—one where there has been a contract and the defendant has not entered the service, the contract being in writing; or, not being in writing, where the defendant enters the service and absents himself. In either of those cases he is liable. But in this case the warrant neither states the contract to have been in writing, nor that the defendant had entered into the service, but merely that he misconducted himself "by neglecting and absenting himself from his said master's service." It is, however, said, that *ex vi termini*, "absenting himself from his said master's service" means that he has entered into it. This, however, is not a necessary implication, and the statute itself is opposed to it; for otherwise it would have been unnecessary to have used the words "having entered into such service." The case of *Lindsay v. Leigh* is a governing authority. There the Court say that there must be an averment either that the contract to serve was in writing, or that the service was entered upon, one of these two circumstances being essential to give the magistrate jurisdiction to commit to hard labour." In the absence, therefore, of either one or the other of these allegations, the warrant is bad, and on the authority of *Lindsay v. Leigh*, in which I fully concur, I must hold that the defendant is entitled to his discharge. *Prisoner discharged.*

Saturday, June 14.

(Before Mr. Justice WIGHTMAN.)

REX. v. THE RECORDER OF MANCHESTER.

Appeal—Filing original order of removal.

Where the recorder of a borough refused to hear an appeal, upon the ground merely that as the original order of removal was not filed (a copy had been filed), the Court had no power to enter upon the appeal, this Court granted a mandamus to him to enter continuances and hear the appeal.

This was a rule for a mandamus to be directed to the recorder of Manchester, directing him to enter continuances and hear the appeal against an order of removal, wherein the parish officers of the township of Preston were appellants, and the parish officers of the township of Manchester were respondents. The appeal in this case came on for trial at the borough sessions for Manchester, in December last. Upon the appellants being about to prove their notice of appeal, it was objected on the part of the respondents that they had not filed the original order of removal, but merely a copy, which, according to the practice of the Sessions, was insufficient, and that being so, the Sessions had no jurisdiction to hear the appeal, and that as no notice to produce the original order of removal had been served on the respondents, the appellants could not be permitted to give secondary evidence of it. To this the appellants replied that they were not bound to file the original order (which was in the possession of the respondents), there being no rule of Sessions requiring them to do so. Upon this the recorder referred to the clerk of the peace to know what was the practice upon the subject, to which he answered that there was no rule upon the subject either way. The recorder then declined to hear such evidence (notice of

## BAIL COURT.

appeal), and struck out the appeal, on the ground (as it was sworn), that in the absence of the said order of removal, the Court had not power to enter upon an appeal against the same.

Hall now shewed cause, and argued that the Sessions were right, for that where it is the practice of the Sessions to require the original order to be filed, it is the duty of the appellants to give the respondents notice to produce it for the purpose. (*Reg. v. Sussex*, 9 Dowl. 125; *Reg. v. Peterborough*, 18 Law J. M.C. 79.)

Pashley, contra, contended that the Sessions were wrong, for that there was no settled practice upon the subject, and that at least the Sessions ought to have permitted the appellants to have proved their notice of appeal, and that such a rule, even if it existed, would be unreasonable. (*Reg. v. The West Riding*, 2 Q.B. 705.)

WIGHTMAN, J. thought that as it was stated upon the affidavits that the recorder struck out the appeal because he thought he had absolutely no jurisdiction to try it without the original order, that in this he was wrong, and the mandamus ought to go.

*Rule absolute.*

Monday, June 16.

(Before Mr. Justice WIGHTMAN.)

BANKS and ANOTHER v. REBBECK and WIFE.

County Court, prohibition to.

On a rule for a prohibition to the judge of a County Court, on the ground that the title to the premises sought to be recovered came in question, it appeared that the defendants occupied the premises, under a written agreement with the owner, for the purchase of the premises for 150*l.*, 8*s.* per week having to be paid weekly until the purchase-money was paid, the 8*s.* weekly to go in liquidation of the purchase-money:

Held, that the ordinary relationship of landlord and tenant did not exist, and that the County Court had no jurisdiction.

In this case a rule nisi had been obtained on the part of the defendant for a prohibition to be directed to the judge of the County Court of Whitechapel, restraining him from further proceeding in this cause, inasmuch as the title to land was in question. This was a plaint under sec. 122 of the 9 & 10 Vict. c. 95 (County Courts Act), by the executors of one Benjamin Rebbeck, to recover possession of premises; and in support of the application it was alleged that the deceased Benjamin Rebbeck, in August 1846, entered into an agreement to let the premises in question, being No. 3, Rose-terrace, to one Hannah Miranda Service, at 8*s.* a week; that subsequently, on the 10th of December, in the same year, a fresh agreement was entered into between them, whereby it was agreed that Benjamin Rebbeck should sell the house to the said Hannah Service for the sum of 150*l.* and, until that sum was paid, she should pay the rent of 8*s.* per week, which was to go in liquidation of the purchase-money, and that he would at that time make out a good title, and execute all necessary deeds. On the day following, Hannah Service married the son of the deceased, being the present defendant; that in the present year Benjamin Rebbeck died, leaving the present plaintiffs his executors, who gave the defendant notice to quit, and instituted the proceedings in the County Court to recover possession of the premises. On the case coming on, the defendant set up the agreement of the 10th December, 1846, alleging that the full amount of 150*l.* had been satisfied to Benjamin Rebbeck before his death, and arguing therefore, that as he claimed title to the premises, the judge had no jurisdiction. Upon this the plaintiffs were asked if they admitted the agreement, which they declined to do; whereupon the learned judge requested to look at the agreement, when he observed that it gave the defendant only an equitable and not a legal title, and therefore he would grant a warrant of possession, but not to be executed for a month, to give the defendant an opportunity of applying to this court.

Barnard shewed cause, and contended that the agreement in question gave the defendant no rights, it not being a genuine instrument, and that in fact no such agreement was proved at the trial, the defendant not having given it in evidence.

Hawkins, in support of the rule, argued that the judge had no jurisdiction: 1st, because the tenancy was not such a one as was contemplated by the 122nd section of the 9 & 10 Vict. c. 95 (*Jones v. Owen*, 5 Dowl. & L. 669); and 2ndly, that the title to land came into question, it being immaterial whether or not the title was well or ill founded, if it were a *bona fide* claim; that the judge dispensed with their calling evidence to prove the agreement, by deciding that the instrument itself was no answer to the application. He also contended that it is now sufficient to shew that title to land is in question.

*Cur. adv. vult.*

WIGHTMAN, J.—An application was made to this Court for a prohibition to the judge of the County Court of Whitechapel, on the ground that the case was not within the jurisdiction of the County Court.

The plaintiffs sought to recover possession of a house which the defendant occupied, by proceeding in the County Court under the 122nd section of the 9 & 10 Vict. c. 95, by which it is enacted, that when and as soon as the term and interest of the tenant of any house, &c. where the value of the premises, or the rent payable in respect of the tenancy did not exceed 50*l.* by the year, and upon which no fine shall have been paid, shall have ended, or shall have been determined by a legal notice to quit, and the tenant shall refuse to quit the premises, the landlord may proceed in the County Court to recover possession. The defendant, who was the occupier of the premises, resisted the proceeding on the ground in the title to the house was in question, and that the ordinary relation of landlord and tenant did not exist between the plaintiff and the defendant. It appeared that on Monday, the 10th of Aug. 1846, the father of the defendant let the house to Hannah Miranda Service, at 8*s.* a week, to commence that day, and the first payment to become due the following Monday, and a week's notice to quit given. It further appears, that on the 11th Dec. the defendant married Hannah Miranda Service, and it was stated in the affidavit on behalf of the defendant, that on the 10th of December the title of the defendant entered into another agreement with Hannah Miranda Service, to sell her the house in question for 150*l.* and, upon payment of that sum the defendant further agreed to give a good title, to execute the proper deeds, conveying the house to Hannah Miranda Service; but until the 150*l.* was paid, she was to pay the father 8*s.* a week for the house, but the 8*s.* a week to be in part payment of the 150*l.* This agreement was said to be a substitution for the agreement to let, and it was stated that the 150*l.* had been paid by so many weekly payments as amounted to 84*l.* It also appeared that the defendant, after the marriage, at 8*s.* a week to the father down to his death, and the defendant paid 4*s.* a week on account of the rent to the mother. The judge of the County Court was of opinion that the title did not come in question. It appears to me that, under the circumstances of this case, after the making of the second agreement, which was for the purchase, the occupation was under that agreement and not under the first, and even though the purchase-money had been paid it would have given no title, but when it was paid the defendant would be in the occupation not as tenant but as purchaser, and the ordinary relation of landlord and tenant would not subsist between the plaintiff and defendant, and the case in principle falls in with that of *Jones v. Owen*, 5 Dowl. & L. 669, upon which my brother Paterson said, to bring the case within the jurisdiction of the County Court, the ordinary relation of landlord and tenant must subsist between the parties, and upon that case it is clear that he ought not to be turned out; but it seems to me, upon the proper construction of the statute as adopted in the case alluded to, in which I concur, that this case is not within the jurisdiction of the County Court, and the rule must be made absolute.

*Rule absolute.*

Monday, June 16.

KNAGGS v. KNAGGS.

Judgment as in case of nonsuit—Issue—Pleading. The rejoinder to a replication concluded in the country but the similitur was not added: Held, that the defendant was not entitled to move for judgment as in case of a nonsuit, on the ground that no issue was joined. Held, also, that the " &c." with which the rejoinder concluded, did not include the similitur. This was a rule nisi for judgment as in case of a nonsuit.

Hoggins shewed cause on an affidavit, which set out the pleadings, by which it appeared that to a replication of set-off the defendant had pleaded the Statute of Limitations by way of rejoinder, but had not added a similitur. It was therefore contended that the cause was not at issue, and therefore that the defendant was not entitled to move for judgment as in case of a nonsuit. The case of *Wright v. Oldfield*, 8 Dowl.

Hoggins contended that as the rejoinder concluded with an " &c." that would be taken to include the words "and the plaintiff doth the like," and that it was not necessary to set out the words at length.

WIGHTMAN, J.—I do not think the *ex parte* will help you, though it has been said that there is great virtue in it. You should have added the similitur, or ruled the plaintiff to surjoin before you were entitled to move for judgment as in case of a nonsuit.

*Rule discharged; costs to be costs in the cause.*

*Ex parte HYDE.*

A conviction under the Game Act, 1 & 2 Wm. 4, c. 32, s. 3, adjudged the defendant to pay 5*l.* to be paid and applied according to law. By sec. 21 of 5 & 6 Wm. 4, c. 20, the penalty imposed by the 1 & 2 Wm. 4, c. 32, is to be applied half

## BAIL COURT.

to the informer, and the other half to the overseer of the poor, or some other officer of the parish, township, or place in which the offence shall have been committed as the convicting justices may direct.

On a motion for a certiorari to bring up the conviction,

*Held*, that the conviction was bad for not adjudicating to whom the penalty was to be paid.

*Held*, also, that the justices had acted without jurisdiction in directing the defendant to be imprisoned in default of paying the penalty (the adjudication to pay the penalty being informal), and, therefore, that the certiorari was not taken away by the 45th section of 1 & 2 Wm. 4, c. 32, which applies to matter of form merely.

This was a rule for a certiorari to remove into this court a conviction of justices made under the Game Act, 1 & 2 Wm. 4, c. 32, for shooting a pheasant within the prohibited months.

The court adjudged the defendant to pay a fine of 5s. "to be paid and applied according to law," &c. and in default of payment to be imprisoned for two months, &c.

In moving for the rule it was contended that as by the 21st section of 5 & 6 Wm. 4, c. 20, it is enacted that the penalty imposed by the first-named statute is to be applied one half to the informer and the other half to the overseer of the poor or some officer (as the convicting justices or justices may direct) of the parish, township, or place in which the offence shall have been committed, &c., the conviction was bad for not specifying to whom the penalty was to be paid; and *Chaddock v. Wilbraham*, 5 C.B. 645, was cited.

*Rose* now shewed cause and contended that by the 45th section of the Game Act, 1 & 2 Wm. 4, c. 32, the writ of certiorari was expressly taken away, and that no conviction under the Act could be brought up to be quashed for want of form. In this case it could not be contended that the justices had not jurisdiction over the subject matter, and therefore that the conviction could not be removed by certiorari. (*Reg. v. The Justices of Somersetshire*, 5 B. & C. 816.)

*Hawkins* (called on by the Court), in support of the rule.—No doubt the certiorari is taken away for all matters of form or mere informality; but it is contended that in this case the justices have acted without jurisdiction, in ordering Mr. Hyde to be imprisoned without having first adjudicated in what manner the penalty was to be apportioned, and to whom paid; and if the justices have acted without jurisdiction the conviction may still be removed by certiorari. It is clear that the jurisdiction to imprison only arises in the event of the non-payment of the fine, and as the mode in which the fine is to be apportioned is not legally adjudicated on the conviction, the order of two months' imprisonment for the non-payment is made without jurisdiction, and therefore the certiorari is not taken away, and, if so, the conviction is clearly bad within the decision of the Court in *Chaddock v. Wilbraham*, 5 C.B. 645. He also cited *Corner's Practice*, "Certiorari," p. 66; and *Rex v. Berkely*, 1 L. Kenyon's Rep. 80.

*Rose* was heard in continuation, and contended that the magistrates had jurisdiction to imprison, the conviction sufficiently pointing out how the fine was to be paid. The Act (5 & 6 Wm. 4, c. 20, s. 21) enacted that half the penalty was to be paid to the informer and the other half to the overseer of the parish, or other officer; therefore in the absence of any direction by the justice the penalty would be payable half to the informer and half to the overseer of the parish, and therefore the direction "to be paid and applied according to law" was a sufficient adjudication. He also contended that as this conviction was in the form given by 11 & 12 Vict. c. 43, schedule I. 2.

*WIGHTMAN, J.*—That form is clearly not applicable to a case where the justices have to adjudicate to whom of several persons named in an Act, different parts of a penalty are to be paid. I have no doubt whatever that the conviction is informal; the only doubt I had was, whether the certiorari was taken away, but I have come to the opinion that the defect in this conviction is matter of substance, and not mere form, and therefore that the certiorari is not taken away. In my opinion the conviction shews on the face of it a want of jurisdiction to imprison; the power of the justices to order that, only arises on the non-payment of the penalty, but in this case the adjudication to pay the penalty is informal, and therefore the jurisdiction to imprison does not arise. I think, therefore, the certiorari must go. *Rule absolute.*

## BUSINESS OF THE WEEK.

Friday, June 13.

*Re CUTTS*.—*Knowles, Q.C.* and *Prentice*, were heard in support of the rule. *Cur. adv. vult.*

*JONES v. CUNY*.—*Dawson* moved for a rule for prohibition to restrain the judge of the County Court of Southwark from further proceedings with the plaintiff. *Rule nisi.*

## INSOLVENCY.

## INSOLVENCY.

*REG. v. ROWLANDS AND OTHERS*.—*Parry* moved for a certiorari to remove into this court an indictment found against the defendants at the last Staffordshire Assizes, for combining to prevent workmen from following their employment, under the 6 Geo. 4, c. 139. *Writ granted.*

*SHIMONE* made a similar application in reference to a similar indictment against other parties. *Writ granted.*

*NEWS AND ANOTHER v. HOLLANDS AND WIFE*.—*Barrow*, shewed cause against a rule for judgment as in case of a nonsuit. *Ball, contra.*

*Rule discharged, upon a peremptory undertaking.*

Saturday, June 14.

*Re EYRE*.—*Shee, Serjt.* shewed cause against a rule calling upon an attorney to pay a sum of money. *Keane, contra.* *Rule absolute.*

*REG. v. THE INHABITANTS OF TURWESTON*.—This was a summons heard in court before *Wightman, J.* and called upon the inhabitants of Turweston, who had been found guilty upon a road indictment, to shew cause why the costs of the prosecution should not be paid to the prosecutor out of the rates for the repair of the highways for the said parish. *Power shewed cause. Walls contra.*

*Cur. adv. vult.*

Monday, June 16.

*RUSSELL v. DENT*.—*Wordsworth* moved to refer back the award made in this case to the arbitrator, in order that he might correct a mistake made therein, in not having adjudicated as to the costs. *Rule nisi returnable at chambers.*

*GILL v. FOWLER*.—*Lush* shewed cause against a rule nisi for a new trial in this case, on the ground of suspense. *Fowler*, in person, supported the rule. *Rule discharged.*

*SMITH v. THE EASTERN UNION RAILWAY COMPANY*.—Referred back to the arbitrator, to find specifically as to a particular fact, which it was contended was left in doubt.

*Ex parte THE TRUSTEES OF PAYING AND LIGHTING THE HAMLET OF POPLAR AND BLACKWALL*.—*Pasley* moved for a mandamus to the East and West India Docks and Birmingham Junction Railway Company, to compel them to build a bridge in the manner pointed out by the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 19. *Rule nisi.*

*REG. v. TURWESTON*.—*Rule* enlarged until next term, to enable the defendants to obtain the certificate of two justices that the road is in good repair.

*REG. v. THE CHESTER AND HOLYHEAD RAILWAY COMPANY*.—*Phipson* moved for a mandamus to the company to issue their warrant to the sheriff to summon a jury to assess compensation to Mr. Eaton for injury done to his lands in the construction of the railway. *Rule nisi.*

*REG. v. SCHLESINGER*.—This was a rule nisi for an attachment for the non-payment of costs, and also to estreat the recognisance. *Hawkins* shewed cause, and contended that the rule must be discharged, as the demand for the costs, which was by letter of attorney (the prosecutor being abroad), misdescribed the rule by which the costs were awarded, and therefore there had been no sufficient demand. *Crompton (Counsel with him) contra.* By the COURT.—*Rule* discharged as to the attachment, but absolute to estreat the recognisance.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Friday, May 30.

*Re JOHN UPTON.*

(Before the CHIEF COMMISSIONER.)

*Assignee—Misconduct.*

The Court will order an assignee to make good any deficiency in an insolvent's estate and effects caused by the mismanagement or misconduct of the assignee.

This case had been repeatedly before the Court, and fully argued by counsel. The facts are sufficiently stated in the judgment, which was delivered by the Court to-day after a *cur. adv. vult.*

The CHIEF COMMISSIONER said, this man was a cotton spinner at Sedburgh, in Yorkshire, and being in prison for debt on the 6th of April, 1848, filed his petition on the 15th April, and obtained his vesting order on the 18th. He was heard at York on the 1st July, 1848, and was discharged forthwith. Mr. John Swainson, creditor 71, and Mr. William Wearing, creditor 70, were appointed assignees, and their appointment is dated 12th July, 1848. Among other property possessed by the insolvent was his interest in a mill called Birks Mill, of which he held the lease for the unexpired term of eight years and a half, and the machinery on that mill; and in another called Milthorpe Mill. On the 16th March, 1849, Mr. Wearing files his account, and on the 12th April Mr. Swainson files his. Mr. Wearing's account was audited on the 29th of March, 1849, and a report was made to the Court, before the late Mr. Commissioner Harris. This report was excepted to, and two matters only were referred back to the examiner, namely, the disposal of the insolvent's property at Birks Mill and at Milthorpe Mill; and it is upon these two particulars that an immense mass of affidavits has been filed, and very lengthened and able arguments have been addressed to the Court. It appears that there was an intention to dispose of the property at Birks Mill by public auction, and the 13th of December, 1848, was the day appointed for the sale. On the morning of that day, a conference took place between the two assignees, a Mr. Fisher, and a Mr. Scott, and Mr. Holmes, landlord, about withdrawing the sale from the public to dispose of the same to Mr. Holmes, the landlord; and ultimately it was agreed that Mr. Holmes should purchase it at the sum of 511*l.* that out of this Mr. Holmes should deduct his claim for rent

of a year and a half, and the balance should be paid by three bills, drawn on and accepted by Holmes. This was done, and the three bills so accepted were deposited with Mr. Swainson, and were ultimately paid, and the public auction was stayed. The creditors object to this proceeding, as a very inadequate sum for the machinery, and that the whole was a scheme to give to Mr. Wearing the mill at a very insufficient value. There had been a valuation of this property by five different persons: a Mr. Fisher at 1,266*l.*; a Mr. Savage, 1,228*l.*; a Mr. Maudsley, 1,128*l.*; a Mr. Jackson, 786*l.*; and Mr. Tomlinson, 706*l.* Mr. Fisher's valuation had been made on the supposition of the machinery remaining on the premises; 306*l.* being his value if such were removed. It is not stated upon what principles these other gentlemen made their respective estimates, but it is obvious that the 511*l.* ultimately agreed upon and paid was very far short of the value of the lowest estimate. Now, it is objected to the *bona fides* of this proceeding that really this was a scheme to give this property to Mr. Wearing. It may assist our inquiry to note the duties of assignees—first, under the provisions of the 1 & 2 Vict. c. 110; and secondly, in analogy with the kindred system of bankruptcy. By sec. 47 of the statute it is enacted "that the assignees shall, with all convenient speed after their appointment, use their best endeavours to receive and get in the estate and effects of the prisoner; and shall, with all convenient speed, make sale of all such estate and effects." Now, the repetition of the two words "convenient speed" in this short sentence, seems to me to point out the duty of assignees in this respect very emphatically. The 62nd section of the same Act, after stating that the provisional assignee shall keep his accounts from day to day, provides that every other assignee, at the end of three months at the farthest from the date of his appointment, shall file his accounts and proceed to dividend; and the following section, the 63rd, enumerates several circumstances in which the Court may charge an assignee with twenty per cent. and the being guilty of waste or mismanagement of the estate is among the provisions of that section; and further, assignees are by sec. 65 expressly made officers of the Court, and liable as such to its control. Now, the assignees in this case did not file their accounts within the three months, but did in about six months from the date of their appointment, and thereby an injury was inflicted on the creditors; for there was owing to Mr. Holmes, the landlord of the Birks Mill, a year's rent on the 7th April, 1848, and another half-year was running on; had the assignees taken to the lease eight years and a half the land would have been entitled to a year's rent only, and to be a creditor for the other half-year when due in November following, but by the arrangement of sale to Holmes on the 16th December following Holmes was allowed to take in full a year and a half's rent, which was deducted at the time out of the 511*l.* that Holmes was to give for the property at Birks Mill. I pause at this part of the case to remark that there is a great number of affidavits connected with the actual levy of the defendants; there is a distressing contradiction as to the mode in which this was effected; but I do not think it necessary to enter into this matter, for I do not see how the property could have been disposed of without the landlord being paid the 120*l.* the arrears then due for the rent. The second, and perhaps the most important part of this inquiry then arises, is Mr. Wearing, the assignee of Upton's estate, in the possession of this mill, and how and when did this occur? December 16th was the day on which the arrangement was made with Mr. Holmes the landlord, and within a week, viz. on the 20th of December, Mr. Wearing writes to a Mr. Hayhurst thus:—"I have taken the Birks Mill, formerly worked by Mr. Upton, and bought the machinery, and have to pay for them on Saturday, and I am a little short of cash." Now this letter called upon Mr. Wearing for an explanation, but not one word does he say in an affidavit after this allegation touching this matter. Mr. Holmes, the landlord, makes no affirmation respecting it. I disregard, therefore, contradiction as to alleged representations of Wearing on this matter. To my mind, there is no getting out of this statement in this letter; yet I would just note the concluding part of an affidavit of Mr. Swainson, sworn the 16th of January, 1850. After stating the mode of the arrangement with Holmes, proceeds as follows. (The learned Chief here read the extract.) Now to this part of Mr. Swainson's affidavit, Mr. Wearing makes no reply, nor offers denial or explanation. I conclude, therefore, that Mr. Swainson's statement is true; and that Mr. Wearing, with a full knowledge of what he was doing in his character of assignee of this estate, has subjected himself to make good whatever deficiency has occurred. Now, in bankruptcy, the assignees cannot bid, nor employ any one to bid for them, at the public sale of the bankrupt's estate; they cannot possess themselves of the bankrupt's property by purchase or otherwise; the rule of the Court





## LORD CHANCELLOR'S COURT.

*A promise to pay the debts of another without some inducement for so doing, is no consideration for a promissory note.*

This was an action by the payee against the maker of a promissory note. In order to prove that the defendant received no consideration for the note, and that it was given solely for his brother's mortgage debt, the defendant tendered the following document:—

"Jan. 6th, 1848. The note of hand given by the undersigned John and James Beale to the undersigned John Crofts this day, is intended as an additional and further security to that amount of the sum of 1,000*l.* due to the said John Crofts from the said John Beale on mortgage.

(Signed) "John Beale. James Beale.  
"John Crofts."

*Selfe*, for the plaintiff, objected that it was in effect an agreement, and required an agreement stamp.

*Willes*, contra, contended that it could not be treated as an agreement,—neither party could sue upon it or enforce it.

*WILLIAMS, J.*—I shall admit it.

*Willes*, in addressing the jury, urged, that, though, as far as he was aware, the point had not been decided, as affecting a promissory note, it would be held to be law, that a bill or note given only in consideration of the debt of another—without promise by the creditor to forbear or to do something which could benefit the maker of the note—was given without consideration, and did not bind the maker. Here, the defendant made the note simply in consideration of, and as security for, a debt due by his brother to the plaintiff, which was already secured by a mortgage.

*WILLIAMS, J.* to the jury.—If you think that there was no other consideration for the note except the debt of his brother, the plea is proved, and there was no consideration which would make the note binding on the defendant. If the note was given simply for the pre-existing mortgage debt of his brother, the defendant is not bound to pay it.

*Verdict for the defendant.*

*Selfe and Prentice* for the plaintiff.

*Willes* for the defendant.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Friday, June 6.

*Ex parte* THE CORPORATION OF BRISTOL.

*Public charities—Appointment of trustees under Municipal Corporations Act—Appointment of charity trustees without public notice.*

*The trustees of charities appointed under the Municipal Corporations Act having been reduced in number by deaths, &c. met without any public notice and selected certain persons to fill up the vacancies, and purposely withheld the names of such persons until the presentation of the petition to this Court praying for their appointment, and the usual reference to the Master having been made, the nominees of the trustees had been approved.*

*Held*, that such a secret election of new trustees was improper, and that the report of the Master must be reviewed, and for that purpose be sent back to the Master, before whom the corporation might attend by counsel.

In this matter two petitions had been presented, the one by the continuing trustees of the municipal charities of Bristol, praying that the Master's report approving of certain persons as trustees to supply vacancies which had occurred by deaths and otherwise; the other petition was by the corporation of Bristol, and prayed that the Master's report might be referred back to the Master to be reviewed, and that the corporation might be at liberty to attend by their counsel before the Master on the selection and appointment of new trustees.

*R. Palmer and Daniel*, in support of the latter petition, stated that the Bristol charities (all formerly vested in trust in the corporation) were about forty-five in number, and had no less than 15,000*l.* of annual income. Several vacancies had occurred within the last few years in the number of trustees appointed after the passing of the Municipal Corporation Amendment Act, by deaths, removals, &c. so that the present number was only fifteen altogether. They held a meeting to select persons to fill up the vacancies without giving public notice. The names of those persons so nominated were kept secret until the presentation of the petition to the Court for a reference to the Master to approve of proper persons to be trustees. The Master, of course, approved of the persons so nominated, there being no person present to object to them. The corporation now, by their petition, submitted that they had a right, as well on behalf of the city of Bristol as of the public generally,

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## ROLLS COURT.

to interfere, in order to prevent this course of self-election among the trustees. Without making any personal objections to the gentleman nominated, the counsel contended that the meetings to recommend new trustees ought to be open meetings. All the inhabitants had an interest in the due administration of the charities. If the surviving trustees may, by the existing law, thus select their associates in the trust, so as to perpetuate the same class of persons in the trust, some new legislative measure becomes necessary.

*Parker and M. James* opposed the corporation petition, insisting that the present surviving trustees had pursued the usual course of first nominating the fit persons to be trustees, and then going before the Master for his approval, with notice, of course, to the Attorney-General. There was no imputation on the character or objection to the fitness of any of the gentlemen nominated to be trustees, and they were all approved of by the Master.

The LORD CHANCELLOR.—I am of opinion that the trustees, in presenting their petition for the appointment of new trustees, are bound to give public notice of that proceeding; and I would not interfere if it were not for the mistake committed in the secret nomination of the new trustees. There is no imputation of improper motives on either side. The corporation complained of the manner in which the new trustees were presented to the Master, and the answer to that charge was, the usual course was followed on this occasion. But the question was, whether the Master or the Court had full means of deciding on the fairness of the selection of new trustees. The existing trustees admit that they purposely withheld all knowledge of their intended meeting to select the persons whose names were to be sent before the Master, because they believed if the day of their meeting had been known, other persons would be proposed in opposition to the persons nominated by themselves. But the inhabitants at large have a right to know the persons that are to be nominated for trustees, and it was a miscarriage to conceal the day of meeting for that purpose, and it was another mistake to conceal the names of the persons nominated. Considering that, under these circumstances, the Master had not sufficient knowledge of the persons presented to him for his approval, I feel bound to refuse confirmation of the report, which I shall, therefore, send back to the Master to review it, with leave to the Corporation to attend by counsel before the Master, not as a Corporation, but on behalf of the public of Bristol generally. With respect to the observation made by counsel as to the necessity of a legislative measure, his lordship said that he, a few evenings ago, introduced a Bill (the Charitable Trusts Bill) into the House of Lords, which would secure the required publicity to such meetings. His lordship then ordered the report to be referred back to the Master to be reviewed.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Tuesday, Jan. 14.

*WHICKER v. HUMK.*

*Domicile—Exceptions to Master's report—Evidence—Will.*

*A testator (the validity of whose will, which was in the English form, was questioned on the ground of domicile) was born in Scotland of Scotch parents, and was educated there. He afterwards went to the East Indies, in the service of the East-India Company, where he remained for some years, and then returned to England. Some short time after he went to Scotland, and became domiciled in Edinburgh. Afterwards he went to London, where he remained for several years, residing chiefly in lodgings. Ultimately he went to France, where he died, having made a will in the English form, describing himself as of Edinburgh, but then residing in Paris. Under these circumstances a reference was directed to the Master to inquire as to his domicile, it being contended that it was either a Scotch or French, but not an English domicile, and that therefore the English will was not valid. The Master found that the domicile was English, and exceptions being taken to his report, the Court affirmed the Master's finding.*

*A person may acquire a domicile without repudiating his nationality or his original character or quality as of the country in which he was born, and without being a householder or more than a lodger in the country in which the domicile is so acquired.*

*Where a testator describes himself as of the place of his original domicile, the words of description are consistent with and may indicate the fact that the testator was born there; but no description which a testator can give of himself can by itself have any effect in determining his domicile. This case came on upon exceptions to the Master's report, finding the domicile of the late Dr.*

## ROLLS COURT.

John B. Gilchrist to be English, and neither Scotch nor French, as was contended by some of the parties to the suit. The facts are sufficiently stated in the judgment.

*Roswell, Thompson, Beavan, Turner, Bagshawe, R. Palmer, and Anderson*, appeared for the several parties. The following cases and authorities were cited: *Bempde v. Johnstone*, 3 Ves. 198; *Somerville v. Somerville*, 5 Ves. 750; *Monro v. Monro*, 7 Cl. & F. 842; *Monro v. Douglas*, 5 Madd. 405; *Phillimore*, 24, 25; *De Bonnavel v. De Bonnavel*, 1 Curt. 856; *Story*, Conf. Laws, 5, 52, 53; *Ellis v. Crafter*, Phillim. 142; *ship Harmony*, 2 Rob. 324; *Nelson v. Lord Bridport*, 8 Beav. 527; *ship Young*, 5 Rob. 303; *ship Ann*, 1 Dods. 221; *Indian Chief*, 3 Rob. 18; *Stanley v. Beans*, 3 Hogg. 437; *Phill. Dom.* 106; *Collier v. Reeves*, 2 Curt. 855.

The MASTER of the ROLLS.—In this case it was referred to the Master on the 11th January, 1843, to inquire where John Borthwick Gilchrist was domiciled at the time of his death, which took place on the 8th January, 1841. The Master reported that he was then domiciled in England, and the case comes before me on exceptions to the Master's report, which have been filed by the plaintiff, one of the testator's next of kin, who alleges that the testator, at the time of his death, was domiciled in Scotland, or if not in Scotland in France. The question is one which, under ordinary circumstances, is proper to be decided upon the trial of an issue; and I should have adopted that course on this occasion if all parties had not concurred in requesting me to determine the exceptions here upon the evidence which was taken before the Master. The evidence adduced is extremely voluminous. There are several affidavits, and an extremely long correspondence consisting principally of letters written by the testator himself, and containing statements of his acts and intentions. Many of these statements are of an ambiguous nature, and very few, if any of them, of a character to be entirely satisfactory and conclusive. The testator was born in Edinburgh, of Scotch parents domiciled in Scotland, in the month of June, 1759. He was educated there, and apprenticed to a surgeon at Falkirk. He was in his early youth in the West Indies for two or three years, but in 1782 he went from Scotland to the East Indies, and entered into the service of the East India Company. There he remained in the East Indies till the year 1804, and during his stay there was appointed as first assistant-surgeon (6th May, 1789), and afterwards surgeon (20th April, 1798), in the service of the Company. It appears that he had paid much attention to the study of Oriental languages. On the 24th December, 1798, he was appointed Professor of the Hindostanee and Persian languages in the College of Fort William, and had spent much time in the preparation of literary works on the subject. In 1804, his health had become impaired: he resigned his professorship, and obtained leave to return to England. The testator was then about forty-five years of age, and it does not clearly appear what plans he had formed for the settlement or employment of his future life: he was looking to both Edinburgh and London, to Scotland and to England. In Edinburgh, and in the year 1804, he presented to George Heriot's Hospital 100*l.* as a small testimony of gratitude for his education there; he procured himself to be admitted a Burgess and guild brother of the city, caused his armorial bearings to be matriculated in the Lion office, and obtained a diploma of the academy of James VI. of the city of Edinburgh, and, in the year 1805, it is said that he embarked in the wholesale linen trade in Edinburgh. He seems, however, for some time to have principally resided in the neighbourhood of London. On the 28th of May, 1805, he obtained a pension from the East India Company as a surgeon retired; he endeavoured to promote the sale of the works on Oriental languages which he had prepared, by giving lectures on the subject; and on the 21st of February, 1806, he was appointed Professor of Oriental Languages in the college of the East India Company at Haylebury, which, however, he held only for a few months. In the mean time he claimed to be connected with the noble Scotch family of Borthwick; conceived that he had some right to the title, then supposed to be only in abeyance; obtained on the 20th of March, 1806, a royal license to take and use the name of Borthwick; and, on the 5th June, 1806, obtained a grant of arms, in which he was described as John Borthwick Gilchrist, of Camberwell. He continued for some time to give lectures (which are called gratuitous) on Oriental languages, with a view to promote the sale of his literary works; but about the year 1806 he seems to have resolved to settle in Edinburgh. On the 23rd December, 1806, he became a member of the Company of Merchants in that city, and entered into partnership as a banker with James Inglis. Although the formal instruments were not executed till a later date (26th December, 1808), yet the commencement of the partnership business was to date from the 1st January, 1807. The partnership property consisted of a heritable flat in Hunter-square, where the

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business was carried on, and 20,000*l.* stock, or 200 shares of 100*l.* each in the Commercial Bank of Scotland. With reference to the time when his engagements to the East-India Company may be strictly said to have ceased, it may not be quite clear at what particular time the testator ought in strictness to be said to have become domiciled in Scotland, but the proof appears to me to be clear and satisfactory that Edinburgh was his domicile, with all the legal incidents of domicile, some years before the year 1817. He was then, and, it is justly and necessarily admitted, that he was then domiciled at Edinburgh, which was, or had been, his domicile of origin—the place of his birth and education, to which he was naturally attached by all the strong ties by which all men—and Scotchmen, perhaps, more than others—are bound. He had early paid certain debts left unpaid by his father and mother, and had prevailed on his mother to return from Newfoundland and join him in Edinburgh. On the 3rd of April, 1807, he purchased a house at No. 6, Nicholson-square, and resided there with his wife, whom he married in May 1808; and, besides the interest he had in his business as a banker, he attended to the printing, publication, and sale of his literary works, and became a member of the Royal Society of Edinburgh, the Horticultural Society, the East-India Club, and the Scottish Military and Naval Academy. Everything indicated that he was settled, and such appears to me to have clearly been his intention. But in the year 1815 the banking firm of Inglis, Borthwick Gilchrist, and Co. fell into difficulties. The testator could not support the expenses to which he had been accustomed, the partnership was dissolved, and the testator retired as from the 30th June, 1815. In the year 1816 he went to reside at Inchyra House, in Perthshire, and, after returning for a time to Edinburgh, he went to London in June 1817. It appears to me from the evidence that he left Edinburgh with the intention to abandon it as his place of permanent residence, and that he arrived in London with no certain or settled determination what to do or how to employ himself. He had affairs at Edinburgh which could not be immediately settled; his property there consisted in part of his moiety of the flat in Hunter-square, where the banking business had been carried on, and of his share of the Commercial Bank Stock; he was indebted to the Commercial Bank in a considerable sum of money, and there were, I think, some partnership concerns not entirely arranged. His house in Nicholson-square was in hand, and could not be easily sold, or even let; he had a stock of books in the hands of agents to sell, and other books used as his library, and moreover he had a family of natural children, who appear to have been extremely troublesome to him, and to have occupied much of his attention. When he left Edinburgh he omitted to relieve himself from the liabilities to which he was liable in consequence of his being a member of various societies there. These several matters are frequently mentioned in his correspondence, which can only be understood with reference to them and to his peculiar character. He was a man in the utmost degree self-confident, measuring the abilities and even the honesty of other persons by their more or less of accordance with his own views. He had no confidence whatever in the stability of the government and institutions of the country, but had very great confidence in every scheme of his own suggestion, believing that his own abilities and honest purposes ought to insure success to every adventure in which he engaged. He very readily engaged in new speculations, but he as readily abandoned them if he found that he could not control them. There is, necessarily, much uncertainty in the conclusions which ought to be deduced from the declarations of such a person on particular occasions: he was irritable and rash, and, like all such persons, no doubt often uttered expressions which could not be considered as satisfactory proofs of settled intention. He very naturally desired to turn his knowledge and abilities to profitable use; he mainly relied on his mode of teaching Oriental languages; he thought it peculiarly his own, and expected to derive from it both honour and profit. To those views he seems to have been more constant than any other; to them, as far as he could, he made all other views subservient. His plans upon the subject commenced in India before 1802—were pursued in London whilst he remained in the neighbourhood of London before he went to reside in Scotland—were pursued in Scotland during his residence there, and were probably the principal if not the only subject of his consideration when he arrived in London in 1817. He desired the assistance and influence of the East India Company, and submitted, though it would seem with reluctance, to seek for their patronage and support. His character, in some opposition to, or even conflict with, his position and interest, gave rise, in process of time, to some inconsistencies and some uncertainty. While he thought it useful, or, perhaps, necessary for his purpose, he wished to receive assistance or favour, but he could not refrain from seeking to establish a

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claim adversely. His petitions to the East-India Company were accompanied or soon followed by attacks very likely to produce unfavourable effects. He seems to have truly described himself as irritable and irritated, and his correspondence abounds in indications of his condition in this respect. Such being the man, he resided in London from the middle of 1817 till 1827 or 1828, mostly in lodgings, but for a time, in a house which he hired furnished. I consider it to be immaterial whether he resided in a house of his own or in lodgings,—in fact he resided in London, with such occasional exceptions or absences as were consistent with London being his usual and common place of residence. We have the undoubted fact of residence, and if we can see from the evidence that this fact during its continuance, was accompanied by an intention to make London his permanent place of residence, and the central place of his affairs and business, then it must, I think, be considered that London became his domicile, with the legal incidents of domicile. His attention was first directed to the East-India Company. He succeeded in obtaining some, though not a satisfactory increase of pension, and he hoped to increase the sale of his books by obtaining authority to give lectures with the sanction of the Company. His applications were continued for what he thought a very long time, and were not so successful as he hoped; and in June, 1818, he informed Mr. McHutchin that he had been worried night and day concerning his business with the Court of Directors for six months past, he feared to little purpose, still he would not quite despair, and would keep at them a little longer. He persevered, and he occupied himself in preparing to give the lectures; and to some extent, his perseverance was rewarded with success; and on the 6th November, 1818, he was informed that with the view of encouraging him to establish lectures of the description he had proposed, and entertaining the highest opinion of his merits and qualifications for the objects in question, the Court of Directors had resolved to allow him the sum of 200*l.* a year for three years, at the expiration of which period, it would appear how far the advantages which he anticipated were likely to be realised, and the Court further resolved that all persons appointed to the company's medical service should be required to attend one course of his lectures, for admission to which they should not pay more than three guineas. This appointment was temporary, but by its assistance the testator was enabled greatly to increase the sale of his books, and I think that from that time he and his wife considered themselves to be fixed in London, and he looked forward to paying a short visit to Edinburgh to wind up his affairs there. He did not consider the professorship, as he called it, profitable in itself, but rather as a losing concern, except as it increased the sale of his books, which was his main object and reliance. He had early begun to think that he liked London better than Edinburgh; and his dislike to Edinburgh seemed to increase. He desired the stock of saleable works without an exception, and his whole library, such as it was, to be sent from Edinburgh to London; and he effected some reduction of the debt which he owed to the Commercial Bank. He seems to have considered himself bound to London by official duties, as he called them. The sale of his literary works was, I think, his principal business; but it was not very long before he hoped to improve his income, or acquire distinction and importance, by some additional employment; and in the different projects which he formed during his residence in London, it is plain that one principal circumstance upon which they were all founded was his own residence in London;—whatever he proposed to do in the various occupations which he at different times contemplated, his contemplated place of action was London. It was there that he was to be either entirely or principally. At various times he proposed to become a director of the European Insurance Company, to acquire some influence or interest in the Brecon Insurance Company, to take an active part in managing the business of a proposed herring fishery, of a joint-stock bank of England and of Scotland, to become gratuitously a director or agent of the Scotch Military Academy, to become director and honorary corresponding secretary of the Southern Edinburgh School, and of the Exeter Public School Committee in London. In these and other projects which may have occurred to his versatile and active mind, London was contemplated as the place where he was to be and to act; and in considering the whole of his correspondence, while one is surprised at the rapid succession and abandonment of different schemes for attaining profit or distinction, importance or notoriety there seems to be a steady and constant contemplation of London as the place where his exertions were to be mainly, if not exclusively, exercised. This might have been consistent with an intention to return to Scotland or to reserve another home or final resting-place after he should have satisfied his immediate purposes, but of this there is no evidence. He cer-

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tainly never thought of repudiating or abandoning his character of a Scotchman. He did not cease to take an interest in his native place—he would probably have been glad to attach his name permanently in some conspicuous manner to Edinburgh, the place of his birth and education, notwithstanding the disgust which he had expressed on leaving it. He paid it two or three transient visits, but I find no trace whatever of his having altered the resolution which he had so strongly expressed to abandon it; and on the whole I am of opinion that the fact of his residence in London was accompanied by a train of conduct and facts so clearly manifesting his intention to reside there permanently or principally, and to make London the centre of his affairs and business, that it must be concluded that in and before the year 1828 London had become and was his domicile. He was a Scotchman born and educated in Scotland, and domiciled there before 1817; but he afterwards abandoned Scotland as his residence, removed to England, and resided there under such circumstances and with such intentions as to fix his domicile there. Such being my opinion the question then is, whether any alteration afterwards took place. The failure of his health and that of his wife, and perhaps considerations of economy seem to have been the sole reason for their subsequent movements, whether they were together or separate. They went to the continent at first for longer or shorter or uncertain periods, plainly without any fixed or settled plan, and without any intention of arranging for the transaction of any thing but occasional business, elsewhere than in London. On leaving London he left there his letters, papers, and deeds, his library, some furniture, and his stock of saleable works, and arrangements were made with reference to his being absent only for a short time; and what happened on his subsequent visits to London, and particularly in the visit of 1833, tends much more to corroborate the notion that he considered London to be his home, than to favour the idea of any change of place. It does not appear to me to be necessary to follow his movements and correspondence in minute detail,—there is, I think, nothing to show any intention to change his domicile, in the legal sense of that word; but the exceptant relies very much on the testator's residence at Paris in and after the year 1837, and it seems that in July, 1837, he agreed to take a lease of apartments in Paris for three, six, or nine years, at the option of the lessor or lessee, each party being allowed to determine the lease on giving six months' notice before the expiration of the three or six first years of the lease, to be reckoned from the first day of October then next. In the apartments comprised in that lease he died soon after the expiration of the first three years. He visited England in the year 1840; when there he gave directions as to the transaction of his affairs, and instructed his solicitor (Mr. Brackenridge) to prepare his will, which will was to be sent after him to Paris, to which place he returned in October of the same year. The draft of his will was prepared in the English form, which would naturally be adopted by Mr. Brackenridge, in the absence of any instructions to the contrary. It can, however, have no weight as evidence in this case, that Mr. Brackenridge did not know or consider that the testator was not domiciled in England. It does not appear that the testator was himself aware that the place of his domicile was material to be considered in determining the form of his will. Before Mr. Brackenridge's draft arrived at Paris the testator employed Mr. Lawson to prepare a will for him there, and Mr. Lawson also prepared the will in the English form. He did this after endeavouring to ascertain the testator's domicile, but I think that it would not be safe to attach much weight to this evidence. Whether the testator had been domiciled in England does not depend on evidence of this sort, or of any facts then occurring. That was established, I think, before the year 1828, and in 1840, the question was, whether the testator had changed his domicile since his English domicile was acquired. But the exceptant has relied on the description of himself which the testator adopted and caused to be inserted in his will. On the 8th December, 1840, Mr. Lawson had described him as "Doctor of Laws and Literature, late a surgeon in the Hon. East India Company's service on their Bengal establishment, now residing at No. at Paris, in the kingdom of France." The testator altered this, and caused himself to be described as "John Borthwick Gilchrist, of the city of Edinburgh, but now residing at No. 18, Rue Matignon, in the city of Paris, in France, Doctor of Laws, formerly for many years in the medical service of the East India Company in Bengal, and one of the professors in the Oriental College of Calcutta, and author of many works on the Oriental languages." "Of the city of Edinburgh," are the only words of any importance in this description; they are consistent with and may indicate the fact that the testator was born there. It was formerly very common for authors and persons desiring distinction, to designate themselves by the names of the places of their origin.

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be instances in which this was done, are too numerous and well known to make it necessary to give examples; but it is unnecessary to consider this, as description which the testator could have given himself would by itself have had any effect in determining his domicile. In the course of the argument it seems to have been considered that the testator could not acquire a domicile without repudiating his nationality—his character or quality of Scotchman, or in a country where he was only a digger and not a housekeeper. For these notions there is no foundation in law; and, on a consideration of the whole case, I am of opinion that the testator, a native Scotchman, was domiciled in Scotland in 1817; and afterwards became domiciled in England, and was so in 1827; that his English domicile was not changed; and that he was domiciled in England at the time of his death. The exceptions must, therefore, be disallowed.

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BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

Friday, May 2.

ASHTON v. LORD LANGDALE.

Mortmain Act.

railway shares, canal shares, railway debentures, shares in banking companies and railway scrip held not to be within the operation of the Mortmain Act.

Mortgages by a railway company of the undertaking, tolls, duties, &c. held to be within the Mortmain Act.

John Ashton, the testator in this cause, by his will dated the 15th of November, 1846, after making certain bequests, proceeded as follows: "I give and bequeath all the rest, residue, and remainder of my personal estate and effects, after payment of the several legacies or sums of money hereinbefore given or bequeathed by me unto the honourable Commissioners at the time being of the Sinking Fund of the united Kingdom of Great Britain and Ireland, to be applied by them according to the directions and regulations of the laws and statutes in force for the time being for regulating and applying that fund in towards the extinction or reduction of the National Debt of the said united kingdom, or as near thereto as circumstances will permit." The testator died in April 1846, and the present suit was instituted by the executors for the administration of his estate. From the Master's report the testator's property at the time of his death appeared to have consisted of the following items:—1st. mortgages of turnpike tolls; 2nd, twenty shares in the Peak Forest Canal Company, which was an incorporated company constituted under the 34 Geo. 3, c. 26, by which Act it was declared that the shares should be personal estate, and transmissible as such, and should not be of the nature of real property. 3rd. Thirty-five shares in the Birmingham Waterworks Company, which was an incorporated company constituted under the 7 Geo. 4, c. 109, by which the company was authorised to purchase and hold lands, and it was declared that the shares should be personal estate, and transmissible as such, and should not be of the nature of real property. 4th. Shares in different railway companies, which, by the Acts of Parliament specially relating to the companies, or by the Lands Clauses Consolidation Act, were declared to be of all intents and purposes personal estate, and transmissible as such, and should not be deemed of the nature of real estate. 5th. Railway debentures in form as follows:—"The Sheffield, Ashton-under-Lyne, and Manchester Railway Company promise to pay the bearer hereof, at Messrs. Glyn and Co.'s, Lombard-street, 5,000*l.* value received; and that until the same shall be paid, interest at 4*½* per cent. shall be paid half-yearly. As witness the corporation seal of the company." 6th. 150 shares in the Manchester and Liverpool District Banking Company, which company's deed of settlement declared the shares to be personal estate, and authorised the directors to invest money on the mortgage of real estate. 7th. Railway mortgages in the following form:—"The ——— Company assign unto John Ashton, his executors, administrators, and assigns, the said undertaking, and all and singular her rates, tolls, and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the said company, to hold the same until the sum of ———*l.* shall be repaid, with interest at 4*½* per cent. 8th. Railway scrip. To this report of the Master, exceptions were taken, disputing the Master's decisions as to the nature of the different species of property; and these exceptions now came on to be heard, the principal subject of discussion being the operation of the Mortmain Act with reference to the property.

R. Palmer and Hobhouse in support of the exceptions.

The VICE-CHANCELLOR said that as the facts stated in the report were admitted, and these excep-

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tions therefore related only to matters of law, they merged in the further directions, and he should make no order on the exceptions, but his decision on the questions in dispute would be by way of declaration.

The Solicitor-General, for the Commissioners, said that they did not intend to raise the question of the residuary gift not being to a "charitable use," and referred to *Nightingale v. Goulburn*, 5 Hare, 484; 2 Ph. 594, as an authority on that point. He also stated that it was not intended to argue that the turnpike tolls were not within the operation of the Mortmain Act, 9 Geo. 2, c. 36.

R. Palmer and Hobhouse then contended that the shares in the canal, waterworks, and railway companies were within the provisions of the Mortmain Act, and cited, on this point, *Sparling v. Parker*, 9 Beav. 450; *Walker v. Milne*, 11 Bea. 507; *Hilton v. Giraud*, 1 De G. & Sma. 183; *Thompson v. Thompson*, 1 Coll. 381; *Howse v. Chapman*, 4 Ves. 542; *Tomlinson v. Tomlinson*, 9 Bea. 459; and *Myers v. Perigal*, 16 Sim. 533. As to the railway debentures, the holders had a right to a receiver (*Russell v. East Anglian Railway Company*, 3 Mac. & Gord. 104), and this property must be considered as within the Act. As to the shares in banking companies, *Myers v. Perigal*, 16 Sim. 533; and as to the railway mortgages, *Finch v. Squire*, 10 Ves. 41; *Doe dem. Myatt v. St. Helen's Railway Company*, 2 Q. B. Rep. 364, were referred to.

Russell and E. Bury, and Calvert and Baggallay for parties in the same interest.

The VICE-CHANCELLOR (without hearing the Solicitor-General and W. M. James, for the commissioners) said, he did not understand that any case had been decided since *Sparling v. Parker* at variance with it, or that any case had been decided since *Walker v. Milne* at variance with it. *Prima facie* then those cases bound the Court not necessarily, but as deserving a considerable degree of deference. Still, if he should have a strong and undoubted difference of opinion, he ought to decide in accordance with his own opinion. But he had not such an opinion; on the contrary, if the case had now come before him for the first time, clear of all decisions, he should decide respecting the canal and railway shares as Lord Langdale had done. As to the debentures, they could not be treated as obnoxious to the statute. There was nothing on the face of the debentures, and nothing extraneous had been shown by which it would appear that the debts were enforceable against property otherwise than as every obligation is, which is enforceable against an individual. With regard to the shares in the banking company, it was contended that they were within the Act, as land might be acquired for offices of business, or for investment, or in respect of bad debts. Property of that description, however, was not the main or chief object of the formation of this company, for principally or mainly the company was formed for the purpose of banking. He was of opinion that these shares ought not to be held obnoxious to the statute. The words of the 1st section of the Act were, "manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments." The words in the 3rd section were "lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or any estate or incumbrance therein, or of any charge or incumbrance affecting or to affect the same." In his Honour's opinion it would not be a reasonable construction of the Act to say that these shares are an estate or interest in land under the words used. Here, therefore, occurred the case of that strong dissent from the recent authority which had been cited (*Myers v. Perigal*), and he should act upon it. His opinion was the same as to the railway scrip, viz. that it was not within the statute. There remained then only the railway mortgages, mortgages of the railway tolls, or of the undertaking itself, and on that his present impression was against the commissioners.

The Solicitor-General and W. M. James then argued that the railway mortgages were not within the operation of the statute.

The VICE-CHANCELLOR said that railway shares and canal shares belonging to persons or shareholders in their individual capacities were not, he considered, within the words of the statute; but with regard to mortgages of tolls, or of the undertaking itself, they proceeded directly from the company itself. They clearly affected hereditaments, and were within the words of the Act. He was, therefore, so strongly different in opinion from the late Master of the Rolls, that he must decide these

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railway mortgages to be within the provisions of the Act.

Wednesday, June 25.

BACKHURST v. KING.

Foreclosure claim—Lunatic mortgagor.

On a claim for foreclosure against a mortgagor who was of unsound mind, but not found so by inquisition, it appearing that the value of the property was much below the amount of the mortgage debt and interest, the Court, upon the plaintiff's undertaking to pay the defendant's guardian his costs, declared that it was for the benefit of the defendant that an absolute decree of foreclosure should be made immediately.

This was a foreclosure claim by James Backhurst, a mortgagee of certain copyhold property which had been mortgaged to the plaintiff for the purpose of securing the sums of 155*l.* and 135*l.* and interest. After the claim was filed, James Backhurst died, and a claim of revivor was filed by his executor, George King, the defendant, being of unsound mind; but not so found by inquisition, appeared by his guardian. The debt and interest amounted to 461*l.* 14*s.* 6*d.*

H. Stevens, for the plaintiff, proposed to take an absolute decree of foreclosure, the value of the property being only 351*l.*

Osborne, for the defendant, George King.

The VICE-CHANCELLOR inquired, whether there was any affidavit of its being for the benefit of the lunatic that an absolute decree should be made.

H. Stevens replied that there was not; but Mr. Lomas, an auctioneer, had surveyed the property, and deposited to its value not being more than 351*l.* and the plaintiff was willing to pay the guardian's costs.

The VICE-CHANCELLOR said, that as that was the case, he would at once declare that it would be for the benefit of the defendant, the lunatic, that an absolute decree of foreclosure should be made immediately, the plaintiff undertaking to pay the guardian his costs.

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Reported by W. H. BENNETT, Esq. of Lincoln's Inn,  
Barrister-at-Law.

Tuesday, June 24.

Re THE WINDING-UP ACTS, 1848 AND 1849, AND OF THE GREAT NORTH OF ENGLAND AND YORKSHIRE AND GLASGOW UNION JUNCTION RAILWAY COMPANY.

ENGLAND'S CASE.

Winding-up Acts—Contributory—Chairman of provisional committee.

A person who had attended and acted as chairman of a provisional committee, at which, as such chairman, he moved a resolution by which an executive committee was appointed to carry out the objects of the association;—and to whom shares were allotted;—and who afterwards paid 30*l.* being 6*s.* per share on the amount of such allotment, towards the preliminary expenses;—and who subsequently signed a letter as an executive committee-man, detailing the steps which had been taken to carry into effect the objects of the association;—

Held, nevertheless, not to be a contributory.

This was an application by motion to have the name of Mr. Thomas England struck out from the list of contributories, upon which it had been placed by Master Blunt, to whom the winding up of the above contemplated company had been referred.

It was admitted before the Master that Mr. England had signed a consent to his name being placed on the list of provisional committee-men of the proposed company, and that as such it was provisionally registered. The company was projected in October 1845, and at a meeting of the projectors early in that month certain resolutions were come to, to the effect that measures should be adopted to form the railway; that three gentlemen therein named should be an executive committee *pro tem.* until an executive committee should be appointed; that Mr. M. should be the solicitor to the company, Messrs. S. T. and S. and Mr. H. agents in London; that the prospectus should be published and printed; and that a guarantee of 10*l.* each should be entered into by the promoters, committee, and directors of this company. At this meeting Mr. England was not present.

On the 6th of October another meeting took place, at which Mr. England was present, and, being solicited, officiated as chairman. At this meeting the following resolutions were come to:—"The report of the last meeting having been read; it was resolved,—That the report now brought in be adopted. That the Leeds Banking Company, and Beckett and Co. be bankers for Leeds. That the York City and County Bank be the bankers for York. That the Yorkshire Banking Company be the bankers at Hull; and other bankers for Ripon, Knaresborough, and London. That a number of shares, not exceeding one hundred, be offered to



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each of the provisional committee, and not exceeding 150 to each of the executive committee. That the following gentlemen form the executive committee (naming nine gentlemen, but not Mr. England), with power to add to their number. That the executive committee should have power to appoint a secretary and all other officers necessary for the purpose of carrying out the objects of this company."

On the same 6th of October two meetings of the executive committee took place, consisting of seven of the nine gentlemen appointed as above; at the first, resolutions were come to appointing a traffic taker, a finance committee, two of whom, with the secretary, should sign all cheques and other immaterial resolutions. At the second meeting of the executive committee surveyors and an engineer were appointed. The capital of the company was declared to be 300,000*l.* in 15,000 shares of 20*l.* each, and the solicitor directed forthwith to prepare the necessary parliamentary contract, subscribers' agreement, scrip, and such other documents as should be required to carry the company's project into parliament at the then next session, and other resolutions come to. On the 23rd of October, at a meeting of the executive committee (called by a circular dated the 16th of October), counsel were ordered to be retained, and the capital of the company declared to be reduced to 250,000*l.* in 12,500 shares, of 20*l.* each.

On the 22nd of December, 1845, another meeting took place, at which it appeared that considerable expense had been incurred in the surveys, plans, &c. but that a sufficient number of shares not having been subscribed for, the company or association was then dissolved and broken up. The solicitor was directed to get in the accounts, and a sum of 30*l.* from each director was ordered to be paid towards liquidating these expenses, and that each shareholder should have 36*s.* per share returned, retaining 6*s.* for expenses.

On the 26th of February, 1846, the following letter was drawn up and signed by nine gentlemen, designating themselves the executive committee, Mr. England being one of them:—"34, Commercial-street, Leeds, Feb. 26, 1846. Great North of England and Yorkshire and Glasgow Union Junction railway. At a meeting of the executive and provisional committees, held for the purpose of ascertaining the position of this company, it appeared that the line had been carefully surveyed, and all plans, sections, and books of reference, deposited in compliance with the standing orders of the Houses of Parliament; but in consequence of many of the parties to whom shares had been allotted not having taken up their allotments, the committee, with great regret, have been compelled to abandon the project at present, notwithstanding the traffic returns shew near 9*l.* per cent. on the contemplated expenditure, exclusive of the through traffic which might arise from the Leeds and Thirsk, the Yorkshire and Glasgow Union, or any other company. Under these circumstances, we have got in the whole accounts due from the company, to liquidate which the sum of 6*s.* per share from each shareholder, as also from the provisional directors upon the 100 shares allotted to each of them, is required, which payment will be considered as in part payment of a future deposit on the shares allotted to each party should he wish to continue them on this scheme being revived, upon which this company have determined. The parties to whom accounts are owing are pressing for payment, and in order to prevent the provisional directors being personally applied to, we beg that the sum of 30*l.* be paid to the undermentioned bankers on or before the 19th instant, who will sign the receipt on the other half of this sheet, after which an account current will be rendered shewing how the 6*s.* per share have been expended. — Thos. Smith, Wm. Blanshard, Thos. England, W. B. Carrick, John Tall, John Hall, S. Musgrave, William Henlock, J. J. Mac Swiney, Saml. Warburton, executive committee." The 30*l.* mentioned in the foregoing letter was paid by Mr. England. The solicitor was examined *viduo* before the Master, and the effect of his evidence was to speak to what occurred at the meeting of the 6th of October, and that Mr. England was then present, and acted as chairman. That Mr. England put the question to the meeting, that the persons named should be the executive committee; but that he did not attend any meetings after the said 6th of October, as he stated that he should be unable to attend on account of ill health, and that he was going from home, but that he had implicit confidence in the other gentlemen elected, as being all his friends. That he suggested his wish that the Leeds Banking Company should be joint bankers with Messrs. Beckett, as he (Mr. E.) was a shareholder in that bank. That they were proposed and appointed accordingly. That notices of the different meetings were sent to Mr. England as to the other members. That 150 shares were allotted to Mr. England as one of the executive committee, as appeared by the allotment book. The witness said

that after the meeting "Mr. England requested me to take care that he had 150 shares allotted to him." That an action had been commenced against him (Mr. England) by the surveyor, for 1,729*l.* and he said it was very hard that he should have to pay the whole amount himself. To this the witness said, if he (Mr. England) would employ a solicitor, he (witness) would try to get the amount reduced. That this action was, in fact, compromised for 834*l.* 12*s.* for which the finance committee gave him (Mr. England) a cheque on Beckett and Co. for 839*l.* 12*s.* 6*d.* which he was to hold until the company was in funds to meet it, and he was to advance the money in the meantime. On the examination of Mr. England himself before the Master, as to this 839*l.* 12*s.* 6*d.* he said, "An action was brought against me, which was compromised for 839*l.* 12*s.* 6*d.* for which sum a cheque was drawn on behalf of the company on Beckett and Co. Beckett and Co. not having the full amount of the cheque in their hands, paid 580*l.* being the balance in their hands;" and the difference between this and the 839*l.* 12*s.* 6*d.* was paid to Mr. England by a cheque drawn on the bankers, in his own favour, and signed by him as a director, and was in this form:—"No. 1052. Leeds, Dec. 30, 1846. Messrs. Beckett and Co. bankers, Leeds. Pay to myself or bearer 259*l.* 12*s.* 6*d.* for the Great North of England and Yorkshire and Glasgow Railway Company. Thos. England, director. 259*l.* 12*s.* 6*d.*" Upon this evidence the Master had placed the name of Mr. England on the list as a general contributory.

*Bethell* and *Baggally*, in support of the motion to expunge the name, contended that there was no binding contract to affect Mr. England as a contributory, and that he had done no act after the 6th of October, 1845, which could make him in any way liable; that the payment of the 30*l.* towards the expenses incurred up to the 26th of February, 1846, was only to prevent litigation and for the sake of peace; and they relied on *Beasley's* case, on the rehearing before Lord Chancellor Truro, 17 Law T. 137, and 15 Jur. 523, as precisely in point.

*Rozbrough*, for the official manager, contended that the resolutions of the meeting prior to the 6th of October having been then read and adopted, Mr. England was liable for anything done or expense incurred in consequence of those resolutions; that at the meeting of the 6th of October, Mr. E. acquiesced in appointing the executive committee, who were then and there authorised to incur all proper expenses to further the objects of the association; and that he was himself identified with such acts; that the case of *Beasley* was distinguishable from the present, as the acts done by England were much more conclusive to affect him with a legal liability than those done by *Beasley*. That Lord Truro, in deciding *Beasley's* case, suggested a case, the circumstances of which were exactly those in the present case. In his judgment the Lord Chancellor said:—"I cannot help thinking that the facts of the case were not accurately and correctly presented to the mind of Lord Cottenham. According to the report of his judgment, it would seem as if it had been represented to him that Mr. *Beasley* had attended meetings of the provisional committee before the provisional committee appointed the managing committee, which might have made, though I do not say that it would have made, some difference; and it might have been urged, that by appointing a managing committee to prosecute the scheme and incur all the expenses incidental to it, he became liable to contribute to the payment of such expenses." Here Mr. England actually moved the appointment of the executive committee to carry out the objects of the association. He contended that the present case was analogous to *Upfill's* case in the House of Lords.

*Bethell* in reply.

## JUDGMENT.

The VICE-CHANCELLOR said these were unpleasant cases to deal with, and he thought during the argument that there was a plausible reason for putting Mr. England's name on the list of contributories, but he considered that the general principle which he had so often asserted must prevail here, that there must be a legal contract on the part of Mr. England making him liable to an action at the suit of a creditor of this association. There was no such contract. After stating the general facts of the case, he said he was bound to say that no act was done by Mr. England to make him liable. It was perfectly clear that all his liability if any ceased on the 16th of October, and there was no evidence to shew that any expense had been incurred between the 6th and the 16th of October; and before a person can be put upon the list as a contributory, the Master must make some statement of the debts in respect of which such person is liable. As to Mr. England's subsequent conduct, although it was important to shew what he considered he had sanctioned, yet he (the Vice-Chancellor) did not think that material; what Mr. England had subsequently done might have been done, and perhaps was, in perfect ignorance that he was under no legal liability;

that this was similar to what occurred in *Beasley's* case: he only paid what he did to get out of a difficulty; that his subsequent conduct did not connect or make more valid the preceding acts. Nothing had been subsequently done which amounted to an admission of prior liability. He did not think that this case was governed by *Upfill's* case, though he certainly could not tell upon what principle that case was decided; and therefore he should in all cases where that case was cited as an authority, require it to be shewn distinctly that the circumstances, and those alone, were the same in both cases.

*Master's decision reversed. The name of Mr. England ordered to be taken off the list of contributories. Costs of motion, and before the Master, out of the estate.*

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

April 17 and 23.

MARKER V. MARKER.

*Ornamental timber—Waste—Injunction—Tenants for life—Infants—Appearance by solicitor in former suit—Acquiescence—Security against loss by reason of injunction—Reference as to timber being ornamental at the date of a settlement.*

By deed, estates were settled to the use of trustees for a term, without impeachment of waste, except the cutting of ornamental timber, and subject thereto to the use of successive tenants for life, without impeachment of waste, except the cutting of ornamental timber. The trusts of the term were declared to be, by felling timber and selling the same, except ornamental timber, of which enough should always remain to "preserve the beauty of the place unimpaired," or by sale or mortgage of the hereditaments, except the mansion-house, to raise three sums of 10,000*l.* each, and pay the same to three persons named. A bill was filed by a tenant for life, for the opinion of the Court whether the estate comprised in the term, or the timber, was the primary fund for the payment of the sum of 10,000*l.* To this bill demurrers were allowed. A bill was then filed by the trustees of the term, praying a declaration that they had a discretion which to resort to, and that the power of the tenants for life to cut timber was subservient to their powers. A motion was made in this suit for an injunction to restrain the tenant for life in possession from felling 700 oak trees, but it was refused, and the sale was completed. A bill was then filed by all the tenants for life in remainder against the tenant for life in possession, who was also the party entitled to two of the sums of 10,000*l.* the trustees of the term, and the persons entitled to the third sum of 10,000*l.* praying an injunction against the felling of the 700 oak trees, or any other ornamental timber in the terms of the settlement of the estate:

*Held*, that the intention of the settlor was to preserve the beauty of the place unimpaired, which was a standard of beauty, set up by the settlor, defined by the existing state of the place at the time of the settlement, and that 500 of the oaks which were in the woods and ornamental to the house and pleasure grounds and the views and prospects of the same ought to be protected; and that an injunction should issue to prevent the felling of the same or any other timber in the woods, but that the defendant was entitled to security against any loss by being prevented completing the sale of the 500 oaks, and that he was entitled to a reference to inquire whether any of the 500 oaks could be cut without impairing the beauty of the place, as it existed at the date of the settlement.

*Held*, also, that infant defendants who appear by the same solicitor as they did as plaintiffs in a former suit, are not bound by the allegations in such former suit, on the mere ground of being so represented by the same solicitor.

*Held*, also, that acquiescence by one of several plaintiffs in an act complained of and proposed to be done by a defendant, is a sufficient answer to a motion for an injunction against such act, so far as that plaintiff is concerned; but parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them.

This was a motion to restrain the felling of ornamental timber in the terms stated by the Court in its judgment. The outline of the case is stated in the head note, and its full details, as well as the arguments, are so fully set out in his Honour's decision as to render any further statement unnecessary. The demurrers to the first bill were heard before Sir James Wigram; the motion for the injunction in the second suit was refused by Lord Cranworth; and the present motion, which was made in the third suit, was set down before his Lordship, but trans-



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barred by an order of the Lord Chancellor to the paper of his Honour Sir George Turner.

*Robt and Poole*, for the motion.

*Bell and Gifford*, for the defendants.

During the argument the following cases were cited: *The Marquis of Downshire v. Lady Sandys*, 5 Ves.; *Wombell v. Belknap* (note to the case); *Tusk v. Mochay*, 11 Bear. 571; *Mann v. Stephens*, 15 Sim. 379; *Lushington v. Boldero*, 6 Madd. 149; *Chamberlayne v. Dummer*, 1 Bro. C.C. 166; *Const v. Harris*, Turn. & R. 2066; *Taylor v. Salmon*, 1 M. & C. 142.

## JUDGMENT.

**Wednesday, April 23.**—**THE VICE-CHANCELLOR.**—This was a motion on the part of the plaintiff for an injunction to restrain the defendant, Henry William Marker, his servants, workmen, and agents, from cutting down or felling, or permitting to be cut down or felled, 700 oak trees, marked or numbered progressively 1 to 700, in the bill mentioned, or any other trees growing on the estates in the bill mentioned, which afford, or give protection, shelter, or ornament to Combe House, in the bill mentioned, or the buildings or offices thereof, or the pleasure-grounds attached thereto, or any of the views and prospects of the same. The trees in question are standing upon an estate of about 1,700 acres, and in which the mansion-house called Combe House is built. It appears to be an old mansion-house, situated on the slope of a hill, and built in the Elizabethan style, with a terrace front, and with lawns and pleasure-grounds attached to it. This hill rises gradually at the back of the house, and there are upon the rise of the hill three woods, called Cross-park-wood, Combe-wood, and the Kennel-copple, which form a belt, or boundary, to the pleasure-grounds, and contain together about thirty-three acres. Above these woods there is a range of sheep pastures, and the higher summit of the hill is again clothed or fringed with wood. There is a footpath leading from the mansion-house through the Cross-park-wood to the rectory-house and grounds; and this footpath is bounded by laurels and holly trees. There are two rookeries in Combe-wood and Kennel-copple; and the farm buildings lie at the back of the Combe-wood. 500 of the 700 oak trees now proposed to be cut are standing in the above-mentioned woods; some few of them form part of the rookeries, a few others immediately adjoin the rectory footpath, and the rest are trees standing either separately, or together in small numbers, in different parts of the woods. The remaining 200 oaks stand either in hedge-rows or fields, and are upon lands forming part of the estate. Eleven of these trees are described as standing in an elevated position, above a small orchard which adjoins the lawn, and as being in view of the mansion and its approaches, and five others of them are described as being in a field adjoining the public road, running through the property from the village of Gittisham to the rectory, but not in view of the house. The position of the rest of the 200 oaks does not appear by the affidavits. The mansion-house and lands at Gittisham form part of a large estate, called the Combe estate, which was formerly the property of Thomas Putt, and contains about 4,000 acres. Thomas Putt died in the year 1787, leaving by his will devised the estate to uses, in strict settlement. From the time of his death until the 24th of August, 1844, the estate was held by several tenants for life in succession, whose estates, under the limitations of his will, were unimpeachable of waste. On the 24th of August, 1844, Margaretta Marker came into possession of the estate as tenant in tail. She barred the entail of the estate, and by a deed dated the 11th of October, 1844, resettled it, in consideration of natural love and affection, to the use of the defendants, Kekewich and Pulman, for the term of 1,000 years, without impeachment of waste, save only the cutting and felling of ornamental timber, as thereafter mentioned, and after the determination of the said term, and in the meantime subject thereto, and to the trusts thereof, to the use of her the said Margaretta Marker for her life, without impeachment of waste, save only the cutting and felling of ornamental timber as thereafter mentioned, with remainder to the use of the defendant, Henry William Marker for life, without impeachment of waste, save as aforesaid, with remainder to the first and other sons of Henry William Putt Marker, successively in tail male, with remainder to the use of the second and other sons of Henry William Marker successively in tail male, with remainder to the use of the plaintiff, Thomas John Marker for life, without impeachment of waste, save as aforesaid, with remainder to the use of the plaintiff, Richard Marker, eldest son of the plaintiff, Thomas John Marker, for life, without impeachment of waste, save as aforesaid, with remainder to the use of the first and other sons of the plaintiff, Richard Marker, in tail male, with remainder to the

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use of the plaintiff, John Marker, second son of the plaintiff, Thomas John Marker, for life, without impeachment of waste, save as aforesaid, with divers remainders over, and with the ultimate remainder to the use of the defendant, Henry William Marker, in fee. By this deed the trusts of the term of 1,000 years were declared as follows:—"And it is hereby agreed and declared between and by the parties to these presents, that the manors, capital and other messuages, tenements, farms, lands, advowsons, and other hereditaments herein limited to the said Samuel T. Kekewich and James Pulman, their executors, administrators, and assigns, for the said term of 1,000 years, are limited to them, upon and for the trusts, intents, and purposes following; that is to say, upon trust, in the first place, by cutting, and felling, and converting into money all or any part or parts of the timber now standing and growing on the said lands which is, or shall be, of full and ripe growth, and not ornamental to the mansion at Combe aforesaid, or the pleasure-grounds attached thereto, or any of the views or prospects of the same, of which timber it is hereby declared, that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired; or, by demising, mortgaging, or selling the premises comprised in the said term, or any part or parts thereof (save and except the mansion-house of Combe as aforesaid, and the estates of Gittisham," and so on, "all of which are hereby expressly reserved from sale), for all or any part of the said term, or by all or any of the said ways or means, or any other reasonable ways or means forthwith, to levy and raise the clear sum of 10,000*l.* and to pay the same to the said Margaretta Marker, her executors, administrators, or assigns, or as she or they shall order and direct for her and their own absolute benefit; and, in the next place, from and immediately after the decease of the said Margaretta Marker, by all or any of the ways and means aforesaid, to levy and raise two several sums of 10,000*l.* and 10,000*l.* and to pay the first of those two several sums of 10,000*l.* each unto the said Thomas John Marker, his executors, administrators, and assigns, for his and their absolute benefit, and to be by him and them received in satisfaction of any claim he may have on his brother, whether legally or otherwise, under the codicil to the last will and testament of his uncle, the Reverend Thomas Putt, deceased; and to pay over and apply the last of the two several sums of 10,000*l.* each to such persons, and in such manner, as Margaret Frances Smith, the wife of the Reverend George Townsend Smith, formerly Margaret Frances Marker, a daughter of the said Margaretta Marker, shall, by any writing under her hand appoint:" and then there is a proviso for a cesser of the term. The deed also contains powers of jointuring to tenants for life, and powers of leasing, and of sale and exchange, and the usual provisions for the change, and indemnity, of the trustees. It appears that the tenants for life, under the will of Thomas Putt, although their estates were impeachable of waste, on several occasions cut down timber in the three woods about the mansion-house, both for use and for sale. But it is clear, that there was a very large quantity of timber fit for cutting upon the estate, and particularly in these woods when Margaretta Marker came into possession in August, 1844. Margaretta Marker did not, nor did the trustees during her life, cut down any trees upon the estate, except a few larch or fir trees, which were cut by her, and no part of the 10,000*l.* secured to her under the trusts of the term was raised or paid in her life time. She died in July, 1846, having by her will appointed the defendant, Henry William Marker, to be her executor. Upon the death of Margaretta Marker, the defendant, Henry William Marker, entered into possession of the estate as succeeding tenant for life, under the resettlement. In January, 1849, 1,900*l.* or thereabouts, was raised by sale of timber upon the estate, and received by him as part of the 10,000*l.* secured to Margaretta Marker under the trusts of the term. Up to this period, no difference appears to have arisen between the parties, but, some time in the year 1850, a question arose, whether, upon the true construction of the deed of the 11th October, 1844, the timber made subject to the trusts of the term, was not primarily liable for the three several sums of 10,000*l.* secured thereby? and for the purpose of determining this question a bill was filed in this Court in the name of the now infant plaintiff, Richard Marker, by Richard John Marker, his next friend, and demurrers were put in to the bill. These demurrers were allowed by the Vice-Chancellor Wigram, before whom they were argued, and who, as I collect, intimated an opinion that the estate comprised in the term, and not the timber made subject to the trusts of the will, was the primary fund for the payment of the sums of 10,000*l.* But this suit appears to have related exclusively to the rights of the parties to the property made subject to the trusts of the term, and not to the extent of the property comprised within the term, and is, therefore, immaterial to the question

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between the parties on the present motion. The suit instituted in the name of the infant plaintiff, Richard Marker, having been disposed of by the allowance of the demurrers, the defendants, Kekewich and Pulman, the trustees, it appears were advised that the decision in that suit determined only that they were not bound to resort to timber in the first instance for raising the sums of 10,000*l.* but left the question undetermined, whether they have not a right to resort to the timber or to the estate for the purpose, according to their discretion; and they, accordingly made a communication to that effect to the defendant, Henry William Marker. The defendant, Henry William Marker, having, on the 10th of December, 1850, advertised the 700 oak trees, which are in question on the present motion, with 100 ash trees, which have since been cut down upon the estate, for sale, upon the 31st of December; the trustees, on the 21st of that month, filed their bill in this court against the defendant, Henry William Marker, and the plaintiff in the former suit, and the other parties interested under the settlement of October 1844, praying that it might be declared, that according to the true meaning and construction of the said indenture of settlement, the plaintiffs, the trustees, were entitled to use and exercise a discretionary power in accordance with the trusts declared by the said indenture of settlement as to the mode in which the three several sums of 10,000*l.* each, thereby directed to be levied and paid, should be levied and raised, and that the plaintiffs, the trustees, had a discretionary power to raise and pay the same, or any part thereof, either by resorting to the timber of ripe and full growth, other than such as was ornamental to the said mansion-house of Combe, and the pleasure-grounds attached thereto, or any of the views and prospects thereof, which were then standing or growing, or which, until the said money should be fully raised and satisfied, should be standing or growing on the said estates; and that the right of the said defendant, Henry William Marker, or any other of the defendants thereto who, under the limitations of the said indenture of settlement, were made tenants for life of the said estates, to cut or fell any such timber was subordinate to the right of the plaintiffs, the trustees, to exercise such discretionary power, and that the said defendant, Henry William Marker, and his servants and agents might be restrained by the order and injunction of this Court from cutting or felling any such timber, or selling or disposing thereof, whilst the said moneys, by the said indenture of settlement directed to be levied and raised, were not raised; the plaintiffs, the trustees, being ready and willing, and thereby offering forthwith, to take all measures and proceedings necessary or proper, in accordance with the trusts and discretionary power vested in them by the said indenture of settlement for levying and raising the same moneys so far as the same then remained unsatisfied. There are other parts of the prayer of the bill, but they do not appear to me to be material to the present question. That bill was filed by Mr. Gidley, as solicitor for the trustees, Kekewich and Pulman, the then plaintiffs, and now defendants, and Mr. Gidley acted as solicitor for the present plaintiffs as defendants in that suit, and as their solicitor in the present suit; and the timber advertised to be sold, including the oaks now in question, was clearly treated by this bill as not being "ornamental to the mansion-house, or pleasure grounds, or any of the views or prospects of the same," it being probably considered necessary so to treat it in consequence of the terms of the declaration of trust as to the ornamental timber. Upon the filing of this bill, application was made to Lord Cranworth for the injunction; but his lordship declined to grant it, the defendant, Henry William Marker (who, it must be observed, was not only tenant for life, but also entitled, as personal representative of Margaretta Marker, to the unpaid parts of the 10,000*l.* secured to her under the trusts of the term), undertaking to account for the produce of the timber if and as the Court shall direct. The injunction having been thus refused, the 700 oaks and the 100 ash trees were sold to different purchasers on the 31st of December last, and the ash trees have been since cut down. And in this state of circumstances the present bill has been filed by Thomas John Marker, Richard Marker, and John Marker, the two latter of whom are infants, as tenants for life in remainder, under the settlement of October 1844, against Henry William Marker, the tenant in life for possession under the same settlement, Kekewich and Pulman, as trustees of the term, and George Townsend Smith, and Margaret Francis, his wife, as interested under the trusts of the term in the 10,000*l.* thereby secured for the benefit of Mrs. Smith. The bill states the settlement of October 1844, and sets forth in detail the trusts of the term. It alleges that the settled estates are not timber estates; that they consist of a mansion-house, with extensive buildings, offices, and pleasure-grounds thereto attached, suitable for the residence of the owner of the estates, and used as such; of farms and lands let to tenants; of a

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comparatively small portion of wood-land; and that for many years previously to the estates being put into settlement by Margaretta Marker, the timber growing thereon has been carefully preserved by the owners of the estates, and allowed to remain uncut; and that there was at the date of the settlement, and at the death of Margaretta Marker, and that there now is, standing and growing on the estates, a large quantity of timber of full and ripe growth, and much more than is usual on estates of a like description. It then states the sale of the timber under which the 1,900l. was raised, and the sale of the 700 oak and 100 ash trees on the 31st of December last. With reference to these trees, it charges that the principal portion of the trees so sold were standing in a wood near the mansion-house, and that the rest thereof were standing or growing in the hedge-rows, or on the open lands on the said estate, and that some of the said trees were standing and growing within 200 yards of the mansion-house; and that all the said trees so sold were ornamental to the mansion-house and grounds, and the views and prospects of the same, and ought to have been preserved as such, and that a great part thereof afforded protection and shelter to the mansion-house, and offices, and the pleasure-grounds of the same, and ought to have been preserved on that account. It further charges that since the sale the defendant, Henry William Marker, has permitted the purchasers of the ash trees to enter upon the estate and cut and fell those trees; that he has received the price thereof from the purchasers and applied the same to his own use, or in satisfaction of the moneys directed to be levied and raised. It also charges that if the 700 oak trees are allowed to be cut down, the mansion-house and the offices and buildings attached thereto will be deprived of the protection and shelter afforded thereby, which ought to be preserved; and the beauty of the same, and the pleasure-grounds thereof, and the scenery, vistas, views, and prospects of the same will be greatly impaired; and that irreparable danger, spoil, destruction, and injury will be occasioned and committed to and upon the estates, and grievous wrong and injury done to the plaintiffs as the parties in remainder entitled to the estates after the defendant, Henry William Marker; and it prays that the defendant, Henry William Marker, may be restrained by the order and injunction of this Court from cutting down or felling, or permitting to be cut down and felled, the 700 oak trees, or any other timber growing on the estate which affords or gives protection, shelter, or ornament to Combe-house aforesaid, or the outbuildings or offices thereof, or the pleasure grounds attached thereto, or any of the views and prospects of the same. Notice of motion for the injunction having been given before Lord Cranworth, and the motion having been transferred to me by the order of the Lord Chancellor, the question I have to consider is, whether the injunction ought to be granted as to all or any part of the timber, and if granted at all, whether upon any and what terms. Upon the argument of the motion before me several points were urged upon the part of the defendant, Henry William Marker, which do not involve the substantial merits of the case; and it may be convenient, in the first instance, to refer to these points. It was contended, on the part of this defendant, that the conduct of the parties, apart from any question of acquiescence on their part, precluded them from all title to the injunction; that having been parties to the suit instituted by the trustees in which the timber in question was alleged not to be ornamental, they could not be permitted by the present bill to assert the right to it, as being ornamental. But nothing further appears by the affidavits upon this subject than that Mr. Gidley, the solicitor for the trustees, the plaintiffs in that suit, acted also as solicitor for the present plaintiffs, as defendants in that suit. It would, I think, be going much too far to hold that defendants, and particularly the present defendants, can be in any manner bound by the allegations of the bill upon the mere ground that they were represented in the suit by the same solicitor, under whose instructions the bill was filed. It does not even appear that the plaintiff, Thomas John Marker, appeared upon the motion in this suit; and the fact, which is undoubtedly proved, that Thomas John Marker interfered to impede the sale, does not appear to me to strengthen this part of the case. Another objection to the motion was that there had been acquiescence on the part of plaintiff, Thomas John Marker, and that acquiescence on the part of one of several plaintiffs, precludes the interference of the Court upon interlocutory applications as much as upon decree. I think the defendant's argument upon this subject is well founded; and that if a case of acquiescence on the part of the plaintiff Thomas John Marker, were established, it would be a sufficient answer to the motion. In a case before Lord Cottenham, when Master of the Rolls, where a bill was filed by several plaintiffs, some of whom were infants, against an executor for the purpose of setting aside a release, and compelling him to account

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for money alleged to have been improperly withheld when the release was executed, he refused to entertain a motion for payment of money into Court upon the ground that some of the above plaintiffs had with full knowledge of the circumstances acquiesced in the retainer; and I think that, upon principle, the Court ought not to interfere at all, if it be fully satisfied that no decree can be made. I have, therefore, felt bound to consider the question whether there has been such an acquiescence on the part of the plaintiff, Thomas John Marker, as would have barred his claim if he had been the sole plaintiff, and I am of opinion that there has not. Neither the catalogue of the timber to be sold, nor the handbill issued upon the sale (presuming him to have seen them), contained any further description of the timber than that it was selected from the Gittisham coppices; and his affidavit in reply distinctly states that he did not know the timber advertised was ornamental until the latter end of February last, soon after which time the bill in this suit was filed. It appears, indeed, that, although not prohibited from going upon the estate, there had been unfortunate disputes which might naturally prevent him going there. It is, I think, clearly established by the affidavits that the timber intended to be felled was (whether purposely or not it is unnecessary for me to consider) so marked as that had he gone upon the estate he could not have detected the marks without traversing the woods. It is to be borne in mind, too, in considering the question of acquiescence on the part of plaintiff, Thomas John Marker, that his right depended upon what under the circumstances of this case was to be considered as ornamental timber,—a question of some difficulty for the Court itself to determine. Parties cannot, I think, be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. Delay was also urged as an objection to the motion; but the same reasons which apply to the question of acquiescence, apply also to the question of delay. The last objection, independent of the substantial merits of the case, rested upon the ground that the purchasers of the timber were not parties to the suit. But I think this objection rather applies to the question what security the defendant Henry William Marker, is entitled to require from the plaintiffs if the injunction be granted, than to the question whether the injunction is to be granted or not. For although purchasers of timber may be entitled in some cases to insist upon the delivery of the specific timber contracted for, and to enforce it by suit for specific performance, I apprehend a special case is required for the purpose, and that the ordinary remedy of such purchasers is in damages. The case of *Carlyle v. The South-Eastern Railway Company*, 1 Man. & G. 689, cited by Mr. Giffard, does not seem to me to apply. The question in that case, as I recollect it, was upon maintaining an injunction which had been obtained at the instance of some shareholders suing on behalf of themselves and the others against payment of dividends by the company; and Lord Cottenham dissolved the injunction as to the dividends actually declared, upon the ground that the declaration of a dividend constituted a separate right in each shareholder; and that the plaintiffs could not therefore, as to that dividend, sue on behalf of themselves and the others. But the case involved no further question of the right to sue, and there can be no doubt that the plaintiffs in this case have a common interest in the subject matter of the suit. I have felt myself compelled, therefore, to consider this motion upon the substantial merits of the case, and I think it may well be considered in two points of view:—First, whether the plaintiffs are entitled to the injunction upon the ordinary doctrine of the Court in cases of equitable waste; and, secondly, whether they are so entitled under the special terms of the particular deed on which their title is founded. With reference to the first point, I consider the doctrine of the Court applicable to cases of equitable waste to be perfectly well settled. The Court considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it; but it exercises that control with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own, and, therefore, as to ornamental timber, confines its protection to timber planted or left standing for ornament. The question, therefore, in all such cases is a question of fact, and the main difficulty lies in the evidence necessary to establish the fact. With respect to the second point, it is, so far as I am aware, a somewhat new question. The evident intention of the settlement is to preserve the beauty of the place unimpaired; and the deed as evidently refers to the state of the property at the time of its execution, "of which timber is hereby declared that enough shall always remain to preserve the beauty of the place unimpaired." May it not be considered then that the settlor has set up a standard of beauty defined by the existing state of the place, and although there will be no doubt great difficulty in ex-

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ecuting a trust, or enforcing an injunction to preserve the property according to that standard, I am not prepared to hold that the difficulty is such as it is beyond the power of the Court to grapple with. Suppose the settlor had built a house, and had directed money to be applied in furnishing it in the most tasteful manner, or, to put a case nearer to the present, in laying out gardens most ornamentally, would not the Court have executed the trust? And yet the judgment of the Court in such a case would have had to be exercised on matters of taste and beauty, and without any standard to guide it. The Court too is not unfrequently called upon to act upon the opinions of persons of science, and why should it not then act upon the opinions of persons of taste, who are consulted by others under similar circumstances? It is to be observed, too, that in the present case the restriction upon waste is connected with the trust. It is clear that the tenants for life are not intending to cut what may not be cut by the trustees, and if, therefore, the restriction upon the tenants for life fails, that upon the trustees would seem to fail also. Neither the cases which have been referred to, nor others to which I have referred, seem to me to decide this question. It is true that Lord Eldon, in *The Marquis of Downshire v. Lady Sandys*, used the expression, "the question which is the most fit mode of clothing an estate with timber, for the purpose of ornament, cannot safely be trusted to the Court;" but he uses that expression with reference, not to a particular trust or a specific restriction, but with reference to the general doctrine in ordinary cases, and his observations in the second branch of the case, when it was brought before him with reference to the provision against injuring the beauty of the mansion-house, rather indicate, I think, his opinion, that the provision would be good. It will be observed, that this case came twice before the Court; first, upon the motion to commit for a breach of the injunction, and afterwards, on a motion which had for its object both to dissolve the injunction and discharge the order which was made on the motion for committal. That part of the deed which had reference to the preservation of the beauty of the place was only brought under the consideration of the Court on the occasion of the case secondly coming before the Court, and it arose in this way, that that part of the trusts of the deed had no reference to the prior tenant for life, Lady Sandys. It had reference to a future tenant for life, and upon an injunction being first granted, and a motion for a sequestration (I believe it was) made, that part of the deed had not been entered on at all. After that motion had been disposed of, the case was afterwards brought before the Court on the part of Lady Sandys, contending that, as the deed contained a provision that the beauty of the place should be preserved unimpaired, the original injunction which had been granted was wrong, and Lord Eldon entered into a consideration of that question, but he entered upon it only to this extent, namely, to consider whether that provision which applied to a subsequent tenant for life, did or did not alter the rights of the preceding tenant for life, and he held that it did not, but makes one or two observations upon the provision itself: in page 113 of the report I find him saying, "This at least is clear, that Lady Sandys claiming an estate for life without impeachment of waste upon the deed in general, must be understood, upon the deed, to claim that estate with such powers as the law of the land, administered in a Court of Law, subject to such restraints (to which that law is subject) as administered in a Court of Equity, gives her, as to felling timber; and neither party can allege surprise in finding their legal rights affected by those restraints. With respect to the question, whether there is context enough in this deed to authorise me to say the defendant can do these acts, which, in general, a tenant for life expressly without impeachment of waste is not entitled to do, because some other persons are authorised after her death to cut timber under the particular terms specified in the power of the trustees,—with respect to that," he says, "I do not know that it is a necessary inference that one party shall have a power today because another party has a power capable of being exercised to-morrow." That, I believe, is the only important observation that occurs in the judgment at all indicating his view that he there takes, clearly making a distinction between the trusts created by a deed, and the common case of equitable waste. The cases of indefinite trusts of a charitable nature to which I was referred do not seem to me to apply. There is no standard of benevolence, and the objects are too unlimited to create such a standard, and the same observation applies to cases which, perhaps, more nearly resemble the present—where the Court has refused to enforce by injunction a covenant not to build, except so as to be an ornament rather than otherwise to the adjoining property, or to keep a garden in neat and ornamental order, as in *Mann v. Stephens*, 15 Sim. 379, and in *Tulk v. Moxhay*, 11 Beav. 571. These cases, I think, have rather more application to the present,

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but I think the same principle which applies to the case of charities, or rather of benevolent dispositions, applies also to this. You have no standard; you cannot tell what, by any possibility, will be rather more improvement than otherwise to the adjoining property; nor can you otherwise tell me the meaning of keeping a garden in neat and ornamental order. These being the views which I entertain of the case, and the question now being whether I am to permit acts to be done by which they would be wholly frustrated, and the power of the Court to deal with them at the hearing of the cause be defeated, I think it is my duty to some extent to interfere by injunction. I think, however, that no case whatever is made out as to the 200 oaks not being in the woods; there is nothing whatever to shew that any of them were planted or left standing for ornament or shelter, nor is there any evidence that any of them are in fact ornamental within the provisions of the deed, except as to the eleven oaks above the orchard, and the five on the road from the vicarage, and as to these, I think the case fails. I am of opinion, therefore, that as to these 200 trees the injunction ought to be refused. With respect to the 500 oaks in the woods, however, I think the case widely different. These woods are in immediate proximity to the mansion-house. The settlor in the deed refers to timber ornamental to the mansion-house and pleasure-grounds, and the views and prospects of the same, and there does not appear to be any evidence of there being any timber upon the estate which could fall within that description, other than the timber in these woods. The settlor lived for nearly two years after the execution of the settlement, and never cut any timber in these woods, although it is clear that they were crowded with timber, and here the estate was unimpeachable of waste, except as to ornamental timber. These considerations far outweigh, in my mind, the evidence on the part of the defendant, Henry William Marker, I cannot place much reliance on such of the affidavits on his part as state simply the fact that the woods were not planted or left standing for ornament or shelter, without assigning any reason for that conclusion, or much more reliance on such of the affidavits on his part as ground the conclusion on the existence of stools or stumps, without information as to the circumstance under which those trees were cut down. Nor can I rely on the case of the tenants for life, whose estates were impeachable of waste, or on the statement that the settlor intended to cut down timber in those woods, no such act having been done by her, and the statement having been made after the execution of the deed by which the property had become bound by the trust. I should have felt it right, therefore, to interfere as to these 500 oaks, even if the question had rested simply upon the point whether they were left standing for shelter or ornament; but beyond this I think it clear upon the evidence that they are, in fact, ornamental within the meaning of the deed, and I am perfectly satisfied upon the evidence that they cannot be cut down without impairing the beauty of the place. I am of opinion, therefore, the injunction must go as to the 500 oaks, and I think it will be proper to extend it to other timber in the same woods, but no further. It must be borne in mind, however, that possibly the plaintiff's case may not ultimately be established; and I must require the plaintiff, Thomas John Marker, therefore, to give security, as in *Wombwell v. Bellayse*, and upon the same principle I think the security must be extended to any loss or damage the defendant, Henry William Marker, may incur or sustain by reason of his being prevented from completing the sale of the 500 oaks or any of them; and if the defendant, Henry William Marker, desire it, I will add a reference to the Master to inquire whether any and which of the 500 oak trees, or any and what other trees standing and growing in the three woods, can be cut without impairing the beauty of the place as it stood at the time of the execution of the settlement of the 11th of October, 1844. I offer that inquiry with this view, that the report upon the inquiry might come on with the cause at the hearing of it, and then if the Court shall be of opinion, that under the very particular terms of this trust, the true result is that the timber is to be protected to the extent merely of preserving enough of ornamental timber to keep up the beauty of the place, that then the Court would be at once in a position to relieve the parties from the difficulty of an injunction, by declaring what trees might be cut down. It is for the defendant to consider whether he desires to have that inquiry or not. I offer it on the present occasion with the view I have stated. In order that we may not have discussions on minutes, I am anxious to get the order, which is to be drawn up, perfectly understood. I refuse the injunction as to the 200 trees, and I grant the injunction as to the 500 trees, and any other trees standing in these woods, following the terms of the order in *Wombwell v. Bellayse*, as to the security, and adding to those terms the words which I have mentioned, "of any loss or damage which the defendant, Henry William

Marker, may incur or sustain, by reason of his being prevented from completing the sale of the 500 oaks, or any of them." And if the defendant, Henry William Marker, desires it, I will add a reference to the Master to inquire whether any, and which of the 500 oak trees, or any, and what other trees standing and growing in the three woods, can be cut without impairing the beauty of the place, as it stood at the time of the execution of the settlement of the 11th of October, 1844.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL, Esqrs. Barristers-at-Law.

Wednesday, June 4.

CORT AND ANOTHER v. THE AMBERGATE, NOTTINGHAM, BOSTON, AND EASTERN JUNCTION RAILWAY COMPANY.

*Executory contract—Breach—Condition precedent—Deed—Discharge—Necessity of tender—Railway Company—Engineer—Agent.*

Where there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept them, the vendor, being desirous and able to complete the contract, may maintain an action against the purchaser for breach of his contract, without making and tendering the residue of the goods. Under such circumstances the plaintiff would be entitled to a verdict upon the issues raised by traversing the allegations that the plaintiff was ready and willing to perform the contract on his part, and that the defendant refused to accept the residue of the goods, and prevented and discharged the plaintiff from manufacturing and delivering them, although the defendants were a corporation, and the original contract was under seal.

A railway company having contracted to purchase goods to be delivered from time to time under the direction of the Company's engineer. After the delivery of part, the engineer ordered the vendor not to deliver any more. The learned judge told the jury to consider whether in fact the company by their mode of dealing had constituted the engineer their agent, so as to be bound by his acts.

Held, no misdirection.

This was an action of covenant for breach of a contract under seal, whereby the plaintiffs agreed to make, according to specification, and to deliver, within certain months and at certain places, various quantities of railway chairs, according to the direction of the company's engineer; and the declaration alleged, that though the plaintiffs were always ready and willing to execute their proposal, according to the specification, &c. yet the defendants, after accepting part, refused to accept and prevented and discharged the plaintiffs from delivering the residue.

Plea.—1. That the plaintiffs were not ready and willing to execute their proposal according to the specification, &c. 2. That the defendants did not refuse to accept, nor did they prevent or discharge the plaintiffs from delivering the residue.

Issue was taken upon those pleas; and at the trial, before Coleridge, J. at the last assizes for the county of Nottingham, a verdict was found for the plaintiffs, damages 1,800*l*. It appeared that for some time after the execution of the contract, the plaintiffs made and delivered railway chairs, which were accepted and used by the defendants; but after several requests to deliver slowly, the engineer of the company in December, 1848, stopped altogether any further delivery by giving the plaintiffs notice that the company had abandoned the making of part of their line, and could not take the residue of the chairs. After that no more chairs were made or tendered. When the further delivery was stopped only 350 tons of chairs would have remained to be delivered, if the full quantities had been regularly delivered month by month, according to the contract; but from the commencement the deliveries had taken place, without reference to the particular stipulations of the contract as to time and quantity. Under these circumstances a rule had been obtained for a new trial, on the ground of misdirection, that the verdict was contrary to the evidence, and that the damages were excessive.

Tuesday, May 27.—*Humfrey and Willmore* shewed cause. 1. There was no misdirection. The learned judge did not direct the jury that in point of law the company were bound by the acts of the engineer; but left the evidence of authority to them. A company can only break a contract by their servants and agents. *Glover v. The London and North Western Railway Company*, 5 Ex. Rep. 66. 2. The evidence is abundantly sufficient to sustain the verdict. The prevention and discharge in the

sense in which that language is used in the declaration is proved. To say that a discharge under seal is necessary in such a case, is to apply to the breach of a contract, the rules applicable only to the making of a contract. There could be no perfect discharge of the contract without the consent of the plaintiffs; and if the plaintiffs had consented, then, of course, no action could be maintained for a breach of it. But the meaning is that the defendants, by their breach of contract, prevented the plaintiff from performing his part of it; if, indeed, it was necessary to prove more than the defendant's refusal to accept. The defendants could not be compelled to execute a deed of release; and can it be said that their refusal to do so is to deprive the plaintiff of his remedy for their breach of contract? There is no authority for any such position. [*Coleridge, J.* referred to *Ripley v. McClure*, 4 Ex. Rep. 345.] That is in favour of the plaintiff, and recognises *Philpotts v. Evans*, 5 Mee. & W. 475; *West v. Blakeway*, 2 M. & G. 729. 3. The damages are not excessive. An actual loss of about 4,000*l*. was proved.

*Macaulay and S. C. Denison*, contra.—1. It was assumed in the learned judge's charge that what was done by the engineer was done by the company. [*Lord CAMPBELL, C. J.*—The learned judge advised the jury to consider the acts of the engineer as the acts of the company; and I certainly should have given the same advice; but he left the facts to the jury as evidence of authority. There was no misdirection in point of law.] The jury, of course, could not help adopting the advice of the judge, and there was no ground for presuming authority. The engineer stated that he had no authority from the company to act in the matter except under the contract, and this was not a trivial matter with regard to which the company could constitute an agent unless by instrument under seal. (*The Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Paine v. The Strand Union*, 8 Q.B. Rep. 326; *Beverly v. Lincoln Gas Company*, 6 Ad. & Ell. 829.) [*Coleridge, J.*—The engineer only said that he had no positive orders to restrict the amount. *Lord CAMPBELL, C. J.*—The management was left to him; he represented the company in the matter.] This is not like a case where there is any general course of business. The engineer is employed in constructing the line; and by deed he has a specific authority to do certain things, beyond which his authority is not to be presumed. (*Cox v. The Midland Railway Company*, 3 Ex. Rep. 268; *Ridley v. The Plymouth Grinding and Baking Company*, 2 Ex. Rep. 717.) 2. The delivery of the chairs being a condition precedent to the recovery of the price, the plaintiff must prove something equivalent to delivery; here he sets up a prevention or discharge; but the prevention, to be equivalent to delivery, must be an actual physical prevention. (*West v. Blakeway*, cited *supra*; *Com. Dig.* "Condition," L. 6. M. 5; *Francis's case*, 8 Rep. 91 b.) [*Coleridge, J.*—Must not the question of prevention depend upon the circumstances of the case? Suppose the defendant threatened the plaintiff to blow out his brains if he attempted to deliver the goods, that would not be a physical prevention, yet it could hardly be said that the plaintiff would still be bound to tender the goods.] That is a very extreme case; and such a threat, if made, would probably not be carried into execution. If the plaintiff relies upon a discharge, he must shew a legal discharge (*Brymer v. The Thames Haven Dock and Railway Company*, 2 Ex. Rep. 549); and as that is a corporate act, it must be done under seal, or at least by some person having an authority under seal. The Companies Clauses Consolidation Act, which provides for the making of parcel contracts by the board of directors or committees, does not apply to this. This declaration is founded on the contract as subsisting; and therefore the performance of a condition precedent must be shewn. The plaintiffs might have treated the defendants' refusal to accept as a rescission of the contract, and then have sued upon a *quantum meruit* for what he had done in relation to the contract. (*Planche v. Colburn*, 8 Bing. 14.) The intimation of an intention to refuse the goods is either a rescinding of the contract, or it is nothing at all; it leaves the contract as it was, and then, unless there is a tender, the plaintiff cannot recover, according to *Philpotts v. Evans* and *Ripley v. McClure*. Readiness and willingness to complete the contract involves the ability to do so; and the plaintiffs were not able to deliver chairs which had not been made. (*Cook v. Jennings*, 7 T. R. 381, was also referred to.) 3. The damages are excessive, because the plaintiffs are not entitled to recover for a refusal after December 1848, to accept goods which ought, by the contract, to have been delivered before. The prevention of delivery cannot apply to any goods which ought to have been delivered before that prevention took place. The stipulations as to quantities and time are not directory merely. *Humfrey* mentioned *Goodman v. Pocock*, 19 L.J. 410, Q.B. in which *Patteson, J.* speaks of the report of *Planche v. Colburn* as not satisfactory.



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ERLE, J. referred to *Elderton v. Emmens*, 6 C. B. 160. *Cur. adv. vult.*

## JUDGMENT.

LORD CAMPBELL, C.J. now delivered the judgment of the Court (a).—We are of opinion that the verdict found for the plaintiffs ought not to be disturbed. As to the supposed misdirection, the learned judge at the trial did not direct the jury that in point of law the engineer had authority to bind the company, but only left it to the jury to consider whether in point of fact the company, by their mode of dealing, had authorised and sanctioned his agreements. His lordship intimated that he thought the evidence was strong to shew that they had done so, but that it was for the jury to give the evidence its due weight. The objection of misdirection therefore fails. We have then to consider whether the plaintiffs were entitled to a verdict on the issue, whether they were ready and willing to execute and perform the said contract according to the said conditions and stipulations in manner and form, &c. and on the issue whether the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract. It is not denied that if the defendants would have regularly accepted and paid for the chairs the plaintiffs would have gone on regularly making and delivering them according to the contract. The objection is, that although the plaintiffs were desirous that the contract should be fully performed, yet, after receiving the notice that the company did not wish to have any more chairs, and would not accept any more, they ceased to make any more; inasmuch that the residue which the company are alleged to have refused to accept never were made. The defendants contended that as the plaintiffs did not make and tender the residue of the chairs they cannot be said to have been ready and willing to perform the contract; that the defendants cannot be charged with a breach of it; that after the notice from the defendants, which in truth amounted to a declaration that they had broken and henceforward renounced the contract; the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the company upon them, and to bring them to the appointed places of delivery, and tender them to the defendants, who, from insolvency, had abandoned the completion of the line, for which the chairs were intended, desiring that no more chairs might be made, and declaring in effect that no more should be accepted or paid for. We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be, that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labour, which might possibly enhance the amount of damages to be awarded against them. Upon the last issue was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them, according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words, "nor prevent or discharge the plaintiffs from supplying the residue of the chairs, and from the further execution and performance of the contract." We consider the material part of the allegation which the last plea traverses to be that the defendants refused to receive the residue of the chairs; but assuming that the whole must be proved, we think that there is evidence to shew that the defendants did prevent and discharge the plaintiff from supplying the residue of the chairs, and from the further execution of the contract. It is contended that "prevent" here must mean an obstruction by physical force; and in answer to a question from the Court, we were told it would not be a preventing of the delivery of the goods if the purchaser were to write in a letter to the person who ought to supply them—"should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say, that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done except physical force or brute violence? Again, we are told there can be no discharge by a corporation unless by a deed under the corporate seal. Of a discharge, in

one sense of the word, this is true. A discharge is sometimes used as equivalent to a release, which must be under seal. (*Brymer v. The Thames Haven Dock Company*, 2 Ex. 549.) But we conceive that in the allegation traversed by the last plea, discharge means only prevent, and that the act of the defendants was the cause of the residue not being delivered, and the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs. It is averred, however, that there are express authorities to shew that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered; that to prevent must be by positive physical obstruction; and that there can be no discharging unless by instrument under seal. The first case relied on was that of *West v. Blakeway*, 2 M. & G. 729, in which an action being brought by lessor against lessee, on a covenant to yield up at the expiration of the term all erections and improvements set up or made during the term, it was held to be a bad plea that there was a subsequent parole agreement between the parties, that if the lessee would erect a greenhouse he should be at liberty to pull it down and remove it. But this merely illustrates the well-known rule that a covenant under seal cannot be varied by parole—"Unum quidque ligamen dissolvitur eodem ligamine quo ligatur." That has no application to a case where the covenantor is prevented from performing the covenant by the covenantee. Roll's Abridg. 453, and in Viner's Abridg. "Condition," M.C. will be found various instances of a covenant being discharged without deed by the act of the covenantee. The next case relied on by the defendants' counsel was *Philpotts v. Evans*, 5 M. & W. 475. That was an action of covenant for not accepting a quantity of wheat sold early in January 1839, by the plaintiffs, at Gloucester, "to be delivered at Birmingham as soon as the vessel could be obtained for the carriage thereof." On the 25th of March the defendant gave notice to the plaintiff that he would not accept the wheat if it were delivered. It was then on its way by canal to Birmingham; and on its arrival there, the defendant was requested to accept it, but he refused to do so. The only question at the trial was as to the time with respect to which the damages were to be calculated. The market having continued to fall from the date of the contract till the bringing of the action, the defendant sought to take advantage of his own wrong, and to calculate the damages according to the price in the market on the 26th of January, when he gave notice that he intended to break the bargain; but it was very properly held, that the plaintiffs were entitled to damages according to the market price when the wheat was tendered to the defendant for acceptance. The Court cannot be considered as having decided that if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not at their pleasure have treated it as a breach of the contract, and commenced an action against the defendant for not accepting it without tendering it to him at Birmingham. The most recent case cited by the defendants' counsel was *Ripley v. Macture*, 4 Ex. 345. This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiff agreed to sell, and the defendant to buy, on arrival, certain goods to be delivered at Belfast, at a certain price, payable on delivery; it was held that a refusal by the defendant, before the arrival of the cargo, to perform the contract, was not of itself necessarily a breach of it, but that such refusal, untracted, down to and inclusive of the time when the defendant was bound to receive the cargo, was evidently a continuing refusal, and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of the contract. But in the case at bar the refusal never was retracted, and therefore there was a continuing breach down to the time when this action was commenced. Upon the whole we think we are justified on principle, and without trenching on any former decision, in holding that when there is an executory contract, for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them. We are likewise of opinion, that in

this case the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept. They were all included in the declaration and in the issues joined. The time mentioned in the proposal for the delivery of some of them had arrived, before the notice was given; but the time of delivery was not of the essence of the contract, and the obligation was still incumbent upon the defendants to accept the whole of the residue. The rule must therefore be discharged.

Rule discharged.

Saturday, June 7.

Re AN AWARD BETWEEN THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS, AND THE INHABITANTS OF TILEHURST, RESPONDENTS. Poor-rate—Railways, Rating of—Branch lines—Deductions.

At the Quarter Sessions for the county of Berks, holden on the 3rd of April, 1840, an order, subsequently made a rule of this Court, was made, whereby a rate or assessment for the relief of the poor of the parish of Tilehurst, and fifty-two other assessments for the relief of the poor in fifty-two other parishes, were respectively confirmed on appeal, subject to the opinion of this Court on an award in the nature of a special case. The material part of the award was as follows:—The Great Western Railway Company are assessed to the relief of the poor of the parish of Tilehurst by a certain rate made the 20th day of April, 1849, in respect of land occupied by them as a portion of the line of the said railway, being part of a branch of the said railway from Reading to Hungerford, called "The Berks and Hants Railway." The Reading, Newbury, and Hungerford branch of the Great Western Railway is 25½ miles in length. It was originally projected by certain persons incorporated under stat. 8 & 9 Vict. c. 40, by the name of "The Berks and Hants Railway Company." The 48th section of the last-mentioned statute enabled the Great Western Railway Company to purchase the said undertaking. By virtue of the above provisions the Great Western Railway Company became the proprietors of the said Berks and Hants Railway, and thereupon by a subsequent Act, 9 Vict. c. 14, it was enacted that the same should become thenceforth part of the Great Western Railway. The Berks and Hants Railway was constructed at the costs of the appellants, and on its completion in the year 1848 was opened for traffic as a branch of the Great Western Railway, and has been, ever since its completion, worked by the appellants as part of the entire railway known by the name of the Great Western railway, but a certain number of engines and carriages are appropriated to it, and a certain number of officers and servants are employed exclusively on that branch. No separate accounts of receipts and expenditure in respect of the branch is kept by the appellants, but such receipts and expenditure are included in the general half-yearly revenue accounts laid before the proprietors, and no separate annual account in abstract showing the total receipts and expenditure in respect of the branch is prepared by the appellants, so as to be furnished to the overseers of the poor of the several parishes through which the said branch passes in conformity with the provisions of statute 8 & 9 Vict. c. 20. The branch line could be worked (as originally intended to be) as a separate railway under independent management, but this would require a larger movable stock, and a greater expenditure than the company now actually employ or bestow on it. The actual expenses of the company are not in the proportion of the actual gross receipts, either on the branch or throughout the entire railway, nor are either such gross receipts or such expenses at one uniform rate per mile. The profits of the company are wholly derived from the carriage of passengers and goods, and none but the company's engines and carriages run on the line. The respondents computed the rateable value of such portion of the said railway as follows:—They estimated the rent at which the entire Great Western Railway trunks and branches, with its appurtenances, including stations, which might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and the commutation rent-charge, and deducted therefrom the probable average annual costs of repairs, insurance, and other expenses necessary to maintain the said railway in a state to command such rent, and such rent for the purpose of the present award is to be taken to be such portion of the net annual profits of the company, after making all proper deductions in respect of tenants' profits, including the profit of trade, as a tenant from year to year might be reasonably expected to give for the right to occupy such railway as a carrier. The mode in which such estimated rental was calculated is as follows:—The respondents ascertained the actual annual receipts of the company, occupying as carriers the entire Great Western Railway, trunk and branches, from the carriage of passengers and

(a) Lord Campbell, C.J. Patteson, J. Coleridge, J. and Erie, J.



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goods over the said railway between the 1st January, 1849, and the 30th December in the same year. From this they deducted the actual annual expenditure of the company during the same period, under the following heads:—1, maintenance of the way, stations, and works; 2, locomotive account; engine-men and firemen, waste, oil, tallow, and fire-wood, labourers and cleaners, cost of superintendence, including clerks, firemen, and office charges, repairs of engines and tenders, comprising wages, materials, &c. &c. coke and coal consumed by locomotive engines, rates, taxes, lighting and gas, repairs of buildings, turn-tables, &c.; 3, carrying account, comprising the expenses of guards, police, and inspectors, porters' clothing, carriage and wagon repairs, stores, consumed stores, disbursements, lighting and gas at stations; 4, general charges, including superintendence and clerks, stationery account, disbursements, and tickets, sundry office expenses, advertising, postage, &c. travelling expenses, &c. loss on light gold, law charges, medical expenses; 5, disbursements for repairs and alterations of stations and insurance; 6, compensation for accidents, returns, and allowances; 7, government duties on gross receipts from passengers; 8, rates and taxes; 9, general offices for direction, salaries, and office expenses; 10, law-stationer's accounts for copying. The above deductions comprise the actual annual trade expenditure of the company, and also their actual annual expenditure from the 1st of January, 1849, to the 30th of December following, necessary to maintain the railway and its appurtenances, in complete repair, and the moveable stock of the company, including engines, tenders, and carriages of all descriptions in effective working order and condition. The difference between the actual annual receipts of the company, and such deductions, the respondents considered to be the net annual profits of the company as such occupiers of the entire railway. They then assumed an amount of capital invested in the entire moveable stock employed in the trade, which for the purpose of the present rate is to be taken to be correct, and deducted from such net annual value a per centage on such capital in respect of interest and tenants' profits, including the profits of trade, which for the purpose of this rate is to be taken as the proper per centage in that behalf. The residue they considered to represent the net annual value of the entire Great Western Railway, trunk and branches, with its appurtenances, including the stations, within the meaning of the Parochial Assessment Act. They further deducted the annual value of the stations, which are rated apart from the line of railway. Having thus ascertained the rateable value of the whole railway, minus the stations, they ascertained the gross actual annual receipts of the company in respect of each mile, and portion of a mile of railway in their parish, and they assessed the appellants in respect of the said two miles and a half of railway in their parish in the ratio which such annual receipts bore to the gross actual annual receipts of the company in respect of the entire Great Western Railway, trunk and branches, the rateable value of a mile of railway in the respondent parish being calculated in the same proportion to the rateable value of the whole line of railway, exclusive of the stations, as the gross actual annual receipts in respect of such mile bore to the total of such actual annual receipts of the company. The appellants contended, that assuming the rateable value of the whole railway to be the right basis of the rate in each parish, and that such rateable value had been correctly ascertained by the respondents, it ought to be distributed along the line, and apportioned on each part of it in the ratio of the net earnings or net profits accruing to the appellants in respect of that part, and not in the ratio of the gross receipts, and for the purpose of supplying to the Court of Quarter Sessions the means of amending the rate, they estimated the rateable value in the following manner:—They took the gross receipts per mile per annum in the respondents' parish, exactly as the respondents had done, and they deducted from these the actual expenses of each mile ascertained or estimated. In order to do this, they ascertained the actual expenses incurred on the branch alone, and where those expenses were common to the entire branch, they divided such expenses by the number of miles in the branch, and they considered the result to be the expense of each mile in the branch. A small portion of the general expenses of the entire railway, being those of central superintendence, printing, and advertising, were apportioned on the branch in the ratio of the business or traffic upon it, and such portion was then sub-divided as before on the mileage principle. The following are the expenses and deductions estimated as above, and claimed by the appellants:—1, maintenance of way, including actual annual repairs of way, rails, fences, &c. at per mile; 2, salaries of servants, police, &c. on the branch per mile; 3, lighting and office expenses on the branch, and share (apportioned as

above) of general expenses of central superintendence, printing, and advertising per mile; 4, annual repair of carriages used on the branch per mile; 5, actual cost of running engines on the branch per mile; 6, rates and taxes; 7, Government duty; 8, annual rateable value of stations on the branch only at per mile; 9, estimated sum per mile per annum for renewal and reproduction of rails and framework of the branch railway over and above the actual cost of maintenance of way and annual repairs specified above, No. 1; 10, estimated sum per mile for renewal and reproduction of moveable stock employed on the said branch over and above the annual repairs specified above; articles 9 and 10 are not annual expenses actually incurred and paid, but the estimated annual sums considered sufficient to form a fund for the complete renewal and reproduction when needed of the rails and timber from work, and also of the engines and carriages called in the above list of deductions "moveable stock." The appellants do not now specifically appropriate any part of their revenue to form a distinct fund for either of these purposes, but they retain out of it enough to form a reserved fund for all contingencies of whatever kind. Since the opening of the railway a large sum was applied to the renewal of a part of the railway which had been worn out, and the expense was paid out of the capital and not of revenue. It wore out in a few years because lighter materials had been used than have since been employed throughout the railway. Since that time all needful repairs and renewals of the rails, timber, and frame work have been defrayed year by year as they occurred from the revenue. With respect to the moveable stock a large fund was originally appropriated to the renewal, but such fund has been since considered unnecessary, and the expenses of reparation and renewal have been paid out of the annual revenue, and this has hitherto been found sufficient to keep it in an efficient state, but not to maintain it in a state to sell for its cost price if valued. The appellants claimed further to deduct an annual sum for interest on capital and tenants' profit, including those of trade, being a per centage on the capital actually and necessarily invested in the moveable stock employed in the branch railway. This also they proposed to distribute like other deductions by a mileage proportion over the branch. Assuming the above deductions to be properly allowable in point of law, they greatly exceed the receipts, and the branch railway is not in itself profitable, nor would the occupation of it alone by any tenant be a beneficial one, and the same would be the result even if articles 9 and 10 be disallowed and omitted, but it is profitable to the company, as proprietors of the entire Great Western Railway, by reason of the increased traffic brought on the main line, and the increased receipts upon that line between London and the western termini of it. If the Court shall be of opinion that the principle upon which the assessment has been made and apportioned by the respondents is correct, and that all proper deductions and allowances have been made in computing the same, then we find that the said assessment should stand at its present amount, that is to say, at the rateable value of 300*l.* per mile, exclusive of stations. If the Court shall be of opinion that besides the deductions allowed by the respondents in calculating the rateable value of the said railway, the company are entitled to any further deductions in respect of any estimated sum for the renewal and reproduction of permanent way, being No. 9 in the last-mentioned list of deductions, or to any per centage on the estimated amount of capital invested in moveable stock employed in the company's trade, form a fund for the renewal and reproduction of such stock in addition to their actual annual expenditure in its repair and maintenance, being No. 10 in the last-mentioned list, then the assessment ought to be reduced accordingly from the rateable value of 300*l.* per mile to that of 254*l.* per mile. If the Court shall be of opinion that the principle on which the said assessment is made is not correct, but that the principle on which the appellants contend that the rate ought to have been made is correct, subject to the same question as to the two renewal funds as above, then we find, award, and direct that the rateable value of the railway be taken at 30*l.* per mile, exclusive of stations, and the assessment be reduced accordingly, and that the difference between the same and the present rate be refunded, and in the meantime, and subject to the opinion of the Court upon the above state of facts, we direct that the present rate stand.

May 31 and June 4.—*Whateley, Q. C., Peacock, Q. C. and Broe, for the parish of Tilehurst.*

*Sir P. Kelly, Q. C. and Smirke, contra.*

Lord CAMPBELL, C. J.—We do not propose to give judgment in this case during the present Term, and before the next Term we hope that Parliament will have interposed so as to relieve us from the necessity of giving judgment at all. The 6 & 7 Wm. 4,

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c. 96, enacts that a rate shall be assessed "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free from all usual tenants' rates and taxes, and tithe commutation rentcharge." This statutory rule was easily applicable to all the property which the Legislature had in its contemplation when the rule was stated, but it is not applicable to a railway extending many miles through different parishes and counties, having a trunk line and various branches, the traffic through which varies in all its parts, and the expenses are different in different parts, and in some parts bear no relative proportion to the earnings. We are required to determine how a rate should be assessed in a parish without any station existing in that parish, the traffic being small, the outgoings large, large from the nature of the place passed through, and we are directed to consider the rent for which this section of the railway might reasonably be expected to let, "free from the usual tenants' rates and taxes, and to the commutation rentcharge," and the only guide for us as to the deductions we have to make is the annual cost of repairs and insurance, without any intimation as to the traffic or of the costs of the means of carrying on the expense of tunnels and embankments, and standing engines employed exclusively within the parish, or of locomotive engines on the whole line, or any knowledge of the general expenses of the directors, stations, and police, and the management of the whole concern. If we settle the rate without information on all these considerations, we shall do so as legislators rather than as judges, and we shall be making rather than expounding the law. At all events, we must proceed on the absurd supposition, that we can tell the rental at which a person would take on rent this portion of the railway passing through a single parish, and while we have not the means to make such deductions as would enable us at all to know how it would be likely to let to a tenant from year to year. Without some alterations of the law, we foresee that if we should give judgment (which we may be obliged to do according to the best of our ability), it will occasion much trouble, litigation, and expense, and must still raise questions between parishes and railway companies. In this case itself three appeals have been consolidated, which might all have been argued separately; and we feel that there is no decision we could now pronounce that would put an end to possible litigation and endless disputes. We do not say what will be done by Parliament, but we make no doubt that a rule might be laid down as to the rating of this novel and important species of property, both simple and equitable, which would prevent all litigation on the subject. Under these circumstances we shall reserve our judgment for the present.

*Judgment postponed.*

Tuesday, June 10.

MASSEY v. GOODALL.

*Landlord and tenant—Agreement not to sell straw produced on the farm—Breach.*

*In a declaration by a landlord for breach of a contract by a tenant not to sell straw produced on the farm, it is not necessary to aver that the breach occurred during the continuance of the tenancy; Erie, J. dissents.*

*Assumpsit, on a promise to pay penalties upon the breach of an agreement. The declaration alleged that the defendant became tenant to the plaintiff of a farm from year to year, upon the following amongst other stipulations, viz. that the defendant should not sell hay, straw, &c. grown or produced on the farm during the tenancy, without the written licence and consent of the plaintiff. Breach, that the defendant did sell hay, straw, &c. grown on the farm during the last year of the tenancy, without the written licence of the plaintiff.*

*Plea.*—That the defendant did not, during the continuance of the tenancy, sell, &c.

*Demurrer thereto.*

*Bayley* appeared in support of the demurrer; but the Court called upon

*Cooling, contra.*—The plea is good, and the declaration bad. The declaration ought to have averred that the breach of agreement was during the tenancy. That is not expressed in the contract, but it is implied by law. This is an agreement on an executed consideration; and as no request is averred in the declaration, the only effectual promise must be that implied by law; and the defendant is only liable to penalties for selling during the term.

Lord CAMPBELL, C. J.—I think that the plaintiff is entitled to our judgment. The declaration sets out a positive unqualified undertaking not to sell; and I think that the breach is well assigned, because it is within both the terms and the meaning of that undertaking. If the undertaking was limited to the continuance of the tenancy, then the tenant might hoard up the produce of the farm during the term, and the day after it expired, sell it all, without being guilty of any breach of his agreement.

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PATTERSON, J. concurred.

**RALE, J.**—I put a different construction upon this contract. It seems to me that it is entered into upon consideration of the relationship of landlord and tenant, and that that consideration pervades all its stipulations. Is the tenant bound to leave all his produce to the landlord gratis? On the contrary, I think that as soon as the term expires, unless there is some arrangement about it, the produce becomes absolutely his own, and he may sell or dispose of it as he pleases. The other construction would subject the tenant to a penalty for selling the produce, although the tenancy had been determined by his purchasing the farm in fee-simple, and becoming the absolute owner of the land as well as the produce.

Judgment for the plaintiff.

Wednesday, June 11.

REG. v. HASLAM.

**Poor-rate—Chemical works—Value increased by use of leaden chambers.**

*The value of certain buildings used as chemical works, to let, was increased by the use of certain leaden chambers or large vessels of sheet lead, which rested upon sand, inclosed within foundation walls of strong masonry, and which were encompassed by a wooden framework, supported by the foundation walls. Pipes for conveying gases into and from the chambers connected them with buildings which were part of the freehold; but those pipes could be removed without injury to the freehold; and if sufficient force were used the chambers themselves might be lifted from the soil without displacing any part of the freehold.*

*Held, that the increased value given to the works by the use of these chambers was properly included in the rate.*

The Sessions had on appeal confirmed a poor-rate, by which the occupiers of certain chemical works, land, tenements, erections, and buildings mentioned were assessed in the sum of 227l. subject to be reduced to the sum of 162l. if they ought not to be assessed in respect of the chambers hereinafter mentioned. The said chambers are constructed in manner following:—The said chambers are placed upon the land in the open air, and are not in any way inclosed or covered by any building or erection. The chambers occupy large spaces of ground. Their respective lengths vary from forty feet to sixty feet; each of them is thirteen feet high, and the average width of each is about thirteen feet. Each of such chambers is a very large vessel of sheet lead weighing several tons, and is composed of two parts; the lower part is a dish about twelve inches deep, in which the acid is deposited, and the upper part shuts down on the lower and receives the vapour. The mode of erecting such chambers is as follows: in some instances the soil has been excavated for the purpose of erecting foundation-walls of strong masonry; in others these walls stand upon the natural level of the ground. The walls are built in the shape of an oblong, and the inside is filled with sand and other materials to a level with the top of the walls. The chamber rests on the sand; a sill, composed of four strong beams of wood, runs along the top of the wall, on which is fixed a frame-work of wood, which encompasses the chamber, and is used for its support. The chamber is attached to the frame-work by leaden rivets. In some of the more ancient chambers the sill is placed on mortar, which has been spread on the top of the walls for the purpose of preserving the level; but in some more modern instances the sill rests on the top of the walls without the assistance or aid of mortar, or any other such substance. At each end of the chamber there is a pipe for the purpose of conveying the gases and vapours into and out of the chambers. Both pipes are at their extremities fixed into buildings, which are part of the freehold; but the pipe which conveys the gas and vapour into the chamber enters the chamber, in the following manner:—A circular hole is cut into the chamber, through which the pipe is inserted, and the lead of the chamber is beaten round the pipe. The whole is rendered vapour-tight by means of a luting of white lead and other materials. The pipe, which conveys the vapour from the chamber, is fastened to the chamber in the same manner, and consists of several short pieces of pipe, which slide into each other like the joints of a telescope, and are rendered vapour-tight by means of luting. It is necessary, in the process of manufacture, to convey steam into the chamber, and it is conveyed from the boiler by means of a pipe, which is attached to the frame-work before mentioned, by leaden rivets. The boiler is affixed to the freehold, and the pipe at that extremity is affixed to the boiler. That pipe may be removed at pleasure, without injury to the freehold, by unfastening the rivets which attach it to framework, and the pipes conveying the gases into and from the chambers may also be removed at pleasure, and without injuring the freehold, by withdrawing the pieces of which the pipes are composed. When these pipes are so withdrawn, the chamber

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rests on the ground by its mere weight, and if sufficient force were used, might be lifted from the soil, without displacing any part of the freehold. The chambers are attached in manner before mentioned to the freehold, but are not affixed thereto. It was proved that personal property was not rated in the said township to the relief of the poor. Upon the above facts the Court found that the said chambers were attached in manner before mentioned to the freehold, but were not affixed thereto, and the Court confirmed the rate, subject to the opinion of the Court of Q. B. The questions for the opinion of the Court are, first, whether on the before-mentioned statement of the building and annexation, the said chambers are affixed to the freehold? Secondly, whether, if the said chambers are not, under said circumstances of building and annexation, affixed to the freehold, the land and buildings are liable to be rated at a greater amount, by reason of the use of those chambers on the land? If the Court shall be of opinion in the affirmative of either of the above questions, then the rate is to be confirmed; but if the Court shall be of a contrary opinion on both of the above questions, then the rateable value is to be reduced as above.

Saturday, May 31.—Hall, in support of the order of Sessions.

Cowling, contra.

Cases cited:—*R. v. St. Nicholas, Gloucester*, 1 T. R. 723, n.; *R. v. Hogg*, 1 T. R. 721; *R. v. Birmingham and Staffordshire Gas Company*, 6 Ad. & E. 634; *R. v. Guest*, 7 Ad. & Ell. 951; *R. v. Southampton Dock Company*, 20 L. J. M. C. 155. *Cur. adv. vult.*

## JUDGMENT.

PATTERSON, J. now delivered the judgment of the Court.—This case was argued on Saturday last in the absence of my lord, before myself, my brother Coleridge and my brother Erie. We are all of opinion that it is unnecessary in this case to determine whether the chambers erected in the appellant's premises are or are not annexed to the freehold, which is rather a question of fact for the Court of Sessions to find than for us to decide, because we are of opinion, according to the principle laid down in the various cases on this subject, that the rateable value is undoubtedly increased by the use of those chambers. In the case of *Rex v. The Proprietors of the Liverpool Exchange*, 1 Ad. & E. 474, the Court, after citing various previous decisions, said, these cases establish the principle that the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into account in estimating its rateable value, wherever those advantages would enable the owner of the building to let it at a higher rent than it would otherwise fetch. Again, in *Rex v. Guest*, 7 Ad. & E. 956, the same Court held the principle to be that real property ought to be rated according to its mercantile value as combined with the machinery employed in it, without considering whether the machinery is real or personal property, so as to be liable to distress or seizure under a *fi. fa.* and whether it would descend to the heirs or executors, or whether, at the expiration of the lease, to the landlord or the tenant; and the Court referred to the *Reg. v. The Birmingham and Stafford Gas Light Company*, 6 Ad. & E. 634, where the same principle was laid down. All these cases were before the Court, and recognised as well established in the case of *Reg. v. The Southampton Docks Company*, 4 New Sessions Cases, 469. Indeed, in the argument, in the present case, the attempt was rather to shew that the chambers did not come within the principle so laid down, than to attack the principle itself; and that the chambers were rather to be considered as the moveable utensils and furniture in a dwelling-house than as fixtures. It is plain, upon the facts stated, that they are not like fixed machinery attached to the buildings for the purpose of being used as such, but are capable of being removed, without injury to the buildings; still they are in some sense attached to the land; nor can it be denied that, if the appellant can underlet the premises, they would fetch a higher rent than could be obtained if the chambers were removed. We are therefore of opinion that the order of sessions must be confirmed.

Order confirmed.

## HOLLOWAY v. THE QUEEN.

**Indictment—Escape—Gaoler—Caption—Stat. 4 Geo. 4, c. 64—Stat. 5 & 6 Vict. c. 110—Stat. 11 & 12 Vict. c. 78.**

*An indictment charged that R. T. being a prisoner in a certain gaol, was endeavouring to effect his escape, and in order thereto had procured a certain key to be made with intent to effect his escape by means of the said key, and had made certain overtures to H. H. a turnkey, to induce him to assist, &c. and that H. H. feloniously procured and received and took into his custody and possession the said key then being fitted for opening the locks in the gaol, &c. with intent to enable R. T. to escape from the gaol, and so that the*

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*said H. H. feloniously did aid and abet in attempting to escape from the said gaol. Held, a good indictment against H. H. upon 4 Geo. 4, c. 64, s. 43, for the substantive part of "aiding and assisting a prisoner in attempting to escape from prison."*

*Semble, that in an indictment for the substantive felony last mentioned it is unnecessary to set out the means by which the person charged aided or assisted the prisoner in attempting to escape. Since the passing of stat. 5 & 6 Vict. c. 114, the city of Coventry is incorporated with the county of Warwick, and an indictment for an offence within the city is well founded by a jury returned generally from the body of the county. Where sentence has been passed generally by an inferior tribunal upon an indictment containing good and bad counts, upon a writ of error brought, the Court above has, by stat. 11 & 12 Vict. c. 78, s. 5, power to arrest its judgment upon the bad counts, and pass sentence on the good counts.*

This was a writ of error upon an indictment one of the turnkeys of the gaol of Coventry, assisting a prisoner in his attempt to escape from the gaol, found and tried at the Quarter Sessions of the county of Warwick, held at Coventry. The name of the indictment was in the following manner:—"Warwickshire, to wit.—At the General Quarter Sessions of the Peace of our lady the Queen, held at Warwick, in and for the said county, on the 1st day of the first week after the 29th of December, 1851, to say, on the 30th day of December, in the 14th year of the reign of our sovereign lady Victoria, and from thence continued by adjournment to be holden at the city of Coventry, in and for the county of Warwick, on Wednesday, the 1st of January, A.D. 1851, before Wm. Dickson, &c. &c. upon the oath of, &c. &c. good and lawful men of the county aforesaid, then and there met and charged to inquire for our said lady the Queen, for the body of the said county, it is presented in a manner and form following, that is to say:—The above named defendant, the said Robin Thompson, being a prisoner in the said gaol, to wit, the said gaol of Coventry, in the county of Warwick, on the 1st of January, A.D. 1851, was endeavouring to procure and effect his escape, otherwise than by due course of law, and in order thereto had procured a certain key, being the key heretofore mentioned, to be made and constructed for the use of him the said Robin Thompson, with intent to effect the said escape of the said R. T. by means of the said key, and also had made and caused to be made to the said Henry Holloway, then and there being a turnkey and having authority in the said gaol, certain overtures and promises whereby to induce the said H. H. to aid and assist the said R. T. to escape from the said gaol, and so in manner aforesaid, as endeavouring to procure and effect his escape from the said gaol; and the jurors aforesaid present, that the said H. H. not regarding his duty in that behalf, then and there, to wit, on the day and year aforesaid, and whilst R. T. was so prisoner as aforesaid, with force and arms feloniously and designly did procure and receive and take into the custody and possession of him the said H. H. the said key, then and there being adapted for and fitted to and capable of opening divers locks in the said gaol, whereby the said R. T. was secured in the said gaol with intent to enable the said R. T. to escape from the said gaol; and so the jurors aforesaid, &c. &c. that the said H. H. with force and arms, in the said division of the said county, in manner and form in this count mentioned, feloniously did aid and assist the said R. T. in attempting to escape from the said gaol against the form of the statute, &c. and against the peace, &c."

The prisoner was found guilty generally, and sentence was passed upon him generally. This writ of error was brought upon the judgment so pronounced.

*Flood, for the plaintiff, in error.*—1. This indictment cannot be sustained either under stat. 16 Geo. 2, c. 13, or stat. 4 Geo. 4, c. 64. Stat. 4 Geo. 4, c. 64, s. 43 enacts, "that if any person shall convey, or cause to be conveyed into any prison, any mask, vest, or other disguise, or any instrument, or arms, proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there for the use of any such prisoner, without the consent or privy of the keeper of such prison, every such person shall be deemed to have delivered such mask, or disguise, instrument, or arms, with intent to aid or assist such prisoner to escape or attempt to escape; and if any person shall by any means whatsoever, aid and assist any prisoner to escape, or in attempting to escape from any prison."

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every person so offending, whether an escape actually made or not, shall be guilty of felony," &c. The two parts of the section must be read together, and the mode of assisting an attempt to escape, which is made to be felonious, is the delivery to a prisoner or to another person for a use of an instrument of escape. Here the person charged had delivered the supposed instrument of escape to no one. But in any interpretation of the act, the indictment is bad for not sufficiently shewing that Thompson attempted to escape, or that his attempt was assisted by Holloway. None of the acts stated shew more than an intention to escape existing in the mind of Thompson; and an intention is widely different from an attempt. One man cannot assist another in his intentions, and therefore Holloway could not assist Thompson in "meditating or projecting" his escape. The charge of having made "overtures and promises" is too vague to be treated as a substantive charge, and the procuring a key to be made, of which key possession was never obtained, does not amount to an attempt to escape by using the key. (2 Hawk. P. C. c. 19.) Again, supposing the indictment to shew an attempt to escape by Thompson, it does not shew any means by which Holloway assisted that attempt. It shews that Holloway did an unlawful and improper thing, and intended to enable Thompson to escape, but it does not shew any connection between the actions of the two persons, or even that Holloway was aware of what Thompson had done or was doing. Separate offences by each were disclosed, and not a common design of both. Further, if any offence has been committed by the plaintiff in error, it is not a substantive felony, but the offence of being accessory to an attempt by another to commit a felony. Such an accessory offence is a mere misdemeanour, and should have been so charged. 3. Another objection is the want of an allegation of place to the several matters stated in the indictment. It does not appear sufficiently that they were committed in the county of Warwick. Lord CAMPBELL, C.J.—How could the escape be from the goal in any place but that in which the goal itself was? The words "aid and assist" do not necessarily imply actual presence. *O'Connell v. Reg.* 11 Clk. & F. 155; *Reg. v. O'Connor*, 5 Q.B. 5; *Tilley's case*, 2 Leach C. 266. 4. Another objection is to the caption of the indictment. It appears that this indictment was found by a grand jury from the county generally; whereas the jury should have come from the Coventry division of the county of Warwick. Before stat. 5 & 6 Vict. c. 110, Coventry was a county of itself. Since that statute Coventry is part of the county of Warwick. But the true construction of ss. 7 & 9 of the statute, which require the Quarter Sessions and the Assizes to be holden separately at Coventry, for the city of Coventry and such other parts of the county of Warwick as shall be included in certain orders made for that purpose, is, that the Coventry division of the county is to be a separate division, with a separate jurisdiction attached to it. He cited also stat. 5 & 6 Vict. c. 110, ss. 1, 2. [There are other objections to the other counts of the indictment, but the sentence has been passed generally.] Lord CAMPBELL, C.J.—If there be one good count, can we not either pronounce judgment upon that, or remit the record to the Quarter Sessions.] It may be doubted how far stat. 11 & 12 Vict. c. 78, s. 5, applies to any cases except where the simple act of amendment is to increase or diminish the punishment awarded upon an indictment, all the parts of which are good.

*Mellor*, for the defendant in error, was not called upon.

Lord CAMPBELL, C.J.—On the question last discussed, the construction to be put upon stat. 11 & 12 Vict. c. 78, s. 5, no doubt can now be entertained that if one count in an indictment be good, though all the others be bad, we should be bound either to pronounce judgment ourselves upon the good count, or to remit the record to the Court of Quarter Sessions, in order that that Court might pronounce the proper judgment. At common law, it was held in *Bourne v. The King*, 7 A. & E. 58, that this Court could not pronounce judgment upon a good count in an indictment, if the Court below had erroneously given a wrong judgment generally. I was Attorney-General when that case was decided, and a writ of error would have been brought upon the judgment of this Court, if the discharge of the prisoner had not prevented that step from being taken. However, we have now a positive enactment of the Legislature, "that whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." Now upon an indictment with good and bad counts, after a verdict upon the whole indictment for the Crown, the proper judgment for the Court to pronounce is to arrest the

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judgment upon the bad counts and pass sentence upon the good counts. If, however, the Court below should pass sentence generally, the Superior Court is now relieved from the difficulty in which it formerly was, and may now arrest the judgment upon the bad counts and pass sentence upon the good, pronouncing the proper judgment. It has not indeed been shewn that any of these counts are bad, for having heard all that can be said against that which is considered the most vulnerable, viz. the second, we do not think it necessary to hear the argument upon those against which less objection is taken. The second count is framed upon stat. 4 Geo. 4, c. 64, s. 43, which enacts "that if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape, from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony." I apprehend that the means by which the assistance is given need not be set out at all, for the prisoner is equally guilty, whatever the means employed, and he cannot assist a prisoner to escape except by some means. The case is different with regard to indictments for obtaining goods by false pretences. In such cases, that which is relied upon as the mode by which the goods were obtained must be set out, that the Court may see whether it is a false pretence within the meaning of the statute. The second count here does set out with sufficient particularity the means employed, and by the allegation that certain acts were done with a particular intent, shews the person indicted very clearly what he had to answer. With regard to another objection, we must consider that this is not an indictment framed at common law against an accessory, but upon the special clause in this Act of Parliament under which it is made a substantive felony to do certain things, which, but for the Act of Parliament, would partake of an accessory character. With regard to the caption of the indictment, that appears to me to be also perfectly regular. By the stat. 5 & 6 Vict. c. 110, Coventry is now annexed to the county of Warwick; and Sessions held at Coventry are in the same situation as Sessions held in other counties by adjournment at two or three different places, in which case the petty jury always comes from the body of the county.

PATTESON, J.—I am of the same opinion. The objection upon the ground of want of jurisdiction is disposed of by the statute, for since the passing of stat. 5 & 6 Vict. c. 110, Coventry is to be taken to be part of the county of Warwick, and the jurors who found this indictment are described as being "good and lawful men of the county." This is an indictment upon stat. 4 Geo. 4, c. 64, and the earlier statute, 16 Geo. 2, c. 31, is wholly immaterial. Then as the statute makes it penal to "assist any prisoner in attempting to escape by any means whatever," it would seem idle and useless to set out the means employed.

COLERIDGE, J.—It is quite clear that if there be one good count we ought to pass sentence upon that count, and the count upon which we have heard the argument seems to me to be good. The Act was intended to punish any assistance given to a prisoner in an attempt to escape. An attempt is an intention carried out into some overt act. Surely the procurement of a key by Thompson was, in this sense, an attempt to escape.

ERLE, J. concurred. Judgment affirmed.

Saturday, June 14.

REG. n. JUSTICES OF WARWICKSHIRE.  
*Paving and Lighting Act—Construction—Distance—*  
*"from house to house."*

*By a local paving Act the owners of houses were to pay the expense of flagging the footway adjoining their premises, unless there was a greater distance than thirty yards "from house to house."*

*Held, that the word "house" included not merely that which was inhabited as a dwelling-house, but such buildings as a coach-house and stable occupied therewith, and forming part of the same premises.*

A rule had been obtained calling upon certain justices of Warwickshire to shew cause why they should not issue their warrant to levy upon Mr. Woodhouse, the owner of a house and premises at Leamington, the sum expended in flagging the footway adjoining his premises. The local Act of Parliament imposed that burden upon the owners where the distance "from house to house" was more than thirty yards; and the distance from the house of Mr. Woodhouse to that of his next neighbour was more than thirty yards, if the measurement was made from that part of his premises which was inhabited as a dwelling-house, but not if the word *house* included the coach-house and stable adjoining and occupied therewith, and the measurement was made from them.

*M. Smith* shewed cause, contending that the word *house* must receive the narrowest construction; and could not be held to include stables or out-houses, though forming part of the same premises.

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*Hayes*, contra, was not called upon.  
Lord CAMPBELL, C.J.—This rule must be made absolute, because we have no doubt that the coach-house and stable must be considered as part of the house; and as that brings it within the thirty yards, we need not consider whether the garden ought also to be considered as part of the house.

PATTESON, COLERIDGE, and ERLE, JJ. concurred.  
Rule absolute.

Thursday, June 19.

APPEALS FROM THE COUNTY COURTS.

*JONES v. ADAMS*.—This was an appeal from the Plymouth County Court. *Greenwood* for the respondent. *Collier* for the appellant. New trial ordered.

*BRIDGES v. HAWKSWORTH*.—Appeal from the Westminster County Court. *Gray* for the appellant. *Hale* for the respondent. Cur. adv. vult.

COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Friday, May 30.

DOE dem. HOPKINSON and OTHERS v. FERRAND, MOSS and ANOTHER v. FERRAND.

*Covenant, Construction of—Tenant for life—*  
*Lease—Waste.*

*A tenant for life, without impeachment of waste, with power to lease for twenty-one years, without taking fine, premium, or foregift, and so that none of the lessees to whom any such lease shall be made be by any clause or words therein contained, authorised to commit waste, or exempted from punishment for committing waste, allotted a portion of the demised premises to poor persons, who dug up ancient pasture, and converted it into gardens. She then leased the premises for twenty-one years, reserving a yearly rent, payable half-yearly, the first payment to be made on the 1st January then next, which was only three weeks after the date of the lease, and the lease contained a covenant that the lessee should not at any time during the term convert into tillage any part of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the lessor.*

*Held, that the reservation of rent in this manner did not amount to a fine, premium, or foregift, and that the exception in the covenant respecting waste, did not authorise the tenant to commit waste, or exempt him from punishment for so doing; but implied merely, that if the tenant for life, being punishable for waste, might convert pasture into garden allotments during her life, the tenant for years might do so during her life, or the continuance of his lease, but not otherwise. Consequently, that the lease was not void as being in violation of the leasing power.*

Ejectment. At the trial before Cresswell, J. at the summer assizes for York, in 1848, a verdict was taken by consent for the lessors of the plaintiff, subject to a special case, in which the following facts were stated:—The lessors of the plaintiff in the first demise were devisees, in trust, under the will of Walter Ferrand, of Harden Grange, near Bingley, in Yorkshire; and the lessors of the plaintiff in the second demise were the surviving trustees appointed by a deed executed in January, 1829, in contemplation of a marriage between the said Walter Ferrand and a Miss Margaret Moss. The defendant was William Busfield Ferrand, esq. of Harden Grange, and formerly M.P. for Knaresborough. Mr. Walter Ferrand was, at the time of the execution of the deed above mentioned, absolutely possessed of an estate in fee-simple, in possession of the premises in question, consisting of a mansion-house, pleasure-grounds, and lands, called the Myrtle-grove Estate, and by that deed he conveyed the same to Edward Ferrand, Henry Moss, and others, to his own use, until the marriage, and after the marriage, to the use of himself and assigns for life, without impeachment of waste, and after his death to the use of his intended wife and her assigns for life, without impeachment of waste, and after the death of the longer liver of them, to certain uses for the benefit of their issue, and, in default of issue, upon trust, that the trustees should, in case his said intended wife should so direct or appoint, raise by sale or mortgage of the estate a sum not exceeding 10,000*l.* and pay the same as she should by will appoint; but with this proviso, that it should be lawful for the said Walter Ferrand in his life, or for his intended wife after his death, or for the trustees after the death of both of them, to lease the premises for any term or terms not exceeding twenty-one years, "so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with and be incident to the immediate reversion or remainder of the premises so to be leased, that can or may be reasonably had or gotten for the same without taking any fine, premium, or foregift for the making thereof, and so that in every such lease there be contained a condi-

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tion of re-entry on the non-payment of the rent thereby reserved by the space of twenty-one days after the same shall become due, and so that none of the lessees to whom any such lease shall be made, be, by any clause or words therein contained, authorised to commit waste, or exempted from punishment for committing waste, anything herein contained to the contrary thereof notwithstanding." The contemplated marriage was duly solemnised, and Mr. Walter Ferrand died on the 20th of September, 1835, having previously by will devised the premises before mentioned and all the rest of his estate to Mr. Hopkinson and another upon trust, to permit his wife and her assigns to take the rents and profits for her life, and after her death to convey the estates to his children and other persons, in manner therein mentioned. At the time of the execution of the deed before mentioned almost the whole of the land comprised in it was ancient pasture land. After Mr. Walter Ferrand's death, his widow occupied and received the rents and profits of the estate as directed by the will, the executors not interfering with the management; and about 1844 she converted at various times a great portion of the land comprised in the deed into garden allotments for poor persons, who dug up the ancient pasture and turned it into vegetable gardens; and by an indenture made in December, 1845, she leased the premises before described to the present defendant, "to hold the same from the 1st of July then last past for and during and unto the full end and term of twenty-one years, at and under the yearly rent of 347l. payable half-yearly, on the 1st day of January and the 1st day of July, the first payment to be made on the first day of January then next, clear of all deductions except property or income tax;" but with the following covenant by the defendant, that he "shall not nor will at any time or times during the said term, plough, break up, or convert into tillage any part of the pasture or meadow land hereby demised, except for the purpose of carrying out the allotment system introduced by the said Margaret Ferrand." Mrs. Ferrand died in April, 1846, bequeathing all the property she had power to dispose of to trustees in favour of the defendant and his children. About three months afterwards Mr. Turner, the co-trustee under the will of Mr. Walter Ferrand, wrote to the defendant, apprising him that the lease to him was void, on the ground that it authorised him to commit waste, and requested him to surrender it; but the defendant refused to do so, upon which proceedings were instituted against him in Chancery, and the present action was directed. The questions for the Court, therefore, upon the special case were—first, whether the circumstance of the first half-year's rent being made payable "on the 1st of January then next" (which was within a month after the execution of the lease), amounted to the taking of a fine or premium by way of foregift, so as to render the lease a bad execution of the power of leasing; secondly, whether Mrs. Ferrand had not improperly exercised her power of leasing by authorising the defendant to commit waste by breaking up ancient meadow and pasture land; and thirdly, whether the receipt of rent had confirmed the lease and precluded the lessors of the plaintiff from recovery in this ejectment.

**Tomlinson** (Henderson with him) for lessor of plaintiff.—The lease is an invalid execution of the power. It is also insensible, and either binds the remainder-man or is wholly void. The reservation of a half-year's rent to become payable a few weeks after the execution of the lease amounts to a fine or foregift, and is clearly an additional advantage to the lessors. (*Doe dem. Harris v. Morse*, 2 Cr. & M. 247; *Doe dem. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 363; *Isherwood v. Oldknow*, 3 M. & S. 382.)

**MAULE, J.**—You will find no case in which the mere payment of rent before the rent-day has been held to be a fine or foregift.

**Tomlinson.**—The main point here is that the lease gives the tenant power to commit, or at least exempts him from punishment for waste.

**CRESSWELL, J.**—Mrs. Ferrand was punishable for waste.

**MAULE, J.**—She might authorise the tenant to commit waste during her life.

**Tomlinson** cited *Cole's* case, 1 B. & C. 196; *Young v. Wollaston*, Hardres, 113; Com. Dig. Plead. 3 A. 14. Suppose an action against the tenant for waste, it would be an answer to it that by the covenant between the parties it was permitted. (*Simmonds v. Norton*, 7 Bing. 640; *Phillips v. Smith*, 14 M. & W. 569; *Doe dem. Martin v. Watts*, 7 T.R. 83; Com. Dig. tit. "Waste.") Again, it is conceded that acceptance of rent is no confirmation of the lease, but it will be contended that a tenancy from year to year was created by it. This, however, was clearly not the intention of the parties. As to demand of possession, the defendant had no rightful possession, therefore it was not necessary.

**Unkank** (*Crompton* with him) for the defendants.—The first point has been disposed of by the Court.

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As to the second point it was not necessary to take a covenant against waste; it is sufficient if the lease is within the terms of the power. By the Statute of Marlbridge, 52 Hen. 3. c. 23, it is provided that "also fermors, during their terms, shall not make waste, sale, nor exile of house, wood, and men, nor of any thing belonging to the tenements that they have to farm, without special license had by writing of covenant making mention that they may do it," &c. This lease gives no special license to commit waste. The Statute of Gloucester, 6 Edw. 1. c. 5, describing the several tenants against whom an action of waste should be maintainable was repealed by 3 & 4 Wm. 4. c. 27, but under the Statute of Marlbridge the tenant in this case could still be punishable for waste. (2 Wms. Saund. 251—8.) An attempt is made to imply a covenant by the lessor to allow waste, but the lease recites the leasing power, and that cannot be implied which is not expressed against the recited intention of the parties. (*Doe dem. Clark*, 2 Q. B. 739; *Hayward v. Hassell*, 6 Ad. & E. 263.) The following are cases of implied agreements:—*Aspden v. Austen*, 5 Q. B. 671; *Dunn v. Sayles*, Id. 685; *Wood v. Copper Miners' Company*, 7 C. B. 906; *Duke of St. Albans v. Ellis*, 16 East, 352; *Rowe v. Smart*, 15 M. & W. 160.

**JERVIS, C. J.**—I am of opinion that the verdict in this case should be entered for the defendant. Three points have been made, but in substance there is one point only. It is admitted that the lease is not void by reason of there being in this case any foregift; but it is suggested that the payment of rent after a short period of occupation might be so calculated as to amount to the payment of a fine. Now, where the power requires the rent to be payable half-yearly it is not satisfied by making it payable before the expiration of the half-year; but then another question arises to counteract the violation of the power, viz. whether it is beneficial to the reversioner, and if so, then the lease may be said, in substance, to follow the power, and there is no forfeiture. As to the second point it is said that a power to lease is accompanied with a condition that the tenant shall not commit waste, and it is admitted that ploughing up ancient land is waste, and then it is said here is a licence to plough up ancient meadow land, and therefore the lease is void, because it does not follow the terms of the power. Now, it is not necessary to consider the effect of the statute of Marlbridge. It may be that a licence to commit waste according to the provision in that statute must be a covenant in writing; but the lease here sets out what the power of the lessor is, and says I leave that a qualified power, and I cannot allow you to commit waste. I have legal remedies if waste is committed, but I will have something in addition, for I am anxious to carry out my covenants, and I require you to covenant that you will not plough up ancient meadow or pasture land. Or it may be received in this way. I am punishable for waste; but I will take care that you do not plough up pasture or meadow land, now or at any time, though I will not prevent your ploughing it up for any term for the purpose of allotment. If we are to infer anything in a case of this description, we should be guided by the situation of the parties, and being so, the inference may be this, that as the lease would be good without a covenant against waste, so here there is a covenant against waste, except as to the allotments, as to which the lessor put it out of her power to object during her lifetime, but no longer. It seems to me, therefore, that the lease sufficiently complies with the power, and that it is not void. Our judgment must therefore be for the defendant.

**MAULE, J.**—I also am of the same opinion. The first and third points have been disposed of in the course of the argument. With respect to the second point, whether this lease is void in respect of its containing a provision that the tenant shall not be punishable for waste. The point is more arguable; but on consideration, I think it is clear that the lease is not void for that reason. The lease was granted by a tenant for life who was not punishable for waste; and it was granted, amongst other things in respect of meadow land, the breaking up of any part of which would have amounted to waste. The lease contains a clause which it is contended amounts to a license to break up such meadow land; but the words in the clause are in terms an exception out of the covenant on the part of the lessee, and if we are to regard them strictly, it is clear they have no more operation in enabling the tenant to commit waste than they would have had if the whole covenant, exception and all, had been left out of the lease, the exception being something which may be considered as erasing part of what had been previously written in the covenant. Now, if you erase that, and also the rest of the covenant which has nothing enabling in it, there can be no doubt that the lease would be no violation of the conditions annexed to the power. But it is insisted, in order to make this lease void, the clause having the word "except" &c. must be by construction interpreted as if it had gone on and permitted that to be done which is the subject of the exception. Now, suppose you do imply from

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those words the power to do any thing, the intention must certainly be coupled with what is instantly held to qualify even express words, namely, that which may be lawfully done by the grantor party. If, therefore, any implication is to be made here, it seems to me that it cannot extend beyond this, that the allotment system might be carried out so far as the lessor had power to do or permit it. In all cases of implication you may introduce the restriction, either for the purpose of making the instrument lawful or valid in respect of the power, the person upon whose power the validity of the instrument depends, as if you imply any license in one person to another in any instrument such a direction or order to do a particular class of things it must always be subject to the condition that things to be done under the license shall not be contrary to the general law, or such as would make the instrument void in which it is contained. I introduce that implication, which I think is what we can introduce, the effect will be, that at the time as Mrs. Ferrand can lawfully license the doing of pastu as she does it, but after that she does it not. In fact, she does not in perpetuity all, but if we were sure that she intended to allow it, I do not think we can reasonably & properly attribute to her an intention of giving a power which she clearly had not, and to do that which would be in violation of the condition of the power, and would make an instrument void, what was clearly the intention of the parties must be a void instrument. Construing, therefore, the covenant with the state of things which upon and with the state of the subject of the deed at the time the lease was executed, I think the construction of it is one which excludes any power granted by Mrs. Ferrand to permit this or any species of waste, except so far as it might be held done, without any violation of the conditions of the leasing power.

**CRESSWELL, J.**—I am of the same opinion. I think we may take the meaning of the clause to be this:—I bind you by covenant not to commit waste, but if a lease for twenty-one years permits you to do it, I allow you to do it; if it does not, I do not allow you to do it.

**TALFOURD, J.**—I am entirely of the same opinion. *Postea to the defendant.*

Monday, June 2.

HARE v. FLEAT.

Practice—Payment of money under award—1 & 2 Vict. c. 110, s. 18.

Reference of the cause only by judge's order, but not at Nisi Prius; award in Hilary Term to pay to plaintiff or his attorney on 1st Feb. amount of payment on the 11th March by plaintiff's attorney not expressly authorised by power of attorney. Affidavit by plaintiff's attorney sworn on 15th April, that money, as he believed, then still unpaid. No demand by plaintiff himself or his affidavit by him that money not paid. His affidavit obtained on 29th April for payment of money under 1 & 2 Vict. c. 110, s. 18, and obtained another rule for payment then obtained on same materials on the 10th of May, both rules being in Easter Term.

Held, that this rule was not obtained in error, that the demand was sufficient by the attorney; that the statement of the money being unpaid was sufficiently recent; and that rules for payment of money under an award might be made in a case enable the party to have execution by the 1st of Feb. c. 110.

This was a rule nisi granted on the 10th of Feb. calling upon the defendant to pay to the plaintiff his attorney the several sums of 100l. 1s. and 97l. 16s. pursuant to an award, a rule of court thereon, and the Master's allocatur. The reference was by judge's order after issue joined, but not at Nisi Prius, and "all matters in difference as to cause" were referred; the costs of the case and cause were referred; the costs of the award. The reference to abide the event of the award. The award was made in last Hilary Term, and the arbitrator found for the plaintiff on all the issues, and that the defendant was indebted to the plaintiff 100l. and no more, and he directed the defendant to pay to the plaintiff or to Mr. D. S. his attorney, the said sum of 100l. and 1s. awarded as damages for the detention of the debt at the office of Mr. S. on the 1st of Feb. 1851. The costs were taxed on the 10th of Feb. at 97l. 16s.

On the 11th of March the plaintiff's attorney demanded the above three sums of the defendant, and in his affidavit of demand sworn on the 15th of April he stated that the defendant did not at the time of the demand, nor hath he at any time paid the same, or any part thereof, and he verily believed that the said three sums have not, nor hath any part thereof been paid to the plaintiff, or to any one on account of the plaintiff, and that the same are now main due and unpaid.

A previous rule had been obtained on April 25th calling on the defendant to pay these same sums



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had been abandoned and the present rule substituted.

*Bramwell and J. Thompson* showed cause.—First, this rule was obtained too soon. The 10th of May was two days before the expiration of Easter Term, and the defendant had the whole of Easter Term, during which he might have applied to set aside the award. (See 2 Chit. Arch. 1503; Russell on Arbitrators, 623.) And it is submitted that as the plaintiff could not know until the end of that Term whether the award would not be set aside, he was not in a position to obtain a rule calling on the defendant to pay these sums so as to enable him to sign judgment, under the 1 & 2 Vict. c. 110, s. 18. In *Jones v. Joes*, 15 Jurist, 107, this Court refused to allow the plaintiff to sign judgment and tax his costs, before the time had expired during which the other side could have applied to set aside the award. It has been laid down in *Creswick v. Harrison*, 1 L. M. & P. 724, and *Tutternall v. Parkinson*, 2 Ex. 343, and many other cases, that the same formalities must be complied with in obtaining these rules, as in rules for attachment. And it has been held that, if, at the time of the demand, the party on whom the demand is made has any fair reason for not complying with it, this rule will not be granted. Here the demand was made on the 11th of March, more than a month before Easter Term, until which time the defendant could not possibly apply to the Court to set aside the award. Surely the plaintiff cannot have this rule upon a refusal to pay upon that demand. The question is, was the defendant in contempt for such refusal? If the Court would not grant the plaintiff leave to sign judgment before the end of Easter Term (*Jones v. Joes*), how can it consistently make this rule absolute, which would give the plaintiff the advantage of a judgment. (1 & 2 Vict. c. 110, s. 18.) Secondly, The demand is insufficient. The award is bad as to that part, which directs the defendant to pay to Mr. S., the plaintiff's attorney. The effect of it would be that Mr. S. would be constituted the irrevocable attorney of the plaintiff for the purpose of receiving this money. If the plaintiff were to change his attorney, is the defendant bound to pay Mr. S.? If he were to forbid the defendant to pay this money to Mr. S., could the defendant justify a payment to Mr. S. subsequently? Could the attorney issue execution for these moneys if this rule is granted, which calls on the defendant to pay him the moneys? [MAULE, J.—We may read the award as if it were the attorney of the plaintiff for the time being, that being the probable intention of the arbitrator.] But the arbitrator's powers are derived from the reference, and that gives him no power to order the defendant to pay to the attorney for the time being, as he is not a party to the award; therefore, whatever right the attorney of the plaintiff has to receive this money, must result from the relation of attorney and client, and not from the direction of the arbitrator. If a demand by the attorney is sufficient in this case, it must be so in every case, whether the award directs the party to pay to the attorney or not. But it is laid down in *Tidd's Practice*, 836, upon the authority of Lord Kenyon, and copied into all the subsequent treatises upon the subject, that the demand must be by the party himself, or by his attorney, expressly authorised by letter of attorney for the purpose. Here there is no power of attorney. The case of costs is an exception to this rule (2 Chit. Arch. 1518), because the attorney is in fact entitled to the costs; when received, it is his own money, which he has earned, and no part of which, as the law regards it, goes into the pockets of the client. It has been decided in *Dunn v. West*, 16 Law T. 150, and *Holcroft v. Manley*, 8 Sc. N.C. 473, that an attorney cannot obtain a rule like this on the ground that he has a lien on the sums awarded. Again, there is no affidavit by the plaintiff that the money has not been paid to him, and there is an interval of twenty-five days between the 15th of April, when the affidavit was sworn, and the 10th of May, when this rule was obtained, during which the money may have been obtained. At least the plaintiff is bound to apply on proper materials, and he should have shown that the money was unpaid at a more recent day than the 15th of April. Thirdly, A rule for payment of money under an award cannot be granted under the 1 & 2 Vict. c. 110, s. 18. Very serious doubts have been stated to this effect by the Court of C. P. in *Creswick v. Harrison*, and in other cases. [The Court intimated that this had been so often decided in the other Courts, that they could not think of disturbing what must now be considered a well-established practice.] This point was then abandoned.

*Lush*, in support of the rule.—As to the objection that this rule was obtained too soon. Even if the defendant had had the whole of Easter Term, during which he might apply to set aside the award, that is no ground for discharging the rule. But the cases do not bear out the proposition that he had the whole of Easter Term for that purpose. There is a distinction on this point between a reference of all matters in difference in the cause only, which is the

present case, and a reference of a cause and all matters in difference between the parties. None of the authorities quoted are cases like the present. [MAULE, J.—Here the arbitrator is not put merely in the position of a jury. There has been no verdict, and there is no power to enter a verdict or judgment.] In *Doe v. Amey*, 8 M. & W. 566, a similar rule to this was made absolute before the time for moving to set aside the award had elapsed. [JERVIS, C.J.—There this point was not raised or argued. *Hobdell v. Miller* seems to favour this objection.] The stat. 9 & 10 Wm. 3, c. 15 (an Act for determining differences by arbitration), clearly contemplates the enforcement of an award before motion for a rule to set it aside, but that statute does not apply where an action has been brought. [TALFOURD, J.—In *Freame v. Pinnager*, Cowp. 23, Lord Mansfield seemed to intimate that an attachment would not be granted till after the time for moving to set the award aside.] As to the money not being paid, if it had been since the affidavit was sworn, the defendant might have shewn that in answer, and the Court will recollect that a former rule was granted on the 29th of April, which accounts for no more recent statement of the money being unpaid than that in the affidavit.

JERVIS, C.J.—This rule must be made absolute. The only point on which the Court had any doubt was whether an application for a debtor to pay before the time for setting aside the award had expired, was good. In this case I think that it was, because the award was to pay in February: the breach of duty was after demand, and there being no authority in support of the objection, I see no reason why further time should be given because the defendant might have shewn as cause the badness of the award, on the rule for an order to enforce it. It was supposed that the case of *Jones v. Joes* was an authority against the application, but I think it is not so. *Jones v. Joes* was a reference of the cause and all matters in difference. If it had been a reference of the cause only, judgment could have been had after the expiration of the first four days of Term, because the Master might then have taxed the costs and issued his *allocatur*; but where the reference is of the cause and all matters in difference, then judgment cannot be had until the expiration of the Term, because in such cases the Master's *allocatur* cannot be had previously. That case is governed by the rules of practice in respect of verdicts, but no such rule of practice applies here. The case of *Doe v. Amey*, seems to be the acknowledged practice, and is an express authority. With reference to the other points discussed, whether the payment was to be to the plaintiff or his attorney, the forms of the award to pay to the plaintiff or his attorney, is very convenient, as it saves the necessity for a form of attorney. The demand is by the attorney to pay the plaintiff, and judgment would not operate in the attorney's favour, nor could execution issue in his name.

MAULE, J.—I am of the same opinion. With respect to the point last mentioned, it seems to me that this award pursues the usual and convenient form, and that it would be wrong, in a case like this, to hold that a power of attorney was necessary. The security of the parties does not require it, and the practice, so far as it has been referred to, does not require it either. With respect to the point mainly relied on, whether this rule was obtained too soon, it is a question of some importance, and I think the cases are not irreconcilable. There are some motions made on the subject of awards which are strictly motions in arrest of judgment, and some which are in the nature of motions in arrest of judgment, and there are others which are merely in the nature of writs of error. Now, when a motion is made in arrest of judgment, it must be made in a certain time, as in the case of a trial at Nisi Prius; but, till the time has expired for making the motion, the person who has succeeded at the trial is not entitled to judgment, but has only an inchoate right. It may, therefore, be properly held that no proceeding, as long as it remains subject to such a motion, shall be enforced. The very nature of the expression, "arrest of judgment," describes something which is to take place before the judgment takes place. But with respect to motions like writs of error, you cannot say, until the time for bringing a writ of error has expired, the successful party is not entitled to judgment; for the Courts never entertain the probability of a judgment being reversed. If they did, a party would never be secure of his judgment until the time for appeal had expired, or until it was confirmed, not only by the Ex. Ch. but the House of Lords. I think this explains the case of *Hobdell v. Miller*, and shews why, in cases of motions in arrest of judgment, the costs may not be taxed before the person is certainly entitled to them; but that rule is not applicable where the motion is in the nature of a writ of error to set aside an award, because in that case the party is certainly entitled to the judgment of this Court for his costs, notwithstanding the award may subsequently be set aside by a motion in the nature of a

writ of error. Motions which are made under the statute of William 3, are motions simply in cases where the arbitrators have misconducted themselves, and must be made within a certain time; and I think that where the award is capable of being set aside by motion under the stat. of Wm. 3, or by analogous motions in the nature of a writ of error, and not in arrest of judgment, in such cases there may properly be a motion for an attachment for not performing that which the rule of Court has ordered the party to perform, notwithstanding that the time for quashing the award which that rule of Court ordered them to obey has not elapsed. I think, therefore, this rule was not prematurely moved for, and that it must be made absolute.

CRESSWELL and TALFOURD, JJ. concurred.  
Rule absolute.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENSLY,  
Esqrs. Barristers-at-Law.

Monday, June 2.

MICKLETHWAIT v. WINTER.

*Trover—Inclosure Act—Quarries—Reservation to lord of the manor.*

Certain common and waste lands were inclosed under an Act 33 Geo. 2. The soil and freehold were vested in A. B. as lord of the manor, subject to certain rights of common. The coal and minerals, and unopened stone quarries, &c. &c. belonged also to him as part of the said freehold. The Act provided that certain allotments should be made to the lord for his right "to and in the soil," and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors of lands for digging coals or minerals; and it also provided that if the lord should enter on any of the lands for the purpose of digging, getting, &c. "any coals or other minerals," he should make compensation for damage done, but no mines or minerals were expressly reserved to him:

Held, that he was entitled to the produce of the stone quarries under the said common, paying compensation for damage done in getting the stone.

Held, that stone is a mineral.

*Trover*.—The declaration alleged that the defendant took and converted to his own use certain stones, flagstones, and grindstones, being the property of the plaintiff.

*Pleas*.—Not guilty, and not possessed.

The following case had been stated for the opinion of the Court:—

## CASE.

For many years previous to, and at the time of the passing of the Act of Parliament next hereinafter mentioned, Benjamin Micklethwait was seised in fee of the manor of Ardsley, in the parish of Darfield, in the West Riding of the county of York, and of the commons and waste land or ground within and parcel of the said manor, and was entitled to certain rents, services, rights, royalties, privileges, and jurisdictions incident and belonging to such manor. At the time of the passing of the said Act there was, within and parcel of, the said manor a considerable tract of common, or waste land or ground, called Ardsley Common, the soil and freehold of which were vested in the said Benjamin Micklethwait, as parcel of the said manor, subject to certain rights of common of pasture. The coal and minerals, and unopened stone quarries, stones, earth, and other substances under the surface of the said common, or waste land or ground, also belonging to him as part of the said soil and freehold so vested in him as aforesaid, and he was entitled to win and work the said coal, minerals, and unopened stone quarries, and there were also certain open stone quarries upon the said common, or waste land or ground, which belonged to him as part of the said soil or freehold so vested in him as aforesaid, but which, at the time of the passing of the said Act, were in lease from him to other parties as in the said Act mentioned. By an Act of Parliament passed in the 33rd year of the reign of his Majesty King George II. entitled "An Act for dividing and inclosing the open common in the township of Ardsley and parish of Darfield, in the West Riding of the county of York," after reciting that there then was a certain large common or tract of waste land or ground lying within the township and manor of Ardsley aforesaid; and also reciting that his Grace the Duke of Kingston and several other persons then were freeholders within the said township of Ardsley, and entitled to right of common upon the said common or waste ground; and reciting that it would be for the advantage of the several persons entitled to right of common, if the said common or waste ground was inclosed, and specific parts and shares thereof allotted to them according to their respective properties, rights, and interests therein, but that the same could not be effectually done without the aid of Parliament. It was (amongst other

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things) enacted that the commissioners appointed for carrying the said Act into execution or any three or more of them (after setting out and allotting so much of the said common grounds as should be equal to one full tenth part of the average value of the said common grounds in lieu of all tithes arising out of the said grounds intended to be inclosed as aforesaid) should set out, assign, allot, and appoint unto and for the said B. Micklethwait, his heirs and assigns (over and above, and exclusive of, such share or allotment, as should, in pursuance of that Act, be allotted to him in lieu of his right of common), such parcel and quantity of the said common as in the judgment of the said commissioners and their successors, or any three or more of them, should appear to them a satisfaction and compensation to the said Benjamin Micklethwait for his right as lord of the manor of Ardsley aforesaid, to and in the soil of the said common or waste lands, and also to, and for, the damage and injury he would sustain by being obliged to make satisfaction as thereinafter mentioned to the proprietors of the lands so intended to be inclosed for the digging for any coals, or minerals, within the said common lands and grounds, and then to divide and set out, ascertain and allot, the residue of the said lands intended to be inclosed unto, between, and amongst the said Benjamin Micklethwait and the rest of the persons interested therein, in proportion to their several and respective interests therein. And it was by the said Act provided that the stone-quarries, the property of the said B. Micklethwait, and demised by him to the Right Hon. William Earl of Stafford, John Uttey, and George Wilkinson should be included in the allotment or allotments to be made as aforesaid to the said B. Micklethwait, or in one of them. And it was thereby further enacted that within the space of six calendar months after the execution of the commissioners' award as therein mentioned, the several parcels of land thereby allotted, should be inclosed, hedged, ditched, or fenced, and that such inclosures, hedges, ditches, and fences should at all times thereafter be repaired and maintained in such manner as the said commissioners, or any three or more of them, should, in such award, order and direct. And it was further enacted that every person entitled to any allotment or allotments to be made as aforesaid should, and was thereby required, to accept such allotment or allotments within the space of three calendar months next after the execution of the said award, and notice thereof given as in the said Act mentioned, and that every person who should refuse or neglect to accept any such allotment within the time before mentioned should be totally excluded from having, or receiving any benefit, or advantage by the said Act of Parliament, and also from any estate, interest, and right of common whatsoever in the lands so intended to be inclosed. And it was thereby further provided and enacted that the said Act should not prejudice the rights of the lord of the said manor, or of any future lord or lords of the said manor, in or to the seignior, royalty, rights, and services incident and belonging to the said manor, but that such lord or lords for the time being, and all persons claiming and to claim under or in trust for him or them, as lord or lords of the said manor, should at all times thereafter hold and enjoy all rents, services, rights, royalties, courts, perquisites, and profit of courts, and all other royalties, privileges, and jurisdictions to the said manor or to the lord or lords thereof belonging, in as full, ample, and beneficial manner to all intents and purposes as he or they might have held and enjoyed the same, in case the said Act had not been made. And it was thereby further provided and enacted that if the lord of the said manor, or any future lord or lords thereof, should enter upon any of the lands and grounds so to be divided and allotted by virtue of that Act for the digging, getting, taking and carrying away any coals or other minerals, he or they should respectively make satisfaction to the respective proprietor or proprietors of such lands, his or their tenant or tenants, for any damage which he or they should or might thereby sustain. The said Act concluded with a saving clause in the words following (that is to say), "saving always to the King's Most Excellent Majesty, his heirs and successors, and to all and every other person and persons, bodies politic or corporate, his, her, and their heirs, successors, executors, and administrators (other than those meant and intended to be barred by this Act), all such estate and interest as they, every, or any of them had and enjoyed of, in, to, or in respect of the said common before the passing of this Act, or could or might have had and enjoyed in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her, or their heirs, executors, administrators, or successors shall have power to disturb any of the allotments to be made in pursuance of this Act, but shall accept the respective allotments which shall be made in lieu of their common rights or other interest which he, she, or they would have been entitled to in case this Act had not been made.

The commissioners appointed by the said Act of

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Parliament in due manner, on the 1st of August, 1763, made their award, and did thereby, amongst other things, award, allot, and assign unto the said B. Micklethwait, to be held in, severally, by him, his heirs, and assigns, a certain parcel of the said common, containing 31a. 2r. 9p. ten acres of which said parcel of land were thereby declared to be allotted to the said B. Micklethwait, as a satisfaction and compensation for his right as lord of the manor of Ardsley aforesaid, to and in the soil of the said commons and waste grounds, and also to and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors of the several allotments on the said common for the digging for any coals or minerals within the said common lands and grounds, and the residue thereof was thereby declared to be part of the allotments made to the said B. Micklethwait, in lieu of his right of common on the said common or waste ground. And the said commissioners did thereby further award, allot, and assign unto the said B. Micklethwait a certain other part of the said common, containing 26a. 0r. 25p. In which said allotment were contained the said stone quarries demised by him as aforesaid, and which were provided by the said Act of Parliament to be included in the allotments to be made to the said B. Micklethwait, or in one of them. The said commissioners in and by the said award also allotted and awarded to R. Crookes, late of Barnesley, in the county of York, surgeon, since deceased, a certain part of the said common or waste ground, now called and known as Crooke's Close, in lieu of certain rights of common to which he was then entitled over the said lands so directed to be inclosed as aforesaid.

The said award, after divers other allotments to various persons, contained a clause or proviso to this effect, viz., that the said lands and grounds hereby allotted, awarded, and assigned, as aforesaid, to the said several persons respectively, should be in lieu and full satisfaction and compensation for their several and respective rights of common, and other rights and properties whatsoever, in, over, or upon the said common or waste ground, and that from and immediately after the said execution of that award, the right of the said B. Micklethwait in and to the soil of the said common, called Ardsley Common, and every part and parcel thereof, which should be taken into the said inclosures, by virtue of the said award, and all the right of common belonging to and claimed by all and every the said owners, proprietors, and occupiers of messuages, cottages, frontsteads, lands, tenements, and other hereditaments within or belonging to the said township of Ardsley, in, over, or upon the said common or waste ground, and every part thereof, should cease, determine, and for ever be extinguished. The said R. Crookes duly accepted pursuant to the said Act the said allotment so made to him as aforesaid, and caused the same to be inclosed, hedged, ditched, and fenced within the space of six calendar months after the execution of the said award, pursuant to the provisions of the said Act; and the said R. Crookes, his heirs, and assigns had ever since the making of the said award, been in the uninterrupted possession, use, occupation, and enjoyment of the said allotment so made to him as aforesaid.

By various devises, descents, conveyances, and assurances, the plaintiff, before the taking of the stone, grindstones, and flagstones hereinafter mentioned, became, and was, and still is the lord of the said manor of Ardsley, and entitled to all such estate and interest in the said manor and the rents, services, rights, royalties, privileges, and jurisdictions, incident and belonging to the said manor and the common and waste thereof, and in the coal and minerals under the same, as the said B. Micklethwait, if living, would have remained and continued entitled to notwithstanding the said Act and award, and the said other matters and things hereinbefore mentioned. In other words, the plaintiff now has such estate and rights as the said B. Micklethwait, if now living, would have been entitled to. In March, 1849, the defendant, claiming title through the said R. Crookes deceased, opened a quarry, before unopened, in the aforesaid allotment, called Crookes' Close, and between that time and the commencement of this action, the defendant dug and raised out of the said quarry under the said allotment, and took and converted to his own use divers large quantities of stone, grindstones, and flagstones of the value of 50l. The plaintiff, as lord of the said manor, claimed the said stone, grindstones, and flagstones, as having been found beneath, and having been, before the passing of the said Act, part of the said common or waste land. The defendant, admitting that the said land from which such stone, grindstones, and flagstones were gotten had been part of the said common or waste land before the passing of the said Act of Parliament, and had been so awarded and allotted to the said R. Crookes, as aforesaid, denied that the said plaintiff was entitled to such stone, grindstones, and flagstones found under the said allotment, as aforesaid.

The question for the opinion of the Court was,

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whether the plaintiff was entitled to the said stone, grindstones, and flagstones, so gotten and raised by the defendant, under the said allotment, to the said R. Crookes, now called and known as Crooke's Close.

*Knowles, Q.C.* (with him *H. Hill*) for the plaintiff.—This case is much like the case of *The Rosse v. Wainman*, 14 M. & W. 859, in 2 Ex. 800. At the time of the Act the Lord had the right of mines, minerals, &c. [MARTIN.] The object of the Act was to give the mine freehold. ALDERSON, B.—There must be some reservation. There is a reservation by implication. *Cowling* (with him *W. R. Cole*), for the defendant was called on.—The question is, whether the property in the minerals is reserved to the lord, or merely a right of digging coals and minerals with compensation for any damage done. In the Act there is no recital of any right of the lord; so that he had some rights, but they are not stated. The object of the Act was to benefit the people by giving a right of common; the rights of the lord were comparatively trivial. The word "soil" means the third section of the Act would include what is on the surface, but every thing below the surface. It seems more nearly resembles that of *Thames v. The Corporation of London*, 2 T. R. 701, than *Lord Rosse's* case. If the minerals would pass to the allottee by the words of sec. 3, which authorised the commissioners to allot, the question is, whether there are any ancient words to alter that. In *Lord Rosse's* case all the mines and minerals were expressly reserved. There ought to be an express exception in the words. (Shep. Touch. 77.) I shall contend that there is any reservation of minerals to the lord, if minerals are not minerals. They are not taken out of the soil but out of quarries. [POLLOCK, C.B.—It is often also obtained by quarrying.] Even a stone to be a mineral, the property in the said minerals is not reserved to the lord, but the right to dig, making compensation. [MARTIN.]—Then you contend that both the lord and the allottee may dig. The lord has only a profit *prendre* reserved to him. [ALDERSON, B.—If the allottee were entitled to the coals and minerals, it would be very unreasonable that the lord should have the right to dig them, paying only for the damage done to the land, and not for the coals or minerals.] First, then, it is contended that stone is not minerals; and, second, that minerals are not reserved, but only a profit *prendre*. [ALDERSON, B.—Coal mines are mentioned in the Poor Laws, all other mines are excluded. The exception does not include a stone quarry, although it includes all other mines.] He referred to the evidence in the judgment in *Lord Rosse's* case, which is wrongly recited in the report; it should be *York Book*, 17 Ed. Hil. Term, fo. 7, pl. 21; there *minere de pierre* and *minere de charbon* are spoken of. [ALDERSON, B.—Yes, that may be read as minerals of stone, minerals of coal, &c.]

POLLOCK, C.B.—We are all of opinion that the plaintiff is entitled to our judgment. The question is, whether the plaintiff is entitled to certain stone &c. in his capacity as lord of the manor. The case was substantially decided by the case of *Lord Rosse v. Wainman*, 14 M. & W. 859. In that case it is true that there were stronger expressions, and perhaps the right of the lord was more clear, for he had distinct rights reserved; that is not expressed here, but I think it is to be inferred. There is here a reservation of taking coals and minerals, which is a reservation by implication. [His lordship read the several clauses of the Act, and commented upon them, and particularly to the 20th clause as follows:—"If the lord of the said manor, or any future lord or lords thereof, shall enter upon any of the land or lands so to be divided and allotted by virtue of this Act for the digging, getting, taking, and carrying away any coals or other minerals, he or they shall respectively make satisfaction to the respective proprietor or proprietors of such lands, his or their tenant or tenants, for any damage which he or they shall or may thereby sustain." This, by way of implication, shows that the lord was to have the coals and minerals. It is found in this case that the right was in him; and it is recited in the Act that he was lord, and entitled to the mines. The question is, what is the effect of this upon the plaintiff? Mr. Cowling contends that the lord has a profit *prendre*—a right to dig; no property in the coals and minerals. That would be a very unreasonable right to reserve against the allottee, and a more reasonable construction that the coals and minerals are reserved to the lord, and compensation to be made for any damage done in getting them. The case of *Lord Rosse* expressly decided that the word "minerals" does include stones. The intention, I think, was, taking the whole case together, to reserve to the lord all the mines and minerals which he previously possessed, which would include the stone he on all such occasions making compensation for the damage done.

ALDERSON, B.—I am of the same opinion. The

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case begins by finding that the lord was entitled to the minerals and stone, and that he had exercised his right by opening a quarry. The 3rd section of the Act, which provides for the making of the several allotments, gives a compensation for the lord's right in the soil of the manor, and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors as thereinafter mentioned. This, coupled with the 19th section, shews, I think, that the rational construction is, that the word *soil* meant exclusive of coals and minerals, and has a similar effect to that expressly contained in Lord Rosse's case. The stone he was previously entitled to. That right is still reserved to him, only he is to make compensation to the allottees for any damage done to the allotments.

PLATT, B.—When the Act of 33 Geo. 2, passed, this common belonged to the lord of the manor, subject to certain rights of pasturage. The rights of the allottees were limited to the surface, the minerals, &c. belonged to the lord. Is there anything, then, in the Act to deprive the lord of such property. One cannot doubt the intention of the Act, it was to give the allottees exclusive rights over small portions instead of general rights over the whole. The word *soil*, in the 3rd section, would pass the mines without the concluding words of that section, but not when taken in connection with those words. How could the lord have to pay compensation if he had no right to dig? It would be very remarkable if he were to pay for the digging but not for the coals or minerals, supposing them to belong to the tenant. And as to the question of stone being a mineral, that it is decided to be in *Lord Rosse's case*.

MARTIN, B.—I am of the same opinion. The stones in question were not stones on the surface, but stones dug out of a quarry. The Act is equivalent to a deed of conveyance to the allottees of the several allotments, reserving to the lord the mines and minerals. Stone dug out of a quarry is a mineral, and mines are quarries or places where anything is dug. All stones not on the surface, but got from the quarries, are minerals, and the property of the lord.

## Judgment for the plaintiff.

O'BRIEN v. LORD KENYON.

*Issue out of Chancery—Deed of assignment—Usury—Life insurance.*

J. O., being indebted, assigned over all his real estates to trustees, in trust, as agreed with the creditors: 1st, to pay the expenses of the trust; 2nd, the annuities charged on the estate; 3rd, to divide the rents into two shares, proportioned to the amount of the debts specified in two schedules, the first to be divided equally between the creditors in the first schedule, and the second in a similar way. The trustees covenanted to insure the life of J. O., the sum assured to be applied to pay the creditors their debts in full, together with five per cent. interest. It was further agreed that any bonus that might be declared on the policies should belong to the creditors named in the second schedule; and the creditors on their part covenanted not to molest J. O. during his life, but to look to the said assignment, &c. for their debts:

*Held, that this was not an usurious transaction.*

The facts of this case are fully set out in the following

## JUDGMENT.

Thursday, April 17.—POLLOCK, C.B.—This case was sent by the Vice-Chancellor Wigram for the opinion of this Court, the material statements of which are, Sir John Osborn being much indebted, conveyed by indenture, dated the 9th of April, 1822, to Lord Kenyon and Thomas Metcalfe, all his life interest in an estate in Bedfordshire, subject to certain annuities in trust, at any time, without the necessity of consent or concurrence on the part of Sir John Osborn, to convey, assign, apply, and dispose of the premises conformably to any advance the trustees should make, a power being given to Sir John Osborn in the deed for that purpose to the creditors mentioned in the schedule to that deed, and in such manner as the trustees in their discretion should think reasonable for that purpose to convene a meeting of those creditors. The trustees did cause a meeting of creditors to be held, and a resolution was come to, that the clear surplus income of the trust estate should be conveyed by the said indenture, to be rendered available for the benefit of the creditors, by a division into two parts, in the manner expressed in the indenture of the 1st of July, 1823, between Lord Kenyon and Metcalfe of the first part, Sir John Osborn of the second part, and the creditors of the third part, made pursuant to that resolution. By the indenture it is witnessed, that in pursuance of the said resolution, and the order to carry into effect that resolution, it was agreed by and between the said parties thereto, that the trustees were to hold the rents in trust,—first, to pay the expenses of the trust; secondly, the annuities charged on the estate; thirdly, to

divide the rents into two shares proportioned to the amount of the debts specified in the two schedules to the deed; the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to the creditors mentioned in the said schedule, in trust, to apply a competent sum in effecting and keeping on foot, in the names of the trustees, a policy or policies on the life of Sir John Osborn, in some office or offices in London or Westminster. It was further declared and agreed between the several parties that the trustees should hold the sums assured, and so much of the last-mentioned assurance and surplus rents as should not be wanting for the purpose of the assurances, in trust to pay the sum assured in payment of the several debts specified in the schedule rateably, and then to pay interest on those debts, and to pay the surplus rents, not wanting to keep on foot the policies, towards the payment of the interest, and the residue towards the payment of the principal of those debts, and to hold any residue that should remain in the hands of the trustees, in trust for Sir John Osborn and his executors. Then follows a proviso that if any addition by way of bonus or otherwise should be made to any of the sums assured, the sums to be received in respect of such addition should belong to the creditors named in the second schedule in addition to their debts, and be divided among them in proportion to their debts, notwithstanding the principal and interest on those debts might be in other ways and means aforesaid fully discharged; and then, in consideration of the provision made by that deed, all the creditors gave to Sir John Osborn leave and license to live anywhere, without any let, molestation, or hindrance to be offered or done to Sir John Osborn, on his person, or in his goods, chattels or effects, by the creditors; and there was a provision made that if any one was to sue or molest him, contrary to the license, his debt should be considered as released, and that Sir John Osborn might plead in bar to any action on such release. Creditors to the amount of 36,697l. 6s. 11d. executed this deed and signed the second schedule. The trustees effected insurances to the amount of 28,500l. and in 1830 permitted some creditors, who signed the second schedule, to sign the first, and at the same time ceased to keep up one of the policies, and applied the share of the rents which had been previously paid to the payment of premiums on the insurances to the payment of the debts of the creditors who were so permitted to sign the first schedule. Sir John Osborn died on the 29th of August, 1848. One year after his death the trustees received the sum assured by the policies kept up, and a bonus or addition, the two sums amounting together to 27,229l. 9s. 11d. They had also in their hands 3,000l. of rents unapplied. Before Sir John Osborn's death, O'Brien, as executor of a deceased creditor named in the second schedule, filed a bill against the trustees and Sir John Osborn, who was made a party. He put in his answer, raising no objection to the validity of the deed; but, after his death, the bill being amended, and Lady Osborn, his widow and executrix, made a party, she, in her answer, submitted to the Court whether, having regard to the proviso for the payment of the bonus to the creditors mentioned in the second schedule, the indenture was not usurious and utterly void; and whether the moneys in the hands of the trustees thereupon directed a case to be sent to this court stating the facts at length, and submitting the following queries:—1st. Whether the indenture of the 1st of July, in the year of our Lord 1822, is wholly or to any, and to what extent, or as to any or what part, void for usury? 2nd. Whether the same indenture is void for usury as to the provisions for the creditors in the first schedule? 3rd. Whether the same indenture is void for usury as to the provision for creditors in the second schedule? 4th. Whether the said indenture is void for usury so far as it provides for the debt of Wm. L.? 5th. Whether Lady Osborn could recover in any action at law from the trustees, Lord Kenyon and Thomas Metcalfe, the balance unapplied in their hands, and the surplus rents and profits received from the life estate of Sir John Osborn, or the amount received by them from the several insurance offices in respect of the policies of insurance, or any and what part thereof? We shall certify our opinion to the Vice-Chancellor, answering all and each of these questions in the negative; but, according to the practice which has of late obtained, we proceed to state publicly our reasons for those answers. We have had much doubt as to the proper answers to be returned to the third and fourth questions, and to so much of the first as relates to the creditors in the second schedule; the doubt arising from the creditors in the second schedule being apparently entitled under the deed to something beyond the principal and legal interest upon the whole amount of their debts, namely, to a proportionate share of the bonus or addition made to the principal sum in the

policies mentioned; but we are satisfied, after much consideration, that the indenture is not void as to those creditors. We have never felt any difficulty as to the answer to be returned to the other questions. By the first indenture, dated the 9th April, 1822, the entire control over the rents is given to the trustees for the purpose of making such arrangement as they might think practicable with Sir John Osborn's creditors, and by the resolution which was carried into effect by the second indenture, the creditors divided themselves into two classes, one who were willing to take their proportion of the rents in satisfaction *pro tanto*, first of the principal, then the interest, of their debts; and another who preferred the application of their shares to the effecting insurances on Sir John Osborn's life and waiting for the payment of their debts till his death; and both then covenanted to discharge Sir John Osborn for the whole of his life and in effect, although not in words, to look alone to his personal and real estate after his death, if there should be any, for the payment of that unsatisfied portion of their debts if any should be unsatisfied; for their debts are not discharged by the indenture, the remedy for the unpaid portion continuing after Sir John Osborn's demise; but any personal remedy against himself by an action at law being absolutely gone, the latter class are entitled to the bonus, if any, on the policies which are effected for their benefit, and the principal question is, whether the stipulation for this additional benefit beyond 5 per cent. interest payable on the death of Sir John Osborn makes the bargain usurious. We never have had any doubt that the transaction with respect to the creditors in the first schedule was perfectly legal. Their proportionate part of the rent is severed from the rest, and in no way affected by the bargain with the other creditors. As to those creditors, in the first place, we are by no means satisfied that this agreement for the license to Sir John Osborn for life can be considered as a forbearing of the debt within the meaning of the statute 2 Anne, c. 16. In this case it is a relinquishment of the personal liability of the debtor altogether; it is not a mere forbearing—but it is a relinquishment of the liability of the debtor personally altogether, for ever, retaining only a remedy against his real or personal representatives, who are not liable in person. And the case may be likened to an agreement to keep up the liability of a surety and to release a particular estate from a judgment, binding all the estate of the parties in consideration of a sum of money, which we do not think would be void on the ground of usury, if not entered into as a shift or contrivance to give colour to it. It is unnecessary for us, however, to give any decisive opinion upon this point, though we plainly intimate that it is the inclination of our opinion at present, because we are satisfied that the proviso as to the creditors in the second schedule is valid on another ground. First, it is obvious, on looking at the whole of the transactions, that the division into two classes is an arrangement made between the creditors themselves, each having the option, at least before the deed was executed by him, to fix the class to which he would belong; and the trustees in disposing of the rents so far as was necessary for the payment of the debts really acted on behalf of the creditors themselves, and the agreement as to the disposition of the shares of the rents belonging to them being a stipulated arrangement *inter se*, which the trustees were to carry into effect, the first class of creditors agreeing to be paid their share and divide it, those of the second class to employ it in what they considered a more beneficial way of securing their debts by effecting insurances and authorising their trustees to do that in a speculative mode by risking it in insurances, and permitting them to share the profits in the shape of a bonus; and Lord Kenyon and Metcalfe then in their character of trustees in the same deed are in the same situation as if the creditors had named other persons to be their particular trustees for carrying this arrangement into effect. It was indifferent to Sir John Osborn under which class the creditors should place themselves; and indeed he had no power to object to any disposition of the rents which the trustees, who by the first indenture had the uncontrolled management of the payment of the debts, should think proper to order. So that, looking at the transaction in this point of view, there is no promise for forbearance beyond 5l. per cent. No agreement from the party to whom the forbearance is made, that more should be paid by him or by any other person for the forbearance; the additional sum is nothing more than what may arise from the use of their own funds in the way in which they chose to use those funds, as they were entitled to do according to the provisions of the indenture. But it may be said that, although this arrangement might have been made and would have been perfectly valid if Sir John Osborn was not made a party, yet he is made a party to it, and there is a stipulation with him that the share of the rents belonging to the second class should be applied so as to give a possible benefit of more than five per cent. and therefore



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there is a usurious bargain with him. It may be doubtful whether such is the effect of making Sir John Osborn a party to the second indenture, and it was agreed between all the parties to the indenture that the trusts therein mentioned should be executed. It is said the covenant is pursuant to the resolution of the creditors, a matter in which Sir John Osborn took no part, and he may be a party to this indenture, not as taking an interest in the application of the funds of creditors of the second class for the purpose of insurances, but only to testify his approbation of the arrangement made by the trustees for the creditors of the second class, and because it was made part of the bargain that he was to have a license for life as well as the surplus of the rents, after effecting the object of the first deed. But if this is a covenant with him by the trustees to lay out the second share of the rents in effecting insurances, so that he or his executors might complain of the breach of covenant, if the trustees applied them to the payment of debts in the second schedule simply, and thereby reduced his debt beyond the amount of the share of the rents received instead of that beyond the sum which ought to have been insured, in our opinion it makes no difference. It was in the option of the trustees to insure in an office which gives no share of the profit to the assured, or in one which does; and in the latter case there is the possible risk of being considered a partner, assuming that in this part of the deed the trustees do covenant with Sir John Osborn to lay out the money in insurances, the covenant is qualified by the proviso, and the effect of so qualifying it is only this, that if trustees choose to do so in one of the offices which make the assured partners, all the share of the profit, which is a compensation for possible risk, shall belong to the creditor, and not to be applied to the benefit of Sir John Osborn in reducing the debt. Sir John Osborn in effect says, "You must insure, so that when I die my estate may have the full benefit of my debts being discharged to the amount of the insurance, and the surplus of the sum assured beyond that,—you may do so in any office in London or Westminster, but if you choose to do so in one in which you may incur the possible liability of partners, you may take all the bonus, which is, in effect, a compensation for any possible risk, for the use of the creditors for whom you act." In this view of the case there is no ground to say that the transaction as to the creditors in the second schedule is usurious, and we are all of opinion that it is not. The answers, therefore, to the whole of the first, and third, and fourth questions, as well as to the second, must be in the negative. As to the fifth, as the transaction is altogether untainted by usury, no action at law will lie at the suit of Lady Osborn against the trustees to recover either the balance as applied, or sums recovered from the insurance office: nor, indeed, if the transaction was usurious as to the creditors in the second schedule, would an action lie. The whole of the rents are vested in the trustees by the first indenture, and Sir John Osborn and his executors had nothing but an equity as to the surplus of the trust funds to be enforced in a Court of Equity. We are of opinion no action at law will lie. *Certificate accordingly.*

Thursday, June 5.  
SMITH v. HOWELL.

*Lessor and lessee—Covenant to repair—Assignee—Covenant to indemnify.*

*A. having an unexpired term of seventy-two years, let for twenty-one years to B. taking from him a covenant for rent, repairs, &c.; A. then assigned the reversion to C.; B. assigned to D. the remainder of the term of twenty-one years, with a like covenant of indemnity, and D. to E., D. also taking a similar covenant from E.*

*In an action on the covenant for rent, repairs, &c. by C. (the assignee of the reversion) against B., B. suffered judgment by default, and the amount was ascertained by a jury, and then paid by him to C. with the costs. B. brought an action for the whole against D. on his covenant; D. defended the action and incurred costs, and then sued E. for the whole he was liable to pay, and also all his costs before he had paid the amount:*

*Held, E. was liable for rent, repairs, and the amount B. paid as costs, but nothing further; that the amount was due when his liability first commenced, notwithstanding D. had not paid when he first sued E.; that B. had pursued the correct course in suffering judgment to pass by default, and having the amount of the liability assessed by a jury.*

This was an action in covenant tried before Martin, B. in Middlesex, when the plaintiff obtained a verdict for the amount claimed, with liberty to the defendant to move to reduce the damages to a nominal sum or such other amount as the Court should direct. It appeared that Messrs. Broughton and Preston being possessed of an unexpired term of seventy-two years in a certain household estate at Fulham, demised the same for twenty-one years, with the usual covenants to pay the rent, repairs, &c.

to a Mr. Goodered, on the 4th of June, 1836, at a rent of 126*l.* and subsequently sold and assigned their reversion to Mr. Bridge in 1848. Goodered had previously assigned his interest to the plaintiff Smith, Goodered obtaining from him a covenant to perform all the covenants of the lease of the 4th of June, and to indemnify Goodered, and subsequently the plaintiff assigned the same to the defendant with a similar covenant. At Michaelmas 1849, 94*l.* 10*s.* became due to Bridge, the then owner of the reversion, for rent from the defendant, while the premises were allowed by him to fall out of repair. In consequence of this an action was brought by Bridge against Goodered, which resulted in a judgment for the plaintiff for 297*l.* 16*s.* 6*d.* for rent, dilapidations, and costs inclusive. Goodered then sued the plaintiff for that amount and for his own costs, making in all the sum of 362*l.* 16*s.* 6*d.* and the plaintiff afterwards, and before he paid that sum to Goodered, brought the present action against the defendant, when he recovered the same from him, and also his costs, amounting in all to the sum of 462*l.* 10*s.* The question was, whether the plaintiff could recover anything from the defendant on his covenant until he had himself paid the sum recovered against him by Goodered; and whether he was entitled to recover the costs of defending the action brought against him by Goodered, and a rule nisi having been obtained to reduce the verdict to a shilling, or such other sum as the Court should direct.

*Hoggins, Q.C. (Field with him) shewed cause.*—The plaintiff is entitled to recover 94*l.* 10*s.* the amount due for the rent, also the damages assessed by the jury when Goodered allowed judgment in the action to pass against him by default as for the repairs, amounting to 165*l.* 10*s.*; the plaintiff's costs therein 37*l.* 16*s.* 6*d.*; other charges necessarily incurred, 65*l.*; altogether 362*l.* 16*s.* 6*d.*: then there were the costs of the action against Smith and Smith's defence, amounting in the whole to 456*l.* 3*s.* 2*d.* for which the action is brought. The defendant's covenant with plaintiff is, that he, the defendant, his executors, administrators, and assigns, would pay the rent of 126*l.* in the lease, and perform the several covenants and agreements, and observe and save harmless and indemnify the plaintiff, his heirs, executors, and administrators from and against the same respectively, and all costs, damages, and expenses which might be incurred by reason of any delay, breach, or default in payment or performance thereof. *Warwick v. Richardson*, 10 M. & W. 284, decides this case; there a testator devised his real and personal estate to D. and R. upon trust to sell and to invest 10,000*l.* arising therefrom in the public funds or real securities for the benefit of certain persons mentioned in the will. The money was not so invested, but, with D.'s consent, was received by R. and used by him in his private trade, and R. gave to D. a bond conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages, and expenses on account of the said sum of 10,000*l.* or by reason of R.'s being permitted to hold the same. Held, that the bond was valid in law, and the legatees having filed a bill in Chancery against the trustees and their representatives, claiming payment of the 10,000*l.* and interest, obtained a decree whereby it was declared that D. and R. were jointly and severally liable to pay that sum, and the legatees carried in a claim against D.'s estate for that amount, but no amount was received therefrom. It was held that the representatives of D. were entitled to recover from R. in an action on the bond the whole amount of 10,000*l.* and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the Chancery suit. In *Loosemore v. Radford*, 9 M. & W. 657, the plaintiff and defendant being joint makers of a promissory note, defendant as principal and plaintiff as surety, defendant covenanted with plaintiff to pay the amount to the payee of the note on a given day, but made default: it was held on an action on this covenant that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages. In *Blyth v. Smith*, 5 M. & Gr. 405, A. brought an action against B., B. gave notice to C. against whom B. had a remedy over to come in and defend the action; C. refused to do so, but did not prohibit B. from continuing the defence; B. suffered judgment by default, and watched the proceedings under the writ of inquiry, putting A. to the proof of his claim. At the trial of the action over by B. against C. the jury included in their verdict the costs incurred by B. in the former action, no objection being then taken by C. to the right of B. to recover such costs. The Court refused to disturb the verdict, being of opinion that there was evidence to go to the jury, that C. had incurred the sanctioning those costs. *Neale v. Wyllie*, 3 B. & C. 533, was like this case; but the decision there has been doubted, if not overruled. The defendant here had notice from time to time of the various proceedings; and as the covenant is not only to indemnify but to save harmless, the plaintiff is entitled to all

the costs he has incurred and been put to, and to recover them as part of the damages.

*Bramwell, contra*, in support of the rule.—The date of this action is material, as when it was commenced judgment was not signed against the plaintiff, nor had the debt and costs been paid. The rent the plaintiff may be entitled to recover; but not for the repairs, and all those costs for which it is contended the plaintiff is liable. A covenant to indemnify is only for such reasonable neglect or default to which the terms of the particular covenant may apply for his own breach of covenant only, and nothing else, but the default here arises out of the breach of covenant of the plaintiff and Goodered, not solely of the defendant. In *Collinge v. Heywood*, 9 A. & E. 633, on a contract to indemnify plaintiff against costs which he is afterwards called upon to pay, the cause of action, it was held, arises when he pays, and not when the costs are incurred, and that the Statute of Limitations runs also from the time of payment. In *Walker v. Hutton*, 10 M. & W. 249, a message and premises were demised to the plaintiff by lease of 10th May, 1828, for twenty-one years from the 26th March then last, which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and to keep in repair the premises, and also to do any repairs which, on a view of the premises by the lessor, should be found wanting, of which notice should be given. By a lease dated the 15th June, 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants with the exception of a stipulation as to painting the outside woodwork in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. Defendant denied that any notice to repair had been given, and insisted that the premises did not require it; plaintiff thereupon offered to suffer judgment by default, which defendant refused to assent to. Plaintiff then gave defendant notice, that as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered 68*l.* damages, and 56*l.* 12*s.* for costs, and he himself incurred 53*l.* 14*s.* 4*d.* costs. It was there held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of covenant to repair. And although the covenants contained in the sublease were (with the exception of that relating to painting) the same in words as those contained in the original lease, they were in effect substantially different, the periods at which the leases were granted being different; and the judges there appeared to have intimated that the plaintiff ought to have paid the amount of the dilapidations into court instead of defending the action. Lord Abinger's judgment is strong in favour of the defendant, and he expressly says the case of *Neale v. Wyllie* is not law, and was decided on a mistaken principle; and in *Logan v. Hall*, 4 C.B. 598, A. being lessee of a message under the corporation of London, demised it, in 1829, to B., C. and D. for twenty-one years; the lessees covenanted to repair, and to insure, "in the sum of 2,500*l.* at the least, in the *Protector Fire Insurance Office*, or in such other respectable insurance office in London or Westminster, as B., C. and D. (the lessees), their executors, &c. should think fit;" with a proviso for re-entry for breach of any of the covenants. In 1835, C., by indenture, granted an under-lease to E. and F. for the residue of the term, wanting one day; the under-lease, containing the like covenants to repair and to insure "in the sum of 2,500*l.* at the least, in the *Protector Fire Insurance Office*, or in such other respectable fire insurance office in London or Westminster as E. and F., their executors, &c. should think fit;" and also a proviso for re-entry for breach of any of the covenants. The message being out of repair, and uninsured, the executors of A. in 1843, brought ejectment and recovered possession: held, that C. was not entitled to recover against E. and F. the value of his reversionary interest, the loss thereof not being the result of their breaches of covenant, but of the breaches of covenants by C. to which covenants they were no parties. Held, also, that the execution by the defendants of the indenture of under-lease and payment of rent thereunder to C. was sufficient evidence for the jury that C. was solely entitled to the reversion expectant upon the determination of the under-lease.

*Pollock, C.B.*—We are all of opinion in this case, that the verdict should be reduced to 362*l.* 16*s.* 6*d.* being the total amount of the following sums, to which we think the defendant is liable upon



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his covenant: 94l. 10s. for rent, 165l. 10s. repairs, and 102l. odd for the costs incurred in the action brought by the assignee of the reversion against Goodered. We think those costs may be recovered, and that the amount of the liability being once ascertained, all others are superfluous. This, upon an examination of the cases, will be found to be in accordance with the recent decisions upon the subject; the old doctrine as laid down in *Neale v. Wyllie* and other cases, is now exploded, and the covenant of indemnity is only to recover from the party liable upon the breach such fair and reasonable remuneration for the damage sustained as can be best ascertained the plaintiff may have suffered, together with the costs which the party may have been put to in properly maintaining his right to have the amount due to him strictly ascertained. The case of *Neale v. Wyllie*, in 3 B. & C. was much considered in *Walker v. Hatton*, 10 W. & M. 249. Lord Abinger said, the only safe rule is to confine the verdict to those which were the necessary result of the act complained of, viz. the want of repair, and I cannot see how it can be contended that the costs of both the plaintiff and the defendant in the former action were the natural or necessary consequence of that act. I think the case of *Neale v. Wyllie* is not law, and that it was decided on a mistaken principle, and I think it better that I should at once express that opinion than attempt to make a distinction between that case and the present, since making distinctions which have no solid foundation, only tends to keep up litigation." On these grounds, therefore, even upon a contract of indemnity, the party is only entitled to recover such costs as have been fairly and reasonably incurred in ascertaining the amount to be paid. No doubt if a person is under considerable difficulty from not knowing what course he is to take, how to act, or best properly to ascertain the amount or other circumstances which may arise, it might be absolutely necessary to incur additional costs, which may be again recovered; on the present occasion, however, there is no ground to introduce any doubt or difficulty of that sort: judgment was allowed to go by default, a jury ascertained the amount of the damage for non-repair, the costs were subsequently taxed, and the present plaintiff being liable, should have paid the amount without further litigation; he did not do so, but incurred further costs, which I do not think the defendant is liable to pay; still the defendant was liable to the extent of his indemnity when that amount was ascertained.

ALDERSON, B.—I am of the same opinion. As to the rent, the case of *Warwick v. Richardson* concludes that; as to the repairs this must have been ascertained, and I think the proper course was here pursued in order to ascertain the amount fairly payable. When the action was brought against Goodered he suffered judgment by default, and the damages were then assessed by a jury; that was, perhaps, the best and most expeditious mode of doing it, and was, I think, the proper course to be pursued. If money had been paid into court, there may have been too much or too little paid, and is a course of proceeding more objectionable than that pursued here; I think the right way is, under the circumstances, to suffer judgment by default, if the liability, as here, is undisputed, and let the amount be then ascertained by a jury.

PLATT, B.—I am of the same opinion on the grounds which have been already stated, that the verdict should be reduced to 362l. 16s. 6d.; the rent was justly due, the repairs fairly done, and afterwards properly ascertained, with such reasonable costs incurred as a party under the circumstances was justified in expending to ascertain the amount of his liability to be recovered over against another. It has been contended that the time had not arrived when he is indemnified, the present plaintiff not having paid the amount of the judgment, and that, in fact, the judgment was not signed against him until after the commencement of this action; but surely he is to indemnify, and his obligation commences when the costs have been incurred, and the rent and repairs are properly ascertained to which he is liable, not merely when an action is brought against him to recover the amount.

MARTIN, B.—Upon the authority of *Warwick v. Richardson*, the defendant is responsible. Then as to the costs. An action was brought against Goodered; he suffered judgment by default; the amount of the liability for the non-repair was ascertained by a jury, which, together with his costs, he was entitled to recover against the plaintiff. To those costs the present defendant is liable, but not to any others. The matter is clear to my mind, and I have no doubt whatever about it.

Verdict to be reduced accordingly.

Tuesday, June 24.

YATES v. EASTWOOD.

Landlord and tenant.—Distress.—Sale of goods for more than rent and expenses.—Remedy for overplus.

The levying a sum of money by distress beyond the

amount of the rent due and expenses, is not the subject of an action for money had and received, but of a special action on the case on the statute 2 Wm. & M. sess. 1, c. 5, s. 2, which directs, that after the sale of a distress the overplus (if any) shall be left in the sheriff's, undersheriff's, or constable's hands, for the owner's use.

This was an action brought for money had and received, a distress having been made upon the goods of one Haliwell (see *Haliwell v. Eastwood*, ante), the tenant, by the defendant, the goods were sold, and realised more than sufficient to pay the rent and expenses, leaving an overplus, and this action was brought to recover that overplus. The cause was tried at York, before Cresswell, J. when a verdict was returned for the plaintiff; and a rule nisi having been obtained to set aside that verdict, and to enter a nonsuit or a verdict for the defendant, or to reduce the damages to 9l.

Watson, Q.C. and Hall, shewed cause.—The only point in this case is, whether money had and received will lie for the overplus in the hands of the defendant, the landlord, who has sold more goods than sufficient to pay the rent due and expenses. [MARTIN, B.—You say he did wrong in selling more than enough to pay himself; but having done so, you waive the tort, and have the right to sue him for the overplus, as for money had and received?] Certainly [PARKE, B.—Is the remedy not under the statute?] One remedy may be under the statute, but the plaintiff contends he has this remedy also; the statute is the 2 Wm. & M. sess. 1, c. 5, entitled, "An Act for enabling the Sale of Goods distrained for Rent in case the Rent be not paid in a reasonable Time," and it recites that, whereas the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby; for the remedying thereof, "Be it enacted, that where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises, charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or undersheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under sheriff, or constable, are hereby empowered to swear) to appraise the same truly, according to the best of their understanding; and after such appraisement shall, and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, undersheriff, or constable, for the owner's use." Here the overplus was neither left with the sheriff, undersheriff, or constable, but remained in the hands of the defendant, who certainly was not entitled to detain it. The plaintiff was entitled to recover it, and in this form of action. *Graham v. Tate*, 1 Mau. & Sel. 609, was in favour of the plaintiff's right to sue. There the tenant of premises under a lease, and at a rent payable half-yearly, agreed to pay all taxes except the landlord's property tax, which the landlord agreed to allow, and the tenant agreed to lay out 20l. in repairs, which the landlord also agreed to allow, but afterwards distrained for half a year's rent, and sold to the whole amount, without allowing either for repairs or property tax, which he knew the tenant had paid to the collector, it was held that the tenant might recover in respect of the property tax, but not in respect of the repairs, in an action for money had and received against the landlord. [PLATT, B.—In waiving the tort, as you say you do, what do you call the tort here?] The not paying over the money under the statute. [PARKE, B.—I do not see that there is any tort here. Your remedy is under the statute of 2 Wm. & Mary, and by an action on the case. The point here was not decided in *Graham v. Tate*. PLATT, B.—Is there any case like this as against a sheriff, where he has levied and realised more than sufficient?] We have not found any. 2 Lord Raym. 1216; and *Powell v. Rees*, 7 A. & E. 426, were cited.

*Pashley and H. Hill*, contra, in support of the rule were not called upon.

PARKE, B.—We are of opinion that the rule in this case should be absolute; it was no doubt the duty of the defendant, after satisfying his rent and reasonable and proper expenses, to leave the balance in the hands of the sheriff, undersheriff, or constable

for the owner's use, as the Act of Parliament directs. In *Graham v. Tate* it was not necessary to decide this point; although it appears to have been argued that the levying a sum of money by distress beyond the amount of the rent due is not the subject of an action for money had and received, but of a special action on the case on the statute of Wm. & Mary, we think the overplus may be disposed of under the statute, and the plaintiff, should the remainder not be properly paid over, must seek his remedy under the statute; and that the present action as for money had and received cannot be maintained.

ALDERSON, PLATT, and MARTIN, BB. concurred.  
Rule absolute to enter a nonsuit.

## BUSINESS OF THE WEEK.

Saturday, June 21.

DON dem. GUEST v. BENNETT.—Macaulay and Mellor shewed cause against a rule obtained to set aside the plaintiff's verdict and enter it for the defendant. The cause was tried at Lincoln before Alderson, B. *Humphrey*, Q.C. and *Hayes* in support of the rule. Rule absolute.

GRIFFITH v. TREGILLAS.—Tried at Warwick, before Alderson, B. *Humphrey* and Mellor shewed cause against a rule obtained to set aside defendant's verdict, and enter same for plaintiff, with 25l. damages. Macaulay and *Hayes* contra. Rule absolute.

PEARS v. WILSON.

Monday, June 23.

HESLOT v. BAKER. Cur. adv. vult.  
FERNANDES v. PARKIN.—In this case a rule had been obtained to shew cause why the verdict should not be set aside and a new trial had. Rule discharged.

AWDE v. DICKSON.—This was an action on a promissory note for 100l. tried at York before Cresswell, J. when a verdict was returned for the plaintiff. In Easter Term Watson had obtained a rule to set aside the verdict for the plaintiff, and to enter a nonsuit. The facts of the case fully appear. (17 Law T. 63.) *Atherton* (with him *Wallis*) now shewed cause. The COURT, without calling on Watson in support, made the Rule absolute.

Tuesday, June 24.

STOCKS and OTHERS v. THE MAYOR, ALDERMEN, and BURGESSSES OF THE BOROUGH OF HALIFAX.

Referred upon terms.

CUNLIFFE v. HARRISON.—Watson and Crompton shewed cause against a rule obtained to set aside the plaintiff's verdict, and enter a nonsuit, and the question was, whether there was any evidence (as the plaintiff now contended) to go to the jury of any acceptance or a delivery of ten casks of wine sufficient to maintain the action for goods sold and delivered; it was also contended that there was a sufficient contract in writing under the statute of frauds; ten had been ordered, and fifteen sent; they remained at their place of destination some time, but the defendant made no specific selection of any ten from those fifteen casks. *Knowles* and *Tomlinson*, in support of the rule, not called upon. The COURT was of opinion there was no sufficient evidence of selection of the smaller quantity from the greater quantity sent, and therefore no such delivery of the ten casks to enable the plaintiff to maintain this action for goods sold and delivered. Rule absolute.

Wednesday, June 25.

NEWTON v. VAUCHER.—This was an action for the infringement of a patent, and at the trial a verdict had been returned for the plaintiff, subsequently a rule was obtained calling on the plaintiff to shew cause why that verdict should not be set aside, and a new trial had. *Knowles* and Crompton now shewed cause. Watson, Cowling, and H. Hill in support. Rule discharged.

LAW v. RAWSON.—This was a rule to shew cause why the verdict for the defendant should not be set aside, and a new trial had. *Knowles* and Crompton shewed cause. *Wilkins*, Serjt. in support. Rule discharged.

COR v. PLATT.

Part heard.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq. of the Middle Temple, Barrister-at-Law.

Tuesday, June 17.

(Before Mr. Justice WIGHTMAN.)

Ex parte CARREY.

County Court.—Prohibition to.

It appeared by the pleadings and particulars in an action in the County Court, that the cause of action was stated to be for "having assaulted the wife of the plaintiff, and maliciously charged her with stealing a shawl," &c.:

Held, that this was a proceeding for a malicious prosecution, and not an assault, and that prohibition ought to go.

This was a rule nisi for a prohibition to the judge of the County Court of Southwark, to prevent him from further proceeding with a certain cause of *Jones and Wife v. Carrey and Wife*, on the ground that the action was for a malicious prosecution, and, therefore, came within the 56th section of 9 & 10 Vict. c. 95. The point was taken before the judge of the County Court, but he ruled that he had jurisdiction, and gave judgment for the plaintiff, damages, 10s.

The summons stated that the defendant was summoned "to answer the plaintiff in an action of tort; for that your wife assaulted the wife of the plaintiff on the 25th of March, 1851, and maliciously caused her to be wrongfully charged with stealing a shawl, and conveyed her from her house to the station, and caused her to be locked up and detained in custody at and in the police cell in the borough of Southwark, &c. until the sitting of the police-court on the 26th; and further caused the said plaintiff,

## BANKRUPTCY.

M. A. Jones and another party to be bound in recognizances for the due appearance of said M. A. Jones at the said police-court on the 15th of April, 1851, to await any indictment which might be found against her. Whereby," &c.

The particulars were similar to the summons. T. Jones shewed cause, and contended that the summons was, in fact, a good declaration in trespass for the assault, with an averment of malice, and therefore that prohibition ought not to go, as it was clear the judge had jurisdiction over the assault, and that the Court would assume that his judgment was given for the plaintiff for the assault, and not the false imprisonment, which was merely charged to aggravate the damages.

M. Dawson, in support of the rule, contended that it was clear the gist of the summons was the malicious prosecution, and that no assault was charged but a constructive one, in conveying the plaintiff, M. A. Jones, to the police station.

WIGHTMAN, J. said, that the question was, whether the plaintiff in this case was wholly or in part for a malicious prosecution, and upon reading the plaint it certainly did *prima facie* appear to be for a malicious prosecution; but it is said, that an assault is charged in it, and that it is to be taken that the judgment of the County Court went upon the charge of assault, and that the other matters were merely brought before the Court by way of enhancing the damages, but I am not aware of any grounds on which that can be supported. The judge did not decide that the case was not one of malicious prosecution, but simply that he had jurisdiction, and he gave a lump sum of 10*l.* as damages. Now upon the plaint and the affidavit it seems clear to me that this was a proceeding for a malicious prosecution, and therefore the rule must be absolute for the prohibition. *Rule absolute.*

## BUSINESS OF THE WEEK.

Tuesday, June 17.

REG. v. THE CHURCHWARDENS OF BANGOR.—Gray moved for a *mandamus* to the Churchwardens of Bangor, Carnarvon, calling on them to convene a meeting and vote a sum for the watching and lighting of the town under 3 & 4 Wm. 4, c. 90, sec. 18, which by mistake they had omitted to do. *Rule absolute.*

Ex parte WARD.

Ex parte HALL.—Wordworth moved for a *mandamus* to the Secretary of the Norfolk Estuary Company, to register a transfer of shares under the provisions of their Act, 9 & 10 Vict. 388 (Private Act). *Rule nisi.*

REG. v. PIPER.—M. Smith moved for a *quo warranto* calling on a Mr. Piper to shew cause why he exercises the office of guardian of the poor for the city of Exeter, the objection to his election being that he was not an inhabitant of the ward for which he was elected as required by the charter of 16 Jac. and 9 Geo. 3, s. 1. *Rule nisi.*

REG. v. PAMPLIN.—Phipps moved, on the part of the prosecution, for a *certiorari* to remove any indictment which might be found against the prisoner at the borough Sessions at Winchester to the Assizes. *Parnell*, for the prisoner, consented. *Rule absolute.*

BROWN v. COLLYER.—Watson and Lush shewed cause against a rule for enlarging the time for making the award herein under 3 & 4 Wm. 4, c. 42, s. 49, the arbitrator having inadvertently let the time pass by within which he was to make his award. James, Q.C. in support of the rule, was not heard. *Rule absolute.*

REG. v. COWDEWELL.

*Rule absolute by consent to change the venue to Abingdon.*

## BANKRUPTCY.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.

COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FONBLANQUE, Esq. Barrister-at-Law.

COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

## COURT OF BANKRUPTCY, BASINGHALL-STREET.

Friday, May 23.

(Before Mr. Commissioner FONBLANQUE.)

ANON.

*Bankrupt trustee proving against his own estate for trust fund, where the fund was small and the person beneficially interested was of unsound mind, but who had not been declared so by an inquisition—Order as to the application of the dividends.*

The bankrupt, as executor of A. B. deceased, by leave of the Court, made a proof against his estate for the sum of 33*l.* 13*s.* 8*d.* bequeathed to him by the testatrix in trust (among other persons) for C. D. a person of unsound mind, but who had not been declared to be so by an inquisition.

Upon the application of Reid, solicitor, and after reading the will of the testatrix, the Court was pleased to order that the amount of any dividend or dividends to be declared on such proof, when carried to the dividend account under the general order, be transferred in the Bank of England by the accountant in bankruptcy to the credit of the matter of the bankrupt. The account of the trust-estate of the testatrix, "and the said accountant is to cancel any dividend-warrants drawn for such dividend or dividends; that the said dividends, when so

paid into the said bank, be laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the priority of the said accountant in trust in the above matter the like account; and the said accountant is to declare the trusts thereof accordingly, subject to further order; and that the interest to accrue due on the said Bank Annuities, when so purchased, shall from time to time, during the life of C. D. be paid by the said accountant to the said bankrupt, and by him applied towards the maintenance and support of the said C. D. the said bankrupt producing to the said accountant, before receiving any half-year's dividends after the first, an affidavit in the form contained in the schedule hereto annexed; and the said accountant is to hold the said Bank Annuities, and all future dividends thereon, after the death of the said C. D. subject to the further order of the Court.

## IRISH BANKRUPTCY COURT.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

## Re COMMERFORD.

*Summoning trader—Giving bond to creditor to secure debt.*

*A trader being summoned under the 11 & 12 sections of the Irish Bankrupt Act (English analogous, 12 & 13 Vict. c. 106, ss. 78, 79), with a view to admit or deny the demand of the summoning creditor, if he appears that he does not owe the debt, and that he has a good defence as to the whole, he cannot be called upon to enter into a bond to secure any sum that may be recovered from him in an action, and he is discharged from the summons.*

The 11th section of the Irish Bankrupt Act empowers commissioners to summon trader if creditor make affidavit of his debt, and of his having required payment. The 12th section authorises the commissioners, upon the appearance of the trader, to require him to state upon oath whether he denies or admits the debt. The 13th section enacts, that if any such trader so summoned as aforesaid shall not come before such commissioners at the time appointed, or if any such trader upon his appearance to such summons, as aforesaid, or at any enlargement or adjournment thereof, as the case may be, shall refuse to admit such demand, and shall not make a deposition in the form hereinbefore mentioned, that he believes he has a good defence to such demand, then, and in either of said cases, if such trader shall not, within fourteen days after personal service of such summons, pay, secure, or compound for such demand to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as such commissioners, or one of them, shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such summons, &c. The 14th section relates to the signing of an admission of the debt out of court; and the 15th section enacts, that if any trader so summoned as aforesaid shall, upon his appearance, sign an admission for part only of such demand, in the form aforesaid (a form given in the 11th section), and shall not make a deposition that he believes he has a good defence to the residue of the demand, then, and in such case, if such trader, as to the sum so admitted, shall not within fourteen days next after the filing of such admission, pay, or tender, or offer to pay to such creditor the sum so admitted, or secure, or compound for the same to the satisfaction of such creditor, and as to the residue of such demand, shall not, within fourteen days after service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same, to the satisfaction of such creditors, or enter into a bond in such sum, and with two sufficient sureties as such commissioners, or one of them, shall approve of, to pay such sum as shall have been recovered in any action which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy, on the fifteenth day after service of summons, &c. The corresponding English enactment is the 12 & 13 Vict. c. 106, sec. 78, *et seq.* In the English enactment, there are but seven days given to compound for the demand or enter into the bond.

In the present case, Commerford, a trader of Galway, was summoned, and required to deny or admit the debt in the usual way.

Fitzgibbon, Q.C. said his client denied owing any sum whatever to the summoning creditor, and contended, that upon his making a deposition to that effect, there was an end to any further proceeding in the Bankrupt Court, and that the creditor should be left to his action, should he think proper to bring one.

Creighton, for the summoning creditor, contended

that, no matter how positive the swearing of the debtor might be as to his nonliability, it was clear from the 15th section, that he was bound to enter into a bond for such sum as the commissioners might approve of, to pay such sum as shall be recovered in any action, &c. That the statute would, in point of fact, be nugatory, and the creditor wholly deprived of his statutable remedy, if the debtor were allowed to escape upon merely swearing that he owed nothing, and he wished the commissioner to call upon the debtor to enter into a bond in the form prescribed by the statute. In Fonblanque's Reports, page 5, a debtor was summoned to admit a demand of 75*l.*, and although he swore that he owed but 5*l.* and had a good defence on the merits as to 70*l.* he was called upon by the commissioners to enter into a bond to secure the whole demand.

The COMMISSIONER said there was considerable ambiguity with regard to the sections which authorised the summoning of the trader; and the present case was the first time where the point was raised, as to a debtor who denied the debt being compelled to enter into a bond. Upon first sight it would appear, from the 15th section, that the commissioner might call on the debtor to give a bond, although he denied the debt; but on looking at the form of summons and practice under the 5 & 6 Vict. cap. 122, from which the Irish Act was copied, he thought he should leave the creditor to his remedy by action; and that, upon the debtor denying the debt, he was discharged from the summons.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Commissioner LAW.)

## PROTECTION CASE.

Re HENRY SMITH.

*Application under sec. 28 of 7 & 8 Vict. c. 96. Quere—Is a judgment debt obtained upon a judgment debt inserted in the schedule a new debt, and will an order obtained under the 28th section protect a petitioner in respect of such new debt? Semble—It will; and the Court, bene dubitante, will grant a protecting order.*

This insolvent petitioned to the Court, under the Protection Acts, in the year 1848, and being opposed by Mr. Henry Russell, his final order was adjourned *sine die* on the 3rd of November, 1848. Five days after, a judgment creditor commenced a fresh action against the insolvent on the original judgment, and having signed judgment in that new action, they took him in execution. His counsel, Mr. Cooke, applied to the Court on the 28th of May, 1851, under the 28th section of 7 & 8 Vict. c. 96, for a protecting order, but, upon consideration, it was doubtful whether a protecting order would protect in respect of the new judgment debt. Some discussion took place, after which the motion stood over to shew the nature of the law proceedings. To-day

Cooke again applied to the Court, and said that, upon further consideration, it struck him that it was the same debt, notwithstanding the fresh action, and, consequently, he was willing to take an order under the 28th section.

Mr. Commissioner LAW said, that was his impression. He was an admitted creditor at the date of the petition, just as much as any tradesman whose debt was inserted in the schedule. If they brought actions in respect of their debts, the order would protect him, and why should a judgment-creditor be in a better position? The order, he thought, might be granted, and when the insolvent came up under the 28th section his creditors might take any objection on that point if they thought proper, as well as on the merits. When he said that this was the same debt, he meant the same as if this had happened. Suppose a man had a judgment, and it was stated in the schedule, and the insolvent was remanded for six months, and before the expiration of the period of remand the plaintiff had brought a second action and obtained another judgment, it would be a question whether they should issue a warrant for his discharge from the new judgment as they would upon the original judgment, treating it in fact as the same debt.

Cooke said, that under such circumstances he had applied to Mr. Justice Bailey for the discharge of an insolvent, but that learned judge relying upon the judgment of Mr. Baron Wood, thought, upon considering the point, that he ought to apply to this Court.

Mr. Commissioner LAW.—If the man had been out of custody and arrested, the course was to go before a judge at chambers, but if he had never been out of custody since his arrest, the case was different. I think this proposed order is the right view of the case. There is no express clause which meets such a case as this. It was a question whether the Court could give a final order to give effect to a warrant in respect of such a debt. I am not, however, at present disposed to hesitate in giving that effect

## INSOLVENCY.

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## CONSISTORY COURT.

to that final order. Take the order under the 28th section.

*Rule nisi.*

*Tuesday, May 6.*

(Before Mr. Commissioner PHILLIPS.)  
*Re CHARLES COLLINGRIDGE.*

*Bail.*

*It is not the practice to oppose bail by affidavit.*

*Sargood* opposed the bail tendered in this case, and proposed to call a witness respecting the value of the property of the proposed surety.

Mr. Geo. Lewis objected, that a witness could not be examined for this purpose on a question of bail, but the opposition should be made by affidavit only.

*Cooke (amicus curiæ)*, said that a long time ago, in the infancy of the practice, he had himself taken this objection, urging that it was in accordance with the practice of the King's Bench, but the chief commissioner, after consulting the other commissioners, decided that they would have *videt voce* oppositions to bail, and that had been the practice ever since.

Mr. Commissioner PHILLIPS said, that he should always prefer *videt voce* oppositions himself, and overruled the objection.

## INSOLVENT COURT, DUBLIN.

Reported by J. LEVY, Esq. Barrister-at-Law.

*May 1851.*

*Re MADDEN.*

*Action of tort—Property acquired between the vesting order and the discharge.*

*Where an insolvent brings an action for a tort between the date of his vesting order and discharge, and obtains a judgment and verdict before adjudication, the amount vests in his assignee for the benefit of his creditors.*

This case was argued by *Maker*, on the part of the insolvent, and by *Armstrong* on the part of a gentleman named *Brien*, the detaining creditor.

It appeared that the insolvent was committed to custody on the part of *Brien*, his landlord, in the month of November, 1847, under an execution marked for the sum of 57l. In February 1848, the insolvent, being still in custody, filed his petition and schedule, and returned *Brien* as a creditor, not only for the amount of the execution for which he was detained, but for arrears of rent which made the entire debt due to *Brien* 133l. The total amount of debts was only about 200l. Shortly after the filing of the petition and schedule, the insolvent was discharged on bail in the usual way, but in consequence of repeated adjournments it was not until the end of January, 1850, that he obtained the final order for his discharge from the Insolvent Court. It appeared that between the period when he obtained the order to be discharged on bail, and his final discharge, he still continued as the tenant of *Brien*, and even after his discharge he continued in possession of the farm, the creditors probably not deeming it of any value, and consequently no steps were taken to appoint an assignee. It further appeared that during the period the insolvent was out on bail, namely, between the date of the vesting order and the final discharge, *Brien* made a distress for rent, which was accompanied with circumstances of peculiar severity and hardship, and for that distress the insolvent brought an action of trespass, and obtained a verdict for 80l. damages and costs against *Brien*. Upon this verdict judgment was made against *Brien* before the insolvent's discharge. Judgment having been entered, *Brien* brought in the amount of the verdict and costs to the Q. B. where the action was tried and was allowed to lodge it to the credit of the cause, and the insolvent having applied for liberty to draw it, *Brien* opposed the application,—first on the ground that he had a claim against it as for the arrears of rent due to him by the insolvent; and secondly, that it being properly obtained between the date of the vesting order and the discharge, it vested in the provisional assignee and consequently belonged to his creditors. This being the state of facts,

Mr. Commissioner CURRAN, in giving judgment, said there had been some litigation in the Q. B. on the subject; but in the course of the proceedings there, with regard to this sum of money, it transpired that the plaintiff in the action had become a discharged insolvent, and it occurring to that Court that neither of the parties might be legally entitled to the fund, and inasmuch as there was no person before them to represent the schedule creditors, the judges of the Q. B. made an order, directing the money to be transferred to the credit of the matter in the Insolvent Court, leaving the Commissioners there to decide the legal rights of the parties, which involved the question, whether the judgment for the amount of the verdict and costs formed any portion of the estate and effects of the insolvent, which, under the vesting order, passed to the assignee. The question referred to him and his brother Commissioner, which he believed was now raised for the first time

in that court, might in general terms be thus stated,—namely, whether a judgment obtained by an insolvent debtor before his final discharge from that court in an action on the case for a *tort*, and as to which the cause of action had arisen subsequently to the making of the vesting order in the matter of his insolvency, was or was not such a debt as to come within the operation of the 20th sec. 3 & 4 Vict. c. 107 (English analogous, 1 & 2 Vict. c. 110, s. 37), by which it was provided that all debts due, or growing due, before his final discharge, should be vested in the provisional assignee; and, after hearing the arguments of counsel, and giving the most attentive consideration to the subject, he had arrived at the conclusion that the judgment in question came within the meaning of the 30th section of the statute, and accordingly became vested in the provisional assignee of the Court for the benefit of the insolvent's creditors.

Mr. Commissioner BALDWIN concurred in the decision of his brother Commissioner.

## Ecclesiastical Courts.

## CONSISTORY COURT.

Reported by Dr. WADDLETON, of Doctors' Commons.

*Saturday, April 26.*

*KNAPP and OTHERS v. THE PARISHIONERS OF ST. MARY'S, WILLESDEN.*

*Alteration in arrangement of pews—Prescriptive right to one of such pews.*

*The grant of a faculty for repewing a church was opposed by a parishioner and occupier of a house, who claimed a prescriptive right to a pew as appurtenant to such house.*

*Held, that he was entitled to do so.*

In the month of June, 1850, it having been resolved in vestry that an alteration should be made in the arrangement of the pews in the parish church, a citation issued against the parishioners and inhabitants of the parish of St. Mary, Willesden, calling on them to shew cause (if they had any) why a license or faculty, for the purpose of repairing and repewing the parish church and chancel aforesaid, should not be granted according to certain plans and specifications which had been lodged in the registry of the diocese. The original promoter of the cause, Dr. Knapp, having died during its progress, it was resumed by the present vicar.

Mr. Joseph Nicholl, one of the parishioners, gave an appearance in answer to the citation, and alleged in an act on petition: that in the year 1819 he became possessed of a certain mansion-house and lands, called Neaddon House, situate in the said parish, and that he, his lessees, or undertenants occupied the said house, and had ever since enjoyed the use of a certain pew in the said church as appurtenant thereto, and which pew stood separate and apart from the other pews and adjoined the chancel; and, that the mansion-house and its appurtenances were formerly the property of Sir William Roberts; and that, in the year 1743, the same came into the possession of the ancestors of Mr. Nicholl, who, or their lessees, had ever since occupied or used the said pew, which had beyond memory been reputed and considered to be annexed and appurtenant to the said mansion-house; that previously to the year 1582 the said pew had been enjoyed and used by Edmund Roberts, esq. of Neaddon, who died in that year, and that he was an ancestor of Sir Wm. Roberts; that on a monumental tablet dedicated to the memory of Edmund Roberts, he is described as of Neaddon aforesaid, and that his hereditary armorial bearings were engraved on the said tablet, and that the same were also carved on the pew in question, and were likewise carved in a part of the mansion-house, and remained there until within the last ten years; that the pew had been in the occupation of several descendants of Edmund Roberts, from the year 1582 to that of 1743; that Mr. Nicholl had, from time to time, since he had been the owner and occupier of the said mansion-house, caused the said pew to be repaired at his own cost, especially so in the year 1820; that in 1840 he caused a new seat to be fixed therein, and at various times had the lock repaired; that the pews and sittings of the church had, within the memory of divers of the parishioners been repaired, altered, and re-arranged, but the said pew had been left undisturbed, in its original state; that on the death of Mr. Nicholl's uncle, an achievement had been placed on the pillar within the pew without any demand for fees on the part of the vicar and churchwardens; that the pew was not of a height sufficient to intercept from the view of any of the parishioners who might be seated either in the nave or aisle of the church, either the pulpit or the reading desk, and would not interfere with the repewing of the church; that notwithstanding the premises, Mr. Nicholl had offered to renovate the pew, and to treat with the vicar and churchwardens for the purpose of carrying into effect the objects in view, subject only to the

conditions that no alteration should be made in the size or situation of the said pew, but that they declined to treat with him subject to the said conditions; the act on petition concluded by praying that the Court would not grant the faculty without a special proviso inserted therein, viz. "that nothing contained in the said faculty should authorise the vicar and churchwardens to remove or alter the pew appurtenant to the said mansion-house, or to molest the said J. Nicholl and his successors, being occupiers of the said house, in the peaceable and undisturbed enjoyment and use of the said pew."

The answer to the act on petition alleged the dilapidated condition of the church, and the insufficient provision of pews for the parishioners; that the plans and specifications for the alterations had been submitted to the Dean and Chapter of St. Paul's, the patrons of the living and the improprisors of the chancel, and they had given their consent thereto; that they had also been approved of by the bishop of the diocese; that, according to the present arrangement of pews and sittings, there was accommodation for not more than 332 persons, of which fifty-nine only were free; but that in the plan proposed there would be accommodation for 427, of which 137 would be free. The answer then admitted Mr. Nicholl's possession of the mansion-house and appurtenances, and also of his ancestors'; but alleged that he acquired his ownership by purchase only, and denied that the said pew was, either by prescription or faculty, appurtenant to the said mansion-house, or that Mr. Nicholl had repaired it; that the consent of the bishop of the diocese to the proposed repewing of the church was given on the express condition that the regulation of the Church Building Society in respect of the shape and length of the pews, should be observed, neither of which conditions could be fulfilled if the said pew were left in precisely its present state; that the said J. Nicholl had been offered the use and enjoyment of a new pew, to be erected in the situation of that in question, which would be the largest in the church, capable of holding eight persons at the least; but that he had refused that offer, and would not allow the said pew to be interfered with.

*Twiss (Bayford, who was with him, was absent)*, contended, in support of the act on petition, that there was a manifest prescriptive right to the pew in question; that although no faculty could be produced, still after so long an occupancy the legal presumption was in favour of its having been granted. The fact of the repairs having been made by Mr. Nicholl and his predecessors, as occupiers of Neaddon House, shews that the pew was appurtenant thereto; and that Mr. Nicholl's legal right to the pew ought to be respected, notwithstanding it might interfere with the arrangements proposed. He cited *Peltman v. Bridger*, 1 Phill. Eccl. Rep. 316.

Dr. Addams, contra, urged that the faculty ought to go, notwithstanding this opposition. The repairs and alterations were not to be made at the expense of the parishioners, but were to be defrayed by voluntary contributions, assisted by a grant from the Church Building Society and the Dean and Chapter of St. Paul's, the patrons of the living; that Mr. Nicholl was the only person opposing the issuing of the faculty; and if his pew was allowed to remain it would derange the whole plan, and prevent the laudable scheme from being carried out. The proceedings should have been by plea and proof, when the claim might have been proved or disproved by direct evidence.

## JUDGMENT.

Dr. LUSHINGTON.—The plans for repewing this church have been submitted to and approved of by the bishop of the diocese and by the patrons of the living, the expenses are to be defrayed by voluntary subscriptions, and great increased accommodation will be afforded to the parishioners. These are reasons exceedingly strong to induce the Court to grant the faculty, and to declare its opinion at once that a faculty so much for the benefit of the parishioners should issue. But the Court must take care in all these proceedings that it does not exceed its authority, well observing where no legal rights or objections interpose, and where such rights and objections do interpose. If I were to grant this faculty and then it should turn out that there was a prescriptive right, the faculty would be of no use, it would be void, and Mr. Nicholl would have a full right to call upon the parishioners to reinstate his pew, as occurred in the case in *Fortescue* (see *Archer v. Sweetnam*, *Fortescue*, 346) notes. Therefore, I must consider, not what I would wish to do, or what I might think a benefit to the parishioners, but what the law will allow. In opposition to the issuing of this faculty Mr. Nicholl alleges himself to be in possession of a pew, and if this is sufficiently alleged and proved to be by prescription, it leaves the Court no discretion or course but to grant his prayer. If the pew be held by prescription or by faculty I cannot touch it. But it is said he should have proceeded, not by act on petition, but by plea and proof. I know no authority for that objection; on the contrary, I believe the ordinary course when





## IRELAND.

le by consent, and had been acted on by the lies, and that the affidavits of the plaintiff showed he possessed sufficient security for the defendant, and that an unauthorised or unauthenticated circular like that which had been produced, and which might be a complete fabrication, ought not to weigh with the Court in such a case. In the case of *Essey v. Elridge*, 2 Cr. & Mees. 336, it was said Bayley, B. "It frequently, nay, generally, happens that *qui law* actions are brought by persons in urgent circumstances who are unable to give security for costs, but there is no instance in which security for costs has been given in such cases; to require such security would frequently render the Act of Parliament giving the penalties inoperative: the question is not altered by there being a number of actions brought by this plaintiff." (a)

**PROG. C. B.**—Without giving any opinion whether this Act is mandatory or not, I am of opinion that this application ought to be granted; on the one hand, the Court might have to decide whether the circumstances are such as to entitle the party to the relief. On the other hand, the Act of Parliament requiring a judge's order, leaves the matter in ambiguity. I feel bound by the decision of the *Barons of Q. B. and C. P.*, which have held that, in a similar state of facts, security for costs should be given. I think, therefore, that in the exercise of the discretion which the Court has, independent of the statute, we ought to order that security for costs should be given; this discretion, however, should if possible be exercised without injustice to the plaintiff. I am by no means of opinion that actions of this kind should be looked upon with disfavour. To secure the performance of public duties, penalties are imposed; and to ward against the non-enforcement of these penalties, the Legislature calls into action the sordid and fishy, or the public, spirit of the parties to effect its ends. Nine separate actions have been brought in this Court for separate penalties, which acts of action might have been introduced as separate counts in one declaration; and that seems me quite a sufficient ground to influence the discretion of the Court to oblige the plaintiff to give security for costs. But the order of Baron Pennefather has been made a considerable time since, and there has been great delay in coming to this Court have the subject reconsidered. We shall therefore limit the security to be given in the three actions which were allowed by that order to be provided with, to the costs to be incurred henceforward.

**PENNEFATHER, B.**—The wording of the clause of the Act of Parliament under our consideration is very peculiar. The defendant is empowered to obtain an order that the plaintiff shall give security for costs through a judge or court; it appears that the Legislature intended a judge should act, when satisfied on the application was made in time, by the proper party, &c. and it does not appear that there is any discretion vested in the Court, when these facts are ascertained. I do not wish to come to a different conclusion from the other law Courts, and I will not ledge myself to this construction of the Act; when made the order which I did, there was no suggestion that one action would have been sufficient to decide the matters in dispute between the parties; when it appears that what is to form the subject of all these actions could be tried in one, I think here is good ground for the exercise of the discretion of the Court.

**LEFROY, B.**—I concur in the rule which has been pronounced, but I do not come to that conclusion on any grounds of discretion. The question which has been raised here is, whether the defendant, against whom all these actions have been brought, has a right to security for costs. In my opinion, if the Act of Parliament does not give him this right it is nugatory. There are great facilities given by the statute for the recovery of penalties; none of the clauses renders certain corporate officers

(a) The statute 3 & 4 Vict. c. 108, s. 89, provides that in the case of any person acting as mayor, alderman, councillor, or municipal commissioner, or auditor or assessor for any borough, or for any ward in any borough, without having made the declaration heretofore required in that behalf, or without being duly qualified at the time of making such declaration, or after he shall have ceased to be qualified according to the provisions of the Act, or after he shall become disqualified to hold any such office, "he shall for every such offence forfeit the sum of 50*l*." The section then goes on to provide that "it shall be lawful for any defendant by judge's order, or by the order of the Court, to be obtained within fourteen days after he shall have been served with process in any such action, to require the plaintiff to give security for costs, and in such case all further proceedings in the said cause shall be stayed until the plaintiff shall give security, to the satisfaction of the proper officer of the Court, for the costs of such action, in case a verdict shall pass for the defendant, or the plaintiff shall become nonsuited, or discontinue such action, or if by demurrer or otherwise judgment shall be given against the plaintiff." The provision of the analogous section of the English Municipal Corporations Act, 8 & 9 Wm. 4, c. 76, s. 83, is in this respect identical, except that the words "or by the order of the Court," do not appear in the clause of the English statute.

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liable to a penalty of 50*l*. for every act done as such, if the party is not at the time of so acting qualified to fill such office, or if he has from any cause become disqualified; the party who sues for the penalty has only to shew that he has so acted, and the party sued must prove that he was at the time of so acting qualified, and, if he fails in this, he must pay the penalty. These offices are, generally speaking, gratuitous, and it is just that the officers filling them, and discharging the duties, should be well protected; and the protection given is, first, to have security for costs whenever they are proceeded against for a penalty; and, secondly, that on the failure of the plaintiff's action they shall be entitled to have their costs as between attorney and client; and, thirdly, there are only a particular class of persons entitled to sue. On the other hand, the plaintiff is entitled to bring as many actions as he can shew defaults; but as the plaintiff is entitled to bring all these actions, so the defendant is entitled to get security for costs in each and every of them. What are the words of the Act? "That it shall be lawful for the defendant, by judge's order or by the order of the Court, to require the plaintiff to give security for costs." Was it intended by the words, "by judge's order," to abridge the defendant's right? If so, what is the meaning of the words, "it shall be lawful for the defendant to require?" It must mean, to insist on the plaintiff's giving security. If "require" does not mean this, the defendant is in the same position as he was before the passing of the Act, when he might, under peculiar circumstances, have applied to the Court to exercise its discretion in compelling the plaintiff to give security for costs. It has been suggested that the reason of the introduction of the words, "by judge's order," was because, as the action could only be brought by a particular class of persons, it was necessary that a judge should decide whether the action was brought by a proper person,—that is one good reason for going to a judge; another is, the rule to give security for costs is generally made by the Court; and when a judge in chambers makes the order, it is considered as the order of the Court. Here a single judge may make the order, not as the act of the Court, but as his single act: it was, therefore, necessary to say that the defendant may apply to a single judge, and thus bring the officer of the Court into action, and not leave the question to the officer. That appears to me to be the object of the Legislature; the words are not introduced to abridge the right of the defendant, but to point out the mode and manner of proceeding. Take the course of proceeding in an ordinary case, as where a sheriff comes in. The Court have, in one sense, a discretion; but, having found the qualification, they have no discretion to deprive the party of what he is entitled to as a right. As the defendant did not give notice of his intention to dispute the order made by Baron Pennefather, I agree that the security for costs ought to be limited to the costs henceforward to be incurred.

**PROG. C. B.**, and **PENNEFATHER, B.**—after having heard the judgment of **LEFROY, B.**, then stated that though it was not necessary to decide the question on the present motion, yet, that they coincided in the opinion which had been so ably expressed by **LEFROY, B.** that it was imperative upon the Court, under the statute, to compel the plaintiff to give, in such case, security for costs, and not merely a matter of discretion.

**MALLEY** applied to the Court to impound the document relied on upon the motion, to the prejudice of the defendant, as a circular of the *Dingie Mission*. **Sir Colman O'Loughlin** objected. The defendant did not wish to be made ancillary to the bringing of an action by a third party; but would undertake to produce the document on any criminal proceedings, but not in a civil one.

**PROG. C. B.**—If the document is impeached as a forgery, we will impound it: let it remain in the hands of the officer of the Court for a week, and after that time let it be handed back to the owner.

It was ordered that the plaintiff be stayed from proceeding until he shall give security for costs, but no costs of the motion.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by **RICHARD GRIFFITHS WILFORD**, Esq. of the Inner Temple, Barrister-at-Law.

Tuesday, June 10.

**KEKEWICK v. MARKER.**

*Trust to raise charges by sale of timber or charge on inheritance—Trustees' discretion—Tenant for life without impeachment of waste subject to a trust term—Injunction.*

Where, by a settlement, a term was created upon trust by felling and sale of timber, or by mortgage or sale of part of the estate to raise several sums of money, the first of which was to be raised forthwith, and paid to the settlor, and subject to that term, the estate was limited to the settlor

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for life without impeachment for waste, with remainder to the defendant as tenant for life without impeachment of waste, and the settlor being dead, the defendant, as tenant for life in possession, had advertised timber for sale, it was

**Held**, on a bill filed by the trustees of the term to restrain the defendant from cutting timber, that the Court would not control the trustees in the exercise of a discretion as to the mode of raising the money, whether by sale of timber or by charge on the inheritance, and that the tenant for life taking an interest in the timber, which is a portion of the inheritance, but subject to prior right and discretion of the trustees, would be restrained by injunction from cutting timber, and thereby depriving the trustees of the power of exercising that discretion the settlor intended to give them.

This was a motion by way of appeal from the decision of Vice-Chancellor Lord Cranworth, who had refused a motion made by the plaintiffs to restrain the defendant from cutting and selling timber. The plaintiffs were trustees of a term under a settlement, dated the 11th of October, 1844, and made between Margaretta Marker and a niece of Thomas Putt, the Rev. H. W. Marker, H. W. Putt Marker, Thomas John Marker, Sir John Kennaway, the Rev. R. Stephens, James Putman, and the plaintiff, Samuel Trebawke Kekewick. Margaretta Marker was seized of the several manors, capital and other messuages, lands, advowsons, and other property, as thereafter mentioned, and that she determined to settle the same upon the several uses and purposes, and subject to the powers and conditions therein after set forth for the several successive benefits of herself and her sons, the defendants, H. W. Marker and T. J. Marker, and their issue respectively, and for her daughter Margaret Frances Smith. It was witnessed that, for carrying the same into effect, and in consideration of the love and affection she had for Margaretta Marker, did grant, bargain, sell, release, and confirm unto Sir John Kennaway and Richard Stephens, and their heirs, several manors and other property which she was then possessed of, with their appurtenances, to hold the same, unto Sir John Kennaway and Richard Stephens, their heirs and assigns, and for the uses upon and for the trusts, and subject to the conditions following:—"To the use of James Putman and Samuel Trebawke Kekewick, their executors, administrators, and assigns, for the term of 1,000 years, without impeachment of or for any manner of waste, save only for cutting and felling of ornamental timber, and immediately after the expiration of the said term, and in the meantime subject thereto, and to the trusts thereof, for the use of Margaretta Marker and her assigns for her natural life, and after the decease of Margaretta Marker, for the use of the defendant, Henry W. Marker, and after the decease of the defendant Henry W. Marker, for the use of W. Putt Marker, who is now deceased, and after the decease of W. Putt Marker, to the use of the first son of his body begotten lawfully, and the heirs male of his body, or of such first son issuing, with divers remainders over, with an ultimate remainder in fee to the defendant, Henry W. Marker." And the indenture of release contained the following declaration of trust as to the term of 1,000 years, limited to Kekewick and Putman:—"And it is hereby declared and agreed between and by the parties to these presents that the manors, capital, and other messuages, tenements, farms, lands, advowsons, and other hereditaments hereby limited to Samuel Trebawke Kekewick and James Putman and their executors, administrators, and assigns for the said term of 1,000 years are limited to them upon and for the uses, trusts, intents, and purposes following (that is to say), upon trust in the first place by cutting and felling and selling and converting into money all or any part or parts of the timber now standing and growing on the said lands which is or shall be of full and ripe growth, and not ornamental to the mansion at Combe aforesaid, or the pleasure-grounds attached thereto or any of the views or prospects of the same, of which it is hereby declared that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired, or by demising, mortgaging, or selling the premises comprised in the said term, or any part or parts thereof (save and except the mansion-house at Combe aforesaid), and the said several manors, messuages, farms, advowsons, rectories, lands, hereditaments, and premises situate, lying, and being in the said several parishes of Gittisham, Fairway, Honiton, and Bucknell, or any or either of them, all of which are hereby expressly reserved from sale, and for all or any part of the said term, or by all or any of the said ways or means or any other reasonable ways or means, forthwith to levy and raise the clear sum of 10,000*l*. and to pay the same to the said Margaretta Marker, her executors, administrators, or assigns, or as he, she, or they shall order and direct for her and their own absolute benefit; and in the next place, from and immediately after the decease of the said Margaretta Marker, by all or any of the ways and means aforesaid, to levy and raise the two several sums of 10,000*l*. and

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10,000*l.* and to pay the first of those two several sums of 10,000*l.* each unto the said Thomas J. Marker, his executors, administrators, and assigns, for his and their absolute benefit, and to be by him and them received in satisfaction of any claim he may have on his brother, whether legal or otherwise, under the codicil to the last will and testament of his uncle, the Rev. Thomas Pott, deceased, and to pay and apply the last of the said two several sums of 10,000*l.* each to such persons and in such manner as Margaret Frances Smith, the wife of the Rev. George Townsend Smith, formerly Margaret Frances Marker, a daughter of the said Margaretta Marker, shall, by any writing under her hand, appoint, order, and direct, and in default thereof, unto her, the said Margaret Frances Smith, her executors, administrators, and assigns, for her and their absolute benefit, together with interest on the two last mentioned sums of 10,000*l.* and 10,000*l.* to be computed at 4*l.* per cent. per annum, from the day of the decease of the said Margaretta Marker, until the full payment thereof respectively; provided always, and it is hereby agreed and declared by the parties hereto that from and immediately after the trusts hereinbefore declared of and concerning the said term of 1,000 years shall in all respects be fully performed, or otherwise satisfied and discharged, or shall become unnecessary or incapable of taking effect, and the said Samuel Trehawke Kekewick and James Putman, and their executors, administrators, and assigns, and every of them respectively, shall be fully reimbursed and satisfied all costs, charges, and expenses to be occasioned by or relating to the trusts hereby in them reposed, the said term shall, as to such of the manors, capital, and other messuages, farms, lands, advowsons, and other premises comprised therein, as shall not have been sold or mortgaged for the purposes aforesaid, absolutely cease and determine. And as to such of the said premises as shall have been so mortgaged, shall, subject to such mortgage, wait upon and attend the reversion and inheritance of the said premises so mortgaged."

Margaretta Marker died in July, 1846, she having previously made her will, dated October 14, 1844, and appointed Henry William Marker her executor, which he duly proved. Upon the death of Margaretta Marker, the defendant, Henry W. Marker, entered into possession of the estate, and has ever since continued in possession or receipt, except since the death of Margaretta Marker. Putman and Kekewick, in pursuance of the trusts of the said indenture, raised by the sale of a portion of the ripe and full-grown timber on the estates, not being ornamental to the mansion at Combe or the pleasure-grounds attached, or any of the views or prospects of the same, the sum of 1,891*l.* 1*s.* 5*d.* and paid the same to the defendant, Henry William Marker, as the executor of Margaretta Marker, in part satisfaction of the sum of 10,000*l.* which by the indenture was directed to be levied and raised by Kekewick and Putman. With the exception of the sum of 1,891*l.* 1*s.* 5*d.* so raised and paid, and the sums of money received by the said defendant, Henry W. Marker, on account of any timber sold by him with which the trustees might be entitled to charge him in reduction of the sum of 10,000*l.* no part of the sum had yet been levied or raised, and no part of the other two sums of 10,000*l.* each by the indenture of settlement directed to be levied and raised had yet been levied or raised by Kekewick or Putman. The yearly rental of the estates was about 3,500*l.*; and for many years previously to the estates being put in settlement, the timber growing thereon had been carefully preserved by the successive owners, and allowed to remain uncut; and at the date of the indenture there was, and is now, on the estates a large quantity of timber of ripe growth, and not in any way ornamental, estimated at the value of 10,000*l.* The bill then alleged that it was the intention of the settlement that the trustees should have a discretion to raise the money by sales of timber, and that the defendant, H. W. Marker, alleges that the trustees ought not to resort to the timber, but should raise the money by a mortgage, and that the defendant, Henry W. Marker, had already given instructions to Messrs. Reed and Warren, the auctioneers, residing in the parish of Heavitree, in the county of Devon, to sell timber by public auction, on the 31st of December then next ensuing; and they accordingly advertised the timber for sale; and the bill prayed for an injunction to restrain them from so doing.

*Roll and Fooks*, for the appeal motion.

*Bethell and Gifford*, contra.

*Roll*, in reply.

## JUDGMENT.

The LORD CHANCELLOR.—This case came before the Court upon an appeal against an order made by Vice-Chancellor Lord Cranworth, by which he dismissed with costs an application for an injunction made by the plaintiffs in this cause. The plaintiffs are trustees of a settlement made by Margaretta Marker, who was the owner of the estate, by deed which settled lands in question to certain uses; the

first use being to the plaintiffs for a term of 1,000 years, without impeachment of waste, to the intent that the trustees might, by cutting and selling timber, except such ornamental timber as was defined, or by mortgaging or charging the estate, to raise the moneys afterwards mentioned, after and subject to the term to the use of Margaretta Marker, the settlor, for life, without impeachment of waste, then to the use of the defendant for life, without impeachment of waste, with remainder to his children successively in tail, and an ultimate remainder to the defendant in fee. The trusts of the term were to cut timber, other than ornamental timber, or by mortgage of the estate, at the discretion of the trustees, to levy and raise the sum of 10,000*l.* to be paid to the settlor herself, then a second 10,000*l.* for the benefit of other persons named in the settlement. The settlor died shortly after the date of the settlement; but during her life timber had been felled, and sold, and applied in part satisfaction of the first sum of 10,000*l.* Then the defendant, as first tenant for life under the settlement, was let into possession. The defendant is also executor of the settlor, and in that character is entitled to the first sum of 10,000*l.* whether for his own benefit or otherwise does not appear. It appears that after the death of the settlor timber was felled with the assent of the trustees, and under the directions of the defendant, as first tenant for life, and applied in part for the satisfaction of the first 10,000*l.* Shortly afterwards the defendant advertised for sale a second fall of timber, and some timber was contracted to be sold, and the trustees then insisted that the proceeds of such timber should be applied in discharge of the several sums they were empowered to raise under the trusts of the term. The tenant for life, the defendant, on the other hand, insisted that he was entitled, under the limitation to him for life, with exemption from waste, to cut the timber for his own use, as part of the ordinary profits of the estate, and that the trustees ought to raise the sums required by the settlement by means of a charge on the estate. The trustees then filed the present bill to restrain the defendant from cutting timber, and moved for an injunction, which the Vice-Chancellor refused with costs. Before this, a bill had been filed by the defendant in the present suit against the plaintiffs, the trustees, stating that the trustees were about to raise the money directed to be raised by a mortgage, and praying a declaration that the timber should be applied to that purpose. That suit was not a candid proceeding, and was instituted with a view of getting a declaration of the opinion of the Court on the trusts of the deeds, and some collateral advantages were supposed to be gained by that mode of proceeding. That cause was heard on demurrer, and Vice-Chancellor Wigram, in giving judgment on the question whether the whole sum ought to be raised by a charge on the inheritance, and he held that the trustees were not bound so to raise the whole of the sums. In the course of his judgment the Vice-Chancellor dropped some expressions that the trustees ought not to apply the timber to that purpose; but that was not an opinion formed, it was only an impression on the mind of the Vice-Chancellor that the tenant for life might cut timber, exclusive of the right of the trustees. The demurrer was disallowed. The question here is whether the trustees have a right to cut timber in satisfaction of the sums charged by means of the trust term; if they have that title, then they have title to the injunction, and their right depends upon their equitable title. There are no special circumstances to control the discretion vested in the trustees by the settlement. My opinion is that the trustees have the discretion of raising the money by means of the timber, and that the tenant for life being about to exclude them and to deprive them of the subject in respect of which the discretion vested in them is to be exercised ought to be restrained. The cases which were cited in argument are not very applicable, and I was referred to 2 Saunders on Uses, 265. The trusts in the present settlement are not in the usual form, and there is no case in the books which affects the question decided on a deed in the terms of this settlement. The trusts of the deed are "to the use of Putman and Kekewick, their executors, administrators, and assigns, for the term of 1,000 years, without impeachment of waste, save only for cutting and felling ornamental timber, as thereafter mentioned, and subject to the said term, and to the trusts thereof, to the use of Margaretta Marker (the settlor) and her assigns for her life, without impeachment of waste, save only the cutting and felling ornamental timber, and after her decease to the use of the defendant, Hy. Wm. Marker for his life, without impeachment of waste, save as aforesaid, and after his decease to the use of the defendant, Hy. Wm. Putt Marker, and his assigns for life, without impeachment of waste, with remainder to his first and other sons in tail." And the trusts of the term are declared to be "upon trust in the first place by cutting, and felling, and selling, and converting into money all or any of the

timber growing on the lands which shall be full and ripe growth, and not waste to the mansion at Combe or the pleasure-grounds attached thereto, or any of the views and prospects of the same, of which it is intended that enough of the most ornamental shall remain to preserve the beauty of the place, and not to be cut, or by demising, mortgaging, or selling, or in any manner comprised in the said term, or any part of," with certain exceptions, to raise the sums of 10,000*l.* The first trust then is to the trustees, regulated in the manner expressed in the above trusts. It is clearly anticipated that the discretion given to the trustees would be exercised, the first sum of 10,000*l.* was to be paid to the settlor herself, and was to be raised forthwith. It marks that in her judgment there was timber to be cut, and that the trustees might raise a sum by disposing of it. The trustees, then, in exercising either to raise the money by the sale of timber, or by charging the estate itself with a charge on the inheritance, that it will not on that discretion where it is vested in persons named in the trusts exercise it. It was contended for the defendant, the effect of that construction would be to take out of the settlement the exemption from waste given to the tenant for life, because it would prevent from cutting timber altogether. But a construction would enable the tenant for life to appropriate to himself the timber, and as to the trustees of the subject upon which they might exercise a discretion; while, if the discretion given to the trustees it would not strike at the settlement the exemption from waste given to the tenant for life. For instance, if the trustees determine not to raise the money by means of the timber, the tenant for life might cut timber, and if they should exercise their discretion by selling timber, he might still be exempt from waste, and might open mines or quarries and raise minerals, and do various other acts by virtue of his exemption from waste. The language used in the half of the tenant for life was, that timber forming part of the ordinary profits of the estate; but that so, for timber not severed is a part of the inheritance, and if the tenant for life can cut timber he is enabled to take a part of the inheritance. It is reasonable to suppose that he should be at liberty to appropriate a part of the inheritance, and to charge upon the estate itself the charge directed to be made. The cutting timber is a special power to appropriate a part of the inheritance. Having adverted to the terms of the deed, which are quite unusual, I cannot see what equitable grounds there are upon which the Court can be asked to control the discretion of the trustees. It is the will of the settlor that the trustees shall have power to raise the moneys directed, either by a sale of timber or by a charge on the inheritance, and to apply the proceeds in keeping down the interest of a charge upon the inheritance. This depends upon the presumed intention of the grantor. She intended that the grantee should take some profits. They might deprive the tenant of all interest in the timber, or the estate may be charged and the tenant for life required to keep down the interest. If I find intention, that is the rule by which the trustees must be interpreted, and the Court is to give effect to that intention. Now, what is the intention in this case? The grantor must have contemplated the exercise of the right or discretion the settlor gave to her trustees; but if I adopt the construction contended for by the defendant I shall defeat her intention. All the excepted portions of the estate are not to be intermeddled with; and a material circumstance that the first sum of 10,000*l.* is to be raised forthwith, and is accompanied by regulation and restriction as to the timber to be felled; and the tenant for life is only excluded from appropriating to himself that portion of the estate. I can find no case, principle, or discretion in that the Court ever controlled the exercise of an express trust; and it goes to support this intention the trustees that the language of this settlement differs so essentially from the ordinary form. The right of the trustees was objected to by raising the case of mortgages, and it was said the mortgagor might fell timber, and that the trustees are in the situation of mortgagees. I am of opinion that there is no such analogy, for a mortgage is a contract, the mortgagor is the owner of the estate, the mortgagee is a security, and while he remains in possession he may exercise acts of ownership. The tenant for life in this case is not the owner of the estate, but his interest is subordinate to the trust of the term. The trustees may interfere at any time. The relations of mortgagor and mortgagee are so different that they have no application to this case. The trustees have power given to them, and the tenant for life's interest is subordinate to that power. The authorities are inapplicable for the tenant for life turn upon different principles. These cases were *Smythe v. Smythe*, 2 Sim. 251; *Farren v. Wilson*, 4 Hare, 434; *Davis v. Farcomb*, 2 Sim. 425. Those cases have no application

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His lordship having commented on these cases proceeded. They are all governed by the case of *Cockerell v. Townley*, which was a case in which the trustees had a power to sell. Those are the cases which were relied on to shew that the interest of the tenant for life. Then this case was likened to a case of marshalling, where one party had two funds to which he could resort, and the other had only one of them, and it was said that here the trustees must resort to the fund which would not deprive the tenant for life of an interest in the timber. This is not a case of marshalling. There the principle is that justice may be done to both parties, and not occasion loss to either. But here one party must lose, and who is to settle that? Why, the grantor has determined it. See what the grantor has done; she has given the tenant for life license to appropriate a part of the inheritance, subject to the prior right of the trustees. The tenant for life is not the owner of the timber until it is felled, but has only a power to cut it, subject to the prior exercise of the discretion of the trustees. It is said the purchaser of the timber has acquired a right to it in this case, and that therefore the Court cannot interfere; but how could a purchaser from the tenant for life acquire a right the tenant for life himself had not? Then it is said there has been delay on the part of the trustees, but I see no ground for that objection. The deed of settlement is only dated in 1844, and the trustees within a reasonable time manifested an intention that timber should be cut in part satisfaction of the first sum of 10,000*l*. The trustees do not appear to have started up for the first time when the tenant for life was about to cut timber, but they had manifested an intention to apply the timber, with the acquiescence of the tenant for life. I see no ground for saying the trustees have improperly exercised their discretion. It is said, if only proper timber is cut by the tenant for life, why should the Court interfere to restrain him? But, if the Court allows the tenant for life to appropriate the timber as profits, and diminishes the amount to be raised by sale of timber, and increases the charge on the inheritance, the trustees have a duty to discharge with fairness to all parties, and selling timber is calculated to reduce the amount of charge on the inheritance. Those in remainder, who are entitled to the inheritance, will benefit ultimately by a diminished charge; and they have a right to the benefit of the caution and discretion of the trustees. Considering the discretion in the trustees to be for the benefit of others interested in the estate, and that it still leaves matter on which the exemption from waste can operate, I think the trustees have power to protect that which the tenant for life is about to destroy. But as a contract for sale of some of the timber has been made, I think it would become the trustees to adopt that sale. I shall grant the injunction prayed for by the bill; the trustees are to account for the produce of the timber, and to assume that the timber has been cut by those who had a title to do so. The whole question being now before me, and there is nothing to vary the case at the hearing, I shall give effect to the right of the trustees according to my opinion. The defendant will be ultimately entitled to the money, either as executor or in his own right. There must be an undertaking on both sides to account for what has been received for timber sold, without prejudice to the title to the timber at the hearing.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLFUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

Feb. 22 and March 8.

SMITH v. STEWART.

*Will—Construction—Dying without leaving issue.* A testator gave his residuary personal estate in shares to legatees by name, and directed that the whole of the legacies should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue: Held, that the words "dying without leaving issue," did not refer to the death of the legatees in the testator's lifetime.

[This was a special case under the 13 & 14 Vict. c. 35, from which the following facts appeared:—*Thomas Smith*, of Gibraltar, master shipwright, by his will, dated the 18th of August, 1849, after directing the payment of his just debts and funeral and testamentary expenses, and bequeathing a pecuniary and specific legacy, proceeded as follows:—"I give my gold watch to my brother James, in case of his death before me to my sister Agnes, and in case also of the death of my sister Agnes before me, then to the eldest son of my said sister Agnes; and as to all the rest, residue, and remainder of my property, both real and personal, and of every nature and kind whatsoever and wheresoever, I direct the same to be divided into fourteen equal parts or shares. And I give, devise, and bequeath the said fourteen shares in manner following,

that is to say,—to my brother, James Smith, now or late of Pencraig, by Ross, in Herefordshire, his heirs and assigns, three shares; to my sister Agnes, the wife of John Affleck, now or late of Brunswick-street, No. 38, Stockbridge, Edinburgh, her heirs and assigns, one share; to the four children of my said sister Agnes, their heirs and assigns, one share each; to the four children of my deceased sister Euphemia, formerly the wife of George Knight, late of Little France, near Edinburgh, deceased, their heirs and assigns, one share each; and to the two children of my deceased sister Grace, formerly the wife of Lees, late of deceased, their heirs and assigns, one share each; and I direct that the whole of the said legacies shall have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue." And after giving in his said will directions not material to the question before the Court, the testator appointed John Stewart and George Rowsell executors of his will.

The testator died on the 23rd of September, 1849, leaving the legatees named in his will him surviving; and the will and a codicil, which did not in any way affect the present question, were duly proved by John Stewart and George Rowsell, in the Superior Court of Gibraltar, and also in the Prerogative Court of the Archbishop of Canterbury.

John Stewart and George Rowsell had in their hands a considerable sum of money on account of the testator's residuary personal estate.

The question which had arisen was as to the construction of that clause in the will whereby the testator directed that the whole of the legacies should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue, whether the legatees were respectively now entitled to absolute interests, or whether their respective shares were subject to any and what right of survivorship.

*Bacon* and *Boys* appeared on behalf of the plaintiffs, and contended that the meaning of the words "dying without leaving issue," was, "dying in the testator's lifetime without leaving issue."

*Cairns*, for the trustees.

*Selwyn*, for the other defendants.

The following cases were cited:—*Shergold v. Boone*, 13 Ves. 370; *Farthing v. Allen*, 2 Madd. 310; and *Horne v. Pillans*, 2 Myl. & Keen, 24.

The VICE-CHANCELLOR said that here there was no express life estate—no substitutionary gift. He stretched words who made those applying to an indefinite future to apply to a definite future. His Honour thought that the construction desired to be put upon the words was contrary to the ordinary and common meaning of the words. That, however, was not decisive, as the context might render it reasonable to depart from the construction of words as correctly used.

*Saturday, March 8.*—The VICE-CHANCELLOR said.—The question in this special case was as to the meaning of the words, "dying without leaving issue," contained in the will of Thomas Smith, a master shipwright at Gibraltar. Three constructions might be suggested, namely, first, did they mean "dying in my lifetime without leaving issue?" secondly, did they mean "dying after my decease without leaving issue?" and, thirdly, did they mean "dying in my lifetime, or after my decease, without leaving issue?" It was only necessary to decide whether the first construction was right or wrong, for as his Honour understood, all the legatees mentioned in the will were alive. That construction appeared to him not according to the proper ordinary sense or presumptive meaning of the words, and therefore ought not to be adopted unless that ordinary sense or presumptive meaning was controlled by the context, or by extrinsic circumstances admissible in evidence. But extrinsic circumstances were here out of the case, so that the only doubt was as to the context. The directions respecting the watch seemed to be not immaterial, and to bear rather against than for the first construction. The language of contingency which the testator had used, was certainly not inaccurate. The proposition that a man will die without leaving issue, it was true, differed from the proposition that a man will die. It might be noticed also, that if this brother, James Smith, had died in the testator's lifetime, the shares given to him must have lapsed, whether he left issue surviving or not surviving the testator, or left no issue; for there was no gift by way of substitution or otherwise to any issue of James Smith, whose name his Honour had merely selected by way of giving an instance. On the whole he was of opinion that the context did not warrant a departure from the proper ordinary sense and presumptive meaning of the words under consideration, and that the first construction could not be adopted, and that one of the other two was right; nor did it seem to his Honour that he was prevented from this conclusion by *Cambridge v. Rous*, 8 Ves. 12, nor by any authority previously or subsequently to *Billings v. Sandow*, 1 Bro. Ch. Ca. 293.

Tuesday, June 17.

Re THE BUTTERWICK FREE SCHOOL.

Sir Samuel Romilly's Act—Charity—Motion—Attorney-General.

By deed, fourteen trustees of a charity school were appointed, and it was provided, that when the number was reduced to four, ten more should be appointed. The three surviving trustees presented a petition under the above Act for a reference to the Master to approve of proper persons as new trustees, and the reference was made. Pending the proceedings before the Master the master of the school died, and as the deed provided that a vacancy in the mastership should be filled up within a month by the trustees and the clergy-men of five parishes named, notice was given for an election to the mastership. One of the surviving trustees moved that the election might be stayed until after the appointment of the new trustees.

The Court considered that the Attorney-General should have been served with notice of the application; that, though when the jurisdiction had fastened under the Act, application might be made by motion, yet the motion should be within the sphere of the subject of the original petition; and that, there being also a doubt as to the legality of the election, if proceeded with, it was most expedient for the Court to decline interfering on the application.

This was a motion under Sir Samuel Romilly's Act (52 Geo. 3, c. 101), on behalf of one of the surviving feoffees in trust of the Butterwick Free School, in the county of Lincoln, that the election of a master of the said school, in the place and stead of Wilson Banks, deceased, might be stayed by the order of the Court until after the new feoffees in trust of the said school should have been appointed under an order of the Court, dated the 13th of January, 1851. This order was made on the joint petition under the 52 Geo. 3, c. 101, of the present applicant, and two other persons, and by it it was referred to the Master to inquire and state whether the petitioners were the sole surviving feoffees in trust of the charity estate, and if he should find that they were, then it was ordered that the Master should approve of eleven fit and proper persons to be appointed feoffees in the place and stead of the feoffees in trust who had died; and after the Master should have made his report, such further order should be made as should be just. While the proceedings were pending before the Master, and on the 24th of May last, the Rev. Wilson Banks, who was the master of the school, died. The original deed of endowment of the school, dated the 2nd of November, 1665, provided that upon the feoffees in trust being reduced to four, ten new feoffees should be appointed, and it also provided that the schoolmaster should be elected and chosen by the feoffees, their heirs and assigns, and the heirs and assigns of the survivor of them, and by the ministers for the time being of the towns of Butterwick, Fishtoft, Skirbeck, Bennington, and Leverton, in the said county of Lincoln, and the major number of them, within one month after the same became vacant. The feoffees, other than the present applicant, and the ministers of the said parishes, having announced their intention to proceed to elect a schoolmaster, in the place of Mr. Banks, on the 19th of June, this motion was made for the purpose of postponing the election until the vacancies among the feoffees were filled up.

*Russell* and *J. H. Palmer*, in support of the motion, contended that powers vested in trustees should not be exercised *pendente lite*. (*Webb v. Lord Shaftesbury*, 7 Ves. 480; *The Attorney-General v. Clack*, 1 Bea. 467; and *Foley v. Wornier*, 2 Jac. & W. 246.) The provisions in the deed prevented any valid election of a schoolmaster being made while there were but three feoffees. They also referred to the case of *Re Chipping Sodbury School*, 5 Sim. 410, for the purpose of shewing that the proper mode of applying in this case was by motion.

*Malins* and *Busk*, for the two other feoffees, objected to the postponement of the election. The deed required that the master should be elected within a month after the vacancy occurred, and there was now a sufficient electing body. The present motion was made by one person only, and being an application under Sir Samuel Romilly's Act, it was not properly made, that Act requiring two or more persons to be applicants.

The VICE-CHANCELLOR said that when the jurisdiction had fastened under Sir Samuel Romilly's Act, an application might be made by motion, but it was another question whether in such a case as this the application was a proper one.

*Russell*, in reply.

The VICE-CHANCELLOR inquired whether the Attorney-General appeared, or whether he had appeared before the Master.

*Russell* replied in the negative.

The VICE-CHANCELLOR said that his impression was that the Attorney-General ought to have been,

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or ought to be before the Master. (a) However that might be, he entertained serious doubts whether he could entertain the present application without having the Attorney-General before the Court. It was true that when once the jurisdiction had fastened (to use the expression ordinarily adopted) under Sir S. Romilly's Act, proceedings might be by motion, but the motion must be within the influence and sphere of the matter producing the original petition. He had some doubts whether, considering the very limited nature of the order and of the original petition, the proposed step was not too large for the Court to take. But that was not all. The existing cooffees and the five clergymen had or had not the power by law of electing a master *rebus sic stantibus*. If they had, he did not consider that sufficient ground had been laid before him for interfering. If they had not, then the election would be ineffectual, and it might, in that case, on a proper proceeding for the purpose, be set aside. It appeared to him that the balance of expediency was much in favour of the Court's not acting on the present application, but he abstained from expressing an opinion whether an election could or could not be made by the present trustees.

Saturday, May 10.

SHARDLOW V. GAZE.

Practice—Claims—Affidavit of plaintiff.

This claim was unopposed, but supported by the affidavit of the plaintiff alone.

Elmsley for the plaintiff.

Amoy for one of the defendants.

THE VICE-CHANCELLOR said, that in a former case he had not expressed himself as he intended to do with reference to a plaintiff's affidavit in support of a claim. What he meant was, that such an affidavit was not evidence where there was a conflict of affidavits, but where there was no opposition, he was willing to treat the plaintiff's affidavit as evidence. He would make an order on the present claim, although it was supported by the plaintiff's affidavit alone.

May 12, 26, and 27.

HUTCHINS V. HUTCHINS.

Breach of trust—Rate of interest.

Where trustees, upon some doubts entertained by themselves as to the status of a person claiming a sum, part of the fund in their hands, refused to pay him, and the status was afterwards satisfactorily established, the trustees were ordered to pay the sum, with 5 per cent. thereon—the account to be taken with rests,—and all the costs of the suit.

This suit was instituted by the plaintiff, Richard Henry Christian Hutchins, against the Rev. James Hutchins, the Rev. George Hutchins, and two other persons, for the purpose of enforcing the payment of one-sixth part of the personal estate, and of the produce of the real estate, of a testator, and interest thereon from 1830; and the bill also prayed that James Hutchins and George Hutchins should pay the costs of the suit. The circumstances of the case were, in substance, as follow:—Charles Hutchins, an undergraduate at Oxford, in the year 1818 left England for India, having enlisted as a private soldier in the East India Company's service. Before 1820 he procured his discharge, and became the head master of the grammar-school at Calcutta, and held a situation in the Asiatic Museum there. In 1820 he married Ann White, the daughter of John White, a ship builder at Chittagong, by which marriage he had four children, viz. three sons, of whom the plaintiff was one, and a daughter. In 1827 Charles Hutchins, who with his wife had lived at Calcutta, removed with his family to Chittagong and resided with his father-in-law, John White. From this place he went to Szigapatam, and died on board the *Dolphin*, on his voyage back to Chittagong, about August, 1828, his wife having died a short time previously. The four children of Charles Hutchins remained with John White, their grandfather, who afterwards removed to Calcutta, taking with him the four children and also his own young children, two girls and one boy, the issue of a second marriage. Under the will of a maternal great uncle Charles Hutchins was entitled, in the event of his surviving his mother, Martha Hutchins, to one-sixth of personal estate and real estate, directed to be sold, and in case he should not survive his mother (which event happened), such of his children who should attain twenty-one were entitled to the same in equal shares. In December 1831, John White, by the desire of their uncle, the Rev. James Hutchins, sent the four children to England, where they were received by their uncles and aunts, the two brothers and two sisters of Charles Hutchins. Not long after the arrival of the children, the uncles and aunts, from certain statements made by the children, and from the complexion of three of them being somewhat different from that which the uncles and aunts had,

(a) See *Attorney-General v. Earl of Stamford*, 1 Ph. 737.

by the letters of Charles Hutchins and John White, been led to expect, came to the conclusion that some other children had been substituted for the children of their brother, Charles Hutchins. This conclusion was communicated to John White, by James Hutchins, in a letter dated in November, 1832. Three of the children (two sons and the daughter), were shortly afterwards sent back to Calcutta, where they died. The plaintiff remained in England, and his friends in India for many years believed that he had been recognized by his uncles and aunts as their nephew. The plaintiff, however, was placed at school, under the name of Warner, and afterwards he received from James and George Hutchins 14s. per week until the institution of the present suit, when the allowance was withheld, and the plaintiff became an inmate of the Brighton workhouse, he being a cripple from alleged neglect in childhood. In 1832 and 1833 Mr. Canham, a cousin of Charles Hutchins, endeavoured to prove to the uncles that their suspicions as to the children were groundless, but without success. In 1832 a commission was appointed by the Governor-General of India and the Bishop of Calcutta to examine the matter and report upon the evidence; and the commissioners in their report, dated September, 1833, stated that they were decidedly of opinion that no fraud had been practised, and that the children were the real children of Charles Hutchins and his wife. In 1842 the Rev. Mr. Morton, at the instigation of the uncles, made inquiries at Calcutta, and in a letter dated in December in that year, told them that no proof was wanting of the truth of the parentage, giving a full statement of the evidence on which his opinion was founded, and concluding, "I really and honestly think the matter is free from reasonable doubt." The sum representing the share which the plaintiff claimed as the only child of Charles Hutchins who attained twenty-one, amounted to 2,184l. 18s. 6d. This sum had been paid by the trustee of the will, who was a defendant, to Messrs. James and George Hutchins, they giving him an indemnity, and was, before the institution of the suit, distributed by them as in default of any child of Charles Hutchins attaining twenty-one. The defendants, in their answers, stated the circumstances upon which they founded their belief of the plaintiff not being the child of their brother Charles Hutchins; they denied that the weekly payments were made on account of any income due to the plaintiff, but as loans to him, and to save him from going to the parish; and they said that since the end of 1832 they considered and treated the plaintiff as a stranger in blood. The sum which the plaintiff claimed was invested in 2,400l. Consols, and was transferred into Court in this suit. Upon a reference to the Master to inquire whether the plaintiff and his brothers and sisters were the children of Charles Hutchins deceased, he reported in the affirmative; and the cause now came on for further directions.

Russell and Haig for the plaintiff.

Wigram and Bellamy for the defendants.

Upon the question of charging the defendants five per cent. interest, the following cases were cited: *Mosley v. Ward*, 11 Ves. 581; *Forbes v. Ross*, 2 Cox, 113; and *Tebbs v. Carpenter*, 1 Madd. 290, 307.

THE VICE-CHANCELLOR (without hearing Russell in reply) said,—I have seldom met with a case more deserving of deep disapprobation and reprehension on the part of the defendants; one of them by breaking his trust and placing the fund, with which he was intrusted, in the hands of those whose interest it was to dispute the ownership of the person really entitled; the others, clergymen, who have been unsuccessful in suggesting, I think without any ground which could for a single moment deserve to be represented as solid, that they were ignorant of the status and condition of their brother's family. The title of the plaintiff is now established by the Master's report, which report has not been disputed. The whole case is so painful that I really do not like to trust myself with dilating upon it. It is sufficient to say, that a breach of trust, of the grossest description, has been established against all the parties, and I must deal with it accordingly. With respect to the trustee of the will who placed the fund in the hands of the other trustees, the Messrs. Hutchins, I think the Court will treat him with great indulgence, in not ordering him to pay costs, and in simply refusing him costs of any kind. With regard to the other defendants, their conduct has been without any pretext that can be urged by a reasonable being. They must pay the whole costs of the suit from the beginning of it to the present time. They will have allowance for all they have paid for maintenance of the plaintiff, his brothers, and his sister. The account will be taken with rests, and, as the plaintiff elects to take the fund as money, the interest will be—as is justified by many such cases already decided—five per cent. The cash in Court will be immediately paid to the plaintiff, and all the stock, excepting, for the present, 1,500l. The accounts must be taken in the Master's office.

Friday, May 30.

HABERSHON V. VARDON.

Legacy—Charity.

A gift of personal estate to be applied towards political restoration of the Jews to Jerusalem and to their own land: Held, to be void.

Nadir Baxter by his will, dated in 1842, devised all his real and personal estate to his son, M. Habershon, and J. Boardillon, and after giving the trusts of certain sums, proceeded to say: "Further, upon trust, other 1,000l. out of my personal estate as may by law be applied for charitable purposes, be paid towards the restoration of the Jews to Jerusalem and to their own land, and as I conscientiously believe also that the institution by the Church of the bishopric of Jerusalem, and the commencement of the great and meritorious Jehovah towards Zion to be fulfilled, so I further devise in trust other 500l. out of part of my personal estate as may by law be applied for charitable purposes, to be appropriated into the fund of the said bishopric accordingly."

W. M. James appeared for the Attorney-General in support of these legacies.

Bacon, Rogers, C. Boardillon, and W. James for other parties, agreed that the legacy of 1,500l. was a good charitable gift.

THE VICE-CHANCELLOR said that he thought a gift of 1,000l. was not a charitable gift as it was a gift for the purpose of creating a revenue for a foreign state, and was void.

Saturday, June 14.

BARKER V. BIRCH.

Practice—Exceptions to Master's certificate. Where interrogatories are settled by the Master and a party is dissatisfied, the proper course is to wait until the hearing, and then object to the depositions being read.

Pursuant to an order, dated in November, 1844, made on the application of the defendant Barker, the examination of two witnesses, who had already been examined in the cause, interrogatories were carried in to be settled by the Master, who settled the same accordingly, and issued his certificate thereof. The plaintiff filed exceptions to the Master's certificate upon several points of law, and upon the ground that the matters inquired after by the interrogatories were protected in being privileged communications between solicitor and client. Upon a suggestion by the Court that the objection was premature,

K. Parker and Webb, in support of the exceptions, cited *Chenell v. Martin*, 4 Sim. 340.

THE VICE-CHANCELLOR (without hearing K. Parker in support of the certificate) said that the proper course was to wait until the depositions were taken, and to object to their being read in evidence. It accordingly overruled the exceptions with respect to any question how far the interrogatories ought to be answered, or how far the answers to them would be evidence, reserving the costs.

Tuesday, July 1.

GRANT V. SMALL.

Dissolving injunction to stay trial—Motion of a defendant against whom the bill had been dismissed.

Malins and T. Stevens, on behalf of the defendants in this suit, moved that an injunction to stay trial of an ejectment brought by the plaintiff moving, together with two other defendants, out of the jurisdiction, against the plaintiffs in error, and which injunction had been dissolved as against the parties moving upon their answers coming in, might be dissolved as to the two other defendants, or that the parties moving might be at liberty, notwithstanding the injunction, to proceed in the trial of the ejectment in the joint names of the parties. The two defendants out of the jurisdiction had, after the action was commenced, left the country. The injunction was dissolved as to the ten defendants now moving, the bill was dismissed as against them with costs.

THE VICE-CHANCELLOR said that the parties moving were not now parties to the cause, and therefore he doubted their ability to make such an application in the suit. He could do nothing but refer to Mr. Walker, the registrar, to ascertain whether there were any precedents on the subject. He would, however, hear the motion on the question of costs.

Bacon, for the plaintiffs, cited *Danson v. Smith*, MS.

Malins in reply. THE VICE-CHANCELLOR said that the motion was entirely irregular, and must be refused with costs, unless Mr. Walker should succeed in finding a precedent.



V. C. LORD CRANWORTH'S COURT.

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**V. C. LORD CRANWORTH'S COURT**Reported by W. H. BARNET, Esq. of Lincoln's-inn,  
Barrister-at-Law.

January 15, 16, and March 1.

MCINTYRE v. CONNELL.

1 & 2 Vict. c. 110, s. 14.—*Public company—Charge on shares.*

A public company, called "The Union Bank of London," which did not carry on its operations under a charter or letters patent, but whose members were all inrolled with their addresses, and every transfer of interest inrolled, and the company empowered to sue and be sued in the name of one of its officers, is a public company within the meaning of 1 & 2 Vict. c. 110, s. 14.

Shares in such a company may be charged with judgments at law, under the provisions of that statute.

This was a demurrer filed to a bill, praying a declaration that certain judgments at law against the defendants Connell, Webster, and one Mark Boyd, were charges respectively upon their shares in the banking company, and that the directors might be ordered to sell the shares, and pay the proceeds to the plaintiff, and for an account. The demurrer alleged a want of equity, and because W. S. Boyd was a necessary party.

The facts of the case were as follow:—The bill was filed in the name of the secretary of the United Kingdom Life Assurance Company (for and on behalf of the company, and by the trustees of the company against John Connell, George Webster, and Mark Boyd, and the directors and the public officer of the Union Bank of London). It stated that there was a public company called the "Union Bank of London," established in 1839, for the purpose of carrying on the business of bankers, according to the provisions of a deed of settlement of the 5th of April, 1839, that the deed of settlement provided that the capital of the company should be 3,000,000*l.* divided into 60,000 shares of 50*l.* each. The deed appeared to contain the usual provisions contained in such deeds, and contained provisions that the business of the banking company should be carried on in the names of such trustees as the directors should appoint; that the directors, if they should think it desirable, might apply for and obtain a charter of incorporation, or letters patent, from the Crown, for granting to the company all or any of the powers or immunities which the Crown was or might be able to confer on trading or other companies, and might obtain an Act of Parliament for better carrying on the business of the company, either as a corporation or otherwise; that it should be lawful for any proprietor, or his legal personal representatives, to sell and transfer all or any of the shares held by him, provided the approbation of the directors to such transfer should be first obtained, and provided the same should be testified by the execution of the deed of transfer by the secretary, or some other officer of the company; that Connell Webster and Mark Boyd held respectively 420 shares in the banking company; that in 1845, Connell Mark Boyd, J. W. Sutherland Webster, and W. S. Boyd gave the assurance company their promissory note for 10,000*l.*; that the assurance company had recovered judgments in three separate actions on this note against Connell, Webster, and Mark Boyd, after which a payment of 3,000*l.* had been made on account of the note; that on the 13th of April, 1850, one of the judges of the C. P. made three orders, under the 1 & 2 Vict. c. 110, s. 14, charging the shares of Connell, Webster, and Mark Boyd with the sums for which the judgments had been recovered against them respectively; that the banking company had made out and delivered to the Commissioners of Stamps and Taxes the several accounts required by the 7 & 8 Vict. c. 113, for Regulating Joint-stock Banks in England; that the shares in the banking company had been since the first establishment thereof, and were, bought and sold on the stock-exchange, and that the market price thereof was published in "Wetenhall's List."

Stuart and C. Webster, in support of the demurrer, contended that this company was not a public company. No definition of what a public company was contained in the 1 & 2 Vict. c. 110. The deed of the company did not declare that it was a public company, but contained provisions for making it so hereafter. No *mandamus* would lie to compel a transfer of shares, which was the criterion. It was a private company for private profit.

Bethell, W. M. James, and Willes (of the Common Law Bar), in support of the bill, contended, amongst other things, that the Registration Act shewed what was a joint-stock company; that a company to which shareholders could be admitted with the consent of the directors was a joint-stock company and also a public company. They relied on *Hawkins v. Gatherecole*, 16 Law T. 230, as shewing that the plaintiffs had a right to have their shares sold under the general jurisdiction of a Court of Equity that being the equitable mode of execution.

Stuart, in reply.

On the 1st of March the Vice-Chancellor pronounced the following

## JUDGMENT.

THE VICE-CHANCELLOR.—The main question in this cause is, whether the Union Bank of London is a public company within the 1 & 2 Vict. c. 110, s. 14. By that section it is enacted, that if any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or share in any public company in England (whether incorporated or not), standing in his own name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. Now in the state of the record, the question, as I stated before, is, whether the Union Bank of London is a public company within the statute of Victoria which I have referred to? The real difficulty which arises on this subject is, that the statute speaks of a public company, whether incorporated or not, as being something known to the law, that is, as it were, something that when mentioned, a Court would be able to say, *ex cathedra*, this is or is not a public company, there being, in truth, no such legal term known as a public company not incorporated. Then, the question is, there being no legal meaning to the term "public company," how are the Courts to interpret that term, because it would be very improper to say that the Legislature had used words that had no meaning, and therefore we must find out, as well as we can, what meaning is to be attributed to the words; and that must be ascertained by discovering what the state of the law was in respect of companies at the time of the passing of the Act of 1 & 2 Vict.; because it must be with reference to the then state of the law that the question is to be determined, and not by the state of the law at any subsequent period, although perhaps what passed subsequently may enable us to interpret in some degree the language used by the Legislature upon a prior occasion, but it cannot of itself give us the meaning. Now, it appears to me, having looked at the matter with some care, that there were only two classes of companies to which by possibility, at that time, the expression "public company not incorporated," could apply.

What was the state of the law at that time? In the first place there was the stat. 7 Geo. 4, c. 46, for the better regulating copartnerships of certain bankers in England. It is well known that prior to that Act nowhere within her Majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on the banking business. The Bank of England were interested in sustaining that privilege upon their part; they had advanced large sums of money to the Government, and their remuneration, in part, was that they were to have a monopoly in banking, except where there should not be more than six partners. But that monopoly was restricted, in the first instance, by the Act to which I have alluded, the 7 Geo. 4, c. 46, which enabled partnerships consisting of more than six members, to carry on the business of bankers, provided only they carried it on sixty-five miles or upwards from London, and provided they carried it on under the restrictions, and in the manner provided by that Act of Parliament, which were that they should make regular returns of the names of all the partners to the Stamp Office. That list was to be amended from time to time, when a transfer of the shares took place, and they were to return to the Stamp Office the names of two or more persons to be called the "Public Officers of the Bank," and parties having claims upon the bank were not to sue the bank as a partnership, according to the ordinary rule of common law, but were to sue the public officers instead, and those public officers were for the purposes of the Act to represent the company; on the other hand, if the co-partners had any claims against these parties they were to sue, not in the ordinary mode in which partnerships independent of that Act would sue, but by their public officers, and the effect of a judgment against the public officers was, that you might take out execution under it against the partnership and every member of it. Now, that Act was in force at the time of the passing of the 1 & 2 Vict. c. 110. In the year 1833, the 3 & 4 Wm. 4, c. 98, was passed, and by it banking co-partnerships, consisting of more than six members, were permitted to carry on business in London, or within sixty-five miles of it, on certain terms. Now, let us see whether there were any other companies to which the language of the 1 & 2 Vict. c. 110, can be held to apply. There certainly was one other class of

trading companies, because by the Act which passed in 1837, namely, the 7 Wm. 4, and 1 Vict. c. 73, intitled "An Act for better enabling Her Majesty to confer certain Powers and Immunities on certain trading and other Companies," power was given to the Crown, not to incorporate partnerships, but to grant them privileges which, by common law, would not be granted, viz. to trade under liabilities to a certain degree restricted. The principal provisions of that Act are these:—The second section enacts that it shall be lawful for her Majesty by letters patent to grant to any company or body of persons associated together for any trading or other purposes, although not incorporated by such letters patent, any privileges or privilege which, according to the rules of the common law it would be competent to her Majesty to grant to any such company or body of persons in or by any charter of incorporation. The next section is, "And be it enacted that in any such letters patent so to be granted as aforesaid by her Majesty to any such company or body of persons so associated as aforesaid, but not incorporated, it shall and may be lawful in and by such letters patent, either expressly or by a general or special reference to this Act, to provide and declare that all suits and proceedings, whether at law, in equity, or in bankruptcy, or sequestration, or otherwise howsoever, as well in Great Britain and Ireland as in the colonies and dependencies thereof, by and on behalf of such company or body, or any person or persons as trustee or trustees for such company or body, against any person or persons, whether bodies politic or others, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one or two officers for the time being appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions of such appointment and registration respectively hereinafter contained, and that all suits and proceedings whether at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, shall be commenced and prosecuted against one of such officers, or if there shall be no such officer for the time being then against any member of such company or body, provided nevertheless that nothing in this Act or in such letters patent contained, or to be contained, shall prevent the plaintiff from joining any member of such company or body with such officer as a defendant in equity for the purpose of discovering, or in case of fraud." The fourth section is—"and be it enacted that it shall and may be lawful by such letters patent so to be granted to any such body or company as aforesaid, to declare and provide that the members of such company or body so associated as aforesaid, shall be individually liable in their persons and property for the debts, contracts, engagements, and liabilities of such company or body to such extent only per share as shall be declared and limited by such letters patent, and the members of such company or body shall accordingly be individually liable for such debts, contracts, engagements, and liabilities respectively to such extent only per share as in such letters patent shall be declared and limited, such liability, nevertheless, to be enforced in such manner and subject to such provisions as are hereinafter contained." Then the 5th section says:—"And be it enacted that every such company or body to which any such privilege or powers as hereinafter mentioned shall be granted under the authority of this Act, shall be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature, and the undertaking shall by such deed or agreement be divided into a certain number of shares, to be there specified, and in such deed or agreement, or in some schedule thereto, there shall be set forth the name or style of the said company or body, the names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body is formed, and the principal or only place for carrying on such business, and in such deed or agreement there shall also be contained the appointment of two or more public officers to sue or be sued on behalf of such company or body in manner hereinafter mentioned," and then just in the same way as in the Bank Act of 7 Geo. 4, a return is to be made to certain public officers of the names and addresses of the members, and the number of the shares they respectively hold, and that is to be renewed from time to time as changes take place; and there is a great number of other clauses, but I am not aware that it is necessary to advert to them for the present purposes. That, therefore, was a class of companies not incorporated, or which might come under the description of public companies not incorporated, which existed at the time of the passing of the 1 & 2 Vict. c. 110. Now those two classes are, so far as I can discover, the only two classes of companies not incorporated to which the Act of Victoria can by possibility refer,—I mean banking companies existing under the 7 Geo. 4,

## V. C. LORD CRANWORTH'S COURT.

c. 46, and the subsequent extension of that Act passed in the year 1833, the 3 & 4 Wm. 4, c. 98, and companies associating, for trading or other purposes, having letters patent granted by the Crown, but not incorporated; and it seems to me if those were the only two classes that either one or both of them must be the class or classes to which the Act of Victoria refers. That the words "public company not incorporated" would be applied properly to the last class, seems to me to admit of no doubt. The names of the members, and of the officers who are to sue and to be sued on behalf of the company, the objects of the society, and many other particulars relating to it, are to be enrolled and thereby made public. Therefore, it seems to me to be impossible to doubt that such a company would be a public company not incorporated within the meaning of the Act of Victoria. Then the question is, whether there is any real distinction whatever between that which I assume must be taken to be a public company not incorporated within the meaning of the Act of the 1 & 2 Vict.; and a banking company acting under the law that was then in force, namely, the 7 Geo. 4, c. 46, and the 3 & 4 Wm. 4, c. 98. I see no real distinction between the two. It is true, that the banking company was not a banking company carrying on its operations under the provisions of a charter or letters patent not incorporating it, but all the attributes of publicity appear to me to exist as well in the one case as the other. The names of the members are all enrolled, with their addresses, and every transfer of interest is enrolled, and the company is to sue and be sued by public officers just in the one case as in the other; and it seems to me, that, in the absence of a legal definition, I must treat the one case to be just the same as the other, and that which was the attribute of publicity in a trading company *quasi* incorporated under the 7 Wm. 4 and 1 Vict. c. 73, was the attribute of publicity in the case of a banking-partnership. In my opinion the two cases are undistinguishable, and the one being, as I assume it must be taken to be, within the meaning of the Act of the 1 & 2 Vict. the other must be taken to be so likewise. It does not appear that, in the case of banking companies, it is at all necessary that their capital should be divided into shares, although, with respect to companies, *quasi* incorporated under the 7 Wm. 4, and 1 Vict., it is necessary that their capital should be divided into shares, and should be transferable. But in point of fact the capital of the Union Bank of London is divided into shares. I do not, however, think I can hold the Union Bank of London to be a public company within the meaning of the Act of the 1 & 2 Vict. merely because its capital is divided into shares. In my opinion it would have been a public company if its capital had not been so divided, because the attributes of publicity would exist, namely, the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company. There was another ground that was relied upon as shewing that this was a public company, which, I confess, I do not pay much attention to. It was that the Joint Stock Companies' Registration Act, the 7 & 8 Vict. c. 110, defines a joint stock company to be a company, the shares in which are transferable without the express consent of all the members; and it was said that this company is a joint-stock company according to that definition, and so I think it is; but I do not rely upon that; I advert to it merely to shew that the observation did not escape me. Then a minor objection, that was raised, was this: the statutes about bankers are confined to banking copartnerships carrying on their business in England; and it was said that, upon a demurrer, it must appear that this was a banking company carrying on its business in England, and that there is an averment in the bill to that effect. Now that objection I should be very much inclined to say would be a good objection, and would be fatal if it were not discoverable from the bill that this banking company is carrying on its business in England; I do not allude to its being called the Union Bank of London. That does not necessarily import that it is carrying on its business in England, for there may be a bank in Glasgow or Dublin calling itself the Union Bank of London. But does it not appear clear that it is not only the Union Bank of London, but that it carries on its business in England? I think it does, for this reason, by the 47th section of the 7 & 8 Vict. c. 113, which is an Act to regulate joint-stock banks in England, it is provided "that after the passing of this Act every company of more than six persons established on the 6th of May, 1844, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of this Act, shall have the same power and privileges of suing and being sued in the name of any public officers of such co-partnership, as the nominal plaintiff, petitioner, or defendant, on behalf of such copartnership, and that all judgments, decrees, and orders, made and obtained in any suit, may be enforced in like manner as is provided with

respect to such companies carrying on the said trade or business at any place in England, not exceeding the distance of sixty-five miles from London, under the provisions of the 7 Geo. 4, c. 46, provided they make out and deliver to the commissioners of stamps and taxes the accounts and returns required by the last-mentioned Act." And the bill contains this averment, that the Union Bank of London immediately upon the passing of the Act 7 & 8 Vict. intitled, "An Act to regulate Joint Stock Banks in England,"—that is to say, in the year 1844—availed itself of the provisions of that Act, whereby it was provided, &c. [referring to the clause in question] how they could not avail themselves of the provisions of that Act, unless they were a banking company carrying on business within sixty-five miles of London, and therefore that objection cannot prevail. I have now disposed of the demurrer on the record so far as it is a demurrer for want of equity. Then the demurrer goes on to allege in substance that Wm. Spratt Boyd, who was one of the co-makers of the note, was a necessary party to the suit. I think that it is wholly untenable, because upon looking at the 32nd general order of August, 1841, it seems as if it were made with reference to this very case. It says—"That where several persons are liable to the plaintiff, the plaintiff may proceed against one or more of them, as he may think fit."

*Demurrer for the causes alleged on the record, overruled with costs.*

*Demurrer on tenus for the absence of parties interested in the securities held by the bank, allowed without costs, with liberty to amend.*

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

May 28 and 30.

*Re STRACHAN'S Estate.*

*Costs out of corpus of compensation—Metropolitan Improvements Act—Tenant for life of estate.*

*The Court has not jurisdiction to order the costs of a tenant for life of property taken by commissioners under an Improvement Act to be paid out of the corpus of the compensation before investment, such costs being incurred in proving the title to the property.*

This was the petition of a tenant for life of real estate, which was taken by the Commissioners of Woods and Forests, acting under the Metropolitan Improvement Acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34), praying that the costs of the petitioner of proving her title to the land and otherwise incurred in consequence of the same having been taken for the purposes of the Acts of Parliament, might be ordered to be paid out of the *corpus* of the compensation money before the same was invested pursuant to the 44th and 49th sections of the first of the two Acts.

*P. J. Wood* produced an order similar to that now asked, made by the Vice-Chancellor of England under the same Acts. The following cases were referred to:—*Ex parte Cooke, re The Liverpool and Manchester Railway Company*, 3 Railway Cas. 135; *Ex parte Molyneux*, 2 Coll. 273; and *Mitchell v. Newell, re The Manchester and Leeds Railway Company*, 1b: 575.

The VICE-CHANCELLOR.—I doubt my power to administer equities between the parties interested in the compensation money. It is a great hardship on a tenant for life to have such costs paid out of the dividends. I will direct inquiries to be made as to the practice of the other judges, and if I can I will make the order.

*Friday, May 30.*—His HONOUR stated that the result of the inquiries he had caused to be made had satisfied him that he had no jurisdiction to make the order asked.

*MOAT v. MORISON.*

*Partnership secret—Injunction—Stamp and dies in Stamp Office for medicines.*

*A partner, on the dissolution of a partnership, who does not shew the lawful acquisition by him of a secret for preparing medicines, for the manufacture and sale of which the partnership was formed, cannot obtain an injunction to restrain the other partners from the use of the stamp distinguishing the medicines, or from the use of the dies for that purpose deposited in the Stamp Office, nor can he compel the other partners to permit him to participate in such use.*

This was a motion for a receiver and for an injunction, and for other purposes. From the pleadings it appeared that Mr. Moat, the late father of the plaintiff, entered into partnership with the late Mr. Morison, in the year 1830, for the period of twenty-one years, the business being for the manufacture and sale of "Morison's Universal Vegetable Medicine," and by the deed covenants were mutually entered into by the partners not to disclose the

secret of the compounding and preparation of the pills and other medicines, the subject matters of the partnership, the covenant of Moat being, that he would not disclose the mode of preparation to any person whomsoever, while that of Morison was, that he would not disclose the same except to any other person who might be introduced into the partnership. Moat executed a bond to the same effect. In 1837 the plaintiff Moat, the son of the original partner, his father, was admitted into the partnership, and he covenanted by deed not to disclose the secret. A motion was now made for a receiver of the outstanding debts and effects of the partnership carried on by the plaintiff and the defendants, Messrs. Alexander and John Morison, and for an injunction to restrain the defendants from interfering with the dies prepared for the purpose of stamping and labelling the medicines, preserved in the Stamp Office for that purpose, so as to prevent the plaintiff from using the same dies. The motion was grounded on the contention of the plaintiff, that although the secret originally belonged to the late Mr. Morison, yet at the termination of the partnership it became common property, and therefore the right to use the dies by which the medicine is distinguished, belonged to and was the common property and assets of the partnership, and ought not to be permitted to belong to the defendants only. As the partners now wished to dissolve the connection, and as in fact there were two sets of dies, they ought to be divided, or at any rate they should be sold, and the produce, like other partnership assets divided between them. The continuing business and its benefits belonged to all or neither. The defendants insisted that the claim of the plaintiff was grounded on entire misapprehension of the rights acquired by the partnership. No property existed in either of them with regard to the dies, which, in truth, were the property of her Majesty, although paid for by the partnership. The communication of the secret by the late Mr. Morison, to the late Mr. Moat, was made for the purpose of the partnership, and for the use of the partners during the term of twenty-one years, and the present plaintiff had no right to the possession of the secret. His father was bound not to communicate the secret, and if he had done so to the plaintiff it was in contravention of the covenant, and if not rightly acquired, he could not use it except as a partner. If, therefore, the plaintiff had no right to the knowledge of the secret, he had no right to use the stamps and labels.

The following cases were cited: *Cumshaw v. Jones*, 2 Ves. & B. 218; *Lingen v. Simpson*, 1 Sim. & Stn. 600; *Perry v. Truesell*, 6 Beav. 66; and *Prince Albert v. Strange*, 1 Hall & Tw. 1.

The Solicitor-General and Metcalf, for the motion.

*Bethell and Shapter* for the defendant.

The VICE-CHANCELLOR.—If the question in this case depended on the construction of the partnership deeds of 1830, or the deed of 1837, which admitted the plaintiff, I should have thought the case required more consideration before I disposed of the present motion. According to the original deed of 1830 Moat was restrained from communicating the secret of the manufacture of the medicine to any person whomsoever. This restriction was clear upon the bond which Moat entered into; Moat died in or before the year 1837. Before the plaintiff can call upon the Court to interfere in his favour for the purpose of enabling him to obtain the use of the stamps, he must shew that he has lawfully acquired the knowledge of the mode of preparing the medicines, or that the other parties have dealt with him on the footing that he lawfully acquired it. If that lawful acquisition had here been shewn, the case would have required more consideration. All, however, that appears is, that by the deed of 1837 the plaintiff covenanted not to disclose the secret. It has been said that this assumes he knew it, but I do not accede to that suggestion. Such a covenant might have been well made without his knowledge of the mode of preparation, and in contemplation that during the continuance of the partnership he might acquire it. Here is nothing to satisfy the Court that the plaintiff has any right lawfully to the possession of this secret. The defendants ought not to be restrained from the use of the stamps, or be compelled to admit the plaintiff to participate in such use, unless the plaintiff had shewn that he is clearly entitled to such relief. The motion must be refused so far with costs. The appointment of the receiver was not objected to.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL, Esqs. Barristers-at-Law.

May 6 and 13.

*HOLT v. DAW.*

*Trespass—Right of way—Pleading.*

*In an action of trespass for breaking and entering*

## QUEEN'S BENCH.

## COMMON BENCH.

## COMMON BENCH.

close A, the defendant justified, under a right of way, the plea, stating that the defendant was the occupier of a certain close in the parish, &c. called B, with certain lands thereunto adjoining, and another close called C, and divers other closes next adjoining thereunto. The plea then stated a twenty years' enjoyment "by the defendant, and the respective occupiers for the time being of the said several closes and lands of a way from B unto, through, and over close A unto and into C, and so thence back again," for the better use, occupation, and enjoyment of the said B. the said lands adjoining thereunto, and the said C. and the said adjoining closes respectively."

Held, upon special demurrer, that the plea was good.

This was a special demurrer to a plea.

Cole, for the plaintiff.

Rew, for the defendant. Cur. adv. vult.

## JUDGMENT.

Tuesday, May 13.—Lord CAMPBELL, C.J. delivered the judgment of the Court.—In this case, which was an action of trespass *quare clausum fregit*, the declaration stated that the defendant, with force, &c. broke and entered the closes of the plaintiff in the parish of Corscombe, in the county of Dorset, called Six-Acre Ryams and Beer Ryams, and did certain damage. The defendant justified, under a right of way, and states in his plea "that he, the defendant, was the occupier of a certain close in the parish and county aforesaid, called Backside Mead, with certain lands thereunto adjoining, and another close called Mead, and divers, to wit, two other closes next adjoining thereunto. And the defendant further says that he, the defendant, and the respective occupiers for the time being of the said several closes and lands for and during the full period of twenty years next before the commencement of this suit have and each of them hath actually had, used, and enjoyed as of right and without interruption, and they have and each of them hath been accustomed to have and enjoy as of right and without interruption a certain way for himself and themselves, his and their servants to go, return, pass, and re-pass, on foot and with horses, mares, geldings, and with other cattle, and with carts, waggons, and other carriages, from the said Backside Mead unto, into, through, over, and along the said Six-Acre Ryams, and thence unto, and into the said Mead, and so thence back again unto, and into the said Backside Mead, at all times of the year, at his own and their free will and pleasure, for the better use, occupation, and enjoyment of the said Backside Mead, the said lands adjoining thereunto, and the said Mead, and the said adjoining closes respectively." And so justifies the exercise of the right. To this plea there was a special demurrer, "that the said plea does not shew with sufficient certainty in respect of what closes and lands, other than the said close called Backside Mead and the said close called Mead, the defendant claims the supposed right of way in the said plea mentioned, or attempt to justify the trespass in the said plea mentioned, or the number, or abutments, or boundaries of the said other closes and lands respectively, nor their situation, parish, or county;" and it was contended on the argument in support of the demurrer that the defendant ought to have named and specifically described by metes and bounds, the lands in respect of which he claims the right of way, and that there is not enough to shew that he has given full notice thereof. We are of opinion that such particularity as is here contended for is not required, either by authority or reason. It appears with sufficient certainty that there is but one way across the land, the abutments of which are specifically described by name as well as the closes in respect of which the right is claimed over other lands. The closes in respect of which it is claimed are said to be adjoining to others, and if those others had been described by names, and metes, and bounds, with however great particularity, the defendant would not have been bound to prove his right in respect of any but the two closes, and would have been entitled to the verdict if he had proved his right in respect of those, though he had failed with respect to the others, as appears by *Bassett v. Mitchell*, 2 B. & Ad. 99. In *Stolt v. Stolt*, 16 East, 343, the defendant justified, under a right of way, in respect of a "certain message, and divers, to wit, fifty, acres of land." In *Simpson v. Levlhwaite*, 3 B. & Ad. 226, the defendant claimed a right of way in respect of 100 acres of land contiguous and next adjoining one of the closes in which, &c. In *Colchester v. Roberts*, 4 M. & W. 769, the defendant justified under a claim of right of way in respect of a message, and divers, to wit, three, closes of land near the close itself. There is, therefore, abundant authority and precedent for such a mode of pleading, and no cases were cited in point to shew that such a mode of pleading was wrong. Our judgment is therefore for the defendant; and if the plaintiff has sustained any loss by having tried the issue before the demurrer was argued, it arises from his own fault in relying upon formal objections, which

are not supported, either by precedent or authority. Therefore our judgment must be for the defendant.

Judgment for the defendant.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Saturday, May 3.

PRITCHARD v. BAGSHAW.

Statute of Limitations—Evidence of plaintiff on this issue—2 Wm. 4, c. 39, s. 10.

Where a writ of summons has been issued to save the Statute of Limitations, and regularly continued by alias and pluries writs, the plaintiff, upon issue joined on the plea of the Statute of Limitations, must shew by extrinsic evidence that the date and return of the first writ were indorsed on the last writ, pursuant to 2 Wm. 4, c. 39, s. 10, at the time of the service on the defendant, and neither the roll containing the statement of the several writs and requisite indorsements, nor the writs themselves containing these indorsements, is or are evidence of this fact.

Trover, for the recovery of "plant," which had been used in reclaiming Lough Swilly, in Ireland.

Plea—Among others, the Statute of Limitations.

At the trial the plaintiff, in order to take the case out of the Statute of Limitations, put in evidence an examined copy of the roll, containing the several writs with the requisite indorsements, and also the first writ of summons issued, and the several alias and pluries writs, with the requisite indorsements thereon; whereupon it was objected that there being no evidence that the indorsements were on the last writ at the time of its service, or by whom they were made, the case was not taken out of the statute, and the defendant was entitled to the verdict on this plea. The learned judge overruled the objection, and, under his lordship's direction, found for the plaintiff. Damages 1,971l.

A rule nisi was obtained (April 24) for a new trial, on the ground of misdirection.

Channell, Serjt. and H. Hill, shewed cause. The objection of the defendant is, that it was not proved that the indorsements on the several writs were made within the time required by the 2 Wm. 4, c. 39, s. 10, or when they were made, or that they were made by the plaintiff or his attorney. If the statement of the writs on the record are evidence of these matters, then everything appeared to have been regular; the plaintiff put in an examined copy of the roll, which shewed that the first writ was issued and returned in time, and so with respect to all the other writs. The 2 Wm. 4, c. 39, s. 10, enacts, "Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ and every writ (if any), issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum, indorsed thereon or subscribed thereto, specifying the day of the date of the first writ and return, to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same, as the case may be." It is true that in *Walker v. Collick*, 4 Ex. 171, it was held that the indorsements must be on the summons at the time of the service, and that the roll is not evidence of that fact; but the present case is not brought within that decision. Each writ is to be filed within one calendar month after its expiration, and the officer makes a memorandum of the date when it is brought, and it is not the practice to file a writ if not brought within the proper time, except under an order. After the writ is handed in to the officer to be filed, the party never has possession of it again. In *Walker v. Collick* the defendant put in the copy of the writ with which he was served, and which did not contain the indorsements; here there was no such evidence; besides, the plaintiff produced the first writ containing the requisite indorsements. [JEAVIS, C.J.—In *Williams v. Williams*, 10 M. & W. 174, 476, it was decided that the indorsements of the date of the first writ and of the return, need not be made simultaneously.] The case of *Harper v. Phillips*, 8 Sc. N. C. 115, was not cited in *Walker v. Collick*; and in the former this Court refused a new trial, the issue delivered having stated the suing out a former writ of summons to bar the Statute of Limitations, although there was an affidavit that no such writ had ever been returned, nor any continuances entered on the roll. It is suggested that *Walker v. Collick* is not a sound decision. The

writs themselves, which were produced, are evidence of the indorsements having been properly made until some doubt is cast upon their accuracy. If this is not so, the officer of the Court and the attorney in the action must both be called to shew that the indorsements were properly made. The last clause of the section, as to the party to make the indorsements, is directory merely, and not obligatory. It is submitted, therefore, that it is not necessary to prove by any other evidence than the writ itself, that the last writ contained these indorsements at the time of the service, unless there is evidence, as in *Walker v. Collick*, to impeach the presumption that the indorsements were properly made.

Phipson, in support of the rule.—The onus of proving the issue upon the plea of the Statute of Limitations is upon the plaintiff, and it is incumbent on him to prove that all the formalities required by the 2 Wm. 4, c. 39, s. 10, have been complied with. It is said that that was proved here either by the Nisi Prius record, or by the examined copy of the roll or by the production of the writs themselves containing the indorsements. The statute requires that every writ issued in continuation of a preceding writ shall contain a memorandum indorsed of the date of the first writ and return. The question is, when are these indorsements to be made? It is clear they should be made before the last writ is served, and they are to be made, in cases of non-bailable process, by the plaintiff or his attorney. The plaintiff must prove that these things have been done, but here there was no evidence when the indorsements were made. The record has nothing to do with this point; that may be evidence that a writ issued on the day stated therein, but it can be no evidence that such writ was ever served. There is no presumption, even after service, that any thing was indorsed on the writ at the time of service, for a copy only is served. If there is no indorsement upon the writ and copy at the time of service, the defendant has no notice of the issue of any preceding writ. The indorsements upon the intermediate writs may be made some time during their currency, but upon the last writ they must be made before service. The cases of *Mann v. Walker*, 15 Law T. 250, Q.B.; *Hunter v. Caldwell*, 10 Q.B. 69; *Higgs v. Mortimer*, 1 Ex. 711; *Medlicott v. Hunter*, 5 Ex. 34; and *Pratt v. Hawkins*, 15 M. & W. 399, were also referred to. Cur. adv. vult.

## JUDGMENT.

JERVIS, C.J.—This was an action of trover, and the defendant pleaded the Statute of Limitations. To prove this issue, which lay on him, the plaintiff produced the record roll, on which the writs with the various indorsements were entered from the earliest writ down to the last writ which was served; and further, the plaintiff produced and proved the various writs themselves with indorsements of the return of *non est inventus* on all but the last, and upon the last the indorsement of the date of the issuing and return of the first writ in compliance with the provisions of the statute 2 Wm. 4, c. 39, s. 10. It was contended at the trial that these writs and the roll did not prove the issue which lay on the plaintiff, to which it was answered that the presumption was that the matter was properly done, and if not that the statement of the writs on the record must be taken as proved to be regular. My learned brother was of opinion that the plaintiff had established the affirmative issue that lay on him, and the plaintiff had the verdict. A motion was made for a new trial on the ground of misdirection, it being contended that there must be evidence on the part of the plaintiff, of the time when the indorsements of the date of the issuing and the return of the first writ, were made on the last writ, and that the indorsements must be proved to have been made by the attorney or the party, this being non-bailable process. The view the Court have taken of the case renders it unnecessary to decide certain points urged in the course of the argument. With respect to the first point that was urged in answer to the rule, namely, that the Court were bound to regard the statement of the writ upon the Nisi Prius record as evidence to take the case out of the statute, that is answered by the evidence in the case, for the production of the first writ shewed on the back of it, that the writ had not been served, and also a return *non est inventus*. That writ of itself could not be available to prevent the operation of the statute, but it would be available by having the succeeding writs properly returned with indorsements of the issue, and return of the first writ, and ultimately a writ so indorsed and served on the party. It was not objected in the argument that the indorsements on the intermediate writs were not properly proved, but it was said that the last writ must be indorsed before the service, and that it must be proved affirmatively by the plaintiff that such was the case. Now that the writ must be indorsed before the service is clearly established by the authority of *Medlicott v. Hunter*, in which that matter came directly before the Court. We are authorised and bound by that decision, and also by the construction





of the service, to hold that such is the law. If that be so, it is proved at the trial that the indorsement was made before service? It was said to be proved by the production of the roll. It is true the roll shews what that writ contains at the time of the enrolling that writ, but it does not shew that it contained at the time of the service the indorsement; so far from that, it has been distinctly determined in *Walker v. Collick*, that the roll so produced, and containing that very entry, is not available for the purpose of establishing that fact. Then, if the roll does not do so, is it proved by the production of the writ? The writ was produced many months,—nay, I believe more than a year after the date of the service; it was plain, therefore, that the mere production of the writ by the hand which might have indorsed it at any moment, even up to the instant of producing it, does not shew that it contained that indorsement at the time of service. The view we therefore take of the case being, that there is no evidence that that indorsement was made before the service, renders it unnecessary for us to consider whether that indorsement ought to be made by the attorney or the party; we are not called on to pronounce an opinion on that. If we were, we should require time to consider the question, because the language in which the Act of Parliament is expressed is on that subject somewhat obscure. It is likewise unnecessary for us to determine at what time the indorsement of the intermediate writs must be made, the objection being, that the last writ was not indorsed before service, and that being supported, entitles the learned counsel to make the rule absolute for a new trial on that ground.

**Rule absolute.**

**Monday, June 16.**

**WILLIAMS v. THE LORDS COMMISSIONERS OF THE ADMIRALTY.**

**ADMI-ALTY.**  
**Practice—Writ of summons—Service.**  
**A writ of summons** was addressed to the defendants as “The Commissioners for executing the Office of Lord High Admiral,” &c. and served upon M. one of them. It appeared that by certain statutes the commissioners might sue and be sued for certain things by that name; and upon the affidavits it appeared that the plaintiff’s cause of action was not for any of such things, and that the defendants were not a corporate body. Upon a motion to set aside the copy writ and service : **Held**, that the Court could not, upon this motion, take notice of the merits of the cause of action, or that the cause of action was not one for which the plaintiff might properly sue the defendants in their collective name.

Also, that M. being one of the commissioners, and there being certain causes of action in which they might be sued in their collective name, the service of the writ on him was not irregular.

A summons in an action of debt had been issued out of this Court, addressed to "The Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland." Service had been made on Captain Milne, who was one of the commissioners, whereupon a rule nisi was obtained at his instance to set aside the copy of the writ served on the service, on the ground that the commissioners were not a corporation.

It appeared upon the affidavit of the plaintiff in shewing cause that he was suing in respect of alleged arrears of half-pay.

*Roebeck and Byles, Serjt.* shewed cause. The Court cannot inquire into the fact of whether there is a good cause of action or not, at this stage of the proceedings. The only question now is, can the plaintiff sue the Lords of the Admiralty in their *quasi* corporate capacity in an action of debt? This point turns upon certain Acts of Parliament, and although the commissioners are not, properly speaking, a corporation, yet they have a collective name given to them for certain purposes. By the 1 & 2 Geo. 4, c. 93, s. 9 (an Act for vesting all estates and property occupied by or for the naval service in the principal officers and commissioners of his Majesty's navy, and for granting certain powers to them), they may bring or defend certain actions in relation to such property, and among others, debt for rent, and in every such action they shall be called "The Principal Officers and Commissioners of his Majesty's Navy," without naming them or any of them. Then the 8 Geo. 4, c. 65, s. 1, enacts that all powers, privileges, authorities, &c. given to and imposed upon the Commissioners for executing the office of Lord High Admiral for the time being, &c. shall extend and apply to the lord high admiral, and to such person or *body corporate* in relation to the lord high admiral, in like manner as if he had been expressly named in such Acts. Then the 2nd Wm. 4, c. 40, transfers all the powers, &c. of the principal officers and commissioners of the navy to the Commissioners for executing the office of Lord High Admiral: and sec. 7 enacts, that in all deeds, conveyances, leases, contracts, and other instruments touching any estate, property, matter, or thing relating to

the naval service, it shall be sufficient to describe them generally by the style and title of "The Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland," without expressing their names. The result of the statutes is, that there are certain actions in which the commissioners may sue and be sued in their collective name, and among such actions is that of debt. But then it is said that the plaintiff shews on his own affidavit that his claim is for alleged arrears of half-pay. [JERVIS, C.J.—For which the plaintiff cannot maintain an action. In *Ex parte Rickells*, 4 A. & E. 999, it was held, that there was no vested right to half-pay, and a *mandamus* to the Lords of the Admiralty to make an order for payment of it was refused. And the case of *Rex v. The Lords of the Treasury*, 4 A. & E. 286, where the Court held that the Lords of the Treasury having admitted that money for sick allowance granted by Parliament was in their hands, a *mandamus* to them to order payment would lie, has never been followed up, but always distinguished.] Whether this is a good cause of action or not cannot be discussed upon this motion. [MAULE, J.—It may be when the plaintiff comes to declare, that he will set out a contract under seal with the defendants by their official name.] Just so: and then, according to *Gould v. Barnes*, 3 Taun. 504, that name would be the proper one to sue them by, and to sue them by their own names would be wrong. And in *Woolf v. The City Steam Boat Company*, 7 C. B. 103, it was held upon special demurrer, that a declaration against the defendants by that title, without describing them to be a corporation or giving any explanation of their title, was good.

*Crowder and M. Smith*, in support of the rule. This writ having been served upon Captain Milne he has a right to apply to set the service aside for irregularity. The writ does not call upon him personally to do any thing; then why is he to be served with it? And then he shews to the Court that the commissioners are not a corporation. But if it is to be assumed now that they are a corporation, still the service is bad, as it is not upon the head officer or clerk or secretary. (2 Wm. 4, c. 39, s. 13.) [CRESSWELL, J.—The argument of the plaintiff, is that this cannot be put higher than a misnomer, and that you should rely on a plea in abatement.] The answer is, that this is a case of service on a wrong person and not of misnomer. There would be a difficulty in entering an appearance. Captain Milne has no power to enter an appearance for the other commissioners, and he is not required in the writ to appear himself. If he is to enter an appearance by the official name, and the case goes on to judgment, how is the execution to be levied? On the commissioners personally, or on the official property? But then the plaintiff's affidavit shews that the cause of action upon which the plaintiff is proceeding, is one for which he cannot sue the commissioners at all. And if so, why may not the defendants apply now to set aside the writ, and why should they wait till judgment? It is apparent now, that whatever steps the plaintiff takes must be useless; then why should the defendants be harassed any further?

*Cyr. adv. vult.*

**JUDGMENT.**

**JERVIS, C.J.**—Upon the discussion, three points were presented to the Court. It was said, that if this was an action brought against the Lords Commissioners of the Admiralty in their individual capacities, and against them personally, they could not be sued collectively in the nature of a corporation, and in that view undoubtedly the writ would be irregular and the motion must succeed. Next it was said, that if they were sued as a corporation, the second branch of the rule should be made absolute, as the service would be irregular, because the Uniformity of Process Act (2 Wm. 4, c. 39, s. 13), enacts, that in case of process against a corporation it shall be served on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of the corporation. Now, Captain Milne was neither of these; he was not secretary or First Lord of the Admiralty. In that view of the case, likewise, the service of the writ would have been void and irregular, and the rule would have been made absolute. But there was a third point presented to the Court, and it was said by the counsel for the plaintiff, that we had no right to enter into the consideration of the merits of the case, or to examine the affidavit of the plaintiff or the defendants, to see that this was an action for half-pay, upon a motion to set aside process and service for irregularity, and that we must look simply to the process and the mode of service of that process. Though during the argument I was inclined to be of opinion and to decide, so far as I was concerned, that we ought to look to the affidavit to see if the plaintiff brought himself within the terms of the Act of Parliament authorising the suit, upon consideration I think I was wrong, and that the rule upon this ground ought to be discharged, it being safer to adhere to the general rule applicable to all cases than to depart from it, to suit the circumstances of the particular case. The foundation of

the argument was this:—By the 1 & 2 Geo. 4, s. 9, the principal officers and commissioners of the navy were authorised to bring, prosecute, and maintain, or to defend certain actions with reference to the particular matters,—namely, laws, regulations, and hereditaments vested in the Crown by Act. And it was enacted that in such cases they should be called "The Principal Officers and Commissioners of his Majesty's Navy," with some of them or any of them. By subsequent statutes of which appoints the Lord High Admiral, and other transfers all the matters relating to the navy to the Commissioners for executing the office of the Lord High Admiral, whatever the commission of her Majesty's navy could do, or whatever could be done now by or against the Commissioners for executing the office of the Lord High Admiral, said that as they may sue and be sued with reference to actions of ejectment or debt for real estate, and as this was a writ in an action, we have no right to look further into the circumstances of it, upon seeing on the face of the process that it is an action of debt, and in certain cases, may be brought against them collectively. For the purpose of this case, we must take it to be so, and proceed upon that. It was said, on the other hand, that this statute did not authorise an action against the persons by name, though they might sue in that name, when the Act says that in every such action they shall be called "The Principal Officers and Commissioners of his Majesty's Navy," and that if they defend, or in any action they may be made defendants in their collective capacity in any action arising within this Act of Parliament. That being so, the question is not whether an action can be maintained, as clearly under the circumstances in this case it cannot, but where they are entitled to look at the affidavits and to state that this is not an action within the Act of Parliament, and therefore treat the process as null. It is not an irregularity because the plaintiff desires to say "I have got an action," although he has no foundation for it. If we were to decide upon the motion that the cause of action, whatever it is, does not come within that Act, we should be depriving the plaintiff of his bill of exceptions or of appeal to an ultimate tribunal to have our decision reversed. At what period is the objection to be made, and further, does the service on one of the defendants authorise his proceeding? The plaintiff must proceed, I apprehend, as if he was founding his action on the statute: he says, "I have a cause of action on the statute against all of you persons; I sue you in your collective capacity;" but he must proceed by entering an appearance for them, or they must for themselves in their collective capacity. Then the objection must be made by raising the question if it can be raised by plea that they never were indebted; and at the trial the judge would decide the matter with reference to the point of law as applicable to the facts, and the plaintiff would have an opportunity of excepting to his ruling. It is not necessary now to point out minutely what course is to be pursued. It is a grave difficulty as to what course is to be pursued by a party attempting to sue on the statute, and events a party has a right to say, "I am founding an action upon the statute;" and the defendant can call on us now to adjudicate on the ground that the cause of action is not within the statute; and if we did so we should deprive the plaintiff of his remedy. That being so, the application must be unsuccessful on the ground that it is made at the wrong time and is improperly founded, and therefore the rule must be discharged. It was moved with costs for expensariness, and I am afraid the necessary consequence must follow—it must be discharged with costs.

MAULE, J.—I agree with my Lord Chief Justice that this rule must be discharged with costs. It is an application on the part of the defendant to set aside the service of a writ for irregularity with costs. And I apprehend that the only question which can enter into on the present occasion is whether the service of the writ is shown to be irregular or not. Now it appears by the case referred to that there are cases in which the Lord Commissioners for executing the office of the Lord High Admiral are liable to be sued by the plaintiff in their collective capacity. The Act of Parliament shews that they may be sued in respect of several causes of action, and instead of being named individually, may be described by that collective name. The plaintiff, therefore, has sued out an action, and any one has a right to sue out, and any person has a right to sue out a writ against any person against whom he has a cause of action, in order that a competent tribunal may try whether he has a right or not; the writ, therefore, was regularly issued. Then the question is, how the writ ought to be served. Now the defendants are not a corporation, else they might contend that they ought to be served by serving the head of the corporation, or some officer of the corporation,—they are not a cor-



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poration, but they are persons whom it is not necessary to mention by name in the writ, and by force of the Act the collective name of the Commissioners for exercising the office of the Lord High Admiral may be used instead of their other names. There is a further provision with respect to actions abating by the death of the Commissioners of the Admiralty, but that is all the Act provides. It leaves all other proceedings brought by the Lords Commissioners of the Admiralty untouched. It appears to me they are to be governed by the general law of the land, and where there is an action brought against six persons, or against any number of persons mentioned in a writ, the proper way of serving them is to serve each of them. It seems to me therefore, that the service upon one is not a complete service upon all the persons concerned, but it is not an irregular service, because the proper course where a man has an action against several defendants is to serve each of them. This being a regular service, the motion to set it aside for irregularity must fail, and it is the universal understanding that persons seeking to set aside a proceeding for irregularity with costs, if they choose to ask for costs, do it at the peril of paying costs if not successful, because it might be that if they had not asked for costs, cause might not have been shewn. With respect to the absence of a cause of action on the part of the plaintiff, however clearly it might appear to the Court, it is a thing which they cannot, on this motion, take cognizance of at all. However clearly an admission it might be that the plaintiff had no cause of action against the defendants as Lords Commissioners of the Admiralty, we cannot, on a question whether the proceedings be regular, enter into that, because it has no bearing on the question whether the proceedings be regular or not; nor do I think that it ought to influence our judgment in respect of costs, because if that were so it would have a tendency, among other things, to useless prolixity of affidavits on motions for irregularity; it would tend to the introduction of long affidavits on the merits in order to influence the Court as to whether they would make the rule absolute with or without costs. I do not think that would be convenient. There are also other reasons, but it is sufficient to say that generally on a motion of this kind, what appears to the Court, on the affidavits as to there being or not a cause of action, is not to the purpose; it has no bearing on the matter in question, and the liability to pay costs ought not to fall on the party on that account. One cannot but see that it is possible, whatever may appear on the affidavits, that the plaintiff might, when he comes to trial, be found to have a cause of action within the statute, and might recover for that cause of action. Notwithstanding, if one were to judge from what is apparent in his own affidavit as well as from those of the other side, that that is a very improbable state of things,—it is no contradiction,—it does happen when things are investigated by witnesses they turn out to be different from that which is the impression of the parties. It is not often the case that a person turns out to have a better cause of action than he expected before; if any, however, turn out to be so. However, for the reasons suggested by my Lord Chief Justice, I think the rule should be discharged with costs, the service having been a proper service under the circumstances.

CRESSWELL, C. J.—I certainly do not differ from my Lord Chief Justice and the rest of the Court, as to the question of costs, although I should have reflected a good deal if they had not given a strong opinion about it, with regard to granting the costs in this case. I concur in discharging the rule to set aside the proceedings, though I by no means mean to commit myself by saying that the proceedings are altogether right. I think there is considerable difficulty in saying so after the discussion. However, I am not satisfied they are wrong.

TALFOURD, J.—I agree in opinion with the rest of the Court. It appears to me it is not made out to our satisfaction that the proceedings are irregular, and though, if we were at liberty to look at the facts disclosed by the affidavits, we might entertain a strong opinion that the plaintiff must fail in his action, yet we ought not, in this instance, to set aside the proceedings under the circumstances. We act on the same principle on which the Court acted in *Davies v. Lowndes*, 8 Sc. N. C. 539. That was an application to set aside a writ of *grand cape*, and subsequent proceedings on a writ of right, after the time had elapsed by the 3 & 4 Wm. 4, c. 27, and the Court in that case gave a clear and decided opinion that the proceedings were irregular, and a mere nullity, and that the whole were void; yet inasmuch as a termination on a summary motion made to this Court would deprive the party of all opportunity for ever after of prosecuting her claim, though in the strongest terms they announced their opinion, they declined to interfere. The same principle governs this case. I agree with the reasons given by the Court in thinking that the rule should be discharged, and also for the reasons given by my Lord Chief Justice and my brother Maule, that it should be discharged with costs. *Rule discharged.*

CRAWLEY and ANOTHER, Appellants, FURNELL and ANOTHER, Respondents.

County Court appeal.—Jurisdiction where judge tries question of law and fact.—Statute of Limitations, 9 Geo. 4, c. 14, s. 1.—Offer to pay in goods, but not in money.—Costs of appeal.

F. brought his claim in the County Court to recover from C. the sum of 34l. 12s. 1d. balance due for goods sold and delivered. C. relied on the Statute of Limitations to defeat the claim. The goods were sold in 1842; and, in order to take the case out of the Statute of Limitations, F. relied mainly on a letter from C. dated April 25, 1845, the material parts of which were as follow:—"I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out." A witness was also called by F. who proved that in 1844 he had an interview with C. respecting the debt, when accounts were stated, and the balance now sued for was admitted to be due; and that in March 1845 it was agreed that F. should take goods belonging to C. from the Pantechnicon: that goods were selected for that purpose, but C. failed to forward them.

The plaintiff was tried without a jury; and the judge, considering the letter and the above evidence sufficient to bar the Statute of Limitations, gave judgment for F. (the plaintiff below).

On appeal, the Court reversed the decision, and gave judgment for C. (the defendant below), with costs of the appeal.

Observations on the question whether an appeal lies from the County Court in cases where neither party calls for a jury and the judge is left to decide on both law and fact.

In appeal cases from the County Court (the Chief Justice being excluded by the statute from the hearing of them) the Court will simply give judgment, without stating reasons for the conclusion it has arrived at, in like manner as in cases where it is called upon to review the decisions of commissioners of taxes.

This was an appeal from the decision of the judge of the County Court of Dorsetshire, held at Poole in this cause. The special case stated by the judge for the opinion of this court shewed that the action was for goods sold and delivered by the plaintiffs below to the defendants below, in the year 1842, to the amount of 50l. 16s. 5d. which, after giving credit to the defendants for goods sold by them to the plaintiffs, to the amount of 19l. 4s. 4d. left due to the plaintiffs the sum of 34l. 12s. 1d. The defendants admitted at the trial that the balance of 34l. 12s. 1d. was owing from them to the plaintiffs, but relied on the Statute of Limitations to defeat the claim. To take the case out of the statute, a witness (J. Furnell) was called, who proved that as the agent of the plaintiffs he had an interview with the defendants in the year 1844, when accounts were stated between the parties, and the above balance admitted to be due to the plaintiffs; that in March, 1845, he had another interview with the defendants, when one of them stated it would be more convenient to pay in goods than in money, and he proposed that plaintiffs should take goods of the defendants out of the Pantechnicon. Goods were selected by the plaintiffs, but the defendants failed to forward them, upon which the plaintiffs wrote a letter (April 1st, 1845), expressing surprise that the goods were not sent according to promise, requesting that they be immediately forwarded, and concluding with a threat of legal proceedings in case of non-compliance with the demand. No goods being sent, the plaintiffs applied by one Knight, an attorney, for payment of the debt. In the month of April, 1845, the plaintiffs received by post a letter, which was put in evidence by the plaintiffs at the trial, and proved to the satisfaction of the County Court judge to have been signed by the defendant, Joseph Cawley. The following is a copy:—

"25th April, 1845.

"Messrs. Furnell and Joyce,

"Gentlemen,—I was much surprised at receiving a letter from Henry Knight this morning, for the recovery of your debt. I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed, when Mr. Furnell was in town. You are welcome to issue as many writs as you think proper; but if you continue to press the thing I shall immediately put myself under the protection of the Court, &c.

J. C."

It was objected at the trial, that this letter was not duly proved to have been written by the defendant, Joseph Cawley. Three witnesses for plaintiffs, who knew the defendant's handwriting swore they believed the signature to the letter to have been that of Joseph Cawley, one of the defendants, though the body of the letter was in a woman's handwriting. For the defence, the defendant, Joseph Caw-

ley, swore that the letter and signature were in his wife's handwriting, that he did not know there was such a letter in existence, and he never knew his wife write letters of business before. The judge, however, held the letter to have been sufficiently proved as signed by Joseph Cawley, and gave judgment for the plaintiffs. Notice of appeal was immediately served, and the two points stated for the opinion of this Court were,—1st, Whether the action is barred by the Statute of Limitations, or whether the plaintiff is entitled to judgment for 34l. 12s. 1d. 2nd, Was the letter of the 25th of April, 1845, sufficiently proved to have been signed by the defendant, Joseph Cawley, so as to satisfy the words in the Statute of Limitations, 9 Geo. 4, c. 14, s. 1, namely, "to be signed by the party chargeable thereby?"

(It was arranged between counsel that the case should be argued before the full Court, though the Chief Justice is precluded by the statute from joining in the judgment.)

Udall, for the appellants. The first question in this case is, whether the debt is barred by the Statute of Limitations; and the second, whether sufficient proof was given, at the hearing of the plaintiff, that the defendant, Cawley, wrote the letter of April 25, 1845. [JERVIS, C.J.—The special case states that the handwriting was proved to the satisfaction of the judge. MAULE, J.—There is no ground for appeal on matter of fact. This letter must be taken as written. You cannot, therefore, raise the second point.] There is sufficient matter of law in this case to require the Court to entertain it, and say whether the letter is sufficient to take the debt out of the Statute of Limitations. It lies on the plaintiff below to establish the affirmative; he must shew that subsequent to the 13th of November, 1844, the defendant did something which renders him liable to pay this debt. There must be on his part either an acknowledgment of the debt *simpliciter*, or an admission of it, accompanied by a promise to pay. The evidence is insufficient to establish this—the letter being in fact a refusal to pay. [MAULE, J.—The letter is a clear acknowledgment of the debt.] Yes, but it contains no promise to pay. There is a head-roll of cases, in which a bare acknowledgment without a promise to pay has been held insufficient. One of the latest cases on the point is *Hart v. Prendergast*, 14 M. & W. 741. In that case, the letter set up as containing a promise to pay was much stronger than this. (*Tanner v. Smart*, 6 B. & Cr. 603.) In that case, there was a clear acknowledgment of the debt, and the Court considered that the question to be decided was, whether it contained a promise to pay. This case is similar to that of *Routledge v. Ramsey*, 8 A. & E. 221. The defendant here says, "Will you take out the debt in goods, first paying what is due on them at the Pantechnicon? if so, I will pay, but not otherwise." This was a condition to which the plaintiff did not accede, and the defendant is, therefore, entitled to the benefit of the statute. (*Murrell v. Frith*, 3 M. & W. 403).

JERVIS, C.J.—Is this a case where an appeal lies at all?

Barstow (interposing).—I submit this is a case in which an appeal does not lie. [JERVIS, C.J. referred to a case in this Court (*East Anglian Railway Company v. Lythgoe*, 16 Law T. 487, C. B.), in which it was doubted whether an appeal lies from the County Court in a case where there has not been a trial by jury.]

Udall.—This is a clear point of law under the Statute of Limitations, arising on the facts, and, as such, the proper ground for an appeal. The question is whether the statute bars the claim or not, which is certainly a question of law. As yet there has been no appeal from the County Court in a case where there had been a jury. [MAULE, J.—Have not the parties here left the law and fact to the judge as in a case of arbitration?] It is submitted that the Court should not favour the objection that it has not jurisdiction, for by so doing it will be defeating justice. There is here matter of law forming good ground of appeal; and it is contended that as the plaintiff has not shewn affirmatively that the defendant made a promise subsequent to November 1844, sufficient to take the case out of the operation of the statute, the Court should hold this appeal well brought, and that the appellant is entitled to judgment.

Barstow and Willes, for the respondents.—There was no error in law on the part of the learned judge in this case. The defendant might have had a jury if he pleased, and in that way have separated matter of law from matter of fact, and therefore he cannot now have his appeal. (*East Anglian Railway Company v. Lythgoe*, 16 Law T. 487, C. P.) As to the question whether the letter is sufficient to defeat the operation of the statute, the Court will regard it as an acknowledgment *simpliciter*, and if so, a promise will be implied. The evidence was sufficient to bring the debt within six years. In 1844 the parties met and transactions took place which amounted to a payment of part of the account, leaving due the sum for which the plaintiff was brought. Assuming that to be so, as the case was tried in 1850, that is sufficient, unless the defendant prove to demonstration that six

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years had elapsed before the trial. He has not done that. All we know by the case, as stated for this Court, is, that the cause was tried in November 1850, whereas it ought to show the date of the commencement of the suit. [JERVIS, C.J.—The judge has found that the parties met in 1844.] Yes; but it is not shewn at what period of the year they had that meeting. It was the defendant's duty to shew at what period the suit commenced. [JERVIS, C.J.—This is not a plaint on an account stated, but for goods sold and delivered; the onus, therefore, lies on you to shew when the suit commenced. CRESSWELL, J.—As the case stands it is for you to shew affirmatively that something has been done taking the case out of the Statute of Limitations.] With submission that is not so; he that objects to the judgment of the Court below has to shew that. The transactions at the meeting in 1844 amounted to a statement of accounts; and as such, the debt being cut down from a larger to a smaller sum, there arises a new cause of action for the lesser amount, a new consideration being thus created. (*Ashby v. James*, 11 M. and W.; *Clarke v. Alexander*, 8 Scott, N. R. 165; *Worthington v. Grinditch*, 7, Q. B. 484.) It is not disputed that the parties came to an arrangement in 1844. This being so, the Court will assume that the date when the suit commenced appeared to the County Court judge, and he saw that it was such as did not give force to the statute to bar the debt. The judge having had the means before him of ascertaining when the account was stated between the parties, how can this Court, which has no evidence when the suit was commenced, say that he was wrong, in point of law, when he gave judgment for the plaintiff? This Court cannot assume, in the absence of a statement as to when the arrangement was made between the parties, that the date was such as to give force to the statute. Under these circumstances, it is submitted first, that the appellants have no *locus standi* before the Court; and secondly, that the respondents are entitled to the judgment of the Court, on the ground that the admission made by the defendant was within six years of the commencement of this action, it being the duty of the appellants to supply the Court with information as to dates. But if the Court should think otherwise, this date being uncertain, owing to non-mention of it, the Court will not assume it was such as to give effect to the statute, particularly as the judge of the County Court had the means of ascertaining the dates, and he ruled that the Statute of Limitations did not bar the claim.

*Udall*, in reply, referred to *Smith v. Page*, 15 M. & W. 683.

JERVIS, C. J.—As the Court, according to the statute, must not now give judgment in Term, let the case stand for judgment in Saturday.

## JUDGMENT.

Saturday, June 21.—MAULE, J. now delivered judgment.—This case came before the Court on an appeal from a decision of the judge of the County Court in Dorsetshire, upon a case which was tried by him without a jury, and he has stated a special case, giving judgment for the plaintiff. The special case, as stated, shews that the debt in respect of which the action was brought, was proved or admitted, and that the defendant pleaded the Statute of Limitations; and the question argued before us was, whether the facts stated in the special case take the case out of the Statute of Limitations. The judge who tried the cause thought that they did, and accordingly gave judgment for the plaintiff. A difficulty has also arisen, which was argued by the learned counsel, whether an appeal lies at all on a case in a County Court, where the parties did not either of them require a jury, but left it to the judge to decide both the law and the facts of the case. This depends on the 14th and 15th sections of the last County Court Act, 13 & 14 Vict. c. 61, which provides, "That if either party, in any cause of the amount to which jurisdiction is given to the County Court by this Act, shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the Superior Courts of Common Law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose." The question then is, what is comprehended within the terms "shall be dissatisfied with the determination or direction of the said Court in point of law?" as the present case does not arise on the improper admission or rejection of evidence. The natural application of the words would clearly mean dissatisfaction with the determination of the Court in point of law, when the Court had nothing but a question of law to determine, such as is the case on a special demurrer, or any similar proceeding, consistent with the practice of the Court, which may be adopted, and where the judge decided a matter of law, and either party was dissatisfied with his decision; as if, for instance, the defendant admitted the cause of action, but set up as a defence that the cause of action did not arise within three years, and that the plaintiff successfully contended that was no defence. That would be a determina-

tion in point of law. So, also, when the judge directs the jury on a point of law, and either party is dissatisfied with his direction, an appeal is given to the Court above. But where the parties do not choose to separate law and facts, but leave the judge who tries the cause to determine both, it may be very much doubted whether the parties do not, by taking that course, except themselves from the words of the enactment, and its spirit also, and place the judge in the position of an arbitrator, whose award is final. It may be said that this would be an absurd construction to say that the statute in such a case gives no appeal, but I do not think that is so, by any means, as parties very often find it convenient to take that course, which clearly excludes such an appeal. So it may be possible that there may be a line drawn which will not exclude every possible case from appeal in which the judge of the County Court has tried the cause without a jury, but which does exclude some cases of the same description. After a very attentive consideration of this case we are of opinion that the judge of the County Court has come to a wrong conclusion. If we are wrong in thus giving judgment for the defendant, it is some satisfaction to know that our judgment may be reviewed, on error, or by action brought; but as we entertain an opinion in favour of the appellants in point of law, our judgment must be for them. I may observe that this is a very peculiar court. The Act of Parliament by which it is constituted says, "Two or more of the puisne judges of one of the Superior Courts shall sit out of Term as a Court of Appeal," and the Court is to determine the appeal as it thinks fit, and may order judgment to be entered for either party as the case may be, and may make such order as to costs as they think proper, and such order shall be final. The chief justices are altogether excluded, and the Court is incapable of sitting in Term time. The thing that comes nearest to this Court is the power given to two or more judges to review the decisions of the Commissioners of Taxes, in which cases, instead of giving a judgment at length, it is customary simply to state that the judges are of opinion that the decision of the judges below are right or wrong, as the case may be. The Legislature seem to have very guardedly framed the Act so as to prevent these courts deriving the advantage which they otherwise would receive from the higher order of judges, namely the Chief Justices; but the custom has for centuries prevailed when the judges have deliberated upon any case of sufficient importance as to require a grave decision, that they have given their reasons for the opinions they entertain, although the actual judgment of the Court may consist of only a few formal words. But as the Legislature have so enacted, the Court will abstain from giving any reasons at all for their judgment; and I have only stated the reasons I have expressed for the purpose of shewing the doubt which existed in our minds as to our having any jurisdiction at all, though we have assumed that we have. The learned puisnes think with me that the judgment below was wrong, and we order judgment to be entered for the defendant; and we make an order for the costs of the appeal.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENTLEY, Esqrs. Barristers-at-Law.

Saturday, June 14.

PARKER v. THE BRISTOL AND EXETER RAILWAY COMPANY.

Money had and received—Received by agent for the principal.

This was an action for money had and received, brought by the plaintiff, who was a carrier, to recover an amount which he alleged had been charged him by the defendants as excess for the carriage of certain goods from Paddington to Taunton. A verdict was found for the plaintiff, before Parke, B. at Westminster, for 9l. 0s. 4d. with liberty to the defendants to move to enter a nonsuit.

Kinglake, Serjt. now moved accordingly, and contended, first, that an action for money had and received would not lie under the particular circumstances; and, secondly, that the defendants were only agents for the Great Western Railway Company as to part of the money; and as to this part, therefore, this action will not lie (*Bamford v. Shuttleworth*, 11 A. & E. 926. *Cur. adv. vult.*)

## JUDGMENT.

Tuesday, June 17.—POLLOCK, C.B.—In this case there was a verdict recovered for 9l. 0s. 4d. and my brother Kinglake moved for a rule to enter a nonsuit. Upon points in the case reserved by my brother Parke, we are of opinion that there ought to be no rule. The case of *Ashmole v. Wainwright*, in the 2nd Q. B. reports, page 837, is a decisive authority, that immediately governs the case before us; and we think, therefore, that if any question is to be made of the doctrine laid down in that case, it ought to be by an appeal to the Court of Error, and probably that would be for something more than 9l. 0s. 4d. This is not a case that would very pro-

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bably lead to an appeal to a Court of Error, the amount being so small; but I entirely concur with the rest of the Court in refusing the rule upon this authority. I must express the opinion which, if I were in a Court of Error, I should more freely and at large express. I cannot help now saying that though I feel here bound by the case of *Ashmole v. Wainwright*, and, in concurrence with the rest of the Court, join in refusing the rule, yet I regret it: it seems to me to break in upon one broad intelligent principle, namely, that the action for money had and received must be brought for a definite, clear, and certain sum, and not for some unknown sum that is to depend upon the verdict of the jury, who are to decide whether the defendant has received the money or not. My brother Parke wishes me to add (but I thought I had already distinctly stated it) that the doubt belongs exclusively to my own mind, and not to that of the rest of the Court, who are satisfied with the judgment, and altogether agree with it not merely as an authority, but it is their opinion and judgment; and I think it right to state, that while I yield to that authority, I not only am not convinced by it, but I think the broad principle that an action for money had and received must be brought for a clear and definite sum, is a principle which has prevailed, I believe, for many years in Westminster Hall, and which, I think, is worth preserving. There was another point made in the case, which was—that part of the money was received, not as principal, but as agent; but the case of *Snowden v. Davis*, reported in 1 Taunton, 358, clearly lays down that an action for money had and received lies to recover back money which has been obtained through compulsion, even although it has been received by an agent who acted for the principal: that, therefore, disposes of the second point, in which we all agree without any doubt, and we all feel ourselves bound by the case I have mentioned in the Q. B. In this case there will, therefore, be no rule. *Rule refused.*

Monday, June 16.

(Before MARTIN, B. sitting alone to hear motions in the Exchequer Chamber.)

BURNETT v. PHILLIPS.

Outlawry—Judgment of waiver—Variance—Reversal of outlawry by writ of error.

After judgment of waiver against a woman in the writ of error to reverse the waiver, the judgment was called a judgment of outlawry: Held, that this was a material variance.

In this case a writ of error had been sued out to reverse a judgment of waiver against a woman. The assignment of errors stated that at the time of issuing the *erigi facias* the defendant was abroad.

To the assignment of errors there was a plea of *non tiel record*.

The judgment roll contained the *ca. sa. erigi facias, allocatur, exigent*, and judgment of waiver.

*Hawkins*, for the defendant. The judgment in this case was a judgment of waiver, not of outlawry. There is no such record, and there is nothing to identify the D. A. Burnett mentioned in the judgment with Dorinda Anne Burnett in the writ of error. There is no averment of identity. The original *ca. sa.* is against D. A. Burnett; the *erigi facias* and the return are the same; and so also is the judgment of waiver; and in the writ of error for the first time the name of Dorinda Anne Burnett is used. Then judgment of outlawry cannot be entered against a woman. The judgment of waiver and outlawry are distinct. (He referred to *Tidd's Pract.* 127, 131.) The same distinction is made in *meane process*. (2 Wm. 4, c. 39, ss. 3, 6, 7; *Outlawry* against a Woman in Error, Com. Litt. 122 b, 123 b; Com. Dig. tit. "Utlagary.")

J. Gray, contra. This is a judgment that the woman is waived; the only question is, whether it is a substantial variance, to call this a judgment of outlawry in the writ of error. They are, in fact, the same, and there is no difference but in the name. The case referred to in Com. Dig. is *Heimes v. Cotton*. The foundation for the distinction no longer exists. It appears in the writ of error, that this judgment is against a woman, and if they had desired to take advantage of this objection they should have applied to quash the writ. The judgment is sufficiently identified by the writ of error, and it may be read as a judgment of waiver. That case, which will be found, 2 Roll's Abridgment, 804; Tit. Utlagary, 5, is as follows:—"Si le record soit que un feme est utlage, ces est erroneus, car doit estre waive."

MARTIN, B.—I always regret when I am forced to give effect to an objection, which clearly arises only from an error; but applying the law to this matter it seems to me that I must decide in compliance with the rule laid down in the case, cited from Comyn's Digest, that there is here no record of outlawry. That case shews that the variance here pointed out is a material one. If this judgment had been a judgment of outlawry it would be bad in error; this is a judgment against a woman, and is properly entered as a judgment of waiver, and can only be reversed as a matter of fact, and I have no right by

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my decision to deprive her of the benefit of averring matter of fact, by which she might reverse the out-lawry. The waiver is legal, but the issue joined is not proved by the production of this record.

*Judgment for the defendant.*

Monday, June 30.

LOWE v. CARPENTER.

*Prescription—2 & 3 Wm. 4, c. 71.*

*A plea of twenty or forty years' user under 2 & 3 Wm. 4, c. 71, ss. 2, 4, is not supported by proof of user from a period of fifty years before the commencement of the action down to within two years of it.*

*Semle, per Parke, B. that there is no good title under the statute unless user can be proved at least once in every year.*

In this case a rule had been obtained, calling on the defendant to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the plaintiff, with such damages as the Court should direct, or why a verdict should not be entered *non obstante veredicto*.

This was an action of trespass *quare clausum fregit*; the defendant pleaded user for twenty and forty years under the stat. 2 & 3 Wm. 4, c. 71, ss. 2, 4. The action was brought in Nov. 1849, and user was proved from 1799 up to the autumn of 1847, but there were two years during which there was no user.

*Wheatley, Q.C. now shewed cause.*—In this case the road was only occasionally used to draw timber and to take lime, &c. on to the land; the user was of rare occurrence, and it was only necessary to prove that the defendant had used the right whenever he had occasion; there was a continual enjoyment, though no user. (*Ward v. Robins*, 15 M. & W. 237.) [PLATT, B.—What do you say to the 6th section? You see the difficulty is this, that if you can prove user for eighteen years and non-user for two, that would, according to your argument, be a proof of user for twenty years? PARKE B.—Does this Act apply to those cases where user is of such rare occurrence, that two years or more may elapse between them?] It is a question for the jury whether there is an enjoyment for twenty years previous to the interruption. If the case of *Parker v. Mitchell*, 11 A. & E. 788, is well decided, no doubt it is decisive, but it was much shaken as an authority by *Carr v. Foster*, 3 Q. B. 581. That case is strongly in the defendant's favour, and cannot be reconciled with *Parker v. Mitchell*. *Flight v. Thomas*, 11 A. & E. 688; *Hull v. Swift*, 4 Bing. N. C. 381; *Jones v. Price*, 3 Bing. N. C. 52, were also cited.

*Greaves, Q.C. in support.* The Court can only consider the time covered by the plea. Here it is not proved that there has been an actual enjoyment as of right for the full period of twenty years. This is a claim which is to be substantiated by the person setting it up. The statute means user, it deprives a landowner of his property, but on certain terms. *Parker v. Mitchell* is expressly in point, except that there the discontinuance of user was a little larger than here cited. (*Wright v. Williams*, M. & W. 77; *Onley v. Gardiner*, 4 M. & W. 496; *Richards v. Fry*, 3 N. & P. 67; *Bailey v. Applegarth*, 161.)

PARKE, B.—I am of opinion that in this case the rule must be made absolute to enter a verdict for the plaintiff, unless the defendant elect to pay costs and amend his plea. The case of *Parker v. Mitchell* is precisely in point; that case decided that a plea of forty or twenty years' user is not supported by proof of user from a period of fifty years before the commencement of the action down to within four years of it. To support such a plea, the defendant must be in the habit of using. It must be an actual, not a constructive enjoyment, during all the period; and there is no difficulty in reconciling this opinion with the decision in *Carr v. Foster*, for upon referring to that case, it will be found that in fact they are not conflicting. In that case there was a good beginning and a good ending, and it was an intermediate space, during which there had been a non-user. If it were necessary to decide the point, which it is not, I own my opinion would be that there is no good title under the statute, unless user were proved at least once in every year. I still remain of the same opinion with regard to this statute as expressed by me in *Ward v. Robins*, and I think that, according to that Act, at least some act done within the last year should be proved in order to bring the case within it.

ALDERSON, PLATT, and MARTIN, BB. concurred.

*Rule absolute for new trial, on payment of costs, defendant to accept any notice plaintiff can give him; or rule absolute to enter a verdict for the plaintiff, with nominal damages, unless the defendant acceded in a fortnight.*

## BUSINESS OF THE WEEK.

Saturday, June 28.

FOSTER, ERIC v. DAUBER.—This was a rule calling on the defendant to shew cause why the verdict found for

him on the 2nd, 3rd, and 7th issues, should not be set aside and a verdict returned for the plaintiff, with 1,500*l.* damages, and interest at 4*l.* per cent.; or why judgment should not be entered for the plaintiff *non obstante veredicto*, or why a new trial should not be had. This was an action on two promissory notes. *Shes, Serjt.*, and *Bramwell*, shewed cause. *Willes* in support. The Court made the rule absolute on certain grounds, and took time to consider their judgment on the remaining.

*Cur. adv. vult.*  
NASH v. CARMAN.—Tried at Kingston before Lord Campbell, C.J. This was a rule calling on the plaintiff to shew cause why the verdict returned for him should not be set aside, and a new trial had, or why the verdict returned for the plaintiff should not be set aside, and entered for the defendant.

*Rule absolute to enter verdict for the defendant on the 7th of June.*

GRiffin v. HUNFREY. *Stands over.*  
DAVIS v. WAKING. *Postponed by consent.*  
ROSE v. THE BIRKENHEAD RAILWAY COMPANY. *Postponed by consent.*

LEWAGHAN v. CAPORE. *Judgment.*

CARNE v. MALINS.—The Court granted leave to amend, by adding the names of several plaintiffs to the record, to save the Statute of Limitations, on the following terms:—1. That the plaintiffs should not plead the Statute of Limitations to a cross action; and, 2. That defendant should be at liberty to withdraw defence within ten days, and have his costs paid.

TURNER v. WINTERBOTHAM. *Settled.*

POOL v. WARDELL. *Rule refused.*

ABBOTT v. BACON.—Tried at Norwich before Jervis, C.J.

This was a rule calling upon the defendants to shew cause why the verdict found for them should not be set aside and a new trial had, or why a verdict should not be entered for the plaintiff *non obstante veredicto*. This was an action of libel by the plaintiff, an ex-superintendent of police, against the proprietor of the *Norfolk Mercury*. The libel charged that the plaintiff had stolen a bottle of pickles, some cigars, and other articles; and the defendant had pleaded a justification, alleging that the plaintiff had stolen a bottle of capers, a cigar, a brush, and a packet of rottenstone. At the trial the jury found a verdict for the defendant, but at the same time thought that the plea of justification had only been proved as to the bottle of capers, and under the direction of the judge they found one farthing damages for the plaintiff, in case the Court should think that that plea was not proved. *Prendergast, Q.C.* and *Raymond* shewed cause. The Court said that the plea of justification put upon the record was clearly not proved, and made the rule absolute to enter the verdict for the plaintiff, with one farthing damages. *Rule absolute.*

GENDIES v. WILLIAMSON and ANOTHER. *Part heard.*

Monday, June 30.

HART v. BIXENDALE. *Rule absolute to enter verdict for the defendant—Judgment.*

BURKETT v. NOBIS. *Rule absolute for new trial—Judgment.*

JONES v. DAVIS. *Rule discharged—Judgment.*

FOSTER v. DENNIS. *Rule discharged—Judgment.*

*Rule to enter judgment non obstante veredicto discharged. Rule absolute for a new trial—Judgment.*

GENDIES v. WILLIAMSON and ANOTHER. *Rule absolute for new trial.*

WILLIAMS v. PRICE. *Rule discharged.*

LOWE v. CARPENTER. *Rule absolute for a new trial on payment of costs, defendant accepting any notice plaintiff can give; or rule absolute, with nominal damages, unless defendant amend in a fortnight.*

DON dem. DIXIE v. DAVIES. *Stands over.*

DON dem. DAVIS v. THOMAS. *Rule discharged.*

LAMBERT v. STEINMAN. *Rule absolute for nonsuit.*

WHITE v. TILL. *Rule absolute on payment of costs.*

VERBY and OTHERS v. BROWN. *Stands over.*

LYSLEY v. CLARKE. *Stands over.*

PRICE v. WOODCOCK. *Rule absolute for a new trial; costs to abide the event.*

MIDDLEMAS v. HOOKER. *Rule absolute for a new trial; costs to abide the event.*

Tuesday, July 1.

LAFONE v. ELLIS. *Struck out.*

JAMES v. WHITE. *Judgment.—Rule absolute to enter a verdict for the plaintiff, 48*l.* 14*s.**

STOCKTON and DARLINGTON RAILWAY COMPANY v. FOX. *Rule discharged.*

KIRK v. URWIN. *Judgment for plaintiff as to first breach, and for defendant as to the second breach.*

LIVEN v. SWANSEA DOCK COMPANY. *Judgment for the plaintiff.*

ADCOCK v. WOOD. *Judgment.—Rule to arrest judgment discharged.*

Thursday, June 5.

(Before WIGHTMAN, J.)

JACOBS, qui tam, v. BRYER and OTHERS.

*Disorderly house—Keeper—Music and dancing—25 Geo. 2, c. 36—Penalties—Verdict.*

*A house was kept for public music and dancing without a license, contrary to 25 Geo. 2, c. 36, s. 2. A. appeared publicly as the sole proprietor; B. was the superintendent of the decorations; C. the musical director; and D. and E. superintended other departments.*

*Held, that B. C. D. and E. were not liable to the penalties imposed by that section, unless, besides*

*such superintendence of the different departments, they or any of them appeared, acted, or behaved as master, or as the person having the care or management of the house.*

*Quære, Whether, in a joint action against four for penalties, an acquittal of one is an acquittal of all?*

*Quære, Whether, in a joint action against four for four penalties incurred on the same day under sec. 2, the plaintiff can, in any event, recover more than one penalty?*

This was a *qui tam* action against Bryer, Bignold, Laurent, sen. and Laurent, jun. for four penalties of 100*l.* each, incurred by the defendants in keeping open the house called "The Argyle Rooms," on the 5th June, 1850, for public music and dancing, without a license, under 25 Geo. 2. Sec. 2 of that Act provides, that "any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles of thereof, without a license had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace, &c. shall be deemed a disorderly house or place, &c. and every person keeping such house, room, garden, or other place without such license as aforesaid, shall forfeit the sum of one hundred pounds to such person as will sue for the same." Section 8 is as follows, "And whereas by reason of the many subtle and crafty contrivances of persons keeping bawdy houses, gaming houses, or other disorderly houses, it is difficult to prove who is the real offender or keeper thereof, by which means many notorious offenders have escaped punishment, be it enacted, by the authority aforesaid, that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof."

It was proved, and not disputed by the defendants, that there was at the time stated in the declaration public music and dancing at the Argyle Rooms; it was also proved that in October, 1849, an application had been made to the Quarter Sessions for a license under the Act, and that the license was refused, but that in October, 1850, a license was granted, and therefore, that during the time laid in the declaration the rooms were so opened and used without a license. From a placard put in by the plaintiff it appeared that a person of the name of Christopher Brown was publicly advertised as the sole lessee; that Bryer superintended the decorations; that Laurent, jun. was the conductor of the musical department, and that the other defendants superintended other departments. Each defendant in his department ordered for it the necessary men and materials—but the orders were given on behalf of Brown. Each defendant was present at the performances, acting as manager in his own department, and Brown was also always present superintending. The defendants took benefits at the rooms.

The *Attorney-General*, in addressing the jury for the defendants, contended that they were not liable to this action. The penalty was imposed by the statute upon persons keeping the house; and persons who acted, or appeared as the master, or as having the care or management of the house, were to be deemed the keepers; but only in the event of there being no ostensible keeper. The recital in sec. 8 gave the reason for the enactment, namely, the difficulty of proving who was the real owner; and the meaning of the section was, that, in the event of such difficulty, any person acting as the owner or manager should be deemed the keeper. But, in this case, there was an ostensible keeper; he was not concealed, but was publicly put forward and advertised as the lessee and manager: he was constantly acting in that capacity. Nor was there any difficulty in proving it, for it had been easily and conclusively proved by the plaintiff. On the contrary, each of the defendants acted merely in his own department; when they ordered men or materials, it was in the name and on behalf of the proprietor, Christopher Brown. Surely they incurred no liability, either as owner or apparent owner. Take the opera—could it be said that the leader of the orchestra, the stage-manager, or the scene-painter were any of them the keepers of the house, when Mr. Lumley was publicly known as the sole lessee. Again, the defendants took benefits at the rooms, which shewed that they were not entitled to share the profits of the proprietorship. Christopher Brown was alone liable, and he was not a defendant.

WIGHTMAN, J. to the jury.—The first question is, were these rooms kept open for public music and dancing without a license. It is not denied that they were; and you will probably find that in the affirmative. In the next place—are these defendants liable? That is,—did they, or any of them, appear, act, or

## NISI PRIUS.

## COURT OF COMMON BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

Thursday, June 5.

(Before WIGHTMAN, J.)

JACOBS, qui tam, v. BRYER and OTHERS.

*Disorderly house—Keeper—Music and dancing—25 Geo. 2, c. 36—Penalties—Verdict.*

*A house was kept for public music and dancing without a license, contrary to 25 Geo. 2, c. 36, s. 2. A. appeared publicly as the sole proprietor; B. was the superintendent of the decorations; C. the musical director; and D. and E. superintended other departments.*

*Held, that B. C. D. and E. were not liable to the penalties imposed by that section, unless, besides*

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behave as the masters, or as persons having the care or management of the rooms? If so, they are liable. The defendants no doubt took part in the conduct of the establishment, but did they act as masters or owners? On the placard produced by the plaintiff, Brown is publicly put forward as the sole lessee; Bryer is described as the decorator; Laurent, jun. as the musical director. No doubt each may have his separate department, and all may share in the proprietorship; but, on the other hand, one may be the sole proprietor, and the other may have the care of separate departments under him. You are to be satisfied that the defendants appeared, not only as managers of their respective departments, but as masters or managers of the house. It is for the plaintiff to make out this to your satisfaction; whereas the evidence produced by him seems rather to lead to the inference that Brown was sole manager or owner of the whole, and that the defendants were sub-managers of departments. If you should think so, you will find a verdict for the defendants.

A bill of exceptions to this ruling was tendered by Lush for the defendants, on the ground that if one defendant obtained a verdict the verdict must be entered generally for the defendants; and, secondly, that in any event only one penalty of 100*l.* could be recovered.

WIGHTMAN, J.—They are points well deserving consideration.

*Verdict for the defendants.*

M. Chambers, Q.C. Heaton, and Charnock, for the plaintiff.

The Attorney-General, Lush, and Parry, for the defendants.

Friday, June 6.

(Before WIGHTMAN, J.)

ARMSTRONG v. PARKINSON.

*Husband and wife—Wife's savings—Money had and received.*

A. was a baker, B. his wife, who lived with him, let apartments, and received the money. Having saved money by so doing, she, without A.'s knowledge, bought shares in a building society; she afterwards sold out the shares and gave the proceeds to C.:

Held, that A. might recover such proceeds from C. in an action for money had and received.

The action was in assumpsit for 360*l.* money had and received to the plaintiff's use, and on an account stated.

It appeared from the evidence that the plaintiff married the mother of the defendant; that the plaintiff carried on the business of a biscuit baker; that his wife, who lived in the same house with him, took lodgers and boarders, received the profits, and thereby accumulated a large sum of money; that she, without her husband's knowledge, invested this sum in subscribing to a building society; that some years afterwards she sold out her shares in the society for 360*l.* and that she gave this sum to the defendant. Upon this coming to the knowledge of the plaintiff, he applied to the defendant for the money; it was refused, and consequently the present action was brought.

Humphrey, Q.C. for the defendant.—That as the money was the produce of the wife's separate business, it must be treated as her separate estate, and that she had properly a power of disposal over it.

WIGHTMAN, J.—I have no doubt whatever that the money belonged to the plaintiff; the wife lived with him, and merely assisted him in his business; while he attended to one branch, she attended to another branch of it; she had no right to dispose of the money so acquired, and could confer no title on the defendant. The plaintiff is entitled to recover.

*Verdict for the plaintiff.*

Knowles, Q.C. and Addison, for the plaintiff.

Humphrey, Q.C. for the defendant.

## ADMIRALTY COURT.

Reported by Dr. WADDILOVE, of Doctors' Commons.

Jan. 9 and 10, and April 17.

The "SAMUEL."

*Salvage—Agreement—Two sets of salvors.*

Two agreements were made with one set of salvors, the conditions of which, owing to circumstances, they could not complete. A second set of salvors saved a portion of the property; but after the agents for the owners had given a notice that no further assistance was required. The action was not commenced by the second salvors until May, 1850, although the service was rendered in Dec. 1849:

Held, that the first set of salvors were entitled to remuneration; that the agents of the owners had a right to refuse the assistance of all persons; that two of the second set of salvors who had notice of such refusal were not entitled to be treated as such, owing to the delay in instituting the proceedings. Only 100*l.* given by way of

costs to the second salvors on account of their delay.

This was a case of salvage. The facts, which are of a complicated character, appear sufficiently in the judgment.

Sir J. Dodson, Haggard, Jenner, and Harding, for the two sets of salvors.

Bayford and R. Phillimore for the owners.

Dr. LUSHINGTON.—In order to obtain a clear view of the question arising in this case, it will be necessary to state some of the admitted facts with reference to the claims for salvage performed by two sets of persons, on account of different services. The *Samuel* was a brig of about 333 tons burthen, and, whilst on a voyage from Cronstadt to London, laden with 750 casks of tallow and some lathwood, she, on the 28th of November, caught the ground on the Hasboro' Sand. She beat thereon for several hours, and made six feet of water; the master, in consequence thereof, ran her on Horsey Beach, about eight o'clock that same morning. The first persons who offered to render any assistance were some men belonging to Horsey, who allege that they saw this vessel aground on the outer beach; that they sent for the ship apparatus from Palling, judging from the heavy sea that they could not, without such assistance, communicate with the ship. The coast-guard came, but was unable to gain a communication, on which the Horsey men launched their boat, with eight hands, and, as they say, at great risk, reached the ship, and took the master and seven hands out of her, the rest of the crew having quitted before. They then secured the brig to the shore, and those facts are not denied. Mr. Butcher, a well-known shipowner at Yarmouth, arrives in the course of the day, for the purpose of acting as agent for the ship and cargo. He entered into an agreement with these persons, and to that agreement I must now refer:—"28th Nov. 1849; it is this day mutually agreed between Mr. Matthew Butcher, agent to the owners and underwriters of the brig *Samuel*, of Sunderland, and John Johnson, William Johnson, and Benjamin Bishop, for themselves and their company, that they will immediately proceed on board the said brig *Samuel*, now lying on Horsey beach, stow her sails, and prepare for getting six or eight pumps down the hold, lay out anchors that may be required, and find sufficient men to pump her off the beach, and if requested, to get out twenty or thirty casks of tallow, and to use their utmost exertions to get the said vessel off the beach and into Yarmouth harbour, the said Matthew Butcher finding steam-tug; and for the said services above-named, the said Johnson and Co. to receive the sum of 250*l.* on the vessel being safely moored in Yarmouth harbour. Should they not succeed in getting into Yarmouth harbour this agreement to stand void; and they further undertake to bear the said Matthew Butcher harmless against any claim that may be made by any other class of boatmen on the coast." There is some discrepancy in the statement of the salvors and owners as to how this agreement was put an end to, the owners alleging that the salvors abandoned it because not sufficiently remunerative; the salvors stating that they gave it up because it was impossible to carry it into execution. It appears to me quite superfluous to attempt to solve this question, the engagement having been given up by mutual consent, the reasons for so doing can have no bearing on the decision in this case; more especially as a new agreement was afterwards entered into. It is not, however, denied, that these salvors acted under this agreement for some time, certainly during the 28th of November. They discharged 120 casks of tallow, they worked the pumps, they laid out a chain cable, and they used every endeavour to get the ship afloat. This they were unable to effect. On the 29th, Mr. Soutter, an agent sent from London by the underwriters, arrived. The Horsey men were in the course of the morning joined by some men from Winterton, and a fresh agreement was then entered into to the following effect:—"The undermentioned boatmen, for themselves and all others connected with them, hereby agree with Samuel Soutter and Matthew Butcher to discharge the cargo, or as much as may be required, and convey the said cargo to Yarmouth in boats without loss of time, to deliver the same into warehouse or on quay, as the case may be—the said cargo now on board the *Samuel* laying on shore—and for their services are to be paid the sum of 12*s.* per cask; such casks as may be landed upon the beach the boatmen are to receive the difference, after deducting the land-conveyance expenses to Yarmouth; and further agree to lose no opportunity of discharging cargo, and getting the ship off and into Yarmouth; and, should they succeed in conveying the *Samuel* into that port, to leave the payment for such services to Samuel Soutter and Matthew Butcher. They are to find two crabs for crabbing the vessel to the beach, charging five guineas each for use of the same. This agreement made at Horsey, near to where the *Samuel*, Captain James Masson, is on shore.—Nov. 30, 1849." These salvors set to work

under this agreement; they lightened the vessel of more tallow, which they sent to Yarmouth, and for the freight of which they have been paid the sum of 84*l.* On the 1st December, at 7 p.m. the vessel, making much water, was got off; they kept her afloat, dropping down with the flood-tide, till the steam-tug the *Emperor* came and took her in tow. She then proceeded into Yarmouth Roads, having on board six of her crew and thirty-nine of the salvors working at the pumps. There was not sufficient water to enable the vessel to get into the harbour that night, and she was accordingly brought to anchor. The next morning, Dec. 2, the pilot again came out, and expressed his opinion that there was not sufficient water to admit the brig; the master, however, and Mr. Soutter determined to make the attempt. It was unsuccessful; the ship was unable to cross the bar, but struck on the south side thereof, outside the pier. Various attempts were made by the steam-tug, by the salvors and others, to render assistance; their efforts were, however, ineffectual, and the vessel drove over towards the north pier, and there remained. At this time, but the particular hour is not stated in Mr. Jenner's act (on behalf of the salvors), it was deemed necessary for all hands to quit her; and it is alleged by the salvors that they left a part of their men on the shore to watch her. In the course of the evening, about seven or eight o'clock, or thereabouts, she began to break up, and some part of the cargo floated out of her. The Horsey men say that they all assembled, forty-six in number, and were willing to have saved the cargo, and were capable of so doing, but that they were prevented by the second set of persons claiming salvage in this case. As to the fact that the cargo was saved by the second set, there is no dispute. Now, for the present, assuming that the cargo was rightfully saved by the Yarmouth men, the first question is, whether the Horsey and Winterton men are entitled to salvage; and if yea, how ought the Court to estimate the value of the property? There is, however, a preliminary consideration. Were the Horsey and Winterton men acting under the agreement of the 30th of November, or were they not? Was the argument at an end, and how? So far as I recollect, these are questions not touched upon by the agreement before me, but which I must decide upon. This second agreement is set forth by the owners in the terms I have read, but I do not find that they assert it to be a subsisting agreement, or that they abandon it. The prayer is simply that justice may be done, leaving it to the Court to find its way as best it may. No doubt it was a valid and subsisting agreement at one time, and acted upon. Freight has been paid, as per agreement, upon certain parts of the tallow which were saved at an early period of this transaction. If the vessel had been got into the port of Yarmouth, the amount of salvage was to have been decided by Messrs. Soutter and Butcher; but the vessel has not been got into the port of Yarmouth. The salvors ascribe the fault to the agents of the owners, for attempting to take the ship into the harbour at an improper time; they say, therefore, that they claim salvage as if she had actually been brought into port. If this argument of the salvors be well founded,—if they rely upon the agreement,—they must go to Messrs. Butcher and Soutter to assess the salvage, and not to this Court. They cannot say that the agreement is good and binding upon the owners and not on them. Had the owners insisted upon this agreement, I should have had no choice but to have remitted the parties to their own tribunal; but the fact is, all these questions have escaped both parties, or been evaded by them. The salvors rely upon the agreement in part, and pray the Court to make a decree without reference to it. The owners allege the agreement, and neither pray that it may be enforced nor considered vacated. Whatever judgment the Court may pronounce must, I think, necessarily be founded upon somewhat vague premises, for the proper issues do not to me appear to have been distinctly raised. I think that this second agreement was vacated by what occurred on the 2nd of December, and by the subsequent acts of the agents. The agents of the owners or underwriters were, I think, perfectly justified in acting upon their own judgment in attempting to take this ship over the bar, for they had to compare risk against risk, and it was their duty and province to decide. On the other hand, I think that the first salvors should not be prejudiced by this act of the agents, especially if done against their will; and I am confirmed in this opinion, because it is not alleged on behalf of the owners that the agreement is now binding on the salvors. The conduct of the agents appears to me to have been a fact unprovided for by the agreement; and that for this reason, and on account of the conduct of all parties, especially the conduct of the suit, I must consider the second agreement as vacated by the acts of the agents on the 2nd of December. I am well aware, looking at the pleadings in this case, that this is somewhat a rough species of justice; but this arises partly from the nature of salvage service and hasty agreements made on such occasions, in



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which it is impossible to see what circumstances may rise,—and partly from the conduct both of owners and salvors in this suit. I am therefore of opinion that the first set of salvors are entitled to salvage,—not for having salvaged this ship and cargo, for that they did not do, but for having contributed towards the salvage of what was salvaged. They did not bring the ship and cargo into a place of safety—certainly not; but they rescued her from imminent danger, and brought her into a condition whereby a part of her property was salvaged, and this by most meritorious services on their part. I take it to be clear beyond all dispute that the salvors may be entitled to reward *pro tanto* for performing a part of a salvage service, though others may complete it, as in the case of persons rendering assistance to a ship on a sand, subsequently towed off by a steamer, though a part of the cargo may be lost. I therefore hold, that these salvors are entitled to salvage, and that it is my duty to fix the amount. The value upon which I will proceed is, the value of the property salvaged, without any reference to the claims of the second set of salvors; and assuming for the present that the second set are successful in maintaining their claims, I should, therefore, be of opinion that the Horey and Winterton men are entitled to some salvage. The amount I reserve, and that amount must depend, no doubt, on the question, whether the Yarmouth men are entitled to salvage, or whether, under the circumstances of the case, their acts ensure to the benefit of the first salvors. This brings me to the consideration of the claims of the second set of salvors—the Yarmouth and Gorleston men. Their claims are, with one exception, all of the same character, namely, for salvage on account of tallow saved at various localities after the breaking up of the ship on the 2nd of December. But I must remark on their delay in proceeding: the first set of salvors entered their action in December, 1849, and that action was concluded on the 23rd of May following, and then, but before the proofs were brought in, these salvors begin their action. In the *Clifton*, (Hagg Adm. Rep. 117, Sir John Nicholl observed that such delay was contrary to the principle and object of the jurisdiction of this court, which is summary, expeditious, and inexpensive; and so in *Re Rapid*, *ibid.* 419, where the services had been rendered at Smyrna, and there was a delay of eight months, the same learned judge dismissed the action, on account of the delay. In this case, see what inconvenience might have been incurred from this delay; the Court might have heard the case for the first salvors, and have made its decree upon a very different state of facts than that which is now brought before it. Fortunately, that did not happen, but this *lache* was entirely voluntary. It is always of importance to merchants and ship-owners that such claims should be rapidly adjusted, and the property set free. But, independently of the effect of mere delay to the owners, this case has been heard in a manner quite unprecedented; it should have been conducted as one cause, with three parties, and one set on petition. There are, instead of this, two acts; and the two sets of salvors, the really contending parties, do not write to the same lot. And what is the reason assigned for this delay, and the confusion introduced into the proceedings of the court? Why, that the property was in the custody of the Receiver of Droits; which is really no reason at all. The mere fact of the receiver holding possession of the property could not bar the salvors from adopting any course allowed by law for the recovery of salvage. The Wreck and Salvage Act would indeed become a nuisance to the shipowners and merchants of this country if, whenever the receiver's hand be placed on property, an indefinite suspension of the settlement of salvage claims should be the consequence. The merits of the second set of salvors must now come under my consideration. It is not to be denied that, by their exertions, the property was salvaged; they would therefore be entitled, necessarily, to a proper reward, unless they were stopped by the intervention of some legal objection. The first set of salvors contend that they were in possession of the right of saving this cargo; that they were forcibly dispossessed by the second salvors, being, as they aver, fully competent to perform their duty. The first set of salvors say, that these facts being proved, the salvage reward legally belongs to them, according to the doctrine in the *Blenden Hall*, 1 Dods. 414. The owners take nearly the same ground, adding that the second set of salvors are *delicto*, in having forcibly undertaken this service, in defiance of the orders of the master and agent of the owner. There is, with regard to the law, not the slightest difficulty in all these questions, for no doubt exists that the master or agent might accept or refuse the assistance of the persons who offered to perform the salvage service. Nor can it be denied that by the Wreck and Salvage Act, 9 & 10 Vict. c. 99, s. 15, the Legislature has imposed a penalty upon persons who disobey the orders of the master or owner. The difficulty, however, in this case, is not as to the facts; and no labour can or will enable the Court,

with entire satisfaction, to form an opinion upon evidence so conflicting as occurs in this case, and without means of testing the credit of the witnesses. The claims of the second set of salvors relate to circumstances occurring in the evening of the 2nd of December, after the unsuccessful attempts to get the brig into Yarmouth harbour. These salvors state that the vessel, after having struck on the bar, drove across the harbour to the sand-bank called "The North," which lies to the east of the north pier, and to seaward; that about half-past eight, p.m. the brig broke up and became a wreck, and her cargo (principally tallow) washed out, and was dispersed along the coast and between the two piers; that many of the casks were smashed, and a quantity of tallow in large pieces floated loose. Admitting this to be a true statement, the first question which occurs is, whether the first set of salvors could be said to have been in possession—corporal possession they certainly had not—were they in a *de jure* possession under the second agreement? Was that subsisting at this time, and did it extend to the then existing state of circumstances? I am not satisfied that it could not be extended to a state of facts such as I have stated. Was, then, a third agreement applicable to this state of things? This question is buried in great obscurity. That the ship and cargo were not abandoned by the master, agents, or crew is abundantly clear, though they were compelled to quit her. The statement of the owners and first set of salvors is, that they left her as a matter of necessity, and that they repaired to a public-house for refreshment, leaving a part of the first set of salvors to watch the ship. This is perfectly true, no doubt, but what does it prove? It proves that the master and agent hoped and intended to effect the rescue of the ship, and no doubt by the first set of salvors, and probably, too, in consideration of the second agreement, and in continuance of it. But it appears to me that neither the second agreement comprehended, nor did the master or agent contemplate, when they quitted the place near the vessel, the immediate occurrence of that which actually took place, namely, the breaking up of the ship. Had they done so, it would have been their duty to have remained on the spot, to give the necessary orders, and certainly not to have crossed to the other side of the harbour. I am well aware that in Mr. Nicholl's rejoinder on behalf of the owners, and not before, it is stated that it had been arranged that, if the *Sawney* should break up, they were all to assemble on the beach to assist in saving the cargo, and that this arrangement is supported by several affidavits. I cannot consider this arrangement, such as it was, a new arrangement, nor did the owners so regard it. Upon the ship breaking up, and the tallow washing out, the master and the agent are called to the spot, and intended, no doubt, to employ the first set of salvors in saving the cargo; but were they at that time, as a matter of right, in possession, and entitled thereby to perform the salvage service? That they had not quitted the vessel with the intention of abandoning her is quite clear, but in legal possession I think they were not, for the agreement was at end. I have dwelt at length upon this part of the case, for, had I come to the conclusion that the first set of salvors were in possession and illegally dispossessed, I must at once have carried into effect the undoubted rule of this Court, as laid down in the *Blenden Hall*. The case would have assumed a very different aspect if the first set of salvors had been employed generally to save the ship and cargo, and not under a specific agreement, which I think had terminated, or, rather, been put an end to, by the occurrence of circumstances unforeseen by all parties. But this conclusion leaves totally untouched another question which I must decide, namely, whether, in violation of the Wreck and Salvage Act, and the general maritime law, the second set of salvors, contrary to the desire of the agent and master, assumed to themselves the right of performing the salvage service, and of excluding the persons selected by the agent or master to perform it. This part of the case, then, resolves itself into a question of fact: whether the second set of salvors were prohibited by the agent or master from performing the salvage, and informed that, by their orders, the first set were employed? The evidence on behalf of the owners proves that to some persons or others repeated orders were given to abstain from interfering with the salvage of the cargo; but the first difficulty which strikes the Court is this: to whom was such prohibition announced? Not to all the second set clearly; for it could not be communicated to them. With a very slight exception—Moses and Halfnight—it is not attempted to identify those to whom it was communicated. How is the Court to do this? It was said in argument that it could not be expected that the evidence should prove that 300 or 400 persons each had notice. Certainly not; but surely the Court had a right to expect that the identification should go farther than it had done. Here is a stormy, dark, December night; the wind blowing, and the sea raging; a ship broken up; the cargo floating in all

directions; hundreds of persons near the spot. I freely admit that, in such a scene of darkness, noise, and confusion as this, it would have been very difficult to bring home to 200 or 300 persons the notification of any particular fact; but without evidence the Court cannot conclude that any one has been guilty of an illegal act; more especially can it not do so where those claiming salvage have distinctly sworn that they had no intimation of any such prohibition. I apprehend the real truth to have been this, that such a notice and prohibition were given; that probably many of the second set of salvors heard it more or less distinctly; that it was impossible to identify all who heard, and that the parties were unwilling to incur the unpopularity of identifying some; that many certainly never heard or knew of the prohibition at all. Under these circumstances it would be injustice to disqualify a whole class; and, for want of evidence, I cannot select the guilty, save the persons of Moses and Halfnight. I am of opinion, therefore, that I cannot deprive the second set of salvors from all claim to salvage; and I think I do no injustice to the owners, for the service ought to be paid for, and it will certainly not be paid for twice; for, as I have already said, the first set of salvors are not illegally dispossessed, and consequently can have no claim upon that ground to the salvage earned by the second set. The next step is to consider the nature of the service which has been rendered. It appears to me that an error has arisen in this, and not only in the minds of the salvors, but of others mixed up in the transaction. It seems to have been thought that upon the ship breaking up and the cargo floating out of her, such cargo became derelict, and that all the incidents which attach to derelict attached upon this property. I am of opinion that this notion was wholly erroneous. The ship and the cargo were in the eye of the law in the possession of the master, though he was not, and could not have been, actually on board. But it may well be that certain parts of the cargo did afterwards become derelict by being carried by the force of the elements out of the possible reach of the master or agent, or beyond the hope of recovery, and such appears to have been the case with some portions, which were carried to sea. I will now state my intentions as to the first set of salvors. Assuming their number to be about forty, and that they have received 84*l.* on account of part of the cargo, I shall, in consideration of their services, decree to them the sum of 250*l.* treating them as having performed a great part of the salvage service. I also give them their costs. With regard to the second set of salvors, it is more difficult to deal with them; perhaps I may say impossible to deal as to each with accuracy. According to Mr. Butcher's affidavit the quantity of tallow saved after the ship broke up was 210 tons. 130 tons at the bight of the back of the north pier—40 tons at the inner end of the north pier—28 tons on the south, or Gorleston side of the river, and other parts picked up by vessels on that side. All the carting has been paid for by the owners. The cost of this second set of salvors is contained in eighty-two affidavits, a number I never wish to see again in a salvage cause. The only course I can adopt, is to divide the case into classes—tallow found first at the north pier—secondly, at the inner end of the north pier—thirdly, on the south side of the river—fourthly, out at sea, and not in the harbour. I shall give one-fourth of the value upon the two first classes, one-third upon the two last, adopting the valuation of Mr. Hammond. I pronounce against the claim of the two persons already referred to. The only way in which I can deal with the tenders is to pronounce for them, if they agree with the rate I have mentioned; if less, then for the salvage according to the rate I have stated. I now come, lastly, to the question of costs. I have very much deliberated this case, and I think myself bound to take notice of the delay in instituting this suit, and the mode of conducting it, whereby the owners have been put improperly to expense and much inconvenience. As a measure of justice to them I shall not give the whole of the costs. I would, as far as lies in my power, recompense them for any loss they have sustained. If I had the power to carry it into effect, instead of giving the second set of salvors the whole costs, I shall give them 100*l.* *nomine expensarum.* (a)

The Court, upon application of Dr. Haggard, allotted the 70*l.* paid to Mr. Hammond for valuation to be paid out of the proceeds.

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Thursday, June 26.

SALMON v. DEAN.

Right of assignee of a mortgage to rents antecedent—*Set off*—*Plea*—*Pleading*.

(a) The proctor for the owners has asserted an appeal.

## LORD CHANCELLOR'S COURT.

## ROLLS COURT.

## ROLLS COURT.

*The assignee of a mortgage, or the mortgagor, cannot, by giving notice to the tenant of the mortgaged estate not to pay any more rent to the mortgagor, acquire any title to rents previously accrued due.*

This was an appeal from an order made by the late Vice-Chancellor of England under the following circumstances:—Mr. Morris Davis let two farms in Wiltshire in 1825 to the defendant Dean and his brother, at a certain rent for each, from year to year until the end of eight years, and at an additional rent of 40*l.* per acre for every acre of meadow or pasture land that the tenants might plough or break up during their tenancy. Mr. Davis afterwards mortgaged the estate and died. The mortgagee also died, having assigned the mortgage. The assignee of the mortgage gave notice to the tenants not to pay any rent to the mortgagor or his representative, the plaintiff Salmon. The tenant claimed a debt against the landlord, and after his death against Mr. Salmon, who, finding that the tenant, several years back, had ploughed and broken up a great many acres of the meadow and pasture land, and had thereby incurred the penalty or additional rent of 40*l.* an acre, proposed to the tenant to set-off the one debt against the other, which the tenant refused to do, insisting that the landlord had, by the mortgage, deprived himself of all right to any rent, and that the mortgagee or his assignee was the landlord for all purposes. The assignee of the mortgage being requested by Mr. Salmon to prevent the tenant from continuing to commit waste on the farms by the ploughing, &c. and to recover the arrears of additional rent, refused to interfere; whereupon Salmon filed his bill against the tenant to restrain him from ploughing the land and for an account of the said arrears. The tenant put in a plea to the effect above stated, namely, that the legal estate was in the assignee of the mortgage, and that to him alone in equity, as well as in law, the tenant was responsible. The Vice-Chancellor of England held the plea to be good, and allowed it.

*J. Parker and Roxburgh*, for the appellant, contended that he was entitled to the arrears of the additional or penal rents that accrued prior to the assignment of the mortgage, that a mortgagee or his assignee was not entitled to any rent or other profit in the mortgaged property, except such as accrued subsequent to the mortgage or assignment thereof; and that the bill having stated the refusal of the mortgagee or his assignee to interpose to prevent the tenant from committing waste, the mortgagor or his representative was entitled to the interference of this Court, not only to restrain the waste, but also to compel an account of the arrears of rent that accrued antecedently to the assignment of the mortgage.

*Rolt and W. W. Cooper*, in support of the Vice-Chancellor's order, contended that the mortgagor, having parted with the legal estate in the property, had no title to sue for rents; that though the mortgagee or his assignee was not actually in possession, he was so virtually by reason of the notice given to the tenant, and the tenant's acknowledgment of his right; and that the assignment of the mortgage gave to the assignee all the arrears of rent and other profits accruing subsequently to the date of the mortgage.

The following cases and authorities were referred to, *Macderrough v. Shoebridge*, 2 Ball & Beattie, p. 555; Mitford on Pleading, p. 126.

*Parker*, in reply, was not called on.

The LORD CHANCELLOR.—If I rightly understand the point in this case, it is clear to me that the plea is bad. Mr. Davis granted leases of the farms from year to year, for eight years, at so much rent for each, and the tenant continued in possession for several years after the termination of the eight years. The law holds that if a tenant holds his farm after the expiration of his lease, and without any new agreement, he holds it on the same terms as tenant from year to year. Hence, by the original agreement, an additional rent was fixed for ploughing any of the meadow or pasture land. The tenant, it appears, did not make known to the landlord that he had ploughed any land, or that he owed any additional rent, and that rent became a debt due to the landlord. He, it appears, after the accruing of that rent, mortgaged the estate, but he did not by that conveyance pass those arrears to the mortgagee. Mr. Radcliffe, the mortgagee, in 1844 assigned the mortgage, and the question is whether the bygone rents (the penal rents that had accrued prior to the mortgage) passed to the assignee by the transfer of the mortgage to him. How could these antecedent rents pass, when even a conveyance of the whole estate, without special words, would not pass them? It appears that a debt became in some way due to the tenant from the landlord. The latter, or his representative, proposed to set-off that debt against the arrears of rent due from the tenant, namely, the 40*l.* an acre for ploughing the land. The tenant, by his plea, denies the claim of the plaintiff to any rent, alleging that such rent was due, if due at all, to Radcliffe

or his assignee by reason of the assignment of the mortgage. But the assignment did not give any right to the antecedent rents. The notice given to the tenant not to pay any more rent to the mortgagor entitles him to the accruing rents, but not to the by-gone rents. No case has been produced, or can be produced, shewing that a transfer of a mortgage carries with it antecedent rents. Radcliffe was not entitled in point of law to those rents, and his assignee acquired no right to them in law or equity by the transfer to him of the mortgage. How can an assignee of a mortgage acquire any legal or equitable title to antecedent rents when there were no words in the deed of assignment conveying them to him? The plea is bad, and ought to have been overruled. The late Vice-Chancellor's order was accordingly discharged.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Saturday, May 10.

THE NEWRY, WARRENPOINT, AND ROSSTREVOY RAILWAY COMPANY v. MOSS.

*Companies' Clauses Consolidation Act—Liability for Calls—Trustee and cestui que trust.*

*The person whose name appears on the register as the holder of shares in a railway company, though he is a mere trustee, is alone liable to the company for calls; but by special contract the cestui que trust may be made liable.*

*The Companies' Clauses Consolidation Act regards only legal relations, and gives no remedy to the company against the equitable owner of shares to compel him to pay calls in arrear.*

*Though the Court, therefore, in the absence of express contract, cannot, at the instance of the company, enforce payment of arrears on calls against a cestui que trust of shares, yet it can enforce trusts, at the instance of the parties to the trust, as against each other.*

This was a suit instituted by the Newry, Warrenpoint, and Rosstrevoy Railway Company for the purpose of making certain parties beneficially interested in shares in the capital stock of the company liable for calls thereon. The bill alleged that the company was incorporated in 1846, and that in the latter end of the same year and beginning of 1847, Messrs. Moss and Company, who are bankers at Liverpool, became entitled to a large number of shares, which they had caused to be transferred into the names of divers persons on their behalf, and for their benefit, and that they had sent the deeds of transfer and certificates of shares to the secretary of the company, with directions to register the shares in the names of their nominees, which was accordingly done. The bill further alleged that shares were thus transferred into the names of Robert Parker, Charles Francis Cameron, John Hampson, J. W. Watson, and T. M. Sudlow, who was the confidential clerk of Moss and Company. About — shares had been transferred into the name of Sudlow; but between the 24th of February and 24th of June, 1847, Messrs. Moss sold some of the shares, and the number of registered shares standing in his name was thus reduced to 905. On the 24th of June, 1847, Messrs. Moss and Company received 214*l.* 14*s.* 9*d.* for interest due upon these 905 shares. On the 27th of August, 1847, when the third call was made, 620 shares only were standing in Sudlow's name, the rest having been sold by Messrs. Moss and Company. On the 6th of November, 1847, Sudlow died, having appointed John Evans his executor, who duly proved his will. The bill further stated that Moss and Co. had sold 110 shares since Sudlow's death, and having paid the third and fourth calls thereon, the same were transferred by Evans, and the deeds of transfer were duly registered; and that there are now standing in Sudlow's name 510 shares registered in the books of the company, on which the third, fourth, and fifth calls were in arrear, and that the company had applied to Evans as executor of Sudlow for payment, but he denied he had any assets, and an action having been brought against him in May 1848 by the company, he pleaded *plene administravit*. The plaintiffs then applied, as alleged by the bill, to Moss and Co. as the beneficial owners of the shares, and the parties on whose behalf they were registered in Sudlow's name for payment of the calls, with interest, but they refused to pay. By the answer on the other hand it was stated that the firm of Moss and Co. had, in the way of their business as bankers, been in the habit of making advances to sharebrokers to enable them, on behalf of their principals, to pay for shares in different railway companies, and that the sharebrokers usually deposited the shares with them by way of security for the loan. In this way they had, in December 1846 and January 1847, advanced to Francis Charles Cameron, to enable him to purchase shares for his principals or himself, but not on their own behalf, several sums amounting to 16,627*l.* 5*s.* 4*d.* and that he had therewith purchased 1760 shares in the plaintiffs'

railway, of which 1,225 were, by his direction, transferred into the name of Robert Parker, 230 into (Cameron's) own name, and 115 into that of John Hampson, and that the scrip certificates for the 1,760 shares were deposited with them (the Moss and Co.) by Cameron as a security for advances and interest thereon. They also alleged that the advances were to be repaid in due time, but that the shares having fallen in value, Cameron was unable to take up the scrip, or the money lent, and that by way of giving them (the Moss and Co.) security for the repayment, he had agreed, and in December, 1846, and January, February, 1847, caused to be transferred 14 shares into the name of Sudlow, who, it was agreed, should stand possessed thereof, subject to a payment of the advances and the interest thereon; but that they (Moss and Co.) had no interest in the shares, except as thus stated, and as a security for the repayment of the advances and interest thereon. Moss and Co. ever, admitted that they had sold 900 shares at different times, and had applied the proceeds to the payment of the advances and interest, as in Sudlow, into whose name the 1,410 shares were transferred, was nominated by them for that purpose as the shares were to be a security to them, and as the transfer was, to that extent, for their benefit but that, subject to this security, the shares were held by Sudlow, in trust for Cameron, who was the beneficial owner, and was entitled to reduce them. They also stated that the 214*l.* 14*s.* 9*d.* interest on the shares standing in Sudlow's name in June, 1847, was placed by them to the credit of Cameron's account in their books, and as a discharge of the debt due in respect of the shares to him. They also admitted they had advanced to Cameron the money necessary to enable him to take the third and fourth calls on the 110 shares of Evans, and that 510 shares were still standing in Sudlow's name, of which, however, they alleged Cameron was the real owner, subject to their claim in respect of the balance still due. Under these circumstances, the cause now came on to be heard, the point of issue being, whether payment of the calls in arrear on the 510 shares standing in Sudlow's name could be enforced by the railway company against Moss and Co.

*Roupeil and Anderson* for the plaintiff (the Railway Company), cited *Fenwick's Case* 1 De G. & Sm. 557.

*Lloyd and Eddis* for the defendant.

*Roupeil*, in reply.

The cases of *Goddard v. Hodge*, 1 C. & M. 33, and *Stanley v. Robinson*, 1 Rom. & M. 241, were referred to.

The MASTER OF THE ROLLS.—The bill cannot be supported. It would be necessary, in order to bring the Court jurisdiction, to prove that the company could compel the *cestui que trust* to pay the arrears of calls upon the shares, and that these defendants stood in that position. The bill has failed in the first. The Companies' Clauses Consolidation Act prevents the Court from acting at anything but legal relations, and gives no remedy against the equitable owner to compel him to pay calls for which the trustee whose name is registered is liable. There might be an express contract making him liable, and that would give a remedy; but in the absence of such a contract, the Companies' Clauses Consolidation Act regards only legal relations, and considers only the party on the register only as owner; nor is the liability by a railway company to the company as owner, nor any remedy to the company against the equitable owner. It was argued that, nevertheless, trusts would be enforced in this court, and that will, but it must be at the instance of the party to the trust themselves. If in this case a trust was that is, if Sudlow was a trustee, and Moss and Co. were *cestui que trusts*, and if Sudlow had paid calls on the shares, he might have compelled Moss and Co. to repay him the sums advanced; and, on the other hand, Moss and Co. might have enforced their rights, and the use of the shares, against Sudlow; but what use of the shares, against Sudlow, is there between the trustee and *cestui que trust* is there between the company and Moss and Co.?—None. There might have been a relation by contract, for, assuming that the railway company, under the powers of the Act, were competent to contract in the same manner as other parties, there might have been an express contract between them and Moss and Co. such a contract should be liable for the calls, but no such contract is pretended to exist; but it is the contract of the defendants' bankers, alleged to be a *cestui que trusts*, or the real or equitable owners of shares standing in the name of another party, and may be said, if this be so there is no remedy, and I think that is so. The case has not been made out here; no case of trustee and *cestui que trusts* has been established between the plaintiffs and defendants, and there is no special contract to exempt the plaintiffs from the usual effects of law applicable to

## ROLLS COURT.

## ROLLS COURT.

## V. C. KNIGHT BRUCE'S COURT.

the case; and being of opinion that nobody but the person appearing on the register as the holder of the shares is liable for calls at the instance of the company, I think the plaintiffs are not entitled to the relief they ask, and the bill must be dismissed with costs.

May 28 and 29 and June 9.

ROWLEY V. ADAMS.

*Trustee Act, 13 & 14 Vict. c. 60—Notice to trustee to convey—Surrender of copyhold—Vesting order—Refusing trustee.*

A decree was made in a cause directing certain copyhold estates on which legacies were charged, to be sold, with the approbation of the Master, and a conveyance to be made to the purchasers, "wherein all proper parties were to join as the Master should direct." The copyholds, which happened to be vested in a married woman, who, as well as her husband, was a party to the suit, were accordingly sold in lots, and as to three of the lots the sales were confirmed and the purchasers had paid the purchase-money into Court. Notice was served on the trustees requiring them to convey and surrender the copyholds, stating that in default of their doing so for twenty-eight days application would be made to the Court for a vesting order. The married woman wrote to the purchasers of two of the lots expressing her determination never to surrender, and after the expiration of twenty-eight days a petition was presented by the plaintiffs, the legatees, for a vesting order, on the ground that the married woman was a trustee within the 13 & 14 Vict. c. 60:

*Held, that as to the two lots as to which she had refused to convey, a vesting order might be granted; but as to the third, the case did not come within the 17th section of the Act.*

*Held also, that the notice was not a sufficient tender of a conveyance within that section.*

*Seemle, that a tender of deed constituting an attorney to take a surrender, and a neglect or refusal for twenty-eight days to execute the same, would bring the case within the Act.*

*An objection being taken that the petition ought to have been presented by the purchasers, and not by the plaintiffs, the legatees, it was removed by an undertaking to make the purchasers co-petitioners.*

By a decree made in 1845 it was declared that the plaintiffs were entitled to have certain copyholds of the testator in the cause sold for the payment of their two legacies of 12,000l. each, and it was ordered that the estates should be sold, with the approbation of the Master, and that a conveyance thereof to the purchasers should be made, "wherein all proper parties were to join as the Master should direct." The copyholds happened to be vested in Emily, the wife of the defendant, George Wyatt, both of them being parties to the cause. The copyholds were accordingly sold in lots; and the lots numbered 1, 2, and 4, formed the subject of the present petition. As to these, the sales had been confirmed, and the purchasers had paid their purchase money into court. On the 12th of April, 1850, George Wyatt and Emily his wife were served with a written notice, requiring them to convey and surrender the three lots of copyholds to the use of the several purchasers, and to execute all deeds and documents, and to do all such acts as might be necessary. The notice stated that the steward of the manor would attend at any reasonable time or place for the purpose of taking the surrenders, &c.; and that in default of their complying within twenty-eight days, application would be made to the Court for a vesting order under the Trustees Act. Emily Wyatt, on the 14th of April, 1850, wrote to the purchasers of lots 1, 2, and 4, expressing her determination never to surrender the copyholds. And no surrender having been made within the time specified, the plaintiffs in the cause presented a petition, alleging that Emily Wyatt was a trustee of the copyholds for the petitioners, or for the respective purchasers within the meaning of the Trustees Act (of 1850), and praying for an order vesting the property in the respective purchasers. The application was made under the 17th section of the Act, which is in these words:—"That where any person jointly or solely seised or possessed of any lands upon any trust, shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorised agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order, vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly

executed a conveyance or assignment of the lands in the same manner and for the same estate." And the interpretation clause provides that "the words 'convey' and 'conveyance' applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised, &c. including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform, preparatory to, or in aid of, a complete assurance of such lands;" and that "the words assign and assignment shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring land." &c. In this case Mr. Wyatt had not refused to surrender as to any of the lots, and Mrs. Wyatt had only refused as to two. The application, therefore, was made on the ground of refusal only in those two cases, and against Mrs. Wyatt; but as against both on the ground of the service of the written notice, which it was alleged brought the case within the 17th section in reference to tendering a deed. The petition being presented by the plaintiffs and not by the purchasers, an objection was also taken to it on that ground.

R. Palmer and Erskine, for the plaintiffs in support of the petition, said, that the purchase-money having been paid, Mr. and Mrs. Wyatt refused to convey, and they insisted that they were within the provisions of the 13 & 14 Vict. c. 60.

Prendergast, for Mr. and Mrs. Wyatt, contended that they did not come within the provisions of the Act. To bring them within its provisions the petition ought to have been by the purchasers of the property, and not by the plaintiffs the legatees; and then as Mr. Wyatt, and to a certain extent also Mrs. Wyatt, had not refused to convey, and as a proper conveyance had not been tendered to them, but only a notice served upon them, requiring them, to surrender, the statute did not apply.

Chandler for Mr. Wood, the purchaser of lot 1.

R. Palmer, in reply.

The following cases were cited:—*Billings v. Webb*, 1 De G. & Sm. 716; *King v. Leach*, 2 Hare, 57; *Hood v. Hall*, 19 L.J. Ch. 312; *Re Blake*, 3 Jon. & L. 265; *Thomas v. Gwynne*, 9 Beav. 275; *Simpson v. Pitchers*, 1 Coll. 13; *Barfield v. Rogers*, 8 Jur. 229.

Monday, June 9.—THE MASTER OF THE ROLLS.—This was a petition under the 13 & 14 Vict. c. 60, asking that an order might be made appointing some person in the place of Mr. and Mrs. Wyatt, to convey or to surrender certain copyholds sold by order of the Court. The legal estate in these copyholds is in Mrs. Wyatt, who, with her husband, is the party to surrender; and not having done so, the Court must consider whether Mr. and Mrs. Wyatt are trustees within the Act. The plaintiffs are entitled to a charge on the copyholds, and subject thereto Mr. and Mrs. Wyatt are entitled. An order was made by the Court for the sale of the copyholds for the purpose of paying off the charge, and the property was accordingly sold to certain persons, and an application was made to Mr. and Mrs. Wyatt for a surrender to the purchasers. Mrs. Wyatt refused in writing as to two of the three lots. In this state of things the plaintiffs presented their petition, and the first objection is, that the petition is by the plaintiffs, whereas if Mrs. Wyatt be a trustee at all, she is a trustee not for the plaintiffs, but for the purchasers, who ought, therefore, to have been the petitioners. The purchasers, however, have consented to be made co-petitioners with the plaintiffs, and that objection, therefore, is removed. Mr. Wyatt has not refused to convey, and therefore I cannot, on the ground of refusal, make an order appointing a person to convey in his place. Mrs. Wyatt, however, as to two of the lots, has refused to surrender, and therefore I may make an order appointing some person in place of Mrs. Wyatt to convey those two lots, and I will accordingly do so. As to the remaining lot she has given no such refusal, and therefore I cannot appoint a person to convey that lot on the ground of refusal. The next question, then, is as to the application for the order, under the 17th section of the Act, which directs the appointment of a person to convey, if the parties having the legal estate neglect or omit to convey for twenty-eight days next after a proper deed of conveyance has been tendered to them. Are those words satisfied? As to Mr. Wyatt, he has neglected for twenty-eight days, and if a deed of conveyance was duly tendered he comes within the provision. Now, notice was served on Mr. and Mrs. Wyatt, requiring them formally to do all that was required to vest the property in the purchasers, but that notice does not satisfy the words of the clause which we are considering, for it cannot be looked upon as in any sense a deed. But, then, it is said that the interpretation clause shews that the words refer to the execution of the conveyance, &c. by such persons, and it is admitted by Mr. Chandler that this section must be read as if the interpretation were inserted in that place, and,

therefore, it is said that the words of the section are satisfied. But I am of opinion they are not, for a notice can in no sense be said to be a deed. The parties may tender a deed to Mr. and Mrs. Wyatt, constituting some person an attorney for them to convey, and that might do, and might satisfy the Act; but all I can do at present is to make an order against Mr. and Mrs. Wyatt as to the two lots which she has refused to surrender, vesting the same in the purchasers. The parties, however, may put themselves in a position to make a proper declaration as to the other lots, and I shall then do what I can.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLRUTT, Esq. of the Middle Temple, Barrister-at-Law.

February 22 and March 8.

JACKSON V. CRAIG.

*Will—Construction—Uncertainty.*

A testator, by his will, after giving certain directions, proceeded as follows:—"Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family somewhere, excepting 200l. a year, to be laid by as a marriage portion for my daughter B.—C. D. is heir to the whole real estate."

*Held, that the real estate descended, and the personal estate was distributable, as if the testator had died intestate.*

This was a special case, under the 13 & 14 Vict. c. 35, in which the executor of the will to be construed was the plaintiff, and the widow and children of the testator were the defendants. The Rev. Edward Craig, the testator, made his will, which was dated the 4th of April, 1850, in the following terms:—"In the name of my blessed Saviour, I appoint this my last will and testament. I appoint J. H. Jackson, esq. of Islington-green, and John Barstow, esq. barrister, of the Fig-tree-court, Temple, my executors; and the Rev. Horatio Dudding, clerk, of St. John's, St. Alban's, and my dear wife, joint guardians of my children. I hope he will educate my boy. I have a house in Edinburgh; a farm at Revel-end, Redbourn, Herts; a piece of land at Burton Latimer; a leasehold interest in my house at Barnsbury; and railway bonds in the hands of Smith, Payne, and Co. Let my dear wife's settlement be regularly paid. Let my few debts be justly paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family somewhere, excepting 200l. a year to be laid by as a marriage portion for my dear daughter, Adelaide Amelia Craig. Edward Cunningham Craig is heir to the whole real estate." Shortly after the date of the will the testator died, leaving his widow and the two children named in the will, his only children, him surviving. The will was proved by Mr. Jackson, the plaintiff. At the date of his will the testator was absolutely entitled to a house at Edinburgh, and to real estate at Burton Latimer, which, together, produced 150l. per annum, and to personal estate of the value of about 7,500l. Upon the occasion of the testator's marriage in 1838, an estate called Revel End (which belonged to him, and produced about 260l. per annum), and also a sum of stock belonging to Mrs. Craig, were, by two indentures, settled upon the ordinary trusts. All the property settled produced about 380l. per annum. The points raised upon the construction of the will were whether, in consequence of the settled estate of Revel End being mentioned, a case of election was raised; and what was the effect of the directions as to the 200l. a year for the daughter.

Archibald Smith appeared for the plaintiff.

The Attorney-General and Shapter, J. Parker and Frederick Wood and Wigram and Hanson appeared for the several defendants.

Saturday, March 8.—THE VICE-CHANCELLOR said, that the first question in this case was, whether on the two settlements, or either of them, a case of election against the widow or either of the children had been made out. He thought that the language used in the will was too vague and obscure to render such an interpretation safe or allowable. He thought, indeed, that he did not dispose of the dividends, interest, or any beneficial interest in any part of the testator's property, with the single exception, if it was one, of the 200l. a year mentioned with respect to his daughter. But was it an exception? He thought that, on the whole, it could not be considered as an exception, and that the testator ought not to be considered to have meant by what he said on the subject anything more than a direction how his daughter's property, whatever it might happen to be, or a part of it, should be applied; a direction which, if not perfectly intelligible, was certainly ineffectual. It followed, in his Honour's opinion, that the testator's real estate had descended, and that his personal estate must be applied as if he had died intestate.



## V. C. KNIGHT BRUCE'S COURT.

Thursday, Feb. 27.

METHOLD v. TURNER.

Will—construction—Contribution.

A testator, who died in 1815, gave his residuary estate to trustees upon trust, after the decease of his wife, to apply the income for the benefit of his son. The son was found lunatic in 1818. The widow, who died in 1832, by her will gave the residue of her personal estate to trustees upon trust to apply a sufficient part of the income in the maintenance of the son, and to invest the surplus, which she directed her trustees to hold upon certain trusts. The income from the two estates exceeded the sum allowed by the Court for the maintenance of the lunatic, but the income from the mother's estate was less than such sum.

Held, that the income from the mother's estate was to be first applied for the lunatic's maintenance, and in exoneration of the father's estate.

By his will, dated the 9th of May, 1814, Bailey Bird gave his residuary real and personal estate to trustees upon trust during the joint lives of Ann Bird his wife, and Bailey Bird his son, to pay the income as therein mentioned, and, after the death of Ann Bird, upon trust to pay such income unto his son Bailey Bird, "or to lay out and expend the same in such manner as the said trustees, or the survivor of them, should think proper in the maintenance and support, and for the benefit of the said Bailey Bird, and his child or children during his life."

And he thereby earnestly entreated the said trustees, acting in the execution of this will, and particularly from and after his wife's death or marriage, to take special care that his said son should be always creditably and decently dressed, and that he should be provided with a sufficiency of clean linen, and with a reasonable quantity of pocket money in silver, and to attend to his wants and comforts; and he requested them to employ a proper person or persons to superintend his estates, and to take care that the same were kept in good repair, order, and condition. Bailey Bird, the testator, died in the month of October, 1815, leaving Ann Bird his widow, and Bailey Bird his son, him surviving. Ann Bird, by her will, dated the 22nd of April, 1831, gave her residuary personal estate to trustees upon trust, in the first place, to apply a sufficient part of the dividends, interest, and income in the maintenance and support of her son, Bailey Bird, during the term of his natural life, taking especial care to provide him with every comfort suitable to his situation in life, and with sufficient pocket money; and, in the next place, to set apart a further portion of the said dividends, interest, and income, sufficient for, and to apply the same in, keeping and maintaining a horse and gig for the use and benefit of her said son, Bailey Bird, and in remunerating and paying a proper person or proper persons to attend to the keeping and care of the said horse and gig, and for all other purposes appertaining thereto, and, in case there should be any surplus of the said dividends, interest, and income remaining in their or his hands unapplied to any of the purposes aforesaid, then she directed that such surplus should be considered as principal money, and invested accordingly. The testatrix then bequeathed such principal money and the capital of her residuary personal estate upon trust as in her will mentioned. Mrs. Bird died in the month of August, 1832, leaving her son Bailey Bird, who in 1818 had been found lunatic, her surviving. By orders made in the matter of the lunacy, certain annual sums had been directed to be paid for the maintenance of the lunatic, but these sums were less than the income arising from the father's and mother's estates, though greater than the income arising from the mother's estate alone. By arrangement between the trustees, the whole of the income arising from the father's estate was applied in the maintenance of the lunatic, and the surplus of the income of the mother's estate was invested and accumulated without prejudice to the question of the title to such surplus and accumulations. The present suit was instituted by Bailey Bird and his committee, seeking to have it declared that the accumulated fund arising from the mother's estate belonged to the estate of the lunatic, and that the income of the mother's estate might for the future be applied in the first instance for his maintenance in exoneration of the income arising from the father's estate. The lunatic died in 1846, and his administrator revived the suit.

R. Palmer and Miller for the plaintiff, contended that the proportions in which the two funds were to be applied for the maintenance of the lunatic were to be determined with reference solely to the interest of the lunatic. (*Foljambe v. Willoughby*, 2 Sim. & Stu. 165; *Re Ashley*, 1 Russ. & Myl. 371; and *Bruin v. Knott*, 1 Phill. 572.)

The Attorney-General, Metcalfe, and Fooks, for the defendants, contended that as the mother must be taken to have known the provision made by her husband for the lunatic, her intention was to supply from the income of her estate any deficiency which

might occur in the income from her husband's estate, and therefore that the whole surplus income arising from her estate belonged to the persons mentioned in her will. (*Revinis v. Goldtrap*, 5 Ves. 440.)

The VICE-CHANCELLOR said that although the testatrix must have been aware of the provisions contained in her husband's will, he did not consider that her mind had been at all addressed to them when she made her will. She must be taken to have made her will without reference to the income to which the lunatic was entitled from other sources. He was of opinion that according to the true construction of the testatrix's will, she devoted the whole income of her estate for the benefit of her son for his life, with the restriction only that if this income were more than sufficient for his maintenance, the surplus should be added to the principal. He considered that the question as to the contribution of the father's and mother's estates must be decided solely with reference to the interest of the lunatic, and that the fund in question belonged to the plaintiff.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BENNETT, Esq. of Lincoln's-inn, Barrister-at-Law.

May 30 and June 3.

THORNHILL v. MANNING.

Mortgagee and Mortgagee—Practice.

After a final decree of foreclosure, the day therein appointed for the payment of the principal, interest, and costs, will be enlarged, upon a proper case being made.

And this, although the decree had been made absolute, and the order absolute had been signed and enrolled.

This was a motion to enlarge the time for payment of principal, interest, and costs, in a foreclosure suit. The final order had been signed and enrolled before the notice of motion. The motion prayed that the time fixed by the decree in the cause made by the late Vice-Chancellor of England for payment by the defendant to the plaintiff of what should be found due to her for principal and interest, and in respect of insurance and interest in the decree mentioned and the costs, might be enlarged for one month from the time when the order on the motion should be made, or for such time as the Court should think fit and proper; and that for the purposes aforesaid, the foreclosure in this cause might be opened, on such terms as the Court might deem expedient,—the defendant being ready and willing, and offering to pay into Court, to the credit of the cause, such an amount as would cover the principal, interest, insurance, and costs, to which plaintiff was or might be entitled; and that in the mean time plaintiff might be restrained from selling or disposing of, charging or encumbering, or in any manner dealing or interfering with the mortgaged premises, and from commencing or prosecuting any action of ejectment to recover possession of such part of the premises as were not then in her possession.

The sum of 5,724l. the amount of principal, interest, and costs, found due by the Master, ought to have been paid on the 3rd February, 1851, which was six months after the date of the report. This sum not having been so paid, the foreclosure was made absolute on the 12th February, 1851. The notice of motion was dated the 11th April, 1851. Affidavits had been filed in support of the motion.

Bethell and Bilton, in support of it, which, upon the fact that the value of the mortgaged premises was very much greater than the sum found due by the Master, and that the Court would always relieve against such a loss as this, when the mortgagee could be fully indemnified by the payment of any subsequent interest and costs, which he might have incurred. They relied on *Jones v. Crewicke*, 9 Sim. 304; *Nanfan v. Perkins*, 1b. 308; *Ford v. Wastell*, 2 Phill. 591.

Stuart and Terrell, in opposition, argued that the order absolute having been enrolled, it was in effect the order of the Lord Chancellor, and, therefore, the Vice-Chancellor had not jurisdiction, and that, until vacated, the application should be to the Lord Chancellor.

The VICE-CHANCELLOR thought it was not necessary to have the enrolment vacated.

On the 3rd June was given the following

## JUDGMENT.

The VICE-CHANCELLOR.—When this motion was made, the counsel for the plaintiff objected that, if I enlarged the time for payment of the sum found due to the plaintiff, I should vary the order absolute; and as that order had been signed by the Lord Chancellor, and enrolled, I had no jurisdiction to alter it. It appears, however, from his lordship's judgment in *Ford v. Wastell*, that the extension of the time is something collateral to the order, and that the enrolment of the order is no obstacle to the extension; the order remains the same order, notwithstanding the time is extended to a future day. That was the

clear opinion of the Lord Chancellor, and I think that it completely answers the objection. Moreover, I have had the advantage of conversing with Sir James Wigram upon the subject, and he told me that he distinctly understood that to be what the Lord Chancellor meant; and he intimated to me, what is evident from the report in 6th Hare, that when *Ford v. Wastell* was before him, he had very great doubt whether he ought not to make the order, but he thought that the case should go before the Lord Chancellor, and that the Lord Chancellor should decide it; I think, therefore, that the point of form does not stand in my way. Then the question is, whether on the merits I ought to make the order. This depends on what is the doctrine of the Court with regard to mortgages. They are anomalous cases. The Court in dealing with them is governed by rules which are totally different from the rules which govern it in other cases. The contract between a mortgagee and a mortgagee has been treated by this Court from time immemorial as being something different from that which it purports to be, namely, as a contract for the repayment of money for which the mortgaged estate is a pledge which the borrower may redeem, notwithstanding the day named in the proviso for redemption has long passed. That being so, the question is, whether I can set upon that principle in the present case without doing injustice to the mortgagee. It is quite impossible to lay down any general rule as to the circumstances which will induce the Court to open a decree of foreclosure; but this I must observe, that the Court has a very strong inclination to give assistance to a mortgagee if he applies promptly, and the Court has the means of giving the mortgagee immediate payment; and perhaps that is the only case which the Court has to guide it. The mortgagee must not lie by and let the mortgagee take possession of the estate, and deal with it as if he were to hold it permanently as his own, and then come and say, "I am now ready to pay you the principal, interest, and costs." The Court would not then interfere on any terms. I think that the promptness of the mortgagee is the great and important feature in the case which must guide the Court in deciding as to what it ought to do. Now, what are the facts of this case? The order of foreclosure absolute was made on the 12th Feb., and I must remark that there had not then been any extension of time. As the mortgagee was endeavouring to raise the money, it would have been almost, if not quite, a matter of course to grant him three months' further time, if he had come before the 3rd of February and asked for it, but which he did not do. It appears from the affidavit of Joseph Manning, the son of the mortgagee, that on the 23rd of January, which was shortly before the time when, according to the decree, the money was payable, Mr. Parker, the solicitor of the mortgagee, said that if there was no obstacle placed in his way, he would do the best he could for the mortgagee; and that all that Miss Thornhill, the mortgagee, wanted was her money, and that she did not want the estate. That was within a fortnight of the time of payment; and I cannot but think that the mortgagee might reasonably rely on that, as meaning that, if the money was forthcoming, the mortgagee would not look strictly to what her legal rights were. The money, however, was not forthcoming, and the decree was made absolute on the 12th Feb. On the 17th Feb. Mrs. Porter, the daughter of the mortgagee, went to visit Miss Thornhill, and Miss Thornhill then said that all that she wanted was her money, and that she would write to Mr. Parker to say so, and that if the money was taken to Mr. Parker he would not refuse it. Afterwards Mr. Parker said that, if the defendant would bring the money to him, he should have the estate. Therefore it is clear, that all parties treated the estate as being merely a security. Then, on the 22nd March, Mr. Parker told Joseph Manning, the son, that his instructions from Miss Thornhill were to sell the estate, for she did not want the property but her money; and that what was remaining after payment of all principal, interest, and costs, would be given to Mr. Manning, and that would be 3,000l. Therefore it is quite clear that, according to Mr. Parker's estimate, the value of the estate was much greater than the money due to Miss Thornhill. Then, on the 9th April, the money was actually tendered to Mr. Parker, but he refused to accept it, and, two days afterwards, the notice of this motion was served. I am of opinion that, applying the principles of this Court to such a case as this, it is quite out of the question to say that the mortgagee is entitled to keep the estate, or that it is to be treated otherwise than as a pledge. Consequently, I think that the mortgagee is entitled to the relief which he asks by his motion, but it must be granted to him on these terms: on payment to the plaintiff, on or before the 10th June instant, at Mr. Parker's office, between the hours of eleven and twelve, of the sum reported due; let the proceedings in the ejectment, commenced by the mortgagee, be stayed; and let the time fixed by the decree be enlarged for a month after the Master shall have



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made his report on the reference hereinafter directed. Refer it to the Master to compute subsequent interest, and to tax subsequent costs, including costs of the ejectment (because I think that the mortgagee had a perfect right, after the decree was made absolute, to deal with the estate as her property), and including also the costs of redeeming the land-tax (I do not know that that would be allowed to a mortgagee, but she had a right to treat herself as the owner), and including all money *bond fide* expended on the faith of the order of the 12th of February, 1851, and refer it to the Master to take an account of the rents received by the mortgagee since the date of his report of the 3rd of August, 1850; and on payment of what shall be found due to the mortgagee, let her reconvey the estate to the mortgagor, the reconveyance to be settled by the Master if the parties differ, and to be subject to any contracts for leases, &c. which the mortgagee may have entered into on the faith of the order absolute.

Order accordingly.

June 25 and July 4.

Re THE WINDING UP ACTS, 1848 AND 1849, AND THE GREAT NORTH OF ENGLAND AND YORKSHIRE AND GLASGOW UNION JUNCTION RAILWAY COMPANY.

CARRICK'S CASE.

*Winding up Acts—Contributory—Member of Executive Committee.*

A person, who, as member of the preliminary executive committee, had attended numerous meetings, at which orders were given, expenses incurred, and officers appointed, &c.—

Held, not to be a contributory within the meaning of the Acts of Parliament.

The application in this case to take the name of Mr. Carrick off the list of contributories, upon which it had been placed by the Master, arose from the circumstances attending the contemplated formation of the above company, which were fully detailed in *England's* case, 17 Law T. 175. Similar acts had been done by Mr. Carrick, as had been done by Mr. England, and they had, with others, signed the paper set out at length in our report of that case.

*Bethell* and *Bagally* in support of the motion to take the name off the list.

*Roxburgh*, in support of the Master's decision, argued at considerable length upon the late authorities, which have been so often before quoted, that what had been done by Mr. Carrick was equivalent to a legal liability to contribute to the expenses of the winding up. That if a party was a contributory to receive money or other advantages, he must necessarily be a contributory to pay expenses, which might have been necessary as inception of profit. At the conclusion of the argument for the respondent in another case on the 3rd July.—

The VICE-CHANCELLOR said, that although he had partly written his judgment in this case, he would now state the conclusion he had come to. A very able argument had been addressed to him by Mr. Roxburgh, to prove that Mr. Carrick had done something more than merely taking shares, and upon the effect of mere allotments; and he (Lord Cranworth) had looked into the case to see if it resembled *Upfill's* case, and he thought at first that it did. What was the liability before the late statutes? Certain persons endeavoured to form a company, and in the progress of that endeavour other persons agreed to take shares, and very large expenses were incurred. Ultimately the endeavour proved unsuccessful, and the expenses must of course be borne by those who unsuccessfully tried to form the company. There could be no community between the persons who failed to form the association and those who only agreed to take shares. There was no doubt that if, in addition to taking shares, a party had paid a deposit, he was entitled to recover it back; it was in effect a legal contract on certain valuable considerations. Thus the matter stood, independently of the recent statutes. In consequence of the argument on this case, he had looked minutely into those statutes, and the question was, whether they altered the law. He could form no other opinion than that they did not. It would have been a most extraordinary thing that as between parties forming a company and those agreeing to become members, the Legislature should have had any such intention; indeed it could not be attributed to it. The projects became so numerous as to be a nuisance, and it became necessary to provide a remedy. The Act, therefore, provided that provisional registry was first necessary, but then nothing but issuing handbills, making surveys, &c. could be done, for by the 23rd section the parties were not described as a company, but "promoters." If the affair was carried on by the Board themselves by a deed, and obtained complete registration, and became a corporation, could choose directors, take shares, inspect accounts, &c. as partners, none of which things they could do up to that time, this did not vary the case of preliminary expenses being the subject of special contract between the parties. The Joint-Stock Act did not

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amalgamate the parties agreeing to take shares with the promoters. It appears to him that it did what the Legislature intended it should—left the rights as it found them, except that it regulated the course each party was to take; and therefore it followed, even if you found ambiguous expressions in the Act, the rights and obligations were not touched, but a machinery given to regulate complicated affairs. First, to make out lists of contributories, members of the company, and all other persons liable to contribute to the expenses thereof. Had the Court at first more strictly adhered to the language of the Act, these difficulties would not have occurred; but, unfortunately, without the slightest disrespect to those who had done so, winding-up orders had been made rather hastily of companies not formed affecting those who, until the company was formed, were necessarily by-standers, and had individual rights, and not as a class. This was proved in *Walstab v. Spottinwoode*, for the parties were continually changing, and there was no common fund, and the rights were those of creditors, no doubt of a peculiar nature. Then came *Cottle's* and *Upfill's* cases. In the latter it was decided that there was a liability for something; and although it was extremely difficult to understand the ground of that decision, it must have been that a man taking shares, and becoming a member of the provisional committee, authorised the said members sufficiently to make him liable as a contributory, as if he had said, "act for me." He (Lord Cranworth) must confess he did not see why that should follow; but that was the governing decision.

On the 4th of July the Vice-Chancellor pronounced

## JUDGMENT.

The VICE-CHANCELLOR.—In his opinion, there was no ground for placing on the list of contributories a mere allottee, because he was entitled to receive back his deposit or for having contributed too much. It was said that that would be controverting decided cases; but in looking at the cases there was a clear distinction, for in some the subscriber's agreement had been signed, and some authority given for expenses incurred, and actions had been brought and verdicts obtained. With respect to the circumstances of the present case, there was nothing to warrant the placing of Mr. Carrick's name on the list, without shewing what the expenses incurred were. There was evidence to shew that he had sanctioned the appointment of a traffic-taker; but it must be shewn that expenses had been incurred, and were now remaining unpaid. He (the Vice-Chancellor) did not think that *Upfill's* case governed this. It was arranged here that 100 shares should be offered; but there was nothing to shew that there was any acceptance. Mr. Carrick had agreed, it was true, to pay 100l. towards the winding up; but that was only a willingness to contribute something towards the expenses, for the sake of peace. The result must be, that Mr. Carrick's name must be withdrawn. But let it be referred back to the Master to review his decision upon any evidence as to Mr. Carrick's special liability, with costs up to the present time.

Order accordingly.

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Tuesday, May 13.

STOKES v. SALOMONS.

Will—Construction—Estate.

The words "I give and devise all my estate and effects" will, unless restrained by the context of the will, dated since the statute 1 Vict. c. 26 (the Wills Act), pass after acquired real estate of which the testator died seized.

William Jenkins, by his will, dated 13th September, 1839, devised as follows:—"I give, devise, and bequeath all my estate and effects whatever and wheresoever, and of what nature or kind soever the same may be, unto William Langford Jenkins, now at, &c. such estate and effects to be paid, assigned, or transferred unto the said William Langford Jenkins, upon his attaining the age of twenty-one years." The testator then directed that in the meantime and until he should attain that age, the interest, dividends, or proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as in the discretion of the executors should be necessary for that purpose, should be applied towards the maintenance, education, and putting forth in the world of William Langford Jenkins. The testator then appointed E. W. Wadson and R. Green executors of his will, and guardians of William Langford Jenkins, and gave the power to alter and vary the securities, and to lay out the same on real or personal security, and to reimburse themselves all expenses out of the said "estate and effects." His will concluded as follows:—"And I give and bequeath unto my said executors a legacy of 100l. each, and in the event of the said William Langford Jenkins not attaining the age of twenty-one years, I

give, devise, and bequeath unto them, or the survivor of them, all my aforesaid estate and effects." After the date of the will the testator acquired copyhold estates of inheritance, of which he died seized to him and his heirs.

This was a special case, submitted for the opinion of the Court under the statute 13 & 14 Vict. c. 35 (Sir Geo. Turner's Act). It stated that W. L. Jenkins was admitted to the copyhold property as devisee under the will, and after he attained the age of 21 years he sold the same to the plaintiff, who after admittance contracted to sell to the defendant, who refused to complete unless the customary heir of the testator occurred in the sale. But subsequently the present case was agreed to.

Greene, for the plaintiff, relied on the 3rd and 24th sections of the statute 1 Vict. c. 26, and cited the cases of *Tanner v. Morse*, Cas. temp. Talbot, 204; *Doe dem. Wall v. Langlands*, 14 East, 370; *Woollam v. Kemworthy*, 9 Ves. 137; *Doe dem. Hick v. Dring*, 2 Mau. & Selw. 448; *Doe dem. Evans v. Evans*, 9 Adol. & El. 719; *Ford v. Ford*, 6 Hare, 486; *Doe dem. Evans v. Walker*, 19 L. J. (N. S.) 293, Q. B.; and *Morrison v. Hoppe*, 17 Law T. 1.

J. Templeton Wood, for the defendant, cited *Doe dem. Spearing v. Buckner*, 6 Durn. & East (Term Rep.), 610; *Newland v. Majoribanks*, 5 Taunt. 268; *Doe dem. Hurrell v. Hurrell*, 5 B. & Ald. 18; and *Saumarez v. Saumarez*, 4 Myl. & C. 331.

Greene replied.

The VICE-CHANCELLOR.—I feel satisfied that no general rule applicable to every case can be laid down. In each particular case the question whether the real estate passes or not under the general words of a will, is to be determined only from the intention of the testator as expressed in the will. All that can be done is to collect the intention from the context of the whole will; and it is the duty of the Court to examine with this object in view every clause of the will, and apply thereto the general rules of construction adopted by the Courts. Now, it is a well established rule of construction, that general words must be allowed their full effect, unless it is perfectly clear that such effect is controlled by the context. In considering the circumstances under which the testator in this case made his will, and the cases cited in support of the passing of the real estate, this fact appears. The will was made after the passing of the Wills Act (1 Vict. c. 26), and with a knowledge, therefore, of the provisions of that Act; for the testator must be presumed to have a knowledge of the contents of the Act of Parliament. The testator, therefore, must be presumed to have known, that if he used several words of disposition, applicable to real estate and competent to pass such estate, those words would operate upon all the real estate of which he might die seized, although he had not a single acre of land belonging to him at the time of making his will. Examining, then, the dispositions contained in the will, while bearing in mind that, at the time he wrote, the testator knew, or must be considered as knowing, that any future acquired real estates would pass by any general records in the will which were large enough to embrace them; first, the testator says, "I give, devise, and bequeath," the word "devise" being a word of itself applicable to real estate. The testator proceeds, "all my estate and effects whatsoever and wheresoever;" the word "wheresoever" pointing to locality, and being, therefore, peculiarly applicable to real estate. He does not stop there, but goes on to say, "of what nature and kind soever the same may be." A clear intention appears on the will, therefore, to pass all his property, wheresoever and of whatsoever nature, and to give it to William Langford Jenkins. The words I have just referred to, if standing by themselves, would undoubtedly pass real estate. It can hardly be contended that they would not pass it. Then come other words, which may or may not operate to control those general words. It is very remarkable, and it shews the necessity of attending closely in each case to the particular language of the will, that the clause which created in my mind the greatest difficulty, was not particularly commented upon during the argument. It is the clause directing that the testator's estate and effects are to be "paid, assigned, and transferred." No doubt the words "pay, assign, and transfer," in their more ordinary sense apply rather to personal than to real estate, but they are not necessarily confined to personal estate. It is clear that real estate may be said to be transferred by any conveyance by which it passes from one owner to another. The testator, after directing it to be "transferred" on attaining twenty-one, goes on to say, that in the meantime, "the interest, dividends, and proceeds of such estate and effects." I may observe, the word "proceeds" would clearly include both real and personal estate. The testator directs "the interest, dividends, and proceeds of such estate;" then come the words which I confess, in the first instance, embarrassed my mind, and which, but for the case of *Saumarez v. Saumarez*, I should have felt a difficulty in getting over. The words are, "the interest, dividends, and pro-

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ceeds of such estate and effects, or so much thereof, or so much of the principal thereof as in the discretion of my executors shall be necessary for the purpose to be applied towards the maintenance, education, and putting forth in the world of the said William Langford Jenkins." The words "so much of the principal thereof" cannot be applied to real estate. By that word most of the difficulty, in my mind, during the argument, was created. He then goes on and appoints executors of his will, whom he names guardians of William Langford Jenkins, and he authorises them to invest his said "estate and effects in real or personal security." Upon those words another difficulty arises, just the same as the difficulty on the word "principal," and one which must be answered in the same manner; then come the words "I direct my executors to repay and reimburse themselves out of my said estate and effects." I think that may apply both to real and personal property. There is nothing more in the will except that in the event of W. L. Jenkins not attaining the age of twenty-one, the testator gives, devises, and bequeaths all his aforesaid trust estate and effects to his executors. Upon that will nothing can be more clear than that the testator did not intend to die intestate as to any portion of the property belonging to him either at the period of his will or of his death. Words occur in the will and in the devising clauses thereof, peculiarly applicable to real estate, and which are undoubtedly competent to embrace such estate. [His Honour then examined with great minuteness, the authorities bearing on the question. In *Newland v. Majoribanks*, the words "estate," and "possessed," occurred. In *Doe dem. Spearing v. Buckner*, there were the words "estate," and "executors and administrators;" in *Doe Hurrell v. Hurrell*, "executors, administrators, and assigns," though *Morrison v. Hoppe*, was decided against the passing of real estate to such persons. *Woolam v. Kenworthy*, was not a devise of real estate. *Saunders v. Saunders*, seemed to govern the present case, both for the general principle laid down by Lord Cottenham, and for the word "transfer" being used. He then concluded as follows:] "The result is, that in consideration of the context of the whole will I find nothing of necessity controlling or confirming the meaning of the general word 'estate,' a term which, in its literal sense, is strictly applicable to real estate. My opinion, therefore, is, that the copyhold premises in question passed by the will. I have given my opinion the more readily without reference to the authorities or to a court of law from my recollection of the numerous instances in which contradictory certificates have been returned to questions of construction referred to these courts."

July 5 and 9.

WEBB v. THE DIRECT LONDON AND PORTSMOUTH RAILWAY COMPANY.

*Specific performance—Railway company. A bill was brought into parliament for forming a railway. A landowner opposed the bill. The promoters of the bill entered into an agreement with the landowner that, in consideration of his no longer opposing, the company would pay him a certain sum for so much of his land not exceeding a given quantity, and a certain amount of costs. At the same time the promoters' agent signed a memorandum that if the Act should not be obtained, the agreement for purchase should not be binding. The opposition was withdrawn, and the Act passed. The company then ratified the agreement. The line was abandoned. The landowner filed his bill against the company for the specific performance of the agreement, and the same was decreed.*

This was a claim filed by Mr. Philip Barker Webb against the Direct London and Portsmouth Railway Company praying the specific performance of an agreement entered into by them for the payment of 4,500*l.* for the purchase of a portion of his land, amounting to about eight acres. The case made by the claim was, that the company, having introduced their Bill into Parliament for making the railway, were opposed by the plaintiff, through whose land the line was intended to pass; that in July, 1845, they entered into an agreement, in consideration of the withdrawal of his opposition, in which, after providing for the erection of a bridge for the plaintiff over the railway, for making a deviation so as to avoid interference with his meadow, for building an ornamental archway under their railway so as to connect a shrubbery with another part of his garden, and after stipulating against the erection of any station, and other matters, they agreed as follows:—"Lastly, that the company shall pay to the said P. B. Webb 4,500*l.* together with the costs, charges, and expenses incurred up to the day of the date hereof, by reason of the intended formation of the said railway (not exceeding the sum of 150*l.*), before the company shall enter upon any of the lands of the said P. B. Webb, for the purpose of making their railway; and

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that all timber and other trees on the lands to be taken by the company shall be the property of the said P. B. Webb; and it is hereby declared, that the sum of 4,500*l.* is to be the purchase-money for the said land so to be taken by the company for the formation of their railway not exceeding eight acres, according to such deviated line as aforesaid, across the property of P. B. Webb, described in the plan, and for the consequential damage to such property." On the same day the plaintiff's agent wrote at the foot of the agreement the following memorandum:—"It is understood and agreed by and between the parties above named, that, in the event of the Act of Parliament referred to in the foregoing agreement not being obtained, the agreement for purchase herebefore contained shall be null and void." The company obtained their Act in June following. In April, 1847, the company, by an indenture under seal, ratified and confirmed the above agreement in consideration of the plaintiff's withdrawal of his opposition to their Bill. It was alleged that subsequently the company had entered on the plaintiff's lands for the purpose of marking out the line, and that they had removed some trees and parts of the fences. In June, 1849, the power of taking land by the company expired, the project of forming the line from Epsom to Portsmouth having been abandoned. On behalf of the plaintiff it was argued, that the entry on the land was made in pursuance of the agreement, and that where no fixed time for payment is made in such an instrument as the agreement in question, the money becomes payable on the event, namely, the Act passing. The cases of *Bland v. Crowley*, decided in the Court of Ex. (not reported) in May last, and that of *Preston v. The Liverpool and Manchester Railway Company*, decided by Lord Cranworth in the present month, were cited and relied on. For the defendants it was contended, that the agreement was not absolute and unconditional, but depended upon the line being actually formed. This was evident from the other clauses of the agreement, providing for bridges, arches, &c. The formation of the line was now impossible by the expiration of the powers of the company; and the plaintiff still remained in possession of this property. As the company were incorporated, but their power of taking land was gone, they could not hold any without violating the Mortmain Act. The entry which had been made was merely under the Lands Clauses Consolidation Act, with the provisions of which the plaintiff must be presumed to be as familiar as the company. If the company proposed to pay this large sum of 4,500*l.* for eight acres of land, any shareholder might restrain the directors from so applying the capital, as it would be very unjust to compel payment for that which had not been actually taken. The cases of *Kimberley v. Jennings*, 6 Sim. 340, and *Harnett v. Yalding*, 2 Sch. & Lef. 549, were cited to shew that equity would not lend its aid to enforce what, at the least, was a hard bargain. The Court would not compel the company to buy land which by reason of the expiration of their powers they could not use, and in consequence of the law of mortmain they could not hold, but would leave the plaintiff to his remedy at law, if he had any. In reply, it was urged that the title of the plaintiff to relief was clear. It was denied that there was any hardship in compelling the company to perform their contract; and it was contended that the bargain was a good bargain at the time the company obtained their Act. The scrip rose, and profits were doubtless made upon the shares. It was no answer to say that they did not now want the land. A man who had purchased a pair of spectacles might as well say he ought not to pay for them, because he had become blind. The Legislature had decided that it was not a hardship to compel these companies to perform their contract. They sought power not only to abandon their railways, but their contracts for the purchase of land, and a Bill for that purpose had passed through the House of Commons. The House of Lords, however, had introduced the 19th section in the Railway Abandonment Act (13 & 14 Vict. c. 83), providing that nothing therein contained should extend to release the companies from any liability to purchase land where the agreement was part performed, or the price of the purchase money was fixed by the contract.

*The Solicitor-General and Messrs for the plaintiff. Malins and W. Bovill for the company.*  
Judgment reserved.

## JUDGMENT.

Wednesday, July 9.—The VICE-CHANCELLOR said that the claim was filed for the specific performance of an agreement, dated the 23rd day of July, 1845. On that day, Mr. Charles Sedgfield Crowley, of Croydon, Mr. Benjamin Baines, of Islington, and Mr. John Laurie, of Charles-street, St. James's-square, three of the promoters of an Act of Parliament for making a railway from the Croydon and Epsom Railway, at Epsom, to the town of Portsmouth, to be called "The Direct London and Portsmouth Railway," on behalf of themselves, and all

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other the promoters of the Act, entered into an agreement with the plaintiff, Mr. Philip Barker Webb, an extensive landowner, near Godalming, in Surrey, by which they agreed, amongst other things, to build a bridge between certain points marked on the plan annexed to the agreement, to connect his property which should be divided by the proposed railway; to build an archway under the railway between certain other points mentioned in the plan, so as to continue the Shrubby-walk, which was proposed to be divided by the railway, and to allow the plaintiff to cross over the railway on a level between certain points; and, further, that they should not erect any station on any part of the lands of the plaintiff, which might be seen from the mansion-house or the grounds surrounding the same; and, ninthly, that the company should not enter upon, nor deposit soil or refuse, earth, or other materials on the plaintiff's lands (except such as should be taken by the company for the site of the railway), for any purpose whatever, without the plaintiff's consent; and, lastly, that the company should pay to the plaintiff 4,500*l.*, together with his costs, charges, and expenses, incurred up to the day of the date thereof, by reason of the intended formation of the railway (not exceeding the sum of 150*l.*), before the company should enter on any of the plaintiff's lands, for the purpose of making their railway; and that all timber and other trees on the lands, to be taken by the company, should be the property of the plaintiff; and it was thereby declared, "that the sum of 4,500*l.* was to be the purchase-money for the said land, so to be taken by the company for the formation of their railway, not exceeding eight acres, according to such deviated line, as aforesaid, across the property of the plaintiff, described in the plan, and for the consequential damage to such property." At the foot of the agreement a memorandum was written, signed by the plaintiff's agent, by which it was understood and agreed by and between the parties, that in the event of the Act of Parliament referred to in the foregoing agreement not being obtained, the agreement for purchase therebefore contained should be null and void. This agreement was entered into while the company's Bill was pending in Parliament, Mr. Webb being a landowner upon the line of railway, the consideration for it being the withdrawal of his opposition to the Bill. After the agreement was entered, namely, on the 26th of June, 1846, the Act of Parliament was passed. On the 5th of April, 1847, the company executed an indenture under seal, by which they agreed to keep all the covenants and agreements which they had entered into in July 1845. It was for the specific performance of the latter agreement that the present claim was filed. The company, it appeared, had entered upon the lands comprised in the agreements for the purpose of setting out the line and taking out the levels. It was expressly admitted that the company had in no other way taken possession or interfered with the lands of the plaintiff. The company had fallen into difficulties, and having abandoned the railway, had no occasion for the land in question. Four points had been urged in opposition to the claim; first, that the agreement was conditional upon the company requiring the lands for the purpose of making the railway, and that the lands, not being required for that purpose, there was no agreement to bind them. Secondly, that the 4,500*l.* was the price not only of the lands, but of the consequential damage, and that the price to be paid for the lands could not be distinguished, and the Court could not decree a specific performance of the agreement to pay the purchase-money. Thirdly, that the powers of the company having ceased they could not now take the land. And, fourthly, that the hardship of this case ought to preclude the Court from decreeing a specific performance. The first point depended upon the construction of the agreement taken altogether, and not upon any particular clause of it. If the construction contended for were right, the agreement in effect would be an agreement for a right to take the land, and not for the purchase of the land itself; it would be an agreement that if they took the land they would give 4,500*l.* and for consequential damage. This was not a very probable contract for a landowner to enter into, the consideration for it being that he was to give up his opposition to the Bill. It might be a question to be considered whether it was so or not. If such had been the meaning of the parties, all the provisions of the agreement would have been subject to that condition; but that was not the case. The provisions to build the bridge and make the arch were absolute, and depending upon no condition, and the land for these purposes must be vested in the company. The clause upon which the argument was founded could hardly be intended to be conditional, the sum to be paid for costs being mentioned in the most positive manner. The construction contended for was not a necessary one; it was arrived at by considering the clause as to the payment of the 4,500*l.* as over-riding the whole of the argument. He saw no reason for such a construction as that

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contended for by the company. It might well be, that the latter part of the clause, "and it is hereby declared, that the said sum of 4,500*l.* is to be the purchase-money for the land so to be taken by the company for the formation of their railway, not exceeding eight acres, according to such deviated line as aforesaid, across the property of the said P. B. Webb, described in the said plan, and for the consequential damage to such property,"—it might well be that that was an independent agreement, and thus a clause, which was said to override the whole agreement would become a clause making 4,500*l.* payable before the company could enter upon any of the land of the plaintiff. Having regard to the other clauses of the agreement, and to the provision as to the cost. His Honour was of opinion that this was the sound construction of the agreement, and that the company's first point could not be maintained. But, then, it had been said that the 4,500*l.* were to be paid for the land, and for consequential damages, and the Court could not enforce an agreement where no definite price was fixed for the land, and that this was not a case for compensation under the Act of Parliament, where there had been a separate and distinct agreement to accept a sum in full for the purchase, and for all damage sustained by the use the company were about to make of the land. But it could surely be maintained that a company were to be discharged from their contract because they were unable to use the land for the purpose contemplated. He could not hold that the substance of the agreement, which was for the purchase of the land, was to be defeated, or against the vendor, because there had been a default on the part of the purchaser. The second point made by the company was, therefore, not sustainable. The third point made was, that the company could not now take the land. He had expressed a strong intimation of his opinion on this point during the argument, and he saw no reason for changing that opinion. The argument was founded upon the company's private Act, by which it was provided, that the railway should be completed within five years, and that at the expiration of such period the powers given by the general Act for executing railway works, or otherwise relating thereto, should cease to be exercised, except as to so much of the railway as should then have been completed. This clause, as he thought, clearly took away the powers granted to the company, but it did not affect their obligations. It had been argued that one of their powers was to take land, but that was gone. The answer to that was, that they had actually taken the land by the contract, by which they had become in equity the owners, having a right to keep the land. A different construction would put an end to all railway contracts, where railways were not actually made, and when the time granted by the Acts for making them had passed. As to the fourth point, namely, the ground of hardship, he saw no ground upon which he could refuse to interfere. The company had entered into the contract with their eyes opened, and they had had the benefit of the consideration by the withdrawal of the plaintiff's opposition to the Bill in Parliament. There was nothing to show that the agreement was not a fair one. It had been written, in the first instance, and some time afterwards had been confirmed by a deed of the company under seal. It was not because the company found themselves unable to complete the railway that he could refuse to compel a specific performance at the instance of the vendor. The decree must declare that the agreement of the 23rd of July, 1845 was not conditional upon the land therein mentioned being wanted for the purpose of the railway, but that according to the construction of the agreement, Mr. Crowley Mr. Baines, and Mr. Laurie, as promoters of the Act, were absolutely entitled to become purchasers, for 4,500*l.* of the land for the purpose of the intended railway, and that by virtue of the indenture of the 5th of April, 1846, the company were bound by the agreement, and the plaintiff was entitled to have the same specific performance. There must be a reference to the Master to inquire into the title of the land comprised in the agreement.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL,  
Esqrs. Barristers-at-Law.

Tuesday, June 17.

TARLETON v. LIDDELL.

*Voluntary Conveyance—Fraud upon Creditors—Common Recovery—Void declaration of uses—Stats. 13 Eliz. c. 5; 27 Eliz. c. 4.*

*A. a trader, being tenant for life of settled estates, with remainder to his wife for life, remainder to his son, B., in tail male, remainders over, in 1815, joined his wife and B. in making a tenant to the præcipe, and suffering a recovery. By deed of*

*the same date the uses were declared to be to B. and his heirs during the life of A. for his own proper benefit, remainder to the wife for life, remainder to B. for life, remainder to his first and other sons in tail male, remainders over. By the same deed other estates, of which A. was seized in fee, were conveyed to the same uses, except that B. was to take an immediate estate for life in them. A. knew that he was insolvent, and executed these deeds for the purpose of defrauding his creditors; but B. was ignorant of the fraud. A. shortly afterwards became bankrupt; and after the trial of an issue, the Court of Chancery, in 1819, decreed that the deeds of recovery were fraudulent and void, as against the creditors, and afterwards ordered them to be delivered up to the assignees to be cancelled, which was done:*

*Held, that the deeds of recovery were void (as against the creditors of A.) under stat. 13 Eliz. c. 5; that the 4th sect. did not apply to B. who was a party to the recovery, but only to persons who had estates in remainder or reversion, expectant upon the estates of the parties to the recovery; and with regard to whom the recovery would operate as a bar, notwithstanding the fraud; that either the deed declaring the uses was void altogether, by reason of the fraud of A., or that the declaration of uses was a voluntary conveyance within stat. 27 Eliz. c. 4; and that in either case, the recovery standing alone would enure to the use of A. for life, remainder to B. in fee; and so a purchaser for valuable consideration from B. after the death of A. would have a good title against the son of B. claiming under the declaration of uses.*

This was a case directed by the Court of Chancery for the opinion of this Court; the facts of which and the questions raised, sufficiently appear from the judgment of the Court.

The case was argued Friday, April 23 (a) by Peacock (with him W. T. S. Daniel) for the plaintiff; Butt (with him Crompton and Prior) for the defendant. Cur. adv. vult.

## JUDGMENT.

LORD CAMPBELL, C.J.—The question in this case being, whether the plaintiff, Bannister Tarleton, an infant, had any estate or interest in certain estates comprised in an indenture of settlement of the 30th of September, 1790, of which estates a common recovery was suffered in Easter Term, 1815; it is material to see who were the parties living and interested in the estates at the time of the recovery. John Tarleton, the grandfather of the plaintiff, then a trader within the bankrupt laws, was tenant for life, with remainder to his wife, Isabella, for life; with remainder to his son, John Collingwood Tarleton, the father of the now plaintiff in tail male; with remainders to the younger son of John and Elizabeth Tarleton, namely, Edward Thomas Tarleton, in tail male; with remainder to Margaret Ann Tarleton, the daughter of John and Isabella Tarleton, in tail general; with remainder to Alexander Collingwood, the original settlor in fee. John Collingwood Tarleton had attained twenty-one years of age in 1815, but was not married till many years afterwards. An indenture of bargain and sale, dated the 18th of March, 1815, was executed, by which John Tarleton, Isabella his wife, and John Collingwood Tarleton joined in making William Ainge a tenant to the præcipe for the purpose of suffering a common recovery, in which Robert Black should be defendant, to such uses as should be expressed in another indenture of the same date. That recovery was suffered in which Isabella Tarleton and John Collingwood Tarleton were vouchers who vouched over the common vouchee. It is plain that there were proper parties to this recovery, and that it was in all respects regular. By indenture of lease and release of the 17th and 18th of March, 1815, John Tarleton, and Isabella his wife, and John Collingwood Tarleton being parties to the release, the uses of the recovery were declared to be to John Collingwood Tarleton and his heirs during the life of John Tarleton, for his own proper benefit, with remainder to Isabella Tarleton for life; with remainder to John Collingwood Tarleton for life, with remainder to his first and other sons in tail male, under which Bannister Tarleton now claims; with remainder to Edward Thomas Tarleton for life, with remainder to the first and other sons in tail male, with remainder to Margaret Ann Tarleton for life, with remainder to her first and other sons in tail male, with sundry other remainders to unborn children, and with the ultimate remainder to John Tarleton in fee. By the same indenture other estates of which John Tarleton was seized in fee were conveyed by him to the said uses, except that John Collingwood Tarleton was to take an immediate estate for life in them. John Tarleton was at the time insolvent, and knew that he was so, and all this was done by him for the purpose of defrauding his creditors. But John Collingwood Tarleton was ignorant of the insolvency and of

(a) Before Lord Campbell, C.J., Patteson, Wightman, and Erie, JJ.

the intended fraud. John Tarleton soon afterwards, on the 22nd June, 1815, became bankrupt; and on the 11th of July, 1816, the usual conveyance of all his estates and property was made to his assignees. On their petition the Court of Chancery, on the 2nd of July, 1819, directed an issue at law to try whether the deeds of recovery were fraudulent and void in law as against the creditors of John Tarleton. The issue was tried, and the jury found that they were fraudulent and void as against the creditors. After this finding the Court of Chancery, upon the 16th of December, 1819, decreed that the deeds of recovery were fraudulent and void as against the creditors, and that the assignees were entitled to possession; and on the 12th of March, 1821, further ordered that the deeds should be delivered up to the assignees to be cancelled, which was done accordingly. The decree does not profess to reverse the recovery, or to set it aside, nor indeed had the Court any power or jurisdiction to do either the one or the other; but the Court ordered the deeds to be cancelled, which they clearly had jurisdiction to do; and if by that decree and order the deeds of the 17th and 18th of March, to lead to the uses of the recovery, were wholly inoperative, the present plaintiff cannot have any interest in the estates, because it is only by the release giving John Collingwood Tarleton an estate for life only, with remainder to his first son in tail male, that the plaintiff can found any claim. It was contended for the plaintiff that the proceedings in Chancery were altogether void; that the deeds of the 17th and 18th of March, 1815, were executed on good consideration and valid in law, but no consideration given to John Collingwood Tarleton for extinguishing the estate tail in remainder, and taking back only an estate for life was shewn, except that of his having his father John Tarleton's estate for life in the settled property, and also an estate for his own life in the unsettled property conveyed to him. The conveyance being clearly fraudulent and void, under the 13 Eliz. nothing whatever passed to John Collingwood Tarleton by the deeds; and the consideration having utterly failed, not by matter *ex post facto*, but by reason of the original fraud in John Tarleton, the father, nothing in the estates, therefore, passed to his son, and the case stands the same as if there had never been any consideration or professed consideration whatever. The case of *Doe v. Mitton and Others*, 2 Wilson, 356, which was relied on by the plaintiff's counsel, is wholly different from the present; for there the party conveying and settling the land did take a benefit, and had good consideration in having part of the lands of which he was seized in fee discharged from an annuity. We are, therefore, clearly of opinion that the proceedings in Chancery were quite right. The only question is, what is the effect of them with regard to the estate of John Collingwood Tarleton, in which the assignees of his father, John Tarleton, had no interest? The 4th section of the 13 Eliz. c. 5, was relied on as shewing that the recovery, though fraudulent within that statute, would stand good as to other parties; and therefore, that as John Collingwood Tarleton was no party to any fraud, it would stand good as to him, and enure to the uses which he had declared by his deed. Now the words of the section, when examined, clearly shew that they apply only to persons who are not parties to the recovery, but have estates in remainder or reversion subsequent to and expectant on the estates of those who are parties to the recovery. This section speaks of recoveries had against tenants in tail or other tenants of the freehold, the reversion or remainder, or the right of reversion or remainder then being in any other person or persons; and it enacts that "every such recovery shall, as touching such person or persons, who are in remainder or reversion, stand, remain, and be of such like force and effect, and none other, as if this Act had never been made." It is clear that the persons there spoken of are not those against whom a recovery is had. No doubt at all can exist as to the meaning, supposing the recovery to be suffered by the tenant in tail in possession; nor can it make any difference that in this case the tenancy in tail was in remainder, for the recovery is had not only against the immediate tenant to the præcipe, but against the vouchee; the meaning of the clause evidently is, that although the uses of a fraudulent recovery shall not prevail to defraud creditors, yet that the recovery shall stand good to bar those in remainder or reversion as if there had been no fraud. John Collingwood Tarleton is not a person having a remainder or reversion within the meaning of this section of the statute, and therefore nothing that he has done in regard to the recovery can be affected by it, and the now plaintiff was not such a person, for he was not born till many years afterwards. But Edward Thomas Tarleton (the younger brother of John Collingwood Tarleton and Margaret Ann Tarleton his sister), and Alexander Collingwood, the original settlor, may be said to have been persons having the remainder or reversion, and, therefore, as regards them, the recovery may stand good as they fall under that section of the statute. It



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would, however, only stand good as a recovery simply so as to bar their estates wholly independent of the question as to the operation of the deed to lead the uses. Now if the deed, namely, the release of the 18th of March, 1815, be wholly vitiated and done away with by the fraud of John Tarleton, it will follow that the now plaintiff has no interest in the lands, and the recovery will then stand as a simple recovery without any deed to lead or declare the uses in such a case, though it was originally held that they should enure to the old uses (*Argyle v. Chenery*, Latch, 82; *Walker v. Snow*, Palmer, 351); and so John Collingwood Tarleton would remain in tail male. But subsequent cases show that the recovery would enure to give a fee-simple to the tenant in tail. (*Nightingale v. Favers*, 3 P. Williams, 207; *Stapleton v. Stapleton*, 1 Atkyns, 9; *Robert's case*, 3 Atkyns; *Martin v. Strachan*, 5th T. Rep. 107, n.) In either way the plaintiff would have no interest, for if John Collingwood Tarleton remained tenant in tail, he plainly acquired the fee simple by a subsequent recovery suffered by him in Trinity Term 1822, his father's assignees, who were the tenants for the life of the father, John Tarleton, joining in making the tenant to the *precipe*; by deeds of lease and release of the 5th and 6th July, 1821, the uses were declared, after the death of John Tarleton, to John Collingwood Tarleton, in fee. If he did not remain tenant in tail, but the use under the recovery in 1815 was to him in fee, of course the now plaintiff could take nothing; added to which, the release of the 6th of July, 1821, declared that not only the recovery then intended to be suffered, but all other recoveries, should enure to the use of John Collingwood Tarleton in fee, so that on the supposition that there was no deed to lead to or declare the uses of the recovery of 1815, this deed of the 6th of July, 1821 (if it operated at all, which probably it would not, as the recovery was wholly bad), would operate as a deed to declare the uses, and the recovery for the non-joinder of John Tarleton, who was only tenant for life in remainder, would not be of any benefit. John Tarleton, and his wife Isabella, having died before John Collingwood Tarleton sold and conveyed the property to the defendant Liddell, it is not material to trace how John Tarleton's life interest in a moiety of the Collingwood estates, being the settled property, passed to John Collingwood Tarleton, together with the other moiety, of which John Tarleton was seised in fee by conveyance from the assignees for 30,000*l.* The whole case, in truth, resolves itself into this question,—whether the deed of March 18, 1815, is still a subsisting deed, as it gives the use declared by it to John Collingwood Tarleton for life, with remainder to his first son, the now plaintiff in tail male; even assuming, as we think we must, that the recovery of Easter Term, 1815, is still unreversed, and subsisting as a recovery. Now, the Court of Chancery ordered this deed to be cancelled. It was certainly void, as regards the life estate of John Tarleton in the property in question, and as to the whole of the property of which he was seised in fee, and professed to convey by it. But it is said that the fraud of the father did not affect the conveyance by John Collingwood Tarleton, and his estate in remainder, and that the Court of Chancery exceeded its power in ordering the whole deed to be cancelled, and should have declared it void *quoad* the property of which John Tarleton was seised in fee, and directed a re-conveyance of the life estate of John Tarleton in the settled property to the assignees, leaving the rest of that deed as well as the deed of bargain and sale of the 18th of March, 1815, to make a tenant to the *precipe* and the recovery untouched. It must be recollected that a fraud was practised on John Collingwood Tarleton by the father as much as it was upon the creditors; he was induced to execute the deed and join in the recovery by the consideration of having his father's life estate and his fee-simple estate conveyed to him, which consideration utterly failed, and never took effect by reason of the fraud, and he was obliged ultimately to purchase a part only of the estates proposed to be conveyed to him for the 30,000*l.* Surely the fraud may well be said to have tainted the whole transaction; the use first declared (that during the life of the father) being void on account of the fraud, must not then the subsequent uses also be held void? *Beckwith's case*, 2nd Reports, 57*a*, where husband and wife levied a fine of the lands of the wife, and the husband, without the wife's consent, by deeds declared the uses to himself and wife for life, with certain remainders over, and the wife by deed, without the assent of her husband, declared the uses to herself for life, with the same remainders over as those contained in the deed of the husband; it was held, that not only the uses for life in which they disagreed, but the subsequent uses in which they agreed, were all void, and the fine was by construction of law to the use of the wife and her heirs, as if no use had been declared. So here, we think that all the uses declared by the deed of March, 1815,

must be held void, and that by construction of law, the recovery enured to the use of the father for life (which passed to his assignees), remainder to the son in fee. Whether the Court of Chancery, at the prayer of John Collingwood Tarleton, would or would not have set aside the deed to lead the uses altogether, both as regarded him, as well as the creditors, we need not inquire; the Court did not do so. The son does not appear to have been any party to the proceedings in Chancery, and the decree is only that the deeds of recovery were fraudulent and void as against the creditors. The subsequent order that they should be delivered up to be cancelled, seems to have been for the benefit and protection of the creditors, and not John Collingwood Tarleton. John Collingwood Tarleton, no doubt, treated the recovery of 1815 as having been set aside by the Court of Chancery, and considering himself to be still tenant in tail, as if that recovery had never been suffered, afterwards, in 1821, suffered another recovery, but the Court of Chancery did not authorise that step; it dealt only with the estates of John Tarleton, the bankrupt, and authorised his assignees to sell a portion of them to John Collingwood Tarleton. The assignees, also, in joining with John Collingwood Tarleton to make a tenant to the *precipe*, express in the release of the 6th of July, 1821, that they do so "at the request and by the direction, and for the accommodation of, the said John Collingwood Tarleton;" and as he could not then pay the purchase-money, 30,000*l.* the uses of the recovery are declared to the assignees during the life of John Tarleton. Subsequently, by lease and release of the 6th and 7th March, 1823, the purchase-money being paid, the assignees conveyed to John Collingwood Tarleton their interest during the life of John Tarleton in the property in question. From all this it is plain that no part of the proceedings in Chancery, either in its decrees or orders, and no act of the assignees dealt at all with the estate of John Collingwood Tarleton, or prevent the operation of the release of March 1815, by which he declared the uses, to himself for life only, save and except the order of the Court of the 12th of March, 1821, for delivering up the deeds to the assignees to be cancelled, upon which we have already commented. But if the deeds of March 1815 be not considered wholly void, and John Collingwood Tarleton became under them tenant for life in remainder after the death of his father and mother, with remainder to his first son in tail, still as the consideration for his suffering the recovery of the year 1815, and declaring the uses has wholly failed, or rather never existed, the declaration of uses must be considered as voluntary, and on the part of the defendant (a purchaser for value in the year 1849), it is contended to be void within the statute of 27 Eliz. c. 4. Undoubtedly, if John Collingwood Tarleton had been seised in fee in 1815, and had made a voluntary deed, settling his estate upon himself for life, with remainder to his first and other sons in tail, though he afterwards married, and had a son, the now plaintiff, he might, in 1849, have sold and conveyed the lands to the defendant, a *bona fide* purchaser, as to whom, by all the authorities, the settlement of 1815 would have been void under the 27 Eliz. c. 4. But whether the statute extends to the case of a tenant in tail suffering a voluntary recovery, and with a deed to lead the uses, also voluntary, is the question here. The settlor himself cannot, of his own will and pleasure, if there be no sale or purchase, treat his own voluntary settlement as void within the 27 Eliz. and make a new settlement of the estate. Therefore, as John Collingwood Tarleton was only tenant for life in remainder at the time of the second recovery in 1822, being twenty-seven years before any sale took place, that recovery would not operate at all and may be forfeited by the now plaintiff, the alleged remainder-man in tail under the release of the 18th of March, 1815. The second recovery in 1822 may, therefore, be put out of consideration in our inquiry as to the effect of the 27 Eliz. c. 4, with reference to the purchase made by the defendant in 1849. The only way in which it should seem that the 27 Eliz. can operate would be by treating the sale and purchase by the defendant in 1849, and the conveyance to him by John Collingwood Tarleton, as making void the declaration of uses, in the voluntary deed of the 18th of March, 1815, and holding that thereupon the recovery of 1815 for want of the declaration of uses would enure to give John Collingwood Tarleton the remainder in fee on the death of his father and mother, which he has conveyed to the defendant in 1849. The case of *Doe dem. Banerstock v. Rolfe*, 8 A. & E. 650, is an express authority for so holding. That case was mainly grounded on the case of *Pitjames v. Moys*, 1 Sidelin, 133; but all the authorities bearing on this point were then considered, and we think that the conclusion at which the Court arrived on such consideration was correct. The result is that either the deed of March 1815 was wholly vitiated and done away with by the fraud of John Tarleton the father, or, if not, that the uses declared in it by John Col-

lingwood Tarleton were void. The effect is the same upon the supposed right of the plaintiff in either view of the case. We are, therefore, of opinion, under all the circumstances of the case, that the plaintiff, Benjamin Tarleton, is at any estate or interest in the moiety of the Collingwood estates comprised in the indenture of release of the 30th of September, 1796, and is entitled to the Vice-Chancellor.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. RUSSELL, Esqrs. Barristers-at-Law.

## BUSINESS OF THE WEEK.

*Thursday, July 18.*  
**HESLOP v. BAKER.**—Judgment.  
*Verdict to be entered for the plaintiff, with 10*l.* to the defendant to tender a bill of exchange.*  
**LANGMEAD v. Ux. c. HOLLIS.**—Judgment.  
**BELDON v. CAMPBELL.**—Judgment.  
*Rule absolute for a writ.*  
**WILLIAMS v. THE CHESTER RAILWAY COMPANY.**—Judgment.  
*Verdict to be entered for the plaintiff for 10*l.* to the defendant, and costs, and 10*l.* to the plaintiff for the costs of the action.*  
**CANNAN AND OTHERS, Assignees, v. THE GREAT WESTERN RAILWAY COMPANY.**—Judgment.  
*Rule absolute for a writ.*  
**PEARS v. WILSON.**—Judgment.  
**GREAT WESTERN RAILWAY COMPANY v. BAKER.**—Judgment.  
**ATTORNEY-GENERAL v. LONDON DOCK COMPANY.**—Judgment.  
**ATTORNEY-GENERAL v. BRADSHAW AND OTHERS.**—Judgment.

**REG. v. MUDGE.**—Unthank applied for the return of the Court to the Remembrancer in an order of extent.

## DEMURRER PAPER.

**WAGNER v. IMBRIE.**—Demurrer to plea. With a support of demurrer. *J. Brown, contra.*  
**MANN v. CROMBIE.**—Demurrer to plea. With a support of demurrer. *B. J. Douglas, contra.*  
*Judgment for the plaintiff, with leave to the defendant to amend in a writ, taking into consideration of trial.*

## COUNTY COURT APPEALS.

**DOUGLAS v. STEVENSON.**—Judgment affirmed, with costs.  
**HUNT v. WRAY.**—Writ for the applicant. Let to the respondent.  
*Judgment quashed, and judgment to be entered for the defendant below. The Court took time to consider the question of costs.*  
**CLAY v. CROFTS.**—Writ for the applicant. With a support of demurrer. *Judgment affirmed with costs.*  
**ROBINSON v. LAWRENCE.**—Writ for the applicant. To the respondent. *One appeared on the other side.*  
**PRICE v. SYMS.**—Judgment affirmed, with costs.

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Reported by MORGAN LLOYD, Esq. Barrister-at-Law.

*Saturday, Nov. 30, 1850.*  
**(Before PATTERSON, COLERIDGE, WIGHTMAN, HALL, V. WILLIAMS, and TALFOURD, JJ.)**  
**TURNER AND OTHERS, Assignees of HIGGINS and Co. Bankrupts, v. THE TRUSTEES OF THE LIVERPOOL DOCK COMPANY.**  
*Delivery on board vendee's vessel—Bill of lading—Conditional delivery—Stoppage in transitu.*  
**M. and Co. merchants at Charleston, bought in account of B. and Co. large quantities of cotton, and delivered the same on board a vessel belonging to B. and Co. sent to Charleston expressly to carry the cotton. The goods were delivered to the captain, who was B. and Co.'s servant, who signed a bill of lading of the cotton, "to be delivered at Liverpool to order or to our assigns, paying freight for the cotton nothing, being owners' property," and M. and Co. endorsed the bill of lading in these terms—"Deliver the within to the Bank of Liverpool or order. M. and Co. M. and Co. afterwards drew bills on B. and Co. for the amount; and in the abstract of invoice sent it was stated that the cotton was shipped for and on the account and risk of B. and Co." And afterwards a full invoice was sent, describing the goods as "shipped for Liverpool, by order and for the account of B. and Co. and in the consigned." B. and Co. became bankrupt before the goods arrived at their destination, and the plaintiffs, as their assignees, sought to recover the goods:  
 Held, 1st, that as the bill of lading made the cotton deliverable at Liverpool to their order, or to their assigns, there was not an absolute delivery to B. and Co. and that M. and Co. had therefore right of stoppage in transitu.  
 2nd, That whether a delivery on board the vendee ship be an absolute or a qualified delivery to vendee depends upon the terms of the bill of lading.  
 3rd, That it was immaterial whether the captain had authority to receive the goods on board the terms on which they were delivered by M. and Co. as it was incompetent to the plaintiffs to set up such want of authority.  
 4th, That it made no difference that M. and**



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ments operated as a complete transfer of the property and possession in and of the said goods to Barton, Irlam, and Co. and that the delivery of the said goods was complete by the said shipment on board the ships of the said Barton, Irlam, and Higginson. 3rd. That neither of the masters of the said ships had authority to receive the said goods, and to carry them safe, as the property of the owners of the said ships, that is to say, Barton, Irlam, and Higginson, and that the signing of the said bills of lading by them in the forms in which the said bills of lading respectively were made, did not prevent the property in and possession of the said goods from vesting in Barton, Irlam, and Higginson. 4th. That the masters of the said ships had neither of them authority to make any contract to prevent Barton, Irlam, and Higginson from having the absolute control and dominion over, and possession of, their said goods, after shipment on board their ships, and that any such contract, if made by the said masters, did not affect the right of property and possession of and in the said goods of Barton, Irlam, and Higginson, or the plaintiffs, their assignees; and that the said evidence was evidence to shew that, by the agreement between Edward Menlove and Co. and Barton, Irlam, and Higginson, the said goods were to be delivered and shipped on the account of Barton, Irlam, and Higginson, and were to be put into their immediate possession by delivery on board their own ships, which were by the agreement to be sent for the same, and to receive the same on board into the actual possession of Barton, Irlam, and Higginson, and that any shipment or delivery of the said goods purchased under the said agreement and arrangement, except to the said Barton, Irlam, and Co. on board their said ships, would have been a breach of and unauthorised by the said agreement; and that the conduct of Edward Menlove and Co. was in effect an attempt by Edward Menlove and Co. to pledge the goods of Barton, Irlam, and Co. without their authority and in violation of the agreement between them and Edward Menlove and Co. 5th. That supposing any right to the goods remained in Edward Menlove and Co. after the said shipment, such right was merely personal to Edward Menlove and Co. and not assignable or transferrable by them, and was determined by the assignment and pledge of the bills of lading by Edward Menlove and Co. 6th. That part of the said goods was purchased with the proceeds of the outward cargoes of the said ships, the *Charlotte* and the *Higginson*; and that such part of the goods at least was the absolute property of Barton, Irlam, and Co. before the bankruptcy, and of the plaintiffs since the said bankruptcy. 7th. That no right to stop any of the said goods *in transitu* ever existed; and even if it did at one time exist, that it had been determined, and had not been exercised by Edward Menlove and Co. and could not be exercised by their assigns, and that no lien ever existed over the said goods as against the plaintiffs; and if such lien ever did exist, it had been determined. 8th. That supposing the right to stop the goods *in transitu* or a lien to exist, such a defence was not open to the defendants upon the pleadings in this suit, and ought to have been specially pleaded, and that the issues joined were only on the ownership and property of the goods and chattels. The counsel for the plaintiffs and for the defendants agreed that there was no question of fact for the jury, and prayed his lordship to direct the jury how in law they ought to find on the issues raised between the parties, and thereupon his lordship directed the jury to give their verdict for the defendants on the said issues, and thus, whether the evidence given on behalf of the defendants, and objected to, as aforesaid, were considered by the jury as evidence, or altogether excluded, his lordship telling the jury, in his said direction, that, in his opinion, the evidence so objected to, did not carry the case further in favour of the defendants.

*Crompton* (with him *Blackburn*), for the plaintiffs.—The question in this case is whether the property in the goods, which are the subject of this action, was, by the effect of the bill of lading and the delivery on board, transferred to the bankrupts. The bankrupts had sent their own ship to receive this cargo, and had instructed their captain not to receive goods except on certain conditions. He had, therefore, no authority to receive goods on any other conditions. This case is, therefore, clearly distinguishable from that of *Mitchell v. Ede*, 11 Ad. & E. 888. In that case, it appeared that the vessel was in the habit of carrying supplies to the estates of the plaintiff, and others also, and it would not have been inconsistent with the captain's instructions if he took on board goods belonging to other parties on freight. Lord Denman, C.J. in that case observed, "As to the character of the ship, the case states that the defendants were in the habit of sending out their ships to Jamaica, with supplies to the estates on which those sugars were raised, and to others, and of receiving consignments from Mac-

kensie and other planters in return; that these ships took out and brought home goods from different shippers when offered, and that the *Thiabe* sailed in the usual course, taking out supplies; and she brought home produce shipped by different shippers, besides the sugars in question. This statement, we think, disposes at once of this part of the argument. It seems to us to be impossible to contend that the *Thiabe*, in the present instance, differed in any respect from any other general ship, and that, therefore, the sugars, after they were on board, remained absolutely under the control and at the disposal of Mackenzie, so far as their having been put on board that ship is concerned." Here the ship was sent out to take the goods as the property of the bankrupts, so that the present case cannot be governed as to this point by *Mitchell v. Ede*. This is more like the case of *Ogle v. Atkinson* (5 Taunt. 759), where the goods were purchased for the plaintiff, and were delivered on board his ship, sent to receive them as his goods, which was held to vest the property. Thus the delivery of the goods renders the bill of lading irrevocable. In the case of *Wait v. Barker* (2 Ex. 1), the bill of lading was in fact never parted with, and there was a contract that the bill of lading should not be parted with until certain conditions were complied with. In page 6, Alderson, B. says, "It is clear that what took place at Bristol was not sufficient to pass the property. You must therefore shew, independently of that proceeding, that the property passed; for the defendant there disputed the quality of the corn, and the parties did not agree as to the thing." Here the condition was a complete afterthought or legal fraud. It was an attempt to pledge against the express agreement of the parties. The question must therefore be, whether the property passed. The word "shipped" is a sufficient word of appropriation. The case of *Van Casteel and Others v. Booker and Others* (2 Ex. 691) does not touch the present case. The question is not charter or no charter. If there is a contract of bailment it does not matter whether the ship be or be not chartered.

ERLE, J.—The Court in that case held that the vendor might make a qualified delivery if vendee was present to consent.

CRESSWELL, J.—It may be looked upon in this way: if the captain could make himself agent of the vendor in point of law, how does the fact stand as to the bill of lading?

ERLE, J.—The fact is to be taken as found, and the question is one of law. Delivery at risk and not on account is not a test of property.

*Crompton*.—All we have to do is to shew on these documents that it was the intention of the parties that on lading the goods should become bankrupt's property. In the case of *Jenkyns v. Brown and Others*, 19 L. J. 286, Q. B. the cargo was, at the time of shipment, the property of the agent of the plaintiff, and there was no evidence of an intention that it should pass by the bill of lading. If a man sends goods in his own ship, there can be no necessity for a bill of lading: control cannot be kept over them. Suppose the parties themselves were there, and they wished to make a contract to retain certain control; I think that cannot be done. That is laid down in *Hovew v. Ball*, 7 B. & Cr. 481. If they intend to pass the property, the reservation of lien cannot affect the property, but is only a personal contract. But, even supposing the parties could do so, still the captain could not. The special instructions were, that the goods should be bought on consignee's account. (*Abbot on Shipping*, 130.) The master had no general authority to receive goods, &c. (*Small and Others v. Nivales*, 9 Bing. 574.) and the shipowner is entitled to his freight notwithstanding.

CRESSWELL, J.—That case is entirely different from this.

*Crompton*.—Mere delivery and indorsement of itself does not pass the property: thus, if a factor did it without authority. (*Newsom and Another v. Thornton and Another*, 6 East, 17.) In page 42, Lawrence, J. says, "In the case of *Lickbarrow v. Mason*, some of the judges did indeed liken a bill of lading to a bill of exchange, and consider that the endorsement of the one did convey the property in the goods in the same manner as the endorsement of the other conveyed the sum for which it was drawn. But when the case was before the Ex. Ch. there was much argument to shew, that in itself the endorsement of a bill of lading was no transfer of the property, though it might operate as such, in the same manner as other instruments may be evidence of the transfer of property. As, if goods be sold by a merchant abroad to his correspondent here, and the bill of lading be sent to him indorsed, to deliver the goods to the vendee or his order; there the transfer of the goods may be evidenced by such indorsement." In the case of *M'Combie v. Davies*, 7 East, 5, it was held that where a broker pledges the goods of his principal as his own, the pawnee, who claims by such tortious act of the broker, cannot claim to retain against the principal in trover for the amount of the lien which

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the broker had on the goods for his general lien at the time of such pledge. And in *Dunlop v. Others v. Dunal and Another*, 5 T. R. 594, it was held that if a factor pledge the goods of his principal the latter may recover the value of them in a suit against the pawnee, on tendering to the factor the sum due to him, without any tender to the pawnee. In *Haille v. Smith*, 1 Bos. & P. 563, there was a change of property, and the bill of lading was evidence of the transfer; but the question of transfer of a lien did not arise. In *Ley v. Ansell and Another*, 6 M. & W. 36, Parker, B. says, "we consider the nature of a lien, and the right it confers, it will be evident that it cannot form a subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues as long as the possessor holds the goods." It comes the next question. Supposing a lien exists, does it arise *in delictu*, and ought it to be specially pleaded. In the case of *Mason v. East*, 12 M. & W. 674, it was held that the defendant could not, under the plea of *non delictu* in possession, shew that he had a common interest in the property sought to be recovered, e.g. that he was tenant in common. The Court, Q. B. however, in the case of *Lane v. Travers*, 1 A. & E. 116, held that a lien could be set up under a plea denying that the goods were the plaintiff's.

*Crompton*, (Knowles, Q.C. and Watson, Q.C. contra).—I contend that the judgment in this case should be affirmed, and that the learned judge was quite correct in directing a verdict for the defendants. The facts of the case have not been brought to the Court in a way that I would altogether regret. Menlove and Co. had contracted liabilities for the cargoes to an amount much exceeding the amount they received. Then what is the usage of trade? It appears that it is the universal practice that all purchases of produce in Charleston are made for cash. The usage, then, is, that if the money cannot be obtained on better terms, to pledge the bill of lading. Then it appears that Messrs. Menlove and Co. were unable, in point of fact, to raise the money except on pledge of bill of lading. This negotiation must have taken place before the bills of exchange were drawn. It was before any part of the cargo was shipped the bill of lading, to order of Menlove and Co. was indorsed to the bank at Charleston; and the goods were consigned to order on account of Barton, Irlam, and Higginson. When the goods were first purchased, in whom did the property then vest? I submit that it vested in Menlove and Co. They were consignors (*Abbott on Shipping*, 136), and they were vendors to Barton, Irlam, and Higginson. When were the goods transferred to them? The letters only shewed an intention to appropriate them to Barton, Irlam, and Higginson. The more substantial evidence that they bought the goods on account of Barton, Irlam, and Higginson, was not enough to transfer the property. In the case of *Albion v. Bell*, 8 B. & Cr. 277, Bayley, J. at page 282, says, "But I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labour. It is said, that there was an appropriation of these specific machines by the makers, so that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the material is long to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered." The first proposition of the plaintiffs is, that Menlove and Co. undertook to buy the goods as the absolute property of Barton and Co. It does not appear that this was absolutely done. There is no contract that the goods as the unqualified property of Barton, Irlam, and Higginson. It is more reasonable to suppose that they were bought for Barton and Co. subject to lien to raise funds, &c. I go further—while they were justified or not is immaterial; more they will not vest the property in Barton and Co. they thought proper to keep these goods themselves, and to ship them in Barton and Co.'s vessel, and to ship them to get them if they thought Barton and Co. were to get them if they thought fit to pay the bills of exchange. To hold of lading was in the usual form. To hold that a bill in this form is bad may seriously interfere with trade. The words "owner's property" were merely put there to exonerate the master, and the words "freight free" mean the same. (*Van Casteel v. Brook*, 2 Ex. 708.) Holding that bills of lading in that form can be properly taken can do no harm. They contend that there would be no invariable interest in such a case, but that is not so. (*Arnold v. Insurance*, 251; *Smith v. Lascoll*, 2 T. R. 186.) It is said that Menlove and Co. might have been defrauded by Barton, Irlam, and Higginson of the freight

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m. but that is not so. The Court of Chancery would take care that Menlove and Co. would only give what they were entitled to. The bill of lading shews that they retain the legal property, and the cargo was evidently consigned to order by the owner. Addressed to order means addressed by order of lading to order. The invoice is only sent with the abstract. The master must have been authorised to receive the goods on the terms that Menlove and Co. were authorised to deliver them, which was subject to these rights. If what they pretend for be true, the master had no right to sign a bill of lading at all, and was only a kind of sea-grogger. [CRESSWELL, J.—Supposed he had the most rigid instructions to receive the goods only as the absolute property of Barton, Irlam, and Higginson, would that force Menlove and Co. to deliver them on those terms?] Certainly not. There is nothing like a gross violation of duty. All the facts bearing on the question have been already stated. Many of them fall off of themselves when the facts are known. In *Wait v. Baker*, 2 Ex. 1, the terms of the charter do not appear. The case *Castell v. Booker*, is more important, but that is not conclusive authority in the present case. I do not say it a bill of lading transfers the property like a bill of change. The question as to the master acting properly in receiving goods without freight was raised in *Van Castell v. Booker*. This is not a question of stoppage in transitu, but of unpaid order. *Coxe v. Harding*, 4 East, 211, was relied on, but that case has never been cited with approbation, and it has, as to one point, been overruled in *Morrison v. Gray*, 2 Bing. 260. The former case is distinguishable from the latter by the *transitu* ending at an end. In *Morrison v. Gray*, all the Court decided was, that a vendor having a right to stop goods in transitu may transfer such right by a transfer of the bill of lading. *Ogle v. Atkinson*, 759, is not inconsistent with *Mitchell v. Ede*, A. & E. 888, except that the former went on the question of fraud. *Mitchell v. Ede* only shews that a consignee has power to change the destination. *Wise v. Ball* only shews that a license was personal, but it does not affect the present case. I do dispute that liens are personal, but this is more in a case of lien. *Jenkins v. Brown* is an authority in my favour. *Hobson v. Millard*, 2 Moo. 342, shews that there are many liens which are transferable. As to the necessity of pleading a lien specially, the answer is, that it is not a lien in a case, besides that it is doubtful whether a lien can be pleaded. *Crompton*, in reply.—As to the objection that the doctrine we contend for would be mischievous to trade, the mischief is quite the other way. By the age of trade, these bills were to be sold. CRESSWELL, J.—I understand that these goods were to be bought for cash; and, according to *Atkinson v. Bell*, they ceased to be the property of Menlove and Co. as soon as they were shipped. *Crompton*.—*Atkinson v. Bell* proves too much, if anything. They admit that the general property rested in us. *Cur. adv. vult.*

IN ERROR.  
JUDGMENT.

Wednesday, May 26.—PATTON, J.—This is an action to try the right of the plaintiffs' assignees of Messrs. Higginson, Deane, and Hall, who were merchants in Liverpool, trading under the name of Barton, Irlam, and Higginson, who had become bankrupts, to the possession of a quantity of cotton and timber as against Messrs. Menlove and Co. who were merchants in Charleston, in America, and the real defendants in this suit. The property in dispute constituted the cargoes of two vessels, of which the bankrupts were owners, called the *Charlotte* and *Higginson*; and as it is agreed that the same question arose with respect to both, and as the circumstances are similar, it will be only necessary to advert to the leading facts relating to one of them, which is the *Charlotte*. It appears that in August 1847 the bankrupts sent orders to Menlove and Co. to Charleston to ship on their, the bankrupts', account a quantity of cotton for the homeward cargo of the *Charlotte*, a ship belonging to the bankrupts, which had been sent to America with a cargo of coal and salt, and which arrived at Charleston on the 19th of September. In the meantime Menlove and Co. had made considerable purchases of cotton in execution of the order, and continued to make further purchases until within a day or two of the sailing of the *Charlotte* on her homeward voyage with the cotton on board, namely, on the 13th of October. On the 12th of October the master of the *Charlotte* received the bill of lading of the cotton to be delivered at Liverpool, "to order or to our assigns, paying eight for the cotton nothing, being owners' property," and Menlove and Co. indorsed the bill of lading in these terms: "Deliver the within to the bank of Liverpool, or order.—Edward Menlove and Company." Messrs. Menlove and Co. informed the bankrupts from time to time of these purchases as they were made, and on the 14th of October they informed the bankrupts of

the sailing of the *Charlotte*, and that they had drawn bills upon them of several dates, the earliest being of the 23rd of September, being for the cargo on their account by the *Charlotte*, and desiring them to insure the cotton. On the 19th of October Menlove and Co. sent an abstract invoice of the cotton, dated the 13th of October, in which it was stated that the cotton was shipped by Menlove and Co. on board the *Charlotte*, for Liverpool, by order and for the account and risk of Messrs. Barton, Irlam, and Co. there, and addressed to order. And on the 23rd of October Menlove and Co. sent to the bankrupts a full invoice of the cotton, dated 13th of October, stating that the cotton was shipped for Liverpool by order and for account of Barton, Irlam, and Co. there, and to them consigned. It appeared that Menlove and Co. having no sufficient funds of the bankrupts in their hands to pay for the cotton, sold the bills they had drawn upon them to the bank at Charleston, and delivered to them the bill of lading, indorsed as beforementioned, as security for the due honour of the bills, which, with the exception of one very small one, were dishonoured by the bankrupts, and taken up by Menlove and Co.; and by letter, of the 23rd of October, Menlove and Co. informed the bankrupts that the bank to whom they had sold the bills required the delivery of the bill of lading to them, and that they had done so. On the 13th of November Higginson and Co. the defendants, became bankrupts; the *Charlotte* arrived at Liverpool on the 26th of November, and on the 27th notice was given to the master that Messrs. Menlove and Co. had claimed to stop the cargo, and required him to deliver it to the bank at Liverpool, or their agent. The question is, whether Menlove and Co. could, under the circumstances, insist upon the delivery of the cargo of cotton to them or their agent, unless the bills were duly honoured? It was contended for the plaintiffs that the assignees, by the delivery of the goods on board the bankrupts' own ship, and especially appointed for the purpose of bringing home those goods, such delivery being made to the master, who was the bankrupts' agent for the purpose of receiving them, the absolute property vested in them, the sale being completed by the acceptance of the order, and the terms of the invoice, and that the terms of the bill of lading by which the goods were to be "delivered at Liverpool to order or to our (Menlove and Company's) assigns," did not prevent such absolute property vesting in the bankrupts, nor entitle Menlove and Company, as unpaid vendors to any right of stoppage in transitu, or any other right over them whatever, more especially as it was stated that no freight was to be paid for the cotton, "being owners' property," which was inconsistent with the property remaining in Menlove and Company. It was also further contended for the plaintiffs, that the captain had no power to bind the bankrupts by the special terms of the bill of lading, and that the delivery must be taken to be absolute to the vendees; and further, that if Menlove and Co. had any lien, the assignment of the bill of lading to the bankrupts divested that lien, and deprived Menlove and Co. of all power over the goods. The cases mainly relied upon by them in support of their principal point, were *Ogle v. Atkinson*, 5th Taunt. 759; *Cox v. Harding*, 4 East. 211; the case of the *Constantia*, reported in Abbott on Shipping, *Bohlingk v. Inglis*, 3 East. 381; *Fowler v. M'Taggart*; and *Taylor v. Kimer*; the cases cited in it. All these cases, however, are clearly distinguishable from the present. In *Ogle v. Atkinson*, the general circumstances bore a close resemblance to the present. The vendor of the goods, delivered them on board the ship of the vendee, which had been sent by him to receive them as the goods of the latter; but the vendor wishing to preserve a control over them, prevailed upon the captain to sign a bill of lading, in which there was a blank for the name of the consignee, assuring him that it was of no consequence, as the goods were to be delivered to his owner, and the vendor then transmitted the bill of lading to a third person, who was to stop the delivery of the goods to the vendee, unless he accepted certain bills. But the Court held that the vendee, under such circumstances, was not entitled to the goods without accepting the bills, for the blank for the name of the consignee was either immaterial, as represented to the captain, or immaterial as the vendor proposed to make it, and, in that case, a fraud was practised on the captain, which could not prevail against the consignee; and Lord Chief Justice Gibbs, in his judgment, says, "It is true the goods might have been delivered on board the ship on the terms on which the defendant contends they were delivered;" and then he goes on to shew that they were not, by reason of the circumstances under which the captain was persuaded to sign the bill of lading with a blank for the name of the consignee. The case, therefore, is clearly distinguishable from the present, but it is important, as shewing that a delivery on board the vendee's own ship, and to his own master, is not inconsistent with the vendor's annexing terms to the delivery, which may enable them to retain a right to

claim them, and prevent any delivery if the terms are not complied with. The case of *Cox v. Harding* decided no more than this, that where goods are shipped on account of, and at the risk of the vendee, the property is vested in them, subject only to the consignor's right of stoppage in transitu, which right is gone, unless exercised before the completion of the voyage and delivery into the possession of the vendee. In the case of the *Constantia* also, it was held that when orders have been received and executed, and delivery has been made to the master of the ship, and the bills of lading signed, the seller is *functus officio*, and has no right to vary the consignment, except in case of insolvency. Neither this case, nor that of *Cox v. Harding*, is an authority for the point relied upon by the plaintiff, that the delivery on board the ship of the bankrupts to their master was, in effect, a complete delivery to them, so as to vest the property absolutely, and deprive the vendors of the power of stopping the goods in transitu, or otherwise acquiring any right or control over them. The case of *Bohlingk v. Inglis* was cited upon the part of the plaintiffs in support of their distinction between the case of goods loaded on board a general chartered ship, where the owners of the ship are merely carriers, and the master their servant, and that of goods loaded on board the vendee's own ship, the master of which is his servant; but neither that case, nor the case of *Taylor v. Kimer*, cited in it, shews more than this, that where the delivery of goods on board a ship is not for the purpose of conveying them to the consignee, but an absolute delivery to him when put on board, all power over the goods is lost to the vendor, and the relation of consignor and consignee no longer exists, and the property is absolutely vested in the vendee. Other cases were cited on the part of the assignees, to which it is not necessary to refer, as they do not appear to us to add materially to the effect of those to which we have already adverted. On the part of the defendants it was contended that Menlove and Co. had never parted with the property in the goods to the bankrupts, but had reserved them until they were paid the purchase-money, notwithstanding the terms of the invoice and the statement in the bill of lading, that no freight was payable for the cotton, it "being owners' property;" and we are of opinion, upon the facts of the case, that the learned judge was right in directing the verdict to be entered for the defendants on the trial, and that they now are entitled to our judgment. It appeared, by the bill of exceptions that it was agreed on both sides at the trial, that there was no question of fact for the jury, and that the judge should direct them how they should find their verdict, and he being of opinion upon all the facts of the case, that Menlove and Co. had not delivered the cotton on board of the ship, to be carried for, and on account, and at the risk of the vendees, but that they intended to preserve their right as unpaid vendors, he directed the verdict to be entered for the defendants. There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or their assigns, and that, therefore, was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship; the vendors still reserved to themselves at the time of the delivery to the captain a *jus disponendi* of the goods, which he, by signing the bill of lading, acknowledged, and without which it may be assumed the vendors would not have delivered them at all. The question really is, whether any and what effect is to be given to the terms in the bill of lading, making the goods deliverable to the order of the vendors; for if by those terms they reserve to themselves a dominion over the cotton, it would not pass to the assignees. The invoice would pass as property whatever its terms might be; the property would only pass upon the delivery; and the only effect to be attributed to the form of expression in the invoice or the bill of lading would be as indicating the terms on which the goods were delivered. The plaintiffs in error rely on the terms of the invoice and the expression in the bill of lading, that the cotton is freight free as being owners' property, as shewing the delivery on board the ship was with the intention to pass the property absolutely. But the operative terms of the bill of lading as to the delivery of the goods at Liverpool, and the letter of Menlove and Co. of the 23rd of October, shew too clearly for doubt that notwithstanding the other terms of the bill of lading and the invoice, Menlove and Co. had no intention, when they delivered the cotton on board, of parting with a dominion over it, or of vesting the absolute property in the bankrupts. On this part of the case, the decisions of the Court of Ex. in *Van Castell v. Booker*, 2 Ex. 691; and *Waite v. Baker* in the same volume, p. 1, are authorities directly in favour of the defendant. The plaintiffs further insisted that the captain had no power to bind the bankrupts by

## JUDGE'S CHAMBERS.

such terms in the bill of lading as would leave the property still in the control of the vendor, and yet engage that the cotton should be freight free. Whether, as the cotton was actually carried, the owner of the ship, as such, might not be entitled to freight on a *quantum meruit*, notwithstanding the terms of the bill of lading, is a point not necessary now to determine. But with respect to the question whether the plaintiffs can set up a want of authority in the master, so as to vest the property in the goods in the bankrupts immediately upon the delivery, notwithstanding the special terms on which they were delivered, and the acceptance by the captain, we are clearly of opinion that it is not competent for them to do so; and that as Menlove and Co. delivered the cotton on board on special terms, which the captain was not bound to accept, but without which they would not have delivered them, which would preserve to the defendant a control over them, the bankrupts cannot treat the delivery to the captain as a delivery to them, as their own property, when it was expressly agreed they were not to be delivered to the bankrupts, but to the order of the vendors, and the want of authority of the master to accept them on such terms will not have the effect of vesting the property absolutely in the bankrupts. *Nicholls v. Ede*, 11 A. & E. 888, is a strong authority in favour of the defendant. With respect to the question whether the transfer of the bills of lading by themselves to the bank at Charleston, divested their power over the goods, we are of opinion it did not. Menlove and Co. were the purchasers of the goods, and reserved to themselves, by the terms in which they delivered them on board the ship, a property in the goods until payment was duly made, by indorsing and depositing the bills of lading in the bank at Charleston as security; and did not divest themselves of the property in the goods which they had reserved, and were in a situation to claim the goods as against the bankrupts by their agents at Liverpool. They never had divested themselves of the property in the goods, or of the possession, except by delivery to the captain. This is not the case of delivery to a carrier for the purpose of his delivering them to the vendor, but a delivery to a carrier for the purpose of that carrier delivering them according to the order of the vendor, who retains more than a mere lien upon the goods. Neither the bankrupts nor their assignees ever had a property in the cotton as against the vendors, and an objection to their title may properly be taken under the plea of non possession. It was said that as Menlove and Company had funds of the bankrupts in their hands to some, although to a very small extent, they were not unpaid vendors to the full extent. But this really makes no difference, as no particular portion of the cotton was bought with these funds, and the bulk generally being purchased by Menlove and Company with their own funds or credit, they retained a property in the whole of the goods until payment for the whole. But a question was made as to the admissibility of some of the evidence; but as the matter of fact was a question for the jury, we are of opinion, independently of the evidence objected to, that there was sufficient unobjectionable evidence to warrant the direction of the learned judge, and it becomes immaterial to consider whether the evidence that was objected to was receivable or not. Our judgment therefore is for the defendants in error.

*Judgment for defendants.*

## JUDGES' CHAMBERS.

Reported by DAVID CATO MACRAE, Esq. of the Inner Temple, Barrister-at-law.

Thursday, July 3.  
(Before Mr. Justice WILLIAMS.)  
WILKS v. TURNER.

*An insolvent petitioner under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, upon the refusal of his final order, having been taken in execution, and having remained in prison above twelve months, and the Insolvent Court declining to discharge him under s. 28 of 7 & 8 Vict. c. 96, which enacts that no debtor shall be imprisoned on any process for more than twelve calendar months, may be discharged by a judge at chambers.*

This was an application by Messrs. Lewis, of Ely-place, for the discharge of the defendant in this action under the following circumstances:—The defendant, James Thomas Turner, filed a petition for protection under the statutes 5 & 6 Vict. 116, and 7 & 8 Vict. c. 96, in the Court for Relief of Insolvent Debtors, and was heard before Mr. Commissioner Law on the 19th of April, 1851, when he was opposed by the plaintiffs in the action. A day was named for the final order; but upon that day, being again opposed, the case was adjourned *sine die* without protection. The day after (May 11, 1850), the defendant was arrested in execution and committed to the debtors' prison. After the lapse of six or seven months, an application was made to the commissioner to grant him a protecting order under sec.

28 of 7 & 8 Vict. c. 96, but the application was refused. Subsequent applications to the same effect were attended with the same result. To-day (July 3, 1851)

Lewis applied to his lordship to discharge the insolvent out of custody, directing his attention to the 7 & 8 Vict. c. 96, s. 28: "Provided always that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition, in case the final order shall be refused or shall not be made, or in case the protecting order shall not be renewed."

Morris, the plaintiff's solicitor, opposed the application.

His LORDSHIP doubted his jurisdiction, and thought that, as this was the first application of the kind, and attended with some difficulty, it ought to have been made in term before the full Court.

Lewis said, the poverty of the insolvent was so great that he could not pay the fee on swearing the affidavit. Probably, as Mr. Baron Parke was at chambers, his lordship would be good enough to consult with him.

WILLIAMS, J. acceded to this request, and after consulting with Mr. Baron Parke, made the following order:—"Edward Frederick Wilks and Another v. James Thomas Turner. Upon hearing the attorneys or agents on both sides, and upon reading the affidavits of J. T. T. I do order that the defendant be discharged out of the custody of the sheriff of Middlesex as to this action, the defendant having filed a petition in the Court for Relief of Insolvent Debtors in England under the statutes of 5 & 6 and 7 & 8 Vict. c. 96, and 116, and more than twelve months having expired since the defendant's final hearing under such petition. Dated 3rd day of July, 1851. (Signed) E. V. Williams."

## BANKRUPTCY.

## IRISH BANKRUPTCY COURT.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

June, 1850.

Re KEELEY.

*Uncertificated bankrupt—Seizure by assignee. Where a bankrupt who had not obtained his certificate was allowed to carry on trade for five years, and where he held out to parties who gave him fresh credit that a partnership existed between himself and his brothers, although no bona fide partnership did in fact exist, the assignee having obtained the warrant of the Court under which all the property in the bankrupt's possession was seized by the messenger, the commissioner directed the goods to be restored, because all the facts of the case were not before him when he granted the warrant, although no fact had been intentionally suppressed or kept back by the assignee.*

The bankrupt in this matter had been a trader in Galway, and in the year 1845 a commission of bankruptcy was sued out against him, and under that commission Mr. David Scott, Merchant, Dublin, was appointed the trade assignee. The bankrupt passed his final examination, the assignee being friendly; no creditor opposing, he set about obtaining his certificate, which the assignee and other creditors signed, but he never went before the commissioner to get it allowed. It appeared that the stock in trade which was in his possession at the time of the bankruptcy was sold to his sister at a valuation, and was paid for by her promissory note to the assignee indorsed by the bankrupt and his two brothers. The business was then carried on, under the name of "Keeley, Brothers," which was over the door, and many of the invoices were in the name of "Keeley and Co." The sister, after a little time, if she ever had any claim, relinquished it and went into a convent in Galway. The trade went on for five years, the assignee himself dealing with the parties occasionally during the mean time. The bankrupt became embarrassed again and entered into a composition with his creditors, and the assignee actually became security for some of the composition bills. After the composition, it appeared that the bankrupt had been tried in London for endeavouring to obtain goods under false pretences, but the prosecution was abortive, or at least the bankrupt was not called up for judgment. About this time a creditor issued an attachment and seized the goods in Galway, and one of the brothers procured the sister, who was in the convent, to make an affidavit of debt as owner of the goods in question. With a view to defeat the previous attachment that was put in soon after this period, the bankrupt and his assignee, who had been previously good friends, fell out, and the assignee, upon a strong affidavit detailing the trading without having obtained a certificate, and the fact of the bankrupt having a large stock of goods in his possession, obtained a warrant under which the whole of them were seized and removed from Galway to Dublin.

*Fitzgibbon now came in on the part of the post creditors who had dealt with the bankrupt and his brothers as "Keeley and Co." and who swore that they were induced to deal with him in some instances on account of the assignee holding him out to the world as a person competent to trade, and having, in fact, traded with him himself. He contended, too, that the property seized was partnership property, and that it was not subject to the operation of the commissioner's warrant; that it would, under all these circumstances, be a gross injustice to post creditors to seize their property, and make it available for the creditors under a bankruptcy of so remote a date, and prayed that the goods might be restored for their benefit.*

Fitzgerald, Q.C. and Creighton, for the assignee, contended that as to the partnership, it had no existence in reality, and was only assumed when it suited the purposes of the parties; that when the messenger made the seizure, the bankrupt's brothers, who were present, never set up any claim on the ground of partnership; on the contrary, it appeared from their books, and from proceedings taken in various courts, that the property belonged to the bankrupt, and that whenever he found it necessary to sue any of his debtors, he did so in his own name, and made his brothers his witnesses. That his Honour ought not to entertain the application of restoring goods to a person incompetent to trade; that, even if the post creditors had equities over the antecedent creditors, the property seized should be administered through the official assignee of the Court, and not handed back to the bankrupt.

His Honour said, the application was sustained by the affidavits of a great many post creditors, chiefly English, who dealt with the bankrupt and his brothers as if a partnership existed, and who saw that the assignee had not only dealt with the bankrupt himself, but, in some instances, recommended him as being worthy of credit. He did not believe that an actual bona fide honest partnership existed; but as some creditors with whom they dealt had not the means of knowing the exact nature of the sort of unity of purpose that occasionally existed in the form of a partnership, and gave credit as if an honest partnership existed, he would not, if he had in the first instance known all these facts, have granted his warrant, and he would be therefore reluctantly obliged to direct the goods to be restored, and put back into the shop in Galway, although, at the same time, it was quite clear that the assignee had not wilfully concealed any thing.

Re KEELEY.

*Proof by wife on her husband's estate.*

*Where one of the trustees of a wife's marriage settlement is dead, and the other out of the jurisdiction, on the husband becoming bankrupt, the Court will permit the wife of the bankrupt to join the executrix of the deceased trustee in making a proof on her husband's estate.*

The bankrupt was an architect in Mayo, and upon his marriage, some four or five years before the bankruptcy, he received a fortune of 500l. with his wife. A settlement was executed, and two persons named, Kelly and Larmony were appointed trustees. Collateral with the settlement a bond and warrant were executed by the bankrupt to the trustees to secure the 500l. Kelly, one of the trustees, died before the bankruptcy, and his widow administered, and obtained probate of will. The other trustee had gone to reside in Canada, and Levy now put forward a proof in the joint names of the executrix of Kelly, the deceased assignee, and the wife of the bankrupt. All the circumstances of the case were minutely stated in the proof, and his Honour said, that although it was of a very unusual character, he would receive it, and permit the dividend to be paid to the executrix of the deceased trustee for the benefit of the bankrupt's wife.

Re McDONNELL.

*Uncertificated bankrupt—Seizure by assignee. Where a bankrupt who had not obtained his certificate has been two years in trade, and property obtained from post creditors has been seized by the assignee, the commissioner will not, on the application of the bankrupt, direct it to be restored, although sustained by affidavits made by the post creditors, stating that they were chiefly induced to give credit to, and deal with, the bankrupt on account of seeing one of the assignees deal with him. The commissioner will direct a portion of money seized under such circumstances to be given to the bankrupt for his defence.*

The bankrupt in this case had been a baker at Rathfarnham, near Dublin, and in March, 1849, a commission of bankruptcy was sued out against him, under which it appeared that two dividends, amounting to 11s. in the pound, had been paid, and a further dividend of about 2s. more was expected. His examination was adjourned *sine die*, in June, 1849, and with the sum of 110l. which the trustees of his wife's marriage settlement received as a dividend on his estate, and which he lent to him, he went into



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business again as a baker, and purchased flour for ready money from time to time from one of his assignees. He got credit from other flour factors to the extent of about 500*l.* and in June, 1851, the assignees under the bankruptcy obtained the commissioners warrant and seized the whole of the property in his possession.

Levy now came in upon an affidavit made by the bankrupt, claiming the property to be restored for the benefit of the post creditors, and also asking for a portion of money seized by the messenger to be given to the bankrupt for the purposes of his defence. There were many of the post creditors in court who were anxious that the property should be given up to the bankrupt, and it might be desirable to let the motion stand over until they would make affidavits. The case accordingly stood over from Monday to Thursday, and his Honour directed that 10*l.* should be given to the bankrupt for the purposes of his defence.

Fitzgibbon, Q.C. with whom were Maher and Leary, applied that the property should be given up, or that his Honour should direct the post creditors to be paid their debts in full. His Honour would not permit the alternative part of the motion to be gone into; the application on the part of the bankrupt should be distinct from any application on the part of creditors, but he would allow the affidavits made by creditors to be used in sustaining the bankrupt's case.

Levy then opened affidavits made by all the creditors who wished the property to be restored to the bankrupt, and allow him to pay them as best he could. They gave credit, seeing the assignee dealing with him.

Fitzgerald, Q.C. and Creighton, for the assignee, opposed the motion.

Maher in reply.

His Honour refused the application, and directed the property to be sold, leaving the post creditors to come in with a view to establish a priority if they should be so advised.

## Equity Courts.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

June 13 and 14.

GUNDRY v. FINNIGER.

*Will—Construction—Next of kin, period of determining—Next of kin, ex parte maternâ—Words of surplusage.*

A testatrix by a codicil to her will gave a sum of stock to trustees, on trust, for her grandniece, M. L. T. for life, remainder to her children; but in case she died without issue, or they should all die before their shares became payable, "then on trust, after the decease of M. L. T. to pay or assign, and transfer the stock to testatrix's grandnephew, N. T. S. P. if he should be then living; but if he should be then dead, then unto his next of kin, in a legal course of distribution, ex parte maternâ." N. T. S. P. died in the lifetime of M. L. T. who was then his next of kin. M. L. T. afterwards died without issue.

Held, that the words "ex parte maternâ" were mere surplusage, and did not exclude next of kin ex parte paternâ, and that the next of kin of N. T. S. P. at the time of his death were entitled under the ultimate limitation.

The question in this case arose upon the codicil to the will of Lucy Heath, by which she gave a sum of 4,316*l.* 3 per cents. to trustees, on trust, for her grandniece, Mary Lucy Tuckey, for life, with remainder to her children; but in case she died without issue, or in case they should all die before their shares became payable, "then upon trust, after the decease of the said Mary Lucy Tuckey, to pay or assign, and transfer the said stock unto her (the testatrix's) grandnephew, Nicholas Thomas Skull Ponting, if he should be then living; but if he should be then dead, then unto the next of kin of her said grandnephew, in a legal course of distribution, ex parte maternâ." Nicholas T. S. Ponting died in the lifetime of his sister, Mary Lucy Tuckey, who was then his next of kin. M. L. Tuckey afterwards died without issue, and at that time the next of kin of N. T. S. Ponting were persons named "Ashe." The question was to whom the stock in question now belonged.

Roswell and Hobhouse, for the plaintiff, the trustees, who for their own protection had instituted the suit, opened the case.

Lloyd and Glass, for the representatives of Mary Lucy Tuckey, contended that the next of kin of N. T. S. Ponting, intended by the testatrix, were the persons filling that character at the period of his death.

Walpole and Prior, for the Ashes.

The following cases were cited:—*Seiffert v. Badham*, 9 Beav. 370; *Holloway v. Holloway*,

5 Ves. 399; *Beck v. Burn*, 7 Beav. 492; *Clapton v. Bulmer*, 10 Sim. 426, and 5 Myl. & Cr. 108; *Booth v. Vicars*, 1 Coll. 6; *Say v. Creed*, 5 Hare, 580; *Smith v. Palmer*, 7 Hare, 225; *Bird v. Wood*, 2 S. & St. 400; *Urquhart v. Urquhart*, 13 Sim. 613; *Vaux v. Henderson*, 1 Jac. & Walk. 388.

Saturday, June 14.—The MASTER of the ROLLS.

—I do not entertain any serious doubt about the proper construction to be put upon this clause of the will. The construction which appears to me to be proper to put upon the will is, that this money was given to Mary Lucy Tuckey for her life, after her death for her children; that in case she died without any children (I will deal presently with the observations made by Mr. Prior), or in case the children died without having attained twenty-one, that then it was to go to the grandnephew, and that, if the grandnephew was not then alive at that time, the persons who were his next of kin at the time of his death were to take it. Now I think, although it is necessary to construe this bequest upon the terms to be found in the will, and to be found in this codicil, I think, as, in my opinion, Mr. Lloyd justly observes, some guide to the construction may be found by looking at what was done by the previous will. The will gives this property to the daughter for her life, afterwards to her children, and in case she died without having any children, it gave the property absolutely to Nicholas Thomas Skull Ponting. Between the interval of the will and the codicil, Mary Lucy Tuckey had married, and accordingly the testatrix revokes her bequest, for the purpose of preventing the husband of M. L. Tuckey from getting any control over the fund; and that seems to be the principal object of this bequest; and accordingly she introduces such limitations as will effectually prevent the husband of M. L. Tuckey from obtaining any control over the fund, which under the will he might have done. There is no proof at all that she intended to dispose of the property so far as Nicholas Thomas Skull Ponting is concerned, differently from what she had done by the will. No fresh event had arisen to make any difference upon that subject, and though it cannot at all control the proper construction to be put upon the words of this bequest, yet, if there be any reasonable ambiguity upon the subject, it may be a guide to direct the Court to ascertain the true construction to be put upon it. Now it is urged, with great force I think, by Mr. Walpole, that in all cases where there is a sum of money to be raised and a distribution to be made on a particular event among a class, the class is to be ascertained at the period when the distribution is to be made, and that, consequently, this case is governed by the case of *Beck v. Burn*, and in effect, by *Clapton v. Bulmer*, which, I think, is very much to the same effect, that if a sum of money is directed to be raised and paid at a particular event, and to be paid amongst a class of persons, the class of persons is to be ascertained at that period. And that observation would have great weight with me, if the words here were, "to pay, assign, and transfer the said stock unto the next of kin of my grandnephew, in a legal course of distribution, ex parte maternâ;" that is to say, if the gift here had omitted altogether the gift to the grandnephew N. T. S. Ponting himself in the first instance, because in that case the case of *Clapham v. Bulmer* would exactly have applied, in which is a similar direction; and also the case of *Beck v. Burn*, which lays down the principle which is a familiar rule of construction. But in this case it is necessary, in the first instance, to arrive at the conclusion that those words are properly to be construed so as "to pay, assign, and transfer the stock unto the next of kin of my grandnephew, in the legal course of distribution;" but the words are, "they are to be transferred to him if he be then alive; and if he be not alive—if he be then dead—then unto his next of kin." Now, that makes a very considerable difference between the case of *Beck v. Burn*, and the case of *Clapton v. Bulmer*, because you must there ascertain that it is not intended to be to a class of persons, to be ascertained at that period, which it might be, if it were not for the previous direction to be paid to Ponting himself. Now, I feel satisfied that the word "then" is not a word which points to the time, but that it only points to the event which has taken place. The rule has been very properly admitted to be, that in all cases it shall be paid to the next of kin, to be ascertained at the death of the person who is the first taker, unless there be some special words to shew that that construction cannot properly apply. I repeat the observation which I made when Mr. Lloyd was arguing, that I never accurately understood the meaning of the words "to next of kin" to be ascertained at any period different from that at which the person himself dies. "Next of kin" are words having a distinct and legal meaning, which do not point to persons who are different persons at different periods, but point to the persons who must be ascertained at a future period, namely, at the death of the person to whom they are to be the next of kin. And, therefore, if you say next of kin of a person, at a

period when he did not die, you really are using words with no sensible meaning or expression; but you ought to make them sensible by saying, "persons who would have been his next of kin if he had died at a period other than when he did die." That is giving a very peculiar and strong force, towards which I do not think there is any rule of law to justify. Now, it is to be observed, there are the words "ex parte maternâ," which certainly produced in my mind considerable difficulty at first. He gives it here to the "next of kin of my grandnephew in a legal course of distribution." Now, a legal course of distribution would have given it, in case of the death of N. T. S. Ponting before the death of Mary Lucy Tuckey, or her issue attaining twenty-one, either to Mary Lucy Tuckey, or to such of her children as then survived her and had not attained the age of twenty-one. Those were necessarily persons *ex parte maternâ*. It is contended in argument that, by using the words "ex parte maternâ," it necessarily means to exclude the persons *ex parte paternâ*. But I do not think that I am at liberty, or that it is justifiable, to introduce that expression into the will. The case of *Say v. Creed* was a very strong case, and I remember it perfectly. That was a case giving a property to a certain person on the death of Lucy Brown to the heirs *ex parte maternâ*, and was not *ex parte paternâ*, as Lucy Brown necessarily filled both characters, if she survived her, which it was possible she would do, and she expected her to take. There seemed to be, from the effect of that, a necessary exclusion of Lucy Brown herself, and that, consequently, the heirs *ex parte paternâ* were necessarily excluded, and that those *ex parte maternâ* must take. But in this case the testatrix must have known that, if Mary Lucy survived Ponting, either she or her children, or the children of N. T. S. Ponting, must have been his next of kin *ex parte maternâ*—that they would have filled both characters. Now is it reasonable to suppose that she intended to exclude all the children of N. T. S. Ponting (which she necessarily would have done), who was an object of her bounty, and to whom she evidently intended to give considerable benefits, if all of those were to be excluded? Was it to be intended, if this event had taken place, which was suggested by Mr. Prior, that Mary Lucy Tuckey should have died, should have left a daughter, who should have married, and who should have died under twenty-one; that she should not have had the benefit of this, which might have been of considerable importance to her, which she would not have had the benefit of, if the next of kin *ex parte paternâ* were to be entirely excluded. In addition to these observations, the case of *Smith v. Palmer* appears to me to be a case which I cannot in substance distinguish from the present, except in the observations made by Mr. Walpole, which is a just observation with respect to the distribution taking place after the death of Mary Lucy Tuckey. But that does not appear to me to produce any difference, or to vary this case from the others, for the reason which I stated in the outset of the observations which I have made, namely, that those cases refer to a distribution among a class, whereas, in my opinion, this is not a distribution to a class, but merely intending to carry into effect what he had already done by his will, that of giving it to N. T. S. Ponting, if he should be alive, and if not, in the legal course of distribution, exactly as he would have taken it if he died intestate; and treating, therefore, the words *ex parte maternâ* as nothing more than this—as words of surplusage, and mere words expressing what the testatrix knew must be the course of devolution, if it revert in the legal course of distribution, namely, that it would go to persons who were next of kin *ex parte maternâ*. It is true, they would also fill another character; but I am of opinion that this is the only mode in which I can reasonably construe the testator's will, and that in so doing I am conforming to the rule which this Court has usually adopted, and of late years very strongly in cases of this description; and also that I am following the case of *Smith v. Palmer*, to which I fully accede.

Monday, July 3.

ZULUETA v. VINCENT.

*Practice—Common injunction—Dissolving of and reviving after amendment of bill—Affidavit. Where an injunction is dissolved on the merits, it may be revived after amendment on special motion, and on verification of amendment by affidavit.*

An affidavit of the truth of the amendments is required to guard against the plaintiff's putting on the record a fictitious case by amendment.

The affidavit of the truth of the amendments and the affidavits to extend the common injunction are not allowed to be contradicted by affidavits on the part of the defendant; but the defendant may shew, either that it is impossible, on the plaintiff's statement, that the answer can afford a defence at law, or to shew that the case is not materially varied by the amendments.

## ROLLS COURT.

## ROLLS COURT.

## V. C. KNIGHT BRUCE'S COURT.

The plaintiff obtained the common injunction to stay proceedings at law, but which, on the coming in of the answer, had been dissolved on the merits. Plaintiffs amended their bill, and the defendant, who was resident at Cuba, having made default in answering, they now moved, on notice, to revive the injunction under the 3rd Order of 9th May, 1833, upon an affidavit of the truth of the amendments. The affidavit of the plaintiffs was as follows:—"That to the best of our knowledge, remembrance, information, and belief, the facts stated and charged by way of amendments in our bill, in this suit, are each and every of them respectively true."

*Roupell and Shadwell*, in support of the application, relied simply upon the affidavit; and as to the form of the affidavit, they cited *Gregory v. Wilson*, 11 Jar. 1095.

*Lloyd and Wilcock*, contra, asked that the motion should stand over to give an opportunity to file affidavits in opposition.

The MASTER of the ROLLS.—In this case I am satisfied that this affidavit cannot be contradicted. Lord Eldon, in *James v. Downes*, observed that the Court gives credit to the bill in the first instance, if there is also a default by the defendant; but that in the latter case (that is, where the common injunction has been dissolved on the merits) the Court will not give credit to the amendments; and upon granting a second injunction requires two conditions to be complied with, namely, default on the part of the defendant, and an affidavit of the truth of the amendments. But he says nothing which would imply that on that occasion the Court will try the truth of the amendments. A more inconvenient course one cannot conceive than to have the merits of the cause tried on affidavit in the first instance, and then repeated a second time upon the answer coming in. The reason for requiring an affidavit of the truth of the amendments is to guard against the plaintiffs putting on the record a mere fictitious case by amendments. The Court requires notice to be given to the defendant to enable him to shew that the amendments, if true, do not materially vary the case on which the Court has already dissolved the injunction. I believe that no case can be found in which either this affidavit or the affidavits to extend the common injunction have been allowed to be contradicted, but it is open to the defendant to shew, in the first instance, that it is impossible, on the plaintiff's statement, that the answer can afford a defence at law; and, in the second, to shew that the case is not materially varied by the amendments. I conceive that the injunction now to be granted would not stay trial, but that a motion must be made to extend it on the next seal.

July 7 and 9.

READ V. STRANGEWAYS.

Will—Legacy—Particular fund for payment—Abatement.

The sum of 1,279l. or property to that amount, was bequeathed by A. to B. B. after referring to the will of A. and mentioning his desire to make the following legacies to A's relations, bequeathed to them legacies amounting to 2,800l. and proceeded:—"But if the property I became entitled to under the will of A. should fall short and be deficient in paying such legacies, my desire is that 500l. out of any other part of my personal estate," shall be paid and applied for that purpose:

Held, that the legacies, though nominally amounting to 2,800l. were to be paid only to the extent of the sum of 1,279l. and 500l. and that therefore they must abate.

Lord Aston, the testator in the cause, had become entitled to certain real and personal estate under the will of Elizabeth Horn, and the Master had in the cause found that the whole of the property amounted in value to the sum of 1,279l. 5s. Lord Aston by his will expressed himself in the following terms:—"And whereas I am become seized and possessed of real and personal property under the will and codicil of my late much-esteemed friend Elizabeth Horn, of Middleham, in the county of York, spinster, and am therefore desirous of making the following devise and bequest to her relations and friends, that is to say, I give and devise unto Emma Isabella Lamb," &c. [The testator here gave legacies to several persons by name amounting in the whole to the sum of 2,800l. and then proceeded]:—"All which several legacies I direct shall be paid within six months after my decease; but if the amount of the personal estate and effects which I became entitled to under the will of the said Elizabeth Horn should fall short and be deficient in paying and satisfying these last mentioned legacies and annuities, then my desire is that the sum of 500l. out of any other part of my personal estate shall be paid and applied for that purpose."

The amount of the property bequeathed by Miss Horn (amounting in value to 1,279l. 5s.) together with the 500l. making in all 1,779l. 5s. fell short by the sum of 1,020l. 15s. of the sum required for pay-

ment in full of the legacies of 2,800l. so bequeathed by the testator; and hence the question arose whether the legacies were to abate or to be paid in full out of the general personal estate of the testator. The cause now came on to be heard on further directions.

*Roupell and Elderton* contended that the legacies ought to abate, and that the bequest was not a bequest of the property derived from Miss Horn, but of a limited amount, which was to be ascertained in a particular manner. The 500l. mentioned in the will was to be added to the value of the property so derived under Miss Horn's will, and that aggregate sum and no more was to be applied in payment of the legacies. To extend the amount so to be applied beyond that aggregate sum would be to strike the latter words out of the will. The case was not one of a gift of a legacy payable out of a particular fund which took effect notwithstanding the failure of the particular fund, but a gift out of the personal estate expressly limited in its amount. They cited *Savile v. Blacket*, 1 P. Wms. 779; *Hancox v. Abbey*, 11 Ves. 179.

*Walpole, Calvert, B. G. White, and Birbeck*, for parties in the same interest, cited *Page v. Leapingwell*, 18 Ves. 463.

*Teed and Faber*, for the heir.

*Lloyd and W. M. James*, for the executors, and representing the interests of the absent legatees.—It is admitted that these are not specific legacies, and they must, therefore, either be demonstrative or general legacies and must be paid in full. It is evident that the testator was under a mistake as to the amount of the property given to him by Miss Horn, but though his computation turned out to be erroneous, that does not affect the question, nor does it at all invalidate the gift or limit the extent of the testator's bounty. In the construction of wills, the intent is principally to be regarded; and to answer that, a mistake in the computation ought to be relieved against in cases of this sort. (*Milner v. Milner*, 1 Ves. sen. 106.) In that case a testator gave his daughter 3,500l. which sum, he stated, would, "with 6,500l. she is entitled to," make up 10,000l. which latter sum he designed she should have for her fortune. The daughter happened to be entitled to only 5,000l.; but it was held that she was entitled to a legacy of 10,000l. The original gift is an express gift of general legacies to a certain amount, and the subsequent are not sufficient to cut down the absolute gift. They cited *Trevor v. Trevor*, 5 Russ. 24.

*Roupell*, in reply.—After making the gifts absolutely to the objects of his bounty, it was competent to the testator either to amplify or restrict them; and he has restricted them by plain unambiguous expressions, which cannot be disregarded without in effect striking four lines out of the will, which the Court has no authority to do.

Wednesday, July 9.—The MASTER of the ROLLS.—In this case I have come to the conclusion that the legacies must abate; and I reserved my judgment for the purpose of looking through the cases, and seeing if I could find any applicable; but I find that they do not, any of them, apply to or govern the present case. After all the arguments which have been brought forward by counsel on behalf of the legatees, I feel satisfied that it is not possible to give the legatees anything out of the testator's estate beyond the aggregate sum composed of the value of Miss Horn's estate and 500l. without doing clear violence to the express words. Observe the terms of the will. It gives certain legacies to certain persons, which the testator declares shall be paid within six months after his death; and he prefaces the bequest with a recital of his motives. It is so far clearly intended that these legacies should have been payable out of his general estate, and payable within six months after his death. But he then adds these four lines:—"But if the amount of the personal estate and effects which I became entitled to under the will of the said Elizabeth Horn should fall short and be deficient in paying and satisfying the said last-mentioned legacies and annuities, then my desire is, that the sum of 500l. out of any other part of my personal estate shall be paid and applied for that purpose." I think it was justly observed that I must strike these latter words out of the will, unless I can confine the amount of the legacies to 500l. beyond what was taken by the testator under Miss Horn's will. I see no way of giving more without expressly striking four lines out of the will. If the testator had said 500l. is to be applied in payment of certain legacies only, that could be so applied; but the testator expressly says that if the property which he had derived under the will of this lady shall be deficient, then 500l. out of the other personal estate is to be applied for that purpose, that is, 500l. in addition to the amount of the property of Miss Horn. I certainly was at one time rather impressed with a desire to discover some means by which these legatees might receive their legacies in full for I believe that the testator thought that the property would be sufficient; but I cannot find any words applicable, or any expression to sup-

port such a construction. The authorities cited do not apply to this particular will, and the case must therefore be determined on the express words of the will itself alone; and I should be doing great violence to the will, and should strike out four lines, if I do not declare that the value of the property derived from Miss Horn, together with the 500l. is alone applicable to pay these legacies; and that sum, therefore, must be divided among these legatees, and the legacies must abate proportionably.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLEN, Esq. of the Middle Temple Barrister-at-Law.

Friday, June 27.

FORBES v. LIMOND.

Demurrer—Parties—Trustee.

In 1847 A. and B. executed a deed of inspection in favour of their creditors, by which C. the inspector, was to distribute from time to time the realized assets among the creditors, who should execute or accede to the deed. In 1849 C. declared a dividend upon the debts, including D's debt; and, after paying some of the dividends, retained those of D. and others. A. and B. afterwards took the benefit of the Insolvent Act, and C. paid the reserved fund to the official assignee. D. on behalf of himself and other the creditors of A. and B. who had executed or acceded to the deed, but had not received their dividend, filed a bill against C. seeking to have the reserved fund appropriated in payment of the dividend to himself and the other creditors, and the accounts taken; and that C. might be declared personally liable to pay the said dividend, &c. There was no allegation in the bill that the plaintiff did not know who the other creditors were, or that they were inconveniently numerous. A demurrer to the bill was allowed on account of the absence of parties, C. as a trustee, being entitled to be delivered from the whole trust.

The bill in this case was filed by Charles Forbes and others "on behalf of themselves and all other the creditors of Messrs. Lyall, Matheson, and Co. who have executed or otherwise acceded to the terms of the deed of inspection hereinafter mentioned, but have not received any dividend on their respective debts, and who shall come in and contribute to the expenses of this suit" against William Limond. The bill stated that in 1847 Messrs. Lyall, Matheson, and Co. merchants at Calcutta, suspended payment, and that at a meeting of the creditors of the firm it was determined that the firm should wind up its affairs under inspection; and that, accordingly, a deed of inspection, dated the 1st of January, 1848, was made between the partners in the firm of Lyall, Matheson, and Co. of the first part; William Limond, of the second part; and the creditors executing the deed, of the third part; and thereby the parties of the first part covenanted, among other things, to get in and convert into money the assets of the partnership, and to pay the same into the hands of W. Limond, or the inspector for the time being, to be by him applied, first, in defraying the costs, charges, and expenses, and then to pay and distribute the residue unto and among the several creditors of the parties of the first part who should have become parties to and should have executed the said indenture, or should have otherwise acceded to the terms thereof, such payment and distribution to be made from time to time when there should be sufficient to pay 5l. per cent. on the amount of their respective debts. In February, 1849, W. Limond, having a clear stamp, declared a dividend of 10l. per cent. upon the debts which included the plaintiffs'. Several of these dividends were paid, and Limond retained the residue as trustee for the plaintiff and the other unsatisfied creditors who had executed or otherwise acceded to the terms of the deed. Some of the partners of the firm of Lyall, Matheson, and Co. took the benefit of the Insolvent Act, and Limond paid the sum so reserved to the official assignee of the Insolvent Court. The bill prayed "that it might be declared that the plaintiffs and the said other creditors of the said Messrs. Lyall, Matheson, and Co. were entitled to have the moneys so as aforesaid received and retained by the said Wm. Limond, and applicable and appropriated by him in payment of the said dividend of 10l. per cent. applied in and towards payment of their respective debts, so far as such dividend would extend; and that an account might be taken of what was due and owing to the plaintiffs and the said other creditors of the said Messrs. Lyall, Matheson, and Co. in respect of their said debts, and that the said moneys so received and retained by the said Wm. Limond, and applicable to the payment of such dividend as aforesaid, might be applied in and towards payment to the plaintiffs and the said other creditors a dividend at the rate aforesaid on their said respective debts or otherwise, ratably and proportionately on such debts as the Court should direct: and that

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if the said defendant, Wm. Limond, should allege or pretend that he had paid the said moneys so received and retained by him as aforesaid, to such official assignee as aforesaid, or to any other person or persons, then that he might be decreed to be personally liable and accountable for, and ordered to make good, and pay the same, and that the same, when paid, might be applied in manner aforesaid, in and towards payment of the debts due and owing to the plaintiffs and the said other creditors of the said Messrs. Lyall, Matheson, and Company, and that the said defendant, William Limond, might be ordered to pay the costs of this suit." To this bill a general demurrer was put in, which now came on for hearing.

Bacon and W. M. James, in support of the demurrer.

J. Parker and A. J. Lewis appeared for the plaintiff.

The VICE-CHANCELLOR, after reading the prayer of the bill, said, that he was of opinion that a case of this kind was not dependent on the rule, which regulated the administration of the effects of deceased persons. In general cases all persons interested in the matter in question must be parties in the suit, or some reason given why they are not made parties. It was said this was not the case here, where the class might be ascertained by the accession to, as well as execution of, the deed. The distinction, however, could not be attended to for any practical purpose, and he was of opinion that the plaintiffs should allege that they did not know who these persons were, or that they were inconveniently numerous. That, however, was not the only objection. The defendant was in the position of a trustee; and such a trustee, as he was, was entitled to be delivered from the whole trust. It was consistent with this bill that there might be other creditors to whom he might be liable. The demurrer must be allowed, reserving the costs, with liberty to amend generally.

Thursday, July 3.

M'INTOSH v. THE GREAT WESTERN RAILWAY COMPANY.

Practice—Leave to amend—68th Order of May, 1845.

The words "last answer" in the 68th Order of May, 1845, apply to the last answer to an amended as well as an original bill.

This was a motion on behalf of the plaintiff, that an order of the Master, dated the 28th of June, 1851, might be reversed or varied, and that leave might be given to the plaintiff to re-amend his bill as he should be advised. By this order the Master had refused the plaintiff leave to amend. The application to the Master had been supported only by such an affidavit as is required by the 67th Order, although the application was made more than four weeks after the answer to the original bill (which bill had been afterwards amended) was deemed sufficient, but within four weeks after the time for accepting to the answer to the amended bill.

Russell and Basalgette, in support of the motion, cited *Arnold v. Arnold*, 1 Ph. 805.

T. Stevens, for the defendants, contended that the case was within the 68th Order of May, 1845, but the plaintiff had not supported his application by the further affidavit mentioned in that Order. If the case was within the 68th Order, the last answer alluded to in that order must be taken as the last answer to the original, and not the amended bill. (*Dean v. Hickinbotham*, 4 Hare, 302; *Winthrop v. Murray*, 7 Hare, 150; and *Christ's Hospital v. Granger*, 1 Ph. 634.)

The VICE-CHANCELLOR said, that, with deference to the Master, he thought the plaintiff was not obnoxious to the 68th Order. It would not be necessary to discharge the Master's order; he could give the leave to amend generally.

Saturday, July 12.

Re THE ST. JAMES'S CLUB.

Joint-Stock Companies Winding-up Acts.

*Clubs held to be within the operation of these Acts.* This was a petition presented by the committee of management of the St. James's Club, formerly called "The Military and County Service Club," and afterwards "The Military, Naval, and County Service Club," and it prayed that the club might be dissolved and its affairs wound up, under the provisions of the Joint-Stock Companies Winding-up Acts. The original scheme was set on foot in 1849, and a prospectus was then issued, stating, in effect, that the club was intended for the benefit and convenience of officers of the militia, the yeomanry, and the East-India Company's service. Debentures, bearing interest at six per cent. were afterwards, upon money being required, issued; and the affairs of the club subsequently became very much embarrassed. At a meeting of the members, duly convened, a resolution was passed for the dissolution of the club, and the cessation of its business.

Makins and Twiss appeared in support of the petition.

Bacon and Burdon, for a member of the club,

contended that these were not associations within the operation of the Winding-up Acts. The different members were not liable at law to the persons supplying goods for the company, but as between the tradesmen and the club, the governing body, that is, the committee of management, were alone liable for such debts. They referred to the case of *The Colonial Society*, 15 Law T. 410.

The VICE-CHANCELLOR said that he thought this club was an association within the meaning of the Act of 1849, and that it fell within the seventh and eighth cases stated in the 5th section of the Act of 1849. His opinion was, that it followed that the order must be made. Much argument had been addressed to the Court, and reasonably addressed, with respect to the liability or the absence of liability of members of the club individually. That argument was one better addressed to the Master—more usefully to be urged in the Master's office—than before him. It might be that no person might be found who could be rendered individually liable: that, however, his Honour had not to decide: he merely said that this was an association liable to dissolution and winding-up under the provisions of these Acts of Parliament, and he made the order as prayed accordingly.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BURNETT, Esq. of Lincoln's Inn, Barrister-at-Law.

Thursday, June 12.

DEEKS v. WALKER, and Re THE BOROUGH OF ST. MARYLEBONE JOINT STOCK BANKING COMPANY AND THE WINDING-UP ACT 1848.

*Winding-up Act—Staying proceedings in a suit. Where a joint-stock company has been ordered to be wound up, and the usual reference made to a master for that purpose under the Winding-up Acts; but previously to such order a suit had been instituted on behalf of the shareholders for the purpose of fixing certain losses on the directors personally and for other objects than the mere winding up of the affairs of the company: An application to stay the proceedings in the suit pending the reference to the Master under the order to wind up, was refused with costs.*

This was a motion in the above cause to stay the proceedings therein until after the Master had made his report under an order obtained on the hearing of two petitions before Vice-Chancellor Knight Bruce on the 8th December, 1849, by which it was ordered that the St. Marylebone Joint Stock Banking Company should be dissolved as from that day and be wound up under the provisions of the Joint Stock Companies Winding-up Act of 1848.

The company was formed in 1836, and in 1841 their affairs became embarrassed, and in 1842 a bill was filed on behalf of the shareholders against the directors for the purpose of fixing certain losses on the directors personally. (*Deeks v. Stanhope*, 14 Sim. 57.) The suit was still pending, and no decree had been obtained in it; the bill did not pray a dissolution of the company, nor did it seek to compel the general body of the shareholders to contribute to the payment of the liabilities of the company. The company had ceased to carry on any business, and their affairs were not completely wound up.

*Bethell, Roll, and Glasse*, in support of the motion.—By the 29th, 30th, 33rd, 58th, and 60th sections, the official manager was put in the same position as a plaintiff; and the Master had full power to decide upon the most refined equities. The decrees in the two suits might clash, for the winding-up would decide upon the rights of individuals; as the Court could, on the case made by the bill, which had stood the test of several demurrers, and was the same as in the case of *Foss v. Harbottle*. The winding-up suit was of a more extensive character, and the Master must decide the same questions except as to costs.

*Stuart and Cble* opposed the motion.—The very same parties who now came here had moved to discharge the winding-up order before Lord Cottenham, but without success. (1 Hall and Twell's, 100.) The defendants wished this suit to be put an end to, but in a regular way, for the motion was not to stay proceedings entirely, but to keep the suit hanging over the defendants with liberty to apply. It was true that the Court could not decide upon the reference to wind up until this suit was disposed of; but this motion sought just the reverse. They contended that the Legislature did not consider that the winding-up order rendered suits respecting the affairs of a joint-stock company unnecessary. They relied on *Underwood v. Gee*, 1 Hall & Tw. 379.

*Makins and Southgate*, for Lord Harrington and another defendant, submitted, that whenever this suit was heard the bill must be dismissed as against them, the answers denying all participation in the transactions inquired after by the bill. (*Stagg v. Knowles*, 3 Hare, 241.)

*Roll*, in reply, cited *Parbury v. Chadwick*, 12 Beav. 614, and commented on the judgment of the

Lord Chancellor in *Lord Mansfield's case*, 1 Hall & Tw. 596.

## JUDGMENT.

The VICE-CHANCELLOR.—I am of opinion that this is an improper application, and one that I ought not to listen to. The suit was instituted by some of the shareholders, on behalf of themselves and the other shareholders in the Marylebone Bank, against some persons who were directors at the time of the filing of the bill, and some who, though not then directors, had been so previously; and the object was to wind up the affairs of the company, and also to charge the defendants personally with a great deal of misconduct and personal liability in respect of the mode in which they had managed the bank. I do not think that the circumstance that some of the defendants have ceased to be directors materially affects the case. The suit was instituted so long ago as 1842. Some time afterwards a supplemental bill was filed, and answers have been put in to it as well as to the original bill, and great expense has been incurred, and great delay has resulted. In the year 1848, just six years after the original bill was filed, an order was made under the then recently-passed Winding-up Act, to wind up the affairs of the company; and now what is sought on the part of the plaintiffs, observe, is to stay all the proceedings in their suit (which is now in the state that the answers are in, but have not been replied to) until after the affairs of the company shall have been fully wound up under the winding-up order, and that on such proceedings being completed, or at such other time as the Court shall think fit (but there is nothing to guide us as to what that other time is to be), any of the parties may be at liberty to apply to the Court touching the costs of the suit. This is asked on a supposed analogy between this case and the case of two suits instituted in this court for the same purpose, in one of which a decree has been already obtained, which will give all the relief that is asked for in the other. On that subject, the first observation I must make is that, according to my experience, the application to stay proceedings in such a case is the application of the defendant, and not of the plaintiff. The defendant says: "Why should I be doubly vexed in this matter? There is a decree which will give you the relief you are asking for in the suit in which you are prosecuting me. I, therefore, ask the Court in the exercise of a sound discretion, to stay all proceedings, taking care that you have every relief you could have had if you had prosecuted the suit." Undoubtedly such a course of proceeding is very common and quite consistent with justice. But I never heard of such an application as this, where a creditor having filed a bill against an executor, alleging that he is a creditor, and charging the executor with gross misconduct, some other creditor files a bill and gets a decree. It would be most extraordinary if, in such a case as that, the first creditor could stay all proceedings in his suit, because the executor thus charged with misconduct might have his whole life dragged out before the affairs of the debtor are wound up. If he is charged with something to which he has made a clear answer, why is the Court to stay the suit at the instance of the party who instituted it, the defendant objecting and insisting on the suit going on to a hearing, in order that he may fix the plaintiff, the author of the unfounded charges, with the cost of it? There is a suit instituted for the purpose of winding up the affairs of a company (whether the words "winding up" have been struck out is immaterial; that is the object of the suit), and for the purpose of charging the directors with sums which, but for their wilful default, they might have received, and with other misconduct, and seeking an injunction among other things, and the delivering up of certain promissory notes, which the plaintiffs say were improperly obtained. Then comes the winding-up order pending that suit, and while the defendants are answering, there being a great number of defendants, and great delay having taken place in getting in their answers. The winding-up order, it is said, gives all the relief that could be had in the suit; but I very much doubt that. I should have doubted it if there were no authority on the subject, because what is done under the Winding-up Act seems to me to be indicated very clearly by the 14th sec. of the Act, which points out what is to be done. It enacts that it shall be lawful for the Court, on the hearing of any petition for the dissolution and winding up or for winding up either originally or subsequently, or on further directions, to dismiss such petition with or without costs, or to make an order absolute for the dissolution and winding up, or for the winding up of the company under the provisions of the Act, with or without such special directions as the Court shall think fit; and by such order it shall be referred to one of the Masters of the Court to wind up the affairs of the company accordingly under the provisions of this Act. Now the order in this case was made without any special directions; and I very much doubt whether it authorises any thing else than

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what is commonly understood by winding up affairs, that is, ascertaining what is owed by the company, and making calls, if necessary, for the payment of what is proved, paying it, and then ascertaining what are the liabilities of the members *inter se*, and giving the necessary directions with respect to those liabilities. I should very much doubt, independently of authority, if anything else is authorised by such a general order. But I am very much relieved from the necessity of giving my own opinion upon it, because Lord Cottenham, in this very case, has said that this bill seeks relief which the plaintiffs could not have under the winding-up order. Therefore unless I am to overrule the decision of Lord Cottenham on a matter not only *pari materid* to the case before me, but in the very case before me, I am bound to say that this bill seeks relief that the plaintiffs cannot have under the Winding-up Act. What right have I, independently of all other objections, to stay proceedings in that suit which Lord Cottenham has said must necessarily be disposed of before the winding up takes place. On that ground, therefore, I must refuse the motion. But independently of all this, the parties making this application (an application to the discretion of the Court) have so conducted themselves as to render it my duty to refuse it. The winding-up order was obtained in December, 1848, and if it be true that all the relief that the suit can give can be obtained under that order, the plaintiffs, who had kept the defendants in Court for six years previously, were bound to come to the Court promptly, and ask that the proceedings in the suit might be stayed. Instead of that they amend their bill, force the defendants to put in a further answer, and except to that answer (all which proceedings were unnecessary, if as they now contend the winding-up order is more efficacious than the suit), and they suffer two years and a half to elapse before they ask the Court to stay the proceedings. After they have so conducted themselves it seems to me, as a matter of discretion merely, independently of all other objections, that it would be most improper to grant their application.

*Motion refused, with costs.*

#### VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Friday, May 2.

SCOTT v. LORD HASTINGS.

*Suit by claim—Suit by bill—Stay of decree.*

A claim was filed for certain purposes. A bill was filed for the same and for further purposes. On the claim coming on for hearing, application was made that the decree might be stayed until the more comprehensive suit was brought to a hearing; but the Court refused to grant the application, and made a decree on the claim at once.

In this case a claim was filed for the execution of a trust under a decree of the Court, and praying certain accounts and inquiries. A bill is also filed for the same purposes, and also for relief in respect of an alleged breach of trust.

*Calvert and Piggott, for the plaintiff.*

The Solicitor-General, Bacon, Roll, Bailly, Cole, and Amphlett, for the several defendants, objected to the claim being heard until the hearing of the case by the bill, as every relief sought by the claim was comprehended in the bill, and beyond that the bill sought relief for the asserted breach of trust. If the decree were now made, the defendants would still be open in the other suit to the question of breach of trust.

The VICE-CHANCELLOR.—I have long anticipated that these objections would arise in suits presented by claim. If I were to stay the decree in this claim, it would follow, upon the same principle, that I must stay every decree upon a claim where a bill has been filed for the execution of the same trust. I will not say that there may not be two suits, one by claim and another by bill, in which it may appear to the Court that a more perfect decree might be made on the bill; but in this case I must direct the same accounts in either suit, although it is possible that a case may be stated on the bill, and made out in evidence, which might entitle the plaintiff in that suit to something further than is required upon the claim. I cannot, I think, stay the decree in this case, on the ground that another decree embracing some additional inquiry or relief may hereafter be made. The proceedings under the bill may be suspended or dismissed; or if not two or three years may elapse before the answers are put in, and the cause comes on to be heard; and in the meantime I shall have done the plaintiff the injustice of delaying his suit, and preventing him from having the benefit of the decree. The claim must proceed.

*Calvert and Piggott* then stated the plaintiff's case, and read the affidavits.

The several counsel for the defendants having been heard, a decree was made declaring the trust to be established, and directing the accounts and inquiries as prayed.

V. C. TURNER'S COURT.

Tuesday, May 6.

ILLINGWORTH v. COOKE.

*Will—Construction—Omission of a name in an exception to a bequest.*

A testatrix bequeathed property to all her grandchildren except ———.

*Held, that the bequest took effect in favour of all the grandchildren.*

Catherine Farrell, by her will, after making some bequests, bequeathed "to all my grandchildren, with the exception of one, viz. ———. I will and bequeath the remainder of the proceeds of my property, after paying the aforementioned 500*l.* share and share alike to them and their heirs for ever." The testatrix died without filling up the blank for the name of the grandchild intended to be excluded.

*Roll and Selwyn* argued the case for the different parties interested. The cases of *Hunt v. Hort*, 3 B. C. C. 311; *Doe dem. Heale v. Hicks*, 8 Bing. 475; and *Goblet v. Beechey*, 2 Russ. & Myl. 624, were cited.

The VICE-CHANCELLOR.—I am of opinion that the testatrix must be considered as not having made up her mind which of her grandchildren to except, and that the gift will take effect in favour of the grandchildren as a class. In the case of a devise by a testator of all his real property except the close called ———, it certainly could not be said that the whole devise would be void by reason of the absence of any specification of the close intended to be excepted. Upon the same principle I think that where the testatrix makes a bequest in favour of a class, but expresses an intention to except some individual of that class, the absence of any specification by the testatrix of the individual to be excepted cannot be held to defeat the benefit bequeathed in favour of the class.

May 13 and 27.

ASKREW v. MILLINGTON.

*Compromise of suit—Petition—Agreement.*

In a case where an agreement for the compromise of a suit goes beyond the ordinary range of the Court in an existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and the more especially when the agreement itself is disputed.

A bill was filed against the defendant Millington, as one of the trustees, and against the defendants, Gratix and Hall, as the executors of the other trustee of certain indentures, for an account of several sums of money secured by three indentures for the benefit of the plaintiffs, and for a reference to the Master to ascertain the respective shares of the plaintiffs, and what was due to them, and that the defendants might make good any loss which had been incurred in consequence of alleged breaches of trust. Replication was filed on the 2nd of November, 1849. A petition was now presented by the defendant Millington, praying that the cause which had been set down in contravention, as he alleged, of an arrangement and compromise, might not be heard, and that in pursuance of the agreement and compromise, the bill might be dismissed without costs as against him, and with costs as against the other defendants, the petitioner undertaking to perform the agreement for compromise on his part in all respects. The case stated was, "that after a previous treaty for compromise, which failed, proposals for a compromise were made on the 23rd of July, 1850, by Mr. Millington, for settlement of the suit of *Askrew v. Millington and Others*: that the bill be dismissed with costs: that Mr. Millington shall pay all the costs of the defendants: that the plaintiffs shall pay their own costs: that Mr. Millington shall pay the plaintiffs 500*l.*: that Mr. Millington shall, at the plaintiffs' expense, take a charge against the estate of Mr. J. Chambers, in the suit *Gratix v. Chambers*, in respect of the trust-moneys and interest owing to the plaintiffs, and shall use his best exertions to substantiate the greatest claim that can legally be admitted;" and, after other statements, the document concluded: "These proposals submitted without prejudice in any way to Mr. W. M. Millington, if not accepted." On the 2nd of August, 1850, the agent for the plaintiffs wrote to the petitioners' solicitors, saying, "My clients will agree to your proposals for a settlement, with the exception of the deduction of 100*l.* on account of the plaintiffs' costs. With a view, however, of meeting you, and ending litigation, I have prevailed upon them to consent to 50*l.* being deducted in addition to the 500*l.* and interest, out of the moneys to be received by Mr. Millington from Chambers's estate; but beyond this they will not go, as they are already making great concessions. I hope your clients will at once consent, that the necessary agreement may be drawn up. This letter is without prejudice." On the 13th of August Mr. Millington's solicitors replied: "We are glad to say that Mr. Millington consents to the modification of the terms of the pro-

posals, as expressed in your letter of the 2nd inst. This suit may now, therefore, be considered as at an end. We will prepare and send you the agreement. The sum to be retained out of the balance of the bank, and any money from Tidswell's estate, of 21*l.* 8*s.* 4*d.*" These were the letters which the petitioners contended constituted the agreement; the part of the respondents it was sworn that agreement was entered into under the approval that the executors of Chambers were to be bound to the agreement. A further correspondence took place on this point, and ultimately, on the 11th of November, the plaintiffs' solicitor wrote, saying that the cause would be prosecuted with all possible despatch.

*Bethell and Renshaw*, for the petitioners, relied on the *dicta* in *Rosse v. Wood*, 14 B. C. 315; and the decision in *Tebbutt v. Potter*, 12 B. C. 164.

*Stuart and Baggalley* contended that the agreement was uncertain in its terms, and was not binding, and the petition was nothing less than an effect might be given to an agreement: what the terms of an agreement. They cited *Red v. Mantou*, 5 Madd. 78, and *Rosse v. Wood*, and that the agreement, if enforced, must be a bill for specific performance.

*Bethell*, in reply, proposed that the order be to stay the proceedings in the original suit, and an undertaking on the part of the petitioners to a bill for the specific performance of the agreement.

The VICE-CHANCELLOR.—The course is pursued in cases of this nature not appearing to be settled by the cases of *Forsyth v. Mantou*, *Red v. Wood*, and *Tebbutt v. Potter*. I have seen many further cases on the subject, but I have not been able to find any others reported. I have not, however, the precedent of a bill which was made by the late Lord Chancellor, in the year 1815, in which, I think, goes far to show what is now the proper course of proceeding. In that case the original suit was between partners for the account of the partnership; and a decree had been made in the accounts; and after the decree, an agreement for compromise was entered into; and the plaintiff in the original suit having refused to carry out the compromise and proceeded in the suit, the bill was filed for the specific performance of the agreement, and for an injunction to restrain the original plaintiff from further prosecuting the suit; and by way of recollection of the case enables me to say that this course of proceeding was the result of a previous motion in the original suit to stay proceedings having been refused by the Court. This case and the case of *Forsyth v. Mantou*, and what fell from Lord Redesdale in *Rosse v. Wood*, appear to me to establish that, at least in cases where the agreement of compromise goes beyond the ordinary range of the Court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings; and I think that *a fortiori* this must be the case where the agreement itself is disputed. In *Tebbutt v. Potter*, in which the Court appears to have interfered on motion, the only question considered by the Court seems to have been, whether the plaintiff should be permitted to dismiss his bill without costs, and it is permitted to dismiss his bill without costs, and the case appears to have been argued without reference to the authorities upon the point. The difficulty arising from enforcing part of the agreement, and the other part of it did not fall within the range of the suit, does not appear to have been presented to the Court, and certainly no question was raised as to any part of the agreement not being binding. Lord Eldon's observations in *Rosse v. Wood* have been probably to the position of the defendant, and was liable to an immediate attachment, and might therefore, be well warranted in applying to the Court to stay proceedings, though his course would be by bill for specific performance. On principle, too, I think that the proceeding by bill is more correct; for it is obvious that the Court, in trying such matters by motion in the original suit, is called upon to adjudicate on affidavits upon matters depending upon equities wholly distinct from the equity appearing upon the record in the case. In the opinion, therefore, that the petitioner in the case has adopted a wrong course of proceeding, as he seeks by this petition to have the agreement for compromise carried out. It may, indeed, be said on his part, that all which he requires is that the bill should be dismissed, and that this is clearly within the power of the Court in this suit; but the question is, not what the petitioner requires, but what in justice ought to be done; and this must depend, not upon part of the agreement, but upon the whole agreement; and if the Court cannot say that the whole agreement can be enforced against the petitioner in this suit, it cannot, I apprehend, enforce part of it in his favour. The difficulty in enforcing the agreement in this suit, I think, felt on the part of the petitioner, for in reply it was proposed that the order should be to stay the



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proceedings in the original suit, upon an undertaking to file a bill for specific performance of the agreement, but I see no ground for such an order being made. The petitioner might have filed a bill without presenting this petition, and he may now do so. He wants no leave of the Court for the purpose, and there was not, when this petition was presented, any ground of apprehension rendering it necessary to make immediate application to the Court. But, independently of these considerations, I could not interfere upon this petition, for I think that upon the merits the Court would not, even upon a bill filed, be justified in staying the proceedings in the original suit. [His Honour then stated the facts at length, and proceeded.] I am much disposed to think that the proposal and the letters do constitute an agreement; but I think that it is not an agreement of which the Court could decree a specific performance. I do not see how this agreement could be enforced against the petitioner. How could the Court compel him (to use the language of the last of the proposals) "to use his best exertions to substantiate the greatest claim that can legally be admitted" against the estate of Mr. Chambers? And again, it is distinctly sworn upon the part of the respondents that the agreement was entered into under the apprehension that the executors of Mr. Chambers were to be parties to it; and I apprehend that an agreement entered into under mistake or misapprehension, will not be enforced by the Court, more particularly when, as in the present case, they are entered into by an agent.

His Honour then referred to the delay in bringing the matter before the Court, and ultimately dismissed the petition with costs.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL PARFELL,  
Esqrs. Barristers-at-Law.

May 30 and June 13.

DOE dem. PALMER v. EYRE.

*Ejectment*—Stat. 3 & 4 Wm. 4, c. 27, 7 Wm. 4 & 1 Vict. c. 28—Mortgagor.

The defendant was admitted, as tenant at will, to certain land by A. and remained in possession more than twenty years, without any payment of rent or acknowledgment of the title of any person. After his tenancy had commenced, the land was mortgaged by A. to the lessor of the plaintiff. A. continued to pay interest upon the mortgage money to the lessor of the plaintiff, until within two years of this action being brought. A sufficient demand of possession had been made upon the defendant.

Held, that the title of the lessor of the plaintiff was not barred by the length of time of the defendant's possession.

This was an action of ejectment, tried before Cresswell, J. at the Lent Assizes, 1851, for the county of York. At the trial it appeared that John Eyre, being seized in fee of the land in question about the year 1820, let his sister, the defendant, into possession. She had remained in possession ever since, without any payment of rent or acknowledgment of the title of any person as landlord of the premises. In the year 1823, John Eyre mortgaged the land to the lessor of the plaintiff for a term of 500 years, to secure the repayment of a sum of money lent upon the mortgage. The interest upon the mortgage money was regularly paid until within two or three years of this action being brought. Default being then made, and the principal money being still unpaid, the lessor of the plaintiff demanded possession of the defendant, and upon its being refused, brought the present action. The learned judge ruled at the trial in favour of the defendant, upon the construction of stat. 3 & 4 Wm. 4, c. 27, ss. 2, 3, et seq. and stat. 7 Wm. 4 and 1 Vict. c. 28, and directed a verdict for the defendant, but reserved to the plaintiff leave to move to enter the verdict for himself. In the following Term a rule nisi was obtained for that purpose; against which

Watson and Hall shewed cause.

Knowles and Unthank were heard in support of the rule.

See *Doe v. Williams*, 5 A. & E. 291; 2 Sugden's Vend. & Purch. 233; *Doe dem. Gooday v. Carter*, 9 Q. B. 863; *Doe dem. Carter v. Barnard*, 18 L. J. 306, Q. B.; *Garrard v. Tuck*, 8 C. B. 231; *Wrixon v. Vise*, 3 Dru. & War. Ir. Ch. Rep. 104, 116; stat. 3 & 4 Wm. 4, c. 27, ss. 2, 3, 7, 13-15, 34; 7 Wm. 4 & 1 Vict. c. 28, s. 1.

Cw. adv. vult.

## JUDGMENT.

Friday, June 13.—Lord CAMPBELL, C.J. delivered the judgment of the Court.—We are of opinion, in this case, that the verdict ought to be entered for the lessor of the plaintiff. Looking only at the statute 3 & 4 Wm. 4, c. 27, the action would be barred, for it was not commenced within twenty

years next after the time at which the right to bring such action must have accrued to the lessor of the plaintiff, or to any person through whom he claims. The facts that the defendant was the sister of John Eyre, and that she held, with his consent, are now immaterial; the possession of a relation of the person entitled being no longer the possession of him; the lapse of time for the requisite period without payment of rent for the premises giving a title irrespective of any consideration whether the possession was in him. The defendant had been tenant-at-will to her brother, and had been in possession more than twenty years from the time of the entry; without payment of rent, or any written acknowledgment under the statute 3 & 4 Wm. 4, c. 27, and if it had rested upon that statute only the fee would have vested in her. (*Doe dem. Gooday v. Carter*, 9 Q. B. 861.) But we must look at the statute 7 Wm. 4, and 1 Vict. c. 28, upon which a court of law is now for the first time called upon to give an opinion. In the year 1823, John Eyre, being seized in fee of the premises in question, mortgaged them for a term of 500 years. The lessor of the plaintiff is now the assignee of the mortgage, and the mortgagor paid all the interest on the mortgage till recently before the commencement of this action; his counsel, therefore, contended that his right to recover was the same as if the statute 3 & 4 Wm. 4, c. 27, had not passed, in which case, there having been no adverse possession, the action would clearly have been maintainable. The statute 7 Wm. 4, and 1 Vict. c. 28, which was relied on, after reciting that doubts had been entertained as to the effect of the former statute, so far as the same related to mortgages, enacts, "that it shall be lawful for any person entitled to, or claiming under, any mortgage of land, to bring an action to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to bring such action shall have first accrued." This language, in its natural and grammatical sense, applies to the present case. The lessor of the plaintiff is entitled to claim under the mortgage of the land, to recover which the action is brought—and he has brought the action within twenty years next after the last payment of interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to bring the action had first accrued. The defendant's counsel contended that the enactment must be applied to a case where the mortgagor has himself been and continues in possession of the mortgaged premises, or might himself maintain an ejectment against the tenant in possession; and we are told that the object was to remove a doubt whether, where the mortgagor had been allowed to remain in possession more than twenty years after the forfeiture of the property mortgaged by default in repaying the mortgage money, although the interest on the mortgage continued to be regularly paid, the mortgagor might maintain ejectment against the mortgagee or his heirs. But we must learn the object of the Legislature from the language of the statute; and it clearly appears to have been to make mortgages available securities, where the mortgage deeds are valid in their inception; and the mortgagee, having received payment of his interest, cannot be charged with *laches*; and this object would be effectually defeated if we were to adopt the limited construction proposed by interpolating the words necessary for that purpose. In the vast majority of mortgages in England, the mortgagor is not in actual possession of the mortgaged lands when the mortgage is executed, and they afterwards remain in possession of his tenants. The mortgagee and those who advise him are perfectly satisfied, if, upon reference to a conveyancer, the title to the premises to be mortgaged is pronounced good, and on reference to a surveyor, the value is found to be sufficient. If a mortgagee receives regularly the payment of his interest under the mortgage, he never inquires, and he would not be allowed to inquire, whether rent is regularly paid by the tenant to the mortgagor. The mortgagor, therefore, according to the defendant's construction of the statute, by omitting to receive rent for twenty years, or to obtain a written acknowledgment from the tenant, may place the mortgagee in the position of suddenly finding that for repayment of the mortgage-money, he must look only to the personal security of an insolvent. On the other hand, it is said that though there may be little sympathy for a person who, like the defendant, ungratefully and fraudulently seeks to turn long-continued kindness into a means of robbing her benefactor, we must regard the hardship which may be thrown on a purchaser for value who for twenty years should be in undisputed possession of the estate. But a purchaser can only be affected by mortgages executed prior to his purchase. In a register county he must have full notice of the mortgage, or it is void against him; and even without the benefit of the register, it must be from negligence on his part that an existing mortgage is not discovered. It was argued before

us, that the real owner of an estate who sees himself barred by the tenant having continued for twenty years without payment of rent or acknowledgment, might, by executing a mortgage and payment of interest to the mortgagee, invest in the latter a right of entry which he has not exercised himself. But by such a mortgage nothing would pass. Under the 34th section of the 3 & 4 Wm. 4, c. 27, the right of the owner is extinguished at the end of the period of limitation. A case may be put, whether a person who has occupied as tenant by sufferance for twenty years without payment of rent, might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises, and continuing for a great many years after to pay the interest of the mortgage. But it cannot be considered to have been an object of the Legislature to protect the interests of such a person. The mortgagor may certainly, in some cases, gain a consequential advantage by such a construction of the statute, though it was passed for the sake of the mortgagee; still, without this, the security intended to be given to the mortgagee would not be obtained. Seeing no inconvenient consequences which would follow from supposing that the words of the Legislature were used in their natural and grammatical sense, we think we are not at liberty to put any forced or limited construction upon them, and therefore that the lessor of the plaintiff is entitled to our judgment.

Rule absolute.

Friday, June 13.

DOE dem. BADDELEY v. MASSEY.

*Ejectment*—Limitation Act—Statutes 3 & 4 Wm. 4, c. 27; 1 Vict. c. 28—Mortgagor and mortgagee—Encroachment.

In ejectment for land which had been mortgaged, the lessor of the plaintiff claimed under a conveyance executed both by the mortgagor and the mortgagee, at the time when the mortgage was paid off. The action was brought within twenty years from that time; but not within twenty years from the time at which the right of entry first accrued.

Held, that the lessor of the plaintiff was a person "entitled to or claiming under a mortgage" within the meaning of stat. 1 Vict. c. 28; and that the period of twenty years was to be calculated from the last payment of any part of the principal or interest secured thereby.

A lessee applied to his lessor for a lease of a strip of land adjoining that which he already held. The lessor said that he could not grant a lease, as the occupiers of other land had a right of way over it; but that the lessee might take it, if he liked, at his own risk. The lessor having inclosed it:

Held, that it could not be considered enclosed for the benefit of the lessor, so as to become part of the demised premises out of which the rent issued.

Ejectment for a message and small piece of land, tried before Coleridge J. in Middlesex, during last Easter Term. It appeared that in 1822 the Marquis of Northampton had leased to one Goodwin, for a term of ninety-four years, a considerable quantity of land, including that for which the present action is brought. In the same year Goodwin leased to Wilson; and Wilson, who was a builder, mortgaged part to Wood. In 1829, Wilson, being mortgagor in possession of that part, leased a portion of it to the defendant, and other portions to other occupiers. Adjoining the part leased to the defendant was a strip of land, over which a way had been reserved for the occupiers of other portions. The defendant applied to Wilson for a lease of that strip of land, but Wilson said that he could not grant one, as other occupiers had rights of way over it, but that the defendant might take it if he liked to do so, and chose to take it at his own risk. The defendant did in 1829 enclose that strip of land, and build upon it, and continued to occupy it for twenty years, without paying any additional rent or any acknowledgment. For that strip of land the present action was brought. In 1835 the last payment of mortgage money took place; both principal and interest were then paid off; and the mortgagor and mortgagee joined in a conveyance of the mortgaged property to Robert Child; and the lessor of the plaintiff claimed by subsequent conveyances from Robert Child. A verdict having been found for the lessor of the plaintiff, a rule nisi was afterwards obtained to enter it for the defendant.

Saturday, June 7.—*Knowles* and *Hawkins* shewed cause. The defendant relies upon the statute 3 & 4 Wm. 4, c. 27, as barring the claim of the lessor of the plaintiff; but there are two answers to that defence. 1. The encroachment by the defendant was for the benefit of the mortgagee; and the strip of land enclosed became part of the demised premises, and was, therefore, not held by the defendant for twenty years without payment of rent or acknowledgment. That is the general presumption, and there is nothing here to rebut it. (*Doe v. Marrell*, 8 Car. & P. 134.) [COLERIDGE, J.—

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## EXCHEQUER.

## EXCHEQUER.

There the encroachment was upon the lessor.] There is no distinction between an encroachment upon the lessor, and an encroachment upon a stranger. (*Doe v. Jones*, 15 Mee. & W. 580.) The encroachment must be taken to be for the benefit of the lessor, unless it be clearly shewn that the lessee did not intend to hold that part of the lessor as well as the rest. (*Doe v. Rees*, 6 Car. & P. 610; *Bryan v. Winwood*, 1 Taunt. 208.) Here it would be for the benefit of the mortgagee; because, the lease being subsequent to the mortgage, the mortgagee might have treated the lessee as a trespasser, and ejected him; or he might have required the lessee to pay the rent to him; and if the lessee did so, then the relation of landlord and tenant would subsist between them. 2. The right of the mortgagee is kept alive by stat. 7 Wm. 4 & 1 Vict. c. 28, which recites that doubts have been entertained as to the effect of 3 & 4 Wm. 4, c. 27, so far as the same relates to mortgages, and for the removal of those doubts, enacts "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry, or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued, any thing in the said Act notwithstanding." Here the last payment of mortgage-money was in 1835, and the lessor of the plaintiff claims under the mortgage. [Lord CAMPBELL, C.J.—Whatever right of entry the mortgagee had has passed to the lessor of the plaintiff. The reason of passing the statute was, that it was thought that under 3 & 4 Wm. 4, c. 27, the twenty years would begin to run from the day when the principal sum was made payable by the mortgage deed, and not from the payment in fact.] But for this Act, the mortgagor, by allowing a tenant to continue in possession for twenty years without payment of rent, might deprive the mortgagee of his security altogether.

*Chambers and Henderson*, contra—1. Even if the defendant could be considered tenant at will, there has been no demand of possession, and so ejectment would not lie; but, in truth, the encroachment was clearly not for the benefit of the landlord in this case, and the ordinary presumption is rebutted. In *Doe v. Jones*, Alderson, B. gives the answer to Lord Kenyon's dictum in *Doe v. Mulliner*, 1 Rep. 460, by saying "the presumption may be rebutted by the repudiation of the landlord." [Lord CAMPBELL, C.J.—We are all of opinion that my brother Coleridge was perfectly right in holding that this piece of land, which was taken in by the tenant, was not to be considered as part of the demised premises, so that the rent was issuing out of it. That being so, there was no payment of rent or acknowledgment for the land sought to be recovered, and the only remaining question is upon the stat. 7 Wm. 4 & 1 Vict. c. 28.] That statute does not apply; because the lessor of the plaintiff does not claim under the mortgage. He claims under the original lease granted by Lord Northampton. [Lord CAMPBELL, C.J.—But the mortgagee had the legal estate; and that which the mortgagee had is conveyed to the lessor of the plaintiff.] Yes; but the statute only applies to existing mortgages. It does not mean to keep alive the rights of persons claiming under some old mortgage which has been paid off for years before the action brought. Is a man who has been in undisturbed possession fifty years liable to be turned out because the property happens to be mortgaged, and the mortgagor chooses to say "I'll pay off the mortgage, and then I can turn you out." If a limited construction is not put upon this statute, it will practically repeal the 3 & 4 Wm. 4. A man is in possession for nineteen years without payment of rent or acknowledgment. The owner then mortgages the property, and pays off the mortgage in six months. What is the consequence? Another term of twenty years has begun to run; and forty, instead of twenty years are required to give the party in possession a title. (*Doe dem. Carter v. Barnard*, 18 L. J. 306, Q. B. was referred to.)

## JUDGMENT.

Friday, June 13.—Lord CAMPBELL, C.J.—This case likewise turns upon the construction of the 7 Wm. 4, and 1 Vict. c. 20. During the argument we overruled the point made on the part of the lessor of the plaintiff, that the bit of ground for which the ejectment was brought must be considered as taken and occupied by him as part of the demised premises, in respect of which the rent is claimed, for the conduct of both parties shews that, as to recovery by him or one claiming under him, other than the mortgagee, lapse of time may have barred it. The real question here is, whether the lessor of the plaintiff can be considered entitled as one claiming under the mortgage. It is not the mortgagor nor the assignee of an existing mortgage. The mort-

gagor had not paid the rent in 1839; then the mortgagee and the owner of the equity of redemption undoubtedly are interested persons, under whom the lessor of the plaintiff claims, although he is not entitled to the mortgage. We think that he claims under the mortgage in no other way than the statute has made effectual for the protection of mortgagees, according to the construction we have put on it in *Doe dem. Palmer v. Eyre*. The mortgagee might have maintained an ejectment after the expiration of twenty years, or he might have transferred the right of action by assigning to another who paid the mortgage; but suppose the mortgage-deed conveys a power of sale, may the mortgagee lose his principal from the mortgagor having omitted to receive the rent or an acknowledgment from the tenant. On payment of the mortgage-money the mortgage ceases to exist as a security for the money; but the person to whom the mortgagee conveys his legal interest takes under the mortgage, though the equity of redemption should likewise be defeated. We are, therefore, of opinion that the lessor of the plaintiff is entitled to our judgment, and the rule to enter the verdict for the defendant must be discharged.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HARRISON, Esqrs. Barristers-at-Law.

Jan. 16 and 18, and June 30.

HART V. BAXENDALE.

*Carriers—Liability of—Receiving goods at places other than booking-office, &c.—12 Geo. 4 and 1 Wm. 4, c. 68.*

The 12 Geo. 4 & 1 Wm. 4, c. 68, does not exempt carriers from responsibility for loss of any of the articles mentioned in the first section of that Act, when such articles have been delivered to the carrier's servant in a cart in the street, or elsewhere than at one of the offices, warehouses, or receiving-houses in which the notice required by the second section is affixed. *Per Parke, Alderson, Platt, and Martin, BB. Pollock, C.B. dissentiente.*

This was an action against a carrier to recover the value of certain fancy dresses, silk tights, Highland costumes, &c. which had been entrusted to him to carry, and which had been lost. At the trial before Pollock, C.B. a verdict was returned for the defendant, with leave for the plaintiff to move to enter the verdict for him for damages in respect of all the property lost if the Court should be of opinion that the circumstances of the case did not come within the Carriers' Act.

It appeared that the defendant had sent for the goods, and had taken them away from the plaintiff's shop, so that no notice could have been put up as required by the second section of the Act.

On the argument of the rule, *Peacock and Willes* shewed cause. *M. Chambers, Bramwell, and C. Pollock*, in support.

PARKE, B. now delivered the judgment of the Court.—In this case we are of opinion that the rule which has been obtained to enter a verdict for the plaintiff for damages in respect of all the property lost should be made absolute, on the ground that the statute, the 12th of Geo. 4, and the 1st Wm. 4, c. 68, does not exempt carriers from responsibility for loss of trinkets, silks, &c. delivered to them for carriage at any other place than one of their offices, warehouses, or receiving warehouses, where a notice is affixed; and the goods in question in this case, having been delivered to one of the defendant's servants in a cart at the plaintiff's own house, without any special contract, the defendant is responsible as a common carrier, at Common Law. It is, therefore, unnecessary to consider whether the whole or part of these articles were such as the defendant could not have been responsible for if they had been delivered at the defendant's receiving house; the question depends upon the construction of the statute, which is not very accurately penned, and which cannot be made consistent throughout, if read according to its ordinary and grammatical sense; the language must, therefore, be modified in some respects, to carry into effect the intention of the Legislature to be collected from the whole Act. It is clear that the object of the Legislature was to relieve such coach proprietors and carriers as should publish notices of restricted responsibility and those only (for this is expressly enacted by the third section) from liability for loss or damage to the enumerated goods which are articles of value in a small compass; they are protected as to these articles by such a notice; and as to goods as to which they are not entitled to the benefit of the Act, they cannot restrict their liability by any general notice; that is, under sec. 4, although they are at liberty

by sec. 6 to make special contracts. It being essential then to the obtaining the protection of the Act that the notice should be given, it seems clearly to follow it is effective only as to those who receive the notice actually or constructively. The statute, then, having in the recital stated the difficulty of proving actual notice, enacts, in sec. 21, to what persons the notice shall be restricted: those are, by that section, the persons who send goods or deliver them at the office where the notice is affixed, who are expressly declared to be bound by it without further proof. But those who deliver, *not at the office*, but elsewhere, are, in no part of the Act, declared to be bound by the notice; and it never could have been intended to exempt carriers from liability to persons who delivered their goods to them without receiving any notice to limit the responsibility, actual or constructive. This intention of the Legislature appears, we think, from what we have stated already, and reading all the clauses of the Act together, there will be nothing which is not easily reconcilable with that construction, and the whole may be made consistent. The first section, after reciting the difficulty of fixing parties with the knowledge, provides that, for the enumerated articles carriers shall not be liable, whether they were delivered to be carried for hire, or to accompany a passenger, unless at the time of delivery at the office of the carrier, or to the bookkeeper, coachman, or other servant, for the purpose of being carried, or accompanying the person of any passenger, the value and nature of the article shall have been declared by the person sending or delivering the same and the increased charge thereinafter mentioned, or an engagement to pay it accepted by the persons receiving such package. The increased charge to be received is provided for by the 2nd section, and it is further enacted, that it shall be ratified by some notice affixed at the office where such packages are delivered; and no case, therefore, can fall within that first section unless there has been notice affixed at some office, for in no other way can the increased charge be ascertained. Then follows the provision that the notice affixed shall be the constructive notice to all who deliver their goods at their office, and afterwards the 5th section occurs, which enables persons who deliver at any such office, and pay the increased charge or premium, to recover it from the carrier in case of loss. There is no provision that any person delivering the goods at any other place shall be entitled to recover their value, which shews pretty clearly the Legislature contemplated no other person than those who delivered at the office to be entitled to the benefit of the Act; for if it had, it would have provided every one paying the premium should, in the event of loss, recover it back again. The only difficulty in the way of making all these provisions consistent, arises from the introduction of the words in the first section, which speaks not only of delivery at the office, but "to the book-keeper, coachman, or other servant of the carrier." It is contended for the defendant that by these words the defendant has a right to the protection of the Act, although the goods are not delivered at the office, but to his servants elsewhere. On the other hand, the plaintiff contends that the meaning of these words is merely that the protection given by the statute shall apply to all goods which are delivered at the receiving-house, or if it happen to be closed, to the book-keeper or a servant there, or to the coachman when the passenger brings his luggage with him, and delivers it to the coachman. We think there are much greater difficulties in the way of the defendant's than the plaintiff's proposed construction; if the words are construed as the plaintiff proposes, by what notice is the increased rates of charge to be paid to the servant to be ascertained? A notice at the nearest receiving-house, or, at what other, and how? If the notice should happen to differ, and if there should be notice at one receiving-house and not at another, what provision is there that such notice should fix the person so delivering the goods to the defendant's servant? How is such a person to recover the premiums as part of the damages in the event of loss? These are serious objections to the plaintiff's construction of these words. On the other hand, to obviate this, would require great alteration in the Act; a provision that a notice at the nearest receiving-house, or at all the receiving-houses in the town, should be constructive notice; a provision that the premium should be recovered whenever the goods are delivered. The defendant's explanation, on the other hand, requires a very slight alteration of the words of the Act, and makes the whole statute consistent and reasonable. A person so delivering will have to pay the premium indicated in the notice at the office, and will be considered as delivering parcels at the office, and having the constructive notice under the second section. Upon this, which, after much consideration, we think the true construction, there will be no hardship on the carrier. It is his duty to receive goods in the street in the cart, which, as a common carrier, he is bound to do, unless he makes a public profession to the contrary. He can only protect himself by special

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contract with each person bringing goods to him, at this he would have no difficulty in doing. It will be a question with him whether it will be more convenient, on the whole, to abstain from receiving goods elsewhere than at the receiving-house, or to the trouble of delivering a special notice to each person bringing a parcel to his servant elsewhere, and so creating a special contract with them. Some verbal criticisms were made by Mr. Peacock on the 20th section, which he contends were in favour of a defendant. The beginning of that section speaks of every parcel containing valuable articles being brought in the singular number; a notice must be fixed to the office where such parcels were received; he argued therefore, that the word such parcels may mean a smaller parcel, or such description of parcel, could not be meant any office where a package containing such valuable articles may not have been received, for the office receives all sorts of parcels. That is the meaning, what is the office where there is several at which notice is put up? for it is at one office only the notice is required to be put up to give the protection of the Act. It is much more reasonable to say the word "such" means the parcels so delivered, as before mentioned, at the particular office where the notice is put up, so that the notice at which office will operate with respect to parcels delivered at each office, although there is a trifling verbal inaccuracy in using the plural number. On the whole, we are of opinion the defendant, by receiving the goods in the cart in the street, has placed himself in the situation of a carrier at common law, who has given no notice, and is, therefore, liable to pay for the loss of the goods, though they may be articles of the description mentioned in the statute, such as he would not have been liable for if delivered at the office where no notice was fixed. This is the opinion of the three members of the Court, not including the Lord Chief Baron, who retains the opinion that he expressed at Nisi Prius; and it is thought, under these circumstances, that if the defendant wishes to contest the propriety of the opinion of the majority of the Court, he shall be at liberty to consider the opinion of the majority of the Court, as delivered by my Lord Chief Baron, at Nisi Prius, in the shape of a bill of exceptions, on paying his costs of the argument for the new trial. Therefore the defendant may elect within any time that is thought proper, after considering this case, to put it upon the record in that shape.

Rule absolute accordingly.

Nisi Prius.

## COURT OF COMMON BENCH.

Reported by A. PULLING, Esq. of the Inner Temple, Barrister-at-Law.

Saturday, June 28.

(Before JERVIS, C.J.)

WILSON v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

**Liability of railway companies as common carriers.** A railway company professing to carry goods from B. to Y. within a specified time is liable, on a promise made by the station clerk that the goods shall be forwarded to a place beyond Y. (on the line of another railway) before a particular hour; and this, it would seem, notwithstanding a general notice has been published that the company would not be responsible for forwarding goods beyond Y. The owner of perishable goods sent by the railway under such circumstances is entitled to recover, as damages, the amount of profits which the goods might be expected to have realized if they had arrived in proper time.

Byles, Serjt. and Pulling were for the plaintiff.

Knowles, Q.C. and Addison for the defendants.

This was an action of *assumpsit*; the first count of the declaration alleging the delivering to the defendants as common carriers, on the 9th August, 1850, of 20,000 fresh herrings, &c. to be by the defendants taken care of and safely and securely carried and conveyed by them as such carriers from Hartlepool, in the county of Durham, upon the same day on which they were so delivered by the plaintiff to the defendants, as aforesaid, to London, and there delivered safely and securely by the defendants to the use of the plaintiff before the hour of five o'clock in the morning of the day next after such delivery to the defendants, as aforesaid, for certain reward, &c. It then alleged a promise by the defendants to the effect aforesaid, and a breach. There were five other counts, in the same form, respecting the carriage of other quantities of fresh herrings on subsequent days; and the declaration concluded with an allegation of special damage by the loss of profits to the amount of 100*l.* which the plaintiff would have derived from the sale of the said several goods, if they had duly arrived in London and been delivered to the plaintiff according to the said several promises and undertakings of the defendants.

Plea.—General issue.

It appeared that in the month of July, 1850, the defendants, who are proprietors of the railway from Berwick to Newcastle and York, and lessees of the branch line from Hartlepool to Ferry-hill, issued the following printed notice, which was pasted up at all their stations:—

"YORK, NEWCASTLE, AND BERWICK RAILWAY. NOTICE.

FRESH HERRING TRAFFIC.

"In order to secure the proper working of this, a special engine will leave the Berwick station at 10.50 a.m. on Monday the 29th of July, calling at the intermediate stations, as under:—

	h. m.		h. m.
Tweedmouth .....	10 55	Longhurst .....	12 49
Beal .....	11 10	Newcastle .....	2 0
Belford .....	11 26	Brookley Wms. ....	2 20
Chat Hill .....	11 40	Ferry Hill .....	3 20
Christon Bank .....	11 45	Darlington .....	3 55
Longhoughton .....	12 2	Arrive at .....	
Lesbury .....	12 7	York .....	6 0
Acklington .....	12 29		

"Fish for stations south of Newcastle to York, and for Leeds, Halifax, Huddersfield, Bradford, and Manchester, when in less quantities than a truck, cannot be forwarded by the above, but must be sent by the train leaving Berwick at 5.30 p.m. or by the night mail train, and no other fish from the commencement of this train will be taken forward from Newcastle by passenger trains. Fish intended for this train must be at the stations one hour before the time fixed for its departure, so as to allow of the fish being properly loaded and booked, otherwise the company will not be responsible for its being forwarded.—By order, "WM. DOUGLAS.

"Newcastle, July 17, 1850."

By the evidence of the plaintiff's witnesses, it appeared that Mr. Learman, the defendants' station clerk at Hartlepool, had, in a conversation with the plaintiff in July, 1850, stated that the company had made better arrangements that season for the fresh herring traffic than had been made in the previous season, and were going to work a special train in order to get the fish to London in time for the morning's market; and that all fish delivered at the station during the season before twelve o'clock in the day would be delivered by the company at the Euston-square station before five o'clock in the morning; and an additional charge would be made for fish sent by that train. The plaintiff, who was an extensive dealer in fresh herrings, accordingly brought on the coast, packed, and sent to the Hartlepool station, on the 9th of August, and on the other days mentioned in the declaration, large quantities of fresh herrings, addressed to "Allan Hughes, Billingsgate-market," the packages always arriving at the station one hour before the train started, and being placed on the trucks in the presence of himself or his servants, and the trucks marked in chalk, with the words "Hughes, London," and the additional charge being always paid in London. On one occasion, when the plaintiff complained at Hartlepool of the train being delayed beyond its time, and stated that he should make the company pay if he lost the market, the station clerk, Learman, remarked "that the fish would be in London time enough, and not to trouble himself about other people's business." It was proved that Billingsgate-market opens at 5 o'clock a.m. and fish must be there soon after or it would not fetch a profit. The plaintiff's fish, however, was always detained on the road several hours beyond the hour specified, and lost the market in consequence, the fish sometimes arriving at 12, sometimes at 10 o'clock in the morning, and on one occasion, being detained all day, it was spoiled.

On the part of the defendants, Learman, the station-clerk, was called, who denied the several conversations deposed to by the plaintiff's witnesses, and stated that the following notice had been published and communicated to the plaintiff previous to any fish being sent by him:—

"YORK, NEWCASTLE, AND BERWICK RAILWAY.

"Notice.

"This company give public notice that they will not be responsible for fish being forwarded by any train unless the same be duly directed and loaded one hour before the starting of the train by which it is intended to be sent; and that they will not undertake to forward fish to places beyond York by the train carrying it to that place, but every exertion will be made to forward it as early as possible.

"E. LEARMAN, Station-clerk.

"Hartlepool, July 23, 1850."

The defendant's counsel contended that this notice precluded the plaintiff from recovering, and that Learman had no authority to make the promise deposed to by the plaintiff's witnesses, even if the jury believed that such a promise had been actually made by him.

The plaintiff's counsel, on the other hand, cited *Muchamp v. Lancaster and Preston Junction Railway Company*, 8 M. & W. 421; *Pickford v.*

*Grand Junction Railway Company*, 12 M. & W. 786; and *Watson v. Ambergate Railway Company*, 15 Jur. 448, as disposing of all the objections.

JERVIS, C.J. said that the station-clerk had clearly authority to make the promise alleged in the declaration, and if the jury believed he did make such a promise, the second notice of the defendants would not preclude the plaintiff from recovering; the plaintiff was entitled to recover whatever damage he had sustained by the loss of the profits of an early sale at Billingsgate-market.

Verdict for the plaintiff; damages, 70*l.* 19*s.* 10*d.*

## Circuit Reports.

## HOME CIRCUIT.

ESSEX SUMMER ASSIZES, 1851.

(Before Baron Alderson.)

ANONYMOUS.

**Criminal Offences Act, 14 Vict. c. 19.—Practice.** The 9th section of 14 Vict. c. 19, prohibits a previous conviction being given in evidence or stated to the jury, until after a verdict of guilty of the subsequent offence:

Held, by ALDERSON, B. after consulting JERVIS, C.J. that the old practice should, nevertheless, still be pursued of calling upon the prisoner to plead to the whole charge against him, including the previous convictions, but that, when given in charge to the jury, that portion of the indictment alleging a former conviction should be omitted.

The clerk of arraigns called the attention of the learned judge to a difficulty which had arisen under Lord Campbell's new Act, creating various new offences and other matters relating to criminals. It appears that, by the 9th section, it is enacted, that in all cases where a previous conviction is charged in the indictment against a prisoner, he is not to be given in charge upon this portion of the indictment until after the jury shall have returned a verdict of "Guilty" against the prisoner upon the principal charge. The officer of the court suggested that, if this section were to be carried out strictly, the fact of the prisoner's conviction could not in many cases be legally brought to the notice of the Court at all, as in the case of a plea of "Guilty," &c. and he therefore wished the direction of his lordship as to what course should be taken.

ALDERSON, B. went out to consult the Chief Justice in the other court, and upon his return he said that, as it appeared that if the strict letter of the section were acted up to, in many cases the prisoner never could be given in charge at all upon a previous conviction, and as this was evidently not the intention of the Legislature, they were of opinion that the old practice should be pursued of calling upon the prisoner to plead to the whole of the charge against him, and when he was given in charge to the jury that portion of the indictment alleging a former conviction should be omitted.

## Irish Reports.

## ROLLS COURT.

Reported by W. ST. Leger BARNES, Esq. Barrister-at-Law.

Monday, December 2, 1850.

LONG v.

**Practice—Security for costs—Officer going on half-pay after filing his bill.**

Where the plaintiff, who was resident out of the jurisdiction of the Court, but was at the time of his filing the bill an officer on full pay, afterwards went on half-pay:

Held, that the defendant thereupon became entitled to security for his costs, and that the plaintiff having been permitted to take a step in the cause after the fact of his having gone on half-pay had become known to the defendant, did not necessarily deprive the latter of his right to demand security.

And when the fact of the plaintiff's having gone on half-pay became known to the defendant on the 25th June and on the 17th September following, the plaintiff filed his replication, but the defendant did not until the 14th October demand security for costs, and on the 29th October served notice of motion:

Held, that the application was in time.

This case, which was a motion to compel the plaintiff, who resided out of the jurisdiction of the Court, to give security for costs, having stood over from a former day; the following judgment was new (Dec. 2) delivered.

The MASTER OF THE ROLLS.—In this case an application had been made upon the part of the defendant that all proceedings in the cause be stayed until the plaintiff gives security for costs. The plaintiff resides out of the jurisdiction; but, when the bill was filed, was an officer on full pay; on the 20th June last he went upon half-pay, and on the 25th of June the defendant became apprised of that fact: on the 17th September the plaintiff filed

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his replication, and on the 8th of October a notice was forwarded to the plaintiff, calling on him to give security for costs, and on the 29th of October a notice of motion was served. The plaintiff's counsel has resisted the application on the grounds that an officer's going on half-pay does not compel him, when living out of the jurisdiction, to give security for costs; secondly, that the plaintiff having since taken a step in the cause by filing a replication, the application comes too late; and, thirdly, that even in any event the motion is too late. I am of opinion that an officer on half-pay is not exempted from the necessity of giving security for costs, and that the plaintiff's taking a step in the cause does not necessarily deprive the defendant of his right to demand security for costs; and I also consider that the defendant having served his notice of motion at the earliest period that the case could be heard (the long vacation intervened), this application ought therefore to be granted.

## COURT OF CHANCERY.

Reported by J. BLACKMAN, Esq. Barrister-at-Law.

Tuesday, Feb. 11.

WORTHINGTON v. PAKENHAM.

Trustees—Breach of trust—Contribution.

Where trustees incur, by reason of their neglect of duty, a joint liability, and the liability is discharged by one of them, he is entitled to contribution from his co-trustee.

But when the trustee against whom it was sought to enforce the contribution had never interfered in the execution of the trusts, and there were circumstances to shew that the other trustee had the entire management of the trusts, the Court granted an inquiry as to the amount of contribution to be paid to the petitioner.

This was a cause petition, by a trustee, praying contribution from his co-trustee in respect of money advanced for the redemption of the trust estate. The facts were, Mr. Robert Shaw Worthington being possessed of a fishery, under an indenture of lease bearing date in the year 1841, by his marriage settlement in the same year, vested that property in the petitioner and respondent upon trust, to receive the profits and to pay thereout the head-rent, then to the use of trustees for 100 years on trust; in case of the insolvency or bankruptcy of R. B. Worthington, to pay his wife an annuity of 150l. per annum to her separate use, remainder to R. S. Worthington. R. S. Worthington remained in possession, and the rent being unpaid, the head landlord brought an ejectment, and evicted the lessee. R. S. Worthington having become insolvent, a bill was filed by the trustees of the term against the plaintiff and respondent. William Latouche Worthington, having consulted counsel, was informed of his liability by reason of the breach of trust in not seeing the head-rent paid. He then called upon the respondent to pay his proportion of the head-rent, that the premises might be redeemed, who said "he would not pay the rent;" notwithstanding which, Latouche Worthington redeemed the premises, and now filed this petition to compel his co-trustee to contribute his proportion of the money advanced for this purpose. The affidavit of the respondent, in answer to the petition, also stated that the respondent had never interfered in the management of the trust estate; that the rents were received by the petitioner, who was the brother of R. S. Worthington, and applied to his own purposes, and that the profits of the fishery were insufficient to pay the head-rent.

F. Fitzgerald, Q.C. with Johnson.—The question is, whether there can, in equity, be contribution as between wrong-doers. Contribution lies in all cases, when the charges and expenses are incurred for the common benefit. (*Lingard v. Bromley*, 1 Ves. & B. 114.) In this case, after the breach of trust, the defaulting trustee communicated the fact of his default to his co-trustee, who paid the money, which the default rendered both trustees liable to. This, then, became a payment for the benefit of both, and the petition is consequently entitled to have contribution.

Green, Q.C. with Maskell, for the respondent.—The only equity raised in the petition is, that Latouche Worthington consulted counsel as to the bankruptcy of himself and of his co-trustee. This is analogous to a hearing upon bill and answer, therefore the statements on our affidavit must now be taken to be true. [The LORD CHANCELLOR.—I will not assume all the allegations in your answering affidavit to be true, this is not like a hearing upon bill and answer.] The respondent is merely a nominal trustee; he never interfered, and is not liable for the default of his co-trustee. (*Brice v. Stokes*, 11 Ves. 324.) The petitioner having advanced the money by himself as trustee, and not jointly with the respondent, his remedy is against the trust property, and not against his co-trustee. The annuity paid to Mrs. Worthington by Latouche Worthington should have been applied to discharge the salvage demand. This claim has been put forward by the petitioner in the cause

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of *Labatt v. Worthington*; that cause is still in existence, and having sought one mode of redress the petitioner should not now be permitted to take another here. It would be inequitable if a trustee, who alone has acted in the management of the trust property, advances money to protect an insolvent estate, or is guilty of a breach of duty, could turn upon his co-trustee and claim contribution from him.

Johnson replied.

The LORD CHANCELLOR.—This case is somewhat novel in its circumstances. The plaintiff and respondent were liable in a double capacity—to the landlord for the rent, and to the *cestui que trusts* for the purposes of the trusts. There was a common obligation, and if a payment be made by one trustee in discharge of that obligation, in the common course of things that will entitle him to contribution. The trustees here were trustees for the purposes of the trusts of the settlement, and it was their duty to prevent and keep the rent of this fishery from falling into arrear. They should have given nothing to Mrs. Worthington; till that duty was fully performed they incurred serious obligations to the parties, their *cestui que trusts*, and were bound to make good to them any damage that should arise by reason of their default. While the trustees held this double position, the landlord took proceedings for the rent they had permitted to become due, and one of them paid the amount of the rent, and thus saved the property from eviction, and his co-trustee from liability; that creates in my mind a clear case for contribution. There is behind the question of contribution another question, whether the respondent is not entitled to an inquiry; and though I cannot enter upon that part of the case here, I think there are circumstances to lay a ground of equity, and if the respondent wishes an inquiry, I will grant it to him. If this were a bill, it would be open to the Court to direct an inquiry into the circumstances existing between the trustees, and I shall direct it now. I think this, being a payment on account of a common liability, the petitioner is entitled to a decree for contribution, but that the respondent is entitled to an inquiry to ascertain the extent of it. I will reserve the question of costs.

Saturday, Feb. 22.

SADLEIR v. WHALLEY.

Pleading—Pendency of another suit.

To maintain a plea of the pendency of a prior suit, it must appear that the suits are for the same purpose, and that the parties are the same. Where a party is merely a defendant, *ad invitum*, and takes no part in the suit, he is not a party to that suit so as to be barred from instituting proceedings of his own to recover a portion of the charge vested, and for the recovery of another portion of which the first suit was instituted.

This was an appeal from the decision of his Honour the Master of the Rolls.

F. Fitzgerald, with him W. Smith, for the defendant.—The test whether the suits be identical is, that the subject matter be the same, the issue be the same, and that the objects of the suits were the same; that the suits were for the same purpose. (*Behrens v. Sieveking*, 2 My. & Craig, 602.) The deeds in issue in this case are the same; the objects are the same, to raise different portions of the same charge, secured by the same term, and by the same instruments; no decree can be had in this suit which could not be also had in the suit of *Coote v. Whalley*; by the operation of the 15, 16, and 17 ss. orders (1843), the plaintiff in this cause was as much a party to the cause of *Coote v. Whalley* as if he had actually answered it as a party in the ordinary way. The case of *Nene v. Weston*, 3 Atk. 557, was a stronger case than this: the creditor filing the bill had only filed a charge in the previous suit, and was, therefore, but a *quasi* party; the decree in *Coote v. Whalley* is as beneficial as any the plaintiff can have in this. This plea is, therefore, good. (*Pickford v. Hunter*, 5 Sim. 122; *Bainbridge v. Baddeley*, 2 Phil. 709; *Huggins v. York Building Company*, 2 Atk. 44, S. C.; 2 Eq. Cas. A to B; *Reeve v. Dolby*, 2 Sim. & Stu. 464; *Keat v. Keat*, Proc. in Chan. 197.) [The LORD CHANCELLOR.—When a creditor comes in and proves, he is thenceforward a *quasi* plaintiff, and a contributor to the expenses of the suit. Mr. Sadleir is a defendant only; the difficulty I feel is how to distinguish him from any other incumbrancer coming and proving his debt; he is not precluded from filing his bill. If the bill were on behalf of the plaintiff and all other creditors, he might apply for the carriage of the proceedings. The cases, in my mind, go this length only, that the proceeding must be by the same plaintiff or by persons in a similar position to that of the plaintiff.] Mr. Sadleir was not only not in a position to become an actor, but it would not be easy to make him contribute to the expense of the suit. (*Gage v. Lord Stafford*, 1 Ves. sen. 544; *Murray v. Shadwell*, 17 Ves. 353; *Anonymous*, More, 268.)

Christian, Q.C. and W. Crozier, contra.—There

are two classes of cases in which this course may be taken. First, those in which the plea is that the suits have the same purpose in view; and, secondly, those in which the plea is that the decree in the first suit is one under which the plaintiff in the second suit can have full relief. (*Rid. Y 2, pl. 246.*) A party may protect himself either by plea or motion, but a plea can be only adopted in cases such as *Nene v. Weston*. The rule there laid down by Lord Hardwicke is, when a party has proved under a decree, and thus takes advantage of the suit, he becomes a *quasi* party, and is bound by it; if the rule relied upon by the other side be correct, though the party be merely a notice party, or having a receiver be made an answering party, he would be precluded from taking any proceedings of his own, though the deed of 1813 covers the whole title. The demands in these suits are separate, and each subsequent devolution of them has been separate, and Mr. Sadleir is the mortgagee of one only. (*Rider N, pl. 248.*) To make the suits identical there must be an identity of plaintiffs. (*Gage v. Lord Stafford*, 1 Ves. sen. 544.) The Court could not, upon motion, stay Mr. Sadleir, unless the suits were for the same matter. Mr. Sadleir never came in under the decree; he was merely an *ad invitum* defendant.

The LORD CHANCELLOR.—There is some difficulty in this, especially by reason of the form of the order of reference to the Master. The question intended to be submitted to the Master was, whether the suits were conversant about the same subject-matter. His Honour, the Master of the Rolls, differed with the finding of the Master. [Smith.—The Master of the Rolls followed the order. (*Howlett v. Lombert*, Fl. & M. 226, S. C.; 3 Ir. Chan. 473.)] If that be the common form of reference to the Master it precludes all question. The Master is then to see whether this suit and the other suit now pending are for one and the same matter, and on that reference the whole matter is open to him to examine into. Two questions were insisted upon by the counsel for the plaintiff. First, that the suits were originally for the same matter and between the same parties; and, secondly, if that be not so, at least up to a certain stage. Is that now the case? The demands can be only said to be for the same matter, because it is to raise a portion of the same common charge. The question in issue in this case is, if a party file a bill to raise a portion of a charge, and another party file another bill to raise another portion, and collaterally to raise the whole, whether the pendency of the first suit can be pleaded to the other. There is no authority to that effect, nor has it been strongly argued. We all know well, that in everyday practice bills are filed by legatees and by creditors, and it has never been decided, that though in these cases the parties seek to recover their demands out of the same estate, it has been held to be the same subject matter of suit. There is an anonymous case, in Mod. Eq. Pr. 406, ed. 3, where a residuary legatee filed a bill; it was held that suit could not be pleaded to a bill by another residuary legatee who is no party to the former bill. The question to be considered is, whether there is the same party prosecuting the same demand against the same estate; and then the question arises, whether a defendant is a party prosecuting a demand. How can it be said that he is prosecuting when he is *primæ facie* the party against whom the suit is depending? I do not see any sense in which a defendant can be considered as prosecuting a demand. It is plain that to the time of the making of the decree in *Coote v. Whalley*, it could not have been pleaded that the suits were the same; it then was in the power of the plaintiff in this suit to have relief, and to carry on that suit as if he were the plaintiff. That is the common case of decrees made every day, under which a creditor obtains the benefit of a suit; but there is no case where a plea has been filed to that suit by a party who was merely a defendant. The common course of practice is against such pleas. The jurisdiction of the Court is not confined to the power of preventing parties instituting proceedings to recover their demands, but it is a jurisdiction to prevent parties instituting proceedings *de novo* to recover a demand which might have been recovered in another suit, and to prevent expense. The course of practice has not been to plead, but to move in the cause to have the proceedings stayed upon such terms as the party should be found entitled to, but there is no case of a plea that there are other proceedings of which the creditor might be in a position to take advantage. If the party be stayed in ordinary cases, he is entitled to his costs; but if, after having notice of the existence of the decree, he goes on to prosecute his proceedings, a question of costs will then arise. It is by no means of course that he should get costs, but I do not say that he should be made to pay them. There is no authority for the proposition that a plea of the pendency of a former suit may be pleaded prior to that of *Nene v. Weston*, decided by Lord Hardwicke; that case is reconcilable with principle and autho-



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ity. That was a plain case: the party there, by his acts, said, "I will prosecute my rights by proving my debt under the decree; I will contribute to the expenses;" and when a defendant so proceeds, I can understand proceedings by him of such a nature as to entitle the defendant to say, "As you have taken other proceedings, you cannot now institute proceedings *de novo*;" but you cannot treat a party who, though bound by the suit, remains inactive, and though he may make himself active as a person prosecuting the suit. On this principle, which appears to me to be that to be given to the cases, I cannot see any reason to depart from the ruling of the Master of the Rolls. I will refuse this motion.

*Motion refused with costs.*

## HOUSE OF LORDS.

Reported by W. H. BENNETT, Esq. Barrister-at-Law.

July 7 and 11.

(Present: The LORD CHANCELLOR, Lord BROUGHAM, and other Lords.)

B. W. SCADDING, Plaintiff in Error,  
L. LORANT, Defendant in Error.

Rating—Poor-rate—Adjournment of vestry—*Replevin.*

*It is as competent to vestrymen de facto to join in making a rate for the relief of the poor as vestrymen de jure.*

*A meeting to make a poor-rate was adjourned, but no further notice of the adjourned meeting, or of the purposes thereof, had been given on the doors of the churches and chapels of a parish, as required by a local Act for that parish:*

*Held, that notice of the original meeting having been duly given, and the purpose for which it was to be held, such notice extended to all adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and consequently a poor-rate made at such adjourned meeting was valid.*

*In replevin, the defendant avowed specially under a distress for poor-rate assessed on plaintiff in respect of his dwelling-house, and as a collector of such rate:*

*Held, that the facts found as to the making the above rate sustained the avowry.*

This was a writ of error upon a judgment of the Court of Ex. Ch. reversing a judgment of the Court of Q. B. upon a special verdict in an action of replevin, in which the plaintiff in error was plaintiff, and the defendant in error and one Joseph Patrick (since deceased) were defendants.

The declaration complained that the defendants, on the 28th of August, 1840, seized and took certain goods and chattels of the plaintiff then being in his dwelling-house in the parish of St. Pancras.

The defendant Lorant avowed specially under a distress for a poor-rate assessed on plaintiff in respect of his said dwelling-house, in and for said parish, and as a collector of such rate. The plaintiff pleaded in bar *de injuriâ*. The jury found a special verdict, setting forth by whom and under what circumstances the rate was made and levied; and the main questions for decision were,—whether the facts found disclosed a valid rate,—and, whether these facts sustained the avowry.

The verdict found that before and at said time when, &c. the parish of St. Pancras was governed by the local Act, 59 Geo. 3, c. 39, intitled "An Act for establishing a select Vestry in the Parish of St. Pancras, in the County of Middlesex, and for other Purposes relating thereto," in conjunction with the Act 1 & 2 Wm. 4, c. 60, intitled "An Act for the better regulation of Vestries and for the appointment of Auditors of Accounts in certain Parishes of England and Wales;" that the election of vestrymen for said parish took place annually, one-third of the vestrymen going out by rotation each year, and vacancies from death or other causes being filled up at the same time; that the number of rated householders in said parish exceeded 10,000; that on the sixth day of May, in the year of our Lord, one thousand eight hundred and thirty-nine, the annual meeting of the parishioners of the said parish for the election of vestrymen and auditors of accounts for the said parish took place at the vestry rooms in Gordon-street, within the said parish, pursuant to previous due appointment by the vestry of the said parish, and that notice thereof was duly given, such notice having been duly signed by the churchwardens of the said parish. And the jurors aforesaid, upon their oath aforesaid, further say, that there were six vacancies in the vestry, by death or other causes, to be filled up at such election, in addition to forty who were to go out by rotation. And that at the said annual election, an election in fact of forty-six persons took place to supply the places of the forty vestrymen, who were so to go out by rotation as aforesaid, and to fill up the said six vacancies so to be filled up as aforesaid. And the jurors aforesaid, on their oath aforesaid, further say, that the names of the said forty-six persons were and are as

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follows (setting out the names). That the said forty-six persons were not, nor was any of them duly elected at the said annual election, nor was there ever, during the said year one thousand eight hundred and thirty-nine, any due election of vestrymen of the said parish, to supply the places of the said forty who were to go out by rotation at the said election as aforesaid, or any of them, or to fill up the said six vacancies, or any of them; but that the said forty-six persons so elected in fact as aforesaid, continued to act from the time of the said election until after the end of the year one thousand eight hundred and thirty-nine, as vestrymen of the said parish. That all the said persons so elected in fact as aforesaid, were duly qualified to fill the office of vestrymen, if they had been duly elected as such. That nineteen of the said persons so elected were a portion of the forty who were to go out by rotation. That on the twelfth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, a meeting of the persons acting as vestrymen of the said parish, was duly convened and held at the vestry-rooms, in Gordon-street, within the said parish, in the manner directed for vestry meetings by the said Act, made and passed in the said fifty-ninth year of the reign of his late Majesty George the Third, chapter thirty-nine, and in the manner and for the purpose in the within avowry in that behalf mentioned, and that notice of the said last mentioned meeting, and of the purpose thereof, had been reduced into writing and signed, and copies thereof also signed, were affixed on the Sunday preceding such last-mentioned meeting, in the manner mentioned in the within avowry, and that all those persons who were members of the vestry of the said parish at the time of the said election, and who were not to go out by rotation at the said election, as well as the said forty-six persons so elected in fact as aforesaid, were summoned pursuant to a resolution passed at a meeting of the persons acting as the vestry of the said parish, held on the third day of August, one thousand eight hundred and thirty-nine, which said meeting was the next previous meeting to the said meeting of the said twelfth day of August. That of the forty vestrymen who were to go out by rotation at the said election, those who were not re-elected in fact as aforesaid were not summoned to the said meeting of the twelfth day of August, one thousand eight hundred and thirty-nine, or any subsequent meeting. That the vicar of the said parish was not present at the said meeting of the twelfth day of August, and that the said Richard Horspool being present, was, before proceeding to business, elected chairman for the occasion, as stated in the within avowry. That the following is the entry of the proceedings at the meeting holden on the day last mentioned, duly entered in a book kept for that purpose, in pursuance of the said first mentioned Act as hereinafter mentioned.

"Parish of Saint Pancras, in the county of Middlesex.

"Vestry Minute Book, No. 13.

"At a general meeting of the vestrymen of the said parish, held at the Vestry-rooms, Gordon-street, on Monday, the twelfth day of August, 1839, pursuant to adjournment:

"Richard Horspool, esquire, in the chair, and thirty other vestrymen present, viz. (setting out the names):

"The minutes of the last vestry were read and confirmed.

"The vestry proceeded to the order of the day (pursuant to the minutes of the last vestry, and to letters of summons issued for the purpose by the vestry clerk) to make a general rate for the relief of the poor of this parish. The notice of the present meeting, and the purpose thereof as published on the churches and chapels of this parish, on Sunday last, pursuant to the Act for regulating vestry notices, was presented and read. The extract from the minutes of the directors of the poor presented with the estimate of expenditure at the last vestry, was referred to and ordered to be entered on the minutes as follows:—(Here follow the extract and estimate. There then follow reports from committees for assessments.)

"Resolved unanimously,—That a general rate of one shilling in the pound be made and laid on the inhabitants and occupiers of houses, lands, tenements, and hereditaments, tithes inappropriate and impropriation of tithes, in the parish of Saint Pancras, in the county of Middlesex, for and towards the relief of the poor of the said parish, and other purposes chargeable thereon, according to law; and the said rate is hereby made and laid accordingly, and is to be collected forthwith."

"Resolved,—That the vestrymen be summoned for Wednesday, the fourth day of September next, to elect and appoint a director of the poor in the place of Mr. W. Michaux.

"Adjourned to the fourth of September next.

"R. HORSPOOL."

That the said persons in the said minutes mentioned as being present at the said meeting, of the said twelfth day of August, were all in fact present

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at the said meeting, and the said Richard Horspool, esquire, and the said Messieurs Chapman, Perrett, senior, Clarke, Harnden, Braithwaite, Arnell, Adams, Charnock, Brettingham, Pickman, C. W. Davy, Perrett, junior, Stock, Prendergast, Warren, Smith, Stockton, Wilson, Simpson, Matthews, and Castell, in the said minutes mentioned, were and are respectively the said Richard Horspool, John Chapman, John Perrett, Robert Bloomfield Clarke, James Cooper Harnden, Thomas Braithwaite, John Arnell, Thomas Alexander Adams, Richard Charnock, Richard Freston Brettingham, William Pickman, John Davy, John Perrett, the younger, Robert Stock, Michael Prendergast, Thomas Warren, Thomas Henry Smith, Samuel Stockton, William Wilson, William Simpson, Thomas Matthews, and Jehosaphat Castell, in the said avowry in that behalf mentioned, as being present at the said meeting. That the said Messieurs Harrison, Maddock, M.D., Wright, Farmer, Godbold, Willis, Page, Willis, and Young, in the said minutes mentioned, were and are respectively the said Daniel Charles R. Harrison, Alfred Beaumont Maddock, Benjamin J. E. Wright, Robert Farmer, Francis Godbold, James Willis, John Page, William Willis, and James J. Young, hereinbefore mentioned. That the persons present at the said meeting, of the twelfth day of August, comprise with others all those whose names are set forth in the within avowry, as being present at the said meeting, held on the twelfth day of August. That of the said persons so present at the said meeting, of the twelfth day of August as aforesaid, the said Richard Horspool, John Chapman, John Perrett, Richard Freston Brettingham, John Davy, William Wilson, William Simpson, and Thomas Matthews, were all persons who were so elected in fact as aforesaid, as vestrymen at the said election, of the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen who were to go out in rotation at the said election. And the said Daniel Charles R. Harrison, Alfred Beaumont Maddock, Benjamin J. E. Wright, Robert Farmer, Francis Godbold, James Willis, John Page, William Willis, and James J. Young, were all persons who were so elected in fact as aforesaid, as vestrymen at the said election, of the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, for the first time. And the said Robert Bloomfield Clarke, James Cooper Harnden, Thomas Braithwaite, John Arnell, Thomas Alexander Adams, Richard Charnock, William Pickman, John Perrett, the younger, Robert Stock, Michael Prendergast, Thomas Warren, Thomas Henry Smith, Samuel Stockton, and Jehosaphat Castell, were all persons who had been duly chosen and returned as vestrymen at the elections, holden in the two years next preceding the said year one thousand eight hundred and thirty-nine. That a special general meeting of the persons acting as vestrymen of the said parish, was held at the Vestry-rooms aforesaid, in Gordon-street aforesaid, on Wednesday, the twenty-eighth day of August, in the year of our Lord one thousand eight hundred and thirty-nine. That the vicar of the said parish was not present at the said last-mentioned meeting, and that the said Richard Horspool being then present, was, before proceeding to business, elected chairman for the occasion, as stated in the within avowry. That the following is the entry of that meeting made in the book duly kept by the vestry for that purpose, and which is at all reasonable times open to the inspection of the vestrymen of the said parish, and of all persons rated or assessed to the relief of the poor of the said parish, and of all creditors on the rates of the said parish, without fee or reward, as stated in the within avowry.

"Parish of Saint Pancras, in the county of Middlesex. At a special general meeting of the vestrymen of the said parish, held at the Vestry-rooms, Gordon-street, on Wednesday, the 28th day of August, 1839, pursuant to requisition.

"PRESENT.

"Richard Horspool, esquire, in the chair, and twenty-three other vestrymen, viz. — [Setting out the names.]

"The minutes of the last vestry were read and confirmed. The requisition by nine vestrymen for convening the present meeting, was presented and read as follows:—

"Saint Pancras, Middlesex.

"Mr. John McGahy, Vestry Clerk. You are hereby requested to convene a special general meeting of the vestrymen of this parish, pursuant to the tenor of the eighty-seventh section of the Act fifty-ninth George Third, chapter thirty-nine, for Wednesday, the twenty-eighth day of August instant, at two o'clock in the afternoon, at the Vestry Rooms, 1, Gordon-street, Gordon-square, within the said parish, to consider a recommendation and plan from the directors of the poor, for making additions and improvements to the work-

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house of this parish, with a view of adopting the same. August 12th, 1839.

"We are, Sir, your obedient servants,"  
(Signed by nine vestrymen.)

"The Vestry proceeded to the order of the day, pursuant to the said requisition, and to letters of summons duly issued for the purpose by the vestry clerk, to consider a recommendation and plan for making additions and improvements to the work-house of this parish.

"Adjourned,

"JAMES BRAIDLEY."

That the said persons in the said minutes mentioned, as being present at the said meeting, of the said twenty-eighth day of August, were all in fact present at the said meeting. And the said Richard Horspool, esquire, and the said Messieurs Houghton, &c. &c. (naming them), in the said last-mentioned minutes mentioned, were, and are respectively, the said Richard Horspool, George Houghton, &c. &c. in the said avowry, in that behalf mentioned, as being present at the said last-mentioned meeting. That the said Messieurs Cooper, Bray, &c. in the said last-mentioned minutes mentioned were, and are respectively, the said Thomas Henry Cooper, &c. hereinbefore mentioned. That of the said persons present at the said last mentioned meeting, and of those who signed the said requisition, the said Richard Horspool, George Houghton, John Perrett, Richard Preston Bretingham, William Simpson, John Davy, Thomas Matthews, and Michael Field, were all persons who were so elected as vestrymen in fact as aforesaid at the said election, of the 6th day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen then in rotation to go out from the vestry of the said parish, and the said Thomas Henry Cooper, William Thomas Bray, James J. Young, Daniel Charles R. Harrison, Benjamin J. E. Wright, and Thomas Dixon, were all persons who were so elected in fact as aforesaid, as vestrymen at the said election of the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, for the first time; and that the said Miles Hughes, John Darlington, John Perrett, the younger, William Kemp, William Pickman, Thomas Braithwaite, John Hill, George Davey, Thomas Alexander Adams, Michael Prendergast, Thomas Yolland, James Braby, Robert Bloomfield Clarke, John O'Neill, and Thomas Cope, were all persons who had been duly chosen and returned as vestrymen at the elections, holden in the two years next preceding the said year one thousand eight hundred and thirty-nine. That a printed notice of the said meeting of the twenty-eighth day of August, and of the purpose thereof, with the name of the vestry clerk of the said parish subjoined thereto, was left for each of the said persons acting as vestrymen of the said parish, at his then place of abode, fourteen days previous to such last mentioned meeting, in the manner in that behalf mentioned in the within avowry, including the said persons so elected in fact as aforesaid, at the said election, holden on the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, but not those who were to go out by rotation from the said vestry at that time, and were not re-elected. And that the said meeting of the twenty-eighth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, was the next subsequent meeting to that of the twelfth day of August, in the year of our Lord one thousand eight hundred and thirty-nine. That on the fourth day of September, in the year of our Lord one thousand eight hundred and thirty-nine, a general meeting of the persons acting as vestrymen of the said parish was duly held at the vestry-rooms, in Gordon-street aforesaid, pursuant to adjournment, from the said meeting of the twelfth day of August. That the vicar of the said parish was not present at the said meeting of the fourth day of September, and that the said James Braidley being then present, was, before proceeding to business, duly elected chairman for the occasion. That the following is the entry of the said meeting of the fourth day of September, in the said book of the vestry, duly kept for that purpose as aforesaid. [The minutes of this meeting are set out.] That the said persons in the said minutes mentioned, as being present at the said meeting of the said fourth day of September, were all in fact present at the said meeting. And the said James Braidley, esquire, and the said Messieurs Adams, Wright, Kemble, Godbold, Dixon, Wickstead, Clarke, Wilson, Pickman, C. W., Kemp, Perrett, senior, T. H. Smith, Field, and Robinson, in the said last-mentioned minutes mentioned, were and are respectively the said James Braidley, Thomas Alexander Adams, Benjamin J. E. Wright, John M. Kemble, Francis Godbold, Thomas Dixon, Benjamin Wickstead, Robert Bloomfield Clarke, William Wilson, William Pickman, William Kemp, John Perrett, Thomas Henry Smith, Michael Field, and Wrangle Robinson, hereinbefore mentioned. That the said Messieurs Newberry, G. Williams, Perry, North, Beckett, and Thompson, in the said last-mentioned minutes men-

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tioned, were and are respectively, John Newberry, George Williams, Philip Perry, William North, Thomas Beckett, and Thomas Thompson. That of the said persons so named in the said minutes of the said meeting of the fourth day of September, the said James Braidley, William Wilson, John Perrett, Michael Field, and Wrangle Robinson, were all persons who were so elected as vestrymen in fact as aforesaid at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen then in rotation to go out from the vestry of the said parish. And the said Benjamin J. E. Wright, John M. Kemble, Francis Godbold, Thomas Dixon, and Benjamin Wickstead, were all persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine. That the ninth day of September, in the year of our Lord one thousand eight hundred and thirty-nine, a general meeting of the persons acting as vestrymen of the said parish, was held at the vestry-rooms, in Gordon-street aforesaid, pursuant to the said adjournment from the fourth day of September. That the vicar of the said parish was not present at the said meeting of the ninth day of September, and that the said Richard Horspool being then present, was, before proceeding to business, duly elected chairman for the occasion, and the following is the entry of the said meeting of the ninth day of September, in the said book of the vestry, duly kept by the vestry for that purpose as aforesaid. [The minutes of this meeting are set out.] That all the said persons in the said minutes mentioned as being present at the said meeting of the said ninth day of September, were in fact present at the said meeting. And the said Richard Horspool, esquire, and the said Messieurs Harnden, Braithwaite, Davy, Wright, Maynard, Clarke, Perrett, senior, Wills, Arnell, Thompson, Tupp, Adams, Dixon, Hill, Pickman, C. W., and Darlington, in the said last-mentioned minutes mentioned, were and are respectively the said Richard Horspool and the said James Cooper Harnden. Thomas Braithwaite, John Davy, Benjamin J. E. Wright, James Maynard, Robert Bloomfield Clarke, John Perrett, James Wills, John Arnell, Thomas Thompson, John Tupp, Thomas Alexander Adams, Thomas Dixon, John Hill, William Pickman, and John Darlington, hereinbefore mentioned. That the said Messieurs Parker and Wood, in the said last-mentioned minutes mentioned, were and are respectively James Parker and William Wood. That of the said persons so present at and so named in the said minutes of the said meeting of the said ninth day of September, the said Richard Horspool, John Davy, and John Perrett were all persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen then in rotation to go out from the said vestry of the said parish, and the said Benjamin J. E. Wright, James Maynard, James Wills, and Thomas Dixon were all persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, for the first time, and the said James Cooper Harnden, Thomas Braithwaite, Robert Bloomfield Clarke, James Parker, John Arnell, Thomas Thompson, John Tupp, Thomas Alexander Adams, William Wood, John Hill, William Pickman, and John Darlington, were all persons who had been duly chosen and returned as vestrymen at the elections holden in the two years next preceding the said year one thousand eight hundred and thirty-nine. That after the said resolution, passed at the said meeting of the twelfth day of August, in the year of our Lord one thousand eight hundred and thirty-nine, the vestry clerk of the said parish, with all reasonable despatch, proceeded to make up four books, which said books, when completed, contained, in addition to every other particular which the form of making out the rate mentioned in the said resolution required to be set forth, the names of the several occupiers of all the rateable property within the said parish, also the names of the owners of such property, and the description of the property rated, and the name and situation of such property, and also the gross estimated rental and rateable value thereof, and the amount of an assessment of one shilling in the pound upon such rateable value, besides every other particular set forth at the head of the respective columns in the form given in the schedule annexed to a certain Act of Parliament, made and passed in the seventh year of the reign of his late Majesty

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King William the Fourth, intituled "An Act to regulate Parochial Assessments," so far as the same could be ascertained. That the said four books were not completed by the said ninth day of September, in the year of our Lord one thousand eight hundred and thirty-nine. And that in making up the said books as above mentioned, the resolutions and acts of the said meetings of the fourth day of September and of the ninth day of September respectively, were acted upon by the vestry clerk in this respect, that is to say, that those owners of property within the said parish, with whom compositions were entered into at the said last mentioned meetings respectively, were assessed in respect of the property to which such compositions related upon the amount of such compositions respectively. That each of the said four books related to and contained principally, but not exclusively, as hereinafter stated, the particulars of the property, situate in one of four several divisions or districts of the said parish, called respectively the north, south, east, and west divisions or districts, for each of which said districts a separate collector of rates was specially appointed to collect, and did collect the rates of such district only, for which such collector was so appointed, subject to the qualification hereinafter stated, but no one of the said books contained the particulars of all the rateable property situate within the said parish. That in some instances the particulars of property belonging to gas companies, railway companies, and water companies respectively, partly situate in each of the said four divisions or districts of the said parish, were entered and contained in one only of the said four books, and in those instances the rates of the property so partly situate in each of the said four divisions or districts, were collected by one only of the said collectors. That the said property, of which the said plaintiff was occupier, as stated in the within avowry, was in the division or district of the parish called the south division or district. That, except as herein described, the said four books did not contain any reference one to another, and that each of the said books contained the following entry at the commencement thereof:—"Saint Pancras, Middlesex. An assessment for the relief of the poor of the parish of Saint Pancras, in the county of Middlesex, and for other purposes chargeable thereon, according to law, made this twelfth day of August, one thousand eight hundred and thirty-nine, after the rate of one shilling in the pound, by the vestrymen of the parish of Saint Pancras, in the county of Middlesex, acting under and by virtue of the provisions of a statute made in the fifty-ninth year of the reign of King George the Third, intituled 'An Act for establishing a Select Vestry, in the Parish of Saint Pancras, in the County of Middlesex, and for other Purposes relating thereto,' which said rate and assessment was made and assessed at a meeting of the said vestrymen, when seven or more, and not less than nine of them were present at Saint Pancras Vestry-rooms, situate in Gordon-street, Gordon-square, and being within the said parish, of which meeting notice was given according to law, and which said rate of one shilling in the pound is to be collected forthwith." That there was no other heading or entry at the commencement, or in any other part of any of the said books, except the declaration hereinafter mentioned. That the said book so relating to and containing principally, but not exclusively, the particulars of the property situate in the said south division of the said parish as aforesaid, contained amongst other particulars, the name of the said plaintiff as the owner and occupier of the house No. 2, Gordon-street, in the said parish, and of the house No. 4, in the same street in the said parish, and described the rateable value of the said house, No. 2, in Gordon-street aforesaid, as one hundred and twenty pounds, and the amount of a rate at one shilling in the pound thereon, as six pounds, and the rateable value of the house, No. 4, Gordon-street, as one hundred pounds, and the amount of a rate at one shilling in the pound, as five pounds, and which said particulars so far as they relate to the said plaintiff, and the said houses in the said avowry mentioned, were and are in the following form. [The form is then given.] That each of the said four books contained certain numbers, which numbers were placed opposite to the said particulars of the said property so described as rated in the said books respectively as aforesaid, and that the said book relating to, and containing principally but not exclusively, the particulars of the property situate in the said East division or district was marked outside as follows, namely, "East" "Poor Rate," "August 12th, 1839," and contained the numbers from 1 to 3107, both inclusive; and that the said book relating to, and containing principally but not exclusively, the particulars of the property situate in the said South division or district, was marked outside as follows, namely, "South" "Poor Rate," "August 12th, 1839," and contained the numbers from 3108 to 6873, both inclusive; and that the said book relating to, and containing principally but not exclusively the

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particulars of the property situate in the said West division or district, was marked outside as follows, namely, "West," "Poor Rate," "August 12th, 1839," and contained the numbers from 6876 to 10,103, both inclusive; and that the said book relating to, and containing principally but not exclusively the particulars of the property situate in the said North division or district, was marked outside as follows, namely, "North," "Poor Rate," "August 12th, 1839," and contained the numbers from 10,104 to 13,555, both inclusive. And that the number placed opposite to the said particulars relating to the said house, No. 2, Gordon-street, was the number 4630, and the number placed opposite to the said particulars relating to the said house, No. 4, Gordon-street, was the number 4632, and that the first page of each of the said four books was marked with the number 1, and the second page of each of the said books with the number 2, and so on throughout all the pages of the said books respectively; that the assessments described in the said four books as aforesaid were equal assessments, and were made at the rate of one shilling in the pound upon all the property within the said parish, which at the time of making it was liable to be rated or assessed to the relief of the poor within the said parish, and were made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, at the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and the commutation rent charge, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain them in a state to command such rent. That on the fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-nine, a general meeting of the persons acting as vestrymen of the said parish, was duly holden at the said vestry-rooms in Gordon-street aforesaid, pursuant to the said adjournment from the said ninth day of September. That the vicar of the said parish was not present at the said meeting of the said fourteenth day of September, and that William Pickman, one of the churchwardens of the said parish, being then present, was, before proceeding to business, duly elected chairman for the occasion, as stated in the within avowry. That the following is the entry of the said meeting of the fourteenth day of September, made in the said book duly kept by the said vestry for that purpose as aforesaid. [The minutes of this meeting are then given.] The said rate books were thereupon signed by ten vestrymen. Resolved—"That the vestry clerk make application for the allowance and confirmation of the said rate by two justices of the county of Middlesex, and thereupon cause due notice of such allowance to be given pursuant to the Act for regulating vestry notices." "Adjourned, R. Horspool." That the said persons in the said minutes mentioned as being present at the said meeting of the said fourteenth day of September, were all in fact present at the said meeting. And the said William Pickman, esquire, and the said Messieurs Harnden, Braidley, Arnell, Perrett, senior, Horspool, Tupp, Matthews, Stock, Hughes, and J. Johnson in the said last mentioned minutes mentioned, were and are respectively the said William Pickman, the said James Cooper Harnden, James Braidley, John Arnell, John Perrett, Richard Horspool, John Tupp, Thomas Matthews, Robert Stock, Miles Hughes, and Joseph Johnson, in the said avowry in that behalf mentioned as being present at the said last-mentioned meeting. That the said Messieurs Dixon, Wright, Cooper, and Maddock, in the said last-mentioned minutes mentioned, were and are respectively, the said Thomas Dixon, Benjamin J. E. Wright, Thomas Henry Cooper, and Alfred Beaumont Maddock, hereinbefore mentioned. That of the said persons so named in the said minutes, and so present at the said meeting of the said fourteenth day of September, the said James Braidley, John Perrett, Richard Horspool, Thomas Matthews, and Joseph Johnson were all persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen then in rotation to go out from the vestry of the said parish; and the said Thomas Dixon, Benjamin J. E. Wright, Thomas Henry Cooper, and Alfred Beaumont Maddock were all persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, for the first time; and the said William Pickman, James Cooper Harnden, John Arnell, John Tupp, Robert Stock, and Miles Hughes were all persons who had been duly chosen and returned as vestrymen at the elections holden in the two years next preceding the said year, one thousand eight hundred and thirty-nine. And the jurors aforesaid on their oath aforesaid further say, that a declaration, of which the following is a copy, was then written in each of the said books, at the end of the particulars therein contained as aforesaid (that is to say), "We,

William Pickman, Richard Horspool, James Cooper Harnden, John Perrett, Thomas Braithwaite, Benjamin J. E. Wright, Robert Stock, Alfred Beaumont Maddock, Robert Bloomfield Clarke, do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them, to which end we have used our best endeavours." And that immediately under the said declaration, the said William Pickman, Richard Horspool, James Cooper Harnden, John Perrett, Thomas Braithwaite, Benjamin J. E. Wright, Robert Stock, John Arnell, Alfred Beaumont Maddock, Robert Bloomfield Clarke signed their names in the manner following, that is to say,—[then follow the names]. And that, save as aforesaid, there never was any declaration or signature in the said last-mentioned books, or any of them, or relating thereto, except the signature of the justices hereinbefore mentioned. That of the said persons who so signed their names as aforesaid the said Richard Horspool and John Perrett, were both persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, having been vestrymen then in rotation to go out from the vestry of the said parish; and the said Benjamin J. E. Wright and Alfred Beaumont Maddock were both persons who were so elected in fact as aforesaid as vestrymen at the said election of the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, for the first time; and the said William Pickman, James Cooper Harnden, Thomas Braithwaite, Robert Stock, John Arnell, and Robert Bloomfield Clarke, were all persons who had been duly chosen and returned as vestrymen at the elections holden in the two years next preceding the said year one thousand eight hundred and thirty-nine. That in each of the said books a confirmation and allowance, of which the following is a copy, was made and entered by two justices of the peace for the county of Middlesex, on the said fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-nine:—"Middlesex, to wit.—We, two of her Majesty's justices of the peace acting in and for the said county of Middlesex, do consent unto, allow, and confirm this assessment. As witness our hands, this fourteenth day of September, one thousand eight hundred and thirty-nine.—Arthur Smith, Robert McWilliam." And that notices of the above-mentioned confirmation and allowance were duly signed and affixed as mentioned in the within avowry. That all the said persons who so acted as vestrymen as aforesaid were resident householders of the said parish, and duly qualified to act as vestrymen of the said parish, if duly elected. That the said Thomas Braithwaite and the said Robert Bloomfield Clarke were not named in any minute or minutes of the said meeting of the said fourteenth day of September, but were really present at it, and were by mistake omitted from the said minutes of the said meeting which were entered into the vestry books of the said parish; and that their above-mentioned signatures were written at the said meeting of the said fourteenth day of September, and the said Robert Bloomfield Clarke and the said Thomas Braithwaite were and are respectively the said Robert Bloomfield Clarke and the said Thomas Braithwaite in the said avowry in that behalf mentioned, and that the said Robert Bloomfield Clarke and the said Thomas Braithwaite were both persons who had been duly chosen and returned as vestrymen at the elections holden in the two years next preceding the said year one thousand eight hundred and thirty-nine. That subject to the said last-mentioned mistake, and to the question whether the aforesaid signing was a sufficient signature of the rate books, and whether the facts disclosed constitute a sufficient making of a rate, the entries in the said vestry book of the proceedings at the several vestry meetings state correctly what took place and all that took place at the said several meetings, and the acts therein stated to have been done were done as therein stated, and that except so far as the facts stated constitute a rate no rate was made. That with respect to all the meetings of the vestry, and of the parishioners for the said election of the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, all the notices and summonses required by law were duly given, save and except that those members of the vestry of the said parish who were to go out by rotation at the said election of the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, and who were not re-elected, were not summoned to any meeting subsequent to the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine; and also, save and except that there was no notice on or near to the doors of the churches or chapels within the said parish, or any of them, that the purpose of any vestry meeting except that of the said twelfth day of August was for making a rate. That the said several meetings hereinbefore mentioned were all held in the manner directed for the holding of vestry meetings by the

said Act of the fifty-ninth year of the reign of King George the Third. That the minutes of the said meeting of the said fourteenth day of September, were read, signed, and confirmed, at the next succeeding meeting of the persons acting as vestrymen of the said parish, which was duly holden on the twenty-first day of September, in the year of our Lord one thousand eight hundred and thirty-nine. That the said defendant, Louis Lorant, before and at the time of the seizing of the said goods and chattels, and the levying of the said distress as hereinbefore mentioned, was one of the collectors of the poor-rates of the said parish of Saint Pancras, duly nominated, constituted, and appointed, in that behalf by the vestrymen of the said parish, under and by virtue of the powers and provisions in that behalf, contained in the said Act of the fifty-ninth year of the reign of his said late Majesty George the Third; and the said defendant, Joseph Patrick, deceased, was also before and at the time of the seizing of the said goods and chattels, and levying of the said distress hereinbefore mentioned, a headborough and one of her Majesty's peace officers for the said parish of Saint Pancras, duly chosen, returned, and sworn in that behalf, according to law, and the powers and provisions of the said Act of the fifty-ninth year of the reign of his said late Majesty George the Third. That the plaintiff was on the said sixth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, and from thence continually until and at the time of making the distress hereinbefore mentioned, the occupier of two dwelling-houses, situate and being numbers 2 and 4, in Gordon-street, Gordon-square, in the said parish, of the net annual value of one hundred and twenty pounds and one hundred pounds respectively, and liable to be rated in respect thereof to the relief of the poor of the said parish, as in the within avowry mentioned, and the goods and chattels in the declaration mentioned, at the time of the taking and detaining them as therein mentioned, were in the said dwelling-house of the plaintiff, being No. 2, Gordon-street, within the said parish. That the several amounts of six pounds and five pounds mentioned in the within avowry were demanded of the plaintiff, at the times and in the manner in the said avowry mentioned, and payment thereof was refused by the plaintiff. That complaint was made upon oath by the said defendant, Louis Lorant, before Robert M'William, esquire, one of her Majesty's justices of the peace, acting in and for the said county of Middlesex, at the time and in the manner in the within avowry mentioned, and a summons was thereupon granted on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and forty, as in the said avowry mentioned, and such summons was duly served, as in the said avowry also mentioned. That the plaintiff made default, as in the said avowry also mentioned, and the defendant, Louis Lorant, appeared before the said last-mentioned justice, and deposed upon oath before the said justice to the leaving of the said summons at the said place (being the usual place of abode of the plaintiff) mentioned in the said avowry, and thereupon the warrant mentioned in the said avowry was issued by the said last-mentioned justice, under his hand and seal, and delivered to the said defendant, Louis Lorant, as and being one of the collectors of the said poor-rates, as in the said avowry mentioned. That the plaintiff was one of the persons mentioned in and under the said warrant, and the sum of eleven pounds was thereunder set down against the name of the plaintiff, as in the said avowry mentioned. That the goods and chattels in the declaration mentioned, were seized and taken as therein mentioned, by the said defendant Louis Lorant, as and being one of the collectors of the poor-rates of the said parish as aforesaid, and by the said defendant Joseph Patrick, deceased, as such headborough of the said parish as aforesaid, for the purpose and in the manner in the said avowry also mentioned.

The judgment of the Court of Q. B. was in favour of the plaintiff in the action.

Upon that judgment the surviving defendant in the action, Louis Lorant, brought a writ of error in the Ex. Ch. and, after argument, the judgment of the Court of Q. B. was reversed by the unanimous judgment of the Court of Ex. Ch.

The plaintiff in the action then brought this writ of error before the House of Lords.

*Peacock* and the Hon. G. Denman, for plaintiff in error, contended that, from the circumstances found by the special verdict, the rate was not a valid rate. That it was not competent in the meeting of the 14th September, 1849, to make any rate, no proper notice having been given, and that the facts found did not sustain the avowry. They cited, amongst other cases, *Reg. v. Bellham*, 11 Q.B. Rep. 379; *Penny v. Slade*, 5 N. Rep. 16; *Turner v. Blain*, Hy. Black. 560; *Winkfield v. —*, 2 Salk. 605; *St. Luke's Regulating Act*, 50 Geo. 3, c. 149; *Reg. v. Ramsden*, 3 Ad. & E. 456; 6 Ad. & E. 784; *Willis v. Murray*, 19 L. J. Ex. 209.

*Prendergast* and *Needham*, in support of the



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rate, relied, amongst other cases, on *Reg. v. Clement*, 12 Ad. & E. 177.

*Peacock*, in reply, mentioned *Res v. Churchwardens of Weobly*, 2 Str. 1259; *Res v. Undertakers*, &c. 2 Bar. & Cr. 714; *Draper v. Garrett*, 2 B. & Cr. 2.

The LORD CHANCELLOR, after stating the nature of the action, and the questions raised in it, put three questions to the judges. If an authority is given by a statute to the majority of a vestry, there being more than seven vestrymen present to make a rate, would such rate be unobjectionable in respect of its validity if the seven persons, or any of them, were seven vestrymen *de facto*, but not *de jure*? Secondly—By the statute of Geo. 3, authority was given to a vestry to make a rate for the relief of the poor; notice of the meeting to be held for that purpose was to be given on the preceding Sunday; and by the same statute it was enacted that notice should be given to each vestryman. At a vestry held on the 12th of August, it was resolved that a rate should be made, but as all the forms of the rate could not then be completed, adjournments were made to several different days, the last being the 14th of September, when the details of the rate were completed. There was a notice of the purpose of the meeting of the 12th of August, but the notice of the meeting of the 14th of September contained no mention of the purpose of making a rate. Supposing the rate to be otherwise valid, was it invalid by reason of the notice not stating the purpose for which the meeting assembled? Thirdly—In an action of replevin an avowry alleged that a poor-rate was made after the passing of a certain statute, and before the taking of the plaintiff's goods, and whilst his goods were liable to be rated, namely, on the 12th of August a rate was made. Would such allegation be supported by proof of the following facts? [The Lord Chancellor here read a summary of the facts as already given.] These three questions embraced all the points, and he moved that they should be the questions put to the judges.

The motion was agreed to, and the judges requested time to consider them.

The LORD CHIEF BARON, after an absence of about three-quarters of an hour, returned, and read the opinion of the judges. In answer to the first question proposed by your lordships to the judges, I have to report their unanimous opinion in the affirmative. We think that the vestrymen *de facto* were as competent to join in making a rate as the vestrymen *de jure*. In answer to the second question, we are unanimously of opinion that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice on the church door of the purpose for which the first meeting was to be held, and that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting. Thirdly, it was stated in the question that the substance of the allegation was, that the rate was made after the passing of a certain Act of Parliament, by virtue of which the taking of the goods of the plaintiff was justified, and certain facts (which his lordship referred to) were stated in support of the allegation; I have to report to your lordships that we are unanimously of opinion that the facts stated in the question well support the allegation in the avowry.

The LORD CHANCELLOR said that nothing could be more clear or distinct than the opinion just delivered, in which opinion he most cordially concurred. All the objections taken by the plaintiff in error were in the nature of technical objections, and it was satisfactory to know that if the rate had been impeachable on the merits, the party might, by appeal to the Sessions, have had that question raised, and, if justice required it, might have obtained redress. Not that that fact ought to prevent any person interested from taking other proceedings to impeach the rate if he thought it objectionable on other grounds. The judges were now unanimously of opinion that the adjournments were but continuations of the first meeting, and that the effect of the notice given previous to the first meeting was well continued to them. This objection was more of substance than either of the others. The opinion of the judges as to the vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence. He therefore moved that the

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judgment of the House should now be pronounced in favour of the defendant in error.

LORD BROUGHAM concurred.

*Judgment for the defendant in error.*

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

July 23 and Dec. 2, 1850.

WARWICK v. HOOVER.

*Licence to use patent—Covenant to pay a minimum sum as royalty—Power to revoke licence—Forfeiture—Waiver—Legal right—Injunction.*

*Patentees having by deed granted a licence to the defendant to use their patent, paying certain royalties to be made to 2,000l. yearly, and reserved the power of putting an end to the licence if that sum was not paid; that rent was not paid, and the plaintiffs received for several years a smaller yearly sum. Plaintiffs having afterwards given notice to revoke the licence, it was held, that by these acts the plaintiffs had waived their right to treat the former nonpayment as a forfeiture of the licence.*

This was an appeal motion by the defendant against an order by the late Vice-Chancellor of England, granting an injunction to restrain the defendant from using a certain process patented by the plaintiff's assignor. The facts are fully stated in the Lord Chancellor's judgment.

*Roll and Hallett*, for the defendant, supported the appeal motion, and cited *Saunders v. Smith*, 3 Myl. & Cr. 711; *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *Bacon v. Jones*, 4 Myl. & Cr. 433; *Collard v. Allison*, 4 Myl. & Cr. 487; *Rigby v. Great Western Railway Company*, 2 Phil. 44; *Spottiswoode v. Clarke*, 2 Phil. 154; *Armsby v. Woodward*, 6 B. & C. 519.

*Bethell and Bird* supported the Vice-Chancellor's order, and cited *Elliott v. Turner*, 13 Sim. 477; *Hill v. Thompson*, 3 Mer. 622; *Stevens v. Keating*, 2 Phil. 333; *Cotter v. The Midland Railway Company*, 2 Phil. 469.

*Roll* in reply.

The LORD CHANCELLOR.—This was a motion to discharge an order of the Vice-Chancellor of England, and also dissolve an injunction by which the defendant was restrained from continuing to work and exercise a certain invention and from manufacturing fabrics on the principle of that invention, or any part thereof, or otherwise in infringement of certain letters patent dated 7th April, 1842, and from selling any fabrics so manufactured since the revocation of a certain licence and during the plaintiff's term in the patent. The bill set forth that certain letters patent were on the 7th April, 1842, granted to John Anthony Julien for improvements in machinery and apparatus for knitting; that by an indenture dated the 31st December, 1842, and made between certain of the plaintiffs and others stated to have become entitled to the patent and the defendant, the said defendant was licensed to use the patented invention in the manufacture of certain fabrics during the remainder of the term for which the patent had been granted upon the terms of paying certain dues or royalties varying according to the particular articles manufactured by the defendant, such payments to be made quarterly, on the 27th October, 27th January, 27th April, and 27th July in each year, the first to commence on the 27th July, 1842; that it was stipulated in the indenture that if in any year during the licence the quarterly payment of dues should not, in the aggregate, equal the sum of 2,000l. the defendant should, within fourteen days after the expiration of every year in which such payment should fall short of such sum of 2,000l. make up the amount of such quarterly payment to the full sum of 2,000l. with a proviso that in case of default in payment of such sum it should be lawful for the plaintiffs or the other persons who, for the time being, should be entitled to the patent, to determine the licence by notice; that the patent, together with the dues and royalties payable under the licence, had been assigned to Warwick and another, two of the plaintiffs in the suit, with the benefit of all covenants in trust for the benefit of the persons who, for the time being, should be interested in the patent; and that the beneficial interest at the time of filing the bill was in all the plaintiffs except the trustee. The bill then alleges that the patented invention was new at the time of the patent, and that the patent was subsisting and in full force; that the defendant manufactured fabrics under and by virtue of the licence; and that since the date of the assignment to trustees, the defendant rendered his accounts from time to time of the quantity of the fabrics manufactured by him under the licence, and paid to them the royalties appearing due upon such accounts, yet that in no one year did the royalties amount to the sum of 2,000l.; and that the defendant had refused and neglected, contrary to the

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stipulation in the licence, to pay such sum as with the quarterly payments would have made up the sum of 2,000l. according to the agreement; that in consequence of such default the power of determining the licence arose and might be exercised, and accordingly by a deed-poll under the hands and seals of the plaintiffs respectively, the said plaintiffs did declare the licence and power thereby granted should cease, determine, and be void; and that due notice was given of such revocation to the defendant on the 6th of April, 1850. The bill then states that by the acts stated the licence had become absolutely determined and put an end to, and that the defendant ought thenceforth to have ceased to use the patented invention, but that the defendant refused so to do, and continued to practise and use the said invention. The bill prayed an account of the fabrics manufactured by the defendant since the revocation of the licence, and that the defendant might be decreed to pay what should be found to be due on the taking of such account, and that the defendant might be restrained from using the patented invention. The Vice-Chancellor of England having granted an injunction in the terms above stated, the defendant appealed to the Lord Chancellor. An affidavit was filed by the plaintiffs in support of the general allegations of the bill. This was met by an affidavit on the part of the defendant, in which he set forth the patent and the licence, and the substance of the covenants contained in the latter, and after stating certain applications made by him to be released from the obligation to make up the annual amount of the royalties to 2,000l. a-year, he set forth a letter of the 4th November, 1845, from the plaintiffs, the trustees, requesting an account to be sent of the royalties payable up to 27th October, 1845, and requesting to know the defendant's intentions as to working the patent, as they were prepared to make a considerable reduction in the scale of charges. He then stated that after this letter a meeting took place on the same 4th November, 1845, between him and the trustees, and that an arrangement was then come to, which was embodied in a letter, from the trustees to him, dated the same day, in which they stated that they agreed to reduce the royalties upon the goods made upon the patent knitting-machines from the 27th October then last, and set forth certain reduced sums as the royalties to be paid in respect of specified articles; that from the 27th October, 1845, down to January, 1850, the defendant continued, with the plaintiff's assent, to work under the licence, and to pay royalties upon the fabrics manufactured, according to the rates specified in this letter; and that from that time no demand or requisition was ever made that the amount of the royalties during the year should be made up to the sum of 2,000l.; that accounts were rendered quarterly to the trustees upon the footing of that letter, and that the trustees acquiesced in the payments made according to such accounts. The defendant also set out a letter from the trustees to him, dated the 1st August, 1849, acknowledging the receipt for a remittance of 174l., and returning 9s. 6d. in postage stamps, leaving 173l. 10s. 6d., the amount of account for royalties, as per statement, to the 27th July, and adding that the same should be duly carried to the defendant's credit with the Patent Knitting Company; also, a similar letter, dated the 8th November, 1849, acknowledging the receipt of bills and cash 2154. 14s., returning 7s. 1d. in postage stamps, leaving 2154. 6s. 11d. to the defendant's credit with the trustees for royalties to the 22nd October, as per the defendant's account; also, a letter, dated the 31st January, 1850, acknowledging the receipt on the 31st January by bill and postage stamps to the amount of 167l. 1s. 1d., being the amount of royalties to the Patent Knitting Company to the 26th January then last. The defendant further stated, that without any previous demand or requisition of payment, he was, on the 6th April, 1850, served with notice of the deed of revocation of the licence, upon the ground, as stated therein, that the defendant had not yearly, since the 27th July, 1843, paid, or caused to be paid, the clear sum of 2,000l. for each year's royalties, according to the reservation in the licence, the notice containing also a demand of the difference between the aggregate of the quarterly payments, and 2,000l. for every year since the 27th July, 1843. The defendant further stated, that relying upon the continuance of the licence, he had entered into contracts for the manufacture of fabrics upon the patent plan, which could not be completed in less than three months; that on the 17th April, 1850, after the notice of revocation, the defendant discovered that the plaintiffs had, upon the 13th April, 1849, executed a disclaimer of a part of the claim set forth in the specification under the patent. An affidavit in reply was filed by the plaintiffs containing a correspondence between the defendant and a former management under the patent on the part of the plaintiffs relative to the defendant's application for a reduction of the royalties, and up to be discharged from the obligation to make them up to 2,000l. a year, and a refusal to accede to that appli-



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cation. The plaintiffs then referred to the meeting of the 4th November, 1845, before mentioned, and made the following statement: "We distinctly deny that from any thing which passed at such interview the said defendant was justified in supposing we made him any promise that we would exonerate him from the fulfilment of his obligation under his deed of licence to pay or make up a minimum sum of 2,000*l.* per annum." In reference to the receipts mentioned by the defendant in his affidavit, the plaintiffs stated that they referred only to the royalties appearing to be due upon fabrics actually manufactured, and were so accepted and taken by the defendant. With respect to the letter of the 4th November, 1845, from the trustees to the defendant, the plaintiffs insisted that it was an agreement only to name certain specific rates, and left the obligation as to making up the dues to 2,000*l.* a year unaffected. The defendant, however, contended that it imported an agreement not only to diminish the specific charges or royalties upon the specified articles, but also a discharge from the obligation to make up the amount of the royalties in each year to 2,000*l.* In the statement I have made of the effect of the affidavits on both sides, I have confined myself to such parts as appear to me to bear upon the point which must determine this application, omitting to notice much which relates to other points upon which my decision will not proceed. From what I have stated it appears that the equity relied on on the part of the plaintiffs results from the following facts: that the plaintiffs are assignees of a certain patent; that the defendant accepted a licence to use the patented invention upon certain terms, one of which was to pay a royalty or rent to the amount at least of 2,000*l.* a year to be made up at the end of each year in manner stated in the licence, and that in default of such payment being made the licence might be determined; that the defendant has made default in such payment in every year except the first since the licence was granted; and that the plaintiffs have, in consequence, determined the licence according to the proviso in that behalf enabling them to do so. On the defendant's behalf, among other points not necessary to be noticed, it is insisted, first, that the condition as to the payment of the 2,000*l.* yearly was dispensed with by the agreement embodied in the letter of the 4th of November, 1845; and, secondly, that if the condition as to the payment of 2,000*l.* a year was not dispensed with, and the covenant to pay such sum had been broken by nonpayment of such sum, yet that the plaintiffs had elected not to treat such breach as a forfeiture of the licence, but to continue the licence by the acceptance of payment of the royalties under the licence accruing due for a period subsequent to the last breach of covenant. I shall first consider the point whether the licence granted to the defendant by those under whom the plaintiffs' claim has been legally determined, so as to make the defendant a wrongdoer as against the plaintiffs by continuing to use the patented invention, because, if the licence has not been determined, there is an entire failure of the equity set forth in the plaintiffs' bill; and I think this point may be determined upon principles and authorities which can be open to very little doubt or dispute. The proviso contained in the licence for determining the same upon default being made in the payment of the 2,000*l.* a year, was inserted exclusively for the benefit of the grantors, and the defendant, the grantee, could in no manner, by any option or act of his, determine the licence; nor were the grantors bound in the event of default being made in the stipulated payments to avoid the licence, or to treat it as determined; and until they, the grantors, should in the prescribed manner declare the option and exercise the right to treat the default as a ground of forfeiture, the licence would continue in full force, notwithstanding any breaches of covenants and conditions on the part of the defendant which might have occurred. It is not necessary to cite authority for this well-established proposition. The question to be determined is, whether the plaintiffs, by receiving royalties which accrued due for two quarters after the expiration of the year ending 27th July, 1849, did not treat and act upon the licence as an existing licence, and thereby elect conclusively not to treat the previous breaches of covenant as grounds of forfeiture, and thereby preclude themselves from afterwards determining the licence upon the ground of any previous breach of covenant. The principle upon which this position depends has been frequently recognised and adopted in cases between landlord and tenant; as where a tenant has committed a breach of covenant in a lease, which the landlord by a proviso in the lease, was authorised to treat as a forfeiture, and the landlord, with full knowledge of the breach of covenant, has afterwards treated the term as continuing, and received rent under the lease which had grown due for a period of time commencing subsequently to his knowledge of the cause for forfeiture. In such cases the receipt and acceptance of such rent under such circumstances has been held to be a conclusive election on the part of the

landlord not to treat the breach of covenant as a forfeiture, and to preclude him from afterwards avoiding the lease by reason of the previous breach of covenant. I cannot perceive any distinction between the present case and the case of landlord and tenant under a lease, and it seems to me to be clear that the receipt of the royalty under the licence for the two quarters commencing after the alleged ground of forfeiture had occurred, was a conclusive election by the plaintiffs not to act upon the previous breaches of the covenants as a ground of forfeiture. The only equity set forth in the bill is, that the defendant has used the patented invention since the licence has been determined. I am of opinion that the licence has not been determined, and, therefore, that the whole equity relied upon is negated upon the affidavits, and that, therefore, the injunction must be dissolved, and the order authorising it discharged with costs; and as it is unnecessary for the purpose of deciding the motion, I forbear to express any opinion upon the other points which have been discussed.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Monday, May 26.

DEW V. CLARKE.

*Practice—Motion to discharge prisoner—Reference to Master—Confirmation of Master's report.*

*Fifth*, in this case, applied to the Court to discharge a prisoner out of custody who had been twenty-four years in prison.

*W. Morris* took a preliminary objection to the application. A petition had been presented to the late Master of the Rolls, and a reference was directed to the Master to inquire into the case, and report, and the petition was allowed to stand over in the meantime. The Master had made his report, but that report had not been confirmed, and the petition was now improperly brought before the Court. The question, therefore, was, whether the Master's report should be confirmed.

The MASTER of the ROLLS said, a short supplemental petition ought to have been presented to confirm the Master's report, for at present he had no constat of the report.

Friday, July 18.

HANCOCK V. AMOR.

*Claim—Specific performance of contract for assignment of lease—Sub-contract—Abandonment of contract.*

*A. B. agreed to grant to C. D. a builder, a lease for a term of certain houses when finished by C. D. (which it was stipulated they should be in a given time) to the satisfaction of A. B.'s surveyor. C. D. assigned to E. F. subject to A. B.'s claim, and E. F. assigned to G. H. in consideration of 250*l.* subject to A. B.'s claims. The 250*l.* was made up of several sums, and 50*l.* part of it was an allowance to G. H. for papering and painting. The papering and painting, and other parts of the work were done in such a manner that A. B.'s surveyor refused to certify. G. H. who had been put in possession, then assigned to E. F. in consideration of 540*l.*, in case the same were paid in six weeks from the date of the assignment, and five days before the six weeks expired, filed a claim for specific performance. Some negotiations then took place, which were afterwards broken off. E. F. did not file a cross claim for specific performance of his sub-contract, but he insisted that it was a bar to the plaintiff's claim:*

*Held, that the plaintiff was entitled to specific performance:*

*Held, also, that the defendant, not offering to file a cross claim, must be considered to have abandoned his contract.*

*A reference was directed to the Master, who was to settle the conveyance, if the parties differed.*

*No consideration in respect of the sub-contract having been paid, and specific performance thereon being sought no otherwise than by way of answer to plaintiff's claim, the necessary inference must be that it was abandoned, and it must so be treated.*

This was a claim for specific performance of an agreement. On the 27th of July, 1850, an agreement was entered into between Sir Edward Kerrison and Robert Brookfield, that within 15 calendar months from the date thereof, Mr. Brookfield would finish two houses in Baling, and that on their being so completed to the satisfaction of Sir Edward's surveyor, he, Sir Edward, would execute a lease of the same for ninety-nine years from the 24th of June, 1850, at a peppercorn rent for the first and second years, and at a rent of 8*l.* 13*s.* 8*d.* afterwards. Sir Edward also agreed to lend Brookfield 700*l.* which, it was stipulated, should be repaid in eighteen months, with interest at 5*l.* per cent. and till it was paid no lease was to be executed. On the 8th of December, 1850, Brookfield assigned to the defend-

ant, Thomas Amor, all his interest in the two houses, subject to the claim thereon of Sir Edward Kerrison for 700*l.* On the 26th of December, 1850, the plaintiffs, Henry Hancock, builder, and John Webb, plumber, agreed with the defendant for the purchase, at the price or sum of 250*l.* of all his interest in one of the houses, called Park-villa East, the same having been lately assigned by Brookfield to the defendant, subject to the claim of Sir Edward Kerrison, for 350*l.* and subject also to a ground-rent not exceeding 5*l.* for and according to the agreement signed by Sir Edward for a term of ninety-nine years. The consideration was paid in several sums, particularly specified, one of the items being a sum of 50*l.* an allowance made by the defendant, Amor, for papering and painting the houses. The house was accordingly painted and papered, but was not in that and some other respects finished in such a manner as to satisfy Sir Edward Kerrison's surveyor, who refused to certify. On the 6th of March, 1851, the plaintiffs, who had been put in possession of the house, in pursuance of the agreement of the 26th of December, agreed with the defendant to sell and assign to him the same house and premises in consideration of 540*l.* provided the same were paid within six weeks from that date. The six weeks terminated on the 17th of April, but on the 12th of April the plaintiffs filed their claim for specific performance of the agreement of the 26th of December, 1850, which now, after some time spent in negotiations for an arrangement, came on to be heard. After the plaintiffs had been put in possession, they employed the defendant to do some work about the house, and also as an agent to let it, for which they were alleged to owe him the sum of 8*l.* 16*s.* Some discussion arose as to the admission of an affidavit by the defendant in support of his own case; and the Court intimated its intention to follow the rule laid down by Vice-Chancellor Knight Bruce in a like case.

*Walpole and Murray*, for the plaintiffs.

*Roupeil and Miller*, for the defendant, did not deny the agreement, but contended it could not be enforced under the circumstances, inasmuch as the plaintiffs had entered into a contract to sell to the defendant the same premises, and had given six weeks to consider, and yet, upon the expiration of the six weeks, had filed their claim. [The MASTER of the ROLLS.—I will give you leave to file a cross claim, and in the mean time allow this to stand over. I would refer it to the Master to settle the conveyance if the parties differ, but, considering that you might then be entitled to file a claim to compel the plaintiffs to convey to you, and that that would give rise to a circuitous process, and, considering also that your purchase-money is in danger, I will allow the claim to stand over, if you like.] We have good grounds of defence, for they have by their own acts prevented us from assigning to them the lease of the house, inasmuch as they did the work so badly as to cause the surveyor's certificate to be refused, and then they have actually contracted with us to sell the house to us. That is a bar to equitable relief, and, therefore, their remedy, if any, is at law. They have stated a case which shews they are the injuring, not the injured party. The facts are a complete bar to specific performance.

*Walpole*, in reply, was not heard.

The MASTER of the ROLLS.—The plaintiffs are entitled to specific performance, and there must be a reference to the Master, who will settle the conveyance if the parties differ. The question is one entirely of conveyance, and therefore if, as is the case, the consideration is paid, there must be specific performance. There is no doubt that this is a proper subject for specific performance. It is said there was a sub-contract entered into on the 6th of March, 1851, and that therefore the six weeks within which the consideration was to be paid not having expired till the 17th of April, and the claim, nevertheless, having been filed on the 12th of April, this is a bar to specific performance. But no money was paid, and the defendant does not seek specific performance of the contract of March 1851, otherwise than as an answer to the plaintiffs' claim, and I must therefore treat the sub-contract as an abandoned contract. The plaintiffs, therefore, are entitled to specific performance, and there must be a reference to the Master, who must, in case the parties differ, settle the terms of the conveyance. The case is not a case for costs.

Monday, July 21.

ROGERS V. ACASTER.

*Husband and wife—Chose in action—Release—Assignment.*

*A married woman was entitled to an interest to the extent of 500*l.* in a bond executed to another person, after the death of that person; and she was also entitled to a legacy after the death of the same person. The married woman and her husband released both the 500*l.* and the legacy for valuable consideration to the trustees of the person who had executed the bond and given the*

## ROLLS COURT.

*legacy. The husband afterwards died in the lifetime of the person to whom the bond had been executed, and after whose death the 500*l.* and the 1,000*l.* were to be payable to the married woman. On the death of the person to whom the bond was made, the widow claimed the 500*l.* and 1,000*l.* notwithstanding the release:*

*Held, that she was entitled thereto.*

*There is no authority to show that the husband can release a debt which is not due to the wife herself, but in respect of which the wife may have an interest.*

*There is a great distinction between an immediate and an accruing right of action. And quare as to the effect of a release by husband of debt due to wife.*

This case came on upon exceptions to the Master's report; the question being as to the effect of a release by the husband and wife of a future interest of the wife, and as to whether by a release the husband can extinguish the right of the wife. The suit was a creditors' suit, instituted by Mary Rogers on behalf of herself and all other creditors of George Clark, of Burnley Moor, Nottinghamshire, deceased, who derived lands charged with the legacy duty hereinafter mentioned from Darcy Clark, the testator in this cause.

It appeared that on the 16th of August, 1838, George Clark executed a bond to Elizabeth Clark for 3,900*l.* conditioned to be void on the payment of an annuity of 80*l.* to Elizabeth Clark for life, and after her death, for the payment of 500*l.* to Mary Ann Stirrup; and that Darcy Clark made his will, bearing date the 22nd of October, 1842, and appointed John Acaster, Benjamin Edisson, James Wagstaff, and John Wright, his trustees. The testator gave a legacy of 1,000*l.* to Mary Ann Stirrup after the death of Elizabeth Clark. Samuel Stirrup, the husband of Mary Ann Stirrup, being indebted in the sum of 1,700*l.* to the testator's estate, and being unable to pay the same, he and his wife, in 1843, in consideration of the 1,700*l.* joined in a release to the trustees of the testator's estate of the 500*l.* and the 1,000*l.* in which the wife was interested after the death of Elizabeth Clark. In 1844, Samuel Stirrup died. On the 27th of February, 1844, Elizabeth Clark died, and thereupon Mrs. Stirrup claimed the 500*l.* and the 1,000*l.* notwithstanding the release. A suit being instituted, a decree was made, directing an account. The Master decided in her favour, and exceptions were thereupon taken to his report, which now came on to be argued.

*Roupell and Elmsley*, in support of the exceptions. An assignment passes, and preserves property, and the question in such case is what the assignor possessed, and that, and that only, passed to the assignee; but in the case of a release it has a larger operation, and acts by way of extinguishment. As to the power of the husband to release a chose in action, it is independent of the property, and depends on the power derived to the husband by the marriage union. By marriage the husband has only a qualified right to a chose in action, that is, if he reduces it into possession, yet he may do many acts without the wife. His indorsement of a negotiable instrument is good without joining his wife. In the same way he may release a debt due to the wife as an executrix which he could not assign. [The MASTER of the ROLLS.—He is executor himself in that case, and therefore the authority to release is in him during coverture.] Yes, but it is a marital right. There are many cases and dicta on the subject shewing the difference between a release and an assignment. They cited *Jac. Rep. H. & W. App. 2*; *Spencer Eq. App. No. 2*; *Bright H. & W. 369*, *et seq.*; *Mason v. Morgan*, 2 Ad. & Ell. 30; *Sherrington v. Yates*, 2 M. & W. 855; *Bond v. Simmons*, 3 Atk. 21; *Bacon Abr. Bar. & Fenn. c. 3, pl. 8*; *Dowell v. Earle*, 12 Ves. 473; *Bates v. Dandy*, 2 Atk. 207; 3 Russ. 72, n.; *Chamberlain v. Hewson*, 1 Salk. 115; *Stiffe v. Everett*, 1 Myl. & Cr. 37; *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 86; 2 Rolle Abr. 84, 134; *Gage v. Acton*, 1 Salk. 325; 10 Rep. 51, b; *Shepp. Touch. 344*; *Belcher v. Hudson*, Cro. Jac. 222; *Thomson v. Butler*, Moore, 522; *Hore v. Becker*, 12 Sim. 465; *Kemp v. Keley*, Prec. Ch. 544, 594; *Bush v. Dalway*, 1 Ves. sen. 19; 3 Atk. 530; *Robinson v. Bazaror*, Vin. Abr. 155; *Whittle v. Henning*, 2 Ph. 731; *Ashley v. Ashley*, 1 Colly. 553.

*Lloyd, Walpole, Wickens, and Beales*, for parties on the other side, were not heard.

The MASTER of the ROLLS.—I will not trouble you, Mr. Lloyd. If I were to accede to the arguments which have been addressed to me, I should shake the foundations of a long train of decisions. In 1838 the testator had given a bond to Elizabeth Clark, to pay her an annuity of 80*l.* for life, and, at her death, to pay 500*l.* to Mary Ann Stirrup, who was a married woman, and her husband releases this 500*l.* to the trustees of the testator's estate. But the debt was not due to Mary Ann Stirrup, but to Elizabeth Clark, and it was conditioned to be void,

if so. Four years after the death of Mary Ann Stirrup's husband Elizabeth Clark dies, and then the wife claims. A distinction was then taken between a release and an assignment, and it is said that where property is to be passed, the husband can only proceed by way of assignment; but where a debt is due, the husband and wife may extinguish it by release, and the wife has no claim afterwards. But no authority nor case (and Mr. Roupell has very clearly and very fairly cited everything that could be found, both for and against himself) to show that the husband can release a debt not due to the wife, but in respect of which the wife may have an interest. Now I decide nothing as to a debt due to the wife herself, but there is a great distinction between an immediate and an accruing right of action, as, for instance, suppose a covenant on the death of the husband, he could not release that. And as to the dictum in *Gage v. Acton*, that was by Holt, and it was found fault with by Lord Kenyon, and, moreover, was not at all necessary to the decision in that case. The dictum in question is, that every right or duty may be released where by possibility it may accrue in the lifetime of the husband; but that is not always the case, and I do not find any other dicta which go to that extent, for in all the other cases the interest became vested during coverture. There is no authority or decision therefore to support the argument. I have the note of Jacob on Husband and Wife, and the whole case is very ably there discussed. *Hore v. Becker* was a case which I would follow if it was rightly understood. The Vice-Chancellor seems to think in that case that the husband might release a bond given to the wife, and he certainly might; and as to the case of a husband releasing a debt to the wife as executrix, that is quite competent for him to do, for the law imposes the duty of executor upon him during the coverture, and he is himself executor. I think the Master right, therefore, as to the bond, and as to the 1,000*l.* legacy, it is also clear. I think the Master right as to both, and the exceptions must be overruled.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLMUTT, Esq. of the Middle Temple.  
Barrister-at-Law.

Friday, Feb. 28.

HUSKISSON v. BRIDGE.

*Will—Construction—Precatory words.*

*A testator by his will, gave all his property to his wife "to enjoy the same in the fullest and most unconstrained manner, subject nevertheless to the following provisions." He then gave legacies to relations of his and of his wife, and expressed his desire to be that his wife should make her will, and in such manner that the whole property should be divided among the relations before mentioned in such proportions as his wife should think they deserved. He then made provision for the disposition of his property in case his wife should be unable to make a will, and added, "but it is my express will that the precautionary clause or power lastly provided for is not to do away with or in any the least to deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself." The testator's widow by her will, made no disposition of the residue of her estate:*

*Held, that the testator's property vested absolutely in the widow, and so far as undisposed of by her will, belonged to her next of kin.*

William Swan made his will, dated the 14th of February, 1831, in the following terms:—"In the name of God, amen. I, William Swan, of, &c. do hereby, of my own free will and consent, give and bequeath unto Mary Swan, my dearly beloved wife, the whole of my property and effects of every description, both real and personal, together with all my cash, whether at my banker's (the bank of England), or otherwise, with my book debts which may appear by my last ledger to be owing, bills becoming due, &c. &c. with all the household furniture and effects whatsoever, to use and enjoy the whole, and the interest arising from the same in the fullest and most unconstrained manner, subject, nevertheless, to the following provisions, donations, stipulations, &c. that is to say"—[Here followed certain legacies to relatives of the testator and his wife.] "It is likewise my will and desire that a full and particular schedule be taken of all my property (of which I have left amongst my papers a memorandum), and that such of my property as is placed in the Funds, or at interest, as well as shares in any concern, shall remain and continue in the same situation as at the time of my decease at interest, for the sole use, benefit, and advantage of the aforesaid Mary Swan, my very sincere friend and faithful wife; and it is moreover my particular will and desire that she, the said Mary Swan, knowing the great uncertainty of human existence, do as soon as can con-

veniently be done make her own will and testament; and it is also my will and desire that the said will be made in such a manner that my whole property which at my dear wife's decease may be then remaining shall be so divided between the relations hereinbefore mentioned as shall be pretty nearly in amount between my own relations and those of my dear wife, and in such portions to each individual as she may think they deserve, or by their respectful or kind behaviour to herself they appear to have merited at her hands. It is also my will and desire that my dear wife should be at liberty during her lifetime to afford assistance to the relations of either side as she may think they deserve, or as she can afford, without doing injury to her own circumstances or abridging her own comforts. The numerous small bequests in this will will be found to amount to between 1,200*l.* and 1,300*l.* which will not distress the circumstances of my dear wife, and which I hope she will approve; they will serve at least to prove to the parties that they were not forgotten; but I have thought it right to bequeath the principal part of my property to my dear wife, to repay her, as far as it is in my power, for the extraordinary pains she has taken by her prudent economy in assisting to acquire it. I thus leave it at her own disposal (almost without restraint), that she may have it more in her power to remunerate those the best who have been found the most deserving of her favours. It is also my will, and I hereby constitute and appoint the aforesaid Mary Swan, my dearly beloved wife, to be the whole and sole executrix of this my last and only will and testament, being of opinion that she will do strict justice to all the parties interested in the just division of my property. I, however, beg to recommend to the consideration of my dear wife, in the event of her surviving me and making a will, the propriety of securing by her will a portion of what she may dispose of to female relations, if not the whole, in such a manner as it may be for their own use and benefit, so as to protect them against improper conduct on the part of any husband of such as are married, or of them that may hereafter become so. And, lastly, with a view of guarding against a possible case happening to my dear wife in her present ill state of health, arising from any disease, or by increased infirmities of any kind, so as to be rendered unable to make a will in the manner by me previously suggested (in regard to the mode of disposing of my property), as well as to prevent the consequences which would arise from her dying intestate, I further will and direct that in such case (and that case only) the whole of my freehold, leasehold, and personal property of every description shall be sold to the best advantage, as soon as conveniently may be after the decease of my dearly beloved wife, and, after paying all debts and demands which may be then due from either of us, as also the charges and expenses of funeral, proving this my will, and attendant thereon, the clear residue or surplus to arise therefrom, to go to and amongst the before-named several relations both on my side as well as on Mrs. Swan's, to whom I have by this my will given specific legacies in manner following." [Then followed certain dispositions among the legatees named in the former part of the will.] "And in such said case of intestacy occurring, I do appoint, but not otherwise, my said brother, Simon Swan, and my friend, Mr. John Abbott, executors, to carry my wishes into effect. But it is my express will and determination that the precautionary clause or power lastly provided for is not to do away with, or in any the least to deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself."

In February, 1831, the testator died. Mary Swan, the widow, by her will, dated in May, 1837, gave certain legacies to her own and her husband's relatives, but did not dispose of the residue of her estate: she died in 1846. The executors of the widow instituted the present suit against the next of kin of William Swan and his wife, and the question which had arisen was, whether under Mr. Swan's will his property had become so absolutely vested in his widow as to pass, subject to the legacies given by her will, to her next of kin.

*Swanston and Piggott* for the plaintiffs.  
*Russell, Wigram, Teed, R. Palmer, Sidebottom, Kingston, Hetherington, and W. H. Smith*, for the several defendants.

The following cases were cited:—*Attorney-General v. Hall*, Fitzgib. 314; *Flanders v. Clark*, 1 Ves. sen. 9; *Knight v. Knight*, 3 Bea. 148; *Maria v. Keighley*, 2 Ves. 335; *Cuthbert v. Purrier*, Jac. 415; *Bardswell v. Bardswell*, 9 Sim. 319; *White v. Briggs*, 15 Sim. 17; and *Johnston v. Rowlands*, 2 De G. and Gma. 356.

The VICE-CHANCELLOR said that he should have thought but for the concluding paragraph of the testator's will, that the case was one of very great difficulty, and he should not have been able to say when or how he should have decided it. That paragraph ending with the words "most agreeable

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to herself," removed all difficulty. It plainly shewed that the desires and wishes he had before expressed were what, in the language of the law, were termed "precatory." The widow took the whole absolutely subject to the payment of the legacies previously given.

Wednesday, March 5.

BLANCHFORD v. TOLLER.

Testator's unsettled accounts.

The executors of a testator invested a sum to meet claims against the estate, in respect of certain unsettled accounts, and paid the dividends to the tenant for life under the will. Upon the death of the tenant for life the Court directed an inquiry by the Master as to who was entitled to the fund, and ordered the dividends to be paid in the meantime to the person entitled to the testator's estate.

Mr. Alderman Skinner, who was an auctioneer and land surveyor, had received various deposits from purchasers of property sold by auction by him. At the time of his death, which took place in 1808, many of these accounts were unsettled, and his executors invested in their names, in Consols, a sum sufficient to answer all claims in respect of these accounts, and paid the dividends to the tenant for life of his property, under his will. The tenant for life having died, the party beneficially entitled to Mr. Skinner's estate filed a claim against the representatives of the surviving executor of Mr. Skinner's will for a transfer of the stock and payment of the dividends thereof, which had accrued since the death of the tenant for life.

Forster for the plaintiff.

Wigram, Osborne, and Schomberg for the several defendants.

The VICE-CHANCELLOR directed that the stock should be brought into Court, that it should be referred to the Master to inquire who was now entitled thereto, and that all arrears of dividends, and the future dividends should be paid to the plaintiff.

Friday, March 21.

TIPPING v. HOWARD.

Construction—Legal representatives.

The words "legal representatives" in an instrument, require to be explained by the context.

By a deed of settlement dated the 12th day of February, 1820, a sum of 3,000*l.* was covenanted to be paid to trustees upon trust to invest, and to pay the dividends to Catherine Winstanley (afterwards Mrs. Howard) for her life, for her separate use, and after her decease upon trust for her children, as therein mentioned; and if she died without issue, or in case such issue should die under age and without issue, upon trust, to pay one third of the dividends and interest to John Howard, for his life, if he kept himself a widower; and upon his death or second marriage, to pay the interest and dividends thereof as follows: one third part to Thomas Winstanley and Ann his wife, during their joint and several lives; and after the death of the survivor to pay the principal, interest, and dividends thereof equally amongst the said Thomas Winstanley's children, and to pay the remaining two thirds of the said 1,000*l.* as follows: one third part to "my" cousin Anna Cotton, or her legal representatives; one third part to "my" cousins Ann Crole and Mary Linister, or their legal representatives, equally; and one third part equally amongst the children of "my" uncle James Lomax, or their legal representatives; and as to the remaining two third parts of the said 3,000*l.* and the interest thereof, after the decease of the said Catherine Winstanley, without issue, as aforesaid, to pay one third part of the interest and dividends thereof to the said Thomas Winstanley and Ann his wife, during their joint and several lives; and after the death of the survivor, to pay the principal and dividends thereof equally amongst the children of the said Thomas Winstanley, or their legal representatives, and to pay the remaining two third parts of the said 2,000*l.* and the interest and dividends thereof, as follows: one third part to "my" cousin Hannah Cotton, or her legal representatives; one third part to "my" cousins Ann Crole and Mary Linister, or their legal representatives, equally; and one third part equally amongst the children of "my" uncle, James Lomax, or their legal representatives. All the persons named in the settlement were living at the date of the deed, and some of them having died before the death without issue of Mrs. Howard, which event happened in 1844, the question arose as to the meaning of the terms "legal representatives."

Wickens, for the trustees.

Prior contended that the words "legal representatives" did not mean "executors or administrators," but were words of substitution, and implied next of kin living at the death of the tenant for life. The words "executors or administrators" were used several times in the deed with regard to the trustees, and this circumstance shewed that "legal representatives" were to be distinguished from those words. He cited *Cotton v. Cotton*, 2 Bea. 67;

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*Bridge v. Abbot*, 3 Bro. Ch. Ca. 224; *Long v. Blackall*, 3 Ves. 486; *Walter v. Makin*, 6 Sim. 148; *Booth v. Vicars*, 1 Coll. 6; *Smith v. Palmer*, 7 Hare, 225; and *Vaux v. Henderson*, 1 J. & W. 388, n.

Selwyn, for parties in the same interest, said, that the words "equally between them" following the words "legal representatives," shewed an intention to refer to next of kin rather than to executors or administrators. He cited *Walker v. Lord Camden*, 16 Sim. 329; and *Kilner v. Leech*, 10 Bea. 362.

W. M. James said that the Statute of Distributions had fixed the meaning of the term "legal representatives" to be next of kin under that statute.

Winstanley, for parties in the same interest.

Oster cited *Wilkinson v. Garrett*, 2 Coll. 643; *Lasbury v. Newport*, 9 Bea. 376; and *Urquhart v. Urquhart*, 13 Sim. 627.

The VICE-CHANCELLOR (without hearing *Giffard* and *Samuel Scott*, who appeared for parties contending that the words "legal representatives" meant executors or administrators) said, that in the first place he would observe that he considered the present case was not governed by any of the cases cited, and he therefore gave no opinion as to any one of them. There were three possible interpretations of these words, either of which led to the same result. They might mean "executors or administrators," and be therefore merely what was commonly called words of limitation, or if words of substitution they applied to those persons living at the date of the settlement, or they were void for uncertainty; and as each led to the same result, it was not necessary to say to which he inclined. He might add, that the words "legal representatives"—he did not say "legal personal representatives"—was a phrase so loose and susceptible of so many arguable constructions of a plausible kind, that if a person using those words desired to have them acted upon by a Court of justice, he was bound to supply a context to explain them.

Saturday, July 19.

Re LEXEMING.

Receiver—Petition.

Where real estate had descended to an infant, the Court directed the appointment of a receiver upon petition.

In this case a petition had been presented for the allowance of maintenance for the infant petitioners, and for a receiver of certain real estates which had descended to them, and an order according to the prayer of the petition was made.

*Amphlett* now mentioned the case again, in consequence of a difficulty raised by the registrar in drawing up the order. There being no suit, the registrar considered that a receiver could not be appointed.

The VICE-CHANCELLOR inquired whether, when the order on the petition was taken, the appointment of a receiver was distinctly drawn to his attention.

*Amphlett* replied that it was, and added, that the real estate having descended to the infant petitioners, there was no mode by which a suit with regard to it could be instituted.

The VICE-CHANCELLOR said that he would make the order for a receiver, though upon a petition only.

NOTE.—See *Ex parte Mountfort*, 15 Ves. 445; *Ex parte Starkie*, 3 Sim. 339.

Re THE DIRECT WESTERN RAILWAY COMPANY.

Joint-stock Companies Winding-up Acts.

*K. Parker* and *J. T. Hamilton Humphreys* appeared in support of a petition to confirm the Master's report (by which report the Master found that it would be expedient that the company should be wound up), and that the Court would order the affairs of the company to be wound up under the provisions of the Winding-up Acts. The reference to the Master was directed on the 13th of January last (see 16 Law T. 338), and the report was dated on the 13th of June.

*J. Parker* objected to the conclusion at which the Master had arrived in his report, as being founded on insufficient materials.

The VICE-CHANCELLOR said that he considered he must act upon the Master's judgment, and made the order asked by the petition.

Friday, July 25.

Re DICKINSON.

Trustees Act, 1850—Infant.

A. B. contracted to sell real estate to C. D. and after receiving the purchase money, died intestate, leaving an infant heir-at-law. No conveyance by A. B. having been executed, C. D. presented a petition to have a conveyance made on behalf of the infant on a vesting order.

Held, that the order could not be made on petition.

This was a petition presented under the 13 & 14 Vict. c. 60, by Miss Elizabeth Ann Dickinson,

## EXCHEQUER.

under the following circumstances. On the 2nd of January, 1843, Mr. G. C. Dickinson entered into a contract to sell certain real estate to the petitioner for the sum of 1,000*l.* and on the 1st of February, 1843, the purchase money was paid by the petitioner, and a receipt was given for the same by Mr. G. C. Dickinson. On the 27th of May, 1851, G. C. Dickinson died intestate, and without having executed any conveyance, leaving John Dickinson, his eldest son and heir-at-law, an infant of the age of three years. The petition prayed that some person should be appointed on behalf of the infant to convey to the petitioner the real estate contracted to be sold, or that the premises comprised in the agreement might, by order of the Court, be vested in the petitioner.

*Torriano*, in support of the petition.

The VICE-CHANCELLOR said that he could not make such an order as was asked, upon a petition.

He would either dismiss the petition, or allow it to stand over, with liberty to file a bill or claim.

*Torriano* elected to have the petition stand over.

NOTE.—See 1 Wm. 4, c. 60, s. 16, with reference to the Trustee Act 1850, s. 7; the object of the latter section appearing to be to obviate the necessity previously existing of filing a Bill for specific performance. The 53rd section of the Trustee Act, 1850, gives the Court authority to postpone making any order upon petition until the right of the petitioner shall have been declared in a suit.

## Common Law Courts.

## COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENTLEY, Esqrs. Barristers-at-Law.

Thursday, July 10.

CLAY v. CROFTS.

County Court appeal—Prospectus—Agreement

stamp—Construction of 55 Geo. 3, c. 184.

The printed prospectus of a school was handed to the defendant as the terms of the contract between him and the defendant, except that the amount to be paid was altered:

Held, that it did not require an agreement stamp under 55 Geo. 3, c. 184.

This was an appeal from the decision of a judge of one of the County Courts, and the question was, whether the prospectus of a school, setting forth the terms, &c. which was tendered as evidence of such terms, required to be stamped as an agreement.

*Lush*, for the appellant, contended that this case was not distinguishable from *Williams v. Stoughton*, 2 Stark. 292; that case had never been overruled, and it decided that a prospectus is the terms of the agreement between the parties, and that it requires a stamp. [PARKE, B.—It is a proposal merely. MARTIN, B.—It cannot be taken as more, for I see that the terms were afterwards altered, and the amount ultimately agreed to be paid was not the same as that mentioned in the prospectus. (*Edgar v. Blick*, 1 Stark. 464.)] In this case there is a strong piece of evidence which is wanting in that case, the prospectus was here actually handed to the defendant as the terms of the contract. The respondent says in his evidence, "I always understood that the prospectus contained the terms of our agreement except so far as related to the price."

The Stamp Act requires "that every agreement, or any minute or memorandum of an agreement, where the value thereof shall be of the value of 20*l.* or upwards," shall be stamped. [MARTIN, B.—Yes; but Maule, J. very well explains that clause in the case of *Vaughton v. Brine*, 18 N. R. 258; he referred also to *Southgate v. Bohn*, and *Knight v. Barber*, 16 M. & W. 34, 66; *Drant v. Boden*, 3 B. & C. 665; and *Beeching v. Westbrook*, 8 M. & W. 411.]

PARKE, B.—We are of opinion that this is nothing but a proposal for an agreement, the terms of which are afterwards to be arranged between the parties. Notwithstanding the terms of the Stamp Act (55 Geo. 3, c. 184), which says that any minute or memorandum of an agreement made in England under hand only, whether the same shall be only evidence of a contract or obligatory upon the parties from its being a written instrument, &c. I think that that applies to cases not only where the document is signed, but where it also contains the actual terms of the agreement between them. Here the paper is not signed, and the terms of the agreement were altered so far as related to the price to be paid. The judgment will therefore be affirmed with costs.

Judgment affirmed with costs.

WAGNER v. IMBRIE.

Bankrupt's certificate—6 Geo. 4, c. 16, secs. 122,

127—Construction—Pleading.

The 122nd sec. of 6 Geo. 4, c. 16, enacts, "That no such certificate shall be such discharge, unless the commissioners, shall in writing, under their hands and seals, certify to the Lord Chancellor

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that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery."

*Held*, that the commissioners must certify both as to the truth and fulness of the discovery, and where therefore a plea stated that the commissioners had certified to the fulness of the discovery, but omitted the word truth, it was held bad on demurrer.

This was an action of debt brought against the defendant upon a recognisance of bail; the defendant had pleaded *puis darrien continuance*. That the plaintiff had been twice a bankrupt; that under his second bankruptcy he did not pay 15s. in the pound; and that his assignees were therefore the persons entitled. To this plea there was a demurrer.

*Willes* in support of the demurrer. To permit an amendment in such a case as this would be to encourage barratry. This plea states that the first bankruptcy took place so far back as 1829, and that the plaintiff obtained his certificate; that the second bankruptcy occurred in 1837, and that he then also obtained his certificate, and that he did not pay 15s. in the pound, whereby, under the 127th sec. of 6 Geo. 4, c. 16, the assignees became entitled. There is also a statement that the assignees under the second bankruptcy made a demand within eight days, which is essential. This plea does not shew a valid certificate under the first bankruptcy. The 122nd section of the 6 Geo. 4, c. 16, after stating how the bankrupt's certificate is to be signed, enacts that "no such certificate shall be such discharge unless the commissioners shall in writing, under their hands and seals, certify to the Lord Chancellor that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery." Now, in this plea, the word *truth* is omitted; and it merely states that there did not appear any reason to doubt the *fulness* of the discovery made. The property, if in either of the assignees, is in the assignees of the first bankruptcy, and the interference of the assignees of the second bankruptcy therefore goes for nothing. Again, the plea states that the estate did not produce 15s. in the pound,—that is clearly not traversable. The 127th sec. provides that where a bankrupt has been bankrupt before, &c. unless his estate shall produce (after all charges) sufficient to pay 15s. in the pound, &c. The plaintiff could not take issue on this plea. The words "after all charges" are omitted and the plea is bad. (*Burrows v. Hodgson*, 9 A. & E. 499; *Herbert v. Sayer*, 5 Q.B. 965.)

*J. Brown*, contra. To support the plaintiff's argument the Court must decide that if the bankrupt had pleaded his bankruptcy in this form it would have been bad. If the certificate substantially agrees with the 127th sec. then the 122nd sec. will come into operation. The statute does not give any form, and if the substance of the enactment is contained in the certificate, that is all that is required. If the commissioners, instead of certifying that the bankrupt had made a full discovery, &c. had certified that he had made a complete discovery, that would have been sufficient; the clause uses the expression truth or fulness in the disjunctive, and one or the other is, therefore, sufficient. If the discovery be not true, how can it be a full discovery? The bankrupt could not in all things have conformed to the Act unless he had made a true and full discovery. This form is found in Chitty on Pleading, 5th Ed.; the word truth is there omitted. It is impossible to discover what does not exist in truth. After the allowance by the Lord Chancellor the Court will take it for granted that the certificate is correct,—he referred to *Howard v. Gossett*. [*PARKE, B.*—The plea would have been good if it had merely stated that the Lord Chancellor had allowed it. I think your first argument was the best.] As to the second part of the plaintiff's argument, the established rule is, that whatever is impliedly contained in the plea is as much traversable as if it were alleged; when the plea states that the gross amount of the estate was not 15s. in the pound, it, of course, implies that the net produce was not 15s. in the pound. The allegation means the same thing as if the words "after all charges" were introduced; it states that the estate did not produce sufficient to pay every creditor 15s. in the pound; that, of course, must mean sufficient to pay them out of moneys applicable to such a purpose, which would be after payment of charges. The authority of *Burrows v. Hodgson* is shaken by the case of *Stewart v. Collins*, 2 L. M. & P. 61; *Parker v. Gill*, 5 D. & L. was also cited.

*Willes*, in reply.—On both points the plaintiff is entitled to judgment; probably the words "veracious and complete" would do as well as "true and full," but that is not the question here; one of the requisites has been altogether omitted.

*PARKE, B.*—We are of opinion that the objections taken to this plea must prevail, and the true

grammatical sense of the words of the Act of Parliament be adhered to. It may be true that it is not necessary to use the precise words of the statute, but here one requirement is omitted. If a man stated he had property which he did not, in fact, possess, that would be a full, and more than a full discovery, but it would not be a true one. It was the intention of the Legislature that the commissioners should certify to the fulness and truth of the discovery. The statute requires it, and under that statute they ought to certify both the one and the other, and if that be so, this plea does not shew that there is any property in these assignees.

*Judgment for the plaintiff.*

May 28 and June 30.

BURMISTER, ONE OF THE P. O. OF THE LONDON AND WESTMINSTER BANK v. NORRIS, O. M. OF THE GERMAN MINING COMPANY.

*A company's deed of settlement contained the following clause:—"That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall be not less than five, or more than nine; and three of them shall form meetings of the directors, and shall for all purposes be competent to act;" but the general purport of the deed confined the concern to the carrying on their operations by levying a sum of money as capital, out of which the business was to be carried on for the benefit of the company:*

*Held*, that the above clause and facts did not give authority to the directors to borrow money on mortgage for the purposes of the company.

*Assumpsit*.—The declaration contained the usual money counts.

*Pleas*.—Non-assumpsit; payment and set-off.

At the trial, before Platt, B. a verdict was returned for the plaintiff for the money borrowed, except 4,927l.

A rule nisi having been obtained for a new trial, on the ground of misdirection.

*Theiger (Bovill with him)* shewed cause.—The question was, whether or not the directors of the German Mining Company were empowered to borrow money for the necessities of the company, or whether the deed prevented it. It appeared that this company had been formed for the purpose of purchasing certain mines in Germany, working them and selling the produce; and it was now contended that the deed gave sufficient authority to borrow, or that, if it did not, the shareholders had notice, and so had acquiesced in what had been done. The clause in the deed particularly relied on was as follows:—"That the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five or more than nine; and three of them shall form meetings of the directors, and shall for all purposes be competent to act." These words, it was contended, were sufficiently extensive to give the directors power to borrow, to enable them to carry on the works of the company. The words in the case of *The Bank of Australasia v. The Bank of Australia* were not larger than these, and this case was stronger than that, for there the money was borrowed to pay money already expended. It appeared that the 4,927l. was rejected by the jury, because it was not included in the bankers' pass-book. They cited *Tredwen v. Bourne*, 6 M. & W. 461; *Hawkins v. Bourne*, 8 M. & W. 704; *Ridley v. The Plymouth Banking Company*, 2 Ex. 717.

*The Attorney-General, Crowder, Cowling, T. C. Smith, and Dreory*, in support of the rule.—The learned judge left it to the jury to say whether the directors of this company had power to bind the shareholders, stating also that it frequently happened that not only the deed itself might be evidence of that power, but that some fact belonging to the case might be added, for the purpose of explaining and giving a construction to it, and he then proceeded to tell them that the deed conferred the sole and entire control of the affairs and business of the company on the directors. That direction is clearly wrong. The deed did not give such an authority, and no acquiescence of the shareholders could overrule the deed or give to them a greater power. The deed invests the directors with sole and entire control, and they have power to create new shares if further capital is necessary, and power to call a general meeting of the shareholders to consider any new mode of carrying on the affairs of the company. [*ALDERSON, B.*—If they had wanted to borrow money, it is reasonable to suppose they would have called a general meeting to lay the matter before them.] The plaintiffs have no right to complain; and if this rule is made absolute, it will be a salutary lesson to joint stock companies. No question was left to the jury of prior authority or subsequent acquiescence. If there was no general acquiescence, which there was not, there was no question to go to the jury; there was only a question of law on the construction of the deed. The meaning of the clause giving power to summon a general meeting is, that the directors

should do nothing to affect the corpus of the property of the company without such general meeting. (*Dickinson v. Walpy*, 10 B. & C. 128; *Es parte Morgan*, 1 McNaughten and Gordon, 225; *Bosquet v. Sortridge*, 4 Ex. 699; *Fisher v. Taylor*, 2 Hare's Rep. 218, were cited. Cur. adv. vult.

## JUDGMENT.

*ALDERSON, B.*—In this case there was a motion for a new trial, and a rule having been obtained by Mr. Crowder, the case was argued before us. The case was tried before my brother Platt, and the question arose as to whether or not the committee of directors, by whom certain German mines were to be carried on, had the power of borrowing; and it appeared from the circumstances of the case, and according to the manner in which it was left to the jury, the jury found it, that in their opinion it was necessary for the purposes of carrying on the mines, that the money should be borrowed; but we are of opinion that, notwithstanding that finding, the company could not have any such power as that of borrowing money; that the mines were to be worked by a company, and the company was to levy a large sum of money with which to carry on that concern, amounting to about 50,000l.; and there is in the deed of settlement by which the directors were empowered to act a power in very general terms, enabling the directors to do everything, "that the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five or more than nine; and three of them shall form meetings of the directors, and shall, for all purposes be competent to act." Now, no doubt those are very large words, but they must be taken in conjunction with the general words and purport of the deed; and the general words and purport of the deed confine the concern to the carrying on of these mines by levying a large sum of money as capital, out of which capital the mines are to be worked for the benefit of the company; it follows, therefore, that the directors had the whole, sole, and complete, exclusive, and entire control, only with respect to the management of the company by means of the moneys which were levied, and that they had no power whatever to borrow money. It would make a vast difference to the subscribers if such a power contained in these words were to be construed as imposing an unlimited responsibility on the parties who have entered into the concern beyond the capital they supposed themselves to have subscribed, and with which capital the concern was entirely to be carried on. We think, therefore, my brother Platt was wrong in leaving to the jury the point; and that though the jury might, in their opinion, think it necessary for the purpose of carrying on the mine, and convenient that the money should be borrowed, yet that that could not be done without the consent of all the subscribers, and with the consent of all the subscribers no doubt it might be done. That would be on a totally different footing. We think, therefore, there must be a new trial.

*Rule absolute.*

## EXCHEQUER CHAMBER.

Reported by ADAM BITTLESTON, Esq. of the Inner Temple, Barrister-at-Law.

## ERROR FROM THE QUEEN'S BENCH.

Monday, Feb. 3.

(Before PARKE, B., ALDERSON, B., CRESSWELL, J., PLATT, B., WILLIAMS, J., TALFOURD, J. and MARTIN, B.)

PHIPPS v. DAUBNEY.

*Attorney—Delivery of signed bill of costs—Railway company—Provisional committeeman.*

*A. the attorney of the railway company, employed B. another attorney, to do work for the company. B. sent by post to A. a letter inclosing his bill of costs, properly signed, and headed, "N. L. and H. Railway to B. Dr." A copy of that bill was afterwards given into the hands of the defendant, a member of the provisional committee, who said that he had seen it before, and that it was not intended to dispute the items. After some conversation between the person who delivered the copy, the defendant, and other provisional committeemen, the copy of the bill was taken away by the person who brought it:*

*Held*—1. That the form of the bill was sufficient to satisfy the statute 6 & 7 Vict. c. 73, s. 37, as the heading imported that the plaintiff meant to charge all the persons liable for the work done by him for the N. L. and H. Railway.

2. That there was evidence for the jury of a sufficient delivery of the bill to the defendant,—as the jury might have drawn the conclusion that though the copy of the bill was in fact taken away, the defendant was at liberty to have kept it if he pleased.

*Quære*, whether the delivery to A. by letter would have been sufficient.

Error from the Q. B. upon a bill of exceptions tendered to the ruling of the learned judge, at the trial.



## EXCHEQUER CHAMBER.

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*Debt*, for work done as an attorney and solicitor, &c.

*2nd Plea*.—That the work, &c. was done after the passing of 7 Vict.; that the plaintiff was during all the time an attorney; and that the plaintiff did not, one month before the commencement of the suit, deliver to the defendant, or send by the post to or leave for him at his country house, office of business, dwelling-house, or last known place of abode, or at any or either of such places, a bill of charges, &c. subscribed with the proper hand of the plaintiff, or inclosed in or accompanied by a letter subscribed in like manner, referring to any such bill as aforesaid, according to the form of the statute.

*Replication*.—That plaintiff did, one month before the commencement of the suit, deliver to the defendant a bill of charges, &c. subscribed with the proper hand of him (the plaintiff).

The record then set forth the proceedings at the trial, which took place before Erle, J., in Middlesex, on the 14th July, 1850; and the evidence then offered, as follows: And thereupon the counsel learned in the law for the said plaintiff, to maintain and prove the issue secondly within joined between the plaintiff and defendant on his part, and produced gave in evidence a written consent on the part of the defendant, dated on the 20th day of October, in the year of our Lord, 1845, to become a member of the provisional committee acting in the formation of a company called the Northampton, Lincoln, and Hull Direct Railway, and signed by the defendant and then proved, and gave in evidence, that one George Pell, before and during all the time hereinafter mentioned, was the attorney of the said company; that the plaintiff was and is an attorney and solicitor practising in England, and that as such attorney and solicitor, he was on or about the 22nd day of December, in the year of our Lord 1845, employed by the said George Pell, to do certain business as such attorney and solicitor, in reference to the undertaking to be carried into execution by the said company, and which was, and is, the business for the recovery of the fees, charges, and disbursements, for which this action was and is commenced and maintained, and that such employment was made by a certain letter, written, addressed, and sent by the post, by the said George Pell, to be received by the plaintiff, &c. (the letter was set out). That the plaintiff, in the month of March, 1846, sent by the post to the said George Pell, a bill of such fees, charges, and disbursements aforesaid, and in relation to the matter aforesaid, subscribed with the proper hand of the plaintiff, inclosed in a letter subscribed with the proper hand of the plaintiff, referring to such, and that such bill was and is in the words and figures following, that is to say:

"Northampton, Lincoln, and Hull Railway,  
To Robert Heaford Daubney, Dr.  
1845, Dec. 20, Carriage of blank forms of notices,  
&c. 2s. 4d.

(Then follow numerous other items.)

(Signed) Robert Heaford Daubney."

And thereupon the counsel learned in the law for the plaintiff, further to maintain and prove the said issue, as secondly above joined, as aforesaid, produced a certain bill of such fees, charges, and disbursements in the words and figures aforesaid, and then proved to the said jurors, that one Joseph Daubney, in the month of December, in the year of our Lord, 1846, shewed the bill, so produced, to the defendant, who then said to the said Joseph Daubney, that he, the defendant, had before seen a bill like the said bill so produced to the said jurors, and thereupon the said counsel for the plaintiff did then and thereinsist before the said justice, on behalf of the plaintiff, that the said several matters so produced and given in evidence on the part of the plaintiff as aforesaid were sufficient and ought to be admitted and allowed as decisive evidence to entitle the plaintiff to a verdict upon the said issue so secondly within joined as aforesaid; and the said counsel for the plaintiff did then and there pray the said justice to admit and allow the said matter so produced and given in evidence for the plaintiff as aforesaid to be conclusive evidence in favour of the plaintiff, to entitle him to a verdict on the said issue; that to this the counsel learned in the law of the said defendant did then and there insist before the said justice that the same were not sufficient nor ought to be admitted or allowed to entitle the plaintiff to a verdict on the said issue; and the said justice did then and there declare and deliver his opinion to the jury aforesaid that the said matters so produced and given in evidence for the plaintiff as aforesaid were sufficient to entitle the plaintiff to a verdict on the said issue, and with that direction left the same to the jury. Whereupon the said counsel for the defendant, conceiving that by law the matters aforesaid so as aforesaid produced and given in evidence to the said jurors by the plaintiff on the issue aforesaid so secondly above joined, were not sufficient to entitle the plaintiff to verdict upon the said issue then and there, and before the giving of the verdict herein-after mentioned, made therein exceptions to the said opinion to the said justice; thereupon the jury then

and there gave the verdict for the said plaintiff upon the said issue, and inasmuch as the matters aforesaid do not appear by record of the verdict aforesaid, &c. (concluding in the usual form).

*Mellor*, for the plaintiff in error.—First, there was no delivery of a signed bill, within the meaning of the statute 6 & 7 Vict. c. 73, s. 37. The statute requires a delivery to the defendant or a sending by the post; and assuming a delivery to the defendant's agent to be sufficient, there is no authority for saying that it is sufficient to send it by post to an agent. (*Tate v. Hitchens*, 7 C. B. 875; *Blandy v. De Burgh*, 6 C. B. 623.) But the real objection to the first delivery, which was the sending by post to Pell, is that Pell is not shewn to have been the defendant's agent for that purpose. Pell was the solicitor of a railway company, of the provisional committee of which defendant was a member. He was not the defendant's private attorney, nor the attorney of the committee; and the defendant is not stated to have been a member of the company. But if so, and if Pell was the attorney of the committee, it would not have been within the scope of his authority to receive an attorney's bill for the defendant, so as to charge the defendant personally. This case is therefore quite distinguishable from *Vincent v. Slaymaker*, 12 East, 372; *Re Bush*, 8 Beav. 66; and *McGregor v. Keiley*, 3 Ex. 794, and that class of cases. The second alleged delivery, when the bill was shewn to the defendant, is quite insufficient, because it was merely shewn to him and then taken away. The defendant said he had seen it before; but that might have been at Daubney's office. It is clear that the signed bill must be left with the party charged. (*Eicke v. Nokes*, Moo. & M. 303; *Crowder v. Shee*, 1 Camp. 437; *Brooke v. Mason*, 1 H. Bl. 290.) *Eggington v. Cumberledge*, 1 Ex. 271, will be relied upon by the other side; but that case is distinguishable, because the Court there proceeded upon the ground that the bill was delivered to parties who might have been sued jointly with the defendant. In that case nothing turned upon the form of the bill; but here the heading of the bill charges the company, and if that is sufficient because the company employed the solicitor, then the delivery must be sufficient to charge the defendant personally. Secondly, the form of the bill is insufficient, because it does not charge the defendant. In truth, it charges no one. The effect of the heading is no more than this,—that the work done had relation to the affairs of the particular railway. Throughout the legislation on this subject it appears to have been a primary object that the bill should point out clearly the party charged (3 Jac. 1, c. 7, s. 1; 2 Geo. 2, c. 23, s. 23; 6 & 7 Vict. c. 73, s. 37); and the statute is not complied with unless the bill of costs be addressed to the person who is intended to be charged. (*Manning v. Glynn*, 1 Jones Ex. Ch. (Irish) Rep. 513; *Taylor v. Hodgson*, 3 Dowl. & L. 115; *Edwards v. Lawless*, 6 C. B. 329.)

*Whitehurst*, contra, relied upon *Eggington v. Cumberledge*, which was an action upon an attorney's bill against a member of the provisional committee of a railway company. It appeared that the plaintiff, who was employed as local agent and attorney, sent his bill to the residence of the solicitor of the company, who laid it on one occasion before the committee, when the defendant was present, and on another occasion it was laid before the committee by the secretary, when the defendant was absent. This was held to be a sufficient delivery of the bill within the statute. (He was stopped by the Court.)

*Mellor* was heard in reply.

*PARKES, B.*—We are all of opinion that the ruling of my brother Erle was correct, and that the judgment of the Court of Q. B. must be affirmed. The question arises upon the replication to the plea, which alleges that there was no delivery of a signed bill of costs. The replication states that the plaintiff did one month before the commencement of the action deliver to the defendant a bill of charges of fees and disbursements in the plea mentioned, subscribed with the proper hand of the plaintiff, pursuant to the statute. It appears upon the evidence as set forth in the bill of exceptions, that a bill of the plaintiff's charges, as attorney, was sent by him to Pell, at Pell's request, the latter as attorney of the company having employed the plaintiff as an attorney to do work also for the company. The bill was worded thus:—"Northampton, Lincoln, and Hull Railway, to Robert Heaford Daubney, debtor." After that a meeting took place, at which the defendant was present, and at which a copy of the bill signed by the plaintiff was produced. The defendant looked the bill over, and said he had seen that bill before, and that he did not intend to dispute the items. Other members came in and the matter was discussed between them, and ultimately the bill was taken away by J. H. Daubney. There is, therefore, evidence that the defendant had the bill of costs in his possession, and that after some conversation on the subject the copy was taken away. The learned judge ruled that there was evidence of a sufficient delivery of the

bill, and gave his opinion that the bill in its present form would satisfy the requirements of the statute. Now, with respect to the form of the bill, it is contended by Mr. Mellor that the statute requires that not merely a list of charges should be made out, but that the bill must state one party to be creditor, and another party debtor, and he contends that this has not been done in the present case; and he cited the authority of *Manning v. Glynn*. No doubt that decision is perfectly correct, but in that case the bill had no heading at all. The question here is whether, on reading the bill, some person is not shewn to be intended to be made debtor. The bill is not headed merely "Northampton, Lincoln, and Hull Railway," but "Northampton, Lincoln, and Hull Railway, to R. H. Daubney, debtor." We think that this heading does sufficiently import that the plaintiff meant to charge all the persons responsible for the work done for the Northampton, Lincoln, and Hull Railway. It, therefore, in our opinion sufficiently charges the defendant. The only remaining question then is, whether there is sufficient evidence to go to the jury that the bill of charges was delivered to the defendant. It is contended that the delivery to Pell was not sufficient to satisfy the statute; and some of us entertain a doubt whether that would have been sufficient had the case turned on that delivery alone. But there is some evidence that Pell delivered the bill to the defendant, for the defendant says that he had seen the bill before, and had examined it. Some of us think that that would be evidence to shew that Pell was authorised by the defendant to receive the bill for him. That would bring the case within the authority of *Vincent v. Slaymaker*, where it was held that delivery to an attorney, who had been substituted for the original attorney, was sufficient. I must say for myself that I entertain some doubt whether the delivery to Pell would have been sufficient to charge the defendant. But we all of us think that the putting the bill into the hands of the defendant at the interview was evidence to go to the jury of a delivery to him. On the facts laid before the jury with respect to that meeting the jury might have concluded that the bill was only shewn to the defendant, and that the plaintiff intended to take it back again, or they might have drawn the conclusion that the plaintiff said to the defendant, "You may take the bill if you like," and that the defendant said, "As I do not intend to dispute the charges, you may take it back again." It was a question for the jury whether the defendant was at liberty or not to have kept the bill. In the one view of the case there would have been a good delivery of the bill; in the other, there would not. We all think that the learned judge was right in saying that there was sufficient evidence for the jury.

Judgment affirmed.

## ERRORS FROM THE EXCHEQUER.

Reported by C. J. B. HERTSLER, Esq. of the Middle Temple, Barrister-at-Law.

Wednesday, May 16.

(Before PATTERSON, MAULE, WIGHTMAN, ERLE, and WILLIAMS, JJ.)

FRIAR v. GRAY and OTHERS.

*Covenant—Pleading—Condition precedent.*

*A lease contained a proviso, that on notice to quit being given by the lessee eighteen months before the end of the eighth year, and all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should determine at the end of the eighth year, "nevertheless without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."*

*Held in error, reversing the decision of the Court below, that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease.*

This was an action of covenant by the assignee of the lessor against the lessees under an indenture of lease. The declaration assigned various breaches of covenant.

*Plea*.—Setting out the lease dated April 30, 1830, of certain lands and mines for forty-two years, at the yearly rent of 280l. for the mines, and 51l. for the land.

The most important part of the lease, and that on which the opinion of the Court was now sought, was a certain proviso in the following terms: "Provided also, that if the said lessees, their executors or administrators, shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the said John Friar, the lessor, his heirs or assigns, notice in writing, eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years (as the case may be), then and in such case all arrears of rent being paid

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and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed, this lease and every clause, and anything herein contained, shall, at the expiration of the first eight years, and thereafter, at the expiration of such third year (whichever in the said notice shall be expressed), cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of 42 years had then run out and expired; but nevertheless, without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The plea then alleged that the whole of the alleged rent became and was due and payable after the 12th day of May, 1846, and after the expiration of the first eight years of the term, and after the lease and every clause and thing therein contained had ceased, determined, and become void as thereinafter mentioned; and that after the making of the lease, and eighteen calendar months before the expiration of the first eight years of the term, the defendants being desirous to quit the said demised premises at the end of the first eight years of the term, gave notice to the plaintiff in writing of such their desire, and thereby gave the plaintiff notice that they would quit and deliver up possession of the said demised premises, on the 12th day of May, 1846, being the end of the first eight years of the said term; that at the expiration of those eight years all arrears of the said rent so reserved, and made payable by the said indenture, had been and were paid, and all and singular the covenants and agreements on the part of the defendants had been and were duly performed and observed by the defendants, and thereupon at the expiration of the said first eighth year of the said term, and which happened before the commencement of this suit, the said lease and every clause and thing therein contained, ceased, determined, and were utterly void to all intents and purposes.

**Replication.**—That all and singular the covenants and agreements in the said indenture were not duly observed and performed; that after the making of the indenture and during the said term before granted, and before the expiration of the first eight years of the term, to wit, on, &c. and on divers other days and times before the expiration of the first eight years of the term, the defendants wilfully neglected to pump out of the colliery large quantities of water which during those days and times had got in, and by reason of such neglect or omission the collieries and coal mines became and were drowned and overburdened with water, &c. contrary to the indenture, and that at the end of the first eight years of the term that breach was still subsisting and continuing. **Verification.**

**Demurrer.**—The plaintiff below contended that the performance of the covenants and agreements on the part of the defendants was a condition precedent to the exercise of the right to determine the lease by notice. The demurrer was argued on the 8th July, 1850, and judgment passed for the defendants, on which the plaintiff brought his writ of error.

**Manity**, for the plaintiff, after going through the lease and pleadings. This question has been already three times discussed, first in the Q. B. when that Court held the condition to be a condition precedent, and gave judgment for the plaintiff. That judgment was reversed in the Ex. Ch. but on the ground of a defect in the pleadings. Then this action was brought in the Ex. and Rolfe, B. in giving judgment, treated the expression of opinion contained in the two previous judgments as extrajudicial. It may be that the compliance with all these covenants to the strict letter would be difficult, but the parties knew the difficulties of the contract when they entered into it. Taking the whole context of the lease together, it is evident that the clause was purposely introduced. First, if the landlord chose to put an end to the lease for breach of covenant, still that is without prejudice to his right to sue for the breach of covenant. Again, the tenant may give notice of his desire to determine the lease, but also without prejudice to the landlord's remedy for any previous breach of covenant. Unless the Court can see distinctly that there was a contrary intention, the Court will let the words have their ordinary meaning; but here the expressions are as plain as words can make them, and are exceedingly strong. The cases relied on on the other side are all cases of independent covenants or covenants dependent on each other; but this is a power given to a tenant to determine his lease, which is in the first instance granted for forty-two years—it is a power dependent upon a condition, and is not the same case as a covenant. The whole power fails if the covenants are not performed, and the lease cannot be determined so long as an important covenant remains broken. This is said to be a case of hardship; but there exists in this lease an arbitration clause, under which the amount of compensation can easily be ascertained. Let the tenant pump the water out of the mine, and give another notice for the next three

years. The Court must violate many general principles if effect be given to the argument on the other side. It is a point of immense importance in the mining districts, and the Court will give effect to this clause, the meaning of which is clear and unambiguous, and neither controlled nor altered by subsequent words. He cited *Bootle v. Blundell*, 19 Ves. 521; *Porter v. Shephard*, 6 T. R. 665; *Bengough v. Edridge*, 1 Sim. 173.

**H. Hill**, for the defendants.—The question is, what was the true intention of these parties, looking at the various provisions of this lease, and taking it as a whole, and not any particular part as separated from the other part? The case of *Porter v. Shephard* has been cited; that case is clearly distinguishable from this; the words there were different, and the property leased being garden ground, &c. the terms and arguments suitable to that case are not applicable to this case; and there the particular words "from and after" were employed. In this lease there is a clause as follows:—"Nevertheless, without prejudice to any claim or remedy which any of the parties hereto may be entitled to for breach of any of the covenants or agreements hereinbefore contained," that does not apply to the proviso for re-entry; that proviso is complete in itself, and the words "hereinbefore contained" relate solely to the prior covenants; and although it may be said that they are all tenant's covenants, there are also provisions that amount to covenants on the part of the landlord. The parties evidently contemplated the possibility of the covenants not being performed.

[**MAULE, J.**—The clause in question was evidently inserted for the landlord's sole benefit. If the tenant does not perform every part of the covenants, he may be turned out, if the landlord thinks proper, or he may retain him if he pleases. The tenant cannot set up any breach of covenant to deprive the landlord of any power in the lease.] The reason for inserting the proviso for determining the lease by notice, is in the event of the mine being worked out. The words here used do not constitute a condition precedent; for if that were so, and the tenant had broken any of the covenants, his power to determine the lease is gone for ever, and many of these are of such a stringent nature that it is impossible strictly to perform them. [**MAULE, J.**—You say, then, that if these words have any meaning, they have so much, and are so stringent that the parties could not have intended that they should have that meaning.] Yes; I am obliged to go to the length that if you strike out these words the meaning of the instrument would be the same. The Courts are not astute to adhere to the strict words, but will look to the meaning of the parties, and the general rule is to ascertain from the nature of the contract the intention of the parties at the time the contract was entered into. It is submitted that if this is a condition precedent, the landlord could not waive a breach except by express dispensation under seal, or by an instrument of an equally high authority. Looking therefore at the nature of the lease, the subject of demise, the manifold and minute covenants, taking the whole deed and examining its language and the cases cited, it is submitted that it could not have been the intention of the parties to make the performance of every one of these covenants a condition precedent. He cited *Com. Dig. tit. "Condition," B. 1*; *Doe dem. Spencer v. Godwin*, 4 M. & S. 265; *Hays v. Bickersstaffe*, 2 Mod. 34; *Warren v. Astors*, Sir T. Jones, Rep. 205; *Darson v. Dyer*, 5 B. & Adol. 584; *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Horne v. Flintoff*, 9 M. & W. 678; *West v. Blakeway*, 2 M. & G. 729; *Thompson v. Brown*, 7 Taunt. 636; *Heard v. Wadham*, 1 East, 619.

**Manity** was not called on to reply.

## JUDGMENT.

**Tuesday, May 20.**—**PATTESON, J.**—This case turns upon the construction which is to be put on a proviso for determining a lease, and that construction must undoubtedly be put which the Court, by an examination of the lease, finds to be according to the meaning of the parties to the contract. The proviso is inserted solely for the benefit of the lessees, apparently to enable them to determine the lease, and get rid of a fixed rent at the end of the first eight years, if they should be desirous to do so, probably contemplating that the lessees might in that time either have exhausted the mine or have found that it was not worth their while to continue to work it. The proviso does not give the lessors any powers of determining the lease, nor does any other clause in the lease give such power. The proviso runs in these terms:—"Then and in such case, all the arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed, this lease and every clause and thing therein contained shall cease and determine and be utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired; but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto or their re-

spective representatives may be then entitled to for breach of any of the covenants and agreements hereinbefore contained." It seems to be clear that this proviso, but for the last clause in it, would make the due performance of all the covenants on the part of the lessees a condition precedent to their right to determine the lease. The words are as regards the covenants—not as regards the rent, because that has been paid—but as regards the covenants having been duly observed and performed, and they are inserted in the middle of the proviso; and unless they were intended to qualify and limit the power, one cannot see what possible sense they can have: they can hardly have been intended to preserve the right of the lessors to recover for breaches of the covenant, for that right is preserved by the last clause, being in much more ample and significant terms; not that it was necessary to insert any words expressly preserving such a right, for the right would exist in point of law without any such clause, although the contrary rule was formerly attempted to be established,—which circumstance may in some measure account for the insertion of the latter clause of this proviso, *ex majore cautela*. The case of *Porter v. Shephard*, 6 T. R. 665, decided first by the C. P. and afterwards by the Q. B. in error, is directly in point, though the learned counsel for the defendant in error attempted to distinguish it by reason of the words "from and after," which are found in that case. But those words really make no difference in the sense of the proviso. The multiplicity and minuteness of the covenants on the part of the lessees was urged to shew the improbability of the parties meaning that any single breach of them should deprive the lessees of the benefit of this proviso; and the inconvenience of such a construction, with regard to similar cases, was also urged. But these reasons do not justify the Court in refusing to put such a construction on the words as they plainly require, and in effect rejecting them altogether, which we must do if we hold them not to be a condition precedent. Again, it is by no means clear that every minute breach of the covenant would deprive the lessees of the benefit of this proviso; for there are clauses respecting a reference to an arbitrator which, if complied with, might well be held to be a due observance and performance of the covenant within the meaning of the proviso. But it is said the latter clause is inconsistent with the construction that the former is a condition precedent, for it manifestly contemplates that the lease might be determined notwithstanding the existing breaches of covenant on the part of the lessees; whereas, if it could only be determined in case all the covenants were duly observed and performed, no such breaches would exist, and yet the lease would be determined. There are many answers to this argument. First, it might happen that the lessor was ignorant of the existence of breaches of covenant until after he had acted upon notice to determine the lease and to take possession of the mines at the expiration of it; and the clause may have been inserted for greater caution, and to enable him to recover for such breaches as they subsequently discovered, and the clause may apply to other remedies than by action, such as re-entry or distress. Secondly, the clause might apply where the lessor had waived the condition precedent by accepting the notice and taking possession, although he might be aware of some breaches of covenant. We do not think the argument sound, that though a deed would be necessary to do away with the condition precedent as such before breach, therefore that after breach the lessor might not waive the condition without deed. Thirdly, the clause applies to both parties, the lessee as well as the lessor; so that it preserves the right of the lessee to sue the lessor for breaches of covenant, if any, although they have themselves, by their own act, determined the lease. All this shews that the latter clause enables the Court to give effect to the words of that clause consistently with the construction of the former as a condition precedent, and so all the words are made to have some effect, whereas by a different construction, as we have already observed, the words of the former part of the proviso would in effect be a strict one. For these reasons we are of opinion the proviso must be construed as a condition precedent, and the judgment of the Court below must be reversed. **Judgment reversed.**

## BANKRUPTCY.

## IRISH BANKRUPTCY COURT.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

June, 1850.

(Before Mr. Commissioner MACAN.)

*Ex parte KIRK, re KIDD.*

*Sales in bankruptcy—Statement of title—Notice to purchaser.*

*A purchaser in bankruptcy is bound by the abstract of title posted in the Bankruptcy Court, and will not be allowed to get out of his purchase on the ground of verbal statements made out of Court by these*

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interested in the sale, or having the carriage of it, even if uncontradicted. Mere notice of the existence of a lease will not bind a purchaser to the covenants it may contain, if he have not the means of informing himself of their character and effect.

The bankrupt in this matter was a linen manufacturer in Armagh, and being possessed of certain freehold and leasehold property, which he mortgaged, the mortgagee obtained the usual order for a sale under the bankruptcy, and the mortgaged premises were accordingly put up for sale, and sold to a Mr. Kirk for a sum of 1,850*l*.

Hardy, for the purchaser, now came before the Court to have his client discharged from the purchase, on two grounds: first, objection to the title; and, second, misrepresentation. He cited *Bessonet v. Robins*, 8au. and Scully's Reports, 142; *Taylor v. Martindale*, 1 You. & Col. 661.

Moore, for the vendor, cited *Re Smith, Ltd. & G. 429*; *Treme v. Wright*, 4 Mad. 364; *Lyster v. Munamarra*, 10 I. L. R. 607; *Spumner v. Walsh*, 10 I. E. R. 386; *Vaughan v. Magill*, 12 I. E. R. 200.

The facts appear in the

## JUDGMENT.

The Commissioner said the grounds upon which the purchaser sought to be discharged from his purchase were twofold; viz. objection to the title, and misrepresentation as to facts. The objections to the title were no less than eight in number. [He specified and overruled them *seriatim*, and then proceeded.] It clearly appeared, that in the present instance the purchaser had ample opportunities to examine and inform himself of every circumstance connected with the property in question, or that could affect his rights or his title as a purchaser. The abstract stated that the lease was not forthcoming; but it referred to a memorial of it, and to its being recited in renewals thereafter abstracted; and these renewals contained all the information that a purchaser could require on that particular point. The purchaser alleged in his affidavit, that he was misled by the statements of the agents of the vendors, by the bankrupt, and by the solicitor of the mortgagees; and these misrepresentations were said to have taken place in coffee-room conversations, whilst the statement of title was posted in the Bankruptcy Court in Dublin. No court in existence should decide questions of title, or decide upon the rights of parties upon any such vague and unsatisfactory evidence, even if all that had been sworn by the purchaser had been uncontradicted. He believed the purchaser would not have purchased if he knew there was only the life estate of the bankrupt in one moiety, instead of a clause for perpetual renewal; but if he were disappointed or led astray as to the nature of the estate he purchased, it was wholly to be attributed to his own neglect; and he should therefore refuse the application to release him from his contract. He would direct that he should pay a sum of 10*l*. as costs of filing the objections, and 5*l*. costs of the motion.

## INSOLVENT COURT.

Reported by DAVID CARO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Saturday, Dec. 7, 1850.

(Before Mr. Commissioner PHILLIPS.)

Re WILLIAM CUMING.

Description—Residence—Place of business.

The statute requires an insolvent to deliver into the Court a schedule containing a full and fair description of such prisoner as to his name or names, trade or trades, profession or professions, together with the last usual place of abode of such prisoner, and the place or places where he has resided during the time when his debts were contracted (1 & 2 Vict. c. 110, s. 69):

Held, that the word "resided" includes a place of business, and that an insolvent must insert in his description all the places where he has carried on a trade or business.

This insolvent appeared for his hearing, and was opposed by Sargood for a creditor. In the course of his examination it appeared that he had carried on the business of a cab proprietor at Ball's-yard, Kennington-cross; but as he had not resided there, he had omitted it from his description. Sargood submitted that the insolvent was bound to advertise himself as of every place where he had carried on a trade or business.

Nichols contra.

Mr. Commissioner PHILLIPS, after looking in the Act of Parliament (1 & 2 Vict. c. 110, s. 69) said that the strict words of the statute did not appear to require it, and consulted the registrar (Mr. Ingpen) as to the practice of the Court.

Mr. Ingpen informed the learned Commissioner that the practice of the Court was to require an insolvent to insert his places of business in his description.

Mr. Commissioner PHILLIPS said, that that being the practice of the Court, the case must be adjourned to amend and re-advertise.

Adjourned generally to amend description and re-advertise. Four days' notice to the opposing creditors.

NOTE.—If places of business where insolvents do not reside were to be omitted from their descriptions, the world would very often be in the dark as to the person petitioning the Court, one great, and indeed generally in the commercial world, the great feature of a trader's identity is his place of business. The head of a celebrated banking firm, J. W. might occupy a back room at nine shillings a week rent in some small street, and if he were described only as of such a street the world would never dream of its being the great banker. A man might carry on several trades in different localities and live in the suburbs, but if described merely as a trader residing at the latter place, the public would be but little enlightened as to his identity. Indeed the heads of half the wholesale businesses in London do not reside at their warehouses.—REPORTER.

Wednesday, July 9.

(Before the Chief Commissioner REYNOLDS.)

PROTECTION CASE.

Re CHARLES MARIE BENNETT.

Petition—Omission of christian name.

A christian name, being disguised, was omitted for that reason in the petition: Held, that the Court might dismiss the petition filed, and grant an application to file another instant.

This insolvent petitioned as Charles Bennett, his real name being Charles Marie Bennett. His counsel, Sargood, to-day applied for the dismissal of this petition, and leave to file another instant, using the same schedule, balance-sheet, &c. Being a woman's name, the insolvent was naturally disinclined to use it, but the initials, C. M. Bennett, were on the brass-plate on his door.

The CHIEF COMMISSIONER inquired why the insolvent had omitted the name?

The insolvent said because he had never used it.

The CHIEF COMMISSIONER dismissed the petition, with leave to file another instant.

Thursday, July 10.

(Before Mr. Commissioner PHILLIPS.)

PROTECTION CASE.

Re RICHARD TIDMARSH.

Amending schedule—Willful omissions.

A petitioner having wilfully omitted a debt from his schedule, will have his petition dismissed.

This insolvent, an accountant, had prepared his own petition, and came up to-day for his examination on his interim order. He was supported by Dowse.

The insolvent being opposed by a creditor in person, it transpired that he had deposited a bill for 12*l*. with a friend who had advanced him 4*l*. 10*s*. and that he had omitted the bill and the debt from the schedule. The petitioner expected to be able to repay the 4*l*. 10*s*. and get back the bill, and believing that he should be able to do that, had omitted all mention of the transaction in his schedule.

Dowse applied for permission to insert, and serve the creditor, and an adjournment for that purpose; after some discussion,

Mr. Commissioner PHILLIPS said the question was, whether he has left it out intentionally? Were insolvents to be permitted to have their own opinions as to what liabilities they should insert and what liabilities they should omit?

Dowse referred to 7 & 8 Vict. c. 96, ss. 3 and 30.

Mr. Commissioner PHILLIPS.—Do these sections say that I shall have power to insert a debt which was remembered at the time of swearing to the truth of the schedule, but omitted for certain reasons?

Dowse said, that no injury had resulted to creditors from this omission. The necessary notice to this creditor might be given by adjournment. Then by s. 30, if this omission did not arise from fraud, culpable negligence, or evil intention, the Court might legitimately exercise its discretion in allowing the schedule to be amended.

Mr. Commissioner PHILLIPS.—This is a debt entirely and deliberately omitted.

Dowse.—This insolvent erred in his judgment, but that does not necessarily deprive the Court of its discretion as to amending the schedule. "I expected," said the insolvent, "to be able to pay Wilcox." There was neither fraud, nor evil intention, nor culpable negligence.

Mr. Commissioner PHILLIPS.—That applies to where the debt is sworn to "at an amount which is not exactly the actual amount thereof." I don't think that there need be any fraud intended.

Dowse.—The 3rd section gives the amplest power of amendment; the commissioner may adjourn such sitting from time to time, and allow the petitioner to amend his schedule, and correct any misstatement therein at discretion.

Mr. Commissioner PHILLIPS.—The 30th section being given up, let us come to what the insolvent was bound to do, and what he has done, and what he has not done. He is bound to insert in his schedule "a full and true account of his debts and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally as nearly as such dates can be stated," and he is bound to swear to the truth of the schedule so filed. That he was bound to have done. Now, what power does the 3rd section of the Act give? The Commissioner may adjourn the sitting from time to time, to amend the schedule and correct any misstatement therein. But there is no misstatement here. There is an omission which the insolvent says he has deliberately made. He was nowhere authorised to supply omissions deliberately made. The insolvent, by a process of argument in his own mind, thought he was justified in swearing he inserted all his debts, and the question was,—was an insolvent to exercise his own judgment as to what acceptances he should insert and what acceptances he should omit? He could not thus allow insolvents to trifle with their oaths, and disregard the requisitions of the Act of Parliament. The insolvent swears he has inserted all his liabilities. It appears he has not. The question then arose,—was this wilfully done or not? If he said it was not done wilfully, he would exercise his discretion. If the omission arose from lapse of memory or other circumstances over which he had no control, he would exercise the discretion which the Act gave him in favour of the petitioner. But when a petitioner wilfully and deliberately omitted a debt, and then went deliberately and took an oath that he had done that which he knew he had not done, he would exercise no discretion. This petitioner omitted this debt or claim purposely, believing that he had a right to do so. He therefore came within the principle he had laid down, and the petition would be dismissed.

Petition dismissed.

Dowse applied for leave to file a new petition, and use the old schedule.

Mr. Commissioner PHILLIPS had great doubts whether he could exercise this discretion. He did not wish, however, to act with too great harshness, and would allow the old schedule to be used. He must, however, repeat that these Courts would soon be in a dreadful state, if insolvents might exercise their own judgments as to what liabilities they might insert in their schedules, and what they might omit.

Leave granted to file a new petition and use the old schedule.

## Ecclesiastical Courts.

## ARCHES COURT.

Reported by Dr. WADDILOVE, of Doctors' Commons.

Saturday, July 5.

HULL v. HULL, falsely called M'ARTHUR.

Nullity of marriage—Consent—Fraud.

A libel pleading that a marriage was procured by the instigation of the parents of the man, the woman being only fourteen years of age, and under their custody and control, was admitted to proof.

This was a question as to the admissibility of a libel in a suit for nullity of marriage by reason of alleged want of free consent on the part of the woman at the time of the marriage. The learned judge of the Consistory Court had admitted the libel, with some hesitation, to proof. This was an appeal from that decision. The libel pleaded that at the time of the marriage the female party to it was of the age of fourteen years and three months. That in consequence of her mother's attending the same place of worship as Mr. Hull, the other party to the marriage, she, the daughter, Miss M'Arthur became acquainted with him. That there was a disparity in their condition of life, she being the daughter of a chemical manufacturer; whereas, he was assistant to his father, a shoemaker, receiving a weekly payment for his work; that he had formed a matrimonial engagement with another person; that the banns of such intended marriage had been published three times; that on the last Sunday of their publication, Miss M'Arthur, missing Mr. Hull from his usual attendance at the chapel, went alone, and unprovided with any clothes, to the house of the father of Mr. Hull, to inquire for him; that she was then told by his father and mother, neither of whom she had ever seen before, that their son was engaged to be married to C. J. but that they were very much displeased therat; that shortly afterwards, at the same interview, Mr. Hull himself entered the room, whereupon R. Hull, the father, and — Hull, his wife, with a view to prevent the intended marriage of their said son with the said C. J. and taking an undue and illegal advantage of the tender age, ignorance, and inexperience of the said Eliza-



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both M'Arthur, and of her presence unprotected in their house, persuaded and induced the said Robert Hull, the younger, and the said Elizabeth M'Arthur to be married together, and accordingly, at their instigation and inducement, the said Elizabeth M'Arthur, entirely unknown to her parents, remained under the custody and control of the said Robert Hull, the father, and — Hull, his wife, partly in their house, and partly in the house of George Hull, another son of the said Robert Hull and — Hull, where she was sent by them to sleep (there being no accommodation for that purpose in their house), until the Tuesday following the Sunday on which she went there. The libel then went on to plead that on the day following such Sunday, Robert Hull, the younger, went in company with his father to Doctors' Commons, where a license for the marriage was procured, the former having, in order to obtain such license, knowingly and wilfully sworn falsely that Miss M'Arthur, whom he untruefully described as of the parish of St. Botolph, Bishopsgate, London, was of the age of twenty-one years and upwards. That in pursuance of such license unduly, fraudulently, and illegally obtained, the pretended marriage was solemnized on the following day, in the presence of Robert Hall and his wife. That in the afternoon of the day of the marriage all the parties repaired to Greenwich. That whilst there the father of Miss M'Arthur made his appearance in company with a policeman and claimed possession of his daughter. That the presiding magistrate at the police-office directed her to be given up to him (her father), which was done. That on the following day she was taken by her father to Glasgow. That the marriage was never consummated, and that no cohabitation or communication of any kind had ever taken place between them, the said Elizabeth M'Arthur and Robert Hull, the younger, since the said pretended marriage.

*Waddilove*, in opposition to the admission of the libel, contended that if the averments pleaded were proved, they would not furnish sufficient evidence of such an absence of consent as would found a sentence of nullity of the marriage. He cited "Field's Annuling Marriage Bill," 1 H. of Lords Cas. 48.

*Jenner and R. Phillimore*, contra, cited *Harford v. Morris*, 2 Hag. Con. Rep. 426.

Sir H. JENNER FUST.—I shall admit this libel to proof, and remit the cause to the Court below. The learned judge of that court said, I hear, when he admitted the libel, although the facts pleaded are not very strong, still a fraud may have been practised, which may possibly be established by the evidence if taken; I shall, therefore, adhere to his decision.

## Irish Reports.

## COURT OF EXCHEQUER.

Reported by W. ST. Leger BARRINGTON, Esq.  
Barrister-at-Law.

Tuesday, January 28.

(Before PIGOT, C.B. and PENNEFATHER, B.)

SHAW v. ODLUM.

Demurrer—Libel—Pleading—Justification—Inuendo.

The declaration averred that the plaintiff was employed by the defendant, who was proprietor of a public coffee-room and tavern, to wait upon those who resorted there, and to collect and receive from them payment in cash for such entertainment, refreshment, and attendance as were to them supplied, according to a regular scale of charges, then and there settled and authorised by the said defendant; and after averring that the plaintiff had conducted himself faithfully in his said employment, proceeded to charge that the defendant published a false, slanderous, malicious, and defamatory libel of and concerning the plaintiff, in the form of an advertisement headed, "Freemasons' Hall, Commercial-buildings, Public and Commercial Coffee-room, Dame-street, Dublin, Richard Odium, proprietor," and in the words following, "The proprietor begs leave to return thanks to the brethren of the order, and gentlemen in general, who have so liberally supported this establishment, and particularly to the brethren and gentlemen who informed him of the misconduct of one of his waiters, William Shew, whom he instantly dismissed for extortion and insolence to the patrons of the establishment," &c. &c. Inuendo.—That "the plaintiff had, in his place and capacity of waiter as aforesaid, secretly and unknown to the defendant unlawfully and fraudulently exacted and received from certain customers of said defendant in and at said tavern and coffee-room, certain moneys not due by and not properly payable by or receivable from said customers; and had, by overcharging said customers sums of money not warranted by said scale of charges, practised extortion on said customers, and had, in his place and capacity

of waiter as aforesaid, behaved himself disrespectfully and insolently to said customers," &c. &c.

To this the defendant pleaded in justification of the words, "misconduct of one of his waiters, William Shew, whom he instantly dismissed for extortion;" that the said plaintiff "did extort from a certain person, to wit, one J. R. then and there being a customer of the said defendant, at &c. a certain sum of money, to wit the sum of sixpence, that is to say, did then and there extort from, and by importunity improperly induce and oblige the said J. R. to pay the said sum to the said plaintiff as and for a gratuity to the said plaintiff, the same being then and there a sum not properly receivable by the said plaintiff, and which he the said plaintiff was not then and there authorised by the said defendant to demand or receive in that behalf, and was thereby then and there guilty of misconduct:

*Held*, on demurrer, that the plea was bad, as not containing a justification of the use of the word "extortion," in the senses imputed to it by the inuendo.

Case for the publication of a libel. The declaration averred that the defendant was the proprietor of a certain public coffee-room and tavern, situate, &c. and that from and after the month of June, 1850, (up to and till shortly, to wit, ten days before the committing of the grievances mentioned, the plaintiff was employed by the defendant as the servant of the said defendant, in and at the said coffee-room, &c. in the capacity of head waiter; and in said capacity, and by reason of said employment, to wait upon and attend the said subjects of our lady the Queen, and all other the customers of the said defendant, who resorted to the said coffee-room, "to collect and receive from said customers respectively payment in cash for such entertainment, refreshment, and attendance as were then and there to them respectively supplied; according to a regular scale of charges then and there settled and authorised by the said defendant, and whereas the plaintiff, during all the time of said employment as aforesaid, did honestly faithfully, and with integrity, conduct himself therein, and never, during all the time aforesaid, exacted, took, or received from any customer of said defendant, in or at said coffee-room and tavern, any moneys whatsoever, save and except the amount honestly due by such customers, and with which such customers' gratuity as such customers might and would then and there voluntarily bestow on the plaintiff; and the plaintiff was never, during all the time aforesaid, in any wise discourteous, disrespectful, inattentive, or insolent towards any customers of said defendant, &c. yet the defendant, &c. continues, &c. to injure the said plaintiff, &c. and to cause it to be suspected and believed, &c. that the said plaintiff had been and was guilty of unlawfully, dishonestly, and fraudulently overcharging divers of the customers of said defendant in and at said tavern and coffee-room, and of unlawfully, dishonestly, secretly, and without the knowledge of the defendant, exacting from said customers in and at said tavern and coffee-room, divers sums of money not really due and owing by said customers, and not properly payable by or properly receivable from said customers, and of practising extortion on divers of said customers in and at said tavern, &c. and behaving insolently and disrespectfully to said customers in and at said tavern, &c. and to vex, &c. the plaintiff, &c. did falsely, wickedly, and maliciously publish and cause and procure to be published, of and concerning the plaintiff, a certain false, slanderous, malicious, and defamatory libel in the form of an advertisement in said newspaper, headed "Freemasons' Hall, Commercial-buildings, Public and Commercial Coffee-room, Dame-street, Dublin, Richard Odium, proprietor," and in the words following, that is to say, "the proprietor (meaning the said defendant) begs leave to return thanks to the brethren of the order (meaning Freemasons) and gentlemen in general who have so liberally supported this establishment (meaning said tavern and coffee-room of the defendant), and particularly to the brethren and gentlemen who informed him (meaning the defendant) of the misconduct of one of his waiters, William Shew (meaning the plaintiff), whom (meaning the plaintiff) he (meaning the defendant) instantly dismissed for extortion and insolence to the patrons of the establishment (meaning that the plaintiff had, in his place and capacity of waiter as aforesaid, secretly and unknown to defendant, unlawfully and fraudulently exacted and received from certain customers of said defendant, in and at said tavern and coffee-room, certain moneys not due by and not properly payable by or receivable from said customers, and had, by overcharging said customers sums of money not warranted by said scale of charges, practised extortion on said customers, and had, in his place and capacity of waiter as aforesaid, behaved himself disrespectfully and insolently to said customers, the proprietor (meaning the defendant) is determined to have the business conducted on the lowest scale of charges, with the most liberal

treatment, and the dismissal of the waiter, William Shew (meaning the plaintiff), will be a sure warning to others (meaning to other waiters in and at said coffee-room and tavern) not to repeat the offence (meaning the offence of extorting money from and being insolent to the customers of the defendant in and at said tavern and coffee-room) by means of the committing of which said several grievances, &c. the plaintiff has been and is greatly injured in his good name," &c.

To this declaration the defendant pleaded the general issue and five special pleas of justification. The second plea was:—"As to the publishing of the said words misconduct of one of his waiters, William Shew, whom he instantly dismissed for extortion, that the said plaintiff, before the publishing of the said words of and concerning the said plaintiff, as in the said declaration mentioned, and whilst he, the said plaintiff, was in the employment of the said defendant, as such waiter as aforesaid, to wit, on, &c. at the said Commercial Buildings, &c. did extort from a certain person, to wit, one John Ryan, then and there being a customer of the said defendant, at the said tavern and coffee-room, a certain sum of money, to wit, the sum of sixpence, that is to say, did then and there exact from, and by importunity improperly induce and oblige the said John Ryan to pay the said sum to the said plaintiff as and for a gratuity to the said plaintiff, as such waiter as aforesaid, the same being then and there a sum not properly receivable by the said plaintiff, and which he, the said plaintiff, was not then and there authorised by the said defendant to demand or receive in that behalf, and was thereby then and there guilty of misconduct, wherefore he, the said defendant, afterwards, &c. did publish the said words of and concerning the said plaintiff," &c. &c. The defendant by his third plea justified the same portion of the publication by alleging a similar extortion from one W. H. Hart, and by his sixth plea he justified the entire publication, by alleging that the plaintiff "did insolently extort from certain persons, to wit, John Ryan, William Henry Hart, Henry Evans, Samuel Gun, Thomas M'Donnell, and Alexander Dudgeon, then and there being customers of the said defendant, at &c. certain sums of money, amounting in the whole to a large sum, to wit, the sum of three shillings, that is to say, did then and there, by importunity and insolence, exact from, and prevail upon, the said last-named persons, to pay him, the said plaintiff, for his attendance upon them, the said last-mentioned sums, the same being then and there sums not properly receivable by the said plaintiff, and which he, the said plaintiff, was not then and there authorized by the said defendant to demand or receive in that behalf, and was thereby then and there guilty of the offences of misconduct, extortion, and insolence, wherefore, he, the said defendant afterwards, &c. did publish the said words, &c. Special demurrer to the second plea, on the grounds that it purported to be a plea of confession and avoidance of the words and cause of action in the plaintiff's declaration, and in the introductory part of said second plea mentioned; whereas the said second plea does not confess and avoid said words and cause of action, but other and different words, and other and different causes of action, and motives and things foreign to and beside the said cause of action," and "doth not in any manner avoid the said last-mentioned cause of action," and that it "purports and intends by the terms and form thereof to be a plea of justification of the words in the introductory part of said second plea, and in the said declaration mentioned;" but said plea does not justify said words in the sense and meaning imputed to them by the said declaration, but in another and different sense and meaning; and that said second plea is an argumentative denial of the publication of the said words in the sense imputed to them by said declaration; and that the defence by said second plea intended to be made amounted to the general issue, and not under the said plea; and that the said plea is in other respects the certain, &c.

To the 3rd and 6th pleas the plaintiff also demurred specially, on the same grounds. The 4th and 5th pleas it is not necessary to notice.

*R. Armstrong*, in support of the demurrer.—The question here is, whether the pleas afford a good answer to the declaration. I submit that they do not, and that they do not justify the using the words in the sense imputed to them in the declaration, but the using of them in a different sense; but if the defendant means to deny that such sense is correctly imputed to them, he must do so under the general issue. (1 Saund. 2446, note g, edit. of 1845; *McPherson v. Daniels*, 10 B. & C. 263; *Montague v. Watton*, 2 B. & Ad. 673; *O'Brien v. Bryans*, 16 M. & W. 168, per Parke, B.) It is clear that the inuendo is not too wide in attributing to the word "extortion" the meaning that the plaintiff had "unlawfully and fraudulently" exacted from the customers moneys which they were not bound to pay; and that is met by the allegation in the second plea, that by importunity the plaintiff



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obtained the money as a gratuity; that it is a clearly and totally different sense to that imputed by the declaration. The plea is a bad plea in confession and avoidance; it should admit the use of the words in the sense imputed to them, and then justified them. The declaration alleges that the plaintiff was accused of fraudulent and unlawful conduct and dishonesty. The justification then is, that he was guilty of misconduct and by importunity obtaining sixpence which he ought not to have got.

**PICOT, C.B.**—The waiter might have said, "Sir, the charge for what you had is two shillings, one and twopence for the refreshment, and twopence for the waiter, which is very small, and I hope you will give me something more," certainly, if that be a fraud and an extortion, there is no knowing where it would end; the question is, how is a fraud committed on anybody by getting twopence as a gratuity?

**Jebb**, in support of the pleas.—As to the publication of these words "misconduct of one of his waiters, William Shew, whom he instantly dismissed for extortion and insolence," the defendant alleges that the plaintiff received, unknown to the defendant, moneys which were not properly receivable by him, and that he exacted and obliged John Ryan, a customer, to pay a sum not warranted by the scale of charges, and was, by so doing, then and there guilty of misconduct; what else can be the meaning of the word extortion in the case of a waiter than what is here alleged? The word has not, in such case, any legal meaning or definition, it is not like the case of extortion in a sheriff. [**PICOT, C.B.**—Extortion seems to be making a demand to which a party has no right, and enforcing it.] Suppose that we had omitted to justify, would not the plaintiff at the trial say that we could not give evidence under the general issue of the plaintiff having taken more than he was entitled to do by the scale of charges?

**PICOT, C.B.**—The word in the libel is "extortion," and a meaning is given to that word by the innuendo in two clauses; one that he unlawfully and fraudulently exacted and received money which he had no right to receive; the other, that he had charged that which he was not warranted in charging by the scale of charges. It seems to me that you cannot justify by the facts which you have stated.

*Judgment for the plaintiff.*

## HOUSE OF LORDS.

Reported by W. H. BENNETT, Esq. Barrister-at-Law.

July 8 and 9.

(Present, the LORD CHANCELLOR, LORD BROUGHAM, V.C. LORD CRANWORTH, and other Lords.)

**Re THE WINDING-UP ACTS, 1848 and 1849, and Re THE WOLVERHAMPTON, CHESTER, and BIRKENHEAD JUNCTION RAILWAY COMPANY.**

**COOPER'S CASE.**

**And Re THE DIRECT BIRMINGHAM, OXFORD, READING, and BRIGHTON RAILWAY COMPANY. THOMPSON'S CASE.**

**Contributory—Preliminary expenses—Stat. 1 & 2 Vict. c. 110.**

*In a case where shares have been applied for in a projected company, but no payment of the deposit made in accordance with the requisition for that purpose contained in the letter informing the applicant of the allotment of shares to him:*

*Held, that such applicant is not a contributory towards preliminary expenses.*

*So, in a case where the deposit has been paid by a party applying for shares, but no signature by the applicant to the subscribers' agreement or parliamentary contract:*

*Held, that such payment did not make the party a contributory; that this was the law prior to the stat. 1 & 2 Vict. c. 110, and the provisions of that statute have made no alteration in the law in those respects.*

The first of these cases was an appeal from an order of Vice-Chancellor Lord Cranworth, dated the 24th June, 1851, whereby he had ordered that the name of William Cooper, jun. should be expunged from the list of contributories of the above company, and upon which list his name had been placed by Master Brougham.

The facts of the case were as follow:—In the year 1845 a company was projected for making a railway communication between Birmingham and Birkenhead, and to effect that object it was proposed to raise a capital of 1,000,000*l.* by the creation of 50,000 shares of 20*l.* each. The projected company was provisionally registered, pursuant to the terms of the 7 & 8 Vict. c. 110, by the name and description of the "Wolverhampton, Chester, and Birkenhead Junction Railway Company." Plans and sections, with books of reference, were prepared, and in conformity with the standing orders of Parliament, were deposited at the offices of the Board of Trade, and with the clerks of the peace of the several counties through which the said proposed railway was intended to pass. A parliamentary contract and

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subscribers' agreement were prepared and engrossed, but neither of them was executed by any party, and the same were afterwards cancelled, in order to obtain a return of the stamp duty. The expenses of obtaining the said plans, sections, and books of reference, together with the charges of the several agents and others employed upon the business of the company amounted to a very large sum, exceeding the sum of 12,000*l.* Samuel Haines, of Edgbaston, in the county of Warwick, gentleman, was called upon to pay, and paid upwards of 500*l.* towards the expenses of attempting to carry into effect the objects of the said company; Thomas Uffill, of Edgbaston aforesaid, gentleman, paid the same sum; Robert Wrightson, of Wymecwold, in the county of Leicester, gentleman, also paid 480*l.* towards the expenses; Thomas Harris, of Highfield-house, Edgbaston aforesaid, gentleman, paid 480*l.* towards the expenses; and Edward Cooper, of Henley in Arden, in the county of Warwick, gentleman, likewise paid upwards of 420*l.* towards the same object. The said Samuel Haines, Thomas Uffill, Robert Wrightson, Thomas Harris, and Edward Cooper, were each also respectively sued for debts due and owing on behalf of the company, and an action is yet pending against Edward Cooper, at the suit of William Stroughton Vardy, one of the solicitors of the company. The company ceased to carry on business on the 5th January, 1846, and on the 26th October, 1849, the said Samuel Haines, Thomas Uffill, Robert Wrightson, and Edward Cooper, preferred their petition unto the Lord Chancellor, praying that the company might be absolutely dissolved and wound up under the provisions of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and that it might be referred to one of the Masters of the Court to wind up the affairs of the company under the said Acts. The advertisements required were duly inserted and published in the *London Gazette*, and in two London daily newspapers, and two local newspapers, according to the provisions in the Acts, and the petition was duly served and supported by evidence according to the requisitions of the same Acts. The petition was heard on the 3rd day of November, 1849, before the Vice-Chancellor of England, when it was ordered that the said company should be absolutely dissolved and wound up under the provisions of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and that it should be referred to the Master of the Court to whom it was referred to wind up the Trent Valley, Chester, and Holyhead Continuation Railway Company, to wind up the affairs of this company. Mr. Wm. Brougham was the Master to whom the said matter was referred, and the appellant was appointed the official manager of the company under the provisions of the said Acts. The Master, on the 23rd June, 1851, made his certificate in the matter, and by his settlement of the list of contributories he included the name of the present respondent, William Cooper, jun. of Henley in Arden, in the character of an allottee, who had applied for, and had had allotted him twenty shares. The Master's certificate also admitted that he had thus included the respondent's name in the list of contributories, notwithstanding it had been proved to him that the required deposit of 2*l.* 12*s.* 6*d.* per share had not been paid as required by the terms of the letter of allotment, nor had the respondent signed either the subscribers' agreement or parliamentary contract, and that those documents had been regularly prepared, yet they had afterwards been abandoned and cancelled for the purpose of obtaining the return of stamp duty thereon. The respondent having received an official intimation that his name had been placed upon the list of the allottee contributories on the 24th ult. appealed against the certificate of the Master. The appeal was heard before Vice-Chancellor Cranworth on that day, when it was ordered that the decree of the Master should be reversed, and that the name of the said Wm. Cooper, jun. should be expunged from the said list of contributories of the company as such allottee. The present appellant now appealed against this order of Lord Cranworth as being erroneous and contrary to equity and justice, and submitted that it ought to be reversed or varied for the following among other reasons, namely, because the said Wm. Cooper, jun. according to the true construction of the Winding-up Acts of 1848 and 1849 is a contributory of the said company within the true intent and meaning of the said Acts or one of them.

In the course of the arguments much stress was laid on behalf of the appellant upon the terms of the letter of allotment, and the two letters with which that letter was itself accompanied; and it was urged that by the respondent's not having sent back the third of these letters he had clearly rendered himself liable to be placed upon the list of allottees. These documents ran thus:—

"Wolverhampton, Chester, and Birkenhead Junction Railway Company.

"[Provisionally registered pursuant to 7th and 8th Vict. c. 110]. Capital, 1,000,000*l.* in 50,000 shares of 20*l.* each. Deposit, 2*l.* 2*s.* per share. Allotment, No. ; 20 shares. Deposit, 42*l.*

## HOUSE OF LORDS.

"Birmingham, Nov. 1, 1845.

"Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you twenty shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share amounting to the sum of 42*l.* must be paid to one of the undermentioned bankers on or before Saturday, the 8th day of November, who, upon receipt thereof, will sign the voucher at the foot of this letter. This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and Parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking.

"I am, Sir, your obedient servant,  
"JOHN SMITH, Solicitor.

"Charles W. Jackson, Secretary *pro tem.*"

With this letter was sent the accompanying:—  
"40, Temple-street, Birmingham,  
"Nov. 1, 1845.

"Sir,—The managing committee, though they feel assured you will take up the shares which have been allotted to you on your own application, by paying the deposit thereon within the period fixed, nevertheless deem it right to state that you may decline them if you see fit, as the shares will be readily taken by other parties; but if such be your wish, in consequence of the recent panic or any other cause, you will at once see the propriety of immediately communicating your intention by signing and forwarding the letter inclosed, (a) otherwise the committee will fully calculate that the deposit will be duly paid.

"I am, Sir, your obedient servant,  
"JOHN SMITH."

*Bethell*, in support of the appeal.  
*C. P. Cooper*, for the respondent.

A discussion then took place between their lordships and the respective counsel as to the best course to be adopted in reference to this and the following case of a somewhat similar character, and it was ultimately arranged that one counsel should be heard for the respective appellants and respondents in each of the two cases.

**HUTTON v. THOMPSON.**

This was also an appeal by the official manager of the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, under the Winding-up Acts, against an order of Vice-Chancellor Lord Cranworth, which, as in the above case, went to reverse the certificate of Master Brougham, by which the name of Henry Thomas Thompson had been put on the list of contributories. The main distinction between the two cases was this, that while the respondent Cooper did not pay any deposit, the respondent Thompson not only accepted the allotment so made to him, but paid the deposit on his twenty shares, amounting to 52*l.* 10*s.*

The facts of the second case were as follow: a company was projected in 1845 to construct a railway from Birmingham to Oxford, and thence to Reading and Brighton. The project was provisionally registered under the title and style of "The Birmingham, Oxford, and Brighton Railway." A prospectus having been issued in the accustomed form, the respondent Thompson, on the 10th of October, 1845, applied for an allotment of thirty shares. This application was responded to by an allotment of twenty shares, intimated by the following letter:—

"Letter of allotment, not transferable.

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital 2,000,000*l.* in 80,000 shares of 25*l.* each. Deposit 2*l.* 12*s.* 6*d.* No. of letter, 8; No. of shares, 100.

"46, Moorgate-street, London.  
18th October, 1845.

"Sir,—The committee of management have allotted to you twenty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 52*l.* 10*s.* into one of the undermentioned banks on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

"This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the company and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th October, and notice will be given when the deeds will be sent into the country.

"I am, Sir, your obedient servant,  
"J. B. RAYNER, Secretary.

"To Henry T. Thompson, esq."

The respondent duly paid the deposit of 2*l.* 12*s.* 6*d.* per share on the said shares to the bankers of the said company; of the 70,000 shares allotted in the said company, the deposits were paid on 4,295 shares

(a) "Wolverhampton, Chester, and Birkenhead Junction Railway Company.

"Sir,—It is not my intention to take the shares allotted to me.  
"I am, Sir, your obedient servant."

## HOUSE OF LORDS.

only, and the undertaking was consequently abandoned. The committee of management collectively and individually had paid large sums of money on account of debts properly contracted by them in discharge of their duties in the due prosecution of the said undertaking, and the said debts of the company are still remaining due and unpaid. On the 21st Dec. 1849, an order was made by the Vice-Chancellor on the petition of Stopford Thos. Jones, whereby it was ordered that the said "Direct Birmingham, Oxford, Reading, and Brighton Railway Company" should be dissolved and wound up. Master Brougham, the Master in rotation to whom the winding up of the company was referred, on the 28th day of January, 1840, appointed the appellant official manager of the company. The appellant, as such official manager, made out and delivered to the said Master a list of the contributories of the company, and in such list he included the name of the respondent Henry T. Thompson as a contributory as an allottee of shares who had paid his deposit in respect of twenty shares in the said company. The Master settled this list and included the name of the respondent as a contributory in respect of twenty shares. The respondent thereupon appealed from that certificate, and upon that motion Lord Cranworth reversed the direction of the Master, and ordered that the name of the respondent should be excluded from the list of contributories. The present was an appeal from that order, with a view to its being discharged, upon the ground that "the said Henry Thomas Thompson, according to the true construction of the Winding-up Acts 1848 and 1849, is a contributory of the said company within the true intent and meaning of the said Acts or one of them."

*Rosbury*, in support of the appeal in this case.  
*Roll*, for the respondent.

## JUDGMENT.

The LORD CHANCELLOR.—On a question of such extensive importance as that raised by the learned counsel at the bar, and from the vast number of cases that depend upon the decision of your lordships, considering its importance and its extent, I should propose the following questions to the learned judges: I propose, first, to ask this question, as bearing immediately and directly on the question upon which their decision will ultimately turn—Ought the name of A. B. under the circumstances set forth in the certificate, in the case before your lordships, to be included in the list of contributories of the company in such certificate? The certificate, my lords, which I advert to, is embodied in the finding of the Master in Chancery in the present case. The provisional registration was made under the statute the 7 & 8 Vict. c. 110, of a proposed company, by the name of the "Direct Birmingham, Oxford, Reading, and Brighton Railway Company." The prospectus was registered and published as follows: Certain persons associated together as a committee for the establishment of the company, and to obtain an Act of Parliament; individuals applied to the committee for an allotment of shares, and the committee did allot shares to the applicants, and among them twenty shares to A. B. Such application and allotment took place in consequence of a certain correspondence; the learned judges have the notes before them, and they will refer to the correspondence. A. B. took no steps after the application for shares, and neither paid the required deposit nor signed any subscribers' contract or Parliamentary contract; then the question I propose is, whether A. B. ought to be considered a contributory? Your lordships are aware of the distinction between the two cases of *Norris v. Cooper* and *Hutton v. Thompson*. In *Hutton v. Thompson* the respondent actually paid the deposit that was required by the letter of allotment; whereas *Cooper* did not; instead, therefore, of the paragraph I have inserted in the question I propose to put in relation to *Cooper's* case: "A. B. took no steps after the application for shares, and neither paid the required deposit nor signed the subscribers' contract or Parliamentary contract," I propose to substitute: "A. B. paid the required deposit, but did not sign any subscribers' or Parliamentary contract." I advert to the distinction between the two cases, as it perhaps will enable the judges to dispose of both. But, my lords, the argument has reference to another circumstance, namely, to the question as to how far the company stood in the position or condition of a company at the time the order of reference was made, so as to come within what are properly called the Winding-up Acts? I propose to put the following question to the judges:—"Under the provisions of the 7 & 8 Vict. c. 110, certain promoters of a provisionally registered or proposed railway company, with a large specified capital to be divided into shares, and certain persons named were appointed to act as a committee for the purpose of establishing the company, and that committee allotted shares to certain individuals who made application to them, the committee incurred considerable expense and contracted debts in the obtaining an Act of Parliament, but not being able to procure a sufficient number of subscribers to form the proposed company the project

was abandoned—do the above circumstances constitute an association, company, or partnership within the meaning and intent of the several statutes for winding up the affairs of joint-stock companies? and would it make any difference if the committee, in contracting the debts, were less than seven or more than nine?" How far this latter question may be material for your lordships to consider when you have received the judges' answer, I do not know at the present moment; but I would venture to say, at all events I think it desirable that your lordships should have the judges' opinion on the first question, and then you can determine whether you think it necessary or expedient to enter into the consideration of the other question.

*Belhell*.—Will your lordship forgive my calling your lordship's attention to the fact that the words "not being able to obtain a sufficient number of subscribers" is contrary to the fact as admitted in the case. The difficulty was, not being able to obtain payment of the deposits by the subscribers who took the shares for three times more in amount than the number of shares that were to be allotted. A very trifling alteration, my lord, is necessary to meet the facts, not being able to obtain deposits, and the sums agreed to be paid.

The LORD CHANCELLOR.—I will make such alteration as will raise the question.

*Cooper*.—Your lordship will find it stated in page 3 of the case.

The judges retired to consider the questions, and on their return,

*Pollock*, C.B. read the following opinion.—The judges have considered the questions which have been submitted by your lordships, and I have to report to your lordships, in answer to the first question that your lordships have put, there is no difference of opinion among the judges; but that with respect to the second and more general question, there is some difference of opinion. On the subject of the first question, I have to report the unanimous opinion of the judges who have heard the arguments, that neither in the case where shares are applied for, but no payment of the deposit has been made, nor in the case where a payment of a deposit has been made, but no signature to the subscribers' or the Parliamentary contract has been affixed, should the name of the party be included in the certificate of contributories. We think that the mere fact of the applicant being the allottee of shares under the circumstances set forth, assuming he was an allottee, as to which we give no opinion, it would not in any way make him responsible for any preliminary expenses incurred in promoting the project. We think this was really the law prior to the statute the 7 & 8 Vict. and that none of the provisions of that Act make any alteration in the law on this subject in that respect, so as to render an allottee of shares liable for preliminary expenses, and we are not called on to give a construction to the Act of Parliament different from that which has been hitherto adopted.

The LORD CHANCELLOR.—Your lordships are considerably indebted to the learned judges for the very distinct and important opinion they have favoured your lordships with, and which probably may render it unnecessary for their lordships to give any judgment or to take into consideration the other question; your lordships will determine whether that will admit of further consideration, and an intimation will probably be given to the learned judges, who may be saved the trouble of a consideration of the other question. At present I do not think we can take the opinions of the judges on that point, and therefore the consideration of it will be adjourned.

## Equity Courts.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Monday, June 30.

HANBURY v. HUSSEY.

Partition of manor—Jurisdiction—Reference to Master.

One tenant in common is entitled as against a co-tenant in common, to a partition of a manor. The plaintiff and defendant were entitled, the one to two-thirds, and the other to one-third of a manor, and the former having filed his bill for partition, a decree was made accordingly, and it was referred to the Master to inquire what the manor consisted of, and who were entitled thereto.

This was a suit instituted by the plaintiff, William Hanbury, who was entitled to two-thirds of the manor of Norton, or Norton Caines, in Staffordshire, for partition of the manor between him and his co-tenant, the defendant, Phineas Fowke Hussey, to whom the other third belonged. The defendants were Mr. Hussey and Miss Sophia Hussey, who was entitled to an annuity charged on Mr.

Hussey's share of the manor. The prayer of the bill asked that the Court should direct a partition of the manor to be made, and all necessary and proper assurances and conveyances to be executed and made to carry such partition into effect, and that the annuity should be charged on Mr. Hussey's share. The defendants by their answer submitted to the judgment of the Court that a fair and equal partition of the manor, with the manorial rights, could not, under the circumstances, or should not, be made by the Court, for that owing to the nature and circumstances of the property in question, they were of opinion a just and equal partition was not practicable, and that no partition could be made without great prejudice to the rights and interests of Mr. Hussey in the manor and manorial rights, amongst which were the right of holding courts baron and courts leet, also suits and services, franchises, forfeitures, mines, chases, fisheries, and also the incidental rights of the lord in and over the commons, waste lands, the tenants of the lands within the manor having, or claiming to have, certain rights of pasturage, and other rights and easements in, upon, or over the waste lands of the manor.

*Walpole and Elmley*, for the plaintiff.—The only question is, as to the partition of the manor. There is jurisdiction in the Court, and this Court will exercise that jurisdiction to decree partition of a manor on the application of one tenant in common against another. All that is asked at present, however, is a reference to the Master to inquire what the property consists of, and who are entitled to it. There might be some difficulty in carrying out a decree for partition, but the matters may be adjusted between the parties with the help of the principle of owelty of partition. In analogous cases partition has been decreed as in the case of an advowson or a mill; in the former of which cases the parties would present to the living alternately, and in the latter they would take every alternate toll-dish. [The Master of the ROLLS.—In *Sparrow v. Fiend*, 1 Dick. 348, and *Lay v. Cos*, ib. a partition of a manor was directed.] Yes, it is there so stated; and it may be done here, one party taking the common and waste lands, and having that equalised by owelty of partition. By the stat. Hen. 8, c. 1, partition is authorised. That Act, after reciting "That divers of the King's subjects were seized of manors, lands, tenements, and hereditaments, as joint tenants or tenants in common with others of an estate of inheritance, and that there was no power to make any severance, division, or partition thereof," enacted "that all joint tenants and tenants in common that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights, or in the rights of their wives, of any manors, lands, tenements, and hereditaments within this realm of England, Wales, or the marches of the same, shall and may be so acted and compelled by virtue of this present Act to make partition between them of all such manors, lands, tenements, and hereditaments as they now hold or hereafter shall hold as joint tenants or tenants in common, by writ *de participatione faciendâ*, in that case to be devised in the Court of Chancery, in like manner and form as coparceners by the common law of this realm have been and are compellable by the law of this realm to do." And by a statute of the next year, joint tenants and tenants in common for *lives or years* are declared compellable to make partition in the same way. They cited *Bodicoate v. Steers*, Dick. 69.

*R. Palmer and Greene*, for the defendant.—Partition will not be directed by a hostile decree. The mode suggested to effect the partition is such as to destroy the manor altogether, for the manor is suspended if the services are given to one, and the lands to another, or by giving the whole to one, and the part taken out to the other. The Court, therefore, would not exercise jurisdiction, which would have such an injurious effect, and where the interests of the tenants of the manor would be so seriously affected. The first question has reference to the unity of the manor, and the moment you touch that you destroy the manor; and the second consideration is, that the severance of the manor affects other parties, viz., the tenants, not now before the Court, for you cannot sever any part of the freeholds, or the mines, or waste lands from the manor court and services, without destroying it, and injuring the tenants. An analogous case is that of copyholds, of which, previously to the stat. 4 & 5 Vict. c. 35, partition could not be made. Leaseholds also may be instanced, in which a partition would not be enforced, inasmuch as it might prejudice the interests of the landlord. And in this case, though the word "manors" is used in the stat. of Hen. 8, yet the writ of partition has been taken away by a subsequent statute. Besides the word "manors," in the stat. Hen. 8, had in contemplation the partition of manors only in cases where there were other hereditaments to be partitioned between the same parties, so that the manor could be assigned to the one, and the hereditaments to the other. A manor is indivisible in its nature, and it is impossible to sever it, or the manorial rights and privileges be-

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longing to it, without destroying it entirely. They cited 6 Rep. 63 a; *Lord Mountjoy's case*, 5 Co. 3 a, 165 a; *Sir Moyle Finch's case*, 6 Co. 63 a; *Reg. v. Duke of Buccleuch*, 6 Mod. 151; 1 Cr. Dig. 52; *Scott v. Fawcett*, Dick. 99; *Hornecastle v. Charlesworth*, 11 Sim. 315; *Jope v. Morehead*, 6 Beav. 213; *Clarendon v. Hornby*, 1 P. W. 446; *Burrell v. Dodd*, Bos. & P. 378; Stat. 3 & 4 Wm. 4, c. 27, s. 6; *North v. Guinan*, Beatt. 342.

The MASTER of the ROLLS.—The statute of Hen. 8 has expressly included "manors" in the enumeration of particulars therein mentioned, and has expressly authorised a partition in that as well as in the other cases. The point is therefore settled by that enactment, and the question concluded. There may be some difficulty certainly in carrying out the partition practically in this, as there was in other cases; but the Court, in the case of an advowson, gives the right of presentation alternately to the tenants in common, and so in the case of a mill it gives every alternate toll-dish to the parties respectively entitled. Some rule may also be adopted in reference to a manor, and without saying how the Court will carry it into effect, whether by alternate enjoyment, or how otherwise it is to be effected,—a matter which must be considered hereafter.—I am of opinion I must decree a partition, without expressing any opinion as to how the decree is to be worked out or carried into effect, and have no doubt some mode will be found. There are two cases in Dickens in which it is stated such a decree was made; therefore, without saying how it is to be carried out, let there be a decree declaring that the plaintiff has a right to partition, and let there be a reference to the Master to inquire what the property consists of, and who are the parties entitled to it.

Thursday, July 24.

COTLE V. ALLYNE.

*Practice*—12th of General Orders of 2nd Nov. 1850—*Exemptions—Setting down—Injunction.* A bill having been filed for an injunction, and exceptions for scandal and impertinence having been taken thereto by the defendant, who, however, neglected to set them down for hearing, the plaintiff was allowed to set them down, though the 12th General Order of 2nd Nov. 1850, declares that they shall be set down "by the party filing the same."

This was an application by the plaintiff to the Court for permission to set down for hearing exceptions for scandal and impertinence which the defendant had taken to his bill, but which the defendant himself had neglected to set down. The plaintiff was anxious to obtain the common injunction, but was, of course, precluded from doing so pending the exceptions, and he therefore came to the Court for leave to set down the exceptions for hearing, but the clerk of records and writs declined to receive them under the impression that the defendant alone was the party entitled to set them down since the 12th Order of the 2nd November, 1850, had been issued. That Order states that "exceptions are to be set down for hearing by the party filing the same."

G. L. Russell, on behalf of the plaintiff, now applied for leave to set down the exceptions, and cited *Hughes v. Thomas*, 2 Colly. 239; 7 Beav. 584.

The MASTER of the ROLLS was of opinion that the Order did not take away the general jurisdiction of the Court, nor prevent the plaintiff from doing what he might have done before the Order. Although the Order says the exceptions are to be set down by the party filing them, it does not say they are not to be set down by any one else.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple.  
Barrister-at-Law.

Wednesday, March 12.

BACON C. COSBY.

Will—Construction—Election.

A testator, having two married daughters, B. who had children, and C. who had none, by his will left his entire fortune equally divided between B. and C. and directed that the portion of C. should devolve in case of her dying without children to B. and her children. C. died without ever having had a child, and it was held that C. took an estate tail in the real, and an absolute interest in the personal, estate of the testator.

C. being entitled in tail to real estate, with remainder to B. and her children, and being also absolutely entitled to personal estate, by the first of two settlements of the same date and made upon her marriage, assigned to D. E. F. and G. the personal estate upon trust for herself for life, and after her decease for her children, and in default of children for B. and her children: the settlement also contained a power for C. by deed or will to appoint a life interest after her decease in favour of H. By the second settle-

ment C. conveyed the real estate (but without barring the entail) to D. E. and F. upon trust for similar purposes, and with a similar power to appoint a life interest in favour of H. C. exercised the power of appointment under both deeds in favour of H.:

Held, that B. and her children were put to their election between the benefits given to them by the first deed and the life interest in the realty appointed in favour of H.

By the settlement made on the marriage of Mr. Schomberg with Miss Margaret Marie Ashworth, and dated the 17th of February, 1836, Mr. Robert Ashworth, the lady's father, settled 66,700l. on her for life, with remainder to her children, and in default of children, to Robert Ashworth himself absolutely. In February 1837, Mr. Schomberg died, and there were no children of the marriage. On the 1st of November, 1837, Robert Ashworth made his will of that date, he having then two daughters only, viz. Mrs. Schomberg, and Emily, the wife of Sidney Cosby, Mrs. Cosby having then two children. Mr. Ashworth's will was as follows:—"I hereby revoke all wills, testaments, and codicils, that I may have made, and leave my entire fortune equally divided between my two daughters; the part that I may have already given to my youngest, being considered to form part of her moiety. I likewise direct that the portion of my said youngest daughter Marie shall devolve, in case of her dying without children, to my eldest daughter Emily, and her children."

In December 1837, Mr. Robert Ashworth died. In July 1841, Mrs. Schomberg married Mr. Wellesley Pole Cosby, and, upon that occasion, the following settlements, dated respectively the 1st day of July, 1841, were made. By the first settlement, made between Mrs. Schomberg of the first part, Wellesley Pole Cosby of the second part, and G. J. Sullivan, Robert Sullivan, Lord Ashtown, and W. Cosby, of the third part,—Mrs. Schomberg assigned certain personal estate, and all other the personal estate to which she was entitled under her father's will, to the said G. J. Sullivan, R. Sullivan, Lord Ashtown, and W. Cosby, upon trust for herself for life, and, after her decease, for her children by that or any other marriage; and, in default of children, for her sister, Emily Cosby, for life; and, after her decease, for her children. The deed contained a power for Mrs. Schomberg, in case she should survive the said W. P. Cosby, at any time or times after the decease of the said W. P. Cosby, by deed or will, and either before or after her marriage with any other husband or husbands with whom she might intermarry, to appoint to such husband or husbands, for all or any part of his or their life or lives, after her decease, the income of all or any part or share of the personal estate by the said deed settled. The other deed was a similar settlement of the real estate, and contained a similar power of giving a life estate to any future husband: it was made between Mrs. Schomberg of the first part, W. P. Cosby of the second part, and G. J. Sullivan, R. Sullivan, and Lord Ashtown of the third part. In 1843, W. P. Cosby died, and in 1846 Mrs. W. P. Cosby married Mr. Bacon. By her will, dated the 7th of September, 1848, Mrs. Bacon appointed the income of her real and personal estate, subject to the trusts of the settlements, in favour of Mr. Bacon for his life; and by two deeds poll, dated respectively the 7th of January, 1849, she appointed the income of the real and personal estate in favour of Mr. Bacon, for his life. In February 1850 Mrs. Bacon died, without ever having had a child, and without having barred any estate tail which, under the terms of her father's will, might have been vested in her. The bill in the present suit was filed by Mr. Bacon against the trustees, and Mrs. Cosby, and her children, who were infants, claiming the life interest in the personal estate, and praying that it might be declared that Mrs. Cosby and her children were bound to elect between their interests in the settled real estate and the benefits given to them out of the settled personal estate by the first settlement of the 1st of July, 1841.

The first question in the suit was whether the words used in Mr. Ashworth's will gave an absolute interest in the personal estate to Mrs. Bacon, or whether, Mrs. Bacon not having had a child, the personal estate devolved, upon her decease, upon Mrs. Cosby and her children.

J. Parker and Walford for the plaintiff.

Russell and C. Hall, for Mrs. Cosby, cited *Turner v. Frampton*, 2 Coll. 331; and *Stone v. Maule*, 2 Sim. 490.

Wigram and Karlake, for the children of Mrs. Cosby, cited *De Witte v. De Witte*, 11 Sim. 41; *Crockett v. Crockett*, 5 Hare, 316; and *Keily v. Fowler*, 3 Bro. Parl. Ca. (Toml. ed.), 299.

Torriano and Hielop Clarke for the trustees. The VICE-CHANCELLOR said that, according to the whole course of authorities, and the plainest rules of law, it was clear that but for the words "and her children" occurring at the end of the will, coupled with the fact that the elder daughter had

children then living, Mrs. Bacon would have been held to have taken an estate tail in the realty, and an absolute interest in the personality. He did not, however, think that the circumstance he had mentioned would furnish a sufficiently substantial reason for departing from the settled construction: and he must hold that the younger daughter took an estate tail as to the real estate, and an absolute interest as to the personal estate.

The next question was upon the election by Mrs. Cosby and her children, between their interests in the real estate attempted to be settled, but in which the estate tail had not been barred, and the benefits in the personal estate given to them by the settlement of the 1st of July, 1841. The difficulty was occasioned by there being two separate deeds, and the trustees of the two estates not being the same, W. Cosby being one of the trustees of the personal but not of the real estate.

J. Parker and Walford for the plaintiff.

Russell and C. Hall, and Wigram and Karlake for Mrs. Cosby and her children.

The VICE-CHANCELLOR said that he apprehended it to be perfectly plain that the two settlements made on the second marriage of Mrs. Bacon, which extended, voluntarily or otherwise, to purposes beyond the ordinary purposes of the marriage, must be taken for every purpose as one transaction; exactly in the same manner as if the whole contents of each instrument were in one deed; and so, if it were material to make the observation, which it was not, as to the two appointments. He considered, therefore, that there was a case of election.

Saturday, March 22.

RIDGWAY V. RIDGWAY.

Will—Construction.

A testator bequeathed the residue of his personal estate to trustees, upon trust for his daughter B. for life, and after her death the trust money, interest, dividends, and produce thereof, in trust for all and every the children and child of B. equally amongst them, share and share alike, to the son or sons when they should have attained twenty-one, and for the daughter or daughters at that age or marriage, with a gift over in case B. should die without having any child or children, or, having any, such children should die before attaining twenty-one, being a son or sons, and, being a daughter or daughters, should die before they attained that age or married. B. died, leaving C. a daughter, her only child. C. died under 21:

Held, that the trust property vested in C. so that the income between the deaths of B. and C. belonged to C.

William Preston, the testator in this cause, by his will dated the 23rd of January, 1815, bequeathed his residuary personal estate to trustees upon trust to pay the income to Elizabeth Preston, his wife, for her life, and after her death he declared his will to be as follows:—"Then the whole of the interest, dividends, and produce shall be paid to and for the use of my said daughter Mary Preston and her assigns during her natural life; and from and after the decease of my said daughter, then the said trust money, and the interest, dividends, and produce thereof, in trust for all and every the children and child of my said daughter, born in wedlock, equally amongst them, share and share alike; to the son or sons, when they shall have attained the age of twenty-one years, and for the daughter or daughters at that age or marriage, my said wife being also dead. And I declare that, in case of my said daughter Mary Preston shall happen to die without having any child or children, or having any, all such children shall happen to die before they shall attain the age of twenty-one years, being a son or sons, and being a daughter or daughter, shall die before they shall attain that age or marry, then and in such case the said trustees, and the survivor, his executors, administrators, and assigns shall stand and remain possessed of and interested in the said trust-money, and the interest, dividends, and annual produce thereof," &c. The testator died in 1815. In 1829 Mary Preston was married to a person of the name of Matthews. In February 1835 Elizabeth Preston, the testator's widow died; and in the same month Mary Matthews died, leaving Mary Matthews, her only child, her surviving. In 1847 Mary Matthews, the daughter, died at the age of sixteen years, without having been married. The present suit was instituted for the administration of the estate of William Preston; and a question was raised as to the right to the income of the residue between the death of Mary Matthews the mother, and of Mary Matthews the daughter.

Russell and Giffard for the plaintiffs.

Lloyd, Hale, Malins, Chandless, Kenyon, and Amphlett for the defendants.

The following cases were cited: *Leake v. Robinson*, 2 Mer. 363; *Saunders v. Vautier*, Cr. & Ph. 240; *Re Barikolomew's Trust*, 1 Hall & Twells, 565; 1 Mac. & Gord. 354.

The VICE-CHANCELLOR considered that the trust

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property had vested in Mary Matthews, the daughter, and consequently the intermediate income belonged to her.

Tuesday, April 1.

WILSON v. BENNETT.

*Will—Construction—Power of Sale—Devisee of surviving Trustee.*

*A testator gave his real and personal copyhold and leasehold estates to B. C. and D., their heirs, executors, and administrators, upon certain trusts: he also empowered his said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell all or any part of his said property. C., the survivor of the trustees, appointed E. and F. his executors, and devised to them and their heirs his trust estates. E. and F. contracted to sell part of the testator's copyhold property to a purchaser, who objected to the title on the ground of their inability to sell:*

*Held, that the point was too doubtful to force the title on the purchaser.*

This was a special case filed under the following circumstances. Mr. Newman Hyde being entitled to copyholds, held of the manor of West Derby, in Lancashire, by his will, dated the 25th of February, 1808, gave and devised all the rest, residue, and remainder of his estate and effects, real and personal, copyhold and leasehold, whatsoever and whosoever, unto S. Hyde, J. Wilson, and J. Leigh, to hold to them, their heirs, executors, and administrators for ever, or for and during all his estate, term, and interest therein: the testator then declared the trusts to be for Mary Dennison for life, with remainder after the death of Thomas Dennison, for certain persons and classes of persons in the will mentioned. The will also contained the following clause: "and I authorise and empower my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell, and absolutely dispose of all, or any part of my said property, at such time and times, and in such manner, as to them or him shall seem proper; and the purchaser or purchasers thereof shall not be bound to see to the application of the purchase-money, nor be answerable for the misapplication thereof." The testator died shortly after the date of the will. Mary Dennison died, leaving Thomas Dennison her surviving, and he died in 1850. J. Wilson was the survivor of the trustees, and he, by his will, dated in 1841, and a codicil thereto, dated in 1843, appointed S. Wilson and P. Wilson his executors, and devised to them and their heirs all the estates vested in him upon any trusts. In 1844 J. Wilson died. S. Wilson and P. Wilson entered into an agreement with Richard Bennett for the sale to him of part of the copyhold property included in the will of Newman Hyde, and an objection being taken to the title on the ground of their inability to sell, this special case was filed for the purpose of having the opinion of the Court, whether, upon the true construction of the will of Newman Hyde, and in the events which had happened, the plaintiffs, S. Wilson and P. Wilson, could, without the concurrence of the several persons beneficially interested in the said copyhold hereditaments under the trusts of the said will, make to the defendant Richard Bennett a good title.

*Malins and Humphreys*, for the plaintiffs, contended that as they were the executors of the surviving trustee, and also devisees of the trust estates vested in J. Wilson, they could make a good title.

*J. Parker*, for the defendant, said that he was a willing purchaser, but required a good title. Hyde had devised his "real and personal copyhold and leasehold" estates to trustees, their heirs, executors, and administrators, that was, his "real and copyhold" estates to the trustees and their heirs, and his "personal and leasehold" estates to the trustees and their executors and administrators. The power of sale might be considered with reference to this, and then the heirs of the survivor of the trustees were to sell the "real and copyhold," and the executors the leaseholds.

The VICE-CHANCELLOR said that he considered the defendant had a right to raise the objection, and on the principle of *reddendo singula singulis*, he thought the point too doubtful to force the title on the purchaser.

See *Titley v. Wolstenholme*, 7 Bea. 425.

Saturday, July 26.

RE THE HEMP AND FLAX MANUFACTURING COMPANY.

*Joint-Stock Companies Winding-up Acts.*

*Discharge of an order for winding up a company.* On the 9th of February, 1850, an order was made for winding up the affairs of the Hemp and Flax Manufacturing Company. (See 14 Law T. 369, 436.) A petition was now presented by some of the contributories for the discharge of that order, at the cost of Mr. Saunders, the company's solicitor, and Mr. Mathew, one of the projectors of the company.

*Malins and Gilmour* appeared in support of the petition.

*Bacon and Metcalfe*, on behalf of Mr. Saunders, offered no opposition to the present application.

*Cooper and Swift*, for the official manager, asked that his costs should be paid by the petitioners.

*Malins* objected to the payment of these costs by the petitioners, as they had no opportunity of getting them repaid.

*Nevinson* applied, on behalf of a person who had deposited the specification of an invention connected with the company, to have the specification returned to him.

The VICE-CHANCELLOR made the order as prayed by the petition, without prejudice to any application which might be made against the solicitor to the company, and directed that the specification should be delivered back to the person who had deposited it.

Thursday, July 31.

EX PARTE GAY, re THE LONDON AND BIRMINGHAM EXTENSION AND NORTHAMPTON, DAVENTRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY.

*Joint-stock Companies Winding-up Acts—Call for debts and expenses.*

*A company, in which shares had been allotted and deposits paid, was ordered to be wound up. The Master divided the contributories into two classes, the first of which had executed the subscription contract. Debts were proved before the Master against the company. The Master, to provide for these debts and the expenses connected with winding up the company, made an order for a call upon the first class of contributories. Upon appeal, the Court, considering that some account ought to be first rendered by the managing committee as to the sums received by way of deposits, discharged the order for the call without prejudice to any question.*

This was a motion on behalf of Mr. John Gay that the order of Master Blunt, the Master charged with the winding up of the abovenamed company, whereby he did peremptorily order that a call of 1l. 13s. per share should be made on the contributories of the company included in class 1 (of which class the said John Gay was a contributory), and whereby the said Master did also peremptorily order that each of the said contributories, on the 22nd day of August, 1851, at eleven o'clock in the forenoon at the office of Henry Croydall, the official manager of the said company, situate at No. 33, Old Jewry, in the city of London, should pay to the said official manager of the said company the balance, if any, which would be due from him after debiting his account in the said company's books with such call, might be discharged, or that such other order might be made with respect to the said call as the Court should think fit.

The total number of shares held by the contributories in this company, as settled by the Master, amounted to 20,010, of which 18,175 shares were held by contributories who had executed the subscription contract in respect of such shares, and had paid deposits thereon, and 1,835 shares were held by contributories who had not executed the subscription contract, but who had paid deposits in respect of such shares. The debts proved before the Master against the company amounted to the sum of 2,731l. 16s. 4d. (subject as to a debt of 783l. 11s. 7d. to taxation), and there were further liabilities of the company amounting to 2,000l. and upwards, and it was alleged that the costs, charges, and expenses of and incidental to the winding up of the company would amount, as it was estimated, to the sum of 1,950l. Under these circumstances, the official manager applied to the Master, on the 15th of July inst. that a call of 1l. 17s. per share should be made on the several contributories of the company. On the 22nd of July the Master made an order for the call in question, and the following is an extract from the memorandum by him on that occasion:—"22nd July, 1851. Having considered, &c. I think fit and do hereby direct that a call of 1l. 13s. per share be made in the first instance upon the several contributories who have executed the subscription contract in respect of the shares for which they have so executed such contract, and I have this day made an order to that effect accordingly. But I do not think fit at present to make a call with respect to the shares as to which such contract has not been executed, and I direct that a copy of such order be served upon the said several contributories who have executed the subscription contract by sending a copy of such order by post to each of such contributories. And I direct that each of such contributories be furnished with a statement of his account, after debiting the same with the amount chargeable against him in respect of such call."

*Daniel and Cole* appeared in support of the motion.—The debts proved against the company were not therefore established as debts to be paid by the contributories. Before any call could be properly made, the committee of management ought to

be made to account for the deposits received by them, and which were amply sufficient for the debts they could legally incur. The Master, however, had made no distinction between the committee of management and the other shareholders. The Winding-up Acts did not alter the legal liabilities of parties, and the creditors should therefore first seek their remedy against the managing committee. They referred to the 83rd section of the Winding-up Act of 1848; *Currie's case*, 15 Jur. 645; and *Lord Mansfield's case*, 2 Mac. & Gord. 57.

*Cooper, Malins, and Swift*, for the official manager.—The question was whether it was the case that there could be no call until all equities were decided between the contributories. It was the intention of the Legislature that, except in certain specified cases, the rights of creditors should not be prejudiced by these Acts (Winding-up Act of 1848, sec. 58), which would be the case if this call could not be now made, the creditors being debarred from suing after they had proved their debts before the Master. They cited *Ex parte Preece*, 16 Law T. 532, and contended, upon the authority of *Ex parte Prichard*, 17 Law T. 58, that this call, which had been made for debts and expenses, was properly made.

The VICE-CHANCELLOR (without hearing a reply) said that the cases mentioned during the argument as having been decided by him, might or might not have been correctly decided; but whether correctly or incorrectly decided, they did not appear to him to govern the present case, and indeed they seemed to him scarcely to affect it. He must assume that this contention was raised before the Master upon his intention being made known of making a call upon the contributories—the contention, that was between the contributories who formed the managing committee and those who did not, whether by reason of the great sums they had received from the shareholders at large, and which they had not accounted for, they were liable, in the first instance, to the call, or liable at least in a much greater degree. Now he could conceive a case in which there might be such an urgent necessity—a case which might be in such circumstances as to render it not unfit, for a time at least, to disregard that contention, and make the call at once. Assuming, however, that there might be such a case, rendering that temporary injustice unavoidable, the question still remained whether this was such a case? It seemed to him there was in the Master's office the means of entering into that question, and of deciding it, to a great extent at least, if not wholly, between the managing committee and the shareholders. The managing committee might have been required to exhibit an account of the sums they had received in the course of their management, and then something approaching to a motion might have been formed, not only upon the question whether there was to be an equality of contribution between the managing committee and the general shareholders, but also as to the amount of the call. He was of opinion that between the two inconveniences, or the two hazards, if there were two, it was safer and better to attempt, at least to investigate that question, before making the call—the call having been made without entering into the question or hearing argument, and without calling for evidence. With deference to the Master, his Honour thought that in this particular case it would be better to adopt that course. The Master, as his Honour collected from what had been said, considered his decision in *Ex parte Prichard* precluded him. He had not so intended to preclude him, and he might say, with deference to him, he did not now so understand that case. He thought, therefore, that the order for a call must be discharged without prejudice, in order that the matter might be gone into before the Master as to this question with the managing committee. He discharged the whole order,—he could not qualify it. The costs to come out of the estate. It might be suggested to the Master, that he thought it would be desirable to consider this case again as to the managing committee. If the Master found he could not do it, he would proceed accordingly. As to the costs of the hearing before the Master, which it was stated had been refused to Mr. Gay, his Honour said that if he had jurisdiction to give the costs he should direct them to be paid out of the estate.

*Order for the call discharged, without prejudice to any question.*

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BENNETT, Esq. of Lincoln's Inn, Barrister-at-Law.

Saturday, April 26.

RE THE VICAR OF PORTSEA.

*Practice—Reference.*

*Where a considerable time has elapsed since a transfer of certain funds from the old Equity Court of Exchequer to the Court of Chancery, under the 5 Vict. c. 5, abolishing the Equity Exchequer,*



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and no dividends upon the fund had been paid out of court to the vicar, who was entitled thereto, the Court declined to make an order for the payment of the dividends accrued due, without a reference to the Master to inquire who was actually entitled.

Speed prayed on petition that certain dividends, which had accrued due on sums of stock transferred from the former Equity Court of Ex. to the Accountant-general of the Court of Chancery, under the 5 Vict. c. 5, s. 8, might be paid to the petitioner, the vicar of Portsea; a former vicar had been declared, by an order of the Court of Ex. before such transfer, to be entitled to receive the dividends from time to time. It appeared that the former vicar had received the dividends from time to time up to his decease; that the present vicar had been appointed in 1836, but he had not received any of them since that time. The Accountant-general declined to pay out the dividends under the former order of the Court of Ex. The affidavit in support of the petition stated that search had been made at the proper office to ascertain if any order of the Court of Chancery had been pronounced touching the dividends or stock since the transfer from the Court of Ex. but that none such could be found.

The VICE-CHANCELLOR thought that a sufficient reason was not shewn why the vicar had not applied before; and he refused to make the order for the payment of these dividends without a previous reference to the Master to ascertain who was entitled to them, and under what circumstances, with liberty to state any circumstances specially.

Ordered accordingly.

Monday, April 28.

ALLEN v. LOADER.

Practice—Absconding defendant.

A defendant absconding to avoid the consequences of a criminal proceeding, is within the 31st order of May, 1845.

W. W. Cooper moved, on affidavits shewing that the defendant was keeping out of the way to avoid arrest under a warrant issued by a magistrate to apprehend him for deserting his wife and children, for leave to enter an appearance for such defendant, under the 31st order of May, 1845. He cited *Cope v. Russell*, 2 Phill. 404.

The VICE-CHANCELLOR, at first, thought that he had not jurisdiction to order an appearance to be entered for a defendant in a case where such defendant was absconding on account of a criminal proceeding, but upon consideration of the terms of the 31st order, he granted the application.

Order accordingly.

Thursday, May 8.

RUSSELL v. WALKER.

Orders of May, 1845—Appearance for a person of unsound mind—Claim.

Under the 32nd order of May, 1845, the Court will order a solicitor of the court to be assigned as guardian of a defendant, a person of unsound mind, not found so by inquisition, to appear and answer for such defendant.

Young moved, on the part of the plaintiff, that a guardian might be appointed *ad litem*, under the 32nd order of May, 1845. The claim was by one of several residuary legatees against executors, for the usual accounts. One of the defendants was a person of unsound mind, not found lunatic by inquisition. The defendants' solicitors had appeared for all except the defendant, the person of unsound mind. He cited *M'Keverakin v. Cort*, 7 Beav. 347.

The VICE-CHANCELLOR made the order in the terms of the 32nd order, which enables the Court to order that one of the solicitors of the court may be assigned guardian of such defendant, by whom he may appear and answer, or may answer the bill and defend the suit. See *Biddulph v. Dayrell*, 15 L. J. (N.S.) 320; *Nelson v. Duncombe*, 9 Beav. 231.

Friday, July 25.

Re ELLIOTT'S TRUST.

Costs—Investment under Railway Act.

Where it was prayed that a larger sum than the amount taken by a railway company, and paid into court, might be invested in another purchase, only the costs in respect of the smaller sum will be ordered to be paid by the railway company.

Humphreys prayed on petition, that a sum of money which had been paid into Court by a railway company, might, with another sum belonging to the trust estate, be invested in the purchase of land, upon the same trusts as the land taken by the company, and that the company might pay the costs of such investment.

Follett, for the railway company, contended that only such costs as might be incurred in respect of the investment of the money paid in by the company should be given.

The VICE-CHANCELLOR said, the addition of the two sums together might make a considerable difference in the stamp duty on the conveyance, &c. and directed that only such costs should be paid by the

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company as would be caused by the investment of the smaller sum. — Order accordingly.

SMEATHMAN v. GRAY.

Foreclosure.

This was a short claim for foreclosure in respect of two mortgages, which had been made at separate dates, but between the same parties. It asked a decree for one foreclosure, including both mortgages.

Southgate, for the claim.

J. Williams objected to a decree for one foreclosure, and cited *Holmes v. Turner*, 7 Hare, 367.

The VICE-CHANCELLOR thought the case was decisive in support of the objection, and said he should decree accordingly. He called the attention of the claimant's counsel to the fact that there was no evidence as to the non-existence of other incumbrancers. If counsel were satisfied as to that, without evidence, the decree should be made at once; if not, an inquiry must be directed whether there were any other mortgagees.

Southgate consenting to waive the inquiry, a decree was made for an inquiry of what was due on each mortgage, and for a foreclosure as to each estate.

VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Tuesday, June 17.

Re HODGSON'S SETTLEMENT.

Trustee Act 1850—Affidavit of new trustees—

Dismissal of trustee.

By a settlement power was given to A. B. to appoint new trustees in the place of deceased and of trustees desirous of retiring. One trustee died, and on a petition stating that the other trustee was desirous of retiring, but it appearing in the evidence that the surviving trustee did not wish to retire, and that the donor of the power was willing to exercise his power:

Held, that the 32nd section of the Trustee Act, 1850, did not give the Court any jurisdiction to remove a willing trustee; and that the power to appoint a trustee, "whenever it is expedient," is confined to the appointment of new trustees, and does not extend to the dismissal of a willing one.

By indentures of settlement, dated in 1809, real estates were conveyed to James Lee and John Lister, their heirs and assigns, in trust for Emmanuel Hodgson for life, with remainder in trust for Mary, his wife, for life, with remainder in trust for their children in equal shares, and if no child, upon trust for sale.

In the settlement was contained a proviso that if the trustees, or either of them, or any surviving trustee, to be nominated in their or either of their stead, in manner thereafter mentioned, should at any time during the continuance of the trust happen to die, or desire to be discharged from the said trusts, or refuse, or be rendered incapable to act in the execution of the same, it should be lawful for the said Emmanuel Hodgson and Mary his wife, and the survivor of them, and after the death of such survivor for the remaining or other trustee by deed duly attested to nominate and appoint new trustees or a new trustee in the place of the trustees or trustee so dying or desiring to be discharged or becoming incapable to act. Mary Hodgson died in 1810 without ever having had a child. James Lee, one of the trustees, died in 1829.

This was a petition presented by parties ultimately entitled under the settlement, which, after stating the foregoing facts, and stating that John Lister was now seventy-eight years of age, and had expressed his desire to be discharged from the office of trustee; that Emmanuel Hodgson had sold all his beneficial interest in the property, and upon application to him he had refused to exercise his power of appointment of new trustees unless he were paid for so doing. It was, therefore, prayed that new trustees should be appointed in the place of James Lee, deceased, and of John Lister. Affidavits were filed by Lister and by Hodgson in opposition to the petition. Lister swore that he had not assented to retire from the trust, nor was he desirous of so doing. Hodgson swore that he was ready and willing to exercise his power of appointing a new trustee in the place of Lee.

Malins and Bilton, for the petition, relied on the 32nd section of the Trustee Act of 1850.

Shebbeare, for other parties beneficially interested, who were also respondents, supported the same view.

C. P. Cooper and Swift said that as Hodgson was willing to exercise his power, and as Lister was willing to act, the Court had no jurisdiction.

The VICE-CHANCELLOR.—The first difficulty in this case arises upon the power vested in Emmanuel Hodgson; for if that power still remains in and can be exercised by him (unless I can find that under the provisions of the statute I am enabled to prevent him from exercising that power), I cannot appoint a

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trustee under the Act in the place either of Lee or Lister. I cannot appoint one in the place of Lister unless I remove him, and if I remove him I could not appoint another in his place unless the provisions of the statute enable me to take away from Emmanuel Hodgson the power vested in him by the settlement. Now, the 32nd clause of the statute runs thus:—"That whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees." The question is, whether that provision of the statute authorises the Court to appoint a new trustee where there is a legal power to appoint one vested in a party who is willing to exercise it? I am of opinion that it does not; and the ground of my conclusion is, that looking at other provisions of the Act, I see that it is not the intention of the legislature, even in dealing with the legal estate, to deal with it except on proper precautions being taken. Thus, the 17th section of the Act by which power is given to the Court to convey in the place of a refusing trustee, enacts, "That where any person jointly or solely seised or possessed of any lands upon any trust, shall, after a demand by a person entitled to require a conveyance of assignment of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorised agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate;" so that where the Act proposes to take the legal estate in lands out of a refusing trustee, the precaution is prescribed of having either a declaration in writing that he will not convey, or a proper deed of conveyance prepared and tendered to him by the party entitled to require the same. So, in another provision of the statute upon the subject of a transfer of stock (the 24th section), a similar precaution is required to be taken. There it is enacted "that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees." It is clear, therefore, that it was not the intention of the Legislature to take estates out of trustees without the observance of a proper degree of precaution, and I think it a reasonable inference that it was not intended to take away a legal power vested in a party without a similar degree of precaution being observed. These, or similar precautions, not having been observed here, I am of opinion that, under the provision of this statute, I cannot take away the power vested in Hodgson, however irregularly he may have intended to exercise it. That, in effect, disposes of the case; for, if I have not power to appoint a trustee in the place of Lee, I clearly cannot have it to appoint one in the place of Lister if I remove him. Independently of that, I think that this statute was not intended to give the Court jurisdiction to remove a trustee, when he states that he is desirous of continuing to act in the trust. The provision empowers the Court, whenever it is expedient to appoint new trustees, I think this is confined to the appointment of new trustees, and that it does not extend to the dismissal from the trust of a willing trustee. The petition must, therefore, be dismissed, but without costs, as I cannot say that it has been improperly presented, because, if Hodgson had persevered when here in his refusal to exercise the power, and if Lister had taken the same course here as he did before the petition was presented, and stated that he desired to retire from the trust, the Court might have found a means of dealing with the case under the provisions of the statute. The petition must be dismissed without costs.

## COMMON BENCH.

Tuesday, July 22.  
HILLS v. M'RAE.

*Parties—Partnership—32nd Order of August, 1841.*  
A claim was filed by a creditor of a firm of two partners against the personal representatives and residuary devisees of a deceased partner:

*Held, that the other partner was a necessary party, and that the 32nd Order of August 1841 did not apply.*

The claim in this case was filed by the plaintiff as a creditor on the partnership firm of George Potter and Company against the executors and residuary devisees of the will of Mr. Donald M' Rae, deceased, one of the partners in the firm of George Potter and Company. The remaining partner in that firm, Mr. George Potter, was not made a party to the claim.

Woolley, for the defendant, took this objection to the hearing.

W. Morris submitted, on behalf of the plaintiff, that Mr. Potter was not a necessary party to the claim. The 32nd Order of August 1841 placed a plaintiff in equity on the same footing as a plaintiff at law. At law, if a defendant did not plead misjoinder of a co-debtor in abatement to the action, the cause was allowed to proceed in the absence of that debtor. But even if that were not sufficient answer to the objection, it was plain that it was not necessary to make Mr. Potter a party to the claim, because no decree could be made against him; and if his presence were necessary in taking the accounts, he might be summoned to attend before the Master. *Wilkinson v. Henderson*, 1 Myl. & Keen, 582; and *Seton on Decrees*, 239, were cited, the latter for the form of the decree.

Woolley did not press the objection.

The VICE-CHANCELLOR.—I consider Mr. Potter to be a necessary party, because he may have paid the debt. I do not think the 32nd Order of August, 1841, applies to this case. I am of opinion that the rule in equity as to the non-joinder of co-debtors is different from the rule at law. The objection is not insisted on, and Mr. Potter may be summoned before the Master, and the decree will be for taking the account of the personal estate and of the separate debts of Mr. McRae, and then an account of the joint debts, with a declaration that the joint creditors are entitled to the surplus after payment of the separate debts.

Saturday, July 26.  
LLOYD v. BETTELEY.  
Claim—Leave to file.

*A claim to have the trusts of a will, disposing of part of a testator's estate, executed, and to have the residue of the estate administered, requires leave of the Court to be obtained before it is filed.*

W. Morris moved for leave to file a claim to have the trusts of a will, which disposed of only a portion of the testator's estate, carried into execution, and to have the residue of the estate, not disposed of by the will, administered as in the case of an intestacy. The only question was, whether this was a case for obtaining the leave of the Court to file the claim. It certainly was not a case in terms within the orders; but it had been held that leave was not necessary in every case of variation from the forms given at the end of the orders.

The VICE-CHANCELLOR said he thought this was a case in which the leave of the Court ought to be obtained before filing the claim, and his Honour gave the leave asked.

## Common Law Courts.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS,  
Esqrs. Barristers-at-Law.

May 7 and 30.

ROSETTO v. GURNEY.

*Marine insurance—Items of calculation as to loss being partial or total.*

*Vessel and cargo were hypothecated for repairs during the voyage, and subsequently encountering further bad weather, and vessel being dismantled, was towed into Cork by salvors; the cargo (corn) was warehoused in a damaged state, and the insured gave notice of abandonment, but a portion of the cargo could have been kiln-dried and transhipped in a new bottom to its destination in a marketable state. The salvors sued for salvage in the Admiralty Court, and that Court ordered the cargo to be sold:*

*Held, that to determine whether the loss was partial or total, the cost of warehousing and drying the corn, of transhipping it in a new bottom to its destination, and the proportion of salvage to the cargo saved should have been ascertained, and if the aggregate exceeded the value of the cargo when delivered at its destination, then the loss would have been total, not otherwise.*

This was an action on a policy of insurance on 3,700 quarters of corn, value 6,400l., entered into with the Alliance Marine Assurance Company, of

which the defendant was the chairman. There was a payment of 3,500l. into court, and a replication that the plaintiff had sustained greater damages. The question raised was, whether there was a total loss of the cargo or not.

The case was tried at the last Liverpool Spring Assizes before Platt, B. It appeared that the policy was upon a cargo of wheat shipped from Odessa to Liverpool, and that the vessel was stranded off the Leander Tower, near Constantinople, and repaired at an expense of 1,800l., which sum the master paid out of money borrowed on the hypothecation of the ship and cargo. The vessel then proceeded on her way, and when near Cork encountered a gale, and the masts were cut away, and ultimately the vessel was towed into Cork by certain parties, who thereupon claimed 3,000l. for salvage. The cargo was landed, warehoused, and a portion of it kiln-dried, and the jury found that a material part of the cargo, 1,700 quarters, about the value of 2,400l. when kiln-dried, could have been forwarded to Liverpool, its port of destination in a marketable state. Notice of abandonment was given to the insurers. Proceedings were commenced in the Court of Admiralty for salvage, and the cargo sold, under an order of the Court, for 4,160l. and the Court decreed 450l. for salvage, and the consequent costs were 2,100l. Under the direction of the learned judge, the jury returned a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him or for a new trial.

W. H. Watson (April 16) having obtained a rule nisi accordingly,

Knowles, Crompton, and Blackburn shewed cause (May 7), and W. H. Watson and H. Hill supported the rule.

Authorities cited.—*Thorneley v. Hebson*, 2 B. & Ald. 513; *Goss v. Withers*, 2 Burr. 697; *Knight v. Faith*, 19 L. J. 509, Q. B.; *Roux v. Salvador*, 3 Bing. N.C. 266; *Navone v. Haddon*, 19 L. J. 161, C. P.; *Reimer v. Ringrose*, 20 L. J. 175, Ex.; *Powell v. Gudgeon*, 5 M. & S. 431; *Sarguy v. Hobson*, 2 B. & C. 7; *Benson v. Chapman*, 6 M. & G. 792; *Vlietboom v. Chapman*, 13 M. & W. 230; *Hunter v. Prinsep*, 10 East, 378; *Shipton v. Thornton*, 9 A. & E. 314; *Birkley v. Presgrave*, 1 East, 220; *Benson v. Duncan*, 3 Ex. 644.

*Cur. adv. vult.*

## JUDGMENT.

Friday, May 30.—JERVIS, C.J.—In this case, the question was, whether the loss suffered was partial or total? If total, the verdict for the plaintiff must stand; if only partial, the defendant will be entitled to succeed, provided he has paid into court an amount sufficient to cover the average loss. On consideration, we are of opinion that the loss cannot, as it appears upon the evidence, be construed to be a total loss; but, inasmuch as the true test between a total and partial loss was not, in our opinion, submitted to the jury, there can only be a new trial. The facts of the case are, in some respects, complicated, but the application of a few well-known principles will clear it of all difficulty, without entering into a minute examination of the various authorities which range within the principles referred to. Without reference to the proceedings of the Admiralty Court as to the salvage, or to the hypothecation of the ship, the duty of the master under the circumstances is clearly defined. And as a general rule, when the whole or part of the cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss, and whether the cargo can practically be forwarded to the port of destination involves a consideration of all the circumstances of each particular case. And this word "practicable" was explained in the case of *Moss v. Smith*, 19 L. J. 225, C. P. and comprehends the conditions upon which the difference between a total and partial loss depends:—"It may be that the damages are irreparable with reference to the place where they happen; it may be that they happen on some inhospitable shore or some place where there is no harbour, or no means of obtaining workmen of requisite powers, or the necessary materials, and so the repair is impracticable, and that is also a case of irreparable damage, and a total loss; but short of that, it may be, that the repairs are physically possible, or that the thing can be done, but that it cannot be done for any reasonable some of money, and that is a total loss; because in matters of business a thing is commonly treated as impossible when it is impracticable, and as impracticable when it cannot be done without laying out more than the thing is worth." Thus if goods are reduced to such a state by sea damage as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss. (*Parry v. Aberdeen*, 9 B. & C. 411.) So if from sea damage the goods ceased to retain their original character, the master is justified in selling, and the assured may recover as for a total loss, as was decided in *Roux v. Salvador*. On the other hand, if the damage is repairable, it is a loss

total or partial according to the circumstances; if the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriter and the assured, impossible; if it can, and the cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, and the assured cannot recover as for a constructive total loss. The same rule applies if a part only of the cargo can be saved. With respect to the means of conveyance, the master is bound by the contract to carry the goods to their destination in his own ship; if the ship be disabled in the course of the voyage and cannot be repaired in time to save a perishable cargo, he is empowered, but not bound, to send it on in another bottom, provided it can be obtained. It is not necessary to go at greater length into the subject, but applying these few general principles to this case, if there had been no proceedings in the Admiralty Court when the cargo arrived in Cork, it would have been the duty of the master to ascertain whether the cost of transhipping and unloading the cargo in a new bottom, the original ship not being repairable, would, in the aggregate, have exceeded the value of the restored cargo at the port of destination; if it would, then it would not have been practicable to deliver it in a marketable state at its port of destination; if it would not, the master could not sell, and the assured could not recover as for a constructive total loss, because it was practicable to deliver the cargo, or part of it, in a marketable state. It was said in the course of the argument, that the cost of carriage from Cork to Liverpool ought also to be taken into consideration, with a view to ascertain whether the expense of restoring exceeds the value of the thing restored. The case of *Reimer v. Ringrose*, 20 L. J. 175, Ex. was cited for that proposition; the point was not made in that case, but the question being, whether a cargo of wheat was totally or partially lost, Mr. Baron Alderson in delivering judgment is reported to have said, "One point made at Nisi Prius was, whether or not it was a total loss in case a party uninsured would have conducted himself as a reasonable man in the way in which the plaintiff had conducted himself; that is to say, selling the corn and receiving the money, instead of putting himself to the expense of bringing home the corn in a damaged state. Now I at that time was of opinion, and am so still, and I believe the Court entirely concur with me, that that was not the proper view of the case to be left to the jury, but that the real question to be left to the jury would have been, whether or not the corn was in that state that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home." With great deference, we think that this is not the correct rule. If the voyage is completed in the original ship it is completed on the original contract, and no additional freight is incurred; if the master transships because the original ship is irreparably damaged, without considering whether he is bound to transship, or is merely at liberty so to do, it is clear that if he transships he does so to earn his full freight, and so delivery takes place upon the original contract. It may happen that the new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled whether in that case the ship's owner may charge the cargo with additional freight. By the French law he may do it, and as a consequence of that rule, the increased freight would be the average loss to be added to the other items. (*Shipton v. Thornton*, 9 A. & E. 314.) In our opinion, to this extent, and to this extent only, the cost of transit from Cork to Liverpool should be taken into consideration in ascertaining the practicability of delivering the cargo, or part of it, in a marketable state at the port of destination. In what respect then do the hypothecation of the ship and the proceedings in the Admiralty Court affect this case? There is no doubt the cargo is liable for salvage; and it is equally clear that the underwriter, who would have borne the loss had there been no such salvage, must contribute to that salvage. Whilst the rule prevails of giving no more than half the value of property saved, the loss by the salvage can only be an average loss, and as the amount of the salvage depends upon the value of the article saved, it cannot alter the nature of the loss, whether it be uninjured or in part deteriorated by the sea, damage being an average loss, only the amount must be added to the other items, with a view to ascertain whether it is practicable to deliver the whole or part of it at the port of destination, in a marketable state. It was admitted, in the course of the argument, that the mere fact of hypothecation would not by the necessary proceedings which would follow on that, make it a total loss of the goods pledged within the meaning of the policy; but it was said that, under the circumstances of this case, it ought to form an item of calculation in estimating the cost of restoring the cargo. We see no reason for this distinction. The fact of a portion of the cargo having

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been injured makes no difference, nor can the case be varied by the circumstance that the Admiralty Court has jurisdiction over the ship and cargo in respect of salvage, in a subject totally unconnected with hypothecation. With respect to the proceedings of the Admiralty Court, it is the well-known duty of the master, in order to save the expense of further proceedings, to tender, in the first stage of the case, by act of the Court, a specific sum for salvage, with an offer to pay the costs; if he does not do so, the cargo is sold by a decree of the Court. This is not a total loss, for which the underwriter would be liable; it is a risk not contemplated in the policy, but the assured must take it upon himself. It remains only to apply the general principles to the case under consideration. The jury having found that 1,700 quarters could have been dried and conveyed to Liverpool at a cost less than their value on their arrival at Liverpool, it is plain that the verdict cannot stand for a total loss; and it is plain, from the form of the finding, that the jury took into consideration only the cost of the drying and transhipment to Liverpool as the basis of their calculation. We think this was not the true test, and therefore there must be a new trial. The question to be submitted to the jury will be, whether it was practicable to send the whole or any part of the cargo to its place of destination at Liverpool in a marketable state? To determine this question they must ascertain the cost of the transhipment of the cargo, the cost of drying and warehousing, the cost of transhipping it into a new bottom, and the cost of the different transits, if it can only be effected at a higher than the original rate of freight, and added to these items the salvage allowed in proportion to the value of the cargo saved. The loss will be total if the aggregate exceed the value of the cargo when delivered at Liverpool, the port of destination; but if the aggregate do not exceed the value of the cargo or the part of it saved, the loss will be partial only. This view of the case renders it unnecessary to discuss the other points raised in this argument, and on these grounds the rule must be absolute for a new trial. *Rule absolute.*

COURT OF EXCHEQUER.

Reported by FREDERICK BAILEY and C. J. B. HENTLEY, Esqrs. Barristers-at-Law.

Saturday, May 3.

LONGMEID and WIFE v. HOLLIDAY.  
Implied warranty—Breach of—Fraud.

*Plaintiff's wife bought for her husband at defendant's shop, a lamp, which he sold, but did not himself manufacture, called the "Holliday patent lamp;" this lamp, so purchased, was defectively constructed, and on being used by plaintiff's wife it burst, burnt her, and caused considerable personal injury to her. The defendant did not construct the lamp himself, but had it put together by others, in parts purchased from third persons. There was no evidence that he knew of the defect, and the jury negatived fraud and found that the defendant sold the lamp without deceitful representation and in good faith:*

*Held, in an action to recover damages for the injury to the wife, if there had been a breach of contract with the plaintiff the husband might have sued for it; but there being no misfeasance towards the wife, independent of the contract, she could not sue and join herself with her husband.*

The plaintiff's wife went to the shop of the defendant (who was not personally a manufacturer of lamps, but kept a shop for the sale of lamps) to purchase a lamp called the "Holliday Patent Lamp," to be used by herself and husband. She bought one, which, it ultimately appeared, was defectively constructed, and in using the lamp with naphtha it burst, and burnt the plaintiff's wife very seriously.

This action was subsequently brought for that injury. The plaintiff had previously brought an action for the defendant's breach of implied warranty of sale, and recovered damages.

The present action was tried before Martin, B. in Middlesex, when evidence was given to shew that the lamp was defectively constructed, but no proof that the defendant, who did not personally construct it himself, but had it put together by others in parts purchased from third persons, knew of the defect; and the jury found that he was not guilty of any fraud or deceitful representation, but sold the lamp in good faith, whereupon a verdict was found for the plaintiff, with liberty to the defendant to move to enter the verdict for him or a nonsuit, and a rule nisi having been obtained accordingly, or to arrest the judgment.

Miller, Serjt. shewed cause against the rule.

Watson, Q.C. contra, in support of it, contended there was no public duty here cast upon the defendant, and if so, it was not stated upon this record, as on looking at the declaration it stated the complaint as one of contract, and no public duty or negligence was sufficiently alleged.

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The following cases were cited:—*Brown v. Edgington*, 2 M. & Gr. 279; *Shepherd v. Pikes*, 3 M. & Gr. 868; *Morley v. Attenborough*, 3 Ex. 500; *Langridge v. Levi*, 2 M. & W. 519; and same case in error, 4 M. & W. 337; *Winterbottom v. Wright*, 10 M. & W. 109; — and *Wife v. Shepherd*, 9 Price, 100; *Chanter v. Hopkins*, 4 M. & W. 399.

Cur. adv. vult.

Thursday, July 10.—PARKE, B. delivered judgment.—This was an action brought by the plaintiff and his wife against the defendant Holliday. The declaration states that the defendant before and at the time of the committing of the grievances herein-after mentioned, was the maker and seller of certain lamps called the "Holliday Lamps," to be used for the purpose of burning in and giving light to houses, shops, and rooms, and thereupon heretofore, to wit, on the 16th day of March, 1849, the plaintiff, Frederick Longmeid, at the request of the defendant, bargained with him to buy of him one of the said "Holliday Lamps," to be burnt and used by the plaintiff, Frederick Longmeid and his said wife, in the shop and rooms of the said plaintiff, Frederick Longmeid, at and for a certain price, namely, 10s.; and the defendant then, during such bargaining, falsely, fraudulently, and deceitfully warranted to the said plaintiff, Frederick Longmeid, that the said lamp then was reasonably fit and proper to be used for the purpose last aforesaid, and the defendant thereby induced the said plaintiff, Frederick Longmeid, to buy the said lamp, and, accordingly, by the means aforesaid, then sold the same to the plaintiff, Frederick Longmeid, for the said sum of money, which the said plaintiff, Frederick Longmeid, then paid to the defendant, whereas, in fact, the said lamp was not at the time of the said sale and warranty aforesaid, nor afterwards, hitherto reasonably fit and proper to be used for the purpose of being burnt and used by the said plaintiff, but was then made of weak and insufficient materials, and then was cracked and leaky, dangerous, unsafe, and wholly unfit and improper for use by the plaintiffs, or either of them, whereby, and by reason and wholly in consequence of the said lamp being so cracked, leaky, and unsafe as aforesaid, the said lamp afterwards, to wit, on the day and year aforesaid, when the said plaintiff Eliza, knowing and confiding in the said warranty, lighted the said lamp, and attempted to use and burn the same in a certain shop of the said plaintiff Frederick Longmeid; and whilst she was holding the same in her hand, the said lamp burst, exploded, and fell to pieces, and the spirit and naphtha then contained therein for the purpose of burning and lighting the same, then ignited and ran upon and over the said plaintiff Eliza, whereby the said plaintiff Eliza, then and still being the wife of the said plaintiff Frederick Longmeid, became and was greatly burned, scorched, and wounded, and became and was sick, sore, lame, and greatly disordered, and was necessarily removed to and confined in a certain hospital. The defendant pleaded not guilty, and that the plaintiff did not bargain with the defendant to buy one of the said lamps of the defendant to be burnt and used by the plaintiff and his said wife. On the trial before my brother Martin, it appeared that the defendant, who was a manufacturer, or who kept a shop (not personally a manufacturer) in some part of London for the sale of lamps, sold a lamp, called the "Holliday Patent Lamp," to the plaintiff's wife, for the purpose of being used by him (the plaintiff) and his wife; there was evidence that the lamp was defectively constructed, but no proof that the defendant—who did not personally construct it himself, but had it put together by others in parts purchased from third persons—knew of the defect; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. In using the lamp with naphtha it exploded, and the plaintiff's wife met with considerable personal injury, for which the plaintiff brought this action, the plaintiff having previously recovered damages in another action for the defendant's breach of implied warranty of sale. The jury found on the trial all the facts for the plaintiff except the allegation of fraud, they being not satisfied that the defendant knew of the defect. The defendant's counsel objected, as the fraud was not proved in this case, that the action would not lie: the learned judge inclined to that opinion, but would not stop the case, and directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter the verdict for him or a nonsuit. The case was fully argued before the Lord Chief Baron, my brother Martin, and myself, and we took time to consider, and the result of that consideration has been that we think the rule ought to be made absolute. There is no doubt, if the defendant had been guilty of any fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intended it to be used by the plaintiff's wife or any particular individual, that the wife, joining with her husband for conformity, or that individual, would have an action for the deceit on the principle

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on which all actions for deceitful misrepresentation are founded. That was strongly illustrated in the case of *Langridge v. Levi*, 2 M. & W. 519, affirmed in error in the 4 M. & W. 337, namely, that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit; but the fraud being negatived in this case, the action cannot be maintained on that ground by the party who has sustained the damage. There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made: as, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskillfully treated him and thereby injured his health, he would be liable to the patient where the father or friend of the patient may have been the contracting party with the apothecary or the surgeon, for though no such contract had been made, the apothecary, if he gave improper medicine, or the surgeon if he took him as a patient and unskillfully treated him would be liable to an action for misfeasance. (*Pippin v. Shepherd*, 11 Price, 400; and confirmed in *Gladwell v. Steggall*, 8 Scott, 60.) A stage-coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect and the servant sustains personal damage he is liable to him, for it is a misfeasance towards him if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road. So, if a mason were to contract to erect a bridge or otherwise on a public road which he constructed, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it if a third person is injured by the defective construction, and he could not be saved from the consequences of his illegal act in committing the nuisance upon the highway by shewing he was also guilty of a breach of contract and responsible for it; and it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or dangerous under peculiar circumstances, as a loaded gun, which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v. Ball*, 5 Maule & Selw. 198. But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine not in its nature dangerous; a carriage, for instance, which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, that the former should be answerable to the latter for a subsequent damage occurring by the use of it. Could it be contended, with justice, in the present case, if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe; although liable to the party to whom he contracted to sell it upon an implied warranty that it was fit for use, so far as reasonable care could make it, for a breach of contract as to all damage sustained by him? We are of opinion, therefore, if there had been in this case a breach of contract with the plaintiff the husband might have sued for it; but there being no misfeasance towards the wife independent of the contract, she cannot sue and join herself with her husband. Therefore a nonsuit must be entered.

*Rule absolute to enter a nonsuit.*

May 2 and June 17.

KEY v. THIMBERLEY.

Pleading—Payment of money into court—Reg. Gen. T. T. 1 Vict. 1838.

*To an action of trover there was a plea that the conversion complained of was the sale of certain cattle after the defendant had seized and impounded the same as the surveyor of the highway, and that the plaintiff ought not further to maintain the said action, in respect of the said conversion, because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff, and that he had not sustained damages to a greater amount:*

*Held bad, on special demurrer, as not warranted by the new rules.*

This was an action of trover for the conversion of three cows and two calves.

Plea.—That the said conversion of the said cattle in the declaration mentioned was the sale of the said cattle by the defendant after he had seized and impounded the same as surveyor of the highways of the parish of East Kirkby, in the county of Lincoln,

## EXCHEQUER.

according to the statute in that case made and provided; and the defendant further says, that the plaintiff ought not further to maintain his action in respect of the said conversion, because the defendant now brings into court the sum of 10*l.* ready to be paid to the plaintiff; and the defendant further saith, that the plaintiff hath not sustained damages to a greater amount than the sum of 10*l.* in respect of the said conversion, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action.

*Special demurrer.*

*Bramwell*, for the plaintiff, contended that the plea was bad as not warranted by the Reg. Gen. T.T. 1 Vict. 1838.

*Crompton* for the defendant.

## JUDGMENT.

POLLOCK, C.B.—We are of opinion that the plea is not warranted by the new rules, upon which it depends, and is therefore bad. The plea of payment of money into court is given by the new rules as a substitute for the supposed more expensive mode of paying into court by a rule to strike the sum out of the damages, which rule it was always necessary to prove at the trial, and this plea being on the record proves itself. It is not governed by the ordinary rules of pleading, for in actions of debt it denies in part the cause of action, but does not confess and avoid; in *assumpsit* and *forti* it does not deny nor confess and avoid; and it appears to be more analogous to judgment by default, with an averment of the amount of damages, than to the common plea. The form given by the new rules allows, no doubt, of a change to adapt it to the facts of each case; as, for instance, where it is pleaded to part, or debt and damages, as well as the debt, and no further. We have already held that the special character of the defence was not required to be stated. The meaning of the term, "as near as may be," in the rule, is only to authorise alterations to adapt the plea to the names of the parties, &c. and the sum paid, and the like. See *Aston v. Perkes and Another*, 15 M. & W. 385. We are satisfied that it never was intended to admit such a variation as is attempted in this case, as it would lead to long and embarrassing pleadings. According to the new rules, the plaintiff has the liberty either to take the money out of court, with the costs, or to plead damages *ultra*. They did not contemplate any other replication, and therefore no plea is contemplated except one, which would lead to one of these results; whereas this may lead to a new assignment and pleading thereupon. Therefore, in such a case, what is to become of the 10*l.*? the plaintiff is not to have it, and the new rules do not provide for its being paid back; another reason for supposing that no such plea as this was intended by them. Further, if the case be that the plaintiff is proceeding for the conversion of part of the cattle by the sale, and as to the remainder for some other conversion, how is he to reply? How much is he to ascribe to one cause of action and how much to another? And how can he tell whether enough has been paid into court to satisfy the damages for which he is proceeding. Besides, the plea in this case, we think, introduces a perfect novelty in pleading, by making the defendant directly aver what the plaintiff's cause of action is, which presumably he cannot do. When the defendant supposes the cause of action to be one thing and for which he has a defence, he pleads by confessing and avoiding, and concludes in the usual though always unnecessary way. Where the justification depends upon a temporary defence different from that in the declaration, the defendant may either conclude with that averment or traverse. In either way the plaintiff must now assign, if he cannot deny the truth of the plea. But if such an averment as this were allowed, the defendant might drive the plaintiff to a new assignment without any plea of confession, as if after making such an averment he suffered judgment by default as to the cause of action. But then it is said it may be a hardship on the defendant, who cannot know what the plaintiff's cause of action is, and who has no legal means of knowing how and in what manner to plead such a plea. This objection would have been exactly the same if the old mode of paying money into court had been adopted, for which this is a substitute, by the Act for the further amendment of the law. But, in truth, it is only an objection on the surface. Practically it is always competent for the defendant to obtain full particulars of the plaintiff's cause of action on a proper affidavit, as a judge requires in all cases of actions *for forti* such an affidavit, otherwise an application would be made in every such case. And if the defendant should not be able to obtain full particulars, so as to ascertain the true cause of action, his proper course is to exhaust all his special defences, where the plaintiff has newly assigned the cause of action (which is now necessary), and plead payment of money into court, or suffer judgment by default. Such a plea as this cannot be allowed; therefore our judgment ought to be for the plaintiff, with liberty to amend on payment of costs.

*Judgment for the plaintiff.*

## EXCHEQUER CHAMBER.

## EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq. of the Inner Temple, Barrister-at-Law.

## ERROR FROM THE COURT OF COMMON PLEAS.

Feb. 4, May 15, and June 3.

BUCHANAN, plaintiff in error, v. KINNING, defendant in error.

*Small Debts Act*, 8 & 9 Vict. c. 127—*Commitment of judgment-debtor for nonpayment—Liability of attorney—Pleading—What in issue.*

*Under 8 & 9 Vict. c. 127, s. 1, enacting that a debtor against whom a judgment has been obtained may be summoned before any one of certain inferior courts, and that if he appears to have the means of paying by instalments, and shall not pay at such times as the Court shall order, the judge may commit him for any time not exceeding forty days:*

*Held, affirming the decision of the Court of Common Pleas, and the judgments of Patteson and Coleridge, JJ. that a summons to shew cause why the debtor should not be committed is necessary previous to the commitment. Erle, J. and Martin, B. dissentientibus.*

*In trespass for false imprisonment, the defendant pleaded that W. T. recovered a judgment against plaintiff: that the plaintiff was summoned before an inferior Court under 8 & 9 Vict. c. 127, s. 1, when an order was made for payment by instalments: that plaintiff made default, which, being proved before the said Court, the judge duly and according to the form of the statute, and at the request of the defendant, the attorney of W. T. acting upon his retainer, ordered the plaintiff to be committed to prison for forty days; that the defendant, as such attorney, delivered the warrant to an officer to be executed, who arrested the plaintiff and detained him in prison.*

*Replication, that the said judge did not order that the plaintiff should be committed modo et forma.*

*Held, reversing the decision of the Court of C.P. that the traverse in the replication put in issue the fact of the making of the order of commitment only, and not its validity.*

*Quere—Whether, although the plaintiff below was entitled to his discharge on habeas corpus, he can sue under the circumstances in trespass for an erroneous order of the judge.*

*But if he can, the attorney of the party is liable for ordering the warrant of the judge to be put in execution.*

*Trespass, by Thomas Kinning (the plaintiff below), for assault and imprisonment.*

The defendant (below) the new plaintiff, pleaded, first, Not guilty. Issue thereon.

Secondly, that before the said time when, &c. to wit, on the 5th day of October, in the year of our Lord 1846, William Townley levied his certain plaint against the plaintiff (i. e. the plaintiff below) in the court of our lady the Queen, before Thomas Challis, esq. then being one of the sheriffs of the city of London, in his computer, situate in the parish of St Giles' Without Cripplegate, in the ward of Cripplegate Without, in the same city, and within the jurisdiction of the same Court, according to the custom of the said city, for a cause of action personal arising within the jurisdiction of the said Court; and such proceedings were thereupon had, that afterwards, to wit, on the 5th day of December, in the year of our Lord 1846, at the said court then held before the said sheriff, at the Guildhall of the said city of London, and within the said city, and within the jurisdiction of the said Court, the said William Townley, by the consideration and judgment of the said Court, recovered against the now plaintiff, as well a certain debt of 19*l.* 19*s.* as also 3*l.* 12*s.* 6*d.* for his costs of suit, as by the record and proceedings thereof still remaining in the said court appears, and after the passing of an Act of Parliament, passed in the 9th year of the reign of our lady the now Queen, entitled "An Act for the better securing the payment of Small Debts," and before the said time, when, &c. to wit, on the 5th of December, in the year last aforesaid, the plaintiff then being indebted to the said William Townley in a sum not exceeding 20*l.* besides costs of suit by force of the said judgment, to wit, the sum of 19*l.* 19*s.* the said William Townley made application by petition and note in writing, according to the form in schedule "B" to the said Act of Parliament amended, to the said Court, the same being an inferior Court of Record for the recovery of debts in and for the city of London, and then being held at the Guildhall aforesaid, in the said city, and within the jurisdiction of the said Court, and the plaintiff then residing within the jurisdiction of the said Court, to wit, within the city of London, and the said Court then having a judge, who was a barrister-at-law (that is to say), Edward Bullock, esq. barrister-at-law, then being the judge of the said Court, by which said petition and note in writing the said William Townley requested the said Court to summon the plaintiff to

answer touching the debt due to the said William Townley by the judgment of the said Court, on his, the said William Townley's, behalf; and thereupon the said Court afterwards, to wit, on the 7th of December, 1846, upon the said application of the said William Townley, granted to the said William Townley a summons according to the form in schedule "A" unto the said Act of Parliament amended, by which said summons the plaintiff was required to appear at the Sheriff's Court, London (being the said Court), to be holden at the Guildhall, &c. on, &c. to answer such questions as might be put to him touching the not having paid to the said Wm. Townley the sum of 23*l.* 1*l.* 6*d.* (being the amount of the said debt and costs recovered by the said judgment), &c. The plea then went on to state that the plaintiff was duly served with the said summons, and that he appeared thereto at the said Court, and that he was duly examined on oath, as required by the statute, and that the said Court thereupon made an order that the plaintiff should pay the said debt and costs by instalments of 2*l.* a month, of which order notice was given to the plaintiff, who was also duly served with a copy thereof, and the original order was at the same time shown to him. That the plaintiff did not pay the said instalments, but made default in the payment thereof, and thereupon it being duly made to appear, and it being proved to the said Court that the plaintiff had had notice of the order and been served with a copy, and shown the original, and had not paid the said instalments, the said Court, so holden as aforesaid, before the said Edward Bullock, so being such judge of the said Court and such barrister-at-law as aforesaid, before the said time when, &c. to wit, on the day and year last aforesaid, at London aforesaid, and within the jurisdiction of the said Court, duly and according to the form of the said statute, ordered that the plaintiff should be committed for forty days to her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein debtors under judgment, and in execution of the superior courts of justice, might be, and were usually confined, within the city of London, being the city in which the plaintiff was then resident; and, thereupon, the said Edward Bullock so being, and as such, judge of the said court, and barrister-at-law, at the request of the defendant, then being the attorney of and for the said William Townley, and as such attorney, and acting upon the retainer, and at the request of the said William Townley, duly, and according to the form of the statute in such case made and provided, then and there made his warrant in writing, under his hand and seal directed, " &c. The plea then set out the warrant, and averred it to have been delivered by the defendant, as such attorney of William Townley, to the serjeant-at-mace, to be executed, by virtue of which warrant, and at the said request of the defendant as such attorney, the plaintiff was taken and arrested, and conveyed to the debtors' prison, and detained therein for thirty-nine days, the said instalments remaining unpaid.

*Replication to the second plea.*—"That the said Edward Bullock did not order that the plaintiff should be committed for forty days to her Majesty's debtors' prison for London and Middlesex, in the city of London, in manner and form as in the second plea alleged." *Issue thereon.*

The issues were tried before Wilde, C.J. now the Lord Chancellor, and the defendant's counsel tendered a bill of exceptions to the ruling of the learned judge, and a writ of error was thereupon brought, and the facts were set out upon the Record in Error. In the first place, it appeared that Lloyd Simpson was called as a witness, and he proved that he was serjeant-at-mace at the Sheriff's Court, London, and that the warrant of commitment against Kinning was delivered to him; and then it was also proved that the order was made to pay; "that the said Thomas Kinning should pay the said debt and costs aforesaid to the said William Townley, in manner following, that is to say, the sum of 2*l.* thereof on the 12th of January then next," and the rest by instalments: "that he, the witness, did not know from whom he received the warrant: that he tried to find the said Thomas Kinning, and could not, that the witness knew a person, named Beard, a clerk of the defendant (Buchanan), who attended to the defendant's business in Court, and had done so for years: that the said Beard likewise attended to the department of business concerning warrants in the defendant's office; that whenever the witness applied at the defendant's office about such things, he, the witness, was referred to Beard upon them generally; that Beard attended to the business of the defendant relative to the Small Debts Act; that after he, the witness, had searched for the plaintiff two or three days, he, the witness, saw Beard, who ordered him not to execute the warrant: that he, the witness, had acted under Beard's directions on a former occasion: that afterwards, on the 24th of April, he saw Beard at the defendant's office, and that Beard then and there told the witness to execute the warrant against the



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plaintiff as soon as he, the witness, could; in consequence of which the witness went to seek the said Thomas Kinning: that he found the said Thomas Kinning, who asked him to let him, the said Thomas Kinning, go to the defendant, and the witness thereupon took him to the defendant's office, where the defendant then was: that they, the plaintiff and the witness, saw the defendant there: that the witness then said to the defendant, I have allowed Kinning (meaning the plaintiff) to come here to see if he can make an arrangement; that the said Thomas Kinning then said to the said defendant, "I did not think you would have served me so;" that the defendant said, "I could not help it; it was no fault of mine;" they then spoke together: that the witness, after waiting five or six minutes, said, "Are you likely to come to any arrangement?" the defendant said, "No;" that the witness then said, "Mr. Kinning, you must accompany me;" that the plaintiff accompanied the witness to Whitecross Prison, where the witness left him. On cross-examination the witness said, he believed he received the said warrant from one Hudson, an officer of the said court. The counsel for the plaintiff also called one William White, who, being sworn, deposed that he saw the said Thomas Kinning in prison, when he was there under the aforesaid warrant: that in consequence of what he told the witness, he, the witness, went to the defendant at his office, and told the defendant that he, the witness, had come at the request of Mr. Kinning, to make some arrangement to release him from prison: that the defendant and the witness arranged that, on payment of 2l. 10s. or 3l. and giving security for the rest, Mr. Kinning should be discharged from prison; that the defendant said he would discharge the plaintiff on payment of 2l. 10s. or 3l. and security for costs: that he, the witness, told the defendant he was surprised, because the plaintiff (Townley) in the action against the said Thomas Kinning, had become a bankrupt, and the creditors had no desire to keep the said Thomas Kinning in custody; that the defendant then said to the said witness, "but you know I must have my costs; they must be made secure;" that he, the witness, saw the defendant five or six times, while the plaintiff remained in custody, upon the subject of the plaintiff's discharge, and offered, upon one occasion, to pay two pounds ten shillings, or three pounds, provided defendant would give plaintiff his discharge; defendant said he must have security for the balance; that witness told defendant that it was utterly impossible, from the situation the plaintiff was in, for him to give security, and witness thought it a very hard thing for Kinning, the plaintiff, to remain in prison after the then plaintiff in the suit in the said Sheriff's Court, and the official assignee and the trade assignee of such then plaintiff, were willing that Kinning should be discharged; and that witness had applied to them; that upon one of the interviews between witness and defendant, a person named Austin, the solicitor for the said trade assignee, and agent for the assignees under the said bankruptcy, was present, and that Austin then said his clients (meaning the said assignees) were willing to discharge Kinning, but they would not be responsible for costs; the defendant persisted in having security for his costs; that he, the witness, then said to the defendant, "It appears to me (meaning himself the witness) that there is some feeling at the bottom of all this, and that Kinning would never get his discharge till he paid the whole;" that he, the witness, had the money (2l. 10s. or 3l.) wherewith to pay, and had offered it to the defendant on every occasion but the first; that the defendant said he had no objection to the plaintiff being discharged, provided he, the defendant, was paid his defendant's costs. And the said counsel then further proved that the said Thomas Kinning was imprisoned and in prison thirty-eight days under the said warrant. The counsel for the defendant then called witnesses, who were duly sworn, and who gave evidence on each of the said issues, and in order to maintain the second issue, produced and gave in evidence the record of the proceedings in the Sheriff's Court. The counsel for the defendant thereupon contended that there was no evidence in support of the first issue, and the counsel for the plaintiff contended that there was no evidence to support the second issue. The Lord Chief Justice held that there was evidence in support of the first issue, and that there was no evidence to support the second issue, and directed the jury to find the said second issue in favour of the plaintiff, and to say whether the defendant was guilty of the trespasses in the declaration mentioned, and what the damages were. To that ruling was a bill of exceptions. The jury found both issues in favour of the plaintiff, with 20l. damages, whereupon a writ of error was brought.

The writ of error was argued in the first instance (Feb. 4, 1851) before Patteson, Coleridge, Wightman, Erie, JJ. and Parke, Alderson, and Platt, BB.

Bramwell, for the plaintiff in error. First. The order of commitment was valid. It is submitted that the decision of the Court of C.P. in Kin-

ning's case, 4 C. B. 507, and the judgments of Patteson and Coleridge, JJ. in the same case, 10 Q. B. 730, cannot be sustained. *Abley v. Dale*, 20 L. J. 33, C.P. proceeded upon the authority of Kinning's case. The general rule, it is true, is, that where an Act of Parliament imposes a penalty, the party liable shall not be convicted without an opportunity of being heard. But that rule is one of construction to be deduced from the language of each particular statute, and is not an abstract proposition of law; and upon a minute consideration of the 9 & 10 Vict. c. 95, ss. 98, 99, 101, it will be found that in a case like the present the judge of the County Court may commit a defaulting judgment-debtor without summons to shew cause. The statutes 8 & 9 Vict. c. 127, and 7 & 8 Vict. c. 96, were referred to as analogous, and as shewing that a party might be committed to prison upon an *ex parte* application. The case of *re Hammermith Rent Charge*, 19 L. J. 66, Ex. was also cited. (This Court intimated that the majority of the Court were not likely to overrule the decisions cited, and that their present impression was that the decision of the Court of C.P. was correct, and that Erie, J. was the only judge present who dissented from that view.) Secondly. The ruling of the learned judge that there was no evidence in support of the second issue was wrong. The only fact in issue on the replication to the second plea was the making of the order, and not the question of its validity. The case of *Dresser v. Stansfield*, 14 M. & W. 822, which will be relied on by the other side, has really no bearing upon this point. There a special plea shewing the grounds upon which it was intended to raise the question of the validity of an award, was specially demurred to as an argumentative plea of *sul agard*, and the Court held that it was so, and that the plea of no award meant no valid award; but here the very terms of the traverse limit the issue to the fact of the making of the order, and do not raise the question of its validity. (*Williams v. Germaine*, 7 B. & C. 468; *Boerard v. Paterson*, 6 Taun. 645; *Cooke v. Blake*, 17 L.J. 370, Ex.; *Adcock v. Wood*, 16 Law T. 552; and *Kinning v. Buchanan*, 8 C.B. were cited upon this point.) Thirdly. The defendant is not liable for what he did, and is entitled to have the verdict entered for him upon the general issue. If this commitment was a penal proceeding, what has the defendant, the attorney of Townley, done to make him liable in this action? As the defendant did not profess to act on his own behalf, no ratification of the arrest will make him liable. (*Wilson v. Timmon*, 6 Sc. N. C. 894; 6 M. & G. 236, S.C.) Process of contempt differs from a *ca. sa.* and an attorney is not liable, if he takes no steps in the execution of the warrant. (*Cooper v. Harding*, 7 Q. B. 928; *Barker v. St. Quinton*, 12 M. & W. 441, is not in point. *Sedley v. Sutherland*, 3 Esp. 202; *Corrall v. Morley*, 1 Q. B. 18.) The Court issues the warrant, and not the attorney, and the clerk of the Court hands it to the serjeant at mace; the defendant, therefore, is not liable for the issuing of this invalid warrant. (*Freeman v. Roher*, 18 L. J. 340, Q.B.) Lastly. This was a case in which the County Court had jurisdiction over the subject of complaint, and the defendant is protected by the process of the Court. (*Marshalsea case*, 10 Rep. 68; and *Thomas v. Hudson*, 14 M. & W. 353; affirmed in error, 16 M. & W. 885.) The argument was then adjourned.

Thursday, May 15.—Argument resumed before Parke, B., Patteson, J., Wightman, J., Platt, B., Erie, J. and Martin, B.

Pashley (Henniker with him), for the defendant in error.—As to the first point, the decisions in the Court of C. P. are relied upon, and also the intimation of opinion of the majority of the judges of this Court already given. Secondly, as to what was put in issue by the traverse in the replication. The plea alleges that the said Edward Bullock, &c. duly and according to the form of the said statute, ordered that the plaintiff should be committed for forty days, and the replication traverses that allegation in these terms:—"That the said Edward Bullock did not order that the plaintiff should be committed for forty days, &c. in manner and form as in the said plea alleged. That traverse involves the *duly* making of the order, and its validity, therefore, as well as the fact of its being made, was in question, and the direction of the learned judge was right. (*Daves v. Papworth*, Willes, 408; *Lewis v. Parkes*, 3 M. & W. 133; *Dudlow v. Watchorn*, 16 East, 39; *Nightingale v. Wilcoxon*, 10 B. & C. 202; *Reg. v. The Justices of Cornwall*, 2 D. & L. 775; 1 Wms. Saun. 376; *Cooke v. Blake*, 17 L. J. 370, Ex.) As to the third point, the following authorities were referred to:—*Calder v. Halket*, 3 Moore's P. C. 70; *Smith v. Boucher*, Stra. 993; Cunningham, 89, 127, S.C.; *Gosset v. Howard*, 10 Q. B. 411; *Watson v. Bodell*, 14 M. & W. 57; *Reg. v. Hampshire*, 9 Dowl. 171; *Andrews v. Marria*, 1 Q. B. 3; *Cripps v. Darden*, Cowp. 640. Cur. adv. vult.

JUDGMENT.

Tuesday, June 3.—PARKE, B. delivered the judg-

ment of the Court, and, after stating the pleadings and facts as above, proceeded:—This case was argued before my brothers Patteson, Wightman, Erie, Platt, Martin, and myself. On the argument of this writ of error before us, three exceptions were taken to the direction of the Lord Chief Justice Wilde on the trial: first, that the order of commitment was valid; secondly, that the only question in issue on the replication to the plea was the fact of the order having been made to the effect stated in the plea, and not the validity of that order; thirdly, that there was no evidence to make the defendant responsible for putting the warrant in force; and, fourthly, that the order being made by the judge of a Court of Record, although invalid, was nevertheless a protection to the officer acting under it, and the attorney in the cause. On the first question, the Court intimated an opinion (except my brothers Erie and Martin, the former of whom has given his reasons, already expressed (10 Q.B. 745), and the latter concurs in them), that they consider the question as to the plaintiff below being entitled to his discharge on the *Habeas corpus* to be settled, and that to make the order of commitment valid, a previous summons was necessary. On the third question, also, this Court intimated that they thought there was evidence for the jury that the warrant was originally ordered to be executed so as to bind the defendant, as the order of his clerk to execute it, was subsequently ratified by him. On the second and fourth questions, the Court took time to consider. On the second, we are all satisfied that the only matter in question in issue on the second plea was the fact of the order having been made as alleged, and not the validity of it; and consequently, that the Lord Chief Justice ought to have directed the jury to find a verdict on that issue for the defendant. The plea states a great number of facts necessary to give Mr. Bullock jurisdiction over the cause and to make the order; namely, the recovery of the debt by Townley, that the Court was an inferior Court of Record, that there was a petition to the Court; a summons; service of summons, appearance; examination on oath, order to pay by instalments; notice thereof, non-payment in pursuance of the order; and that it was duly made to appear, and adjudicated that it did appear, that he had notice of the order, that it was served upon him, demand made, and that the instalments were in arrear; whereupon the court duly, and according to the form of the statute, made the order of commitment. The only traverse in the replication is that the order was not made in manner and form; and in terms it denies only the making of the order and the manner and form in which it was made, not that it was made duly and according to the form of the statute, that is not included in the terms of the issue. If it was the intention of the pleader to include only the fact of the order being made by the Court, more apt words could not have been used; but supposing that the traverse was in the formal terms that the order was not made duly according to the form of the statute, we do not think in this replication it would be considered as including the denial that the plaintiff was duly summoned, and neglected to appear to answer the charge of not paying the instalments. It is clearly settled that this traverse would not put in issue any one of those numerous and special allegations; for admitting, *argumenti causa*, that there was an allegation, simply, that the order was made duly and according to the statute, and that the traverse was, that an order was not made duly and according to the statute *modo et forma*, the validity of the order would be involved in the issue. It is clear on such an issue as this, where divers facts essential to the validity of the order are stated, and an opportunity to traverse each is afforded, the denial of the making of the order does not involve the denial of any one of those facts, as where it is averred that one was seized in fee and demised, the plea of *non demisit* does not involve the question of seizing in fee, as was fully explained in the case of *Cooke v. Blake*, 17 L. J. 370, Ex.; 1 Ex. 220, S.C. All these facts being admitted, and the order alleged to have been made thereupon, that is, on the happening of those circumstances, duly and according to the form of the statute, we cannot possibly believe that this was meant to be a traverse by implication, that the additional facts existed which are now held to be necessary; that is, that the debtor was summoned to shew cause and neglected to appear, or appeared and made no excuse, and that thereupon the order was made. The averment of certain facts, and that the order was made on a certain adjudication of facts by the Court, seems to us inferentially to state that those were all the facts on which the order was made, and the averment that it was duly made means in this plea that it was made duly, because the premises warranted it, not that the other essential circumstances existed. We are therefore of opinion that the Lord Chief Justice's direction was wrong upon this point; and we are not now called on to decide whether, understanding the plea or not as containing an averment that there was a summons and non-attendance, or attendance and no excuse,

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the plea would be bad or not; that will be open hereafter, when the verdict is found for the defendant upon this plea. If the plaintiff is entitled to his discharge on the *Abeas corpus*, as follows from what we have said, it does not therefore follow that a person so entitled can bring an action of trespass. The case of *Hammond v. Howell*, 1 Mod. 184, shews that when this record comes before us again, that point will be discussed. We need not at present give any opinion upon it. Therefore the judgment will be reversed, and a *venire de novo*.

*Venire de novo.*

## ERRORS FROM THE EXCHEQUER.

Reported by C. J. B. HERRLEST, Esq. of the Middle Temple, Barrister-at-Law.

Monday, May 19.

(Before Lord CAMPBELL, C.J. and PATTESON, COLERIDGE, MAULE, WIGHTMAN, and CRESSWELL, JJ.)

THE PLASTERERS' COMPANY v. THE PARISH CLERKS' COMPANY.

Prescription—Right to Lights—2 & 3 Wm. 4, c. 71, s. 3.

The payment of rent for the enjoyment of lights is not evidence to establish an interruption of the enjoyment so as to take the case out of the 3rd sec. of 2 & 3 Wm. 4, c. 71.

The declaration stated that at the time of committing the grievances hereinafter mentioned, and from thence and hitherto, a certain messuage or dwelling-house, with the appurtenances, situate in London aforesaid, the reversion whereof then and still belonged to the plaintiffs, were in the possession and occupation of Benj. Bradley Ward, Henry Sturt, James Carter Sharp, and John Ward, as tenants thereof to the plaintiffs, in which said messuage or dwelling-house, during all the time aforesaid, there were and still of right ought to be divers, to wit, ten windows, through which the light and air during all the time aforesaid ought to have entered, and until the grievances hereinafter mentioned, did enter and still of right ought to enter into the said messuage or dwelling-house for the convenient and wholesome use and enjoyment thereof; yet the defendants, well knowing the premises, but contriving to injure and prejudice the plaintiffs in their reversionary estate and interest of and in the said messuage or dwelling-house, heretofore, to wit, on the 21st day of June, A.D. 1848, wrongfully and injuriously erected a certain wall and building near the said windows respectively, and then and there wrongfully and injuriously kept and continued the same from thence hitherto, by means whereof the light and air during all the time aforesaid were and still are hindered and prevented from entering or coming into or through the said windows, or either or any of them, into the said messuage or dwelling-house, and the same has been and is thereby rendered dark, close, uncomfortable, and unfit for habitation, and that the plaintiffs were thereby greatly damaged in their reversionary estate and interest in the same.

*Plea*—1st. Not Guilty. 2nd. That no such alleged reversion of and in the said messuage or dwelling-house, with the appurtenances in the said declaration mentioned, did or does belong to the plaintiffs in manner and form, &c. 3rd. That the said messuage or dwelling-house, with the appurtenances, were not, nor was any part thereof, in the possession or occupation of the said Benj. Bradley Ward, Henry Sturt, &c. in manner and form, &c. 4th. That there was not, nor of right ought to have been, at or during all or any part of the said time, &c. mentioned, any or either of the said windows through which the light or air ought to have entered or still of right ought to enter into the said dwelling-house, in manner and form, &c.

The cause was tried at Guildhall, on the 3rd of July, 1850, before Pollock, C.B. when the plaintiffs, in order to maintain the last issue, proved that the messuage or dwelling-house in the declaration mentioned was built in 1669, and was situate No. 85, Wood-street, Cheapside, and that it partly abutted on the south-east end of an open yard belonging to the defendants, and that ever since 1670 there had been four windows belonging to the said messuage (being those in the declaration mentioned) looking into the said yard, and that the light and air to the said windows had been enjoyed without interruption, except the obstruction caused by the defendants' building in the yard, in June, 1848. They further proved that there was a cellar under the said yard during all that time, belonging to the defendants, which was lighted by a grating in the pavement, and that for many years Nos. 84 and 85 had been occupied by one tenant, who also occupied the cellar as tenant thereof to the defendants.

The defendants put in evidence an indenture, dated 4th September, 1669, being a license from the Parish Clerks' Company to John Austin, to make four windows into the hall-yard of the company, to enjoy the same for fifty-one years, paying 10s. a year. It was also proved that the said John Austin was, at the date of the lease, tenant to the plaintiffs

of the said messuage, No. 85, Wood-street, and owner of No. 84. Another indenture was also put in, dated 20th Nov. 1704, being a lease from the defendants to one Wm. Patteson, of the before-named cellar, for seven or eleven years, at 3l. a year rent, whereby, in the event of the said Wm. Patteson not observing certain covenants, the said company reserved to themselves the right to stop up the lights in the said cellar. There was also proved an agreement for a lease of the said vault to Elizabeth Patteson, dated 14th January, 1716; and an indenture dated the 19th April, 1725, being a lease for seven years, from the said defendant, to Elizabeth Heaford, of the said vault, at 4l. rent, which contained a similar proviso for stopping up the lights. They also proved that from 1807 till 1840 the plaintiffs' house and the house No. 84 had been occupied as one house by Messrs. Whitbread and Co. viz. the house No. 85, as tenants to the said plaintiffs, and of the house No. 84, as owners in fee, and that they had, as such tenants, paid to the defendants the sum of 3l. 10s. as an annual rent for the said lights and cellar. And the defendants further proved that from the year 1840 till the commencement of this action, the said two dwelling-houses had been occupied together as one house by Messrs. Ward and Co. who had paid a like yearly rent, and also that since 1669 there had been a doorway from plaintiffs' premises into the said cellar, which had been closed for many years, and that the four windows had been opened subsequent to the building; and a notice to quit, which had been served on the Messrs. Ward, dated 21st June, 1847, was also put in. It was then objected for the plaintiffs that these payments of Messrs. Whitbread and Messrs. Ward did not constitute an interruption within the meaning of the 2 & 3 Wm. 4, c. 71, and that the plaintiffs had acquired a right by actual enjoyment for twenty years, and that inasmuch as the defendants had not proved that the said enjoyment was had under agreement in writing, there was no evidence upon which a verdict could be found for them on the last issue. The Lord Chief Baron held that a demand of rent for the lights and payments made in compliance therewith was an interruption within the meaning of the statute, and therefore that the defendants had given evidence upon which the jury might find for them on the last issue, and he so directed them; to which direction the plaintiffs tendered a bill of exceptions.

*Issue*, for the plaintiffs, after stating the above pleadings and proofs, contended that the enjoyment of the lights for twenty years without interruption gave an absolute right, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." (2 & 3 Wm. 4, c. 71, s. 3.) The payment of rent cannot be called an interruption. An interruption means a suspension of the enjoyment. He cited *The Mayor of London v. The Plasterers' Company*, 2 Mo. & Rob. 409; *Flight v. Thomas*, 11 A. & E. 688; *Harbidge v. Wervick*, 3 Ex. 532; *Onley v. Gardiner*, 4 M. & W. 496; *Tickle v. Brown*, 4 A. & E. 369.

*H. Hill*, for the defendants, in error; also the defendants below. The right which is now contended for could under no circumstances have existed before this statute; it must therefore be clearly established, and it must be shewn that the statute contemplated such a case as this. The title of this statute is "An Act for shortening the Time of Prescription in certain cases;"—it was never intended to confer new rights. The payment of rent is such an interruption as will take the case out of the operation of this statute. He cited *Moore v. Rawson*, 3 B. & C. 332, 339; *Wood v. Ward*, 3 Ex. 748; *Salkeld v. Johnson*, 2 Ex. 256.

Lord CAMPBELL, C.J. — The question in this case is simply this, whether the payment of this rent of 10s. a year is evidence of an interruption of the enjoyment of these lights. I think that it is not; to establish an interruption there must be a discontinuance of the enjoyment. Here there has been an absolute enjoyment for a space of twenty years without any interruption, and I am of opinion that there ought to be a *venire de novo*.

*Judgment accordingly.*

## JUDGES' CHAMBERS.

Reported by DAVID CATO MACRAE, Esq. of the Inner Temple, Barrister-at-law.

Wednesday, July 16.

SHARP v. EVELEIGH.

*Costs*—A Judge at Chambers has jurisdiction under the 13th sec. of 13 & 14 Vict. c. 61, to order costs, notwithstanding an order of reference, whereby the arbitrators had the same powers to certify as a judge.

This was an action of covenant, which came for trial at the last Spring Assizes for Sussex, at Lewes, when the case was referred under the usual order. There were two issues raised, on one of which the defendant had paid 20l. into court, and on that issue had a verdict. The plaintiff had a verdict on the

second issue, but for less than 20l. The plaintiff having obtained an order for his costs, under the 13th sec. 13 & 14 Vict. c. 61, the defendant now applied to set that order aside, on the ground that the same was made without jurisdiction, the arbitrator having been invested with the power to certify; and he not having certified, the judge had no power to make an order for costs.

PARKER, B. said he considered the plaintiff entitled to the costs, and that he had clearly jurisdiction to make the order. Therefore the present summons must be dismissed with costs.

*Hawkins*, counsel, for the plaintiff.

*Horn* for the defendant.

Attorney for the plaintiff, Mr. Gibson.

Attorneys for the defendant, Messrs. Wilton and Blackman.

## BANKRUPTCY.

## IRISH BANKRUPTCY COURT.

Reported by JOHN LEVY, Esq. Barrister-at-Law.

Re MACDONNELL.

*Execution upon a joint judgment against husband and wife — Condition — Warrant of attorney — Judgment.*

An execution upon a joint bond and judgment against husband and wife will be set aside. A judgment must be in conformity with the warrant of attorney.

Where judgment is entered up within twenty-one days after the execution of the bond and a warrant, a condition entered into at the execution of the warrant need not be written on it.

Where an execution creditor conducts a sale hastily, and is himself the purchaser, he will be censured by the Court.

The bankrupt in this matter was a trader in Belfast, and his wife being entitled to some property in her own right, and he having become indebted to Messrs. Young and Company, of that town, they on the 9th of July, 1850, obtained the joint bond of the bankrupt and his wife, on which occasion they handed to him the following letter:—"Sir,—In reference to the band which you and your wife have given to us this day, we beg to say that it is for a general lien for our account current, and that when you pay us off we shall have no objection to have it cancelled or handed up to you, if paid before the 1st January, 1851. Yours, &c. Young and Co. To Mr. B. McDonnell, Belfast." After the execution of the bond the bankrupt purchased considerable quantities of goods from other parties, and when Young and Co. saw that he had a tolerably large stock, and that he was dealing with others, they applied for payment of their bond, which McDonnell was unable to meet. They soon afterwards issued execution (judgment was entered immediately after the execution of the bond and warrant of attorney), and sold the entire of the bankrupt's stock-in-trade. It appeared that the warrant of attorney was dated the 9th of July, 1850, the same date as the bond and letter of agreement; it authorised the confessing of a judgment as of Trinity Term, or any other term or time whatever after the day of the date hereof. Now, the judgment was entered up as of Trinity Term, 1850, which commenced on the 22nd of May previously, and upon this point one of the principal objections to the judgment and execution was raised by the assignee.

The three points of objection raised were, 1st, that the letter of agreement was a defeasance, or condition, that should, according to 3 & 4 Vict. c. 105, s. 14 (English analogous, 3 Geo. 4, c. 39, s. 4), be written on the same paper as the warrant of attorney. 2nd, that the judgment did not follow the warrant; the warrant authorised the entering up of a judgment as of Trinity Term, or any other Term, after the 9th of July, 1850; the judgment was as of Trinity Term, 1850, whereas that Term had passed by before the warrant was executed. The third point was, that a bond and warrant by a feme covert were void, and that an execution founded on such bond and warrant was a nullity. The parties agreed that these were the points in dispute to be argued, and they were brought by consent before the learned Commissioner for his decision.

Fitzgerald, Q.C. for the assignee, contended that the judgment and execution should be set aside. The letter of agreement given concurrently with the bond and warrant was a defeasance, or condition, that should have been written on the same paper, as prescribed by the statute; however, as judgment had been entered up within twenty-one days, he did not rely so much on that point. But upon the other two points in the case, he was clearly entitled on the part of the assignee to have the judgment and execution set aside. It was quite clear that upon the construction of the warrant it did not authorise the entering up of a judgment anterior to its date. (*Cobbold v. Chilver*, 1 D. N. S. 726; *Couslet v. Clutterbuck*, 2 D. N. S. 391.) A judgment against

## NISI PRIUS.

a feme covert was a nullity, and the sale under an execution founded upon such a judgment could not stand. (*Feithmeire v. Blagmore*, 6 M. & S. 73.)

*Oreighton*, contra, for the execution creditor, cited, *Conlan v. McNaspie*, 10 I. L. R. 295; and *Maclean v. Douglas*, 8 Bos. & Peel, 128. It was a rule of law that where a joint warrant of attorney was given by two or more persons one of whom might be an infant or person incapable of executing such an instrument, the Court will order it to be vacated against such person, and to stand against the others. (*Ashlin v. Langton*, 4 M. & S. 719.) He thought there was nothing in the point relating to the date of the warrant of attorney. The evident meaning of the passage in the warrant was, that judgment was to be entered up as of the Trinity Term preceding, or any other term or time afterwards. In point of fact it might be said that Trinity Term was then pending, for the sittings of it were actually going on.

The COMMISSIONER delivered an able judgment.—Besides the legal grounds put forward in the arguments of counsel for the assignee, it appeared that there was, throughout the whole proceeding on the part of the execution creditors, conduct highly censurable; the execution was issued in Dublin one day, the sale was had in Belfast the next day, and the mode of conducting it was, putting up one side of the trader's shop and its contents in one lot, the other side in another lot, and his household furniture in another lot; these lots were knocked down to the bidders of the execution creditors and carried off to their stores in Belfast. It was a question whether the sale in itself was not of such a character that no force or effect should be given to it, and that it should be treated as if it were altogether void. His Honour, after referring to the various authorities cited, and to others pointed out by himself, directed the execution to be set aside, the goods, which were still in the creditor's warehouse, to be returned, and that they should pay 20*l.* as the costs of the present application. With regard to the point raised as to the defence or condition being written on the same paper as the warrant of attorney, he thought it was not necessary, as the judgment had been entered up within twenty-one days, but there was enough in the case besides to warrant the judgment he had given. He would be glad if the execution creditor would appeal to the Lord Chancellor.

No appeal was taken.

## Nisi Prius.

## COURT OF COMMON BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS IN LONDON AFTER TRINITY TERM.

Wednesday, July 9.  
(Before Lord CAMPBELL, C.J.)

REG. v. KAYE.

**Libel**—*Newspaper Criticism*—Malice bona fides. A Wesleyan minister was charged before the magistrates with being the father of a bastard child, and the summons was dismissed for want of corroboration. Defendant, the proprietor of the "*Wesleyan Times*," then inserted articles in his paper, commenting upon the fact that it was dismissed solely for want of corroboration, and urging the Wesleyan Conference to investigate the matter:

**Held**, that if the defendant was acting fairly and honestly he was not guilty of libel, but that, if he thus intended to insinuate that the minister was guilty of the offence charged against him, he must be convicted.

This was a criminal information against John Kaye, the publisher and proprietor of the *Wesleyan Times*, for libels published in that paper on December 2nd, 16th, and 23rd, 1850, and on January 12th, 1851, reflecting upon the moral character of William Henry Clarkson, a Wesleyan minister. The defendant pleaded the general issue.

It appeared that a young woman, of the name of Charlotte Hiroms, had been servant to Mr. Clarkson, and had been discharged in the family-way. Upon the birth of her child she declared that Mr. Clarkson was the father, and she applied to the magistrates for an affiliation order. There was no corroborative evidence, and the summons was dismissed. Shortly before an article appeared in the *Wesleyan Times*, introducing the case to the notice of the public, and without mentioning the name of Mr. Clarkson, calling upon him to submit the case to a full investigation, for the honour of the ministry. This was on September 16th. On the 18th November appeared another article, stating that the person, before alluded to, had been not only suspected but directly charged with being the father of a bastard child, charging the Conference with deserting its duty in giving an appointment to a man so charged, who had not cleared himself, and insisting upon a speedy investigation. On the 27th of November

the investigation before the magistrates took place, and the charge was dismissed. On the 2nd of December a full account of the investigation was published in the *Wesleyan Times*,—it was a fair report; but it was accompanied by an article, commenting upon the fact, that the summons was dismissed solely for want of corroborative evidence, and proceeded thus:—"Mr. Clarkson's counsel declared that he had a clear answer to the case; that may have been the fact, but, if so, it is a pity that he did not urge the bench to let him adduce it. As the matter now stands, neither party has any cause for satisfaction—the defendant no more than the complainant. The judgment of the magistrates is neither a condemnation nor an acquittal—the case was not decided, it was dismissed." This was the first libel complained of. The second was on the 16th of December, which, after stating certain disputes in the Wesleyan body, proceeded thus:—"We might mention instances by the dozen, in which travelling preachers who had compromised themselves by immoralities, which the Conference was induced to regard with leniency, have been sent, without passing through any purgatory, to another circuit, there to undertake, without hesitation or delay, the hazardous responsibility of administering the Lord's Supper, and perhaps the much more hazardous responsibility of preaching entire sanctification to others. Is not every Methodist in the United Kingdom able to name at least one man who is at this present time doing every duty that falls to a travelling preacher, with the strongest accusation that a woman can make against a man hanging over him?" On the 23rd of December, the paper contained the following passage:—"Mr. Clarkson's conduct, so far as we know, was the reverse of all this: he called for neither accuser, charge, nor proof. Why? Was it that he knew all three were at hand?" And on the 13th of January, 1851, there was the following paragraph:—"Speaking of trials, we are glad to find that the trustees of the chapels in the Leeds second circuit have appointed a committee to examine into the case of *Clarkson v. Hiroms*. They are far from satisfied with Mr. Clarkson's explanations, and have determined that the case shall be thoroughly investigated. They purpose sending for the girl to Leeds, that the examination into the case may be made in the presence of both parties." It was established on cross-examination that it is a rule of the Conference, that if charges of immorality are made against a minister of that connection, those charges should be investigated, with a view to determine whether or not such minister is fit to remain in his calling: that an inquiry might be brought before the district meeting, but that the final settlement must be in the Conference: that all ministers may attend the Conference as members, if they have the permission of their district to attend; a charge must be made to enable the Conference to entertain it: no charge was made.

The Attorney-General, in addressing the jury for the defendant, declared that the defendant did not now, nor had he ever, affirmed the truth of the charge made by Charlotte Hiroms against Mr. Clarkson. All that he had done from the very first, was to contend that an accusation of so grave a character ought to be examined into by a competent body, and that the examination which had taken place before the magistrates ought not to be regarded as final and conclusive, inasmuch as it had failed, in consequence of the requirements of the Act of Parliament not having been complied with. The defendant had a right to assume that as the basis of his observations, if he acted *bona fide* and without malice. The gist of the present inquiry was whether the defendant had in writing thus intended to injure the prosecutor. To decide that question, the jury must look to all the circumstances of the case. Mr. Clarkson was occupying a public position; he was the minister of a large congregation, and if a charge was brought against a person in such a position—a charge which was calculated to bring scandal upon the community—it concerned the interests of that community, and of religion generally, that such a charge should be fully investigated. The first article inserted in the defendant's paper showed clearly that that was the object with which the matter was taken up by the defendant—it called upon the Conference to investigate the charge. The second article blamed the Conference for neglecting to investigate. Was it not a foul scandal that after such a charge was made against a Wesleyan minister, instead of the matter being investigated before a district meeting or before the Conference, the accused should be at once appointed to another district of importance? Under such circumstances the defendant, as an advocate of the interests of the connection, and as one of the reformers of the body, was barely discharging his duty in writing as he did. It was for the jury to say whether the defendant had written those articles for the purpose of maliciously injuring the character of Mr. Clarkson, or whether they were not written in a fair spirit, with a view to compel the Conference properly to discharge their duty in reference to accusations which might be brought against their ministers. If the defendant had acted maliciously

they must find him guilty; but if, looking to all the circumstances, they should think that he acted fairly and within the province of a public journalist, they would find the defendant not guilty.

Lord CAMPBELL, C.J. (to the jury).—My direction to you will be very nearly in the terms used by the learned Attorney-General. I shall advise you to consider whether the articles in the *Wesleyan Times* were prompted by a desire to be of service to the Wesleyan community, and were written with a view to promote the cause of religion and morality, or whether the defendant made himself a partisan, and wished to insinuate that Mr. Clarkson was actually guilty of the offence laid to his charge. It is of the greatest importance in this free country that judicial proceedings should be liable to be commented upon. There is no objection to any person saying that a judge or a jury has been mistaken, provided it is done temperately and in good faith; but such great freedom ought not to be made the medium for the gratification of private malice. If you should be of opinion, on looking deliberately at these papers, that they contain fair comments on the case, you will say that the defendant is not guilty; but if you think that the real purpose of the defendant was to convey to all who might read his journal, a clear opinion that the prosecutor was guilty of the offence charged against him, you will find the defendant guilty. It is much in the defendant's favour that he published a perfectly fair account of the investigation before the magistrates. That account was both full and fair; it was admitted to be so, and it was much to the credit of the defendant. The case is one of considerable hardship upon Mr. Clarkson, for the Conference to which he belongs appear to have been satisfied with his conduct; and when the case had been decided by the magistrates, he was still allowed to remain in his office, according to the rules of that most respectable body to which he belongs. At the same time, if you think that the defendant was acting fairly in the matter, though it may be hard upon Mr. Clarkson, it is your duty to say that the defendant is not guilty. If, on the other hand, you should think that he was not acting fairly, but maliciously, you will say that he is guilty of the charge now made against him.

Verdict, guilty.

Sir F. Theigier, Q.C. Atherton, and Russell, for the prosecution.

The Attorney-General, M. Chambers, Q.C. and Hance, for the defendant.

## Irish Reports.

## COURT OF CHANCERY.

Reported by J. BLACKHAM, Esq. Barrister-at-Law.

March 1 and April 16.

BOULGER v. SMITH.

**Will**—*Trustee*—*Unequal division of trust estate*. Where a trustee, to whom property is given by a will, is invested with an unlimited discretion as to the quantity of estate he may give the cestui que trusts, and he gives but a nominal share to one, the Court will not inquire into his reasons for so doing unless there be an allegation that he has been actuated by corrupt or dishonest motives in the distribution made by him.

This was a cause petition, and prayed an account of the real and personal estate of Michael Boulger, deceased. The facts were, that Michael Boulger, by his will, bequeathed to the Rev. Patrick Smith "all property of whatsoever kind I may die possessed of or entitled to at the time of my decease, in trust for the benefit or use of my children, Wm. and Anne Boulger; and my will and meaning is, that the Rev. Patrick Smith shall have the power and right to determine how much shall be given to each of my children aforesaid out of my property;" and he appointed the Rev. P. Smith and two others his executors. Probate was granted to the Rev. P. Smith alone, who went into possession of the testator's property; and subsequently, by deed of the 15th January, 1851, he appointed to the petitioner 20*l.* in cash, and 25*l.* per annum charged upon a house in Kevin-street. The petition contained several allegations to shew that the Rev. P. Smith had improperly exercised the power vested in him by the testator. The particulars of the testator's property returned, upon which the probate duty was estimated, amounted to 1,000*l.*

The answering affidavit of the respondent stated that the petitioner was a person of irreclaimably drunken and profligate habits, that every means of reclaiming him had been adopted by the respondent, without effect.

Wall, Q.C. with W. Darby, for the petitioner.—The question is, whether this is a fair provision, considering the nature and amount of the property left by the testator. This deed is not a fair appointment, and the Court will relieve. (*Gibson v. Kinsess*, 1 Vern. 66; *Warburton v. Warburton*, 2 Vern. 420; *Longmore v. Elicum*, 2 Yo. & Col. V.C. 363;

## IRELAND.

## IRELAND.

## IRELAND.

*Costabadie v. Costabadie*, 6 Han. 410; 11 Jur. 345; 16 L. J. 259, C.; *Astree v. Astree*, 2 Cas. in Chan. 57.)

The LORD CHANCELLOR.—There is a class of cases in which this Court has controlled a mother in the distribution of a fund for maintenance: they are all discussed in *Hodges v. Irwin*. I do not see what I can do with this case; it is not a case of maintenance, like *Costabadie v. Costabadie*, it is an ordinary power. Mr. Smith may change his mind as to the provision he has made for the petitioner; considering the latitude given by the testator to the respondent, I do not think I can interfere, unless the petitioner is in a position to shew some impropriety in the conduct of the respondent.

*Christian, Q.C. and Benjamin Stephens* for the respondent.—In the case referred to, the party seeking to set aside the appointment had been given interest in the fund, and the person to whose hands the distribution was entrusted, was not to maintain one object of the donor's bounty in preference to another. (*Civil v. Rich*, 1 Cha. C. 310; *Potter v. Chapman*, 1 Amb. 99; *Walker v. Walker*, 5 Mad. 426; 2 Sug. Pow. 193.) When there is a general power it has been held to be well exercised by the creation of a rent-charge in favour of the object. (*Theoclytus v. Dye*, 2 Vern. 80.)

*W. Darby* replied.

The LORD CHANCELLOR.—My present impression is, that I should dismiss this petition; but I will take time to consider the authorities which have been referred to. The words of the will in this case are very peculiar: that "the Rev. Patrick Smith shall have the power and right to determine how much shall be given to each of my children." Notwithstanding that clear expression of intention on the part of the testator, I am now required to take from the respondent that power which the testator has invested him with. I know of no authority going that length. Then one was to be found where the Court has controlled a capricious existence of such a power. The old authorities appear to proceed upon that ground in cases where the appointment was illusory; but Sir W. Grant, M.R. said (a) he would go so far as he was bound by authority, and no farther. Since those decisions an Act of Parliament has been passed, (b) it being considered that when an appointment was made, which, though it appeared to be illusory, yet good reason might be shewn for such an exercise of it, that it was proper that the Court should be in a position to consider those reasons, and that therefore it was better altogether to put an end to the doctrine, so that, as the law now stands, with keeping in view those reasons, we must look at the old cases with care. In *Costabadie v. Costabadie*, the plaintiff had an equitable interest in the residue, subject to the discretionary power, vested in her mother, and the trustee of the fund was bound to maintain the family; and the Court, looking at these reasons, will see that the power conferred is properly exercised. I find nothing in this petition shewing the respondent to be actuated by any other feeling than that of partiality for the sister of the petitioner. The Court will not investigate the reasons which have induced that partiality; the account rendered by the respondent appears to be a fair and honest one, and without a sufficient reason, I should be unwilling to put the parties to the expensive proceeding of having another account taken before the Master. It coming to this conclusion I do not proceed altogether upon the matters stated in the affidavits, but on the ground that the petition makes no case, no charge of a corrupt or dishonest dealing by the respondent with the fund committed to his charge. If I finally come to the conclusion that the petitioner is not entitled to an account, the words of the will being too strong to be got over, I will dismiss the petition with costs.

Wednesday, April 16.—The LORD CHANCELLOR.—I have looked into the authorities referred to, and on consideration I can see no ground to warrant me in interfering. Looking at the facts of this case, as between man and man, I would wish to have somewhat more information respecting it; but the question I have to consider is, whether this Court can interfere. [His lordship stated the facts.] Has Mr. Smith exercised a just and sound discretion? If he has done so, it is a difficult case to call upon this Court to interfere in, and since the doctrine of illusory appointments has been done away with, this Court cannot interfere upon that ground alone. Some cases bearing upon this question were strongly relied upon, and were properly submitted to the Court as shewing that this Court would interfere; but those were all cases in which the Court had something to guide,—something to be done shewing that the objects for whom the fund was given in trust were not to be disappointed. *Longmore v. Elmore*, 2 Y. & Col. 363, V.C. and *Costabadie v. Costabadie*, 6 Hare, 410, were relied upon, as shewing that the Court would interfere. In the latter

case, the Court granted an account, the parties being entitled to it on other grounds; but there is no case in which the Court has interfered where the party exercising the power of distribution had a right to make that distribution a final one; and there being nothing to guide him in the mode of distribution. *Gibson v. Kinven*, 1 Vern. 66, was the case of a power to a wife upon trust and confidence, that she would not dispose thereof, but for the benefit of her children. In *Warburton v. Warburton*, 2 Vern. 420, there was something to guide the Court as to the intention of the testator how legacies were to be taken. In *Burrell v. Burrell*, 1 Amb. 659, there was also a guide for the Court to act upon. *Civil v. Rich*, 1 Cas. in Ch. 309, was a strong case; but the Court held that the trustee was the sole judge of the mode of distribution; as was also the case in *Walker v. Walker*, 5 Mad. 424. On these grounds it appears to me that these cases do not support the argument in support of which they have been cited. Recollecting, then, that this gentleman was the sole judge, the facts stated in the affidavit shew that he had good grounds for exercising, in the manner he has done, the discretion vested in him. Another difficulty is, that to give any account to the petitioner is inseparable from the necessity of the respondent's rendering an account to the sister of the petitioner also. She does not require any account, but if she requires it she may present a petition also. In consequence of the scandalous charges made in this petition against Mr. Smith, and which have not been proved, I will dismiss the petition with costs.

*Petition dismissed.*

## LORD v. MURRAY.

*Action-at-law—Injunction to remove nuisance. Where A. by erecting across a river a mill weir, between B's mill and the mill of A. had occasioned the mill of B. to be flooded, and B. brought an action and obtained a verdict thereon against A. for the special damage: Held, that the Court had jurisdiction by injunction to compel A. to discontinue the nuisance. Held, also, that the trial had not being under the direction of the Court, the parties were entitled to an issue to try the case at law, though the Court expressed its approval of the trial already had.*

This was a cause petition. It appeared that the plaintiff was the owner of a mill on the river Dodder, and the defendant of a mill contiguous to and below the mill of the plaintiff. That the defendant in August 1849 erected a weir across the river, which had the effect of throwing back the water and flooding the mill of the plaintiff, and that for the damage done thereby, the plaintiff brought an action in the Court of Q.B. and obtained a verdict. The defendant having declined to remove the weir the plaintiff presented this petition, praying that the defendant should be directed to abate the nuisance.

*Martley, Q.C. and John F. Walker*, for the petition, cited Mit. Pl. 144; *Ryder v. Bentham*, 1 Ves. 143; *The Attorney-General v. Nichol*, 16 Ves. 338; *Blake v. The Glamorganshire Canal Company*, 1 My. & K. 181; *Robinson v. Lord Byron*, 1 Bro. C. C. 589; *Lane v. Newdigate*, 10 Ves. 192; *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 189.

*F. Fitzgerald, Q.C. and Coates*, for the respondent, cited *Weller v. Smeaton*, 1 Cox, 102.

*Isaac O'Callaghan*, for a lessee of the defendant. The LORD CHANCELLOR.—I am perfectly satisfied as to the jurisdiction of the Court to make a decree in conformity with the prayer of the petition. I shall, however, look into the authorities before I express a final opinion.

Wednesday, April 16.—The LORD CHANCELLOR (after stating the facts).—When this case was formerly before me, it appeared to me to be one which was properly within the authority of a Court of Equity. I was impressed by the argument that there was no instance of a decree, establishing the question as to whether this jurisdiction was ever exercised, pending the trial of a legal right, but it appears to me to fall within that elementary jurisdiction inherent in this Court, of giving relief when the right having been established at law, it only remains to give effect to the rights of the parties. The questions I have then to decide are, whether there is not a discretion in the Court, and whether this is a case in which the Court should interfere. The Court will, in some instances, interfere at once, and sometimes not until the rights of the parties be fully established at law, and then the power of the Court to adopt this course appears to me to be fully established by the case of *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 193. *Weller v. Smeaton*, 1 Cox, 102, was a bill by the lessee of an ancient mill, stating his own title, and charging that defendant had erected certain floodgates and other works upon the said river, &c. and prayed that defendant might be decreed to pull down his several works, and might be restrained by injunction from building any other works. Demurrer,

that the plaintiff should have established his right at law. The Lord Chancellor said, "Most of the cases had been looked into in the case of *Welly v. The Duke of Portland*, in the House of Lords, and it was found that in no instance, except that of *Bush v. Western*, Pre. Ch. 530, this Court had ever interposed in a mere question of right between A. and B. they having an immediate opportunity of trying the right at law, which would be definitive. If after the trial the party should begin again, and commit trespasses, it is possible a case might be made to induce this Court to entertain the bill." The demurrer was allowed. The question then discussed was, whether the relief could be given in this court till the right had been ascertained at law. *Sampson v. Smith*, 8 Sim. 272, was a question of parties. In *Robinson v. Byron*, 1 Bro. Ch. C. 589, the facts came before the Court upon motion. The history of that case will be found reported in 2 Cox, p. 4. The Lord Chancellor there said that upon his recollection of the cases he did not conceive that a right was ever considered in the Court of Chancery as determined, with a view to a perpetual injunction by any one trial at law, unless upon an issue sent out of that Court for the purpose. In *Crowder v. Kutler*, 19 Ves. 617, Lord Eldon, p. 625, speaking of that case, said "that was not a case in which Lord Byron had done anything exposing him to an action of damages, as the act done could not be regarded as one that might or might not, depending upon the effect of further Acts, be injurious to the plaintiffs; there was an action then depending for what had been done already; the Court, therefore, imposed upon them the necessity of going speedily to the trial of that action, maintaining the injunction in the meantime, and providing against delay; and the right being established at law the Court granted a perpetual injunction. In *Dawson v. Paver*, 5 Hare, 439, a form of decree is given. In *Ryder v. Bentham*, 1 Ves. sen. 543, the Lord Chancellor said "he never knew of an order having been made to pull down any thing upon motion," but he does not say that it might not be done; but that case recognises the jurisdiction of the Court to effect by decree that object after a trial is had. In *East-India Company v. Vincent*, 2 Atk. 83, the Court decreed the wall erected by the defendant to be pulled down. In *Lane v. Newdigate*, 10 Ves. 192, the Court made an order, the effect of which was to restore a stopgate which had been removed. In *Mostin v. Nulkin*, 2 F. W. 266; 2 Eq. C. At. 23, pl. 22, the Court at the hearing granted a perpetual injunction against the ringing of the parish bell the legal right being clear. Having considered these authorities, I am of opinion that it is necessary that there should be a trial under the direction of the Court; I am by no means dissatisfied with that trial which has already been had, but if the parties wish it I will direct an issue, and if it were not that I wished to let the parties have this opportunity afforded them, I would have disposed of this case during the vacation.

## COURT OF QUEEN'S BENCH.

Reported by W. ST. LEXER BARRINGTON, Esq.  
Barrister-at-Law.

May 9 and 11.

THE MIDLAND GREAT WESTERN RAILWAY COMPANY v. MICHAEL QUIN, JUN.  
SAME v. SAME.

*Railway Company—Action for calls—Plea of infancy—Demurrer—Necessity of pleading a repudiation of the contract by the infant—Companies Clauses Act.*

To an action by a railway company for calls, the defendant pleaded that he had bought the shares in question, and that an agreement was entered into between the plaintiffs and the defendant, whereby, in consideration that he would undertake and agree to pay all calls that should thereafter be made in respect of said shares, the plaintiffs undertook to place his name on the register of shareholders; and that before and at the time he bought the said shares, and before and at the time of the making of the said agreement, and before and at the time of placing his name on the register of the company, and before and at the time of the making of the calls and each of them, he was and still is an infant under the age of twenty-one years, to wit, of the age of nineteen years; and that he has not at any time derived, and does not seek or claim to derive, any profit or benefit or advantage whatsoever from the said shares, or any of them, by reason of his being such registered shareholder as aforesaid.

Held, that the plea was bad on general demurrer, by reason of the absence of any averment of an express repudiation by the defendant of any title or interest in the shares.

These were two actions brought by the Midland Great Western Railway Company of Ireland against the defendant, as a shareholder in the company, to recover the sums of 800*l.* and 200*l.* respectively, being the amount of calls made by the company in

(a) *Smile, in Butcher v. Butcher*, 9 Ves. 383; *Mocatta v. Latham*, 13 Ves. 133.

(b) 11 Geo. 4 & 1 Wm. 4, c. 46.



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respect of certain shares of which the defendant was the registered proprietor.

To the two declarations the defendant pleaded the general issue and two special pleas. To one of the declarations he pleaded, that the alleged cause of action arose in virtue of an agreement between him and the said company, by which the company were to allot to him certain shares, which were afterwards so allotted and registered in his name; and that at the time of the said agreement and registration he was and still is an infant. The second plea was similar to the first, except that it contained an averment that the defendant never had derived, and did not seek or claim to derive, any profit, benefit, or advantage whatsoever from the shares. To these special pleas (which will be found sufficiently fully set out in the judgment of the Court) the plaintiffs demurred generally.

*B. Armstrong*, in support of the demurrer, contended that the pleas were bad, inasmuch as they did not expressly aver that the defendant repudiated the contract. That in order to have availed himself of his minority he ought, by his pleas, to have expressly avowed that he had repudiated the contract; and cited *The Cork and Brandon Railway Company v. Cazenove*, 10 Q. B. 939; *Midland Great Western Railway Company v. Quin*, 1 Jur. 260; *North-Western Railway Company v. M'Michael*, 5 Railw. C. 114; *Leeds and Thirsk Railway Company v. Pennrley*, 4 Ex. Rep. 31; *Kelsey's case*, Cro. J. 320; *Kirton v. Elliot*, 2 Buls. 69.

*Fitzgibbon, Q.C.*, and *O'Hara*, contra, insisted that the filing of the pleas was a sufficient repudiation of the contract, and further, that the defendant could not, until he came of age, validly repudiate it. (*Bligh v. Priest*, 2 Y. & Coll. 268; and *Cork and Brandon Railway Company v. Cazenove*, 10 Q. B. 939.)

*Malley, Q.C.* replied. *Cur. adv. vult.*

JUDGMENT.

*Monday, May 12.*—*BLACKBURN, C.J.* delivered the judgment of the Court.—In this case two actions have been brought by the Midland Great Western Railway Company to recover the respective sums of 900l. and 200l. claimed by them in respect of calls due on foot of forty shares in the company held by the defendant. In both these cases the plaintiffs sue for calls alleged to be due by the defendant as the registered holder of shares in the company. The declarations are in the common form, and the defendant, by his guardian, has filed two special pleas; one to each declaration, and the plaintiffs have demurred to each of those special pleas. In one of those pleas the defendant says, "that he ought not to be charged with the said sum of 200l. above demanded or any part thereof, because he says that before the making of the said several calls in the said declaration mentioned, or any of them, and before any person had been registered as the holder of the said shares in the said declaration mentioned; or any of them, to wit, on the 1st day of July, in the year of our Lord 1847, at Dublin, in the county of the city of Dublin aforesaid, this defendant had bought the said several shares in the said declaration mentioned, for divers large sums of money, then and there paid to divers persons then and there claiming to be entitled to the said shares; that is to say, a large sum, to wit, the sum of 4l. for and in respect of each of said shares, making in all a large sum, to wit, the sum of 160l. sterling; and the defendant saith that afterwards and before the said several calls, or any of them, were or was made, and before any person or persons were or was registered as the holder of said shares or any of them, to wit, on the day and year aforesaid, in the county of the city of Dublin aforesaid, an agreement was made and entered into between the said plaintiffs and the defendant, whereby, in consideration that this defendant would undertake and agree to pay all calls that should thereafter be made in respect of the said shares in the said declaration mentioned, and of every of them, the said plaintiffs undertook and promised this defendant to place the name of the defendant on the register of shareholders for the said company; and this defendant further avers, that in pursuance of the said agreement, the said plaintiffs afterwards, to wit, on the 18th day of December, in the year of our Lord, 1845, at Dublin, in the county of the city of Dublin aforesaid, did place on the register of shareholders of the said company the name of the defendant, as the holder of the said shares in said declaration mentioned; and the defendant further avers, that before and at the time that the defendant so as aforesaid bought the said shares, or any of them, and before and at the time of the making of the said agreement between the said plaintiffs and the defendants, and before and at the time that this defendant's name was so placed on the registry of shareholders of the said company, and before and at the time of the making of the calls in the said declaration mentioned, and each and every of them, this defendant was and still is an infant under the age of twenty-one years, to wit, of the age of nineteen years, to wit, at Dublin aforesaid, in the county of the city of Dublin;

and the defendant further avers that he (the defendant) has not at any time derived, and does not seek or claim to derive, any profit, benefit, or advantage whatsoever from the said shares, or any of them, or by reason of his being such registered shareholder as aforesaid; and this he, the said defendant, is ready to verify, wherefore he prays judgment." &c. The second plea in the other case is similar, except that it omits the last averment, which I have stated. The question which arises in this case, namely, is an infant liable to be sued upon such a contract as this, is settled by authority; for, although the position laid down by Lord Denman in *The Cork and Brandon Railway Company v. Cazenove*, 10 Q. B. 923, must be taken with some qualification, yet it is plain from the authorities, and we have acted upon them in this Court, that no mere plea of infancy by a contractor will be sufficient in an action against a shareholder for calls, but he must take another step whenever he seeks to avoid the contract before or after he comes of age, by repudiating the shares and any interest in them. This is expressly decided in the case of *The Newry and Enniskillen Railway Company v. Coombe*, 3 Ex. Rep. 563. Now if an infant might repudiate, the question is, must he not do so by so pleading as to shew an entire abandonment of all interest in the shares? Nothing can be more consonant to justice or principle than to require him to do this; for while his name remains on the registry he has an indisputable legal right to share in the profits of the very undertaking, which, so far as in him lies, he frustrates by refusing to contribute to those funds by means of which the profits are to be realised. The question then is, can either of these pleas admit of such a construction as would shew that the defendant has divested himself of all those shares? In the first plea there is a total absence of any such averment, and in the other the defendant does not expressly disclaim any benefit of the shares. No notice to that effect is given to the company, and the omission is fatal, the defendant was bound, if relying on the defence of infancy, to abandon those shares, the retention of which was prejudicial to the company and to all its members. I think, for these reasons, that the demurrers should be allowed, and the other members of the Court concur in the same opinion.

Judgment for the plaintiffs.

Equity Courts.

LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Saturday, July 19.

DEW V. CLARKE.

*Chancery prisoner for contempt—Nonpayment of money—Act 1 Wm. 4, c. 36—Insolvent debtor.*  
The Court has no power to discharge a prisoner committed for contempt in nonpayment of a sum of money directed by an order of the Court to be paid by him under the Act 1 Wm. 4, c. 36, or otherwise, but persons so committed who are unable to pay the sum ordered to be paid must resort to the ordinary tribunal for the relief of insolvent debtors.

This was a petition presented by the defendant, who had been for many years confined in prison for contempt of the Court in nonpayment of the sum of 5,000l. which he and his late brother and co-defendant, Valentine Clarke, had been ordered to pay to the receiver in this cause. They had also been ordered to deliver up certain deeds and documents: Valentine Clarke had absconded and died at Boulogne, but the petitioner had been committed to prison in 1827, where he had since remained, having neither paid the money nor delivered up the deeds. On a recent application to the Master of the Rolls, his Honour discharged the defendant from his contempt in respect of the delivery of the documents, in consideration of his long imprisonment, upon his making an affidavit that he has not the deeds in his possession, and does not know what has become of them, and stating that his late brother, Valentine Clarke, had taken the deeds away with him to Boulogne.

*Jas. Parker and Frith* now supported the defendant's petition which was presented under the 1 Wm. 4, c. 36, s. 16, commonly called Sir Edward Sugden's Act.

*Morris and Hughes* opposed the defendant's discharge, on the ground that he was imprisoned solely through his own obstinacy, and that he might at once obtain his discharge by application to the Insolvent Debtors Court; but he desired to avoid that course because there the plaintiff could examine him on oath, both as to the money and the abstracted deeds.

The facts of the case are stated by the Lord Chancellor in his

JUDGMENT.

The LORD CHANCELLOR (after stating various

proceedings which had taken place in the cause by and against the defendant and his late brother) added—The disputes originated in the administration of the estate of Eli Stott, father of the plaintiff, Mrs. Dew. He was found a lunatic in 1821, and died the same year, leaving property of the value of 40,000l. and a will made in 1818, prior to the finding of the lunacy. The executors named in that will renounced probate under the impression that the testator was not sane at the time he made the will. Then the testator's nephews, Valentine and Benjamin Clarke, the residuary legatees named in the will, applied to the Ecclesiastical Court, and having there obtained administration with the will annexed, proceeded to take possession of the estate. Mrs. Dew, the only child and sole next of kin of the testator, instituted a suit in the Ecclesiastical Court to recall the administration upon the ground of the insanity, which consisted simply of a monomania respecting herself, always speaking of her as a worthless, vile, and demoniacal person, and treating her with the greatest harshness and cruelty. The daughter succeeded in Doctors' Commons, and the administration granted to the Clarks was recalled and administration granted to Mrs. Dew. There was then an appeal to the Court of Delegates, where the decree of the Court below was affirmed. [For those proceedings see 1 Huggard, 311; 1 Addams, 288; 2 Addams, 103; and 3 Addams, 79.] Mrs. Dew then filed her bill in this Court against the two Clarks for an account of the moneys received by them from the estate of the deceased. An order was made on them to produce certain papers and documents in their possession relating to the estate; and also to pay into Court a sum of 5,000l. admitted to have been received by them. They had made application for a commission of review, which came before Lord Lyndhurst, then Lord Chancellor, who refused the application. They then filed a bill against Mrs. Dew and others, but that suit was not prosecuted, Thomas Clarke having been at that time incarcerated in prison for disobedience to the order of the Court. His brother Valentine had gone out of the country, and taken the documents with him, and died abroad. [For an account of the proceedings of the suits in this Court see 1 Sim. & Stuart, 108; 4 Russ. 373; 5 Russ. 163; and 1 Myl. & K. 103.] The costs of all these proceedings exceeded 10,000l., all of which were paid out of Eli Stott's estate. There were several attachments for costs against Thomas Clarke, besides the order of attachment for non-payment of the 5,000l. That sum is a debt, and this Court has not the power of discharging the prisoners from it. The Master of the Rolls has already discharged him from the contempt for non-production of the documents, it appearing that Valentine Clarke had taken them with him, but he refused to discharge him from the contempt as to the 5,000l. That was as just a debt as any debt could be to the estate of Eli Stott. If the petitioner seriously wished to be discharged from prison, his course was to pay the debt, or give up all the property he had towards the payment of it, and apply to the Court for relief of insolvent debtors, and he would, upon giving up all his property, obtain his discharge. Whatever disposition I may have to discharge him, I have not the power. The case does not come under Sir E. Sugden's Act, and I must refuse the prayer of the petition.

ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

July 24 and 25.

MATHEW v. BRISE.

*Testamentary guardian under 12 Car. 2, c. 24—Trustee—Account—Statute of Limitations.*  
A testamentary guardian appointed under the statute 12 Car. 2, c. 24, is a trustee, and the Statute of Limitations is inapplicable as between him and his ward.

Accordingly, where a testamentary guardian entered as guardian into possession and receipt of the rents and profits of real estate, &c. devised to his ward, and so continued till after the ward attained twenty-one, and ten years after the ward attained twenty-one, and nine years after his death, a bill was filed for an account, it was held that he was a trustee and could not set up the Statute of Limitations as a defence, but must render an account as between trustee and cestui que trust.

In this case the testator, the Rev. Edward William Mathew, died in 1834, having, by his will, devised real estates to his son William Brise Mathew, then an infant of sixteen years of age, and having appointed his wife, the plaintiff, Charlotte Olivia Mathew, and the defendant, John R. Brise, the guardians of the infant W. B. Mathew. After the testator's death J. R. Brise, as guardian, entered into the possession and receipt of the rents of the real estates, and he continued in possession until the 10th of March, 1839, when W. B. Mathew attained

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his age of twenty-one years. W. B. Mathew died in May, 1840, and in the August following letters of administration were granted to the plaintiff, Charlotte Olivia Mathew, who, on the 22nd December, 1849, filed the present bill against J. R. Brise for an account of the rents of the real estates received by him. The defendant, however, insisted that the plaintiff was barred by the Statute of Limitations, and by lapse of time, from making any demand against him as late guardian of W. B. Mathew. It appeared that the defendant had been concerned in other matters for the plaintiff and her family besides being joint guardian with her of her son, and in respect of these he had various accounts which it was alleged he had blended together. Mrs. Elizabeth Maria Mathew, who was the mother of Edward William Mathew, the testator in the case, died on the 17th of February, 1835, having by her will given the plaintiff a life interest in certain property, and having appointed the defendant her executor, and the defendant was also employed by the plaintiff to assist her in taking letters of administration to her son, so that the defendant was accountable to the plaintiff in three several ways,—first, in her capacity of administratrix to her son; secondly, as tenant for life under the will of Mr. E. M. Mathew, under which she was entitled to considerable benefit; and, thirdly, as joint guardian with her of her son, and receiver of the rents of his real estate. There was a good deal of correspondence between the solicitors of the parties and the parties themselves, but ultimately the defendant, not being able to produce vouchers for certain items of disbursements, and the items being therefore objected to, the plaintiff set up the Statute of Limitations, and refused to give any further account. The cause now came on to be heard.

R. Palmer, Chandless, and Caldecott, for the plaintiff, contended that the plaintiff, as testamentary guardian, and in receipt of the rents of the real estates, was in fact a trustee for the infant, and therefore the Statute of Limitations was inapplicable; that as it was by the defendant's own request the delay in taking the account occurred, and the proceedings were suspended, no objection could be taken on that ground; and that the payments were all made on one combined account, without reference to any particular fund, and without any specific appropriation, and therefore, though plaintiff might not be a trustee, the account as to the ward was still open. They cited *Burrell v. Sibbald*, 15 Ves. 185; *Simpson v. Ingham*, 2 Barn. & Cr. 95; *Waters v. Tompkins*, 2 Cr. M. & R. 723; *Cleave v. Jones*, 15 Jur. 515; *Mellish v. Mellish*, 1 S. & St. 145.

Craig and Greenidge, for the defendant, insisted that the defendant was not a trustee after the infant came of age, whatever he might be before, and that he received the rents as testamentary guardian under and by virtue of operation of the stat. 12 Car. 2, c. 24, and not as trustee, which character, they contended, did not belong to him at all. They cited Co. Litt. 87 b; stat. 21 Jac. 1, c. 16; *Lockey v. Lockey*, Prec. Ch. 518; *Foley v. Hill*, 1 Ph. 399; *Beckford v. Wade*, 17 Ves. 87; Bac. Abr. "Guar. & Ward"; *Beaufort v. Berty*, 1 P. W. 703.

THE MASTER OF THE ROLLS.—The case is one in which the question is, whether this relation of testamentary guardian and ward is a strict relation of trustee and *cestui que trust*. It is a peculiar relation, and as testamentary guardian he is not merely guardian of the property and estate, but he is also a guardian of the person, and bound to see to the education, maintenance, &c. of the ward, and therefore he must be made responsible for the discharge of those duties. In *The Duke of Beaufort v. Berty*, 1 P. W. 703, Lord Maclesfield observed, "that guardians were but trustees, and that the statute by enabling the father to devise the guardianship of his children, did no more than empower the father by will to choose a different person than what the law would have appointed, and to continue that guardianship to a different time than the guardianship in sorage would have continued, viz. until 21 instead of 14, but that still a guardian appointed according to the statute had no more power than a guardian in sorage, and as the Court could interpose where there was a guardianship in sorage, so might it also do in a case of guardianship by the statute, both being equally trustees; and that this Court would interpose if guardians gave occasion to suspect their behaviour, and that this interference was grounded upon the general power and jurisdiction which it had over all trusts,—and a guardianship was most plainly a trust." The guardianship, therefore, is not confined to property, but goes much beyond that. All the property a guardian acquires in that character is held by him as a trustee for the ward, to be applied for his education, support, &c. In *Mellish v. Mellish*, Sir John Leach granted an injunction to restrain proceedings in an action by the guardian to recover the balance claimed by him on account of transactions after the ward came of age; another account was to be taken on equitable principles, and it was sufficient for the purpose of obtaining the injunction to shew that the relation of

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guardian and ward existed. Now, on what principle are accounts taken in this court? Accounts are taken in this court where there are mutual and complicated dealings and accounts, or between parties who stand in a fiduciary relation, but not between two strangers. An account may be taken, however, in this court between the guardian and ward, and if a wrong item is introduced it will not be allowed, and yet the account is all one side, and there is nothing at all like mutual accounts, and therefore the account can only be taken on the ground that the relation of trustee and *cestui que trust* exists between the parties. Again, a guardian in such cases gets his costs as between solicitor and client, and in taking the account is charged with interest on balances in hand, and that can only be on the ground that the relation of trustee and *cestui que trust* exists. It is said that the Court acts sometimes in analogy and sometimes in obedience to the statute of limitations, and if there has been a waiver of the right or an acquiescence in the facts of the accounting parties, then the Court will not interpose, and that is true if the account has been fairly made out and settled. But here it is not pretended that the accounts were settled or taken at all, and it is now nearly ten years since the infant attained twenty-one, and nine years since he died. It is said, however, that the guardian in this case after so long a time is unable to produce accounts for many of the items; but if he is not able to do so, that is no reason why an account should not be directed. I am clearly of opinion that the guardian must be treated as a trustee, and that, therefore, subject to anything Mr. Craig may say to-morrow morning, and to any authority he may produce, I must direct an account to be taken in the usual manner, as between trustee and *cestui que trust*.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLWORTH, Esq. of the Middle Temple.  
Barrister-at-Law.

Monday, April 28.

WOODFORD v. WOODFORD.

Claim—Parties—Residuary legatees.

The administrator of A. B. entitled to a moiety of a definite sum, appropriated in respect of two thirteenth shares of a residue, and also entitled to a tenth part of the other moiety, filed a claim against the executor for payment: Held, that the persons entitled to the other shares were necessary parties.

This was a claim by Joseph Woodford, the administrator of Walter William Woodford, one of the residuary legatees of John Woodford, who died on the 3rd of June, 1838, and who, by his will dated the 11th of August, 1836, gave the residue of his personal estate to trustees upon trust, to convert the same into money, and to stand possessed thereof as to two thirteenth parts in trust for Walter William Woodford and John Woodford equally to be divided between them, and to be vested interests, and to be paid and payable to them at their respective ages of twenty years; and the said testator directed, that during the lives and life of the said Walter William Woodford and John Woodford, and such suspense of vesting of their shares as aforesaid, the said trustees should stand and be possessed of the said two thirteenth parts or shares in trust to invest the same as therein mentioned, and to pay the income thereof for or towards the maintenance of the said W. W. Woodford and J. Woodford, in equal shares; but in case either of them the said W. W. Woodford and J. Woodford should die without obtaining such vested interest as aforesaid and without issue, then to be divided among all the testator's other nephews and nieces to whom the other shares had been given.

The claim stated, that with the exception of the said two thirteenth shares and one other which was sufficiently secured, all the shares were duly paid; that in the year 1841 the trustees, through their solicitor, transmitted a copy of the residuary account, whereby it appeared that the two thirteenth shares amounted to 595l. 3s. 2d.; that W. W. Woodford attained his age of twenty years, and died on the 8th of May, 1848; and that the claimant was his administrator; that John Woodford died under twenty, and, consequently, the claimant had become entitled to an eleventh part of the moiety of the said fund; that one of the trustees became bankrupt, and that the other placed the sum to a joint account with the other trustee at a bank, where the whole was lost; and that the defendant, the solvent trustee, was liable to make good the same. The claimant, therefore, prayed the payment of the sum due to W. W. Woodford.

Wigram and F. S. Williams in support of the claim.

R. Palmer and Renshaw, for the defendant, objected that the other parties entitled to the residue of the testator's estate ought to be parties to the suit.

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The cases of *Perry v. Knott*, 5 Bea. 293, and *Lenaghan v. Smith*, 2 Ph. 301, were cited.

The VICE-CHANCELLOR said that he considered the defendant was entitled to be delivered at once from such a trust, and directed the claim to stand over, with liberty to amend by adding parties or otherwise.

Thursday, April 24.

GILLIES v. LONGLANDS.  
Settlement—Real estate—Will.

In 1789 a sum of money was vested in trustees in trust for A. the wife of B. and in that year the money was invested in the purchase of real estate which was conveyed to the trustees upon trust for A. for life for her separate use, and after her decease for the children of A. and B. and in default of children, without lawful issue, then for B. in fee. The deed also contained a power for the trustees, with the consent of A. and B. to sell and re-invest the proceeds in the purchase of real estate. In 1801 the real estate was sold, and the proceeds were invested in stock, and afterwards re-invested in other stock. In 1815 the surviving trustee executed a declaration of trust of the stock by reference to the trusts of the deed of 1789. In 1835 B. died, leaving a son and two daughters surviving. The son died in A.'s lifetime, leaving a child. A. died, leaving her two daughters her surviving, and by her will she gave all her personal estate to her daughters, but made no disposition of real estate. A suit was instituted by the infant child of the son, claiming an interest in the stock before mentioned, and it was

Held, that the stock remained as real estate; that the ultimate trust under the deed of 1789 was in favour of A. absolutely, subject to the life interests of her children, but that the same did not pass by her will, and therefore descended to the infant child of her son, as her heir-at-law.

The sum of 1,850l. Jamaica currency, was in 1789 vested in William Campbell and John Cunningham, in trust for Elizabeth Mary Gillies, the wife of MacLaurin Gillies, of Jamaica; and in the same year this money was invested by them with the concurrence of MacLaurin Gillies and his wife in real estate. By an indenture dated the 1st of September, 1789, and duly enrolled in Jamaica, James Ingram, in consideration of 1,850l. Jamaica currency, paid to him by Campbell and Cunningham, conveyed to them a messuage, land, and hereditaments, called Fowler's-hill, in Montego Bay, in Jamaica, to hold the same, with the appurtenances, unto and to the use of the said Campbell and Cunningham, and the survivor of them, and the heirs, executors, and administrators of such survivor, upon trust for the sole and separate use of Elizabeth Mary Gillies for her natural life, and after her decease in trust and to and for the use, benefit, and behoof of all and every the children (if more than one) of the body of the said MacLaurin Gillies on the body of the said Elizabeth Mary, his wife, begotten and to be begotten, to be equally divided amongst them, share and share alike, to take as tenants in common, and not as joint tenants, and in default of such child or children, without lawful issue, then in trust and to the use of the said MacLaurin Gillies, his heirs and assigns, for ever. The indenture also contained a proviso, that it should be lawful for MacLaurin Gillies, and Elizabeth Mary, his wife, to sell, and the trustees, at the request of MacLaurin Gillies and his wife, to consent to such sale of the said hereditaments, and to lay out the moneys arising by such sale or sales in the purchase of other freehold hereditaments as might be directed by Gillies and his wife, and to resell and reinvest the moneys on new purchases, as often as Gillies and his wife should think fit, such hereditaments so to be purchased as aforesaid, *toties quoties*, to be settled, conveyed, and assured to, and for such uses, intents, and purposes, upon such trusts, and under and subject to such provisos, limitations, and agreements, as were thereinbefore expressed concerning the said hereditaments thereby granted. In 1801 Campbell and Cunningham, at the request of Gillies and his wife, sold the hereditaments, and the settlement was delivered over to the purchaser. The moneys arising from the sale were from time to time invested in various securities by the trustees, and in 1815 they were invested in a sum of 1,700l. Navy five per cent. annuities, in the name of Campbell the surviving trustee. In February, 1815, Campbell executed a deed, declaring that the sum was held by him upon the trusts of the deed of 1st of September, 1789. The stock was never again invested in the purchase of land, and Mrs. Gillies received the dividends as they became due. MacLaurin Gillies died in 1835, intestate, leaving Elizabeth Mary, his widow, and George Gillies, his eldest surviving son, him surviving. Elizabeth Mary Gillies by her will, dated the 4th of September, 1841, bequeathed as follows:—"I give and bequeath all my moneys, and securities for moneys, goods, chattels, credits, and all other my personal estate and

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effects whatsoever and whosoever, and of every kind soever, which I shall be possessed of or entitled to at the time of my decease, either in possession, remainder, reversion, or expectancy, subject to the payment thereof of all my just debts and funeral and testamentary expenses, unto my two daughters, Elizabeth Gillies and Martha Gillies, of Exmouth, equally to be divided between them, share and share alike, as tenants in common; and I make, nominate, and appoint, my said two daughters, Elizabeth Gillies and Martha Gillies, the executrices of this my will." The testatrix died in April 1845. Mr. and Mrs. Gillies had thirteen children, of whom one died before the date of the deed of 1789, nine after that date, and during the life of Mr. and Mrs. Gillies; the said George Gillies, who died after his father, but in his mother's life-time, leaving issue; and the two daughters mentioned in Mrs. Gillies's will, both of whom survived their mother. The present suit was instituted on behalf of the infant son of George Gillies, for the purpose of establishing his right to ten twelfth parts of 1,785l. three and a-quarter per cent. Bank Annuities, which represented the estate settled by the deed of 1789.

*Walker and Stevens*, for the plaintiffs, contended that the stock must be considered as real estate, and that Mrs. Gillies had not by her will disposed of her resulting interest in the same under the deed.

*Teed and Rennalls and K. Parker and C. P. Phillips*, for the defendants.

The following cases were cited: *Hereford v. Ravenhill*, 1 Bea. 481; 5 Bea. 51; *Triguet v. Thornton*, 12 Ves. 345; and *Cookson v. Cookson*, 12 Cl. & Fin. 121.

The VICE-CHANCELLOR said it appeared to him that the just inference from the will before the Court was that the sum of 1,850l. laid out in 1796 in the purchase of real estate was in every sense personality belonging to Mr. and Mrs. Gillies, or to him in her right. It was not a just inference from the materials before the Court that that sum absolutely, to all intents and purposes, was reduced into possession by the husband. In his opinion it ought to be taken that the money found its way direct from those who represented the estate into the hands of the trustees of the deed of 1789; still he was of opinion that it was competent to the wife to direct its investment in real estate. He was of opinion, therefore, that that investment bound the husband and wife; that the property, therefore, became to all intents and purposes real estate, and that considering the nature of the settlement after the marriage of Mr. and Mrs. Gillies, the length of time that had elapsed since that deed, and the want of contemporaneous evidence beyond it, the rights in that real estate must be bound by the deed as it stood. There was nothing in which the deed could be reformed or amended; it would probably have been different had it been a case of marriage articles. According to the true construction of the deed his Honour thought that it gave the property beneficially to Mrs. Gillies for her life to her separate use, afterwards to her children, so many soever as there might be, for life; but the deed did not validly do any more, for the remainder professed to be given to the husband was not only after the death of the children, but after the death of the children without lawful issue. So far, therefore, there was no trust created. The trust resulted, according to the title of the money, not as money, but as land; still land according to the title to the money, and, as his Honour was of opinion that that money was not reduced absolutely into possession, he thought, in effect, that the trust of the land was for the husband and the wife, and as the husband died without doing any further act to affect the property, the trust took effect ultimately for the single and absolute benefit of the wife. It appeared, however, that in the year 1801, twelve years after the settlement, the property was sold; and the produce was invested in the funds, and afterwards placed in another kind of stock, which yielded more income, and the trusts of that fund were declared by the deed of 1815, in which the husband and the wife, so far as she could join, joined in declaring the stock to be upon the trusts of the deed of 1789, leaving it, therefore, real estate. The husband died in 1835, and was survived by three children of the marriage, and the wife, who died in 1845, was also survived by two children of the marriage. There was no doubt whatever, but that at the death of the husband the fund was impressed with the character of real estate. After the husband's death, the wife had no power of herself to change that character, because her children had a voice in the matter, inasmuch as they were entitled to the life interests in remainder. But even if that were out of the case, there was no evidence whatever to shew that the widow intended to change the character of the fund; and it was not the actual state of the fund, but the state in which it ought to have been, that governed the case, and the fund remained as it was originally, unless there had been an act declaratory of the intention to change it; an act which, in *Triguet v. Thornton*, was held to be

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effectual. In the present case, his Honour found no such act; he found himself obliged to say, that during the whole of the life of Mrs. Gillies, after her husband's death, this remained impressed with the character of real estate; that was, subject to the trust to be invested in land to be settled on Mrs. Gillies for life, remainder to the daughters for their lives, with remainder to Mrs. Gillies in fee. Having been survived by her daughters, he did not apprehend that it was competent for her, by her will, to direct a different mode of disposing of the fund. Still, however, as she had the absolute property, subject to her daughter's reversionary life interests, she might, by any words fit for the purpose, have declared how, subject to their life interests, it should go; therefore, if she had given all her property, in general words, no doubt it would have passed. Most unluckily, however, meaning, as he could not but suppose she did, to give everything she had in the world to her daughters, she had used only words descriptive of personal estate merely. She had given her personal estate in remainder reversion or expectancy, but that gift was preceded by the words, "which I shall be possessed of or entitled to at the time of my decease," they were much too vague and general to have reliance placed on them, as indicating a particular intention. Being of opinion that this was not personality, he must reluctantly come to the conclusion that the testatrix had died intestate as regarded this property, and that it had descended upon her heir-at-law, subject to her daughters' life interests. His Honour had feared that there were two cases before Sir William Grant, which rendered it necessary for him to deal with this case as he had, and he found that it was so. These were two well-known cases, viz. *Ashby v. Palmer*, 1 Mer. 296, and *Stead v. Newdigate*, 2 Mer. 521. Therefore, if the heir-at-law would take this property, he could not take it away from him. All the costs must come out of the fund as between solicitor and client.

Monday, May 5.

*Ex parte TUNSTALL.*

*Trustee Act, 1850—Appointment of new trustees. Where a testator had appointed a sole trustee, who died intestate, the Court appointed two new trustees in his place, and that without a reference, upon the production of an affidavit of the fitness of the proposed trustees.*

This was a petition presented under the Trustee Act, 1850, for the appointment of new trustees. The testator by his will gave the whole of his property to John Blackburn, as sole trustee, and he also appointed him sole executor; and subject to certain arrangements for carrying on his business by his wife, the testator directed his whole estate to be converted into money and the produce to be invested upon trusts for his wife, for her life, and, after her death, for his children. The will, which did not contain any power for the appointment of new trustees, was proved by John Blackburn. The testator's property consisted of real and personal estate; and the real estate subject to a mortgage for 700l. was the only property now applicable to the trusts of the will. In 1849 Mr. Blackburn died intestate, leaving an infant heir at law, and administration was taken out to his estate. The petition was presented by the testator's widow and only child, they being the only persons interested under the will, and it prayed the appointment of Mr. Woods and Mr. Chaburn as trustees, and a direction that the said real estate might be vested in them and their heirs upon the trusts of the will. The petition was served upon the heir-at-law and the administration of Mr. Blackburn; and there was an affidavit of the fitness of the proposed trustees.

*Prendergast* appeared in support of the petition.

The VICE-CHANCELLOR said, that although by the will the testator appointed only one trustee, he considered the vesting of property in a sole trustee so inconvenient that he should sanction the appointment of two trustees; and as the property was small, he would do so without a reference, the affidavit of the fitness of the proposed trustees being satisfactory.

Tuesday, May 13.

*CARWARDINE v. WISLADE.*

*Claims—Service of writ of summons.*

*Service of a writ of summons upon a claim for foreclosure upon the wife of a person interested in the equity of redemption, and who was travelling in America, ordered under the 4 & 5 Wm 4, c. 82, to be deemed good service upon the husband, the wife being in the possession and receipt of the rents of the property mortgaged.*

This was a claim for foreclosure by a mortgagee in fee. The mortgagor devised the property, the subject of the mortgage, consisting of ten houses, to his children, one of whom, Mary, afterwards married John Connup. John Connup left England for America in May 1850, and had there commenced the trade of a butcher, and was travelling about the country slaughtering. He continued to correspond

## V. C. LORD CRANWORTH'S COURT.

with his wife, who occupied one of the houses devised to her, and received the rents of the other.

*T. C. Wright* moved that service of the writ of summons upon Mary Connup should be deemed good service upon her husband. The facts before stated were verified by the affidavit of Mary Connup. The application was made under the 4 & 5 Wm. 4, c. 82, s. 1, whereby the Court was empowered to order that service of a *subpoena* to appear and answer upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, should be deemed good service upon the party.

The VICE-CHANCELLOR said, that under that statute he would make the order.

Saturday, Aug. 2.

*Re THE CHELTONHAM HOTEL COMPANY.*

*Joint-Stock Companies Winding-up Act—Change of Master to whom reference had been made.*

*Rosburgh* applied in this case for the transfer of the reference from Master Senior to Master Brougham. The application was made with the consent of both Masters, in consequence of Master Brougham having already proceeded with the reference in the absence of Master Senior.

The VICE-CHANCELLOR made the order.

Monday, Aug. 4.

*Ex parte HILL and EVERILL, re THE TRING, READING, AND BASINGSTOKE RAILWAY COMPANY.*

*Joint-Stock Companies Winding-up Act of 1848, sec. 7—Proof under bankruptcy of a company.*

*Selwyn*, on behalf of Messrs. Hill and Everill, solicitors, moved for the reversal or variation of the decision of Master Richards, whereby the Master disallowed the claim of Messrs. Hill and Everill, as creditors against the company, in consequence of the proof of Messrs. Hill and Everill, under the bankruptcy of the company, having been rejected by the commissioner, and that they might be at liberty to make proof against the company in respect of the debt claimed by them before the Master.

The company was dissolved under Lord Dalhousie's Act in August, 1846, and the company was afterwards adjudged bankrupt. On the 30th of March, 1848, the commissioner rejected Messrs. Hill and Everill's claim to prove, "subject to liberty to reopen the matter in case of the decision of Mr. Commissioner Shepherd on Green's claim being reversed, but application to be made for that purpose within fourteen days after the order to be made thereon by the Vice-Chancellor." The decision in *Green's* case was reversed on the 7th of March, 1849, but no renewed application was made by Messrs. Hill and Everill. On the 29th of June, 1849, this company was ordered to be wound up.

*Rosburgh*, for the official manager, opposed the motion, on the ground that under the 7th section of the Winding-up Act of 1848 the proceedings in bankruptcy were conclusive, and that they could not be reopened.

The VICE-CHANCELLOR said, that he would give leave to Messrs. Hill and Everill to go in before the Master, and make such proof as they could establish. If it was wished, the order might be drawn up in the matter of the bankruptcy and in the matter of the winding-up order.

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Reported by W. H. BARNET, Esq. of Lincoln's-inn, Barrister-at-Law.

Monday, Aug. 4.

*Re THE WINDING-UP ACTS 1848 AND 1849, and THE WOLVERHAMPTON, CHESTER, AND BIRMINGHAM JUNCTION RAILWAY COMPANY.*

*HOLROYD'S Case.*

*Appeal—Contributory.*

*Leave to appeal against the decision of the Master (whereby H. the appellant, had been put upon the list of contributories a year ago, and who was now about to be called upon for contribution to wind up the affairs of this company) granted, on the ground that the appellant had previously paid a certain sum in full of all demands for contribution.*

This was an application for leave to appeal against the decision of the Master who had put the name of Mr. Holroyd upon the list of contributories towards winding up the affairs of this association. Twenty-five shares in the company had been originally allotted to Mr. Holroyd as a provisional committeeman, but who, however, had never accepted them. He had acted as a provisional committeeman, and had, shortly after the abandonment of the project, paid with others a sum of 120l. towards a fund for settling all demands upon the projectors of the attempted company. At the time he made this payment, there was an express understanding that it was to discharge him from all future payments or liabilities. The Master had put his name on the list of contributories about twelve months since, and he

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was now about to call upon Mr. Holroyd for a contribution towards satisfying a demand upon the company to the extent of 5,000*l.* The Master had delayed making a final order upon the subject, to enable the appellant to apply to the Court as he might be advised. The present application was in consequence made for leave to appeal against the Master's decision, declaring Mr. Holroyd to be a contributory.

*Rolt and Selwyn*, for the appellant, relied upon *Cermichael's case*, 16 Law T. 146, 189.

*Bethell and Roxburgh*, for the official manager, contra, contended that Mr. Holroyd, by his acts, had completely accepted the allotment of the shares; and inasmuch as his name had been placed and had remained upon the list of contributories a whole year, he was not now entitled to question the decision of the Master in that respect.

The VICE-CHANCELLOR said, that in this case he must be satisfied of two things, first, that there were sufficient grounds for the present appeal, and next, whether there had been such delay on the part of Mr. Holroyd as to disentitle him to what was asked. As to the first, he should give no reasons for his opinion; but on the second, it appeared to him that Mr. Holroyd had paid the 120*l.* on the express understanding that he was not to be called upon to make any further payment, or be under any further liability. He (the Vice-Chancellor) should therefore give leave to appeal, but Mr. Holroyd must undertake not to apply to have back any part of the 120*l.*

Ordered accordingly.

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

May 8 and July 5.  
FREEMAN v. LOMAS.

*Equitable set-off—Cross demands.*

*A bill was filed for payment of part of an unpaid legacy due to a legatee, the plaintiffs being the assignees of the legatee, who had become bankrupt. The defendant, the executor, admitted assets for payment of the legacy, but claimed a right to retain the unpaid part of the legacy in part payment of a debt due from the legatee to him, but not due to him as executor of the testator's will.*

*Held, that the defendant was not entitled to retain the money for such purpose, the rule of set-off in equity not being applicable to cross demands which exist in different rights.*

The bill in this case was filed by the assignees of James Napier, a legatee, against the surviving executor of the will of Thos. Lomas, the elder. The testator, by his will dated in 1815, gave a legacy of 1,000*l.* to his daughter, Mary Wood, a married woman, for life, and after her decease, gave the principal to her children who should attain the age of twenty-one. He appointed his son, Thomas Lomas, the younger, the defendant, and R. Bentley, his executors. He died in 1816, and his will was proved by the executors. Mrs. Wood had only one child, Martha Lomas Wood, who in 1835 attained twenty-one, and in 1840 married James Napier. No settlement, or agreement for a settlement, was made on that event. Mr. Bentley died in 1842, but had accounted with his co-executor for all his receipts. Soon after his death the surviving executor, at the instance of Mrs. Wood and Mr. and Mrs. Napier, paid to him 500*l.* part of the 1,000*l.* and all three joined in the receipt. In 1843 Mrs. Napier died intestate, and her husband took out letters of administration to her estate. In 1847 he became bankrupt, and the plaintiffs were appointed his assignees. Mrs. Wood died in 1848. The bill (not seeking to affect the estate of Mr. Bentley) prayed that it might be declared that the assignees were entitled to the 500*l.* residue of the legacy, with interest, from the death of Mrs. Wood, and for payment accordingly. The defendant admitted assets for the payment of the 500*l.* and interest, but set up a title to retain the money, because, before the bankruptcy, he had joined James Napier and other persons in certain promissory notes, as surety for him, and that he did so by reason of his having under his control the remainder of the 1,000*l.* legacy; and that James Napier had given him a warrant of attorney for the amount; and that after the bankruptcy he had been forced to pay the money due on the promissory notes, amounting to 518*l.* 6*s.* The defendant, therefore, asserted that he was entitled to retain the balance of the legacy in payment of so much of the money paid by him, and interest thereon.

The *Solicitor-General* and *Torrano*, for the plaintiffs, cited *Bishop v. Church*, 3 Atk. 691; *Whitaker v. Rush*, Amb. 407; *Medicot v. Bowes*, 1 Ves. 208; *Cherry v. Boultbee*, 2 Keen, 319, and 4 Myl. and Cr. 442; and *Gale v. Luttrell*, 1 Yo. & Jer. 180.

*Glasse*, for the defendant, relied on *Ranking v. Barnard*, 5 Mod. 32; *Jeffs v. Wood*, 2 P. Wms. 131; *Clark v. Cort*, Cr. & Phill. 154; *Rawson v.*

*Samuel*, id. 161; and *Courtesy v. Williams*, 3 Hare, 539.

The *Solicitor-General* replied.

JUDGMENT.

*Saturday, July 5.*—The VICE-CHANCELLOR.—The plaintiffs in this case were the assignees of James Napier, a bankrupt. The defendant, Thomas Lomas, was the surviving executor of Thomas Lomas, the elder. Thomas Lomas, the elder, by his will, dated the 24th of June, 1815, bequeathed the interest of 1,000*l.* to his daughter, Mary, wife of George Wood, for her life, and after her decease bequeathed the principal to and amongst her children who should attain twenty-one. The residue of his property he gave to the defendant, Thomas Lomas, whom, with Richard Bentley, he appointed his executors. The testator died in the year 1816, and his will was proved by both executors. Mary Wood, the testator's daughter, had one child only, Martha Lomas Wood; she attained her majority in 1835; in October, 1840, she intermarried with James Napier. Richard Bentley, the co-executor of the defendant, Thomas Lomas, died some time previously to the 15th of April, 1842, and on that day, 500*l.* part of the legacy of 1,000*l.* was paid to James Napier, on a joint receipt given by Mary Wood, Mary Lomas Napier, and James Napier, to the defendant, Thomas Lomas, as sole executor and residuary legatee of the testator. In June, 1843, Mary Lomas Napier died, and in December, 1843, James Napier administered to her. Between this period and December 1847, the defendant, Thomas Lomas, became surety for James Napier to various persons for various sums of money, for one of which sums he took a warrant of attorney from Napier by way of security against his liability. In December 1847, a fiat in bankruptcy issued against James Napier, under which the plaintiffs are assignees. James Napier has never surrendered to the fiat, and since the fiat was issued, the defendant, Thomas Lomas, has been called on to pay, and has paid on account of his suretyship, moneys exceeding in amount what remains unpaid in respect of the legacy. Mary Wood, the tenant for life of the legacy, died in January 1848, and this bill is filed by the plaintiffs, the assignees of James Napier, to recover the unpaid part of the legacy of 1,000*l.* with interest from the death of Mary Wood. The defendant, Thomas Lomas, by his answer, admits assets sufficient for the payment of the unpaid part of the legacy, but claims to retain the amount on account of payments made by him in respect of his suretyship. The question to be determined is, whether he has this right of retainer or not. Questions as to the right of debtors and creditors, in cases of cross demands between them, appear to have arisen and been determined in equity before the right of set-off was introduced into the statute law of this country, as will be found on reference to *Carron v. The African Company*, 1 Vern. 121, and *Peters v. Soame*, 2 Vern. 428, cases, both of which were anterior to the stat. 4 Anne, c. 17, by which the first statutory provision for set-off in bankruptcy was introduced; and there are other cases in equity not falling within the provisions of the statute of Anne, between the date of that statute and the stat. 2 Geo. 2, c. 22, by which the right of set-off at law was given. (*Downman v. Mathews*, Pre. Ch. 58; *Jeffs v. Wood*, 2 P. Wms. 131.) It is clear, therefore, that the rights of debtors and creditors in cases of cross demands between them, as those demands subsisted in equity, were not derived from, or dependent upon, any statutory right of set off; and on the other hand, it seems not to be improbable that the statutory rights were founded on the equitable rule. It is important, therefore, to the determination of the present question, to consider what was the foundation of the equitable rule. Sir Thomas Clarke, in *Whitaker v. Rush*, Amb. 407, though the report, erroneously as I conceive, ascribes to him the opinion, that the rule was first introduced into our law by statute, refers the rule itself to the Roman law, and I have no doubt he was correct in this. By that law (Dig. lib. 16, tit. 2), it is said (sec. 3), "Ideo compensatio necessaria est, quia interest nostra potius non solvere, quam solum repetere." And in the comment on the word "interest," it is said "Id est cum lis possit uno judicio definiri, scilicet, per actionem, et exceptionem, pluralitas, seu multitudo judiciorum non debet admitti, ut quæ incommode, sumptus que adferat: quietiam compensationem requiritur poscere videtur: nam dolo facit, qui petit quod restitutus est." And in sec. 6 it is said, "Etiam quod natura debetur, venit in compensationem." But although the Roman law was thus liberal in allowing compensation, it would seem that it did not allow it where the cross demands were not in the same right, for in sec. 23, in the same title, it is said, "Id quod pupillorum nomine debetur si tutor petat, non posse compensationem obijci ejus pecunie quam ipse tutor suo nomine adversario debet." The rule then being thus deduced from the Roman law, it is to be seen how it has been dealt with by our Courts, and I believe, that upon examining the authorities it will be found that, except

upon special circumstances, Courts of Equity have never allowed cross demands, existing in different rights, to be set the one against the other. The cases cited on that point on the part of the plaintiffs, to which may be added *Chapman v. Derby*, 2 Vern. 117, are distinct authorities against a right in an ordinary case, to apply one of such demands in satisfaction of the other. But it is not to be denied, on the other hand, that an agreement, express or implied, may confer such a right, and that slight circumstances may be sufficient to warrant the Court in presuming such an agreement. Thus the right was admitted in *Downman v. Mathews*, upon the course of dealing; in *Jeffs v. Wood*, upon the fact of the legatee having to credit the executor with the goods supplied; and in *Jones v. Moscop*, 3 Hare, 568, on the ground of the objection as to the demand being in different rights, having been removed by the answer. This being the position of the general question as it stands upon the authorities, it is hardly necessary to consider the reasons on which the rule of the Court is founded. It is sufficient to refer to the judgment in *Jones v. Moscop*, as explaining the principle of the rule; and to the judgment in *Bishop v. Church*, 3 Atk. 361, as pointing out the inconveniences to which a contrary rule would lead. It may be said, that in the present case the admission of assets removes many of those inconveniences; but surely the right cannot depend upon the amount of the assets. If the right exists where the assets are fully sufficient, must it not exist to the extent to which they are sufficient? The inconvenience, too, of mixing the demands, is hardly less whether the assets be sufficient or not; for if the account afterwards falls to be taken with the residuary legatee, the Court would be driven to the ascertainment of the debt due to the executor from the legatee, and though in this particular case the executor may be himself the residuary legatee, I cannot see how the right can be made to depend upon that fact. The same state of circumstances existed in *Medicot v. Bowes*, 1 Ves. Sen. 208, where Jane Bowes was (as appears from the registrar's book, though not from the report) the executrix and residuary legatee of Dr. Bowes, but the Court nevertheless in that case refused the set-off, and acted on the broad general rule that there was no right of set-off at law, and no right in equity before the introduction of set-off at law. It remains to be considered, then, whether there are any special circumstances or any ground for presuming an agreement which will justify the Court in allowing a set-off in the present case. I am of opinion that there is not. I think, on the contrary, that the fact of the defendant having taken a warrant of attorney leads to the contrary presumption. I am of opinion that the plaintiffs are entitled to the decree which they ask, and looking to the case as a contest upon a point of law in which the plaintiffs have succeeded, I must give them their costs. I have not noticed the other cases referred to in argument, as I do not think they have any application to the present question. In none of them were the demands in *auter droit*, for where the question arises with assignees in bankruptcy, according to the anonymous case, 1 Mod. 215, and the authorities cited in the note, the assignees are considered as the bankrupt, a circumstance which has always created a difficulty in my mind as to the decision in *Cherry v. Boultbee*; although had it been necessary to consider that case I should, of course, have felt myself bound to follow it. The other cases which were cited in argument merely establish the principle that where one demand is equitable and the other legal there is set-off in equity if these would be set-off at law had both the demands been legal. There must be a decree for payment of the legacy.

## COMMON LAW COURTS.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL PANKELL,  
Esqs. Barristers-at-Law.

Jan. 20 and 29, Feb. 1, and May 5.  
*Doe dem. SHAWCROFT v. PALMER, et UX.*  
*Will—Alteration—Evidence.*

*If a will, duly executed and attested, have upon its face an alteration or interlineation, the presumption is that such alteration or interlineation was made after the execution of the will, and is invalid; but such presumption may be rebutted by legitimate evidence leading to a contrary conclusion.*

*Evidence of statements made by the testator at a date prior to that of the execution of such a will, indicative of his intention to devise his property in the mode in which it is devised by the will as altered, is admissible to prove that the alteration or interlineation was made before the execution of the will.*

This was an action of ejectment, tried before Lord Campbell, C.J. at the Summer Assizes, 1850, for



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the county of Stafford, when a verdict was found for the defendants, but leave reserved to the lessor of the plaintiff to move to enter the verdict for the plaintiff, if the Court should be of opinion that there was no admissible evidence adduced at the trial upon the part of the defendants to justify the jury in finding that an alteration in a will upon which the defendants relied was made before the execution of the will by the testator.

In Michaelmas Term, *Whealey* obtained a rule nisi accordingly to enter the verdict for the plaintiff, or for a new trial, upon the ground of misdirection. In Hilary Term last, *Keating* and *Whitmore* shewed cause. *Whealey* and *Phipson* were heard in support of the rule.

The facts and arguments sufficiently appear from the judgment of the Court.—The following authorities were mentioned:—*Cooper v. Bockett*, 4 Notes of Ca. 685; *In the goods of Thomas Cross*, 1 Notes of Ca. 189; *In the goods of Edward Jacob*, ibid. 401; *Burgoyne v. Showler*, 1 Robertson, 13; *Larkins v. Larkins*, 3 B. & P. 16; *Pechell v. Jenkinson*, 1 Wms. Exors. 53; *Bond v. Seavell*, 3 Burr. 1773; *Hope v. Almon*, 11 Jur. 1097; stat. 3 & 4 Wm. 4, c. 106, s. 3; *Brooke v. Kent*, 3 Moore, P.C. 334; *Knight v. Clements*, 8 A. & E. 215; *Trowel v. Castle*, 1 Keb. 21; *Best on Presumptions*, 85; *Shepherd's Touchstone*, 53; *Earl of Newburgh v. Countess of Newburgh*, 5 Madd. 353; *Hippesley v. Horner*, 1 Turn. & Russ. 48, n.; *Broom's Legal Maxims*, 260; 2 Wms. Exors. 440, 990; *Miller v. Travers*, 8 Bing. 244; *Doe v. Hiscocks*, 5 M. & W. 363; *Clayton v. Lord Nugent*, 13 M. & W. 200; *Thomas v. Thomas*, 6 T. R. 671; *Whittaker v. Tatham*, 7 Bing. 628.

*Cur. adv. vult.*

Monday, May 5.—Lord CAMPBELL, C.J. delivered the judgment of the Court.—This was an action of ejectment to recover certain cottages and a garden, situate in the borough of Stafford. At the trial before me, at the Stafford Summer Assizes, in 1850, it appeared that the lessor of the plaintiff claimed as devisee of Francis Brookes, who was heir-at-law of his brother, Colonel William Brookes. It was admitted that Colonel William Brookes, at the time of his death, was seized in fee of the premises in question; that he died on the 5th of April, 1834; that Francis Brookes was his heir-at-law, that Francis Brookes, on the 2nd of November, 1836, made his will, containing words sufficient to pass the premises to the lessor of the plaintiff, and that he died on the 25th of November, 1836, without revoking or altering his will. That of course was a *prima facie* case for the lessor of the plaintiff. The defendant claimed under the will of William Brookes, bearing date the 27th of July, 1833. This will was duly executed and attested so as to pass real estates, and was all in the handwriting of the testator. It contains a clause in which there is the following passage:—"I give to Francis Brookes, of Moss Pit Bank, in the county of Stafford, all those six lots of land and houses which I purchased from Mr. Job. A. Stokes, situate in the Craberry and the Church Lands." Then there was written originally these words—"to him and his heirs and assigns for ever." These words are scratched out, but remain legible, and there are these words interlined in the handwriting of the testator—"during his natural life, and at his decease the churchyard cottages are to descend to Mary Thornton, and at her death to Agnes Thornton, her daughter; Noah's Ark cottages and garden to Appaulina Biddulph, daughter of Margaret Biddulph." Therefore the interlineation changes the interest that was taken by the Brookes from an estate in fee to an estate for life, and gives a remainder in these cottages to Appaulina Biddulph. The Noah's Ark cottages and garden are the premises sought to be recovered. Appaulina Biddulph is now Mrs. Palmer, one of the defendants, and was a natural daughter of testator's brother Francis. The testator had purchased these premises subsequent to the time of making the prior will hereinafter mentioned, which he had revoked. By his last will, of the 27th of July, 1833, he disposed of the whole of his real and personal property, without making any provision for Appaulina Biddulph, except the above limitation of the premises in question. The execution of this will was proved by two of the subscribing witnesses. The testator signed his will in their presence, and said it was his will, but they were not informed of the contents of it. Charles Dawson, one of the executors, swore that Colonel Brookes destroyed himself on the morning of the 5th of April, 1834; that the witness on the same day went to his house in Stafford, and received from Mary Thornton, who had been his housekeeper and his mistress, the will of the 27th of July, 1833, enclosed in an envelope, with three seals upon it then unbroken, and it was folded like a letter, with an indorsement on it in the testator's handwriting, and in the envelope was a letter from him addressed to the witness, in the testator's handwriting; and there was on the table in the testator's house a sealed letter, addressed in his handwriting to the witness. Ann Locksley, who had lived with Colonel Brookes as a servant, swore, that two or three months before his

death, she saw him give a packet containing the will to Mary Thornton, and heard him say, "Mary, take this and keep it; if it should be wanted and I am not in the way, you will have it in your possession." The defendant's counsel first contended that the presumption was, that the alteration in the devise of the premises in question had been made before the will was executed; but on the authority of *Cooper v. Bockett*, 4 Notes of Ca. 685, I held that it was not so. The defendant's counsel then proposed to call witnesses to prove declarations of the testator, before the will was executed, that he intended to make provision by his will for Appaulina Biddulph. This evidence was objected to, but I received it, subject to the opinion of the Court on its admissibility. Dr. Knight, a physician of Stafford, was then called, and he swore, in his examination in chief, that he knew Colonel Brookes well; that he attended him professionally; that he was one of his executors; that he had heard him talk of a testamentary disposition; and that he frequently heard him say he would make some provision for Appaulina Biddulph, of whom he appeared to be very fond. In his cross-examination the witness said, in the latter end of 1832 (but he was indistinct as to the time) he applied to the testator for a loan of money for his brother Francis Brookes, when the testator said, "I cannot assist my brother, I have provided for his natural daughter." Ann Locksley swore that many a time before the will was executed in July, she heard Colonel Brookes say that, "die when he might, he would leave Appaulina two or three houses; and he would leave the churchyard cottages to Mary Thornton for life, and afterwards to Appaulina Thornton, his natural daughter, who was then at school. Charles Pasmore, an attorney at Stafford, swore that he received instructions from Colonel Brookes in 1830 to make a will, of which he produced a draft, containing a legacy to Appaulina Biddulph of 500*l.* payable at the age of twenty-one, the interest to be applied for her maintenance and support. There was a will engrossed from this draft and executed. The testator was not then in possession of the property in question. He went to India immediately after, and remained there two years. The defendant's counsel likewise contended that the appearance of the will afforded evidence that the alteration must have been made before it was executed, from the appearance of the folds and the ink upon it. I said that the jury might look at the will; and I left the question to them whether from the evidence they were satisfied that the alteration was made before the will was executed. The jury said, "we are satisfied that the alteration was made before the will was executed." I then directed a verdict to be entered for the defendants, with leave for the lessor of the plaintiff to move to enter the verdict for him, if the Court should be of opinion that there was no admissible evidence to shew that the alteration was made before the will was executed. A rule having been granted for this purpose, the subject has been very learnedly and ably discussed before us. After a long and very attentive consideration of the authorities and the arguments on both sides, we have come to the conclusion that the verdict for the defendants rests on legitimate evidence, and that it ought not to be disturbed. We agree that there is a presumption that the alteration in the will was made after the will was executed, and of course this presumption must stand till some evidence is produced to rebut it. We are not absolutely to be bound by the case of *Cooper v. Bockett*, as if that were a decision of the House of Lords, a tribunal to which an appeal lies in the last resort from a Court of Common Law, but we entirely approve of that decision. We are not here called upon to give an opinion respecting an alteration on the face of a deed, or a negotiable instrument, but having regard to the Statute of Frauds, and to the statute 1 Vict. c. 26, respecting wills, we entertain no doubt that the *onus* is cast on the party who seeks to derive an advantage from such an alteration of the will, to adduce some evidence from which the jury may infer that the alteration was made before the will was executed. Without this rule there would be a dangerous facility given to a testator to alter a will; and all wills might be altered by false declarations. And the presumption contended for by the defendant is inconsistent with the 21st section of the Wills Act, which enacts, "that no alteration made in any will after the execution thereof shall be valid, unless such alteration shall be executed in like manner as is required for the execution of the will," with the exception that the signatures of attestation may be at the margin instead of at the foot. We have to consider, therefore, whether in this case there was any admissible evidence to rebut that presumption. The evidence relied on consisted of declarations by the testator frequently made before, and nearly down to, the time when the will was executed, that he intended to make provision by his will for Appaulina Biddulph, the now defendant, Mrs. Palmer, coupled with the fact that without this alteration the will which disposes of the whole of his property real and personal makes no provision for her. Are these de-

clarations admissible evidence to rebut the presumption, or, in other words, ought the judge to have received this evidence, and to have told the jury that on this evidence they would be justified in inferring that the alteration had been made at the time the will was executed, although they were not bound to infer so? It may be convenient, first, to consider the question whether, if in a will which was not in the handwriting of the testator, an alteration being made, evidence might be received of the previous declarations by him that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form? If the draft of the will could be produced corresponding with the will in its altered form, would not that be admissible evidence, and might not the jury infer from it that before the will was executed a draft of the will had been prepared, and the mistake rectified? Would not written or verbal directions from the testator to his solicitor to draw the will in the altered form be equally admissible?" In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration to another person that he had determined in his will to dispose of his property in a manner different from that in which he had disposed of it by the will as altered? What distinction can be drawn between the draft of a will or the written instructions for a will, and the verbal declarations of the testator's intention, except as to the strength of the evidence which they respectively afford? As to their admissibility, they all seem to rest on the same principle, and if the verbal declarations of intention must be rejected, so must the draft of a will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded, as a logical inference might be fairly drawn from it respecting the priority of two events, that is, the making of the alteration and the execution of the will; and I am not aware of any principle, rule of law, decided case, or argument, against the admissibility of such evidence. I allow, we cannot be guided alone by the consideration that, if a party claims, under a testator, on declarations of the testator, after the time when the controverted will is supposed to be executed, it would not be admissible to prove it had been duly signed and attested as the law requires; and for the same reason a declaration by the testator after the will is executed, or an alteration is made, would be inadmissible; but the previous declarations of the testator, as to the same testamentary intention, do not seem to be liable to the same objection. They demonstrate that the alteration is not an after-thought, and cannot, therefore, be offered with any view of evading the law respecting the execution of wills, but they still leave upon the devisee the burden of proving by reasonable evidence that this law has been complied with. There is evidence of what, in particular cases, would weigh with a reasonable man in forming a conclusion which the law excludes; because, if generally adopted, it would more frequently mislead than guide to a just conclusion. But this evidence is not of that nature, for though it may vary very much in respect to the weight to be given to it, it seems liable to no greater objection than the declarations of a testator respecting his testamentary intentions, where a will is impeached on the ground of incompetency. If declarations of a testator are receivable to rebut the presumption respecting an alteration in a will in the handwriting of another, is there to be a different rule as to a holograph will, there being a greater facility in altering such a will after its execution? and declarations, if entitled to weight, and admitted, with respect to alterations in one case, could not be excluded with respect to another. Although no decision can be quoted in which evidence for rebutting the presumption has been admitted, yet no case has occurred in which it has been rejected, and in cases closely analogous, similar evidence, it appears, has been received. Declarations of a testator have been alluded to to rebut the presumption that the legacy is satisfied by a provision made in the lifetime of the testator, and to rebut the presumption as to the executor being entitled to the residue of the personal estate: not only where the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admitted respecting his dislike to his relations, or those who appear in the will to be the objects of his bounty, and as respecting his intention either to benefit them or to pass them by in the disposition of his property. The case of *Baleman v. Remington*, 3 Mo. P.C. Cases, 222, though not adverted to in the argument, appears to be entitled to great consideration. The executors of Richard Sparling Berry, the testator having died suddenly, propounded nevertheless probate to be entered in the Prerogative Court of Canterbury, and they filed in the Ecclesiastical Court two papers; the first was a will written in ink, with the date "5th October, 1827," written in pencil in the third line, with the signature of the testator, likewise written in pencil, and preceded by the following words, also written in pencil—"In

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case of accident, I sign this my will." This paper had a clause of attestation, but without the subscription of any witness. The other paper, without date and in the form of a will, was subscribed by the testator in ink, with a clause of attestation, without the subscription of any witness. The deceased, at the time of his death, was seized of real estates, and possessed of personal property of great value, which were all disposed of by these testamentary papers. Now, *prima facie*, these papers were not entitled to probate, the presumption being that they were wholly fraudulent. Sir Herbert Jenner rejected them on the ground of the alteration in the earlier part, and the declaration in pencil "In case of accident, I sign this my will;" but on appeal to the Judicial Committee this sentence was reversed, and the cause being then retained, probate was granted, though the will, the signature being in pencil, was presumptively fraudulent, and the alteration and the attestation clause being unwitnessed, afforded a strong presumption against the validity of it, the Court of Appeal being influenced by the manifest intention of the testator not to die intestate. Might not a similar declaration in writing by the deceased on another paper, or by word of mouth, have been admitted equally to rebut this presumption? Almost all the cases cited on the part of the plaintiff were merely instances of rejection of declarations by testators where the question was upon the construction of ambiguous language used by them in their wills; but this is not a case of pretended ambiguity or the meaning of a word at all, the question being entirely one of fact, upon the priority of two events—the making of the alteration and the execution of the will. It therefore much more nearly resembles those cases referred to, in which the declarations of the testator have often been admitted. The plaintiff's counsel relied much upon the case of *The Earl of Newburgh v. The Countess of Newburgh*, 5 Madd. 364, where the testator, having executed his will, devising to his wife lands in the county of Sussex, it was proposed, with a view of making the will pass estates in the county of Gloucester and the county of Sussex, to prove that a draft of the will was prepared by a solicitor and settled by a conveyancer, in which he devised to his wife lands in the county of Sussex and Gloucester, and desired it to be copied for its execution, and that the stationer who copied it inadvertently left out the words "and Gloucester" and changed the word "counties" into "county." Sir John Leach, Master of the Rolls, and afterwards the House of Lords, according to the unanimous advice of all the judges, decided that the evidence was not admissible to enlarge the devise, as it appeared on the face of the will. There can be no doubt as to the propriety of that decision, for the proposed alteration would have been to make a new will, contrary to the Statute of Frauds. But in the present case the evidence admitted was to shew that the devise under which the defendants claim was part of the will when it was duly executed. The case of *Miller v. Travers*, 8 Bing. 244, is equally well decided, and equally worthy of consideration. There the testator devised all his freehold estates in the county of Limerick and city of Limerick; having no estates in the county of Limerick, and a small estate in the city of Limerick, but large estates in the county of Clare, which he intended to pass by his will, but did not. The devisee proposed to shew, by parol evidence, that an estate was devised to him in the draft, the draft was sent to the conveyancer to make certain alterations not affecting the estates in the county of Clare, and by mistake he erased the "county of Clare," and that the testator, after keeping the will by him for some time, executed it without adverting to this alteration. Lord Chancellor Brougham, with the advice of Lord Chief Justice Tindal, and Lord Chief Baron Lyndhurst, most properly held that the proposed evidence was inadmissible. The only other case cited worth mentioning was that of *Doe dem. Hiscocks v. Hiscocks*, 5 M. & W. 363. There the testator devised lands to his son John Hiscocks for life, and on his decease to his grandson H. eldest son of John Hiscocks, for life, and on his decease to the first son of the body of his said grandson, John Hiscocks, in tail male, with other remainders over. At the time of the making of the will the testator's son, John Hiscocks, had been twice married; by his first wife he had one son, Simon,—by his second wife an eldest son, John, and other younger children, sons and daughters; the question was whether John or Simon should take, neither of them answering the full description given in the will. An ejectment being brought by Simon against John for the lands, it was proposed to offer in evidence the instructions given by the testator for the will, also declarations made by him after its execution, to shew that Simon was really the person in his contemplation as the object of his bounty at the time of making the will. This evidence was received, and the Court of Ex. set aside the verdict founded on it; being of opinion that, for the purpose of relieving this ambiguity, the declarations of the testator ought not to be received as to

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what he intended to do in making his will. The object of the evidence was to assist in the construction of the will; and the real question was, whether this could be considered an instance of patent ambiguity. The decision, therefore, whether right or wrong, is no authority in this case, where the question is totally different. Upon the whole, there being no authority adverse to the defendants, the analogous cases being in their favour, and the admission of the contested evidence appearing to us to be conducive to truth and justice, we are of opinion it was rightly given. This is the only question we have to determine. If the evidence was admissible, the weight to be given to it was a question for the jury; but it may be proper to notice an argument much pressed at the Bar, that the declarations in favour of Appaulina Biddulph are completely confirmed by the subsequent deliberate intention which the testator is supposed to have entertained, to leave the premises in fee-simple to his brother Francis; and we should believe that the limitation of the premises in the first instance was by deliberation, and not by mistake. This does not shew that the testator had ever for one moment changed his opinion to make a provision by his will for Appaulina Biddulph. Here the alteration consists in turning the devise in the will of certain cottages to Francis Brookes into a limitation to him for life, with remainder in fee to Appaulina Biddulph. If for a moment he intended that she should take no interest in the cottages, which most certainly the declarations proved he did not, but that he meant to provide for her by his will, it might reasonably have happened that in writing the will, or in reading it over before it was executed, he recollected he had made no provision for her, and then introduced the alteration with a view to keep the promise which he had often made. This seems much more probable than that he introduced the alteration after the will was executed and before it was sealed up in the manner described, though it afterwards remained in his own custody. Not only may he be presumed to have known the law upon the subject, but this testator executed a prior will, and was acquainted with the solemnities which were requisite for a valid devise of a real estate. There appears to be no ground for the conjecture that he might have altered the will after its execution, intending to have it immediately re-attested: he had an ample opportunity to have done so if he had so intended. There seems every reason to believe he sealed up the will immediately after its execution, and he certainly delivered it in a sealed packet to Mary Thornton, intending that it should remain in her custody till he should commit the fatal act. We think, therefore, the jury were fully justified in coming to the conclusion that the alteration was made before the will was executed. If the lessor of the plaintiff had proved that, down to the execution of the will, the testator did not know of the exclusion of Appaulina Biddulph, or that he had expressed a purpose to exclude her from the will, an answer would be given to the evidence offered by the defendant to rebut the presumption that the alteration was subsequent; but the obliterated words shewing the premises had been given to Francis affords no sufficient answer. It being quite certain that the testator intended that Appaulina Biddulph should take the premises after the death of Francis, and the intention appearing to us to be justified according to the rules of law, we think she ought to be allowed to remain in possession of them, and that this rule to enter a verdict for the lessor of the plaintiff ought to be discharged.

Rule discharged.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Tuesday, May 6.  
HAMBER v. HALL.*Insolvency—Liability of creditors' assignee for fees of messenger—5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.**Where there is no express contract for the payment of the messenger's fees, the creditors' assignee in insolvency under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for them.*This was an action of *assumpsit*, containing counts for work and labour, money paid, money had and received, and on an account stated.*Plea—Non assumpsit.*The cause was tried at the sittings after Michaelmas Term last, before Jervis, C.J. and a verdict taken for the plaintiff for 25*l.* 10*s.* and interest, subject to the opinion of the Court on the subjoined special case.

The plaintiff was, on the 26th of May, 1847, and had ever since been, a messenger of the Court of Bankruptcy in London, attached to the court of Mr. Commissioner Goulburn. The defendant was a solicitor and banker at Ross, in Herefordshire, carrying on business as a solicitor in partnership with Mr. Minett under the firm of "Hall and Minett." On the 26th of May, 1847, one John Mathewman

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presented a petition for protection from process to the said Court of Bankruptcy in London, and that petition was duly allotted to Mr. Commissioner Goulburn. On the 27th May, 1847, George Green was duly appointed official assignee of the estate and effects of the said John Mathewman, under the said petition, and so continued until his death on the 21st of October, 1849. On the 10th of November, 1849, William Pennell was duly appointed official assignee in the stead of the said George Green, and so continued until the plaintiff was discharged of possession, as hereinafter mentioned. On the 12th of June, 1847, the defendant, who was a creditor of the said John Mathewman, was duly chosen creditors' assignee of the estate and effects of the said John Mathewman under the said petition, and duly accepted the appointment, and has ever since been and acted as creditors' assignee. On the 27th of May, 1847, the plaintiff, as such messenger as aforesaid, by virtue of a warrant under the hand and seal of the said commissioner, directed to the plaintiff, as such messenger, duly seized and took possession of certain goods and effects in and upon a certain colliery belonging to the said John Mathewman, or wherein he was interested, situated at Oaken and Churchway Levels, St. Brivies, in the forest of Dean, and by himself and his assistants had and retained possession of the said goods and effects until he was discharged from such possession on or about the 4th of March, 1803. The said John Mathewman had no other property besides his goods and effects before mentioned, and his interest in the said colliery. The said petition is now filed of record, and remains in full force and effect in the said Court of Bankruptcy. A final order in the matter of the said petition was made on the 1st of April, 1848. The plaintiff's bill of charges and disbursements as such messenger under the said petition has been taxed by the proper officer of the Court of Bankruptcy, and allowed at the sum of 25*l.* 6*s.* 9*d.* Of this sum 25*l.* 7*s.* 3*d.* is due in respect of services subsequent to the date of the defendant's appointment as creditors' assignee. The residue is in respect of services before such appointment. No assets have ever been received by the official assignee, or by the defendant, out of the estate of the said John Mathewman. The defendant never was upon the colliery, nor did he ever interfere with the said plaintiff, or with his possession of the said colliery, or the goods and chattels of the aforesaid John Mathewman thereon, except so far, if at all, as the same may be inferred from the correspondence and affidavit set out in this case. [The correspondence only shewed that the defendant knew that the plaintiff was employed on the colliery as messenger, and had communications with him relative to the property.]

The special case stated the questions for the Court to be, whether the plaintiff was entitled to recover the whole, or any, and if any, what part of his said bill, and whether with or without interest; and if the Court should consider him so entitled, the verdict was to be entered for such amount as the Court should direct; if not, the verdict for the plaintiff was to be set aside and a nonsuit entered.

*Issue*, for the plaintiff.—The question for the consideration of the Court is, whether the plaintiff is entitled to recover the whole, or any part of this bill, from the creditors' assignee, under statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in like manner as he could have recovered from the assignee in bankruptcy previous to those Acts. The cases on this subject are, *Burwood v. Felton*, 3 B. & C. 43; *Hamber v. Purser*, 2 Cr. & M. 209; *Robson v. Jonassohn*, 7 M. & Gr. 351; and a case in equity, *Ex parte Hartop*, 9 Ves. 109. In the last case the liability of the assignee in bankruptcy was distinctly recognised. [CRESSWELL, J.—The case of *Robson v. Jonassohn* shews that the messenger is the servant of the assignee; now if the assignee does not need his services he cannot be liable.] There are no other cases on the subject, but those cited are sufficient to support the plaintiff's case: they decide that the messenger is the servant of the assignee, and the assignee is liable to pay him. [JERVIS, C.J.—The assignee finds a messenger in possession; he may, but does not, turn him out, and is therefore liable for continuing him. What date do you fix for the liability?] The assignee is liable from the date of his appointment. These cases, no doubt, are all anterior to the Bankruptcy Act (1 & 2 Wm. 4, c. 56, s. 22), which appoints an official assignee; but that makes no difference. The position of the creditors' assignee is little altered; his duty is to realise assets and pay over proceeds to the official assignee. By the 22nd section of 1 & 2 Wm. 4, c. 56, official assignees are appointed, and one is to be assignee of each bankrupt's effects, together with the creditors' assignees, "and all personal estate and the rents of real estate, and the proceeds of sale of all real and personal estate are to be possessed and received by the official assignee alone," and there is a proviso that before the appointment of the creditors' assignee the official assignee is to be deemed to all intents and purposes

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the sole assignee of the bankrupt's estate and effects. This means that whilst the title to the property shall vest in both, the duties of the official assignee are limited to receiving the proceeds. [CRESSWELL, J.—No; no. JERVIS, C.J.—You say the creditors' assignee has the sole management of the estate. Under what section is that?] The Insolvency Act, 5 & 6 Vict. c. 116, s. 1, says that the estate and effects of the petitioner are, on the presentation of the petition, to become vested in the official assignee, who may forthwith take possession of so much as may be obtained without suit, and is to hold and stand possessed of the same in like manner as official assignees under the Bankruptcy Act. The 7th section says that "after making the final order the whole estate shall vest in the official assignee and the creditors' assignee." By the 7 & 8 Vict. c. 96, s. 4, the terms are altered, for it says that the property shall be possessed and received "by the official assignee alone." By the 10th section it would seem that the official assignee has not power to sell without the authority of the commissioner. [CRESSWELL, J.—Not while he is alone.] The 13th section of 5 & 6 Vict. c. 116, is important. Under this the judges had power, amongst other things, to make rules and regulations as to the duties of assignees, and they, in pursuance thereof, made such order on 1st November, 1842. The 11th order is pertinent here. The creditors' assignees generally deal with the property in bankruptcy; and it was in the power of the judges to order that in insolvency cases the creditors' assignees should look after the estate. [CRESSWELL, J.—The order for the dismissal of the messenger came from the creditors' assignee, at the instance of Pennell, the official assignee. He gave a clear order of dismissal.] The order for dismissal was sent to the plaintiff, not by the official assignee, but by the creditors' assignee, the defendant. The defendant should have said at once, "I am not liable, you must not look to me." [JERVIS, C.J.—You say the defendant had power to dismiss the messenger, where is your authority for that?] He had it in the capacity of creditors' assignee, to which it is incident. The official assignee had no power to direct or control the sale of the property; it would therefore be most unjust to hold him liable to the expense of the messenger, however long the creditors' assignee may please to keep him in possession.

Channell, Serjt. (with him Bovill) for the defendant.—The correspondence shews that the messenger was not put into possession by the creditors' assignee; and the statement, that on his signature to an order from the official assignee for the dismissal of the messenger the latter should be discharged, does not prejudice the creditors' assignee. That was all that he did in the matter from beginning to end. Of himself, he had no power to dismiss the messenger. The messenger was employed under a warrant of the Court. As to the question upon the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the effect of the 1st section of the former was considered in *Sayer v. Dufaur*, 11 Q. B. 325, where it was held that the right of action is in the official assignee and not in the petitioner, after petition and before final judgment. The operation of that section is to give possession of the property to the official assignee, though, on the appointment of the creditors' assignee the property for some purposes vests in both. The 7 & 8 Vict. c. 96, does not repeal the former Act, but was passed for the purpose of amending it. In the 10th section expressions are found which would raise an inference that, after the creditors' assignee is appointed, the official assignee and himself are on the same footing; but that will not prejudice the defendant's case. Neither the correspondence nor the facts are sufficient to shew that there was any contract between these parties; and it is therefore submitted a nonsuit should be entered in this case.

Lush, in reply, stated that he would leave the question on the statute in the hands of the Court; and he limited his answer to the facts.

JERVIS, C.J.—I am of opinion that the defendant in this case is entitled to the judgment of the Court. Although in the text-books it is asserted generally that the assignees are liable, under the old law, to pay the messenger, there is no clear authority to that effect since the stat. 1 & 2 Wm. 4, c. 22; therefore every case will be found to resolve itself into a question of contract between the parties. Under the old law, when the assignees were entitled to the whole property, it was their duty to manage it; and if they found a man in possession, and knew he was doing acts within their duty, they constructively recognised and adopted those acts. Here there is no evidence of an express contract between the parties. The messenger was employed by the official assignee, and it has been contended that the creditors' assignee had knowledge that he was so employed. The question then arises, now we are called upon to imply a contract, what are the duties of a trade assignee? The question is on the construction of 5 & 6 Vict. c. 116, s. 1; and the 7 & 8 Vict. c. 96, s. 4; and 1 & 2 Wm. 4, c. 56, s. 22. What is the effect of 1 & 2 Vict. c. 116, s. 1? It pro-

vides that, whereas an assignment was formerly necessary, adjudication without any assignment vests the property in the official and creditors' assignees, but the personal property is to be in possession of the official assignee. The creditors' assignee is not in possession, and receives nothing. Here the contract is, if any, to pay if there are assets; and it is contended he is to pay without assets. How could it be so? He would have to pay first, and then have his action for money had and received. We have to decide whether there was a contract in this case between the parties; it seems to me that there existed no contract such as would make the defendant liable either by adoption or otherwise.

CRESSWELL, J.—I am of the same opinion. The action is for work and labour done at the request of the defendant. Now, undoubtedly, there is here neither an express contract, nor an express promise to pay. Was the work and labour done for the defendant, or was it not? The work done was keeping possession of the property. Was the keeping possession an act done for the trade assignee? No, for the property was in the official assignee. The work, therefore, not being done at the request of the defendant, he cannot be held liable to pay. The *postea*, therefore, must go to the defendant.

WILLIAMS, J.—I am also of like opinion. There is here no evidence whatever of a contract, express or implied, under which the plaintiff was employed by the defendant. The messenger was not employed on the retainer of the defendant.

TALFOURD, J.—I am of the same opinion. The messenger was in possession before the appointment of the defendant as trade assignee. There has been no such interference on the part of the defendant as would make him liable for the expenses of the messenger.

*Nonsuit to be entered.*

May 8, 9, and 30.

STAINBANK v. FENNING.

*Marine Insurance—Interest of insured.*

*The master borrowed money for necessary repairs of the ship, and drew upon the owner and consignee for the amount, and also gave to the lender an instrument, purporting as such master, to pledge vessel, cargo, and freight, and stipulating that in case the bills should be refused acceptance or dishonoured, the lenders might take possession of the vessel, ship, and cargo, and sell under process of the Admiralty or Vice-Admiralty Court, according to the maritime law of England, and it was also declared therein that the lender forbore any premium or maritime interest upon the risk of the advances, that the voyage was at the sole risk of the owner; that the advances, together with the premiums for insurance, were to be recoverable from the owner, whether the vessel arrived safe or not:*

*Held, that the master had no authority to pledge both the ship itself and the personal credit of the owner; that the payment of the advances, not depending upon the safe arrival of the vessel, the Admiralty Courts had no power to enforce the sale according to the instrument, and therefore that the lenders had no insurable interest in the vessel.*

This was an action on a policy of insurance on the ship *Hartland*, for 1,675l. 11s. 6d. effected by the plaintiff as agent of Gilmour and Co. and the point upon which the case was determined was, whether the insured had any insurable interest.

The case was tried before Platt, B. at the last Liverpool Spring Assizes, and under his lordship's direction a verdict found for the plaintiff. The following are the necessary facts to explain the point on which this Court gave judgment.

On the 20th of September, 1846, the *Hartland* sailed from Quebec for Bristol. Having sustained damage, she put back to Quebec in a few days afterwards, and the Master there borrowed of Gilmour and Co. the plaintiff's principals, for necessary repairs and disbursements, the sum of 1,675l. 11s. 6d. to secure which, he drew upon the owner of the ship for 1,307l. 12s. 1d. and upon the consignee of the cargo for 367l. 19s. 5d. giving to Gilmour and Co. at the same time, an instrument under his hand and seal, upon the consideration and effect of which the case mainly depends. This instrument, after reciting the damage sustained by the *Hartland*, the necessity for the advances made by Gilmour and Co. upon condition of their being secured by hypothecation of the ship, cargo, and freight, the delivery to Gilmour and Co. of two bills of exchange by the master upon the owners of the ship and consignee of the cargo, proceeds thus:—

Now, know ye that for the effectually securing to the said Gilmour and Co. the due and punctual acceptance and payment of the said bills of exchange so drawn by me, the said George Hooper, one of which, on the said William Hooper, for the said sum of 1,307l. 12s. 1d.; and the other on the said R. Mead and Son, for the said sum of 367l. 19s. 5d. for the causes and in the manner aforesaid, I, the said George Hooper, have pledged, mortgaged, and hypothecated, and by these presents do (as master of the said barque or vessel called the *Hartland*, and in the said capacity of master, by virtue of all other powers and

authorities whatsoever me thereunto in any wise enabling) pledge, mortgage, charge, and hypothecate the said barque or vessel, the *Hartland*, her tackle, apparel, and furniture, and the freight of the said vessel, and every part thereof, to the said Gilmour and Co. their executors, administrators, and assigns, but including, with respect to the said bill on the said William Hooper, the cargo on board, the said expenses being incurred for the benefit of the freight, ship, and cargo. And I, the said George Hooper, as such master as aforesaid, do hereby grant, testify, and declare, that in case the said bills of exchange shall be refused acceptance or payment, or be otherwise dishonoured, or not duly and punctually accepted and paid by the said William Hooper and the said R. Mead and Son, on presentation for the said purposes, according to the tenor and effect thereof; it shall and may be lawful to and for the said Gilmour and Co. forthwith to seize and take possession of the said barque, the *Hartland*, and to cause the same to be sold and disposed of, either by virtue of process to be issued out of her Majesty's High Court of Admiralty of England, or any Court of Vice-Admiralty possessing jurisdiction at the port at which the said barque or vessel may at any time thereafter happen to be lying or to be, according to the maritime law and custom of England. And I the said George Hooper, as such master as aforesaid, do by these presents testify, declare, and make known, that I took up and borrowed of the said Gilmour and Co. the said sums of money on the credit and account of the owner of the said barque, the *Hartland*; and do hereby, as far as in me lies as master as aforesaid, grant and declare that it shall and may be lawful to and for the said Gilmour and Co. to place the same to the debit and account of the owner of the said barque. And in case of the nonacceptance or nonpayment of the said bills of exchange, the said Gilmour and Co. shall and lawfully may have, use, and take all such lawful ways and means whatsoever for the recovery of the said sum of money, or such part or parts thereof as may at any time or times hereafter remain due or unpaid, as merchants or other persons in a foreign port or other ports out of the kingdom of Great Britain advancing money at the instance of a master of a ship or vessel for the repairs, outfit, and disbursement thereof, to enable such ship or vessel to proceed on her homeward-bound voyage, on the credit and account of such ship or vessel; and her owner can or lawfully may have, use, or take for the recovery thereof against such ship or vessel, her owner or master. And I the said George Hooper, for myself, my executors, administrators, and assigns, do hereby covenant, promise, and agree to and with the said Gilmour and Co. their executors, administrators, and assigns, in manner and form following—that is to say, That I the said George Hooper, my executors and administrators, shall and will at any time or times hereafter when thereunto required by the said Gilmour and Co. make, do, and execute all and every such further or other act and deed, and deeds, thing and things, instruments and assurances in the law whatsoever, for the further, better, and more effectually hypothecating and charging the said barque or vessel called the *Hartland*, and her apparel and furniture, and the freight and cargo of the said vessel, and every part thereof, with the payment of the said sums of money as by them, the said Gilmour and Co. their counsel, attorneys, solicitors, proctors, or agents, shall or may be devised, advised, or required, which said barque or vessel has been duly registered, a copy of which, with a view of identifying the owner, is herein transcribed.

And then, with a view to identify the owner of the vessel, the instrument further proceeds to set out a copy of the certificate of registry, shewing that the *Hartland* had been previously mortgaged, and then concludes with the following agreement:—

It is hereby concluded, declared, and agreed by and between me, the said George Hooper, and the said Gilmour and Co. that inasmuch as the said Gilmour and Co. forbear any claim by way of a premium or maritime interest upon the risk of the said sums of money so advanced as aforesaid, that the voyage of the said barque shall be at the sole risk and peril of the owner of the said barque or vessel the *Hartland*; and that, therefore, whether the ship arrive in safety or not, in the event of shipwreck or loss of the same by the act of God, accident, or the Queen's enemies, the said sums shall in either or any case be recoverable and be paid by the owner of the said barque to the said Gilmour and Co. or to their order as aforesaid, together with such further sum or sums of money as they may pay or lay out in causing the said barque or her freight to be insured, should they think proper so to do, in an amount sufficient to cover the advances by them made as aforesaid; and which insurance the said Gilmour and Co. by these presents by me, the said George Hooper, are authorised and empowered to cause to be done and made, and to charge the same to me and the owner of the said barque. And it is further agreed and declared that the said Gilmour and Co. shall and will have all the rights, privileges, and remedies by process of the Courts of Admiralty, and otherwise which by law are given to the owners of bottomry bonds, anything herein contained to the contrary notwithstanding. And, lastly, it is agreed and declared that the said vessel, her tackle, apparel, furniture, and her freight and cargo, shall at all times hereafter be chargeable and liable for the payment of the said sums of money advanced to enable the said barque to proceed on her voyage, and the costs of insurance as aforesaid, unto the said Gilmour and Co. their executors, administrators, and assigns, according to the true intent and meaning of these presents.

Wednesday, April 23.—W. H. Watson obtained a rule nisi to set aside the verdict and enter a nonsuit, or a verdict for the defendant.

May 8 and 9.—Knowles and Atherton shewed cause, and W. H. Watson and Tomlinson supported the rule.

Authorities cited: *Murphy v. Bell*, 4 Bing. 567; *Cousins v. Nantes*, 3 Taun. 513; *Kulen Kemp v. Vigne*, 1 T. R. 304; *Wilson v. The Royal Exchange Insurance Company*, 2 Camp. 623; *Thompson v. The Royal Exchange Insurance Company*, 1 M. & S. 30; Com. Dig. tit. "Admiralty;" Viner's Abr.



## COMMON BENCH.

"Hypothecation;" *Gratitudine*, 3 Rol. Ad. R.; *Bridgman's case*, Hob. 12; *Scarborough v. Licius*, Noy. R. 9; *Atlas case*, 2 Hagg. Ad. R.; *Knight v. Faith*, 19 L. J. N.S. 509, Q.B.; *Manfield v. Mailland*, 4 B. & Ald. 582. Car. adv. vult.

## JUDGMENT.

Friday, May 30.—JENKINS, C.J.—Upon the argument of this rule four points were made for the defendant. It was insisted, first, that the plaintiffs had no insurable interest. Secondly, that their interest, if any, was misdescribed in the policy; thirdly, that having regard to the nature of their supposed interest, there was no loss within the meaning of the policy; and, fourthly, that under the circumstances a notice of abandonment was necessary, and was not given in due time. Upon consideration, we are of opinion, that the first point must prevail, that the plaintiff had no insurable interest, and that therefore the rule must be made absolute. This view of the case renders it unnecessary to consider the other points. His lordship then recapitulated the above facts of the case, and proceeded:—In substance, by the above instrument, Gilmour and Company forbore all interest beyond the amount necessary to insure the ship to cover their advances, and the master, having given them bills of exchange for the amount advanced, upon her owners and the consignee of the cargo, making his owners personally liable, as far as he can, takes upon himself and his owners the risk of the voyage, makes the money payable at all events, and subjects the ship to seizure where-soever she may be, at any moment, should the bills be refused acceptance, or not paid. It was conceded during the argument that this was not an instrument of hypothecation in the usual form, and it was not contended that the Master had authority to mortgage the ship, but it was said that an hypothecation may be good without making the repayment of the advances depend upon the arrival of the ship, and that if the lender does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, the Master may pledge both the ship and the personal credit of the owner. The cases of the *Tartar*, 1 Hag. Ad. 1, and the *Nelson*, Id. 163, upon which the plaintiff's counsel relied, do not support the latter part of this proposition, for which they were cited. Where the Master professes to hypothecate the ship, and also to pledge the credit of his owners, the Court of Admiralty will reject that part of the instrument which is directed to the latter object, and proceed *in rem* against the ship; but the cases cited do not shew that the Court of Admiralty will do this where the instrument is not in other respects in strictness an hypothecation, because in each of those cases the return of the money depended upon the completion of the voyage, and the lender took upon himself the risk of the ship's return. The case of *Samson v. Braginton*, 1 Ves. 443, is however referred to, and though the report does not explain the grounds of the decision, nor very clearly disclose the circumstances of the case, yet as it is cited with approbation in Abbott on Shipping, it acquires additional authority from the known accuracy and high reputation of the learned author of that work, and is said to be an authority in point. We have been furnished with a copy of the decree from which the following appear to be facts of that case. Braginton and Pitman were part owners of the *Duisley* galley, of which Pitman was master. On her homeward voyage she was disabled and put into Jamaica, where Pitman applied to the plaintiff to advance the necessary funds for her repairs, for the use and on account of himself and Braginton, as co-owners, and as a further inducement engaged with the plaintiff, by an additional security for the repayment of the money, to hypothecate the ship. The plaintiff repaired the ship, expended for that purpose 808*l.* and, at his request, Pitman drew upon Braginton for the amount, and, by way of additional security, as master of the ship, according to maritime usage in like cases, by deed-pool, after taking notice of the damage and advance, did, for securing the payment of the said money, hypothecate to the plaintiff the ship, with the freight and cargo. The ship sailed from Jamaica, was captured and sold; Braginton and Pitman received the insurance upon her loss, but Braginton refused to accept the bills, and the plaintiff was not paid the amount which he had advanced for the repairs of the ship. Upon this statement the plaintiff filed his bill against Braginton and Nichols, the representative of Pitman, for repayment of the money advanced by him. Braginton, by his answer, admitted the plaintiff's statement, but submitted that he was not liable to repay what Pitman might have paid for the repairs, because Pitman was indebted to him, and suggested that bottomry interest had been taken for the advances, and that therefore, according to maritime custom, the lender took the risk of the voyage upon himself. There was no proof in support of this suggestion, and the Master of the Rolls decreed that the money advanced by the plaintiff in refitting the ship ought to be established against Braginton and Nichols according to their respective interests. It is not very apparent

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how, upon the bill and answer so framed, the validity of the hypothecation could come directly in question. The plaintiff did not seek to establish his claim by that instrument, because it did not profess to charge the owners personally with the debt; and the defendant Braginton failing to prove that bottomry interest had been taken, could not add to the deed by implication a condition that the repayment of the advances should depend upon the return of the ship. The decree seems to have proceeded upon the ground that joint owners were liable for money advanced in a foreign country for necessary repairs, whether the master had properly pledged the ship or not, as the ship was lost, and the plaintiff was proceeding upon the personal liability of the joint owners. The reporter states that his Honour took time to consider, and afterwards (as he was informed) determined that the ship was well hypothecated, and that the part owners were liable. In Abbott on Shipping, p. 135, 6th edit. the decree against the part owners is stated positively, but the learned author adds, cautiously,—“It is said also that the ship was thought (not determined) to be well hypothecated.” He does not give the full weight of his unqualified sanction to this proposition, and upon examination we think that this case is not to be considered as an authority conclusive against the more recent decisions to which reference has been made. The deed now in question only professes to give such an interest as can be enforced in the Admiralty Court. In certain events Gilmour and Co. may seize the ship and cause her to be sold by process out of the Admiralty of England, or any other Court of Vice-Admiralty professing jurisdiction; and further, they are to have all the right, &c. by process of the Admiralty Courts or otherwise which by law are given to the holder of bottomry bonds. The interest which they have in the ship is the right of proceeding in the Admiralty Court against the ship; but if, under similar circumstances, the Admiralty Court would not act because it has no jurisdiction, Gilmour and Co. have no available interest. Now the cases shew that under circumstances like the present, the Court of Admiralty would decline to act. In the case of the *Atlas*, 2 Haggard, 48, Lord Stowell refused to entertain a suit of bottomry because the advance was payable within thirty days after the arrival of the ship, “or in case of the loss of the ship, then within thirty days next after the account of such loss should have been received in Calcutta or London.” Upon appeal the delegates decided that the bond was void because there was no sea risk to justify the taking of maritime interest, and so it became unnecessary to determine the principal question. But, upon the argument of the question of jurisdiction, Hullock observed that the condition destroyed the whole instrument. The more recent case of the *Emancipation*, 1 Rob. is an express authority upon the same point. There, upon the face of the bond, and according to legal inference, the payment of the money advanced did not depend upon the safe arrival of the ship, and for that reason the Court pronounced judgment against the bond. Upon these authorities it is clear that if the *Hartland* had arrived in this country, the plaintiffs could not have proceeded against her in the Admiralty Court; they had, therefore, no interest in the vessel; they have lost nothing, and upon this ground the defendants are entitled to succeed. But without reference to authority we are of opinion, upon principle, that the master has not, by an instrument of this nature, authority to pledge the ship. By the Roman Law, and still in those nations which have adopted the Civil Law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship, without a formal instrument of hypothecation; but by the law of England no such right can be acquired except by express agreement, and a master can only make such an agreement if he act within the scope of his authority. The right to raise money upon bottomry can only be justified by necessity. If the master in a foreign country wants money to repair or victual his vessel, or for other necessities, he must, in the first instance, endeavour to raise it upon the credit of his owners. If he can do so, he has no authority to hypothecate the vessel; but if he cannot otherwise obtain the money, then he may hypothecate the ship; not transferring the property in the ship, but giving the creditor a privilege or claim upon it to be carried into effect by legal process upon the termination of the voyage. As incident to this transaction, the lender may, if he think fit, insist upon maritime interest; but whether he do so or not, the advance is made upon the credit of the owner, and the owners are never personally responsible. There is no trace in our books, with the exception of *Samson v. Braginton*, of any case in which a master has been held to have authority to make a valid hypothecation of a ship, unless the payment of the money borrowed has been made to depend upon the arrival of the ship. There is, therefore, nothing to shew that a master has authority to hypothecate in any other manner; indeed, if the money be ori-

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ginally advanced upon the credit of the ship, and for any cause an hypothecation be made, even before the ship leave the places where the advances were made, the bond will be void, and cannot be enforced. For these reasons we are of opinion that the master had no authority to make an instrument like that in question, and that the instrument passes no interest in the ship: the money advanced for repairs was a mere debt from the owners to the lender, and it being admitted that a mere debt from the owners to the assured for repairs and disbursements could not legally be made the subject of an insurance, it follows that the defendant is entitled to the judgment.

Rule absolute to enter judgment for the defendant.

## COURT OF EXCHEQUER.

Reported by C. J. B. HENSLY, Esq. of the Middle Temple, Barrister-at-Law.

June 6 and July 1.

THE SWANSEA DOCK COMPANY v. LEVINE.  
Call on shares—Meeting of directors—Advertisement in newspaper—Notice.

For the purpose of calling a meeting of directors, it was necessary that fourteen days' notice should be given in a newspaper circulating in the neighbourhood of Swansea. The advertisement appeared in the third edition of the *Sun*, and it was proved that this paper did not go to Swansea, and, in fact, that the third edition was for circulation in London:

Held, that such notice, and the proceedings taken at the meeting held in pursuance thereof, were invalid.

This was an action in debt to recover 45*l.* with interest from the 11th of March, 1848, the amount of a call of 3*l.* per share upon fifteen shares of the defendant in the Swansea Dock Company.

The defendant pleaded:—1. Never indebted; 2. That he was not a holder of the said shares; 3. That the call was not made by any person having authority to make such call.

The cause came on to be tried at the Surrey Summer Assizes in 1849, before the Lord Chief Baron, when an order was made to enter a verdict for the plaintiffs on all the issues, subject to the opinion of the Court upon a special case.

The following statement includes all that is necessary, or that was referred to by the Court in giving judgment. The question was, whether the defendant was bound to pay a call made at the meeting on the 10th of February, 1848. A private Act was passed in July 1847, and at a general meeting on the 31st of January, 1847, the directors were properly and legally appointed, and the call was made by those directors; and if they were the lawful directors on the 10th of February, 1848, the call was a valid call; but the objection made to the call was, that on the meeting in London, on the 20th of October, 1847, those directors had been deposed, and a new body of directors got in their place. It appeared that the directors who made this call transacted the business of the company at Swansea, and about fourteen or fifteen days before the 20th of October, 1847, they published in a newspaper an advertisement requesting the attendance of certain shareholders for a particular purpose; that this giving dissatisfaction to some directors who lived in London, they, sometime before the 20th of October, 1847, advertised the meeting to be held in London on the 20th of October. For the purpose of making that a lawful meeting it was necessary that fourteen days' notice should be given, and those fourteen days' notice should be given in a newspaper circulating in the neighbourhood of Swansea. The evidence that was given of that was, that in a third edition of the *Sun* newspaper, that was published late in the evening, there was such an advertisement published; but it was proved the *Sun* newspaper did not go to Swansea; that this particular newspaper never went there, and, in point of fact, was merely circulated in London.

*Phipson*, for the plaintiffs, contended that the call was legally made, and that all the proceedings of the board of directors making the call had been regular and valid. That a meeting of the shareholders, which took place on the 31st of August, 1847, was the first ordinary meeting of the company; and that its validity was not affected by an attempt being made to hold such ordinary meeting on another day, that attempt having proved abortive. That a meeting held at Swansea, on the 19th of August, was duly called, and that the bye-laws then passed were valid and binding. That the meeting held in London, on the 20th of October, 1847, was an invalid meeting, and not an extraordinary general meeting of the shareholders held according to the Act. That no due notice was given of the time of holding such meeting, and that the proceedings thereat were not entered in the books of the company, according to the Companies' Clauses Consolidation Act, 1845. That such proceedings were irregular and void, being in contravention of the bye-



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laws of the 19th of August, 1847; and that that meeting had no power to rescind such bye-laws. That the course of proceeding at the said meeting was improper and illegal, and that the proxies held and tendered by the secretary ought to have been received by the chairman. That the appointment of directors at that meeting was void. That the extraordinary meeting held at Swansea, on the 21st of October, 1847, was a valid meeting, and its proceedings binding; and that from that time the parties who by the resolution of the meeting were displaced from the position of directors or officers of the company ceased to hold office. That all the acts and proceedings set out in the present case of the parties described as "the Swansea directors" to the time of the call were valid and binding. That all the acts and proceedings of the parties described as "the London directors," subsequently to the 20th of October, 1847, were null and void. That the general meeting of the company at Swansea, on the 31st of January, 1847, was valid, and its proceedings binding. That the call made on the 10th of February, 1848, was legally and duly made, and due notice thereof given; and that none of the proceedings had any effect on the liability of the defendant to pay the call.

*Booth*, for the defendant, contended that the call was illegal, as not being made by competent authority, but by persons who were not directors at the time, and who had no power to make it if they were. That such call was made by only a portion of the directors at Swansea, without due notice having been given, and without the co-operation of the directors in London, and that the defendant was not shown to be liable. That the first general meeting of the company was held on the 3rd of August, 1847. That the bye-laws made at Swansea, by the Swansea directors exclusively, without the sanction of the London directors, were inoperative and void, and that the meeting of the 19th of August was invalid, and not duly convened. That the meeting held in London on the 31st of August, 1847, was illegal, it being the second in that month, and contrary to the Act of Parliament, and that the subsequent meetings were also invalid. That the extraordinary general meeting at Guildhall Coffee-house, held on the 20th of October, 1847, was a valid meeting. That the directors then nominated became thereafter exclusively the directors of the company; that the other directors were then displaced, and that the alleged bye-laws were then abolished, and that the Swansea secretary from that time ceased to hold office. That the alleged meeting on the 21st of October was invalid, and that all the acts and deeds of the parties styling themselves directors and secretary at Swansea, subsequent to the 20th of October, 1847, were void. That the contract made at Clifton, dated the 17th of March, 1848, showed that the persons at Swansea, styling themselves directors and secretary, did not so consider themselves, or they would not have had any dealing with the parties in London, who designated themselves, and acted as directors. That the resignation on the 20th of April, 1848, of the London directors, in favour of the Swansea directors, by virtue of resolutions drawn up by the Swansea solicitor in favour of the parties at Swansea, showed that the parties at Swansea, being then appointed directors in room of those in London, considered those in London to be previously, and at that time, the directors of the company. And that a contract made at Clifton of the 17th of March, 1848, by which certain shareholders were released from the payment of any call in respect of their shares, operated as a release in favour of the defendant in respect of the alleged call made upon him as a co-partner.

JUDGMENT.

MARTIN, B.—We are of opinion that the notice calling the meeting of the 20th of October, 1847, was not a valid notice, and that the persons who met on the 20th of October, 1847, had no power to depose the directors, who had been lawfully appointed on the 31st of January, 1847, and therefore these calls made by them were valid calls. The other objections fall to the ground. That is sufficient in the event of that meeting being a valid meeting. The directors who made this call are completely appointed, and were competent to make it. We are therefore of opinion that judgment ought to be given for the plaintiffs.

*Judgment for the plaintiffs.*

May 6 and July 10.

BELDON v. CAMPBELL.

*Power of master of ship to bind the owner. The master of a ship has authority to bind the owner as to all repairs that are necessary for the purpose of bringing the ship to the port of destination; and he has also power to borrow money, but only in a case where a ready-money payment is absolutely necessary, as for port or light dues, &c.; and in all cases where practicable, he must first communicate with the owner; and in no case can he bind the owner for money lent for the purpose of paying a debt already incurred.*

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*Per MARTIN, B.—The case of Robinson v. Lyall, 7 Price, 592, is not law.*

This was a case tried before Platt, B. in which a rule for a new trial had been granted, on the ground that there was no evidence to go to the jury. The facts fully appear in the judgment.

*Atherton* showed cause.—The question in the case was the extent of the authority which the master of a vessel has to bind the owner. He cited *Arthur v. Barton*, 6 M. & W. 138; *John v. Simons*, 2 Q. B. 425; *Stonehouse v. Gent*, id. 431; *Williamson v. Page*, 1 Car. & Kir. 581; *Snowden v. Chadwick*, Law T. 140.

*Crowder* (with him *Bramwell*), contra, cited *Machintosh v. Mitchell*, 4 Ex. 175; *The "Lockiel,"* 2 W. Rob. A.R. 45; *Abbott on Shipping*; *Hawtayne v. Bourne*, 7 M. & W. 599, and contended, that if a debt was once incurred for the purposes of the ship, the captain could not borrow money to pay such debt so as to bind the owner, the debt being incurred, the borrowing of the money is not for the benefit of the ship. There is an analogy between such a case and the case of husband and wife; the wife can pledge the husband's credit for necessities, but could not for money lent to pay a debt already incurred.

JUDGMENT.

PARKE, B.—In this case the point reserved for the consideration of the Court was, whether the owner of a vessel, who resided at Newport, was liable to the plaintiff, who was a merchant at Newcastle, for a sum of money which had been borrowed by the master for the purpose of paying a debt contracted in towing the vessel by a steam-tug into port; and also for a sum paid to a master carpenter on a Saturday night, the master carpenter having been employed to do repairs upon the vessel. We are of opinion that in this case a nonsuit must be entered. There is no doubt of the power of the master by law, but there is as to what extent it goes, to bind the owner; the master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has, as incident to that employment, a right to bind his owner as to all things necessary; that is upon the legal maxim *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*. So, therefore, the master has perfect authority to bind his principal, the owner, as to all repairs that are necessary for the purpose of bringing the ship to the port of destination; and he has also the power, as incidental to his appointment, to borrow money, but only in a case where ready money is necessary; that is to say, where there are certain payments made in the course of the voyage, and for which ready money is required and credit is never given. He has the power to borrow money for the purpose of making those payments; an instance of this is, the payment of port dues, which are required to be paid down in cash; or lights, which are also required to be immediate payments; or any dues which require immediate cash payments; and so, also, there was a case referred to in the course of the argument, where the ship being at the termination of a long voyage and ordered to proceed on another, money borrowed to pay seamen's wages, and who would not go on the second voyage without being paid, was held also to be necessary. But these cases of borrowing money do not apply to any case in which the owner of a vessel is near the spot so as to be convenient to be communicated with, and before the master has any right to make him debtor to a third person he must consult his owner, to see whether he is willing to be made a debtor to a particular third person, or whether he will refuse to pay the money at all. In this case it appears to us that there are two objections to the plaintiff recovering either one sum or the other. With respect to the sum of money borrowed for the purpose of paying the steam-tug, it appears that the vessel was off the port of Newcastle, which was its ultimate port of destination at the time, and the steam-tug was necessary in order to tow the vessel into the river Tyne, and the owner of the steam-tug did not object to tow the vessel in, without any previous payment. If the owner of the steam-tug had said "I will not tow you in unless you will actually pay the money down," then it would have been competent for the master to have borrowed the money for that purpose in order to pay him. It could not be expected that he would wait at the mouth of the harbour where it would have been impossible for him to have communicated with the owner living at Newport, a great distance off, in order to ascertain whether he should borrow the money or not; but in this case the owner of the steam-tug did not make any such stipulation, but the vessel was towed into Newcastle, and the money was not paid to the owner of the steam-tug until after several days had elapsed, during which it was perfectly competent for the master to have written to Newport, which was only a day's post, as it happened, and to have got the owner's answer to ascertain from whom he should borrow the money; instead of that he goes four or five days afterwards and borrows from the plaintiff a sum of money for

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the purpose of paying this debt to the owner of the steam-tug, a debt which the owner of the vessel was liable to, because it was within the power of the master to employ the steam vessel on credit; but we think he had no power, under these circumstances, to borrow money in order to pay a debt for which the owner of the vessel was already responsible by the original contract, and still less that he could borrow that money without consulting the owner, who was living at Newport, and was able to be communicated with before it was absolutely necessary to pay the money, even supposing that the master had made a contract to pay it on a particular day. So that there are two objections to the plaintiff's right to recover that sum. And with regard to the other, which was a sum paid to a master shipwright, who wanted it to pay his workmen on a Saturday night, we also think it is impossible to say that was a payment of necessity, because the completion or progress of the work on Monday was not a necessity, for the vessel had arrived at her place of destination. It was perfectly competent for the master to have consulted the owner, and to ascertain whether he would have the repairs gone on with, even supposing it were necessary to have paid the money down in order to accomplish that purpose. We think in neither of these cases are they payments of necessity, or fall within the authority which the master has, by the general law, to bind his owner by the contracts that he enters into.

MARTIN, B.—I will only add, that I had very considerable doubt in this case; I thought the authorities went further than it seems they properly do, with the exception of the one I have before me, of *Robinson v. Lyall*, 7 Price, 592. On consideration, I am of the same opinion that my brother Parke has stated; the true principle is, that the master had not authority to borrow money after the work had been done, for the purpose of paying the debts. I think it is the sound and safe principle; and my own impression is, that the principle in this case of *Robinson v. Lyall*, is not law; and the view taken by Mr. Justice Holroyd, and laid down afterwards by the Court, is not true law.

PARKE, B.—I understand they only ask for a new trial. The rule must be absolute for a new trial.

*Rule absolute for a new trial.*

June 21 and 23, and July 10.

HESLOP v. BAKER.

*Bankrupt Law Consolidation Act, 1849—12 and 13 Vict. c. 106, ss. 125, 141—Construction of. (a) The bankrupt's own property passes by the adjudication to his assignees under the 141st section, but for the purpose of selling chattels in his reputed ownership it is necessary to obtain an order of the Court under the 125th section before the right of property and possession can be divested. Per Pollock, C.B. Parke, Alderson, and Martin, BB.; Platt, B. dubitante.*

The facts and arguments of this case appear fully in the judgment, that it is unnecessary to give them at greater length.

*Bliss, Q.C.* appeared in support of the rule.

*H. Hill, contra.*

*Ryall v. Rolles*, 1 Atk. 164; and 1 Ves. sen. 376; *Kitchen v. Bartsch*, 7 East, 53; *Kensington v. Chemtler*, 2 M. & S. 36; *Lilly v. Osborn*, 3 P. Wms. 298; *Cripp v. Pratt*, Cro. Car. 548, were cited.

*Cur. adv. vult.*

JUDGMENT.

PARKE, B.—This case was tried before Cresswell, J. It was an action of trover, and there was a plea of not possessed. The plaintiff claimed the property in question under an assignment made several years before. The defendants were the assignees under a commission of bankruptcy, and they claimed the property as being property in the apparent ownership of the bankrupt at the time of the act of bankruptcy. Mr. Bliss objected that, under the last bankrupt Act, the 12th & 13th Vict. c. 106, property, in the order and disposition of a bankrupt, did not rest in the assignees, and they could only deal with it by means of an order made under the statute. Now the question, in this case, depends entirely upon the construction of the 125th and 141 sec. of the 12th & 13th Vict. c. 106. If this were an entirely new

(a) Sec. 125 enacts, "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy," &c.

Sec. 141.—"That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, rights, and interest in such debts, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt by virtue of their appointment."

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statute on a subject with respect to which no previous enactment had existed, there could not have been any question but that the bankrupt's own personal estate, present and future, would have vested in the assignees on his being adjudged a bankrupt under sect. 141. But "goods in his order and disposition" under sect. 125; the lands and goods previously transferred, when the bankrupt was insolvent, under sect. 126; the real or personal estate extended by a fraudulent extent, under sect. 127, would not pass by the adjudication; but an order of the Court would be required to sell and dispose of them before any one else than the bankrupt would have any title in them. This is the construction that would be required by the plain and unequivocal language of the statute. But it is contended, on the part of the defendant, that the new Bankrupt Act is not to be construed as an entirely new Act, but as a consolidation of the previous statutes, which were repealed and re-enacted; but the whole is to be construed with reference to the old law, and the re-enacted clauses understood in the same sense as they were before, and that, if so, the 141st sect. of the new Bankrupt Act has the effect of passing, not only all the property which belongs to the bankrupt, but all of which he was in possession as reputed owner. We, however, think, after much consideration (my brother Platt still entertaining some doubt on the point), that, construing the Act of Parliament with reference to the repealed enactments, it is impossible to give that effect to the 141st section in this Act. The state of the law before the passing of the Act 1 & 2 Wm. 4, c. 56, s. 25, repealed and re-enacted by the new Bankrupt Act, is to transfer the property from the bankrupt's possession. By the statute 13 Eliz. c. 2, the commissioners sold or assigned a portion of the bankrupt's personal estate to each creditor; by the 1 Jas. 1, c. 15, they had the like power as to lands or goods conveyed, without consideration, by the bankrupt to his children or others; by the 21 Jas. 1, c. 19, s. 10, they had the same power, where the bankrupt had his estate extended by another under the colour of that person being an accountant to the Crown, that power to be exercised after examination on oath; and by the 11th section of the 21 Jas. 1, they have the like power, without any such previous examination, over the goods and chattels in the possession of the reputed owner. But in the 6 Anne, c. 22, sec. 4, which was a temporary Act only, assignees were directed to be appointed for the benefit of all the creditors, and the commissioners are to assign all the bankrupt's estate and effects to those persons only. After that Act expired, the 5 Geo. 2, c. 30, a perpetual Act, containing similar provisions in sec. 26, was passed, and afterwards that Act was repealed, and the other provisions enacted by the 6 Geo. 4, c. 16, s. 63, extending in words to all the present and future personal estate of the bankrupt which, by construction, the general assignment had been considered to do before, and by the 72nd section the commissioners were empowered to sell and dispose of, for the benefit of the creditors, the goods and chattels in the bankrupt's reputed ownership, with a similar power by sec. 73, as to lands and goods conveyed to his children or others, without consideration, with the additional limitation that he shall then be insolvent; and by the 71st section, after examination on oath, a similar power is given as to lands or goods fraudulently extended. As the law stood after that Act passed, there is no doubt the commissioners could assign goods and chattels in the possession and reputed ownership of the bankrupt by virtue of the 72nd section, and the personal estate mentioned in the 73rd, by one general assignment, to the assignees; and no doubt the former of these passed by the assignment, which ordered, disposed of, bargained, sold, and transferred and set over all the goods and chattels and other personal estate whatsoever and whosoever whereof the bankrupt was possessed, interested in, or entitled unto at the time he became bankrupt, or at any time since. This is the form given in Deacon's Bankrupt Laws, 495, and that given in 2 Cooke's Bankrupt Laws, 53, 67; the form contains only an assignment of the bankrupt's estate, the object of such assignment being only to defeat an extent which would not apply to the goods of others in his reputed ownership; and the difference probably arose from that cause. At a time, then, prior to the 1 & 2 Wm. 4, c. 56, s. 25, there is no question, a general assignment operated to vest in the assignees goods in the reputed ownership of the bankrupt, supposing the general assignment to be in the form I have described, which it probably was. When the statute had passed, it is a question whether such goods did pass by the adjudication by virtue of the 25th section. That section provides, when a person has been adjudged a bankrupt, all his personal estate and effects, present and future, not the personal estate, which by the laws now in force may be assigned by the commissioners, shall become absolutely vested in and transferred to the assignees by virtue of the assignment, without any deed of assignment, as if such estate were assigned by deed to such assignees

and the survivors. On the other hand, the language of the former part of the section appears to apply to the bankrupt's own property only, and the other words "which by the laws now in force may be assigned by the commissioners," may give the former words a more extensive operation. In a note on this statute by Koe & Miller, in their edition of 2 Mont. & Ayr. Bankrupt Laws, 230, it is said, neither the property mentioned in the 71st section, nor that in the 72nd section of the 6 Geo. 4, c. 18 (goods in the possession or reputed ownership of the bankrupt), vests in the assignees before adjudication. If this be so, no question can possibly arise in this case, for a similar construction would have to be made of the 141st section of the 12 & 13 Vict. c. 106, which would pass only the bankrupt's own personal estate, by its proper description of his personal estate and effects. But supposing it to be otherwise, and that by a liberal construction of the 1 & 2 Wm. 4, c. 50, s. 25, it ought to be held the words "his estate," comprise all the estate which by the laws in force might be assigned by the commissioners to the assignees, and consequently that property in the reputed ownership of the bankrupt did vest under that statute, it by no means follows it would pass under the 141st section of the new Bankrupt Act, even if it had stood alone; for in this section we do not find the only words that might enable us to give a more extensive signification to the words "all his estate," that is, the words "which, by the laws now in force, may be assigned by the commissioners," under which words it may be supposed the Legislature meant to comprise all that could be assigned. These words are omitted; and when we find in the same Act of Parliament, the 72nd section of the 6 Geo. 4, c. 16, is re-enacted with this alteration only, that instead of the commissioners having power to sell and dispose of the same, that is, practically to assign them to assignees, the Court has power not "to sell and dispose of," but to "order them to be sold and disposed of," we think the meaning of this enactment in the new statute is, that in the case of the bankrupt's own property it is to pass by the adjudication, but in the case of chattels in his reputed ownership, something different must be done, and the Court must make an order to sell and dispose of the same in order to divest the property from the bankrupt. It was justly observed by Mr. Bliss that there is a general heading to these and the two other sections, with respect to "the power of the Court over certain descriptions of property" (those are the words of the heading), in all of which a power to order and dispose of is given by express words; and it may be added, as to the property mentioned in the 127th section, it is impossible it could pass by adjudication, as the Court must first examine on oath as to the debt due to the Customs before they can make the order. Taking all these clauses together, and acting on the sound and established rule of construing statutes, and all written instruments by their ordinary and grammatical sense of the words used, unless it would lead to some absurdity and inconsistency with the intent of the framers, to be collected from the whole of the instrument. On these legitimate grounds of construction we do not feel (at least all of us, except my brother Platt) any doubt that the goods in question did not pass simply by the adjudication. There is no absurdity, or inconsistency, or inconvenience in holding that an order was necessary in such a case; when given, the title of the vendee, if the goods are sold by the assignees, if the order is to vest the goods in them, will relate to the act of bankruptcy in the same way as the title of the assignees would by the general rule, for all will be sold or assigned that the bankrupt had at the time he became bankrupt. Whether this state of the law arises from a mistake of the framers of the Act, or was intended is a matter of mere conjecture, possibly it may have been a mistake in making this enactment in the terms used. Of the meaning of the terms used there is, in the opinion of all of us (except my brother Platt), no doubt; and according to the words of the enactment, it is clear the goods in question do not pass by adjudication. If the Court makes an order to sell or vest in the assignees, the question may arise whether it would be final and conclusive by virtue of the subsequent sections in cases where the claimant of the goods does not petition under section 12, and consequently not to be questioned in a court of law: upon this point it is unnecessary to give any opinion. We think, therefore, that the rule must be absolute for a new trial, and if it becomes necessary, and the defendants choose, they may tender a bill of exceptions.

*Rule absolute for a new trial.*

*Rule absolute for a new trial.*

## EXCHEQUER CHAMBER.

## EXCHEQUER CHAMBER.

Reported by FREDERICK BAILLY, Esq. of the Middle Temple, Barrister-at-Law.

## ERRORS FROM THE EXCHEQUER.

Tuesday, May 20.

(Before CAMPBELL, C.J. PATTERSON, MAULE, COLERIDGE, CRESSWELL, and TALFOURD, JJ. SMITH v. CARTWRIGHT.)

*Corporation—Custom to measure coals—5 & 6 Wm. 4, c. 63—Right to weigh instead of measure coals—Appointment under seal of Corporation officers.*

*The plaintiff as a meter appointed by (but not under seal of) the corporation of Kings Lynn, claimed an immemorial custom in the corporation to measure all coals imported into that port down to 1836, and subsequently under the 5 & 6 Wm. 4, c. 63, a right to weigh instead of measure all the coals there imported.*

*Held, there was no enactment in that statute, either express or implied, that where coals had been theretofore of right measured, they should be thereafter weighed: nor was there, in this case, any evidence offered of a right in the corporation, or persons deputed by them, to weigh coals against the will of the importer.*

*Also, that as the meter claimed an office with certain profits annexed to it, the payment for the measurement being for the benefit of the meter only—not the corporation—and he sued for the disturbance of his right to that office, his appointment to the office should have been under seal; at all events, if a corporation, by prescription, might prescribe and do certain corporate acts without seal, such custom must be alleged.*

This case came before the Court upon a bill of exceptions tendered to the summing up of the cause by the Lord Chief Baron to the jury at the Norfolk assizes, where it was tried. It was a special action on the case, brought by the plaintiff, one of the meters deputed by the mayor, aldermen, and burgesses of the borough of Kings Lynn, against the defendants, for preventing the plaintiff from weighing the defendant's coals, the plaintiff claiming the right of the corporation of that borough to the work, labour, and privilege of weighing instead of measuring all coals imported into the port of Kings Lynn on and since the first of January, 1836, and that the corporation had power to appoint their own meters for that purpose. The plaintiff alleged that until the 1st of January, 1836, there was an immemorial custom of the corporation to measure all coals imported into that port, and that subsequently to that date the right to weigh instead of measure could be supported under the 5 & 6 Wm. 4, c. 63. The learned Chief Baron was of opinion, at the trial, that the plaintiff had not given evidence of the right of the corporation to that so claimed, and directed the jury to find a verdict on the second and seventh issues, which raised those points, for the defendants. To this exception was taken. The second exception was, whether there was evidence to go to the jury to prove that the plaintiff was one of the meters deputed by the mayor, aldermen, and burgesses of the borough of Kings Lynn denied by the twelfth and twenty-third pleas, the objection being that he was an officer, not a mere servant, and that an appointment under the seal of the corporation was necessary.

Sir Fitzroy Kelly, for the plaintiff in error. There was an immemorial custom of the corporation to have measured all such coals as were imported into the port of Kings Lynn down to the passing and coming into operation of the 5 & 6 Wm. 4, c. 63 (January, 1836), and the plaintiff had been and was their servant for many years, so that the duty and rights of the plaintiff and the corporation continue unimpaired to that time; by the 14th section of that Act it is recited, that for the purpose of ascertaining and providing for the fulfilment of all existing contracts, and fixing the payments to be made in consequence of such contracts or rents in England and Ireland, payable in grain or malt, or in any other commodity or thing and in consequence of any toll, rate, or duty, heretofore payable according to the weights and measures heretofore in use, where the same shall not have been already ascertained and fixed by agreement between parties, or under the provisions of the said Act of the fifth year of his late Majesty; be it enacted, that at the General or Quarter Sessions of the Peace to be holden in every county, riding, or division, and in every city, town, or place (being a county of itself), in England or Ireland, next after the expiration of three months after the passing of this Act, or at any General or Quarter Sessions of the Peace to be holden thereafter, on the application of any party to such sessions, an inquisition shall be taken before the justices assembled at such General or Quarter Sessions, by the oaths of twelve substantial freeholders of the said respective counties, cities, towns, or places, having lands or tenements to the value of 100l. per annum or upwards, to be summoned by the

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sheriff or proper officers of every such county, city, town, or place, to inquire into and ascertain the amount, according to the standard of weights or measure by this Act established, of all contracts to be performed or rents to be paid in grain or malt, or any other commodity or thing, or with reference to the measure or weight of any such grain, malt, or other commodity or thing, and the amount of any toll, rate, or duty heretofore payable according to any weights and measures heretofore in use within such counties, cities, towns, or places respectively; and in taking such inquisition, care shall be taken that in every case in which grain, malt, or meal, or any other commodity or thing, having, before the said 1st day of January, 1835, been sold by weight, shall henceforth be sold by measure, or having before the said 1st day of January been sold by measure, shall henceforth be sold by weight, no increase or diminution be made in the amount of any rate, toll, or duty, hereafter payable for such grain, malt, or any other commodity or thing, due regard being had to the substitution of measure for weight, or of weight for measure, as the case may be; and such inquisition, when taken, shall be transmitted by the respective clerks of the peace of the same counties respectively, or by the mayor, bailiff, or other head officer of every such city, town, or place (being a county of itself), into his Majesty's Court of Ex. at Westminster and Dublin respectively, and shall be there inrolled of record, and shall and may be given in evidence in any action or suit at law or in equity; and the amount so to be ascertained shall, when converted into the standard weights and measures, be the rule of payment in regard to all such contracts, rents, tolls, rates, or duties in all time coming." The coal meters for the corporation have weighed, instead of measured, the coals imported at Kings Lynn ever since the Act passed; sec. 6 of which, in fact, impliedly abolishes measuring, as it says, that from and after the passing of this Act the measure called the "Winchester Measure," and the lineal measure called the "Scotch Ell," and all local or customary measures, shall be abolished, &c. Then the 9th sec. states that, "whereas the sale of all coals, slack, culm, and cannel of every description by weight, and not by measure, would tend greatly to prevent the commission of frauds and impositions in the vend and delivery of such coals, slack, culm, and cannel of every description; be it therefore enacted, that from and after the 1st day January, 1836, all coals, slack, culm, and cannel of every description shall be sold by weight, and not by measure; and every person who shall, from and after the 1st day of January, 1836, sell any coals, slack, culm, or cannel of every description by measure, and not by weight, shall, on conviction, be liable to a penalty not exceeding 40s. for every such sale." So that the Act appears, in fact, to substitute weighing for measuring. *Goody v. Penny*, 9 M. & W. 687, is in point upon this subject, as also *The Mayor, &c. of Rochester v. Lee*, 16 Law T. 262. [MAULE, J.—As you insist upon the right to weigh every one's coal imported, and of course to be paid for it, what good does this weighing do to any body? CAMPBELL, C.J.—Do you say it is for all coals imported, whether for sale or otherwise? Yes. The custom was that all coals should be measured, and it is contended that the Act of Parliament substitutes weighing for measuring. Then, 2ndly, there was evidence of the plaintiff's having acted as a meter for more than twenty years before the action was brought, and that he was duly appointed to do so by the corporation as their servant, which he has continued uninterruptedly for more than twenty years. Is the officer, as such, a public officer, or is there any difference between this office and a vestry clerk. (*M'Cahey v. Allston*, 2 M. & W. 206; *Marshall v. Lamb*, 5 A. & E. 115; *Butler v. Ford*, 1 C. & M. 662, and the cases collected in Taylor on Evidence, vol. i. p. 112, there cited.) There is no evidence of any appointment under the corporation seal; all the others have been appointed heretofore as the plaintiff was, and have acted down to this time; and it is submitted that the appointment is good without being under seal. (*Anonymous*, 1 Salk. 191; *Smith v. Birmingham and Staffordshire Gaslight Company*, 1 A. & E. 526.)

*Watson, Q.C.* for the defendant in error.—There are two exceptions taken in this case to the summing up of the Lord Chief Baron; and the defendant submits to this Court that the learned judge was correct as to both points. The claim here is, that the corporation of Lynn have, from time immemorial down to 1836, a custom in measuring, and since that period a right to weigh all coal imported into the town of Lynn, for whatever purposes required—all coal brought in for the purposes of sale may perhaps be measured or weighed advantageously for all the parties interested; but there the right is for all coal imported, required or not. [CAMPBELL, C.J.—We cannot here now inquire into the custom, if we had power to do so; it certainly seems a very strange custom.] It was then contended there was no power conferred by the 5 & 6 Wm. 4, c. 63, to give the corporation the right of

insisting upon weighing all coals imported; and clearly there was no such right without it. (*Jenkins v. Harvey*, 5 Tyrwhitt & 2 C. M. & R. 393; 1 C. M. & R. 877; *Fitzgibbon*, 243, were referred to.) 2ndly, The plaintiff was an officer of the corporation, and should have been duly appointed under seal to give him the right he claims; but if not, and even supposing that a corporation by prescription might prescribe and do certain corporate acts without seal, which by the general law might require the use of a seal, that custom should have been alleged.

Cur. adv. vult.

## JUDGMENT.

*Saturday, June 21.*—PATTERSON, J. delivered judgment.—The first question that we have to determine in this case is, whether the Lord Chief Baron was right in directing the jury upon the second and seventeenth issues, that the plaintiff had not given evidence of the right of the mayor, aldermen, and burgesses of the borough of Kings Lynn in the sole and exclusive work, labour, and privilege, on and since the 1st of January, 1836, of weighing instead of measuring all coals imported into the port of Kings Lynn, as claimed in both counts of the declaration, and in directing the jury to find a verdict on those issues for the defendants respectively. The plaintiff, alleging the immemorial custom of the corporation to measure all such coals till that day, admits that it is only under the statute 5 & 6 Wm. 4, c. 63, the claim afterwards to weigh can be supported; and it is quite clear, without the authority of Parliament, a right to measure could not be converted into a right to weigh. The plaintiff's counsel, in arguing that there was no necessity for an inquisition at Quarter Sessions, asserts that this case does not come within the 14th section of the statute, there not being a fixed sum payable for measuring the coals at Lynn; they therefore renounce all benefit from that section, and they can only seek to avail themselves of the 9th section, which enacts, that after the 1st of January, 1836, coals shall be sold by weight, and not by measure; but looking to the very singular right claimed on this record, we cannot see how the exercise of it is at all affected by the statute. It is not a right to any toll, rate, or duty payable to the corporation, nor a right at all connected with the sale of coals: no purpose is pointed out for which the measurement is made, and the only payment in respect of it was a reasonable sum paid to the meter appointed by the corporation for his work and labour in measuring; there is no express enactment in the statute that wherever coals had been theretofore of right measured they should be thereafter weighed, and we think it contains nothing from which such an intention on the part of the Legislature is to be implied. There are many purposes for which coals may still be lawfully measured, as to ascertain the amount of freight or warehouse-room to be paid for them, which may be regulated by their volume and not their weight. Nothing appears why the corporation of Lynn might not have continued to ascertain the quantity of coals landed in their port by measurement as before, and we think they offered no evidence of a right in themselves or persons deputed by them to weigh coals against the will of the importer. *Goody v. Penny*, 9 M. & W. 687, was an action of debt for rates and duties imposed by the local Act of Parliament on coals landed within a certain district, and there was no doubt that the rates and duties were payable. The decision there that an inquisition by the lessor was unnecessary, does not apply here where a special action on the case is brought for preventing the plaintiff from weighing the defendant's coals, and no right to weigh them is established; so the case of the *Mayor of Rochester v. Lee*, referred to in the argument, has as little application, as that was an action of debt for the toll or port duties payable to the corporation on the landing of coals within the port of Rochester, and the proportion between the chaldron and the ton to regulate the payment had been duly ascertained within the 14th section of the Act of Parliament. On the first exception we think the defendant in error is entitled to our judgment. The second exception depends on whether there was evidence to go to the jury to prove that the plaintiff was one of the meters deputed by the mayor, aldermen, and burgesses of Lynn, which is denied by the 12th and 23rd pleas. The objection is, that an appointment under the seal of the corporation was necessary. If it was not necessary there was abundant evidence that would have justified the jury to have found for the plaintiff on these issues. It is material to look to see how the custom is alleged. The declaration claims a right in the corporation (by the persons by them in that behalf from time to time deputed and appointed, as hereinafter mentioned), and afterwards states that the corporation had duly, and in the exercise of their said right in that behalf, deputed and appointed certain meters, of whom the plaintiff was one. The declaration does not anywhere say how he was to be appointed, or when he should be appointed; the declaration does not state, as part of the immemorial custom, that the meters might be

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deputed and appointed without seal, nor any particular mode in which they should be appointed: therefore, even supposing that a corporation by prescription might prescribe and do certain corporate acts without seal, which acts by the general law would require the use of a seal, which, however, we by no means intend to lay down as the law, still the custom must be so alleged, which it is not in the present instance, the corporation claims a right to measure by persons appointed by them; that alone would make the appointment merely that of a servant, and might well be without seal. But the payment in respect of the measurement is for the benefit of the meter only; the corporation takes no part of it; the meter is the plaintiff, and complains of being disturbed in the exercise of his privilege. This shews that the meter claims an office to which certain profits, to be fixed, indeed, from time to time by the corporation, are annexed; and he sues for the disturbance of his right to that office. If he had performed the duty, he must have claimed the prescribed fee as due to himself. Now, this right to discharge certain duties in regard to the property of third persons (altogether against their will), and demand payment for so doing, must be by reason of his having an office, and he is not a mere servant of the corporation, but an officer appointed by them; therefore he must have an appointment under seal, and we do not think that the tenure of his office, which is said to be during the pleasure of the corporation, can make it unnecessary that he should have such an appointment, or convert him from an officer into a mere servant. On this exception, therefore, as well as the other, we think the defendant entitled to succeed, and the judgment of the Court below must be affirmed.

Judgment affirmed.

## BANKRUPTCY.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLSUTT, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FORBESLANQUE, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Saturday, Aug. 2.

Ex parte CLEGG, re CLEGG.

*Bankrupt Law Consolidation Act, 1849, 230th and 231st sections—Creditors voting by attorney. At a meeting called under the 230th section, creditors, though resident in England, may vote by letter of attorney.*

On the 14th of August, 1827, a commission of bankruptcy was issued against the petitioner, Samuel Clegg, and two others, and the petitioner obtained his certificate on the 12th of November following. The petitioner's separate debts were paid in full, and a surplus was carried over from his separate estate to the joint estate, and the creditors on the joint estate were paid 15s. in the pound. The petitioner being desirous of having the commission superseded and annulled as to him, called a meeting of his creditors on the 28th of May, 1851, when an offer to pay a further dividend of 2s. 6d. in the pound was made, and this offer was accepted by two persons, to whom the greater part of the creditors had assigned their debts. A second meeting was held on the 23rd of June, 1851, at which the two persons before mentioned accepted the petitioner's offer of composition, but, on the same day, an application being made to Mr. Commissioner Perry to examine the said proceedings, he, after hearing an objection raised by one of the petitioner's creditors, postponed his decision until the 27th of June, when he decided, under the 231st section of the Bankrupt Law Consolidation Act, that the creditors were not authorised to vote at the said meetings by power of attorney unless such creditors resided out of England. The present petition was one of appeal from the commissioner's decision.

*Swanston and Hardy* appeared in support of the petition.

*W. W. Cooper*, for the assignees, offered no objection.

The VICE-CHANCELLOR said that he considered that a creditor might attend at a meeting called under the 230th section of the Bankrupt Law Consolidation Act, 1849, and vote by letter of attorney duly executed, and he accordingly directed that the commission should be superseded as to the petitioner on his paying into court the proposed dividend.

## Ecclesiastical Courts.

## PREROGATIVE COURT.

Reported by Dr. WADDILOVE, of Doctors' Commons.

Tuesday, July 1.

In the goods of J. NATLER.

Practice—Joint administration.

Administration of the effects of a wife, refused to

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one of three joint administrators with the will annexed, of the husband.

Frances Naylor died on the 19th of December in the year 1805, leaving a husband surviving her. He left a will, and in the month of October, 1825, administration with that will annexed, was granted jointly to his three sons, as the residuary legatees named therein. A representative of Frances Naylor was required to carry on proceedings in Chancery. A claim had been filed in that court by H. B. spinster, in respect to a sum of 500*l.* directed by an indenture, dated Jan. 23, 1777, to be raised for the benefit of the daughter or daughters of M. B., wife of J. B., who should attain the age of twenty-one years. H. B. and Mrs. Naylor, the deceased, were the only daughters of the said M. B. and consequently the Court of Chancery required her legal representative, she being dead, to appear as a party to the suit. Of the three joint administrators with the will annexed of her husband, one was abroad, and another had been declared bankrupt. The administration was therefore prayed for on behalf of the third alone. By the practice of the Court, had they been three co-executors, instead of three joint administrators, one of them alone might have taken the administration of the effects of the deceased; but they being administrators, and more than one, it was required that they should all join.

Harding moved for the administration to be granted to T. N. as one of the administrators, submitting that under the circumstances of this case the practice of the Court might with reason and justice be departed from, upon the authority of *Willand v. Penn*, cited in Williams's Exors. p. 758 (3rd edit.), where it was held by the K.B. after three arguments, that one of several administrators stands on the same ground and footing with one of several executors.

Sir H. JENNER FUST.—The Court never forces a joint administration, that parties may not have reason to complain of any inconvenience that may result from that form of grant; but when the parties have themselves joined in the administration, I do not feel justified in relaxing a practice which has been prescribed and found useful. I must reject the motion.

*In the goods of E. MARTIN.  
Will of wife of a convicted felon*

Administration with the will annexed (the executors having renounced) of the wife of a convicted felon was granted, an affidavit having been made, to satisfy the advisers of the Crown, that the property disposed of had been acquired after the conviction.

The deceased died on the 9th of May last, having made and duly executed a will, dated the 19th day of March, 1842. It appeared, however, that the testatrix had been married in the month of January, 1830, to John Martin, but he had been, in the month of October, 1832, convicted of a felony, and sentenced to transportation for life, which sentence was carried into effect by his being sent to Van Dieman's Land. In the year 1844 he obtained from the governor of that colony a pardon, conditioned on his not returning to this country during the remainder of the term of his sentence (viz. his natural life), consequently he still remained in Van Dieman's Land. A letter had been received from him there, dated January 1850.

Deane, under these circumstances, moved the Court to grant administration with the will annexed (the executors having renounced) to the residuary legatee named in the will, the deceased being in law, in consequence of her husband's sentence of transportation, a *feme sole*, and therefore competent to make a will. He cited Co. Litt. 132, 6; *Countess of Portland v. Progers*, 2 Vern. 104; *Compton v. Collison*, 2 Bro. Ch. C. 585; also *Ex parte Franks*, 1 M. & Scott, 11.

Sir H. JENNER FUST.—I have no doubt as to the principle contended for, or its application to the present case, but I am unwilling to grant this motion without notice to the Queen's proctor, since the rights of the Crown may be affected.

Sir J. Dodson, Q.A. said, on behalf of the Crown he should be satisfied if an affidavit were brought in, stating that the property disposed of by the will had been acquired by the wife after the conviction of her husband.

That affidavit was afterwards brought in, and the administration, with the will annexed, was then decreed.

## Nisi Prius.

## COURT OF QUEEN'S BENCH.

Reported by W. J. MURDOCK, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS AT WESTMINSTER AFTER TRINITY TERM.

Saturday, June 21.  
(Before Lord CAMPBELL, C.J.)  
FLORENCE v. LAWSON.

Witness—Judge—Examination.

A judge of the Superior Courts should not be called as a witness to prove facts which may be proved equally well by other persons. If called, his examination will not be allowed.

This was an action on the case for a libel. The libel was alleged to have been committed in a newspaper report of certain proceedings at Judges' Chambers.

To prove what took place at chambers, it was proposed, on the part of the plaintiff, to call Platt, B., the judge before whom it took place.

Lord CAMPBELL, C.J.—I shall not examine Mr. Baron Platt upon such a subject.

Humfrey, Q.C. said that he remembered several instances of judges having been examined as witnesses—he instanced Lord Cottenham.

Lord CAMPBELL, C.J.—I shall not follow the example. I believe Lord Cottenham was examined to say how far he was influenced by a nod from counsel. No doubt there are cases in which it would be necessary that the judge should be examined; but it would be very unseemly that this should be done where the same facts could, as in this case, be equally well proved by other persons. The learned baron was not examined.

## Verdict for the plaintiff.

The Attorney-General and Manisty, for the plaintiff.  
Humfrey, Q.C., Bovill, and Hawkins, for the defendant.

Tuesday, June 24.

(Before Lord CAMPBELL, C.J.)

ESTOB v. WRIGHT and OTHERS.

Notice of action—Court—Cause of action—  
Special damage.

Notice of action to the clerk and bailiffs of a County Court stated that the action would be brought in the Court of Common Pleas: Held, it would not support an action in the Court of Queen's Bench.

The notice was for breaking plaintiff's house, and taking furniture therein without expressly claiming the furniture as belonging to the plaintiff: Held, that it would not support an action for breaking the plaintiff's house and for taking her goods.

Semble, the notice should state the special damage, if any is to be claimed in the declaration.

Semble, if execution issues from the County Court against the goods of A. and the goods of B. are taken, and his house is broken by mistake, the clerk and bailiffs are, under 9 & 10 Vict. c. 95, s. 138, entitled to notice of action.

This was an action of trespass for breaking and entering the plaintiff's house and for seizing his goods. The defendant Wright pleaded, not guilty by statute; the defendants Goldsworthy and Pegler pleaded not guilty, not possessed of the goods, not possessed of the doors, and a justification under a warrant issued of the County Court.

Wright was the clerk of the Bloomsbury County Court, Goldsworthy the high bailiff, and Pegler the deputy bailiff of the same court. Execution issued from that Court against the goods of the plaintiff's father, and it was now alleged that they had taken the goods of the daughter under that execution.

Humfrey, Q.C. objected to the notice of action which was tendered in evidence by the plaintiff, in the first place, because it gave notice of an action to be brought in the Court of C.P. instead of the Q.B. Secondly, 9 & 10 Vict. c. 95, s. 138, required notice in writing of such action, "and of the cause thereof," to be given; and, doubtless, the object was that tender of amends might, under the same section, be made for the whole cause of action. Here the action was for breaking the plaintiff's house and for seizing her goods, claiming the goods as the goods of the plaintiff, whereas the notice was only for breaking the plaintiff's house and taking furniture therein without claiming the furniture, as belonging to the plaintiff. There was, therefore, no notice of action as to the goods, and the defendants could not, therefore, tender amends in respect of the whole cause of action. Thirdly, in the declaration and particulars 47*l.* were claimed as special damages for hiring other goods in the place of those seized, for the consequent loss of a lodger, and for other losses. But in the notice no special damage was mentioned. The defendants could not, therefore, with effect have tendered amends. On these grounds the notice was bad; it must be construed strictly. (*Lovelace v. Curry*, 7 T. R. 634.)

Shee, Serjt. contra.—The alteration of the Court was a mere accidental omission in the copying, and it clearly did not mislead the defendants. The Act required notice of the action, and of the cause thereof, to be given; it was not necessary to state the Court, and though stated erroneously, it was not binding.

Lord CAMPBELL, C.J.—You are to give notice of "such action"—that is of this action. Have you given notice of this action in the Court of Q.B.? There may be another action pending in the Court of C.P. to which this notice applies.

Shee, Serjt.—The statement is surplusage. The Court need not be specified. Then, as to the second objection, seizing the goods is stated in the notice of action to be part of the cause of action; it will be intended to mean the goods of the plaintiff.

Lord CAMPBELL, C.J.—That also appears to me a very serious objection. When I was at the Bar, we always used to make the notice a copy of the declaration.

Shee, Serjt.—A shorter form is now in use. It is stated that the goods were in the plaintiff's house. Surely it will be intended that the plaintiff claimed for seizing of those goods as being her own. As to the special damage, it is not necessary to state it in the notice.

Lord CAMPBELL, C.J.—Have you any authority for saying that you may lay special damage in your declaration, which is not mentioned in the notice?

Shee, Serjt.—Notice is required only of "such action and of the cause thereof." Special damage cannot be said to be the "cause of action." *Jones v. Bird*, 5 B. & A. 837, shows that the notice is sufficient.

Ogle and Pearson, on the same side, contended that the only object of the notice was to enable the defendants to tender amends, and that it must, therefore, be quite immaterial whether the action was in the Q.B. or C.P. The defendants could not be injured by the mistake. That the title to the goods was sufficiently shown in the notice. If so set out in the declaration, it would have been good on general demurrer, and in all probability even on special demurrer, and that it was not necessary to claim in the notice for special damage. It was not a cause of action, but a consequence of the cause of action. It was not stated in the authorized precedents.

Pearson further contended that no notice was necessary in this action.

Lord CAMPBELL, C.J.—There is an issue joined upon it.

Pearson.—It is an immaterial issue, *Munday v. Stubbs*, 20 L. J. 59, C.P. was in point.

Lord CAMPBELL, C.J.—There is an issue to be tried, whether material or not is not now in question—that will be a matter for the subsequent consideration of the Court. I am, however, strongly of opinion that it is material—and if due attention is paid to sec. 138 of the statute, it seems to me impossible to contend that it is immaterial. As to the notice, it is clearly bad. The action is in her Majesty's court, before her Majesty herself, at Westminster, and the notice is of an action in her Majesty's Court of C.P. There may be at this moment such an action. At any rate the notice cannot apply to the present action. I think it also bad because it studiously avoids claiming the goods seized as the goods of the plaintiff, whereas the declaration claims them—a different cause of action is therefore inserted, and a tender, if made only for the cause of action stated in the notice, viz. for breaking the house, would not have been sufficient. There is also much in the objection as to the non-statement of special damage. How would a tender be made? I am of opinion that this is not such a notice as is required by the Act. The verdict must be for the defendants.

The case notwithstanding proceeded, in order to ascertain the costs of the other issues, and the jury ultimately found for the defendants on all the issues.

Shee, Serjt. Q.C. and Pearson, for the plaintiff.

Watson, Q.C. and Hugh Hill, for the defendant Wright.

Humfrey, Q.C. and Leach, for the other defendants.

## Circuit Reports.

## WESTERN CIRCUIT.

DORSETSHIRE SUMMER ASSIZES, 1861.

Dorchester.

(Before Mr. Justice COLERIDGE.)

Practice—Prosecutions—Attorneys' fees.

The judge ought not to act as prosecutor, as counsel for the prosecution, and as judge.

Where a prosecution is not prepared by an attorney the Court will hand the depositions to counsel.

But every prosecution ought to be conducted by counsel and attorney.

The fee of one guinea allowed by the counties to the attorney for preparing brief and attending at the assizes is not a sufficient remuneration, and ought to be increased.

In discharging the grand jury,

COLERIDGE, J. said:—I feel it my duty to speak of the great number of cases in which no brief for prosecution have been delivered to counsel. If this arises from the county allowance being so small that respectable attorneys will not take the business, I must say that it is a false notion of economy. True economy is that the course of justice should be so provided for, that where parties are guilty their guilt should be fully made out. If this circumstance



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arises from a notion that the judge will act both as prosecutor and also as counsel for the prisoner, as well as judge, *I protest against any such notion, and I will not, if I can avoid it, act in those several capacities. Others may find it easy enough to do all these, but I find it enough to act as a judge, to administer even justice between the parties.* This inconvenience I can in part remedy by handing down the depositions to counsel; but by so doing I am disarming myself. It is a sad thing, indeed, if the allowance to attorneys is so small as to be considered no remuneration at all. *If only one guinea is allowed for a brief, I should like to know how much of this can be said to remunerate the attorney for drawing it, or for the pens, ink, and paper with and on which it is written.*

H. C. Goodden, esq. the foreman, said the subject should be brought forward at the next Quarter Sessions.

HOME CIRCUIT.

Reported by W. L. JONES, Esq. Barrister-at-Law.

MAIDSTONE SUMMER ASSIZES, 1851.

Tuesday, July 29.

(Before JERVIS, C.J.)

WIGHTWICK AND OTHERS (Assignees)

v. WOODHAMS (Bankrupt).

*Evidence—Witness—Interested party—6 & 7 Vict. c. 85, s. 1.*

*The proviso to sec. 1 of 6 & 7 Vict. c. 85, enacts that that Act shall not render competent "any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part."*

*Held, by Jervis, C.J. that the word action in that place extends to a feigned issue.*

This was an issue to try whether the defendant, at the time of his bankruptcy, was the reputed owner of a policy of assurance on the life of his mother for £100. Shortly after the bankruptcy the mother died, and the assignees claimed the policy. A Mr. Douthwaite also claimed the policy, as having been assigned to him by the defendant previously to the bankruptcy, and it was contended that the defendant was only trustee for Douthwaite, who, it was admitted, was the party really defending the case and instructing the attorney.

The deed of assignment was given in evidence.

*Drumwell, Q.C.* for the defendant, then proposed to call Douthwaite as a witness, in order to prove that notice of the assignment was given to the assurance office before the bankruptcy, upon which *Willes* objected to his admissibility.

*Drumwell, Q.C.*—The proviso to 6 & 7 Vict. c. 85, s. 1, is "provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively. It has been held that, under the 3 & 4 Wm. 4, c. 42, no amendment can be made in a feigned issue because the words is "action."

*JERVIS, C.J.*—Because there is no writ of summons. I think the word "action" was inserted in the 6 & 7 Vict. c. 85, for shortness, and we must give a reasonable construction to the statute. Why in an action a person should not be a witness, and in a suit or proceeding he should, I cannot see, the one having the form of the commencement by writ of summons, and the other beginning without that expense. There is a golden rule upon construction, that it must be reasonable. The general scope of this Act of Parliament shows it is intended to be most general.

*Drumwell, Q.C.*—The additional words, "suit or proceeding," being used in one part of the clause and not in another, would give rise to the belief that they were designedly omitted.

*JERVIS, C.J.*—I do not see that. The other day there was a question in the C.P. on the Uniformity of Process Act, by which no writ is to take a case out of the Statute of Limitations unless it and every writ issued in continuation of it shall be returned *non est inventus*, and be filed. Now it is impossible that the last one can be returned *non est inventus*, because that one is served; and to construe the statute accordingly, reference was made to the golden rule, which is against a nonsensical construction.

NORTHERN CIRCUIT.

YORKSHIRE SUMMER ASSIZES, 1851.

York.

(Before Mr. Justice WILLIAMS.)

Reo. v. BRUMBY.

Larceny—Assault—7 & 8 Geo. 4, c. 29.

*Clover is "a cultivated root or plant used for the*

*VOI. XVII.—No. 437.*

*food of man or beast" within the 43rd section of 7 & 8 Geo. 4, c. 29, and therefore the subject of larceny.*

William Brumby, the younger, and John Brumby were charged with having, in Branlingham, in the East Riding, on the 15th June last, stabbed, cut, and wounded William Hill, a police officer, with intent to prevent their lawful apprehension. There was a second count, which charged them with cutting and wounding the prosecutor, with intent to do him some grievous bodily harm.

*Seymour*, for the prosecution; and *Dearsley* for the prisoners.

It appeared that the prisoners, who are two respectable young men, carried on their business as fishmongers by taking fish in a light spring cart between Hull and Weldon, and selling the fish at those places and the intermediate villages. On the evening of the 15th of June last, having been occupied all day in their business, they were passing through the parish of Branlingham, and their horse being tired, they pulled up, and getting over a hedge into a clover field, they cut a little clover to give to their horse. The farmer who owned the clover field having had a good deal of clover stolen had set the prosecutor and another man to watch, which they were doing when the prisoners came to cut the clover. The prosecutor and his assistant immediately attempted to take them into custody on a charge of stealing the clover, whereupon the prisoners violently resisted, and William Brumby threatened that he would kill the prosecutor before he would allow himself to be taken. He then ran to his cart and got a large fish knife, and threatened to stick it into the prosecutor if he attempted to take him. The prosecutor upon this drew a pistol, and fired it at the prisoner, William Brumby, the bullet from which passed through his arm. William Brumby then struck the prosecutor on the head with the knife, and inflicted a very severe wound on his head. The prosecutor then drew another pistol, which he fired, but it having no bullet in it, did no damage. In the end, however, the prisoners were both captured.

At the close of the case for the prosecution, his lordship asked the learned counsel for the prosecution if he could refer him to any authorities in support of the first count of the indictment, which was for an assault with intent to prevent their lawful apprehension.

*Seymour* said that he had not drawn the indictment, and had not looked into the authorities.

*Dearsley* then submitted, on behalf of the prisoners, that the prosecutor had no right at common law to apprehend the prisoner, because at common law the severing growing clover from the freehold, and taking it away without suffering any time to intervene, so that it might be converted by construction into a chattel belonging to the owner of the field, was not a larceny, but only a civil trespass. Neither would the statute 7 & 8 Geo. 4, c. 29, s. 43, apply to the case before them; for by that statute it is enacted "that if any person shall steal, or destroy, or damage with intent to steal, any cultivated root or plant used for the food of man or beast, &c. every such offender, being convicted before a justice of the peace, should be liable to be committed to gaol;" and as clover was not, as he (the learned counsel) submitted, a cultivated root or plant, it did not come within the statute.

His Lordship said he would consider the point.

*Dearsley* then addressed the jury on the facts of the case, contending that the prisoners had a right to resist their apprehension, as the prosecutor had no legal authority to take them into custody. The question, therefore, for the consideration of the jury would be, whether the prisoners had resisted to a greater extent than was requisite to prevent their apprehension; and when they looked at the fact of the prosecutor having fired a pistol through the arm of one of them, it could not be said that they had resisted to too great an extent. The prisoners expressed their extreme regret at having taken the clover, which they admitted they had done to refresh their tired horse, not imagining that they were committing a felony, and which, he submitted, they were not. The learned counsel then called several witnesses, who gave the prisoners excellent characters.

His LORDSHIP, in summing up, told the jury that they would take the law of the case from him, and that, in his opinion, clover was "a cultivated root or plant used for the food of man or beast," under the 43rd section of the 7 & 8 Geo. 4, c. 29, and that consequently the prisoners, by cutting it and taking it, as they had done, had committed a larceny within the statute, and therefore the prosecutor had a right to apprehend them. They, the jury, would therefore direct their attention to the facts, and say whether, in their opinion, the prisoner William Brumby had cut and wounded the prosecutor with intent to prevent his lawful apprehension, or whether he was guilty on the second count, which charged him with the cutting with intent to do grievous bodily harm.

The jury returned a verdict finding William

Brumby guilty on the first count, and John Brumby not guilty.

His LORDSHIP then said he would consult Mr. Baron Platt on the point of law which he had decided, and consider before the end of the assizes whether or not he should reserve the point for the consideration of the Court of Criminal Appeal.

His LORDSHIP then sentenced William Brumby to six months' imprisonment with hard labour.

HOUSE OF LORDS.

Reported by W. H. BRYANT, Esq. Barrister-at-Law.

Friday, August 8.

(Present: The LORD CHANCELLOR, LORD CRANWORTH, LORD BEAUMONT, LORD FORTESCUE, and other Peers.)

COOPER'S CASE.

THOMPSON'S CASE.

*Contributory—Winding-up Acts—Preliminary expenses.*

*A person who has accepted shares in a projected company, whether he has paid the deposit on them or not, is not responsible or liable for the expenses which were incurred in the process of the formation of such company. (See 17 Law T. 237.)*

The facts of these two appeals have been fully given in the number of the LAW TIMES for Saturday, the 2nd of August, and the cases now again came before the House for final adjudication.

JUDGMENT.

The LORD CHANCELLOR.—My Lords, in the cases of *Norris v. Cooper* and *Hulton v. Thompson*, they are appeals from the orders of my noble and learned friend the Vice-Chancellor Lord Cranworth, reversing the order of the Master to whom the adjustment was referred, of the affairs of a projected concern called the Wolverhampton, Chester, and Birmingham Junction Railway Company, and also the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, under the Winding-up Acts, that is, the statute of the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 180. The case has been argued at your lordships' bar, and now stands for judgment. The respondent Cooper had shares allotted to him in the company called the Wolverhampton, Chester, and Birmingham Junction Railway Company, and the respondent Thompson, in the Direct Birmingham, Oxford, Reading, and Brighton Railway Company; the only distinction in point of fact is, that the respondent Thompson paid the required deposit on the shares allotted to him, while the respondent Cooper did not pay any such deposit. The points to be decided in the two cases are identical, and they were, therefore, heard together, and as Thompson had an additional fact in support of the respondent's liability, which does not exist in the other case, it follows, if your lordships should be of opinion that the appeal in that case cannot be sustained, the decision of that case will govern also the case of *Norris v. Cooper*. It will be sufficient to state the circumstances of the case that relate to *Hulton v. Thompson*. The material parts of the case are these: in the year 1845, certain persons proposed to construct a railway from Birmingham to Oxford, Reading, and Brighton, the capital of which was to consist of 2,000,000*l.* to be divided into 80,000 shares, of 25*l.* a share: the company was provisionally registered under the 8 & 9 Vict. c. 110; a prospectus, containing the names of the provisional committee, was published, together with the form of application for shares. About the 10th of October in that year, the respondent Thompson applied to have allotted to him thirty shares; the committee of management, on the 18th of October, sent him a letter to the following effect:—"Sir,—The committee of management have allotted to you twenty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 52*l.* 10*s.* into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the company, and executing the parliamentary contract and subscribers' agreement," &c. That is signed by the secretary. The latter clause in this letter will require to be attended to, namely, that which informed Thompson he was to exchange his receipt with the letter for scrip, and execute the parliamentary contract and the subscribers' agreement. Upon the receipt of this letter, Thompson paid the deposit of 2*l.* 12*s.* 6*d.* per share, as desired, but never exchanged the banker's receipt, nor ever executed any parliamentary contract or subscribers' agreement, and none such was ever prepared. The committee, who took the charge on themselves, allotted 7,000 shares, and the deposits were required on all, to be paid on or before the 20th of October, 1845, or the allotment would be null and void. Deposits were paid only on 4,295 shares, and it was therefore found absolutely impracticable to establish

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the company, and the project was therefore abandoned. On the 21st of December, 1849, an order was made under the statute—the Winding-up Statute,—referring it to the Master to wind up the affairs of the company under the provisions of the Act mentioned; and the Master having afterwards inserted both the respondents, Cooper and Thompson, in the lists of contributories, against that order the respondents appealed to the Vice-Chancellor, Lord Cranworth, and his lordship reversed the order of the Master; and the present appeals are,—one by the official manager against the order of reversal, and the other against the order on Mr. Cooper, who was also a contributory under the circumstances, I have mentioned. Upon these facts, then, the question arises whether the respondent Thompson ought to have been inserted by the Master in the list of contributories. In support of the appeal it was contended at your lordships' bar, that by the application of the respondent for shares, and by the allotment to him in conformity with his application, and by the payment of the deposit upon the shares allotted, the respondent became a member of the company, and as each member liable to be put on the list of contributories; and it was argued that by the third section of the Winding-up Acts, "contributory" includes every member, "a member," in the Act, being any person entitled to a share in the company; and as by the 7 & 8 Vict. c. 110, s. 3, the word "subscriber" is to be held to be a person who has agreed to take shares in a proposed company, the respondent must be said to be a subscriber, and consequently a contributory. This appears to me by no means to follow. The respondent Thompson never became, it appears to me, either a "subscriber" or a "member" within the meaning of this statute. He did not comply with the conditions necessary to make him either, and on the abandonment of the project he was not in a position to be liable to an action at law at the suit of any creditor of the company; and it is quite clear that until Thompson had signed the parliamentary contract and subscribers' agreement, and exchanged his receipt for scrip, he had no claim upon the company for any of the profits, and therefore was not within the provisions of the Acts a member of the company. In answer to this, on the part of the respondent, it was argued that he had agreed to become the proprietor of the shares allotted to him in a company with a capital of 2,000,000*l.* divided into 80,000 shares, at 25*l.* a share; but no such company as that of which he agreed to become a member was ever established, and therefore the consideration upon which he had agreed to become a subscriber has wholly failed, and on such failure it became impracticable for him ever to obtain the shares, and so far from respondent being liable to contribute to the expenses and debts incurred by those who endeavoured to establish the company, he was entitled, according to the decision in *Walstab v. Spottiswoode* and several other cases, to recover back the deposits which he had paid, and that according to such decision it must be held a payment made by the respondent, when in point of law no such payment was recoverable back again on the ground of entire failure of the consideration. The answer thus urged appears to be a valid answer in point of law to the grounds on which the appellant relies, and the respondent became subject to no responsibility for the acts done by him except that of taking the allotted shares in the event of the company being established. The case of *Upfill*, decided by your lordships, was much relied on, on the part of the appellant, but with regard to that case it is only necessary to say at present that it is an authority rather against the appellant than for him, for by that judgment *Upfill* was held to be a contributory expressly on the ground of the conjoint effect of the two facts that he was a member of the provisional committee, and had also paid the deposits on his shares, the language of the judgment being that it was a case of a provisional committeeman plus the acceptance of shares; and it clearly appears from the judgment if either of these facts had been absent the opinion of the noble and learned lord who pronounced that judgment would have been against the appellant. The case of *Nockels v. Crosby* long ago decided that the preliminary expenses of an abortive scheme must be borne by the projectors, and cannot be thrown upon the mere subscribers to the shares. This case was argued in the presence of nine of the learned judges, and your lordships put questions to the learned judges, to which they gave answers. One of such questions has now become material, and I shall now state to your lordships the answer the learned judges have given. The question put was,—A provisional registration was made of a certain company under the statute of the 7 & 8 Vict. c. 110, by the name of the "Direct Birmingham, Oxford, Reading, and Brighton Railway Company." The prospectus was registered and published as follows:—Certain persons acted as a committee in the establishment of the company and to obtain an Act of Parliament: individuals applied to that

committee for an allotment of shares, and the company accordingly did allot shares to the applicants, and among them twenty shares to A. B.; such application and allotment took place in consequence of the accompanying correspondence, to which the judges were referred. A. B. took no steps after the application for shares, and neither paid the required deposit nor signed any subscribers' or parliamentary contract. Ought A. B. to be considered as a contributory within the intent and meaning of the Act? It was then proposed to repeat the same question with these additions—"A. B. took no steps on the letter of allotment, except after the receipt he paid the required deposits, but did not sign any parliamentary or subscribers' contract." My lords, as I before mentioned, another question was decided, not knowing how far the answer to the same question in substance, although divided in the manner I have stated—how far the opinion of the judges might lead to the conclusion of the case, a further question was proposed relating more generally to the state and condition of the company: the question of how far it came within the Winding-up Acts, which it has become unnecessary now to determine. The following is the answer given by the judges:—"The judges have considered the questions proposed by your lordships, and I have to answer on the first question, that it is the unanimous opinion of the judges who have heard the arguments, that neither in the case where shares were applied for, and no payment of deposits made,—nor in the case where a payment of a deposit was made, but there was no signature to the subscriber's or the Parliamentary contract affixed, should the name of the party be included in the certificate of contributories. We think that the mere fact of the applicant being the allottee of shares under the circumstances set forth in the Master's certificate, assuming he was an allottee, as to which we give no opinion, would not in any way make him responsible for any preliminary expenses incurred in promoting the object before the abandonment of the undertaking. We think this was really the law prior to the statute 7 & 8 Vict. and that none of the provisions of that Act make any alteration in the law on this subject in that respect, so as to render an allottee of shares liable for preliminary expenses; and we are not called upon to give a construction to the Act of Parliament different from that which has hitherto been adopted." Such, my lords, was the unanimous opinion of nine of the learned judges; and the opinion they have written seems to me to be in conformity with what has been established as law in the variety of cases, and consistent, as I believe, with sound law. I agree with my Lord Chief Baron, and if your lordships shall think fit to adopt it, the two appeals ought to be dismissed; and accordingly I move your lordships that the case of *Hutton v. Thompson* be dismissed.

My lords, in the case of *Norris v. Cooper*, which, as I have stated, was less strong than that of *Hutton v. Cooper*, by the fact of payment of deposits having occurred in the one case and not in the other, that should follow the same fate. I shall, according to your lordships' decision in the first, advise your lordships, moving, as to that case, that it should be dismissed.

LORD CRANWORTH.—My noble and learned friend on the woolsack has so exhausted this subject, that it is hardly necessary for me to say more than that I concur in the opinion he has stated and the view he has taken of these cases; and indeed it is hardly necessary for any noble lord to have done even that, and particularly it would be unnecessary in my case, considering that I have already, at very considerable length, expressed my opinion, not indeed upon these very cases, because they were not cases that were argued before me, but on other cases which stood in precisely the same situation. Cases of this description, to a very great extent in point of number, have come before the Court in which I have had the honour of sitting during the last six or eight months; and I have on a great many occasions given my opinion as to what the law is on this subject, and that opinion stands recorded in print in a variety of cases, and that opinion is in so exact conformity with what my noble and learned friend has now stated, that it will be almost superfluous for me to say a word to your lordships, and my reason for speaking is chiefly to exclude any possibility of a notion that I doubted, upon this subject, on the propriety of my own opinion. I had no doubt whatever on the subject, and I confess, except that doubt which one always must entertain in matters that have not been absolutely decided, I never did, or could entertain a doubt that, prior to the passing of these Acts—the Joint Stock Company's Acts—the Winding-up Acts—that parties were not liable to contribute to the expense of forming a company when they had merely agreed to take shares in the company when formed, was a matter which had been decided in a great many cases up to the time to which my noble and learned friend has adverted, and that when the matter is examined it requires no case to enable you to arrive at such a conclusion. What

does a person do when he agrees to take shares in a company? All he agrees to is to this effect: "You tell me you are forming a company to consist of 10,000 shares; very well—I shall be glad to be a shareholder of one of those 10,000 shares."—"You shall," he says. I either do pay earnest or I do not. In either case I sit down and remain passive. If six months after he tells me, "I am sorry to say I could not form that company," I say, "I am sorry for it, you must give me back my deposit if you have received it, or the remainder of what you have." There is an end of it. What is there in that which leads to the conclusion that I am bound, myself, to contribute to the expenses which he has been at in trying to do that the doing of which was the reason for my assisting him at all? It is obvious, when the matter is looked into, that not only are there plenty of authorities to show that I am not liable, but all principle goes with that conclusion. That being the state of the law before the passing of any of these Acts, and it being the state of the law in so exact and clear conformity with the obvious principle and good sense I have stated several times, it would require very cogent Acts to show me the liability before I could suppose there was any such intention. Now, the two Acts relied on have been, first of all, the Joint-stock Registration Act (mainly relied on—there were others partially alluded to) and the Winding-up Act. I may dismiss that in a word. The Winding-up Act was an Act passed two or three years ago for the purpose of facilitating the winding up the affairs of companies, in the winding up of which, according to the ordinary rules of Courts of justice, the ordinary proceedings had been found infinitely complicated and difficult, and regulations were made for that purpose, and which to some extent, no doubt, have answered their object; but it hardly requires to be propounded that the Legislature could have meant to make other people liable than those who were liable before. It would have been an act of such monstrous injustice, if a man were not liable to contribute to 10,000*l.*, to pass an Act under the pretence that it was to give facility for the winding up of the affairs of those who were liable, that somebody else was to be made liable who was not liable before; and, in truth, it would be so obviously unjust, that it is hardly necessary to propound the proposition. But, in looking at the Winding-up Acts, there is nothing that points to any thing of the sort, and therefore I dismiss that. The other Act, which was relied on equally, is an Act not bearing on the case when it is clearly analysed, although undoubtedly some of the expressions in it have been used in a way that has, I believe, misled the public. I allude to the Joint-stock Companies Registration Act. The only observation that I shall make further and trouble your lordships with on this case is, to show, by analysing very shortly a few of the provisions of the Act, that they do not alter the law at all. In the first place, what is the preamble? "Whereas it is expedient to make provision for the due registration of joint-stock companies during the formation and subsistence thereof, and also after such complete registration as hereafter mentioned, be it enacted." And what are the objects there? Why the objects are to make provisions for the due registration while the company is in course of formation, and after it has been formed, and when formed to give it many of the incidents of a corporation; and then to make certain regulations. There is nothing there suggested as to the object to make other people liable to the expenses of forming the company, than those who were liable before. The two or three first sections are preliminary sections, giving the definition of words to be used in the Act, and so forth; and then comes sec. 4, one of the sections which has been mainly thought to have the effect of altering the liability of parties. It enacts, "before proceeding to make public any intention to form a company, it shall be the duty of the promoters to make to the officer thereby provided a return to the following effect," that is to say, the proposed name of the intended company—the names of the promoters together with their residences; that is, that due notice may be given to the public of what the company is to be, and what are to be its objects, and who are the parties promoting it; and then several other particulars, namely, the names of the members, and so on; and a variety of other matters that would be useful for the public to know. When one of those schemes that were really only mere bubble schemes, as they have been called, was in progress of formation, that is what is to be done for provisional registration before forming; then, when it is completely formed this is enacted—"It shall not be lawful for any joint stock company to act otherwise than provisionally until such company shall have obtained a certificate of complete registration, and no joint-stock company shall be entitled to receive a certificate of complete registration unless it be formed by deed," and then a great number of details are entered into of what you are to do in order to become a completely formed company. Then there are a number of regulations as to the registration of the company registering the change of shares, so that the public

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might always, by going to a particular office, know who are the parties constituting a joint-stock company. Now come the important sections, the 23rd and 46th. The previous section had said what was to be done—first, provisionally registering it, and, secondly, what was to be done when completely registered. Now, what is to be done while it is simply provisionally registered? Section 23 says this,—“On the provisionally registering of any company, it shall be lawful for the promoters of the company so registered to act provisionally; and it shall be lawful for the promoters of the company to assume the name of the company, but coupled with the words registered provisionally; to open the subscription list; to allot shares, and to receive a small sum, namely, 10s. in every 100l. by way of earnest upon the shares; but not to make calls, or execute any works except such as are necessary to make surveys and so on, in order to the establishment of the company.” Now, that section makes a manifest distinction between the company and the promoters during the period of provisional registration; that is, before the company have been actually formed; and although the promoters of the company are entitled to assume the name of a company, coupling, however, with it “provisionally registered,” yet it is not the company that is there acting, and for the best of all reasons, that there is no company at all; for the Act of Parliament says, expressly, there shall be no company until they are completely registered; and therefore, although these parties call themselves the word “company,” they must couple with it “registered provisionally;” and then, looking at the clause, you will see that all the acts done by the parties so describing themselves a company provisionally registered, are merely done by certain individuals, the promoters of the company; and therefore, the expenses then incurred are not the expenses of the company, there being no company; they are expenses incurred by the promoters; and therefore, how can you alter the law, which before said, if I have agreed to become a member of this company when you have got it completely registered, what is the liability I have incurred? The liability I have incurred is to pay for those shares when completely registered: what have I to do with the expense you have incurred in the meantime? If you have been hastily and without due security incurring enormous expenses in making surveys and advertising, and so on, in a hope and confidence that you would get this company, that which you have made me agree, I will, when it is formed, take a share in; what have I to do with any expense you have been incurring in the meantime? That is the common sense of the thing before this Act passed; and I certainly must say to your lordships that I have looked through the Act many times and have been unable to find anything that points to any intention of varying it. On these grounds, my lords, which I have stated because my noble and learned friend has gone into the matter so fully, I see no reason to doubt the propriety of the decision which was given by myself in these cases. Of course, I conceive my confirmation of your lordships' views will be of very little weight, as it is an appeal from my own judgment; but I felt bound to state the ground on which I proceeded. I proceeded then, advisedly, and nothing has ever occurred to make me doubt the propriety of that decision to which I came, and which I entirely concur in advising the House to confirm.

Judgment in both cases affirmed, with costs.

Equity Courts.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLFUTT, Esq. of the Middle Temple. Barrister-at-Law.

Monday, July 28.  
LODGE v. PRICHARD.

*Solicitor and Client—Professional Confidence.*  
In a suit to set aside a sale to executors of part of the testator's property, the evidence of a solicitor as to a consent to the sale by his clients, the residuary legatees, given in writing and signed by them, was disallowed, on account of the professional confidence existing between the witness and the residuary legatees.

At the hearing of this cause, a question arose as to the admissibility of evidence under these circumstances. The plaintiff, one of the two residuary legatees of the testator in the cause, filed his bill against the defendants, the executors, for the purpose of having the usual accounts taken; the bill also prayed that the purchase by the executors of certain shares in a ship which belonged to the testator's estate might be set aside. The defence to the special relief so asked was, that the residuary legatees had had these shares valued, and had themselves endeavoured to sell them, but being unable to do so, had requested the executors to become the purchasers, which they declined, upon the ground

that a Court of Equity would not sanction a purchase by trustees from their *cestuis que trust*. In order to meet this objection, and induce the executors to purchase, the residuary legatees sent their solicitor to the defendants, who stated his authority to negotiate a sale, and produced a document, signed by the residuary legatees, wherein they expressed their willingness to sell at the sum then proposed; and, after a long interview, the solicitor succeeded in removing the objections of the executors, and satisfied them that the sale could not be impeached, inasmuch as it was authorised by the only persons interested in the shares, and thereupon the executors were induced to become the purchasers. To prove this defence, the executors examined the solicitor (Mr. Christopher Bland Walker, of Preston), who had negotiated the sale, and his evidence was as follows:—

“On or about the 16th April, 1838, at the instance and request and as the professional adviser of the plaintiff, Adam Lodge, and defendant, John Lodge Ellerton, I called upon and had an interview with the defendants, Richard Williams Prichard and William Rushton Coulborn, respecting the sale to them of the shares then late of the said testator, Adam Lodge, in the ship *Ganges*; such request was conveyed to me by a letter from the plaintiff, Adam Lodge, as follows:—

(Exhibit A.)

“‘Woodford-park, Saturday evening.  
“‘My dear Sir,—Mr. Hindle is strongly of opinion that your professional and friendly intervention might be serviceable in a course of proceeding at Liverpool, rendered expedient by entire want of confidence in the executors of my late father, and the person acting as their solicitor, who is by a variety of circumstances disqualified from furthering the interest of my brother and myself. Could you accompany us to Liverpool “special,” on Monday? Mr. Hindle intended to proceed there, but is prevented by an access of gout.  
“‘Yours, very truly,

“‘C. Bland Walker, esq.      “‘A. Lodge.  
I was authorised to act on behalf of the plaintiff, Adam Lodge and the defendant, John Lodge Ellerton, as their professional adviser. I had for ten years and upwards before that time been well acquainted with the plaintiff, Adam Lodge, and the defendant John Lodge Ellerton, and also with their sister, Mrs. Hindle, but I had not before that time been acquainted with the defendants, R. W. Prichard and W. R. Coulborn, or either of them. I did at such interview with the said R. W. Prichard and W. R. Coulborn, as aforesaid, and on behalf of the said Adam Lodge and J. L. Ellerton, endeavour to induce the said R. W. Prichard and W. R. Coulborn, to become the purchasers of the shares, late of the said testator, Adam Lodge, in the ship *Ganges*. It was suggested at such interview, but by whom I do not now recollect, and it was determined in consequence thereof, that the said plaintiff, Adam Lodge, and the defendant, J. L. Ellerton, should take steps to satisfy themselves as to the value of the said shares. I acquiesced in the propriety of such suggestion, and I know that the plaintiff, A. Lodge, and the defendant, J. L. Ellerton, consulted Mr. Daniel Buchanan, of Liverpool, broker, and Mr. Henderson, of Liverpool, merchant, as to the value of the said ship. I afterwards, on behalf of the said plaintiff, A. Lodge, and the defendant, J. L. Ellerton, endeavoured to negotiate a sale of the said testator's shares in the said ship to the said R. W. Prichard and W. R. Coulborn, but the said R. W. Prichard and W. R. Coulborn expressed a reluctance to enter into a negotiation, on the ground that it would in effect be a purchase by trustees from their *cestuis que trust*, which a Court of Equity would not sanction. I endeavoured to remove such objection, and to satisfy them that such sale, if effected, could not be impeached, inasmuch as the said A. Lodge and J. L. Ellerton were the only persons interested in the shares of the said ship, and they were both of full age, and one of them a barrister-at-law, and I was also there as their professional adviser. The defendants R. W. Prichard and W. R. Coulborn still persevering in their objection in order to remove the same, the following paper, writing was prepared:—

(Exhibit C.)

“‘We, John Lodge and Adam Lodge, being the residuary legatees of the personal estate of our late father, Adam Lodge, esq. do hereby consent to an absolute transfer of his interest in the ship *Ganges* to any person or persons for the sum of 1,200l. in cash. Such interest to vest in the purchaser as and from the termination of her last voyage. The purchase-money to be paid into the bank of Messrs. Moss and Co. in your names as executors of Mr. Lodge.  
“‘As witness our hands this 19th day of April, 1838.  
“‘JOHN LODGE,  
“‘ADAM LODGE.’

“‘To Messrs. Prichard and Coulborn.’  
It is in my own handwriting, and the names ‘John Lodge’ and ‘Adam Lodge,’ thereto subscribed, are in the respective handwritings of the said J.

Lodge and A. Lodge. The said paper writing was, to the best of my recollection and belief, originally drawn up by the plaintiff, A. Lodge, and it was copied or put into its present form by myself, and it is the same paper writing or document which I delivered to R. W. Prichard and W. R. Coulborn. John Lodge, who subscribed his name to the same paper writing, or document, is the same person as J. L. Ellerton in the pleadings of this cause named. I said, on delivering the said paper writing to the said defendant, W. R. Coulborn, ‘Now I think you are safe, and the transaction being, in my opinion, unimpeachable, you may either keep or sell the shares to whom you like;’ and the said R. W. Prichard and W. R. Coulborn thereupon agreed to take the said shares at 1,200l. the sum mentioned in the said paper writing.”

This evidence was objected to, on the ground that the witness was at the time the transactions to which he deposed took place, the solicitor of the residuary legatees, and therefore, that it was a breach of professional confidence to produce the letter containing his authority to act; and that the interview to which he deposed was in consequence of that letter, and therefore his evidence of all that took place thereat ought to be suppressed. It was moreover insisted, that he should not have deposed to the handwriting of the plaintiff subscribed to the document authorising the sale. To these arguments it was replied, on behalf of the executors, that it was immaterial whether the letter from the residuary legatees, giving authority to the solicitor to act, was proved or not; and that a solicitor was bound to give evidence of statements made by himself to the adverse party by the directions of his client.

*Baily, Dickenson, and Selwyn* for the plaintiff.  
*Bacon and Tylloston* for the defendants.  
The cases of *Gainsford v. Grammar*, 2 Camp. 9; *Ripon v. Davies*, 2 Nev. & Man. 310; *Griffith v. Davies*, 5 Barn. & Adol. 502; and *Turner v. Railton*, 2 Esp. 474; and *Phillips on Evidence* (ed. 1843), vol. 1, p. 776, were referred to.

The VICE-CHANCELLOR said that he was of opinion in this particular case the evidence of Mr. Walker, as to the document marked C. was so associated, blended, and united with the professional confidence existing between him and his employer; it was so infected, if he might use the expression, with professional confidence, that he could not cull and select any part of it and depose as to that. The whole was affected by the original confidence. If his Honour were the only judge who in any event would have to decide upon the facts of the case, the admission or rejection of the evidence would be of very little importance. He agreed that parts might be selected, which might be free from the objection, if they could be separated; but he thought they were not with propriety separable.

VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

July 9, 22, and 28.

BASIL V. LISTER.

*Accumulations—Thelluson Act—Portions.*  
A trust to keep up policies of assurance on lives is not within the statute 39 & 40 Geo. 3, c. 98.

In this case Josias Lister by his will (which was ungrammatically and otherwise obscurely expressed) dated 12th of April, 1803, after bequeathing certain property to his wife and daughter, as to part for life and as to part absolutely, and declaring that the same should not include any money, bank bills, bonds, or notes of hand that might be in his house, proceeded as follows:—“And that all such, with any other personal property that I may leave, with any expectancy, I direct and will that it may be put out into government security, the interest whereof, with all the rents and profits from freehold, copyhold, or leasehold property, or any eventual property that may happen to come in, that the proceeds, after all my just debts and funeral expenses are paid and discharged, and also the insurance from loss or damage by fire of the whole of the premises that I may die possessed of whatsoever, as also the house I now live in, with household furniture, linen, plate, and china, and so forth (although I have bequeathed the use of the same during the lives of my wife and daughter, or the survivor of them), and all policies of insurance on lives, particularly three, that I have at this time in the Equitable, at Blackfriars Bridge, viz. one hundred and fifty pounds on John Brettell's life, policy No. 19,172, 5l. 5s. per annum premium, payable on the 13th day of May; also 1,000l. on William Lister, my eldest son's life, policy No. 15,611, and 18l. 18s. per annum premium, payable on the 20th day of December; also 1,000l. on John Lister, my youngest son's life, policy No. 16,100, 18l. 16s. premium, all of which are in my iron chest; also two on my own life, and the vouchers of premium paid, and the accounts with compound interest added, to shew the advantage resulting from each policy on a

## V. G. TURNER'S COURT.

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death, and additions that have at various times been made to expectancy, are in a tin box with my name thereon, after all which has been performed, then I give the remainder of my profits, rents, or interests, or in expectancy, of whatsoever kind, to my wife and daughter Elizabeth, for their lives or the survivor of them. But first paying out of the said profits, rents, or interests, as before mentioned, the two following annuities." The testator then gave sixty guineas a year to each of his sons, with particular directions relating to such annuities, and then went on thus: "It is further my will and desire, at the marriage of either or both of my sons, William and John, that my said trustees should settle the interest of either of the 1000l. policies, as also the interest of any addition that may become payable on either of them at my said sons' decease, the principal policy and additions that may be made, should first be placed in government securities, and the interest thereof to be paid to each of their respective widows during their lives, and after their decease, to each of their respective offsprings (if any), the principal to be divided equally among them on the youngest attaining the age of twenty-one years, and if not any widow or offspring of either side, then for the whole of the said property to revert to my said child or children and their offspring, jointly and equally, as I have above directed, should my two sons survive my wife and daughter." The testator died on the 1st of November, 1803. In 1820 a bill was filed, praying, among other things, account of the rents and profits of the testator's estate, and of the debts due the testator's estate. By the decree made in December, 1820, it was, among other things, ordered that the receiver (who was to be appointed) should, pursuant to the directions contained in the said will of the testator, out of the rents and profits of the said estates pay the said annual premiums of insurance. On the 6th of May, 1822, certain payments by the receiver were directed to be made, and the balances, "after deducting the premiums payable on the several policies of assurance," &c. were to be paid as therein mentioned. By an order dated 21st Nov. 1827, the receiver was directed to "keep down the payments of the premiums," &c. The question before the Court, and which came on upon a petition of rehearing, was whether the premiums having been directed to be paid during the lives of the sons, and the payments having been made for a longer time than twenty-one years from the testator's death, which expired on 1st of Nov. 1824, the case did not come within the *Thellusson Act*. Another point was whether or not the case was one of portions within the exceptions of the 2nd section of that Act. A question was argued whether the petition of rehearing was too late, the last order for payment of the premiums being dated in 1827, but no decisive opinion was pronounced on this point. The petition of rehearing was presented in 1851, the sons on whose lives the policies were granted being still alive. The testator's widow was dead.

*Beckell, Roll, and Eddis*, for the plaintiff, argued that there was accumulation within the *Thellusson Act*. Assurance was a mode of accumulation, and if this were not an accumulation it would be easy for a testator to select twenty or any other number of young lives and insure them, and direct the policies to be kept up, and thus defeat the statute. There could be no difference between accumulating in the hands of a trustee and in an assurance office; it was necessary to trust to the credit of either. Even if it were not accumulation, it was postponing enjoyment. It might be said that the case was within the 2nd section of the Act concerning portions for children of persons taking an interest under the will. The provisions, however, are not portions, for portions mean sums payable at twenty-one or marriage (*Hargrave*, 192). Then the donor must be in *loco parentis*. (*Shaw v. Rhodes*, 1 Myl. & Cr. 135; *Powis v. —*, 3 Myl. & Cr. 135; *Webb v. Webb*, 2 Beav. 493; *Halford v. Stains*, 16 Simons, 488; *Morgan v. Morgan*, 15 Jur. 319.) But the testator's sons took no interest in the policies; and at all events the provisions for the sons' widows was not a provision for children of persons taking any benefit under the will. As one of the next of kin the plaintiff was entitled to share in what would have been accumulated. (*Ellis v. Maxwell*, 3 Beav. 587; and 12 Beav. 104; *Eyre v. Marsden*, 2 Keen, 564; *O'Neil v. Lucas*, 2 Keen, 313.)

The Solicitor-General and Shapter, for the principal defendant, contended that there was not accumulation of rents and profits, for accumulation of rents and profits was adding rents and profits to rents and profits and getting back the same thing with accretions, and that the party entitled might at any time require their payment, stopping the further accumulation. But this could not be here, for the accumulation must go on until the lives should drop. It was wholly different from accumulation by a trustee; in that case the same thing was got back, but here the thing got back was very different, namely, a sum of money paid out of the assets of a mercantile partnership concern; in fact, it was

spending of rents to preserve lawful property,—resembling insurances, often directed by the Court to renew leaseholds, or resembling trusts to apply rent to drain, build on, or improve lands. As to the argument that a selection might be made of twenty young lives in fraud of the statute, sufficient protection against that would be found in the invalidity of policies in which the assured had no interest. Suppose, then, there was in effect an accumulation, yet there was no express trust to accumulate. (*Elborne v. Goode*, 14 Sim. 165; *Corporation of Bridgnorth v. Collins*, 15 Sim. 538.) If in any way it could be said to be accumulation, it was not an accumulation to postpone enjoyment within the statute. It was not sufficient that accumulation or postponement of enjoyment should occur, both must concur. It must be an accumulation to postpone enjoyment. If it were to satisfy a contract, it was not within the statute. It was a contract compulsory on the insurance office, and virtually compulsory on the assured, for if his estate did not continue the assurance, it would lose the benefit of the premiums paid by the testator in his lifetime and for twenty-one years afterwards. The case was within the exception of the 2nd section of the statute concerning portions, as it was to secure portions, and it was immaterial how small the interest the parent took. (5 Cl. & Fin. 127.) A grandfather in *loco parentis*. (*Bacon v. Proctor*, 1 Turn. & R. 31.) Here the parents took annuities of sixty guineas. The widows of the sons were one with their husbands.

*Stuart and Leach, Bacon and Bagshawe, Russell and Hobhouse*, appeared for other parties. *Eddis* replied.

Monday, July 28.—The VICE-CHANCELLOR said that the effect of the will was to keep up policies or assurances on the lives of the testator's sons for the benefit, after their deaths, of their widows and children. The decrees and orders directing the payment of the premiums were made more than twenty years since, and this was a petition presented praying a rehearing, and complaining of the payment of those premiums for a period of more than twenty-one years from the testator's death. The question then for the consideration of the Court, the main question, then was whether this trust of the payment of the premiums on the life policies out of the income of the residuary estate was void beyond the twenty-one years under the statute 39 & 40 Geo. 3, c. 98, commonly called the "*Thellusson Act*." As his Honour's opinion was unfavourable to the case of the petitioner on the question of the accumulation, he said he should give no opinion on the other points relating to the time within which a petition of rehearing should be presented. At common law the direction to accumulate would have been valid. The object of the statute was to provide against the accumulation of rents and profits, and was not intended to interfere in any manner with contracts. The present case was plainly not one of accumulation, and it was equally clearly one of contract. The payment of the annual premium to an insurance office was not an accumulation, but it was an annual sum payable by the assured upon a contract with the office. His Honour was of opinion that neither the well-known cause of the enactment of the *Thellusson Act*, nor the intention of the legislature in passing it, nor the words of the statute itself, afforded any foundation for the argument that the payment of premiums on policies of insurance was restrained by or was within the mischief intended to be obviated by the Act. With regard to the case which had been put of a party selecting any number of lives at his pleasure, and so defeating the intention of the law, the obvious answer to that was, that such insurance would be void for want of interest in the insurer. He should dismiss the petition of rehearing with costs.

## COMMON LAW COURTS.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLETON and PAUL FARNELL,  
Esqrs. Barristers-at-Law.

April 16 and June 17.

SIEVEWRIGHT v. ARCHIBALD.

Contract—Goods sold—Variation—Bought and sold notes.

A broker having authority to negotiate a contract between two parties for the sale of iron, sent a sold note to the seller, in which the iron was described as "*Dunlop's Pig Iron*," and a bought note to the buyer, in which it was described as "*Scotch Pig Iron*." It appeared that "*Dunlop's*" was a description of Scotch iron, and that the contract which the defendant had authority to negotiate was for the sale and purchase of "*Dunlop's Pig Iron*." The defendant had refused to receive the iron, and the action was brought for such refusal. There was evidence of a general admission by the defendant of his liability for a breach of some contract to purchase iron. There was no entry of the contract in the

broker's book signed by the broker or by either party.

Held (*Erie*, J. dissentiente), that there was no binding contract between the parties, either in the terms of the bought or of the sold note, the variance between them being fatal, and that there was nothing in the admissions of the defendant to warrant the jury in finding that the defendant had ratified a contract in the terms of either the bought or the sold note.

This was an action of *assumpsit* brought against the defendant for an alleged breach of contract in refusing to accept certain iron alleged to be contracted to be sold to him by the plaintiff.

Plea—*Non assumpsit*.

At the trial before Lord Campbell, C.J. at the sittings in London after Michaelmas Term 1850, the plaintiff had a verdict for 125l. damages, leave being reserved to the defendant to move to enter the verdict for himself. A rule nisi having been accordingly obtained,

*Beckell*, in Easter Term, shewed cause.

*Watson and Hawkins* were heard in support of the rule.

[The facts and arguments are fully stated in the judgments of the learned judges.]

*Cur. adv. vult.*

Tuesday, June 17.—The Court being divided in opinion, the learned judges delivered their opinions separately.

*ERLE, J.*—In this case it appeared by the evidence of the broker at the trial that he had agreed with the defendant to sell him 500 tons of Dunlop's iron; that Dunlop's iron was Scotch iron; that he had delivered to the defendant a bought note, in which the thing bought was named "*Scotch iron*;" to the plaintiff a sold note, in which the thing sold was named "*Dunlop's iron*." It further appeared that the defendant had repeatedly admitted the existence of some contract, by requesting the plaintiff to release him therefrom on terms. The plaintiff declined to release him from not accepting the Dunlop iron; but on the defendant producing the bought note, so that it was in evidence, and objecting that there was no contract, because the bought and sold notes varied, the plaintiff then contended that the defendant had ratified the contract expressed in the bought note sent to the defendant. The declaration was then amended, to agree with the bought note; and the jury found a verdict for the plaintiff; and that the defendant had ratified the contract as alleged in the amended declaration. I take this to be the substance of the evidence, which will be stated more fully in the judgment of my Lord Chief Justice. The defendant then obtained a rule to set aside this verdict for the plaintiff, and to enter it for the defendant on two grounds. First, he contended that in cases where a contract has been made by a broker, and the bought and sold notes have been delivered, they alone constitute the contract, and that all other evidence of the contract is excluded, and that if they vary, the contract is disproved, and that the notes now in question did vary. And, secondly, he contended that if evidence was in such cases admissible, there was no evidence here to go to the jury, to prove the ratification of the contract alleged in the amended declaration. But after considering the argument it appears to me that he has failed to establish either ground. With respect to the first ground, I would observe that the question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes, which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note, delivered to the defendant has been tendered, and that the point is, whether such evidence is admissible because the sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are, by presumption of law, a contract in writing? I think they are not. If bought and sold notes, which agree, are delivered and kept without objection, such acceptance without objection, is evidence for the jury of mutual assent to the terms of the notes. But the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof, if they constituted a contract in writing. This seems to me to be the effect of the mercantile usage relating to bought and sold notes, as was held in *Hawes v. Forster*, 1 M. & Rob. 368, mentioned below, and this is the ground upon which the verdict in that case is to be sustained, according to the opinion of Parke, B. pronounced in *Thornton v. Charles*, 9 M. & W. 802. The form of the instruments is strong to shew that they are not intended to constitute a contract in writing; but to give information from the agent to the principal of that which has been done on his behalf, and the buyer is informed of his purchase and the seller of his sale; and experience has shewn that they have varied in form according as mercantile convenience may have dictated; both may be signed, or one, or neither. They may be both signed by the broker, or one by him and the other by the party; and the names of



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both contractors may be mentioned, or one mentioned by name and the other described. They may be sent, either at the time of the contract, or after, or one at an interval after the other. No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange and consent at a certain and the same time. The governing principle in respect of contracts is to give effect to the intention of the parties, and where the intention to contract is clear, it seems contrary to that principle to defeat it, because bought and sold notes have been delivered which disagree. They are then held to constitute the contract only for the purpose of annulling it. It seems to me, therefore, on principle, that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. Before examining the authorities upon which this proposition is supposed to be founded, I would draw attention to the distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds. The question of compliance with the statute does not arise until the contract is in proof. In the case of a written contract, the statute has no application. In the case of other contracts, the compliance may be proved by part payment, or part delivery, or memoranda in writing of the bargain. Where a memorandum in writing is to be proved in order to show compliance with the statute, it differs from the contract in writing, in that it may be made at any time after the contract, if before the action commenced; and any number of memoranda may be made, all being equally originals, and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although they be not expressed in the usual form of agreements. (See *Egerton v. Mathews*, 6 East, 307.) I now advert to the authorities usually cited on this point:—in *Thornton v. Kemper*, 1 Marshall, 355, the bought and sold notes could not be reconciled, and no other evidence appears to have been offered of the contract, and the plaintiff did not adopt the note delivered to the defendant. As the case stands in the report there was no evidence of mutual consent to the contract alleged by the plaintiff, and the point was not raised whether other evidence of the contract was admissible. In *Cumming v. Roebuck*, Holt's N.P. 172, the statement is that the bought and sold notes differed; and Gibbs, C.J. is reported to have ruled, that if the broker deliver a different note of the contract to each party contracting, there is no valid contract, and nonsuited the plaintiff: and in this case it does not appear that any other evidence of the contract besides the notes was offered, and if so, the ruling here also seems irrelevant to the present case. The learned judge is reported to have added, that the case which states the entry in the broker's book to be the original contract had since been contradicted. The facts in relation to which this opinion was expressed are not given. If it was intended to be unqualified, there is authority and principle against it. In *Hayman v. Neale*, 2 Campb. 337, an entry was made in the broker's book, and bought and sold notes were delivered. The defendant returned the bought note, and contended that there was no contract till the notes delivered were agreed to by the parties. But Lord Ellenborough held that neither party could recede from a contract after it was entered in the book: that the bought and sold note is not sent on approbation, nor does it constitute the contract. It is only a copy of the entry which would be valid, although no bought or sold note were sent. In *Grant v. Fletcher*, 5 B. & C. 436, the plaintiff proved a verbal contract to purchase by the broker, and to comply with the statute gave in evidence an unsigned entry in the broker's book, and imperfect bought and sold notes, and the nonsuit was supported because these imperfect instruments did not constitute a sufficient memorandum in writing of the bargain. In the judgment it is stated that the entry in the broker's book is the original, and the bought and sold notes ought to be copies of it, and a valid contract may probably be made by perfect notes signed by the broker and delivered to the parties although the book be not signed. The Court, therefore, was far from holding the notes, if delivered, to be the sole evidence of the contract. In *Goom v. Aftalo*, 6 B. & C. 117, the broker had made an unsigned entry in his book, and he had delivered to the parties signed bought and sold notes. It was objected that the entry in the book was the original, and that therefore the notes were inadmissible; and this objection was only overruled after argument on a special case. The Court, therefore, was still far from recognising the doctrine that bought and sold notes are the contract itself. In *Thornton v. Meux*, 1 M. & M. 43, Abbott, C.J. states, that he used to think the broker's book was the proper evidence of the contract;

but he afterwards changed his opinion, and held, conformably with the rest of the Court, that the copies delivered to the parties were the evidence of the contract they had entered into. It is obvious that this ruling does not follow from the judgments that had lately preceded it. It seems that the late change of opinion was not acted on in the case so as for the plaintiff to be nonsuited thereon; but the trial proceeded, and the plaintiff was nonsuited on another ground. Therefore there was no opportunity to review the ruling in *base*, and both the last cases assume that a document in writing is necessary for a contract for the sale of chattels. In *Hawes v. Forster*, 1 M. & Rob. 368, the contract, as stated in the bought and sold notes, varied from the contract as stated in the broker's book. At the first trial the plaintiff's note only was in evidence, and the broker's book was rejected. On the second trial, the plaintiff relied on both the notes, with the evidence of some merchants, stating that they always looked to the bought and sold notes as the contract, and if the note was not consonant with their directions, they returned it. The defendant relied on the entry in the broker's book. The jury were directed to find for the plaintiff if the bought and sold notes in their opinion constituted the contract, and they found for the plaintiff. These cases ought not to be taken to establish a general proposition of law that the notes in all cases constitute the contract. The verdict may be well supported on the facts of the case, or the acceptance of the notes without objection was evidence for the jury of mutual assent to the contract on the terms expressed in those writings which agreed; and this view was explained by Parke, B. in *Thornton v. Charles*, 9 M. & W. 807, where he is speaking of *Hawes v. Forster*:—"The jury found the bought and sold notes were evidence of the contract, but on the ground that those documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of those notes. That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or there be a memorandum in the book, made according to the intention of the parties, that memorandum, signed by the broker, would not be good evidence to satisfy the Statute of Frauds." The same learned judge expresses himself to the same effect in *Pitt v. Beckett*, 13 M. & W. 743; and it is clear that if, according to the evidence of the witnesses, there is a right to return the note as contrary to instructions, the keeping of the note makes it binding, and not the signature. These are the principal authorities cited by Mr. Smith in his book on mercantile law in support of the principle now under discussion; and from this review I gather that, in the greater number of the cases, the doctrine that bought and sold notes are the sole evidence of the contract, is not recognised; nor was the point decided that other evidence of a compliance with the statute is inadmissible, if bought and sold notes have been delivered which disagree; and if the principle is not established by direct authority, the manifest evil resulting from it is a strong ground for believing that it is not founded in law. Then, if other evidence of the contract and of compliance with the statute was admissible, the second question raised by the defendant remains to be considered, namely, whether there was sufficient evidence to sustain the verdict for the plaintiff. Upon this point I think the jury were warranted in inferring that the substance of the contract was as alleged in the amended declaration, and as stated in the defendant's note. The broker who made the contract appears to have so understood it, as he so expressed it at the time. The defendant, with whom he made it, probably so understood it as to have kept the note in that form without objection, and treated for a compromise, on the assumption that he was bound thereby, and produced it at the trial as the contract. The plaintiff might well so understand it; for as Dunlop's iron was Scotch iron, the article which the plaintiff intended to deliver was the article which the defendant intended to buy. There is no evidence that Scotch iron made by Dunlop is better than any other Scotch iron. On the contrary, it is probable, from the conduct of the parties, that the mention of Dunlop's name was an immaterial accident, not affecting the substance of the contract, as in the case of the purchase of wheat or other articles usually supplied by name. If the dock where it stood, or the ship in which it was brought, was mentioned in one note and omitted in another, the omission of the place would, I presume, be held immaterial. So the omission of the manufacturer of the Scotch iron, in the defendant's note, ought to be held immaterial, if the subject of his purchase was intended to be Scotch iron; and his conduct is good evidence of such intention. If the evidence was, that the defendant had proposed to buy Scotch iron, and the plaintiff proposed to sell him the article he wanted, namely, Dunlop's, and the defendant had described his contract to be the purchase of Scotch iron in the memorandum made at the time, the jury

would infer that Scotch iron was the substance of the contract; and the evidence, now in the cause, appears to me to warrant the same conclusion, that the substance of the contract was as alleged in the defendant's note, and that note alone would be a sufficient memorandum of the bargain, signed by the agent of the defendant, within the meaning of the statute. The note delivered to the defendant was held sufficient by Lord Kenyon, in *Rucker v. Cammeyer*, 1 Esp. 105. One note only was offered in evidence by the plaintiff in *Powell v. Dinett*, 15 East, 29, and no objection was made on that account. One note only was held by Lord Denman to be sufficient in *Hawes v. Forster*. And one note only, signed by the defendant, was held sufficient in *Dickenson v. Lilval*, 1 Stark. 128, although it varied from the note signed by the plaintiff's broker, which had been sent to the defendant. But it is not necessary to discuss whether one note alone would be a sufficient memorandum, for if the substance of the contract was as alleged, the notes did not substantially vary. It was held in *Bold v. Rayner*, 1 M. & W. 343, that several apparent differences in the terms of bought and sold notes might be reconciled by evidence of mercantile usage in respect of those terms. So that where two descriptions are used in those instruments of that which, in the intention of the parties, may be the same article, I think the apparent discrepancy may be removed by evidence of such intention; and if both notes were essential to the plaintiff's case, both may be reconciled on this evidence, and held valid, they not being inconsistent, as was the case in *Thornton v. Meux*. But it is further objected by the defendant, that the question of ratification was left to the jury, instead of asking them what was the substance of the contract. It appears to me the jury intended to find that the contract was, as alleged in the declaration and asserted in the bought note. If not, this objection would not warrant the entry of the verdict for the defendant, which is the present rule. If the present point can be resorted to, at all events it goes to a new trial only. For these reasons my opinion is against the defendant on both grounds, and that the rule ought to be discharged.

PATTESON, J.—I need not state the facts of the case, because I know my lord will explain them very fully. The Statute of Frauds requires that some note or memorandum in writing of a bargain be made and signed by the parties to be charged by such contract, or their agent thereunto lawfully authorised. The question is whether in this case there was any such note or memorandum in writing, signed by the defendant or his agent. If there was I take it to be clearly immaterial whether there was any such note or memorandum signed by the plaintiff. See *Egerton v. Mathews*, 6 East, 307, where the memorandum was signed by the defendant himself, not by the broker or agent, and none was signed by the plaintiff; yet it was held that the statute was satisfied. But I consider the memorandum need not be the contract itself, but that the contract may be made without writing, and if a memorandum in writing be afterwards made, embodying that contract, and is signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied. Still it is plain, if the original contract was itself in writing, signed by both parties, that would be a binding instrument, and no subsequent memorandum signed by one of the parties would have any effect. In this case the contract was made by a broker acting for both parties, but such contract was not in writing signed by him or them. If there be any writing to satisfy the statute, it must be some subsequent memorandum in writing signed by the defendant or his agent. There are subsequent memoranda in writing signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant; the sold note to the seller, the plaintiff. Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered of what the broker has done as his agent in that purchase. Surely a bought note delivered to the buyer cannot be said to be a memorandum of the contract signed by the buyer's agent, in order that he should be bound thereby; for then it would have been delivered to the seller and not to the buyer, and *vice versa* as to the sold note. Can, then, the sold note, delivered to the seller, be treated as a memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? I think the very language clearly shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his book, and sign all contracts made by him. And if the broker had made such signed entry I cannot doubt, notwithstanding the cases and *dicta* apparently to the contrary, that such memorandum would be a binding contract on both parties. In the case of *Hawes v. Forster*, 1 M. & Rob. 368, there was such a memorandum signed in the broker's book. There were also bought and sold notes tallying with each other, but varying from

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the book. On the first trial of that case Lord Denman held the bought note produced by the buyer, the plaintiff, was sufficient, and was proper evidence of the contract, and not the book, and that no notice to produce the sold note need be given to the defendant. The Court, on motion, granted a new trial, holding that this evidence was not the proper evidence of a contract, unless there was a custom of the trade in London that bought and sold notes, and not the signed broker's book, was the contract; and considering that such custom had not been sufficiently inquired into. That case is so explained by Parke, B. in *Thornton v. Challs*, 9 M. & W. 802, and in *Pitts v. Beckett*, 13 M. & W. 746; and my own note of the case, I having been a member of the Court which granted the new trial, is entirely in conformity with that explanation. On the new trial the jury found the custom that the bought and sold notes constituted the contract, and not the broker's book. A bill of exceptions was tendered, but the defendant did not persist, and submitted to the verdict. Possibly, if he had, it might have been held that the bought and sold notes, when acquiesced in, constituted a new contract; but that they could not be so treated under such circumstances as an original contract, seems to me to be impossible to imagine. However, in the present case, there was no signed memorandum in the broker's book, therefore the bought and sold notes together, or one of them separately, must be the memorandum in writing signed by the defendant's agent; or there is none at all. The statute need not be satisfied. If the bought and sold notes together be a memorandum, and they differ materially, it is plain there is no memorandum of it. The Court cannot positively say, nor can the jury say, which of them is to prevail over the other. If being read together they are inconsistent, but assuming the variance to be material, and if one is to prevail over the other, that one will be the memorandum and not the two together. If, on the other hand, one only of these notes is to be considered as the memorandum in writing, signed by the defendant's agent, which binds the defendant, which of them is to be so considered—the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them, by itself, can be so treated. In no one of the cases has the Court, or a judge at Nisi Prius, held that. And Lord Denman held in *Hawes v. Forster*, on the first trial, that the proof of one was sufficient without notice or proof of the other. Therefore it would be only holding that either must be taken to correspond with that produced, until the party producing the other shewed a variance. But on the second trial notice to produce the other was given, and it was produced, and the two corresponded. In *Coom v. Aflalo*, 6 B. & C. 117, there was no variance at all, and the only question was, whether as there was an unsigned memorandum in the broker's book, the bought and sold notes could be treated as a memorandum, and the Court held that they could. All the three in the case corresponded. If this were *res integra*, I am strongly inclined to say I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds; but I consider that point to be too well settled to admit of any discussion; yet there is no case which they differed in which the Court has upheld a contract, plainly shewing that the two together have been considered the memorandum binding upon both parties. For these reasons, which to my mind, I confess, are quite unsatisfactory, but I yield to the authorities. I do not go through and examine all the cases on the subject; they are collected in the last edition of Dowdeswell's *Smith on Mercantile Law*, 452, and they shew that the Courts have invariably held, where bought and sold notes are resorted to as the contract, or as a memorandum of the contract, and they vary in any material point, there is no writing to satisfy the Statute of Frauds. It seems to me, therefore, the only question to be determined in this case is, whether the bought and sold notes vary in any material point. In the one the words are "Dunlop's pig iron;" in the other "Scotch iron," generally. The one would be complied with by a delivery of any Scotch iron of any manufacture, possibly inferior to that of Messrs. Dunlop; the other ties the parties down to a delivery of Dunlop's, though possibly, again, that might be greatly inferior to some other Scotch iron. How is it possible to read the two notes together and say they mean the same thing, or to say that you can incorporate the one note with the other? that that which specifies Dunlop's iron does not immediately prevail over that which does not? I cannot but think that there is as much variance between the bought and sold notes as in the case of *Thornton v. Kempster*, 1 Marsh. 355, wherein one note was "Petersburgh clean hemp," and "Riga Rhine hemp" in the other, and where the Court of C. P. held that there was no contract, independently even of the Statute of Frauds. The broker, undoubtedly stated in his evidence that he made the original contract verbally about Dunlop's iron; but how can that evidence make the

bought and sold notes delivered to the defendant for Scotch iron generally to be a memorandum signed by the defendant's agent, and binding on the defendant? The question is not, whether either of the notes correspond with the contract originally made by word of mouth, but whether either of the notes made separately *per se* be a signed memorandum and binding upon either party. On the whole, therefore, however much I may regret that such objections should prevail, I feel bound to say that, in my opinion, there is no evidence of any contract binding on the defendant.

Lord CAMPBELL, C.J.—I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although believing he had broken his contract, he could only have defended the action in the hope of mitigating the damages, and although he was not aware of the objection on which he now relies until within a few days before the trial. But it appears to me that we cannot refuse giving effect to this objection, without disregarding the Statute of Frauds, without overturning decided cases, and without the danger of introducing uncertainty and confusion into the rules for enforcing mercantile contracts for buying and selling. The plaintiff, in his declaration, set out the following written document, stated to be a sold note of certain goods agreed to be purchased from him by the defendant:—"26, Lombard-street, London, February 26, 1849. Sold Charles Dixon Archibald, 44, Upper Harley-street, 500 tons Messrs. Dunlop, Wilson, and Co.'s pig iron, No. 3, at 52 shillings per ton, free on board at, &c. payment cash one month from the date of," &c. This professed to be signed by William Richardson, the broker. The declaration in the usual form averred that the iron was duly tendered to the defendant, but that he refused to receive it or to pay for it. The only material plea was *non assumpsit*. William Miller being called as a witness, swore as follows: "I am a metal broker in the city. The plaintiff carries on business at Glasgow under the name of Sievwright, Wilson, and Co. I received instructions from him to sell 500 tons of Dunlop, Wilson, and Co.'s pig iron; I sold it to the defendant. I saw the defendant in London; he gave me verbal authority to make the purchase for him. I agreed with him that it was to be a purchase of 500 tons of Dunlop, Wilson, and Co.'s iron. The names of Sievwright, Wilson, and Co. were mentioned as those of the sellers. On the 26th of February I wrote a contract, and sent it to the defendant." The bought note being called for, was produced by the defendant, and it corresponded with the sold note set out in the declaration, except that, instead of "500 tons of Dunlop, Wilson, and Co.'s pig-iron," it stated "500 tons of Scotch pig-iron." The bought note being read, the witness continued: "This was inclosed in a letter of the 26th of February, and sent to the defendant in Upper Harley-street. I sent to the plaintiff, the same day, the sold note." A copy of it was admitted and read as set out in the declaration. Dunlop, Wilson, and Co.'s witness says, "are manufacturers of iron in Scotland, and their iron is Scotch iron." The defendant's counsel insisted that there was no binding contract on him, there being a material variance between the bought and sold notes; for according to the bought note the seller would perform his obligation by giving 500 tons of pig-iron, made by any manufacturer in any part of Scotland; whereas by the sold note the buyer might demand 500 tons of pig-iron made by Dunlop, Wilson, and Co. which might be of a peculiarly good quality and of superior reputation in the market. I intimated an opinion that the variance was material; and as there was no entry in the broker's book signed by him, and as the plaintiff had proposed to prove the contract by the bought and sold notes, the variance was material. The plaintiff's counsel then said he had clear evidence that the defendant had subsequently ratified the contract; and an objection being made that he could not have ratified the contract as set out in the declaration, I permitted the declaration to be amended according to the terms of the bought note. Richardson, the broker, being recalled, after stating that he had had the delivery orders for the 500 tons of iron ready to be handed over to the defendant, on the 28th of February says, "I saw the defendant about the end of March. On the 4th of April he came to me, and he agreed that I should propose to the plaintiff to take a bill at four months, and the delivery orders to be lodged as a security at the Union Bank. The price of the iron had fallen 5s. a ton. Before the 29th of March the defendant had given me unlimited authority to get the transaction settled as I thought best." This was the end of Richardson's evidence. There was then read a letter from the defendant to Richardson, of the 5th of April, in which he says, "You must manage the iron speculation as you think fit;" a letter written by Richardson to the plaintiff, saying, that Mr. Archibald agreed to give a bill at four months; the

plaintiff's answer refusing to take a bill at four months, but offering to take one at three months; another letter written about the same time by the defendant to Richardson, saying, "I hope you will conduct it to a successful issue;" and a further letter, between the parties, continued the negotiations until the 27th of October, 1849, when the defendant denied his liability. I left the question to the jury, whether the defendant had ratified the contract sent to him contained in the bought note? The jury found that he had; whereupon the verdict was entered for the plaintiff for 125*l.* damages, with liberty for the defendant to move to enter a verdict for him, if the Court should be of opinion that there was not evidence to prove the declaration as amended. Having heard the rule obtained for this purpose learnedly argued, I do not think there was any sufficient evidence of that ratification. Nothing having such a tendency was done by the defendant before the 26th of March, the day on which he ought to have performed the contract. What constituted the ratification? What date is to be given to it? There never was any reference by the defendant to the terms of the bought note, more than the sold note. The variance between them was not known to him till after the action was brought, nor was there any assent by the plaintiff to accede to the terms of the bought note, whereby he would have become bound to deliver Dunlop, Wilson, and Co.'s pig iron. The sold note contained different terms, and was not declared on by him, or set up by him as the true contract until the declaration was amended. The plaintiff likewise sought to recover under the count for goods bargained and sold. But this could not avail him, for the defendant never accepted the goods, and the contract was not for the sale of any specific goods, the property in which could be considered as transferred to him. Recurring to the special count, the plaintiff attempted to support it by the parol agreement alleged to be entered into between the broker and the defendant, using the bought note as a memorandum of agreement to satisfy the Statute of Frauds. In the first place, there seems to be great difficulty in setting up any parol agreement when the parties intended that it should be understood that there was a written contract. What passed between the defendant and the broker previous to the 26th of February seems to me only to amount to an authority from the defendant to the broker to enter into the contract; and Richardson himself said, on the 26th of February, "I wrote a contract, and sent it to the defendant. I sent a sold note the same day." Again, the memorandum under the 17th section of the Statute of Frauds must be signed by the party to be charged, or his agent. But assuming that the parol agreement for the contract was made, and that when Richardson wrote the bought note it was only to tell his principal what it was, there is a difficulty in saying, he being *functus officio*, in so far as making the bargain was concerned, that he had any authority to sign the memorandum for the defendant, and thereby to charge him. But if he had, can this be said to be a true memorandum of the contract? We are here again met by the evidence of the variance, which is as strong between the parol agreement and the bought note as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note; and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected and the declaration was amended. I by no means say that where there are bought and sold notes they must necessarily be the only evidence of the contract; circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold, without hesitation, notwithstanding some dicta or supposed ruling of Lord Tenterden, in *Thornton v. Meux*, to the contrary, that this entry is the binding contract between the parties, and that the mistake made by him in sending him a copy of it, in the shape of a bought and sold note, would not affect its validity. He being authorised by the one to sell and by the other to buy, in the terms of the contract when he has reduced it into writing and signed it, as their common agent, binds them according to the Statute of Frauds, as if both had signed it by their own hands. The duty of the broker requires him to do so, and until recent times this duty was scrupulously performed by every broker. What are called bought and sold notes were sent by him to his principals by way of information; that he had acted on their instructions, but not as an actual contract which was to bind them. This clearly appears from the practice still followed in sending the bought note to the buyer and the sold note to the seller; whereas, if these notes had been held to constitute the contract, the bought note would have been put into the hands of the seller, and the sold note into the hands of the buyer, that each might have notice of the engagement of the other party and not of his own. But the broker,

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to save himself trouble, now omits to enter or sign any contract in the book, and still sends bought and sold notes as before. If these agree, they are held to constitute a binding contract. If there be any material variance between them, they are both nullities, and there is no binding contract. This last proposition, although combatted by the plaintiff's counsel, has been laid down and acted on in such a long series of cases, that I could not venture to contravene it, if I did not assent to it. But where there is no evidence of a contract, unless by the bought and sold notes sent by the broker to the parties, I do not see how there can be a binding contract unless they substantially agree. Where contracting parties must assent to the same terms, and where the terms in the two notes differ, there can be no reason why faith should be given to the one more than to the other. This is certainly a most inconvenient mode of carrying on mercantile transactions. From the carelessness of brokers and clerks mistakes not unfrequently arise, of which unconscientious men take advantage, and no buyer or seller can be safe unless he has the sold note and the bought note as well, a precaution which the course of business does not permit to be taken. But these inconveniences can only be remedied by the Legislature imposing on the broker a faithful performance of his duty in entering and signing the contract. In the present case, there being a material variance between the bought and the sold notes, they do not constitute a binding contract. There is no entry in the broker's book signed by him, and if there were a parol agreement, there being no sufficient memorandum of it in writing nor any copy, except the part taken, the Statute of Frauds has not been complied with. I therefore agree with my brother Patteson that the defendant is entitled to our judgment. My brother Wightman, who heard the argument, is engaged in another place, but he authorises me to say that he has read this judgment, which I have now read, and that he entirely concurs in it. But the Court being divided, instead of making the rule absolute to enter the verdict for the defendant, we think that a nonsuit should be entered, so that the plaintiff, by a special verdict or bill of exceptions, may have the opportunity of bringing a fresh action and taking the opinion of a Court of Error on this point. With the most sincere deference for that member of the Court who differs from us, and with whom a Court of Error might agree, we wish that the party should not be bound by our judgment, but should have an opportunity of reviewing it.

*Rule absolute to enter a nonsuit.*

## COURT OF EXCHEQUER.

Reported by C. J. B. HERTSLET, Esq. of the Middle Temple, Barrister-at-Law.

May 2 and 12.

BLAND v. CROWLEY.

*Railway company—Agreement for compensation for damage—Consideration.*

*An agreement was made between the plaintiff and the defendants, provisional commissioners of a railway company, whereby the plaintiff covenanted to accede to the passing of the Bill through Parliament (which he had previously opposed), and in consideration of such assent the defendants covenanted with the plaintiff that in the event of the Bill passing the company should pay to the plaintiff for such of his land intersected by the railway as might be required or severed, at the rate of 120*l.* an acre, such sum to include all damage to arise from severance, and also to pay the plaintiff 3,000*l.* as compensation for general damage to the park, &c. &c. The Bill passed, but the railway was abandoned.*

*Held, per Parke and Platt, BB., Pollock, C.B. dissentients, that the defendants were bound to pay the 3,000*l.* immediately after the passing of the Act, notwithstanding the railway was not constructed, nor any damage done.*

This was an action of covenant, in which the plaintiff sought to recover against the defendants, amongst other things, the sum of 3,000*l.* which he alleged they had, by a contract in writing, become liable to pay. The declaration alleged that the defendants, Sedgefield Crowley and Benjamin Baines, and John Laurie, since deceased, on the 25th day of July, 1845, being three of the provisional directors of a company, registered provisionally, for the promotion of a Bill in Parliament to enable them to make a railway from the termination of the Croydon and Epsom Railway to Portsmouth, and which said company was intended to be incorporated and called the Direct London and Portsmouth Railway Company, by articles of agreement, made upon the 25th of July aforesaid, between the plaintiff of the first part, and the defendants, and the said John Laurie, therein described and since deceased, of the second part, and which articles of agreement, sealed with the seals of the defendants, and John Laurie, the plaintiff now brings into court, after reciting that, according to the parliamentary plans of the railway

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deposited with the clerk of the peace for the county of Surrey, the line of the said railway was proposed to be carried close to the park of the plaintiff, in the parish of Leatherhead, in the county of Surrey, called Randolph's Park, and through some of his fields in that parish; and that the plaintiff had, until that time, dissented to and opposed the carrying of the said Bill into a law; but in consideration of the covenants and agreements thereafter contained, by certain parties of the second part, the plaintiff then consented thereto; It was witnessed that, in pursuance of the said agreement, and in consideration of the covenants therein contained, by the parties of the second part, the plaintiff covenanted and agreed with them that he would accede to the Bill, provided the same should pass into a law in the then present session of parliament; and in consideration of the assent to the Bill by the plaintiff, the defendants covenanted and agreed with the plaintiff as follows:—That in the event of the said Bill passing into a law in the present or succeeding session of parliament, the company thereby to be incorporated should and would fulfil the following stipulations, conditions, and agreement; first, that the company should pay the said plaintiff for such of his lands intersected by the line of the railway as might be required for the purposes thereof, or as might be severed from the remainder of the fields, as shewn in the parliamentary plan, at and after the rate of 120*l.* per acre, and so in proportion for any less quantity than an acre; such sum to include all damage and inconvenience to arise from the severance of the land and premises; and, secondly, that the said company should pay to the plaintiff the sum of 3,000*l.* as compensation for the general damage which the said line should or might do to the mansion, park, and estate called Randolph's, including therein the crossing of the road near the entrance of the park by a bridge, and lowering the said road, and obstructing the view, and the disturbance of the privacy and seclusion of the park and mansion, the expense of a temporary residence during the progress of the works of the said company, the depreciation in the value of the residence, and the additional expense in the cultivation of the farm by reason of the alteration of the road leading from Leatherhead, and all other damage to be done to the mansion and park. And the plaintiff did thereby declare and agree to and with the parties of the second part, that on tender to him by the company or their agents of the sum of 120*l.* per acre for all the land required for the purpose of the railway, and so in proportion for any less quantity of so much of the land required for the purposes of the railway, and also on tender to him by the company of the said sum of 3,000*l.* he would convey to the company the said land. The declaration then proceeded to state that the plaintiff, in pursuance of the said articles of agreement, assented to the said Bill passing into a law, and that the said Bill passed into a law in the session of Parliament next ensuing that after the making of the agreement, and the said company were thereby incorporated by the name of the Direct London and Portsmouth Railway Company. Breach.—As to the 3,000*l.* that although a reasonable time for the payment of the said sum had elapsed before the commencement of the suit and since the passing of the Bill into a law, and that the company at a reasonable time had been requested to pay the same, yet neither the said defendants nor the said John Laurie, or any or either of them, had paid the same. To this declaration the defendants pleaded in like manner as to the whole declaration, as to the quantity of the said lands intersected by the line of railway, that they were not, nor was any part thereof, required by the company for the purpose of the said railway, and that neither was that, nor any part thereof, severed from the remainder of the land, as shewn upon the Parliamentary plans. To these pleas the plaintiff demurred.

*Peacock*, for the plaintiff, in support of the demurrer.

*Bramwell* for the defendant. *Cur. adv. vult.*

## JUDGMENT.

PLATT, B.—The question raised by the pleadings in this case, is, whether, according to the true construction of the covenants of the defendants the payment of the sum of 3,000*l.* depended upon the company entering upon the plaintiff's land, or requiring for the purposes of the railway the whole or part of the plaintiff's land, intersected by the proposed line of railway. The solution of this question depends on the intention of the contracting parties, to be collected from the recital and stipulations in the deed; and by the recital the sole object of the contract with the directors appears to have been to buy off the plaintiff's opposition, and the object of the plaintiff to have been to secure the price for which he would abandon it. Such being the respective objects, the plaintiff, in consideration of the covenants and agreements of the directors, contracted with the directors to assent to the Bill, provided it should pass into a law within a particular period; and the defendants, in consideration of the

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assent given to the Bill by the plaintiff, covenanted with the plaintiff, that in the event of the said Bill passing into a law in the present or the ensuing session of Parliament, the company incorporated thereby should pay for such of his lands as were intersected by the line of railway, as might be required for the purposes thereof, at a certain rate per acre; and, secondly, that they should pay to the plaintiff the sum of 3,000*l.* in full compensation for certain damage which the said line of railway might do to the said mansion, park, and estate called Randolph's, including therein crossing the road near to the park, and other particular kinds of damage to the estate. The particular description of damage agreed to be included in that as the subject of compensation does not appear to me to shed any light on the construction of the covenant. It seems to have been added in order to protect the company from any further claim for compensation; and it should be observed, that the damage for which the compensation was to be paid might include damage particularly specified. It does not follow that it excluded all other damage which might result from the company's Bill passing into a law, such as the depreciation of the value of the plaintiff's estate, resulting from a portion of it being, during the period prescribed for executing the works of the company, subject to the exercise of their power over it. Without further embarrassing the question unnecessarily, the fact was, he was so entitled. By the covenant between the parties the money is to be paid in the event of the Bill passing into a law; if either event was to happen before, the liability of the parties was to attach. No other event is mentioned in the covenant. The liability could not have been ascertained until after the company entered on the land, which is one of the pleas. The plaintiff was not bound to give them possession until they had tendered not only the price of the land, but the 3,000*l.* the sum stipulated in the deed. The deed does not contain any clause tending to shew that the liability to pay the compensation was to be dependent on the company requiring the land for the purpose of the railway. The contracting directors covenanted that in the event of the Act passing, the incorporated company should pay such certain compensation for general damage by them to be done to the plaintiff's estate, and the sum was ascertained; and why should not the parties have agreed that it was to be paid forthwith? The plaintiff may have distrusted the power of the projectors to execute their contract, and to have anticipated them in his demand for any damage which even in that case he would be likely to sustain. The argument to be deduced from the Lands Clauses Consolidation Act cannot, as it seems to me, alter the distinct terms of a contract. If we were to permit such alteration we should make for the contracting parties a bargain which they have not dreamt of themselves. On the whole, it seems to me that the defendant Laurie, in consideration of the assent given to this Act of Parliament, covenanted to pay for the general damage a sum certain by way of compensation, and that in the same event that they should pay also a stipulated sum for the acreage of such lands as might be taken of the property of the plaintiff, consisting, antithetically to general damage, of particular damage which the owner of the estate might have suffered. It seems, therefore, that these two pleas are insufficient as a bar to the action, and that the plaintiff is entitled to recover.

PARKE, B.—It is unnecessary for me to state the pleadings in this case. The question is as to the true construction of the deed, which was prepared apparently in the confidence that, if the Bill for making the Direct Portsmouth Railway passed into a law, the promoters would certainly carry the undertaking into effect. If the parties had contemplated the possibility that after the Bill passed the railway would have been abandoned, it is probable a distinct provision would have been made for that event, leaving no doubt whatever as to the intention of the contracting parties. As the deed is framed, some doubt may arise as to the intention, and also as to what the parties would have stipulated, if the present state of facts had been presented to them. All we can do is, to look to the words, and in construing the deed we must adopt the established rule of construction, to read the words in their ordinary grammatical sense, and to give them effect, and to make such a construction as does not lead to an absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed. I think the parties have bound themselves by their covenant that the company is to pay the 3,000*l.* for which the action is brought immediately after the passing of the Act, although the railway should not be constructed, nor any damage done to the plaintiff. They have covenanted in the event of the Bill passing into a law in the present or the ensuing session of Parliament, that the company shall perform two covenants; first, that the company should pay at the rate of 120*l.* an acre for all land that might be required, and for damage by severance. If no land should be



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required the stipulated price would not be payable; as none was required the defendants could not be called upon to pay any part of the price. The second covenant is, that they are to pay 3,000*l.* to the plaintiff in full compensation for the general damage which the line of railway should or might do to the plaintiff's mansion and lands, including therein the crossing of the road near the entrance of the park by a bridge, the lowering of that road and obstructing the view, disturbing the privacy of the park, the expense of a temporary residence, the depreciation in the value of the residence, the additional expense in the cultivation of the farm by reason of the alteration of the road leading to Leatherhead and other towns in the neighbourhood, and all other damage to be done to the mansion-house and park. This latter covenant is a distinct and separate one; it is not made to be contingent upon the company requiring the land. Then comes a covenant that the plaintiff should convey upon the tender of 120*l.* per acre and 3,000*l.* There is no time stipulated for the payment of the 3,000*l.* and the plaintiff is not bound to convey at any time without a tender of the price of the land and 3,000*l.* thus obtaining a lien upon the land for both. But the defendants are not bound to pay the 3,000*l.* at any precise and stipulated time; all that they covenant is, that in the event of the Bill passing, the same shall be paid as a compensation for special damage that shall or may be done, and all other damage to be done. It is not said that when the Bill is passed the money shall be paid, but only that in the event of its passing it shall be paid. This difference in expression was pointed out by the Court in the course of the argument; and it was suggested that the covenant was to be read in the same way, in the event that has happened, of the passing of the Bill, as if introduced into a deed prepared after the Bill had passed; and if so, it could not be contended to be a covenant that it was to be paid, unless damages of the nature supposed had actually accrued or occurred. Even so read, it would have been questionable whether that would have been the true meaning of the covenant. A difficulty would have occurred as to the time of payment said to be made when any damage, however small, occurred. If so, greatly more than this amount would be payable if the whole sum would become due, and there is no provision for the payment of a proportionate part. On the other hand, if it would be payable when all the past damage had been sustained, the payment must be indefinitely postponed, and possibly would never arrive. But, in truth, this mode of considering the question, if the deed had been executed after the act, is certainly erroneous. There is a great difference between such a covenant before a Bill passes, and after a Bill becomes a law. After a Bill becomes a law there could be no reason for paying money to the plaintiff except as compensation for actual damage. Before the Bill became a law, the plaintiff might oppose it, possibly with success, and the covenant not to oppose furnishes a good reason for making the covenant to pay absolute. It is to be the price given to the plaintiff for agreeing to give the company, through the medium of the Act, a power for three years to affect his estate, by exercising the powers of the Act; and the form of the deed in this case shews clearly that the plaintiff's consent was the consideration for which the defendants covenanted the money should be paid. Indeed it is expressly so stated. I cannot, therefore, consider this covenant of the defendants to be on the same footing as if introduced in the same words in a deed executed after the passing of the Act, as it is a condition precedent to the covenant having complete effect. The money is to be paid at some time, and as no precise time is fixed, it is payable immediately. It is not stated that it is to be paid as soon as any damage shall be done, or after all shall be done, and the inconvenience above pointed out of the other construction forms a good reason for not adopting it. Neither can we say the payment ought to be at a period when, according to the provisions of the Act, the time for assessing the damages would arise, for that would be to alter the language, and to introduce new terms in it; and indeed all damage specially mentioned, could not be the subject of compensation to the plaintiff if the covenant had not been introduced. The rule upon this subject having been so lately laid down by the Court of Q.B. and I think very rightly, that the test where lands are injuriously affected by the construction of a railway is, whether if they are deteriorated in value by an act done by an individual without the authority of an Act, the landowner might obtain compensation. And indeed the damages enumerated do form a reasonable objection on the part of a resident gentleman to the proximity of a railway, though not entitling him to compensation. It is to be observed that it may be that the passing of the Act would be a practical damage to the plaintiff, because it would render his place less saleable by reason of the power of the company to make the railroad, during the period they have the power of making it by the Act, though the railroad shall not be actually made. Without altering any of the

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words of the deed, and according to their true ordinary meaning, I consider this a reasonable construction of the covenant,—that the 3,000*l.* is merely the price of buying off the plaintiff's opposition, and he having consented to the Bill passing, it must be paid, and when paid the plaintiff is not to insist afterwards on any compensation whatever for any kind of damage. In this view of the case it is immaterial whether the road be constructed, or attempted to be constructed, or not; the only condition precedent being that of the passing of the Act of Parliament; and that being averred, the plaintiff is entitled to recover; and therefore there must be judgment in my opinion for the plaintiff.

POLLOCK, C.B.—The question is, what is the true construction of the contract which the parties have entered into? Two constructions are presented to our attention. On the part of the plaintiff it is contended that the agreement means that in consideration of the assent of the plaintiff to the passing of the Bill the defendants agreed that in the event of the Bill passing into a law the company would fulfill certain conditions, one of which was to pay to the plaintiff the sum of 3,000*l.* in full compensation for the general damage which the line of railway should or might do to the mansion, park, and estate belonging to the plaintiff, including certain heads of specified damage or injury, none of which, it is to be observed, not one single individual source of damage which is there enumerated, being of a description, that which would arise from the actual construction of the railway,—none of the damage that has been alluded to by my learned brother Parke in his judgment just now,—such as, that the estate could not conveniently be sold in the meantime, or was liable to be taken, or was taken during the period of three years,—no such uncertainty in respect of enjoyment of the estate, or the possibility whether the railway could or not be constructed; no damage of that sort was mentioned; nothing is mentioned in the agreement except that description of damage which could alone arise from the actual making of the railway; and the plaintiff contends that the only condition precedent to his recovering the money is the passing of the Act, and that the consideration he gave was his assent to the Bill; and he contends that as soon as the Bill passed his title to the 3,000*l.* accrued. On the other hand the defendants contend that the agreement was, in effect, to settle the amount of damage as between the claimant and the company, when any damage should be done; and that if the company should not prosecute the scheme at all it would not have to pay the sum of 3,000*l.* In construing this agreement I think we are entitled, and indeed I may say, that we are bound to consider not only the actual words of the contract itself, but all the circumstances of the transaction, so far as the statute law and enactments in the public statutes have reference to the subject matter. Now the public Act, 8 & 9 Vict. c. 18, commonly called the "Lands Clauses Consolidation Act," makes provision for compensation, and enacts that lands may be taken for undertakings of a public nature; and I may here observe, that the very expression, "may be," which I have just used, does not mean "may or may not be," but "may be taken" as there used, is "may be actually taken,"—not "may be" taken, possibly or contingently; but "may be" "actually" taken. And it divides the compensation into two parts,—namely, what is to be paid for the value of the lands to be purchased, and the sum of money to be paid as compensation for damage done to the other lands belonging to the same individual. As these clauses form part of the general law of the land, not merely as being presumably known to all persons, but probably as having been referred to and stated by those who framed this agreement,—we are entitled to look at these clauses just as much as if they had been embodied in the agreement itself; and it appears to me that so reading the agreement, and so looking at the public law of the land, the agreement between these parties was made expressly with reference to these clauses. Now, I find by the terms of the agreement, the company are to perform the following stipulations and conditions,—which are two only; namely, first they are to pay for so much of the land as may be required, or as may be severed from the remainder,—they are to pay for that at the rate of 120*l.* per acre; and as the company are to purchase at that rate not only all the land that is required, but all the land that is severed from the remainder, the price of the land naturally and necessarily includes the price of severance. If that be all that is severed, there can be no damage remaining to be paid for by the agreement itself. The second stipulation is the one on which the question now turns; and that second stipulation is to pay 3,000*l.* in full compensation for the whole damage which the line of railway should or might do the mansion and other lands of Mr. Bland, which are not taken and not subject to it. Then there is a covenant by the plaintiff, that on tender of these two sums, namely, the value of the land at 120*l.* an acre, and

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the sum of 3,000*l.* before mentioned, he (the plaintiff) will convey the lands and deliver possession. Now, I do not see that the order in which these stipulations are placed makes the one a condition precedent to the other; but in construing the words that the parties use, it may be not unimportant to consider that they have made two stipulations: the first is, that the land shall be paid for; secondly, that the damage shall be paid for. The present contention on the part of the plaintiff is, that the first stipulation is of no importance whatever, and is no precedent whatever with reference to the second; but that the company was bound, and ought to perform the second portion of the agreement, making no reference to the first at all. Inasmuch, however, as these two conditions are in the agreement, although mentioned together, I infer from them, and from the manner in which they are mentioned, that the agreement had reference to the question which, on the passing of the Act, would arise between the plaintiff and the company, and that they really meant to provide that instead of resorting to arbitration or to a jury, in the event of the Act passing, the claim of the plaintiff should in that case be considered to be settled by agreement, probably on very liberal terms,—the land to be at so much per acre, and the general damage at a gross sum; but that it was not intended as accessory to the payment of one sum, still less to make the latter payment of 3,000*l.* payable *instantly*, and wholly irrespective of whether any lands should be taken or any damage done to it. It appears to me that if this agreement had been entered into after the passing of the Act, no doubt would have arisen as to its true construction; and if that be so, I own I do not see why it may not be construed in the same way, though the agreement was made before the passing of the Act. It would have been, on the other hand, that the owner of the land consented to the passing of the Act, which would be of no possible mischief to him whatever if the Act did not pass at all; and his consent to the Act passing amounted to nothing, unless the Act did pass; and the Act having passed, then arises the question what he shall be paid for his land, and the compensation for damage, in the manner stipulated for by the agreement. And I understand the plaintiff to say this: "If I assent to the passing of this Bill, and do not oppose it, you must agree to a stipulation that I shall stand in the same favourable position in respect of compensation, to be distinctly ascertained beforehand,—that I may have no extra costs to pay and no expenses to incur,—no uncertainty or anxiety to sustain." The expression "shall or may," used with reference to the damage to the mansion and other lands of the plaintiff, was urged upon us by the plaintiff's counsel as shewing that the sum of 3,000*l.* is to be paid whether any damage is done or not; but this argument certainly produced no effect on my mind, for the expression general damage "which the line of railway shall or may do to the said mansion," &c. in my judgment, is with reference to this Act especially, and the making of the agreement, and the subject matter, and the statute. With reference to the rights of the parties, in my opinion the expression "shall or may be," is grammatically to be read "shall or may actually take place;" and if the word "actually" were in the deed (and I think it ought to be read as if it were there), I think it is perfectly certain the plaintiff could not claim the 3,000*l.* until some actual damage had been done. And I may observe here, that in the 18th section of the Act, "damage that may be sustained" is an expression to be found; which expression it is impossible to construe in any other way than as damage, not possible, but damage which actually may be sustained. I think, therefore, that that was what was intended to be referred to; but it seems to me the very language, and the very agreement with reference to the language which the Act uses, expresses "shall or may be done," as meaning "shall or may actually be done." Considering, therefore, all the circumstances which belong to the agreement, and to the language used, I do not find myself fettered by any such grammatical construction, opposed to the view I have taken, as compels me to decide in a manner which I must say is, I think, not only contrary to the intention of the parties, but exceedingly contrary to the justice of the case, and to the general policy that should be observed in cases of a like nature. I must say, moreover, that I entertain no doubt whatever that the construction which I have put on the contract, is that which the parties intended; and I think it is the far better and more reasonable construction, and for that reason I adopt it. The whole scope of the agreement appears to me much more to resemble an agreement to take a just value as compensation, upon the passing of the Act, without any question of price between the parties, than to provide for the payment of the sum of 3,000*l.* at all events if the Bill should pass, without any reference to whether any injury should or should not be done. The injuries for which compensation is provided by the agreement are all of them such injuries as could not arise except from the actual construction of the rail-



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way; and do not include any other injuries,—certainly they do not include the injuries my brother Parke has just referred to,—namely, that the land might be tied up before a certain period, without a prospective possibility of the mischief that might or might not arise. It seems to me to follow from the very language used by the agreement, that they did not intend that compensation should be paid, except in the event of the railway being actually made. I think, therefore, that our judgment ought to be for the defendants; but as my learned brothers are of a different opinion, the judgment of the Court must be for the plaintiff. *Judgment for the plaintiff.*

June 6 and July 10.

**WILLIAMS v. THE CHESTER AND HOLYHEAD RAILWAY COMPANY.**

*Contract made by secretary—When not binding on the company.*

*A contract made by the secretary of a company on behalf of the company is not binding on them unless authorised by the directors or committee; and such contract should be by deed, under the seal of the company, and signed by the directors as required by the Act of Parliament.*

This was a special case. The facts and arguments are so fully stated in the judgment that it is unnecessary to give them at greater length.

*Phipson* (with him *Willes*), for the plaintiff, cited *Elmore v. Kingscote*, 5 B. & C. 583; *Aeebal v. Levy*, 10 Bing. 376.

*Bros* (Keating with him) for the defendants.

## JUDGMENT.

MARTIN, B.—This was a special case. The question stated for the opinion of the Court was whether the plaintiff was entitled to recover on both or either of two special counts in the declaration. The first count was founded on an alleged contract by the defendants to buy and accept from the plaintiff 2,000 tons of boiler plates; the second count was upon an alleged contract to buy and accept from 400 to 500 tons of other boiler plates and of angle iron, that being a description of iron used in applying boiler plates. The defendants are a corporation created and regulated by the stat. 7 & 8 Vict. c. 65, and not by the general Act; but the provisions applicable to the present case are the same in both Acts. By the 87th section the affairs of the company were placed under the management and superintendence of the directors who were authorised to enter into contracts for the execution of the works of the company and for all matters necessary for the transaction of its affairs; by the 93rd section the directors were authorised to appoint one or more committees, who, while three were present, were, by the 94th section, authorised to perform the acts entrusted to them. By the ordinary law, contracts to bind the company could only, except in particular instances, be created by deed. But by the 95th section of this Act the directors, or the committee appointed by them, were authorised "with respect to any contract which, if made between any private persons, would, by law, be valid although made by parol only, and not reduced into writing;" and such "contracts, made according to the provisions thereinafter contained, were effectual in law and binding upon the company and their successors." The present alleged contracts were contracts in which there had been a delivery and acceptance of part of the goods under both, and also part payment under both. It was contended on behalf of the plaintiff that, under the provisions before alluded to, the contract was binding on the company, and assuming there was no other objection to the contract, we think this contention is well founded. The first contract originated in a circular letter, dated the 24th of July, 1846, which the directors caused to be sent to the plaintiff, and on the 28th of July he answered this letter. On the 29th a board meeting of the directors was held, when this letter was laid before them, and at this meeting it was resolved that the tender be accepted of the plaintiff for 2,000 tons of iron at certain prices; and on a careful consideration of this resolution we are of opinion that the quantity of iron which the directors resolved should be absolutely accepted from the plaintiff was 2,000 tons altogether, including boiler plates and angle iron. Under the authority of this resolution, Mr. King, the secretary, on the 31st of July, addressed a letter to the plaintiff, stating that he was instructed by the directors to enter into an agreement for the supply of 2,000 tons of boiler plates; and, in consequence of a misunderstanding as to the price, the matter was not finally arranged until some time afterwards. On the 16th of October, Mr. King, the secretary, addressed a letter to the plaintiff:—"Referring to my letter to you of the 31st of July, of which a copy is appended hereto, I am now instructed to state that the directors will agree to an alteration in the terms as therein stated, the alteration to be to the following effect,—That the supply of 2,000 tons of boiler plates shall consist of 1,000 tons of the best, and 1,000 tons of the 'best best,' at the same price per ton," and these are some other terms mentioned in the letter of the 31st of July and set out at length, in which

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the quantity of iron is stated. It was stated it was left to Mr. Stephenson and Mr. Fairbairn to arrange as to the quantity and price of each description, and the times of delivery, and some other stipulations which are not material. Upon the 19th of October, Mr. Williams answered to this effect:—"I have your letter of the 15th instant, offering me an order for 2,000 tons of plates, half of which are to be best, and the other half 'best best,' at prices therein mentioned, and a quantity of angle iron, as will be ordered by Mr. Fairbairn, all of which I beg to say I will accept." It was contended for the plaintiff that these two letters constituted a contract with the company, and that by virtue of it the defendants were bound to accept and pay for the 2,000 tons of plates, exclusive of the angle-iron, which might be ordered by Mr. Fairbairn. If the question depended upon the mere construction of these two letters, we probably should have considered the plaintiff's view correct; but it was contended on the part of the defendant, that Mr. King, the secretary, had no authority to bind the company, as such, beyond that authority conferred on him by a resolution of the directors or the committee, the secretary of a railway company having himself no independent authority to bind the company, and that to bind them otherwise than by a deed the contract must be signed by three of the directors of the company, and it must be made in conformity with the 94th section of the Act of Parliament, and, on consideration, we think this argument well founded. The secretary of a railway company is in a very different position from that of a managing clerk of a private company or firm; he is the secretary, or scribe, only; and unless his Act is authorised by the directors or the committee, it is not, in our opinion, binding on the corporation or company. We have already stated that in our view the resolution of the company only authorised a contract for the purchase of 2,000 tons of iron, and therefore it follows, according to our judgment, the contract alleged in the 1st count, which is founded on an alleged contract to buy and accept 2,000 tons of boiler plates, exclusive of angle iron, is not proved, and is not entitled to be called a contract. It has been reported to us by Mr. Whitmore, to whom it was referred by the parties, that the letters of the 31st of July and the 15th and 19th of October were not laid before the directors, nor were the terms otherwise made known to them, so no confirmation or ratification can be alleged to exist. The contract in the second count originated in a letter, by Mr. King the secretary, of the 28th of March, 1846, requesting to be furnished with a tender for a further quantity of iron. To this letter the plaintiff replied on the 31st of March, offering to supply 400 to 500 tons of plates and angle-iron at various prices. This letter was laid before the directors at a board meeting, held on the 6th of April, when they authorised the contract to be entered into with the plaintiff for 350 tons. On the day of this meeting the plaintiff, being in London, where the meeting was held, wrote on a slip of paper, as follows:—"Mr. Walter Williams to inquire if the company have decided about the plates," and sent it in to the secretary, who returned it to the plaintiff, with the following written upon it by him:—"Tender accepted for 350 tons." On the 11th of April, however, the secretary addressed a letter to the plaintiff, to this effect:—"Your tender of March 31 for a further quantity of iron for the Conway and Britannia bridges is accepted by the directors, and I am instructed to request a line from you in confirmation thereof." And on the 12th of April, 1846, Mr. Williams wrote to the secretary, Mr. King, stating that he agreed to the contract. The plaintiff considers the contract contained in the second letter, of the 30th of March and the 11th of April to be the real one, *videlicet*, a contract for 400 to 500 tons of iron, and the second count is founded on such a contract; but for the reasons already given, we consider there was no such contract binding on the company, the directors having alone authorised one for 350 tons. It was suggested that this count might be amended on the memorandum, written by the secretary on the day of the meeting, by alleging it to be a contract for 350 tons; but this could not be done, because in truth the plaintiff never contracted to supply 350 tons. The contract was for the supply of from 400 to 500 tons, so that the parties never agreed *ad idem*; therefore the substantial result is, that, according to the agreement stated in the case, the verdict must be entered for the plaintiff for 40l. 11s. 1d. upon the common count. There are some other issues with respect to the other counts, which the parties will probably be able to arrange among themselves. We cannot conclude without calling attention to the extreme imprudence of persons dealing with railway or other companies on letters or documents signed by the secretary of such companies. There is no reason to suppose that any fraud was intended in this case, or that the mistake originated otherwise than in an unintentional oversight; but the consequence to the plaintiff is the same as if a gross fraud had been practised on him of the directors authorising one contract and their secretary know-

## BANKRUPTCY.

ingly communicating one varying from it to him, he not unreasonably supposing the contract, as contained in the letters of the 15th and 19th of October, was the contract of the company; but in consequence of this contract not being authorised by the resolutions of the 29th of July, which he most probably never saw, it is not binding on the company, and he has failed in his suit upon it. Persons dealing with these companies should always bear in mind that such companies are corporations, and essentially different from ordinary partnerships or firms for all purposes of contracts, with reference to evidence of giving the legal authority, and they should insist on their contracts being made by deed under the seal of the company, or signed by the directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such bodies on any other footing. But the same observation will also apply with respect to any deviation or alteration in the contracts already made.

*Judgment for the defendants.*

## BANKRUPTCY.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FORDBLANQUE, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Saturday, May 10.

*Ex parte CARTER, re CARTER.*

*Disputing adjudication of bankruptcy.*

*Where a bankrupt does not avail himself of the remedy for disputing the adjudication given by the 104th section of the Bankrupt Law Consolidation Act, 1849, still every other remedy for disputing the adjudication remains to him.*

This was a petition by way of appeal from the commissioner's decision, under the following circumstances. On the 30th of July, 1850, Carter was taken in execution on a *ca. sa.* at the instance of J. Dimmock, T. Dimmock, and T. Keeling, three joint judgment-creditors, and he was committed to gaol. On the 15th of February, 1851, J. Dimmock, T. Dimmock, and T. Keeling, filed a petition of adjudication of bankruptcy against Carter, whereupon he was adjudged bankrupt, and notice thereof was served upon him personally on the 19th of February, when he was discharged from custody. On the 28th of February notice of the adjudication was published in the *London Gazette*, and the 16th of March was appointed for the first public sitting. On the 19th of March, Carter presented to the commissioner a petition, praying that the adjudication might be annulled, as the petitioning-creditors' debt had become satisfied by their having taken him in execution. The commissioner, however, dismissed the petition, because the bankrupt had not shown cause against the adjudication within the time allowed by the 104th section of the Bankrupt Law Consolidation Act, 1849. On the 23rd of April the present petition was presented.

*Daniel* appeared in support of the petition.

*Swanston* and *W. W. Cooper*, for the assignees, contended that, after the expiration of fourteen days from the service of notice of the adjudication on the bankrupt, the commissioner had not jurisdiction to entertain the bankrupt's petition, and that he had properly dismissed it. The present petition was also filed too late, as it was not within twenty-one days after the adjudication (12th section), nor within twenty-one days after the advertisement in the *Gazette* (233rd section).

The VICE-CHANCELLOR said that though the bankrupt did not avail himself of the remedy allowed under the 104th section, yet every other power or remedy of disputing the adjudication which he would have had, remained to him. Then it appeared that before the end of twenty-one days after the advertisement he applied to the primary jurisdiction in bankruptcy to annul the fiat. That petition was in time, and it was competent to the Court to entertain it. The Court, however, came to a certain decision, and refused to entertain the petition, and that decision came under review before his Honour, the merits of the case being, that one man had made another a bankrupt without having a legal debt. The proceedings must be annulled, with costs.

Wednesday, July 16.

*Ex parte JOHNSON, re CROSS.*

*Official assignee—12 & 13 Vict. c. 106, s. 41.*

*An action was brought by A. B. against the official and creditors' assignee of a bankrupt, and a verdict obtained for the plaintiff. The bankruptcy was afterwards found to be invalid. The creditors' assignee was insolvent, and A. B. was about to issue execution for the costs against the official assignee, when he applied to the Court for protection. It appeared that the result of A. B.'s action did not depend upon the validity*

## INSOLVENCY.

or invalidity of the fiat, and the Court considered that there was no jurisdiction to interfere with *A. B.'s* proceedings.

In January 1848 a fiat in bankruptcy was issued against Mr. Cross, under which he was adjudged bankrupt, and Mr. Patrick Johnson was appointed official assignee, and Mr. George Smith was chosen creditors' assignee. In the following month a petition to annul the fiat was presented by Mr. R. Partridge and Mr. Cross, and upon that petition coming on to be heard, an action was directed to be brought by the petitioners against the assignees, for the purpose of trying the validity of the fiat. The action (which, however, was not tried according to the directions of the Court) resulted in a verdict for the plaintiffs. A second action was then directed to be brought against the creditors' assignee alone, and in this a verdict was given for the plaintiffs. In February 1850 all proceedings under the fiat were ordered to be stayed, and the Court gave Partridge and Cross leave to sue out execution against the creditors' assignee. In 1848 two other actions with reference to parts of the bankrupt's property were brought by Mr. Archer and Mr. Hawkins against the official and creditors' assignees, and in both of these actions verdicts were given for the plaintiffs. The creditors' assignee was insolvent, and Mr. Archer being about to issue execution against Mr. Johnson for the costs of his action (amounting to upwards of 500*l.*), Mr. Johnson applied to Mr. Commissioner Evans for protection. The commissioner considered that he had no jurisdiction to interfere; and accordingly the present petition was presented by Mr. Johnson, praying that as one of the officers of the Court of Bankruptcy, he and his estate and effects might be protected from all claims and demands of Mr. Archer in respect of these matters. It was admitted that the validity or invalidity of the fiat would not have affected the result of Mr. Archer's action.

*Russell and Walford*, for the petitioner, Mr. Johnson, relied upon the 41st section of the Bankrupt Law Consolidation Act, 1849, as protecting the official assignee from personal liability for acts done in execution of his duty. They referred also to the provisions in the former Acts on this subject—1 & 2 Wm. 4, c. 56, s. 22; 5 & 6 Vict. c. 122, s. 54; and cited *Re Martin*, 1 Ph. 445; and *Munk v. Clarke*, 10 Bing. 102.

*Craig and Reilly* for the respondents.

*Russell*, in reply.

The VICE-CHANCELLOR said it was not necessary to say what he should have done with this case if it had been certain or even probable that the result in either of the actions would have been in any respect materially different if Cross had been well made a bankrupt. But it had not been shewn to his Honour that, if Cross had been proved to have been well made a bankrupt, the result in either action would have been in any respect materially different. The state, then, of the evidence before him obliged him to deal with the matter on the supposition that the bankruptcy, or absence of bankruptcy, on the part of Cross, was an utterly immaterial ingredient in the case. That being so, it was impossible for his Honour to interfere.

## INSOLVENT COURT.

Reported by DAVID CARO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Commissioner PHILLIPS.)

Tuesday, July 29.

*Re JOSEPH HOWE.*

*Appointment of assignees under 1 & 2 Vict. c. 110, and 10 & 11 Vict. c. 102, by the County Courts. Held, that the judge of a County Court possesses and may exercise all the powers exercised by the Court for Relief of Insolvent Debtors at a hearing in reference to the nomination or appointment of assignees, but unless he duly forwards the papers containing the notification of appointment and acceptance, as required by the 10 & 11 Vict. c. 102, s. 10, to the Court-house in Lincoln's-inn-fields, the Court will not take judicial notice of the appointment, and will proceed to act upon an application by another party for the appointment as if there was no sub-assignee.*

This insolvent was heard in the County Court at Lancaster in May, 1850, and Thomas Smith was appointed assignee of his estate and effects, but as the papers were never forwarded to the Court in London, as required by the 10 & 11 Vict. c. 102, s. 10, upon an application to this Court by certain other parties, the provisional assignee granted a certificate that no sub-assignee had been appointed, upon which *Cooke*, on their behalf, obtained a rule nisi for their appointment as assignees.

To-day, *Lucas* shewed cause, and, with affidavits of the appointment of Thos. Smith by the County Court, put in a parchment purporting to be the actual appointment by the County Court at Lancaster, on the 10th of May, 1850, acceptance having been duly signified, stamped with the seal of the

## INSOLVENCY.

County Court, and a certificate from the clerk of the court that this was the formal appointment issued by the Court, Smith had taken out his appointment, though not in this court. Then the question was, whether or not a person who is appointed assignee by a County Court was bound to come to that court and take out his appointment. He had to argue that, since the statute 10 & 11 Vict. c. 102, and after the petition was referred to a County Court under that statute, the judge had sole jurisdiction in the matter, and that all he had to do was to transmit the record to this court, and that it was not necessary to come there and take out his appointment. The learned counsel read the words of the clause, and contended at some length in effect that the County Court had not merely the power to make the appointment, but that, upon signification of acceptance made to it, the clerk of the court had power to issue the formal document called an "appointment," which is the evidence of title.

*Cooke*, in reply, observed, that the Court was quite aware that this subject had been most carefully gone into by Mr. Commissioner Law, in *Re Sarah Gar-side*, July 1st, 1850, reported in the LAW TIMES. His opinion was, that no matter by what authority a man was named assignee, his acceptance of the office must be signified to that court. The mere nomination by the County Court, or formerly by the commissioners on circuit, or even by this court, although it may fix the man to whom the estate is to be conveyed, does not give the property to him. There was something more to be done before the property of an insolvent vested in him. The man must accept the appointment, and signify such acceptance to the court. That could mean nothing but the court in London. They must look at the whole Act of Parliament, and at the practice before the transfer of the jurisdiction. The record made at the hearing on circuit, that a certain party was to be appointed assignee, was transmitted to the court in London, upon which, acceptance being signified, and no reason appearing to the contrary, the appointment issued from the office of the provisional assignee as a matter of course.

*Mr. Commissioner Phillips*.—After the appointment by the circuit commissioner, was there any limitation in practice as to the time for signifying acceptance by the party appointed.

*Cooke*.—Yes; a month. The 30th section of the Act (1 & 2 Vict. c. 110) gave the commissioner on circuit the power to appoint assignees at the hearing; and the 45th section gave the Court power to appoint assignees at any time after vesting order made. These sections must be read together. There was no magic in the words "appointment by the Court or commissioner." No property passed until the assignee appointed or nominated did the thing the statute declared necessary, namely, signified his acceptance to the Court. Until the signification of acceptance to the Court, there was no estate in the assignee appointed or nominated. The County Courts had the same powers as the commissioners on circuit and the Court in London possessed in reference to the appointment of assignees at the hearing; but the acts and doing of the County Courts must be governed by the same practice and the same law as those of the commissioners on circuit and the Courts in London. For the purpose of saving trouble and expense the judge of the County Court was substituted for the commissioner on circuit. The clause in the 10 & 11 Vict. c. 102, gave him the same power as the 30th section of 1 & 2 Vict. c. 110, gave to the commissioners on circuit. These clauses were *mutatis mutandis* the same. It must therefore be looked upon as a part of the 1 & 2 Vict. c. 110, and the judge of the County Court must consider himself as a commissioner of the Court for Relief of Insolvent Debtors, and governed by the same law and practice as other commissioners. The law (sec. 45) required that in all cases there should be a signification of acceptance to this Court. Then in the present case there had been no signification of acceptance to this Court under the 45th section, therefore the property was still in the provisional assignee of the Court.

*Mr. Commissioner Phillips*.—There is one thing clear, that this appointment is not registered in the books of the provisional assignee of the Court, nor had he applied to have it registered on this parchment, purporting to be an appointment by the County Court at Lancaster. There was no signature that it was entered of record by the provisional assignee. Had that registry been made according to that Act of Parliament?

*Lucas* said it was utterly indifferent or not, so far as the appointment was concerned. The judge of the County Court was to transmit all the documents here to be registered, and if that appointment had not been registered, it was merely the *laches* of the judge of the County Court in not forwarding them, and could not affect third persons. A year had elapsed since he had acted as assignee, and he had got in all the estate and distributed it. The learned counsel referred to *Re Notten*, 12 Law T. 248, and contended that he had the authority of the learned

commissioner for saying, that from and after the order of reference, the jurisdiction of the Court in London ceased, and that it could not afterwards interfere.

*Mr. Commissioner Phillips* said he was constrained to adhere to his opinion expressed in *Re Notten*, respecting the appointment of assignees in insolvency cases by the County Courts. He differed *toto calo* from the judgment of Mr. Commissioner Law. After giving all attention to it, he confessed he could not bring his mind to the conclusion he did. As to the case of *Notten*, he did consult the Chief Commissioner, and his answer was as read out. He had consulted him again that morning, and his answer was, his mind wavered very much, and Mr. Commissioner Law having given the fullest consideration to the subject, he (the Chief) desired his vote to be thrown into the scale, although wavering. He (Mr. Commissioner Phillips) was not convinced by Mr. Commissioner Law's judgment, and it would lead to great saving of expense and trouble, if, instead of collating various Acts of Parliament, they would take the plain words of the clause and understand it. The plain question was, had not a commissioner on circuit merely the power to chronicle, but also to appoint? He was clearly of opinion that he had both, but subject to the contingencies mentioned by Mr. Cooke. The statute (1 & 2 Vict. c. 110, s. 30) said that such commissioner should have the same power at the hearing of an insolvent in the country, as the Court had in London, and that he should make all orders, &c., necessary for the discharging or remanding of the prisoner, "and otherwise respecting such prisoner and his schedule, and his creditors, and his assignees, as the said Court for relief of insolvent debtors may make, give, or do in the matters of petitions heard by the said Court, and that in each and every matter to be heard and inquired into by such commissioner, he shall have the same power as the said Court would have therein, if the same were heard and inquired into by the said Court." He shall have the same power as the said Court. What Court? Why the full Court. If the power of the Court followed the commissioner into the country, and he sat with the same power, where then was the difficulty? And all and every act done shall be transmitted to the said Court signed by the judge (10 & 11 Vict. c. 102, s. 10). To what Court shall they be transmitted? Why, to the said Court whose powers were given to the commissioner on circuit. The judge of the County Court had the same power to appoint assignees, but subject to the return of the appointment and signification of acceptance signed by the judge as directed by the Act (10 & 11 Vict. c. 102, s. 10). These documents were to be transmitted to this Court as records. He was not going to blink the question that it was the practice of the commissioner on circuit merely to nominate assignees, and that the Court of four commissioners had a veto upon all acts done regarding the appointment of assignees upon due cause being made to appear; but what he contended for was that the commissioner on circuit went out with the full power of the Court *pro hac vice*, and was empowered to do everything at a hearing which this Court was empowered to do. One of these powers was the appointment of assignees, subject to the contingencies to which even the appointment in the full Court was subject, namely, the signification of acceptance. (1 & 2 Vict. c. 110, s. 45.) Once the signification of acceptance being signified to the commissioner or Court, this Court had no power afterwards to interfere, except upon some statutory complaint. (1 & 2 Vict. c. 110, s. 65.) He would then go back to sec. 45. What was the language of the clause? "And when such assignee or assignees shall have signified to the said Court his or their acceptance"—of what? Said nomination? No; but "the said appointment, the estate, effects, rights, and powers, of such prisoner vested in such provisional assignee as aforesaid; shall immediately, by virtue of such appointment, and without any conveyance or assignment, vest in the said assignee or assignees." (1 & 2 Vict. c. 110, s. 45.) He confessed he thought there was great signification in this word "appointment" used there. He would now come to the 10th section of the County Courts Act (10 & 11 Vict. c. 102); and he begged the words of that section to be fully attended to, for it seemed to him that the Legislature had expressed itself in a most unmistakeable way: "The judge of such court shall have and possess the same power and authority with respect to every such petition, and shall make all such orders, give all such directions, and do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, his schedule creditors, and assignees, as the said Court for Relief of Insolvent Debtors, or any commissioner thereof, might make, give, or do in the matters of petitions heard before such Court or commissioner" (10 & 11 Vict. c. 102, s. 10). The Legislature not only gave the power of the Court, but of the commissioner. Why was that word "commissioner" put in? It was highly probable that the gentleman who drew the statute had

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heard the practice of this Court, and therefore put in those words, that there should be no doubt but that the judge of the County Court had both the power of the commissioner and the power of the Court. It did not matter that the commissioner on circuit did not use this power. The point was, had he the power. He thought he had shewn clearly that he had the power. A great portion of Mr. Commissioner Law's judgment hinged on the practice of the Court. But the question was not so much as to the practice of the Court, as the proper signification of these words in the 10th section of the County Court Act (10 & 11 Vict. c. 102). The words clearly and plainly gave the judge of the County Court jurisdiction to appoint assignees. It was all very well for Mr. Cooke to say, with his usual ingenuity, that the question was, had that Court clearly distinguished between the word "appointment" and "nomination?" He said it had. The 25th rule of Court shewed this. It was this—"Appointment of assignees.—Assignees will be appointed, if expedient, by the Court or a commissioner at any time after vesting order made." Now what followed?—"In a case heard at Berwick, a nomination by the justices will be attended to." Appointments might be made by the Court or a commissioner at any time after vesting order made, but a nomination by the justices would be attended to. There he said the Court itself had made the distinction. Upon reading that rule, the conclusion was inevitable that a commissioner had not only the power to nominate, but to appoint, although, as Mr. Cooke said, that appointment was nothing in itself unless followed up by its incidents, the solvency of the man, &c. But there was one important portion of the appointment, that was the signification of the acceptance by the creditor appointed. What did he (Cooke) say upon that subject? That this Court, upon receiving the appointment and the signification of acceptance by the creditor, signed by the judge, was bound to register the acceptance, and the appointment and signification of acceptance so recorded, although emanating solely from the County Court, would be as valid as if made in and by this Court. The nomination or rather appointment of assignees was made in that Court at the hearing every day. But the nonacceptance of the appointment at the time did not vitiate the appointment in the Court above. Why, then, should it have that effect in the Court below? Under these circumstances, he was as clearly of opinion as he ever was of any thing, that the judge of the County Court at the hearing in his Court had the full power of this Court. But there was another point. Had he a right to look at the appointment now produced in Court at all? The judge of the County Court was bound to transmit his notification of appointment, and the signification of acceptance by the creditor or other person, when made at the hearing, to this Court, to be a record of this Court. The certification of the nomination or appointment by the judge, and the signification of acceptance by the person appointed, had not been transmitted to this Court. It ought to have been transmitted at once. It had not been done, and he could not take judicial notice of the act of the judge until he had duly certified it to this Court by the transmission of the documents authenticated by his signature. If the judge was minded to keep this record below at Lancaster, he could take no notice of it, and he therefore thought that the rule should be made absolute for the appointment to issue.

*Rule absolute, no record having been transmitted to the Court.*

*Lucas* wished the affidavits signifying this appointment and acceptance to appear on the files of the Court.

Mr. Commissioner PHILLIPS.—Yes.

*Note.*—The Act of Parliament (1 & 2 Vict. c. 110, s. 45) vests the prisoner's estate in the person nominated or appointed assignee, "when such assignee or assignees shall have signified to the said Court his or their acceptance of the said appointment."

"Every such appointment shall, after such acceptance thereof, be entered of record in the said Court;" "and such notice thereof shall be published as the said Court shall direct; and every person so appointed assignee shall be deemed to be an officer of the said Court, and shall be liable as such to the control thereof." (1 & 2 Vict. c. 110, s. 45.) Three things are essential to constitute a valid appointment—1. Nomination or appointment by the Court, or commissioner, or judge; 2. Signification of acceptance by the person appointed or nominated to the said court; and, 3. The publication of such notice as the said Court shall direct. No appointment could issue without the assent and direction of either the Court in London or the Circuit Court, but the assent of either of those Courts having been given, and duly signified to the provisional assignee, the appointment would issue as a matter of course, provided there was in the office a signification of acceptance by the person nominated or appointed. The acceptance paper might and often was filled up in the Circuit Court, but if it was lost, or by any accident never reached the Court in London, the ap-

pointment could not issue till another acceptance paper was duly filled up by the assignee, and forwarded to London. But if the appointment or nomination had been made in the Court in London, and the acceptance paper had been burnt or destroyed before reaching the office of the provisional assignee, the appointment could not issue till another acceptance paper was duly filled up and deposited in the office. Both the itinerant and permanent Court had the same power of making the appointment. The County Court has the same power of making the appointment; but all the difference of opinion that has taken place on this subject, hinges not so much upon the power of making the appointment as upon the power of issuing the proper legal evidence of the appointment. There is no provisional assignee in the County Courts, any more than there was in the Circuit Courts, consequently they cannot issue the legal evidence of the appointment any more than the Circuit Court. The legal evidence of the appointment is a copy of the order appointing the assignee, "upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose, endorsed thereon, and to be sealed with the seal of the said Court; and such appointment shall in all courts and places, and without further proof, be recognised and received as sufficient evidence of such order and appointment having been made, and of the title of such assignee under the same" (1 & 2 Vict. c. 110, s. 46). The "appointment" which will issue by the order of Mr. Commissioner Phillips in this case will be regular in all these respects. The appointment issued from the Lancaster Court will be irregular in all these respects; and when the two documents come in contact in a court of law, as they are likely to do, the chance that the Lancaster parchment will be recognised in any other light than as a curiosity, is very small indeed.—REPORTER.

## Nisi Prius.

## COURT OF QUEEN'S BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS IN LONDON AFTER TRINITY TERM.

(Before Lord CAMPBELL, C.J.)

*Tuesday, July 8.*

HELLABY v. WEAVER and OTHERS.

*Common carrier—Railway.*

*The defendants collected goods in Worcester, and sent them by railway to their destination, sometimes receiving the whole cost of carriage, at other times receiving only the charge for conveyance to the station. In this case the goods were sent to Exeter, and the defendants received the whole charge for conveyance:*

*Held, that the defendants must be considered as common carriers.*

This was an action to recover 48l. the value of goods sent by the defendants as carriers from Worcester to Exeter, and lost on the road. The defendants, who carried on business under the name of Crowley and Co. were in the habit of collecting goods in Worcester, and of sending them by railway to the place of destination. They in some cases received the whole cost of the carriage from the consignor, and in others only the charge of conveyance to the railway station. In the present case, silk goods packed in a case were sent by the plaintiff to Exeter. The defendants received payment for the carriage over the whole distance, and sent them by railway from Worcester to Exeter, and during the journey a large portion of the goods was abstracted.

M. Chambers, Q.C. contended that in forwarding the goods by railway the defendants were not acting as common carriers; that their liability as common carriers ceased when they had conveyed the goods to the railway station.

Lord CAMPBELL, C.J.—I am of opinion that the defendants, having received the whole charge for the conveyance of the goods, must be treated as if they themselves were actually conveying the goods. Under the circumstances of the case, the defendants must be considered as common carriers.

*Verdict for the plaintiff.*

Wilkins, Serjt. and Addison, for the plaintiff.  
M. Chambers, Q.C. and Unthank, for the defendants.

## THE NORTH AMERICAN COLONIAL ASSOCIATION OF IRELAND v. MORISON.

*Public company—Shareholder—Calls—Liability. The defendant was the holder of shares in the North American Colonial Association of Ireland. Calls were duly made and notice was given to the defendant, but before the day of payment arrived the defendant transferred his shares: Held, that the defendant was still liable for the payment of the calls.*

The action was brought to recover the sum of 2,818l. being the amount of calls due upon 1,025

shares, of which the defendant was the holder, in the North American Colonial Association of Ireland. It appeared that the calls were duly made; that the defendant was at that time the holder of the shares, and that notice of the calls was given to him, but that before the day of payment arrived the defendant transferred his shares.

Whateley, Q.C. contended that the defendant was not liable for the payment of these calls; he was not now a holder of shares. The Court of C. P. had decided that, under such circumstances, the defendant was not liable. (*Semble Aylesbury Railway Company v. Mount*, 4 M. & G. 651; 5 Sco. N. R. 127.)

Lord CAMPBELL, C.J.—The Court of Q. B. have decided the other way, (a) and my own opinion is, that if the defendant was a shareholder at the time when the calls were made, he is still liable for their payment, though he transferred his shares before the time for payment arrived. My opinion is quite clear upon the subject, for the Act of Parliament provides that all that is necessary to support an action for calls is to prove that at the time of making the calls the defendant was the holder of one or more shares, and that notice of the calls was given to him. That is all which it is necessary to prove, and in this case all these facts are admitted. The Legislature never could have intended that a shareholder might get rid of his liability by merely assigning away his shares after the calls are made. If the defendant could thus get rid of his liability, it would leave the directors without means of paying the surveyors and solicitors the amount of their bills, or the contractors for work done for the company. I shall direct a verdict for the plaintiffs. (*Ex parte Tooke*, 18 L. J. 343, Q.B.)

Whateley, Q.C. tendered a bill of exceptions.

*Verdict for the plaintiffs.*

Sir F. Theiger, Q.C. and Phipson for the plaintiffs.  
Whateley, Q.C. and Willes for the defendant.

## Irish Reports.

## COURT OF DELEGATES.

Reported by W. St. LEGER BARNETON, Esq. Barrister-at-Law.

*Tuesday, June 17.*

(Before PENNEFATHER, B. PERRIN and JACKSON, JJ. Dr. GAYER, Q.C. and Dr. ANDREWS, Q.C.)  
DERINEX, Appellant; TURNER, Respondent.  
Will—Execution—Stat. 1 Vict. c. 26, s. 9—Signature at the foot or end.

*A will was written upon two sides of a sheet of paper, and came down to within about two inches of the bottom of the second page, which space was left blank, and then at the top of the third page the attestation clause was written, beside which the signature of the testatrix was affixed, and immediately under the signatures of the witnesses. It was admitted that the testatrix was nearly blind, and required more room than an ordinary person:*

*Held, that this was a due execution of the will by the testatrix, within the provisions of the 26 Vict. c. 26, s. 9, requiring a will to be signed by the testatrix at the foot or end thereof.*

*The case of Smee v. Bryer, 6 Ecc. & Mar. Cas. 406, and Supp. xli. distinguished and commented on: and*

*Semble, that the words "foot" and "end" in the 9th section of the stat. are not synonymous.*

This was an appeal from the decree of the learned judge of the Consistorial Court of Dublin (Dr. Ratcliffe), made on the 4th day of February, 1851, whereby he refused to grant probate of the will of the late Elizabeth White Turner, of Harcourt-street, in the city of Dublin, bearing date the 19th day of August, 1850, upon the ground that according to certain recent decisions of the Court of Prerogative in England, the will was not signed "at the foot or end," as required by the statute, 1 Vict. c. 26, s. 9, the learned judge stating that he made his decree entirely in deference to those decisions, but that in his opinion these were erroneous; however, that sitting in a court of inferior jurisdiction he did not think it becoming to decide contrary to them, as the opinion of the Court of Delegates could be had, which he considered to be necessary to settle the law on the subject. It appeared that in the present case the will was written on two sides of a sheet of post paper, and came down to within about two inches of the bottom of the second page, which space was left blank, then at the top of the third page the attestation clause was written, at the side of which the signature of the testatrix was affixed, and immediately under those of the witnesses; there were no controverted facts in the case, there having been a consent admitting them all, among which was the fact that Mr. Storey, the gentleman who drew the will, conceiving it to be necessary that there should be an attestation clause,

(c) *Semble North American Colonial Association of Ireland v. Bentley*, 19 L. J. 427, Q.B.

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he carried it on to the third page, and there placed the seal for the testatrix; it also appeared that the testatrix was nearly blind, and required more room than an ordinary person.

Dr. Willy appeared for the appellant; and Dr. Ball for the respondent.

## JUDGMENT.

PENNIFATHER, B. delivering the judgment of the Court.—The Court has given this case its best consideration, and I am happy to say that the members of the Court are all agreed as to the opinion which ought to be pronounced. The question arises upon the 9th section of the Act of 1 Vict. c. 26, and is, whether the signature of the testatrix is to be taken to have been affixed to the instrument in question at the foot or end of it. The statute requires that the signature of the testator should be made in the presence of two witnesses, who should subscribe the instrument in the presence of the testator, and of each other; and that the signature of the testator should be at the foot or end thereof. That the present instrument has been signed by the testatrix, and that it is the general expression of her will, no question has been made; and it comes now to be considered whether this instrument, which appears to have been signed by her in the presence of two witnesses, is to be set aside, because, as has been argued, no part of the writing of the will is on the same side of the paper with the signature of the testatrix and the attestation. If the signature were at such a distance from the body of the will that the Court would infer that it was not affixed to the instrument, then we should decide that the instrument was not signed by the testator; but upon an inspection of the instrument in question it plainly appears to have been signed by the testatrix. We are next to consider whether it has been signed at the foot or end of the will. The Act of Parliament was introduced, I apprehend, mainly to do away with those decisions which had determined that a signature at the commencement or in the body of a will was a sufficient compliance with the Statute of Frauds, and it therefore directed that the signature shall be at the end of the instrument, the words of the statute being, "at the foot or end thereof." The meaning of the Legislature is not limited to the word "foot," but is extended, as it strikes me, by the addition of the word "end." We are then to look at the instrument in question, and see if the signature is at the end of it; executors are appointed by it, the clause is added, "in witness whereof I have hereunto set my hand this 19th day of August, 1850," so that the instrument on the face of it appears to be complete and final, and is not within the mischief of that class of cases which gave effect to inchoate instruments which had not been perfected or completed. On the very next page, immediately after, I can almost say, the signature of the testatrix comes. Surely in common sense that is at the end of the will; and if the object of the Legislature is considered, and if in reference to that point we look at the report of the commissioners made previously to the passing of the statute, any one would say that this signature was at the end of the will; that it is referable to the instrument appears manifestly on the face of the documents as well as by being proved by the attestation, the testimony of the witnesses, and the admissions in the case. It is the signature of the will; we think there is sufficient proximity for that; it is not at the beginning or middle, and it cannot be fairly considered in our judgment anything but a signature at the end of the will. But it has been said that cases in England have been decided upon this statute which bound this Court, or which, though not actually binding the Court, ought to be considered of such authority that the Court ought not to decide contrary to them. I think, and all the Court are agreed also upon this, that as regards the decisions of the Privy Council, we ought to be very slow indeed to come to any decision opposite to them; I will not say that we are bound by those decisions, if they should manifestly appear to be wrong; but we ought not hastily, or without the fullest conviction that they are wrong, decide against them. It would be a great misfortune that the law in this country should be administered in one way and in England in another; that a statute should receive one construction in London and a different one in Dublin. The statute in question applies equally to both parts of the empire, and ought, if possible, to receive the same construction. But how far are we bound by the decisions in England? It appears that after the passing of this Act of Parliament several cases came before the judge of the Prerogative Court in England, Sir Herbert Jenner Fust, and that at first he was disposed to view the statute in the same way that we consider it now, but that afterwards in consequence, as he said, of communications from higher quarters (see *Smee v. Bryer*, 6 Ecc. & M. C. 26), he changed his determination upon the subject, and came to a decision which he said was to be extracted from the decision in the case of *Smee v. Bryer*, 6 Ecc. & Mar. Cases, 406, and Supp. xli. made by the Privy Council, and which went to this length—that to support a signature under the statute, it was necessary that a por-

tion of the will should be upon the same side of paper or page with the signature; that rule, it is said, is to be extracted from the decision in *Smee v. Bryer*, with which we have been so much pressed. But it is to be remarked that that exact rule is not to be found in the judgments of any of those persons who decided that case, and as far as we can ascertain the facts, *Smee v. Bryer* is materially different from the present case, not only in respect of the distance of the signature from the body of the instrument, but also in the remarkable circumstance of a special memorandum or clause of attestation of an interlineation on the first page being interposed between the body of the instrument and the general attestation clause and signature. Then, after the clause of attestation, comes the signature of the testator, and in such a way that really, as far as we can collect, it could not be said with certainty, upon an inspection of the document, that the signature was one to the will in question, and if not a signature to the will of the testatrix, it was not at the foot or end of it. However, after that decision, Sir Herbert Jenner Fust appears to have decided several other cases; they have been commented on with great ability by the learned advocates who have addressed the Court on either side; and it has been urged that some of those decisions went such a length as to approach absurdity; and it was attributed to the learned judge that those decisions, however strange they might appear, were the legitimate consequence of the rule supposed to be laid down by the Privy Council. In one or two of the cases which I do not mean to say come within the insinuation which I have just mentioned, Sir Herbert Jenner Fust said that the rule of the Privy Council was that which I have just adverted to, namely, that some part of the writing of the will must be on the same side of the paper under which the signature of the testator is to be affixed; so that the signature should be *quodam modo* under the will, and at the foot of it. In that sense Sir Herbert Jenner Fust has decided several cases upon that principle. Supposing the rule to be so, and one of those cases arising upon the will of a Mr. Shadwell (7 Ecc. & Mar. Cases, 377), struck me as very remarkable; and if it were a decision of the Privy Council, we should consider it to come very close to the present case, and might perhaps consider it as ruling it. But that was a case decided not upon any suit, but upon a mere *ex parte* motion for probate; Sir Herbert Jenner Fust saying that he would not give probate upon the motion, but "leave the parties to propound the paper;" and it may reasonably be taken that the parties interested did not think it worth their while to institute a suit for the purpose of obtaining probate; at least acquiescence in the decision may be as well attributed to that cause as to any other. The same might be said of other cases which came before the same learned judge; and we cannot, under the circumstances, attribute any binding effect to those decisions—of a very eminent judge unquestionably, but a judge, so far as this Court is constituted, standing in an inferior place to ours,—or take it, that they expressed the universal feeling of the profession, in contradiction to what appears to us to be the proper construction to be put upon the statute in question. We think that according to the proper construction of the statute the signature of the testatrix is to be considered as affixed to the instrument in question; and being affixed to it, that it should be taken to be affixed to it at the end of the will; and that being the case, that probate ought to be granted of the will to the executors named in it; and that the decision of the learned judge of the Consistorial Court ought, in that respect, to be reversed. But the question being one arising from the act of the testatrix, and from the state of the instrument, we think that the costs ought to come out of the estate; but that they should be taxed as between party and party.

## COURT OF EXCHEQUER.

Reported by W. ST. LUCIE BARRINGTON, Esq.  
Barrister-at-Law.

HILARY TERM, 1851.

Tuesday, January 28.

(Before PIGOT, C.B., PENNIFATHER and LAFROT, BB.)  
v. KNOGH.

*Demurrer—Pleading—Action on the case—Factor—Consignment—Notice of.*

*A declaration against a factor for not having disposed of certain "pigs' heads or cheeks," and*

*Note.*—In the case of *In the Goods of M. Bosley*, 14 Jur. 514, the dispositive part and testimonium clause of a holograph will occupied the whole of the first side of a sheet of letter paper. The name of the deceased and the words "signed in the presence and attested," were on the top of the third side, the second being left blank. Sir H. Jenner Fust granted probate, observing, "I think this paper entitled to probate; it may be compared to legal writings, which are written on fresh sheets, and not carried over the back of each sheet." See also on this subject the case of *In the Goods of Rowe*, 7 Ecc. & Mar. Cas. 545, and several other cases which have been decided on the same subject, and reported in the same volume, from p. 545 to p. 552.

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*hams and "pieces or sides of bacon," of the value of "one thousand pounds," pursuant to a retainer by the plaintiff for that purpose, alleged that afterwards, to wit, on the 1st July, &c., the plaintiff "consigned and transmitted" the goods "to the defendant to Dublin, of all which the defendant had due notice."*

*Held, that the declaration was well enough, although the averment of notice was laid without time and place, for that the words "consigned and transmitted to the defendant to Dublin," would have been sufficient without any allegation of notice.*

*Held, also, that "pounds" must be taken to mean pounds sterling; and that "pigs' heads or cheeks," were to be construed not as an allegation in the alternative, but as meaning pigs' heads otherwise cheeks.*

*Want of venue in the body of the declaration is helped by the venue in the margin.*

*Trespass on the case.*—The declaration in this case, which contained several counts, stated that before the time of committing the alleged grievance, the plaintiff, who resided in Roscommon, had employed the defendant as a factor or broker to dispose of certain "pigs' heads or cheeks," and hams and "pieces or sides of bacon of great value, to wit, of the value of one thousand pounds," and that, after the retaining and employing the defendant, "the plaintiff, to wit, on the 1st July, &c. consigned and transmitted to the defendant to Dublin" the pigs' heads or cheeks, &c. "of all which he had due notice;" but that the defendant did not dispose of same, &c. The defendant demurred specially to every count in the declaration, on the grounds that it was uncertain whether the plaintiff meant that the articles were of the value of one thousand pounds sterling, or that they were of one thousand pounds weight; that there was no venue; that the averments were made in the alternative, so that it did not appear whether the goods were pigs' heads or cheeks, or whether they were pieces or sides of bacon; and also on the ground that there was no time or place laid in the averment of notice to the defendant of the transmission of the goods.

*Hamilton Smyth* (with whom was *MacDonough, Q.C.*), in support of the demurrer upon the first ground of objection, cited *Steph. on Pl.* 349, edit. of 1847. [*Pigot, C.B.*—Pounds in this case, I think, must be taken to mean pounds sterling.] The course of precedents is, that the declaration should state so many "pounds sterling of the lawful money of Great Britain." In *The Mayor of Reading v. Clark*, 4 B. & Ald. 266, the omission was held a good ground of demurrer. [*PENNIFATHER, B.*—We are not disputing that the value must be stated, but we think that the word pounds here must be taken to mean pounds sterling; where you say to the value of so many pounds, it must be taken to mean pounds in money.] The declaration is bad for want of venue. [*Pigot, C.B.*—It has been decided in this court that the venue in the margin is enough.] But there is also a want of an averment of time in the allegation of notice, which, even if the want of place is cured by the venue in the margin (there was a venue stated in the margin of the declaration), cannot be got over. (*King v. Rosborough*, 2 Tyrwh. 473, and 2 Cr. & J. 456, S.C.; *Steph. on Pl.* 292; *Ferguson v. Mitchell*, 2 Cr. M. & Ros. 687; and *Tyrwh. & Gr.* 179, S.C.; *Richardson v. Denison*, 14 East, 291; *Pippin and Wife v. Sheppard*, 11 Price, 400.) As to the averment being in the alternative, *Smith v. The London, Brighton, and South Coast Railway Company*, 7 C. B. R. 782; the words there were "gold or silver." [*Pigot, C.B.*—The meaning of "or," in this case, is otherwise. *PENNIFATHER, B.*—In mere matters of description "or" means otherwise.]

*Harman and Lynch, Q.C.* for the plaintiff.—(The Court only required counsel to speak to the objection of the omission of an averment of time.) The allegation of notice in this pleading is unnecessary, and may be struck out. A statement that the plaintiff had delivered the goods to the defendant would have been sufficient; but the statement here is that in pursuance of the retainer of the defendant the plaintiff consigned and transmitted the hams, &c. to Dublin, to the defendant. And it has been held that a delivery to a common carrier is, in legal effect, a delivery to the consignee; so much is that a rule of law that an action for a loss on the road must be brought in the name of the consignee, and here the allegation is that the plaintiff "consigned" and transmitted the goods to the defendant to Dublin; therefore the allegation of notice might have been omitted, and may be struck out, for the averment amounts to an allegation that the goods were delivered to the party himself, and then there is an end to the necessity of notice.

*Smyth*, in reply.—It is laid down in 1 Chitty on Pleading, 328, that when "the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof." If the transmitting and consigning means merely the sending forward,



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and does not involve the receipt of the articles, then it must be admitted that notice was necessary.

**Pigor, C.B.**—We ought to construe these matters *ut res magis valeat quam pereat*; we ought to construe transmission as not merely sending from, but to; the plaintiff resides in Roscommon, and he says he consigned and transmitted the articles "to the defendant to Dublin," and it is no very great stretch to suppose that he had notice.

*Demurrer overruled.*

Equity Courts.

ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

July 18, 19, and 21.

FOLEY v. SMITH.

*Taxation—Solicitor—Principal and agent—Special agreement—Cash amount—Bill—Common order to tax.*

**F.** a solicitor, who was an executor of, and entitled to the residue under, a will, procured one of the legatees to institute a suit against him for the administration; and **S.** another solicitor, was employed as solicitor in the cause on the terms expressed in the following letter, addressed to **F.** by **S.**:—"Dear Sir,—We have to thank you for your show of professional confidence in us by employing us in the institution and prosecution of a suit in Chancery, and in undertaking your defence thereto; and we beg for your satisfaction to state, that we consider that we act as your agents in this or any other suit, action, or matter, in which we may be concerned for you, either personally or otherwise, and that our charges in respect of the said suit, and in any other suit, action, or matter, in which we may be so employed by you, will therefore be on the usual footing of agent and principal."

**Held**, that this letter amounted to an agreement by **S.** to carry on the business for **F.** as his solicitor on the ordinary terms of principal and agent.

**F.** had not, at the time the letter was written, taken out his certificate for the year, and was afterwards uncertificated, at least during part of the time while the suit was going on:

**Held**, nevertheless, that the letter constituted a valid binding agreement, by virtue of which **S.** was precluded from charging for his services at a higher rate of remuneration than according to the ordinary agency terms.

**Held**, also, that it made no difference whether **S.** supposed **F.** to be a certificated solicitor at the time the letter was written, as was alleged by **S.** but denied by **F.**; and that the same construction must be put upon the agreement as if **S.** had known that **F.** was without a certificate.

**Held**, also, that such an agreement might have been made with an ordinary client; and if so made, it would be legal; and though **F.** was not a client at the time this contract was made, and though it was made under the idea that he was a solicitor, it ought not to receive a different construction from what it would receive if **F.** had been a client, merely because it was not known that he was not certificated.

**Held**, also, that the agreement constituted such a contract as precluded taxation on a common order for that purpose, and it was necessary to file a bill to get the benefit of it.

**F.** had obtained the common order to tax the bills of costs of **S.** but finding he could not, under that order, avail himself of the agreement, he filed his bill. The Court thought it would be proper that the order should be abandoned.

The defendant had taken a mortgage from the plaintiff for certain sums intended to be paid by them for the plaintiff, but which they retained in their own hands; the Court, nevertheless, would not direct the Taxing Master to allow interest on those sums in hand to be paid by the defendants to the plaintiff.

The bill in this case was filed to obtain an order for taxation, on the footing of an agreement to charge for professional services according to a particular scale, and not on the ordinary terms. The bill stated that the plaintiff, William Nathe Foley, was admitted in Trinity Term 1837, and took out his certificate for that year. Subsequently he and another person, who declined to act, were appointed executors of the will of Ann Dod, who thereby gave legacies to several persons, and among others, a legacy of 200*l.* and a second legacy of 100*l.* to Mr. Foley. The testatrix died possessed of about 8,000*l.* together with 46,725 sicca rupees, of the value of 5,158*l.* 15*s.* 3*d.* The property being more than sufficient to pay all the legacies, &c. and there being no residuary bequest, and the testatrix having no next of kin, Mr. Foley, who was the sole acting executor, and had alone proved the will, claimed to be entitled to the residuary estate. Mr. Foley, being

threatened with a hostile suit on behalf of Edward Alexander Turner and Emily Turner, two of the legatees under the will, alleged that he was advised by Messrs. George Smith and William Compton Smith, two of the defendants, to file an amicable suit as residuary legatees, and so get the estate administered under the direction of the Court, and to procure a legatee to become a plaintiff, or himself as defendant, and so have the conduct of the suit in his own hands; and that they, the Messrs. Smith, agreed with him that, if he got the legatee to employ them as solicitors in the suit, they would act as if they were plaintiff's agents, and would charge for their services only on the terms of principal and agent. The plaintiff accordingly procured James Henry Clarke, on behalf of his two infant daughters, Ann Helena Clarke and Sarah Juliana Clarke, who were legatees under Mrs. Dod's will, to file a bill as their next friend against the plaintiff, who had agreed with Clarke to indemnify him against the consequences of his so doing. The suit of *Clarke v. Foley* was accordingly instituted on the 28th of February, 1845, and the Messrs. Smith were the solicitors employed to conduct it, and the plaintiff also employed them to file his answer therein, which they did. The plaintiff alleged that on the 24th of February the Messrs. Smith knew that he, the plaintiff, was the residuary legatee of Mrs. Dod, and had arranged with Clarke to be the plaintiff in *Clarke v. Foley*, and also that the plaintiff had agreed with Clarke to indemnify him against all costs, &c. in the suit; and that being fully aware of these particulars William Compton Smith, on behalf of himself and his partner, wrote and delivered to the plaintiff a letter dated the same or 4th of February, 1845, in these words:—"Dear Sir,—We have to thank you for your show of professional confidence in us by employing us in the institution and prosecution of a suit in Chancery, and in undertaking your defence thereto; and we beg, for your satisfaction, to state that we consider that we act as your agents in this or any other suit, action, or matter in which we may be concerned for you either personally or otherwise, and that our charges in respect of the said suit and in any other suit, action, or matter in which we may be so employed by you will therefore be on the usual footing of agent and principal." The bill in *Clarke v. Foley* being thus filed, and the plaintiff's answer thereto being put in, Messrs. Foley being the solicitors for both plaintiff and defendant, the cause came on to be heard on the 8th of March, 1845, and an order was made for a transfer into Court of the funds of which the testatrix's estate was composed, and also of a sum of 333*l.* 19*s.* 5*d.* which was admitted by the answer to be in the hands of Mr. Foley. Accordingly, on the 18th of April, 1845, the sum of 7,388*l.* 1*s.* 10*d.* Three per Cent. Annuities, and 213*l.* 15*s.* 5*d.* Three-and-a-Quarter per Cent. Annuities, were paid in and on the 7th of July; 46,725 sicca rupees, amounting to 5,158*l.* 15*s.* 3*d.* were also paid in, but Mr. Foley being unable to pay in the 333*l.* 19*s.* 5*d.* applied to Messrs. Smith for assistance, and on the 1st April, 1845, they offered him the loan of 150*l.* whereupon he applied to Clarke and obtained from him a loan of 180*l.*; and this sum, together with 3*l.* 19*s.* 5*d.* Mr. Foley paid over to Messrs. Smith to make up with the 150*l.* they proposed to lend him, the whole sum of 333*l.* 19*s.* 5*d.* which he was ordered to pay into court. The matter being so arranged, Mr. Foley alleged that he believed the sum was so paid into Court, and had no suspicion whatever that it was not; on the contrary, the Messrs. Smith had often so expressed themselves as if the money had been paid in, and there was originally an entry of that sum in the draft discharge prepared by the Messrs. Smith to be taken into the Master's office, but which has been since struck out. The 333*l.* 19*s.* 5*d.* however, was not so paid in by Messrs. Smith as he, Mr. Foley, had believed. The bill stated that the plaintiff, being in want of money, applied on the 19th of December, 1845, to the defendants, Messrs. Smith, for an advance of 150*l.* and on the 5th of January, 1846, signed and delivered a letter to them giving them a lien or charge for 300*l.* on his legacies and residuary interest under the will of Mrs. Dod, of which the sum of 54*l.* 12*s.* was for the payment of a debt to one Joseph Smith, in respect of an action at law by him against the plaintiff; the sum of 150*l.* was in lieu of the sum so proposed to be lent by the Messrs. Smith, to make up the 333*l.* 12*s.* 5*d.* to be paid into court, and 95*l.* 8*s.* the residue of the 100*l.* was to be paid to the plaintiff himself. On the 12th of January, 1846, Messrs. Smith requiring further security for the sums so advanced, the plaintiff executed to them a mortgage of his legacies and residuary interest under the will of Mrs. Dod, for the sum of 400*l.* The bill further stated that in March 1849, the plaintiff obtained a transcript of the account from the Accountant General's office, and thereby found that the sum of 313*l.* 19*s.* 5*d.* had not been paid in, as he was led to believe, and as it ought to have been; that the Messrs. Smith stated the residuary estate of Mrs. Dod to amount only to

573*l.* 15*s.* 4*d.* inclusive, instead of, as it ought to be, exclusive, of the said 333*l.* 19*s.* 5*d.*; and that they had got payment out of court of the 573*l.* 15*s.* 4*d.* on the trusts of their mortgage, and that they refused credit for the 183*l.* 19*s.* 5*d.* The bill also stated that there were six bills of costs by the Messrs. Smith, charged to the plaintiff, amounting to 236*l.* 16*s.* 8*d.* which had not been taxed, and four other bills amounting to 369*l.* 11*s.* which had been taxed and paid as alleged by Messrs. Smith. And the bill charged that all these ten bills ought to be taxed, in accordance with an agreement of the 24th February, 1845. It was also stated that the legacies, amounting, with interest thereon, to the sum of 306*l.* 15*s.* 11*d.* and the residue of the testatrix's estate, amounting to 573*l.* 15*s.* 4*d.* had been received by the Messrs. Smith, and appropriated by them to their own use, on the ground that he was indebted to them in sums of equal or greater amount; and in a cash account, in which credit was given for the 306*l.* 15*s.* 11*d.* and the 573*l.* 15*s.* 4*d.* they brought the plaintiff in a debtor to them in the sum of 95*l.* 5*s.* 8*d.*; that the plaintiff had never seen the four bills of costs said to have been taxed and paid, and that he had never authorised the appropriation of the sums which came into their hands to the payment of those bills.

The bill prayed that the agreement entered into on the 24th of February, 1845, might be carried into effect, and that the Messrs. Smith might be decreed to deliver to the plaintiff their bill or bills of fees and disbursements in the suit of *Clarke v. Foley*, and also in relation to the other matters therein before-mentioned; and that it might be referred to the Taxing Master in rotation to tax and settle the said several bills of costs, upon the footing of the said agreement of the 24th of February, 1845; and that, if necessary, proper directions might be given to the Taxing Master as to the scale or amount of fees (not being disbursements) to be allowed in such taxation; and that an account might be taken of the sums which had been paid to the plaintiff, or on his account, by the Messrs. Smith, with interest thereon; and that the amount thereof and of the fees and disbursements, when taxed, might be debited to the plaintiff in the cash account between him and them; and that an account might be taken of sums (including the said sum of 183*l.* 19*s.* 5*d.* and interest thereon) paid by the plaintiff to the Messrs. Smith, and that sums received by them on his account might be placed to his credit; and that the sums paid by the plaintiff in procuring the order of the 8th December, 1845, and of opposing the motion of the Messrs. Smith, and in procuring the said transcript, might be also placed to the credit of plaintiff's account; and that the sums of money, and interest thereon now due to the plaintiff from the Messrs. Smith, might be ascertained, and that the same might be directed to be paid; and that the Messrs. Smith might be ordered to pay the costs of the suit.

The defendants, by their answer, stated that the certificate taken out by the plaintiff in November, 1843, expired in November, 1844; and was not renewed till the 15th of November, 1845; that on the 27th of December, 1845, the plaintiff's certificate was taken out for 1846, but had not since been renewed, so that he was not entitled to practise as a solicitor from November, 1844, to November, 1845, nor since November, 1846; that they did not believe that Clarke authorised Foley to employ them as his agent, as alleged; but they admitted that to induce Clarke to give them the retainer, Mr. Foley gave him the indemnity; that no such agreement ever was made as that alleged previous to the letter of the 24th February, 1845; and that the letter itself was written in ignorance that Foley was an uncertificated attorney, and, moreover, that it never was acted on, but was waived and disregarded; and, as evidence thereof, they stated that Foley employed them in 1846 as his attorney in an action-at-law, and allowed them to appropriate certain moneys in payment of their charges; and that they had received the legacies and residue by order of the Court, but denied the application thereof to their own use. They admitted, however, that the sum of 250*l.* odd was owing from them to the plaintiff on the balance of account, and that by some oversight the money was not paid into Court. Previously to the filing of the bill, and on the 18th December, 1845, the plaintiff obtained the common order to tax the defendants' bill of costs; and on the 25th, the defendants moved to discharge it, on the ground of irregularity; but it was held, that the common order to tax was not irregular, and the motion was discharged without costs. See the case of *Re Smith*, 13 Law T. 251, where the facts of the case are fully stated. The plaintiff, however, finding that under the common order to tax he could not avail himself of the agreement of the 24th of February, 1845, took no further steps on that order, but filed his bill, and thereby prayed for relief, as already stated. The defendants thereupon moved to take the bill off the file with costs, or that the plaintiff should pay the costs of the abandoned order to tax, of the motion unsuccessfully made to discharge it, of the drawing up of the

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order made thereon, and of the then motion by the defendants; but it was held, that the bill could not be ordered to be taken off the file, but the plaintiff was ordered to pay the costs of the original order for taxation, and of the application then made. See *Foley v. Smith*, 14 Law T. 288. The defendants having put in their answer, and admitted the sum of 250*l.* odd to be in their hands, and owing to the plaintiff, they were ordered to pay the same into court.

There was a second cause between the same parties, in which the plaintiff sought relief, and an account in respect of the mortgage transactions, and that the mortgage might stand only as a security for so much money as was actually advanced and paid in respect thereof, with interest thereon; and inasmuch as interest was charged by the defendants on the 33*3*/<sub>4</sub> 19*s.* 5*d.* part of the sum for which the mortgage was taken, the plaintiff asked, in the first suit, that interest might be charged on that sum in the hands of the defendants. Under these circumstances the plaintiff having repeatedly asked for an account, and no account being given, nor any bills of costs delivered, filed his bill on the 22*nd* of May, 1849, for an account, and to the purpose already stated, and also instituted the second suit in respect to the mortgage transaction. Both causes now came on to be heard, but the second was not considered, costs, &c. being reserved.

*Teed and C. Webster*, for the plaintiff, stated the facts of the case, and insisted on the validity of the agreement, of the 24*th* February, 1845, and contended that the want of a certificate did not in any way affect the plaintiff's case, for he was a qualified solicitor, if he was examined, sworn, and admitted within the stat. 22 Geo. 2, c. 46. They cited *Re Smith*, 9 Beav. 182; 11 Beav. 600; 12 Beav. 154; *Wragg v. Denham*, 2 Y. & C. Ex. 117; *Hutchins v. Hutchins*, 14 Ves. 504.

*R. Palmer and Daniell*, for the defendants the Messrs. Smith, cited *Re Smith*, 4 Beav. 309; *Cooper v. Ewart*, 2 Phill. 362; *Chuck v. Cremer*, 2 Phill. 477.

*Forbes* for Clarke, a second mortgagee of the plaintiff's interest under the testatrix's will.

## JUDGMENT.

**Monday, July 21.**—**THE MASTER OF THE ROLLS.**—The question with me was, whether this taxation might not have been obtained upon the common order to tax. If this had been an agreement by a London solicitor to conduct the business of a solicitor in the country, it might have been taxed under the common order. The case now made is, whether the agreement, of the 24*th* February, 1845, which Messrs. Smith entered into with Mr. Foley, who was a solicitor without a certificate, which he omitted to take out for ten months afterwards, was to be carried into execution. It was not clearly made out that Messrs. Smith knew he was uncertificated. The bill, as prepared, states that Messrs. Smith were not to charge more than agency fees, though Mr. Foley was not certificated; and upon looking at the agreement, I am of opinion that Messrs. Smith are not entitled to higher charges against Mr. Foley than if he had been a certificated solicitor, the meaning of the letter written by Messrs. Smith being, that they would carry on the business for him as his solicitors on the ordinary terms of principal and agent. It was, however, said, that the agreement was made to conduct the business as the agents of Mr. Foley, who was supposed to be a qualified solicitor, but that, not being qualified, they were entitled to make those charges which they would have made against a client. But such an agreement might have been made with a client, and if made it would have been legal, and so Lord Langdale has stated; but this was not a contract such as that; in pursuance of it a bill could have been taxed on the ordinary order for taxation, it was necessary to file this bill to get the benefit of it. Mr. Foley was not a client when the contract was made, and it was made under the idea that he was a certificated solicitor; but ought that to receive a different construction from that which it would receive if he had been a client, merely because it was not known that Mr. Foley was uncertificated? The question is, are Messrs. Smith under this agreement, by which they agreed to do all the business that Mr. Foley might bring to them at one rate of remuneration, entitled to charge at a higher rate because Messrs. Smith did not know that Mr. Foley was without a certificate? I am of opinion that the same construction must be put upon it as if Messrs. Smith had known that Mr. Foley was without a certificate. It would, indeed, be very hard if a town solicitor or agent could say to his principal in the country, "You have made a mistake in a day, week, or month in taking out your certificate, and consequently I, the agent, shall proceed with the business on a totally different footing from that upon which it was brought to the office." I consider the construction of the letter amounts to a contract to charge only the usual fees between solicitor and agent, and upon that declaration I shall refer it to the Taxing Master to tax Messrs. Smith's bill of costs; but I do not think that the plaintiff has any

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right to charge interest upon the money which Messrs. Smith retained in their hands merely because there was a mortgage bearing interest, which was to include that sum; I can only treat that sum as an ordinary sum of money in hand. There seems to have been precipitation in instituting the second suit, which seems of needless length. I have not looked into it, as I propose to reserve the costs. I shall, therefore, refer it to the Taxing Master to tax the bills of costs, and let him state if any correct account has been delivered, and if so, he is to be at liberty to adopt it, and also to state special circumstances. I think it proper that the plaintiff should abandon the order obtained in *Re Smith*, 11 Beav. 437, and if any costs remained unpaid in respect of them, Mr. Foley must pay them.

**Friday, July 25.**

ATTORNEY-GENERAL V. THE MAYOR, &c. OF SOUTHAMOLTON.

*Charity—Surplus funds—Accretion—Appropriation of surplus—Trust or beneficial ownership.*

*P. founded a free school, with residence for master, in 1686, and vested the same in trustees, and during his life paid a certain sum yearly to its support. In 1709 P. made his will, and thereby, after reciting that he had built a school for thirty poor scholars (the conveyance to the trustees mentioning only twenty), he directed them to be taught gratis; and after directing certain payments to be made out of his freehold property therein mentioned, he devised the same (except the presentation to the vicarage of N. the parish in which it was situated) to the corporation of S. on condition they would allow the vicar of N. to hold the vicarage-house, with the gardens, glebe, &c. and pay him and his successors the sum of 16*l.* a year, and pay to the free school he had established, the sum of 40*l.* of which 25*l.* was to keep the master, 5*l.* to the trustees of the school, 3*l.* for their usual feast, and 7*l.* for the reparations of the school-house, &c. and the highways between it and the S. bridge, and as to the balance declared, and the overplus which the said freehold, &c. should produce beyond and more than all those sums amounted to, it should go to the mayor, &c. of S. for the time being for the expenses of the mayoralty, &c. and the other half should be applied to the repair of the highways near S. The testator then made various dispositions of other parts of his property. The income of the property so devised to the corporation of S. having increased to a much larger amount than was required for the payment of all the sums directed to be paid, the corporation had been in the habit of paying no greater amount except in the case of the vicar, but applied the surplus to their own use.*

*Held, that all the objects of the charity ought to take a share in the surplus bearing the same proportion to the whole as the sums directed to be paid to them by the testator.*

This was an information filed by the Attorney-General, as the relation of James Miles, against the Corporation of Southmolton, in Devonshire, praying that all the objects of a charity founded by Hugh Squier, intended by him to be thereby benefited, should be declared to be entitled to a share in the property, bearing the same proportion to the whole as the sums originally given by the testator, and that an account of the rents and profits of the charity property should be taken, and that an inquiry should be directed under what circumstances an alienation was made of certain part of the property, and as to the present trustees and an appointment of new trustees, and a scheme. The principal question had relation to the surplus remaining after making the payments directed by the testator, and to the appropriation of that sum to the purposes of the corporation themselves, or to the benefit of all the objects of the charity proportionately, and was entirely a question of construction. It appeared that, in 1686, Hugh Squier built a school-house, with residence for the master, &c. in Southmolton, and vested the same in trustees for the accommodation of twenty poor scholars, and he paid a certain sum yearly to its support during his life. In 1709 Mr. Squier made his will, and thereby, after reciting that he had built a school for thirty poor scholars (though twenty only had been stated in the deed), he directed the thirty to be taught gratis; and, after directing certain payments to be made out of the revenues of Northam Upcott, and it estimated for purpose of renewal, and certain payment to the trustees, &c. for their trouble, he devised all his estates in Northam, in the county of Devon, to the corporation of Southmolton, except the presentation to the vicarage of Northam, on condition that they should allow the then vicar to hold the vicarage-house, with gardens, glebe, &c. and pay him and his successors 16*l.* a year, and also renewal fines, &c. as to other property, and should also pay 40*l.* a year to the free-school of Southmolton, so by him esta-

## V. C. KNIGHT BRUCE'S COURT.

blished, of which 25*l.* was to go to the master, 5*l.* to the trustees, 3*l.* for their usual feasts, and 7*l.* for the reparation of the school-house and buildings, and of the highways between the school and Mole Bridge, and the overplus, or balance, *de claro*, which the said Upcott and Northam should produce beyond and more than all these amounted to (which he computed at 60*l.*) should go as to one-half thereof to the corporation of Southmolton for the time-being, towards the expenses of the mayoralty, &c. and the other half to the reparation of the highways near Southmolton; and the testator made various other provisions as to the management of his other property, and the application of it to the other trusts therein directed to be established; and he gave the advowson of Northam to his friend Mr. Green, and his heirs, in trust for the parish, who were to have the election of a vicar, subject to the conditions therein mentioned.

It appeared that for a long time past only twenty scholars have been taught writing and arithmetic, as directed by the will, and the writing-master has only received 25*l.* a year; and, in fact, only 40*l.* the original sum directed, has been paid for the use of the school. But 70*l.* and 18*l.* 15*s.* 4*d.* have been paid to the vicar of Northam, who was the only object of the charity whose stipend was enlarged. The income has now increased from the sum of 180*l.* to the sum of 800*l.* a year, as alleged by the will, and to 600*l.* a year as admitted by the answer. The corporation had allowed a chapel to be built on the ground, and had alienated that portion of the ground, the fine for renewal thereto being diminished. The cause now came on to be heard.

*Lloyd and W. Morris* for the information.

*Walpole and Karslake* for the corporation.

*Roupell and Speed* for the trustees of the school.

The following cases were cited:—*The Thetford School case*, 8 Co.; *The Attorney-General v. The Drapers' Company*, 4 Beav. 67; *Page v. Leapingwell*, 18 Ves. 463; *The Attorney-General v. The Skinners' Company*, 2 Russ. 407; *The Attorney-General v. Christ's Hospital*, 4 Beav. 73; *The Attorney-General v. The Grocers' Company*, 6 Beav. 526; *Jack v. Bennet*, 12 Cl. & F. 812; *The Attorney-General v. The Mayor of Bristol*, 2 Jac. & Walk. 294; *The Attorney-General v. Guryllus*, 2 R. & M. 576; *The Attorney-General v. The Cordwainers' Company*, 3 Myl. & K. 345; *The Attorney-General v. —*, 2 Cl. & F. 295.

THE MASTER OF THE ROLLS was of opinion that the corporation could only take a definite amount of income, in proportion to the shares originally given them, and that all the objects of the testator's bounty should be declared to be entitled to a share in the surplus, in the proportion of their respective shares to the whole; that there should be an inquiry as to the chapel, in respect of which the alienation was made, and he directed a reference and a scheme to be settled. But he refused a retrospective account.

## VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Reported by GEO. S. ALLKUTT, Esq. of the Middle Temple. Barrister-at-Law.

**Wednesday, July 23.**

NEDHAM v. CARPENTER.

*Practice.*

*Fund in court belonging to a married woman.*

This claim came on to be heard on further directions, the Master having by his report found the title of all the persons interested in a certain fund in court, the subject matter of the claim.

*Speed*, for the plaintiff, asked that the order now to be made might provide that the share of one of the defendants, who was a married woman, should be carried over to her separate account, if it should amount to or exceed 200*l.*; but that it should be paid to her husband if it should not amount to that sum.

*Greene, B. L. Chapman, Villiers, and W. Morris* for the defendants.

THE VICE-CHANCELLOR declined to make the prospective order asked, and directed that the share should be carried over to the separate account of the defendant.

**Wednesday, July 30.**

GOOCH v. GOOCH.

*Husband and wife—Equitable mortgage.*

Prior to January, 1850, S. S. a widow, deposited title-deeds of property, of which she was seized in fee, with S. and F. solicitors, to secure 400*l.* and interest advanced by them, and 400*l.* advanced by J. B. In January, 1850, a marriage was agreed upon between S. S. and E. G.; J. B. required payment of his 400*l.* and S. and F. were willing to pay the same for S. S. if she gave them a legal mortgage. E. G. thereupon offered to pay and did pay off the two sums of 400*l.* but the deeds were allowed to remain with S. and F. In February S. S. and E. G. were married, but no settlement was ever made. E. G. died in May,

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1850, intestate, and letters of administration were granted to his widow:

*Held, that the freehold estate was still liable to the lien or equitable mortgage for 800*l.* in favour of the personal estate of E. G.*

This was a special case filed under the following circumstances:—In and previous to January 1850, Sarah Gooch, then Sarah Stiell, widow, was seized in fee simple of a freehold estate, consisting of a messuage with the appurtenances, at Henley-upon-Thames. Before the said month of January 1850, the said Sarah Stiell, being so seized as aforesaid, deposited the title-deeds of the said estate with Messrs. Sewell and Fox, solicitors, by way of equitable mortgage to secure the repayment of a sum of 400*l.* and interest advanced by them at the request and by the direction of the said Sarah Gooch, and for her use, with interest; and the further sum of 400*l.* advanced by Jeremiah Byles to the said Sarah Stiell, with interest. In January 1850, a marriage had been agreed upon between Sarah Stiell and the Rev. Edmund Gooch; and in the same month, after the marriage had been agreed upon, the said Jeremiah Byles requested payment of the said sum of 400*l.* which was then due to him upon the equitable mortgage from Sarah Stiell; and she proposed to Messrs. Sewell and Fox that they should pay off for her the further sum of 400*l.* which they agreed to do on her executing a legal mortgage to them to secure the repayment of the said two sums of 400*l.* and 400*l.*; informing her, at the same time, that the transaction would be attended with expense to her. Sarah Stiell informed Edmund Gooch of these circumstances, and he thereupon offered to pay for her the said two sums of 400*l.* to which Sarah Stiell assented, and shortly afterwards, and previous to the solemnization of the then intended marriage, Edmund Gooch directed his stockbrokers, Messrs. Marsden and Shaw, to pay the same, and they immediately paid 400*l.* to Messrs. Barnett and Co. bankers, London, to the credit of Jeremiah Byles, with his bankers, Messrs. Alexander, Ipswich; and Jeremiah Byles thereupon wrote to Messrs. Sewell and Fox acknowledging that his charge was satisfied, that he had no further lien on the title-deeds, and that Sarah Stiell wished to have them; and at the same time the stockbrokers of Edmund Gooch, by his direction, paid the sum of 400*l.* to Messrs. Sewell and Fox in discharge of the sum then due to them upon such equitable mortgage as aforesaid; but Messrs. Sewell and Fox had not at that time, nor at any subsequent time during the life of the said Edmund Gooch, any communication with him on the subject, and the said title-deeds were suffered to remain with Messrs. Sewell and Fox, and still remained in the hands of Messrs. Sewell, Fox, and Sewell, their present firm. The marriage between Edmund Gooch and Sarah Stiell was duly solemnized in February, 1850, but no settlement, or articles, or agreement for a settlement, were ever entered into or made either before, upon, or subsequent to the solemnization of the marriage, and there never was any issue of the marriage. Edmund Gooch, died in the month of May, 1850, intestate, leaving Sarah Gooch his widow, and his brother and sister, Arthur Gooch and Emily Gooch, the only persons entitled to his personal estate according to the Statutes of Distributions; and on the 19th day of October, 1850, letters of administration to the personal estate and effects of the said Edmund Gooch were granted to the said Sarah Gooch, his widow, by the Prerogative Court of Canterbury. A question had arisen whether Sarah Gooch was entitled to the freehold estate freed and discharged from the said debt of 800*l.* and every part thereof, or whether the said freehold estate was still liable to any and what lien or equitable mortgage in favour of the personal estate of the said Edmund Gooch for the said sum of 800*l.* or any and what part thereof, and the parties by this special case submitted the question for the opinion of the Court.

*Glassey and Selwyn* for the plaintiff, Arthur Gooch, cited *Pitt v. Pitt*, T. & R. 180; and *Penfold v. Bouch*, 4 Hare, 271.

*J. Bailey and Waley*, for Emily Gooch, referred to *Bagot v. Oughton*, 1 P. Wms. 348.

*Russell and Terrell*, for the widow, contended, that when Mr. Gooch paid the money he intended it as a gift to his intended wife. If it was not a gift it was a new contract, and although it might have created a debt it did not create a mortgage, as there was no change in the custody of the deeds. If there was a mortgage created it was merely to secure a debt, which, being released by the marriage, was also extinguished, and in this respect a charge by contract differed from one created otherwise.

The VICE-CHANCELLOR said, that the first question was, what was the intention to be collected from the circumstances stated in the special case, and to which he was confined. He was of opinion that the true inference was, that the husband did not mean a gift to the wife, but to save expense, or from some other cause, he was willing to take upon himself the security, and accordingly he paid the

money. The true result, notwithstanding Mr. Byles's letter, was, that the legal debt remained to him and Messrs. Sewell and Fox, but that they held the debt so legally due to them in trust for the husband. Whether the debt then remained, that is, whether if the husband had left an executor, not his wife, it could be recovered as a personal claim, it was not necessary to say. In his Honour's opinion the intention was to preserve the security on the land. The second question must therefore be answered in the affirmative, that was, that the freehold estate was still liable to the lien or equitable mortgage in favour of the personal estate of Edmund Gooch for the sum of 800*l.*

EMERY v. BOND.

Will—Construction.

*Annuities given by a will out of the interest, dividends, or proceeds of the testator's estate: Held to be chargeable upon the corpus.*

Richard Emery, by his will dated the 26th of February, 1823, subject to the payment of his debts, funeral and testamentary expenses, and the annuities and legacy thereafter mentioned, gave to Edward Bond and William Oakley, all his real and personal estate, upon trust, to permit his wife to occupy his house in the Close at Lichfield, together with such parts of his household goods and furniture as she should select, and in trust to sell all his real and leasehold estates, except the said house, and convert his personal estate into money. The testator then proceeded as follows:—"And upon trust to put and place out the moneys arising therefrom upon Government or real securities, and by and out of the dividends, interest, or proceeds thereof, to pay unto my said wife or her assigns, during the term of her natural life, or so long as she shall continue my widow and unmarried, one clear annuity or yearly sum of 120*l.* and I direct the same to be paid to her by four quarterly payments, &c. clear of all taxes and deductions whatsoever, for the maintenance of herself and my children, until they respectively attain the age of twenty-one years . . . and in trust to pay unto the said Richard Emery during the term of his natural life one clear annuity or yearly sum of 25*l.* which I give and bequeath to him, and direct to be paid to him by four quarterly payments, clear of all taxes and deductions whatsoever. . . . And upon trust to pay and apply the residue of the said trust moneys unto and amongst all and every my child and children equally, share and share alike (if more than one), and as tenants in common, when and as they shall respectively attain the age of twenty-one years," &c. The testator died on the 23rd of February, 1826. This was a suit instituted by one of the testator's children for the administration of the estate. The annual proceeds of the estate being insufficient to provide for the annuities, the question arose whether the deficiency was to be made up out of the corpus.

*Glassey and Bilton*, for the plaintiff.

*K. Parker, Faber, and J. Parker*, for the several defendants.

The case of *Wroughton v. Colquhoun*, 1 De G. & Sm. 36, was cited.

The VICE-CHANCELLOR said that he was clearly of opinion that the annuities were chargeable upon the corpus.

Thursday, July 31.

STEPHEN v. COOK.

*Practice*—4 & 5 Wm. 4, c. 82—Substituted service of subpoena.

*Hoare*, in this case, moved, under the 4 & 5 Wm. 4, c. 82, for an order for substituted service of the subpoena on H. Robert Cook, the brother of the defendant, John Richard Cook, the suit relating to real estate. From the affidavit filed in support of the motion, it appeared that application had been made ineffectually at a former residence of the defendant, but which he had left two years since. It was then ascertained that the receiver of the rents of the estate in question had been in the habit of addressing the defendant at the residence of his brother, Robert Cook, in Warwick-street, Regent-street. Upon inquiry at Robert Cook's residence he stated that he could not give the defendant's address, but inquired of the deponent what his business with the defendant was. A letter inclosing a subpoena was subsequently addressed to the defendant at Robert Cook's residence, which letter was neither answered nor returned.

The VICE-CHANCELLOR said, that upon the production of an affidavit that the deponent believed that the defendant "secreted or withdrew himself so as to avoid being served with the process of the Court," he would order that service upon Robert Cook and the receiver of the rents should be good service on the defendant John Richard Cook.

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Reported by W. H. BARNET, Esq. of Lincoln's-inn, Barrister-at-Law.

March 31, and April 1 and 3.

THE SHREWSBURY AND CHESTER RAILWAY COMPANY v. THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY.

*Injunction to restrain contract.*

*In a case where the Shrewsbury and Chester Railway Company had entered into a contract with the Shrewsbury and Birmingham Railway Company as to a particular mode of working their line of railway, but the latter company now contended that such contract was void,—and proposed to enter into an agreement with another railway company, by which the contract, if valid, would be violated:*

*Upon application to restrain the Shrewsbury and Birmingham Railway Company from holding a meeting to sanction such agreement, the Court refused to interfere, on the ground that the conflict between the convenience and inconvenience on the one side or the other preponderated in favour of the party who had the legal right to enter into the contract in question.*

This was a motion by the plaintiffs for an injunction to restrain the defendants, the Shrewsbury and Birmingham Railway Company, their directors, and all other persons acting on their behalf, or their authority, from entering into, or carrying out, an intended agreement with the London and North-Western Railway Company, or any agreement similar thereto, or which should cause it to be the interest of them the defendants to fail in, or should prevent or obstruct them in carrying out the purposes of an agreement of the 12th of July, 1850, in the bill mentioned, and from doing, or omitting to do, or procuring the doing, or omission either by resolutions or otherwise, of any act, matter, or thing, the doing or omission of which is or may be in breach or violation of, or repugnant to, or inconsistent with, the said agreement of the 12th of July, 1850, or any of the provisions thereof.

The facts of the case are fully stated in the judgment.

*Bethell, Malins, and Giffard*, in support of the motion.

The Solicitor-General (Wood), Sir F. Kelly, and Follett, for the London and North-Western Railway Company, relied on *Spottiswoode v. Clarke*, 2 Phill. 156; *Kaye v. Marshall*, 1 Myl. & Cr. 373; *Rigby v. Great Western Railway Company*, 2 Phill. 44; *Pickford v. Grand Junction Railway Company*, 3 Rail. Ca. 538.

*Stuart and Hardy* for directors of the Shrewsbury and Birmingham Railway Company in the same interest as the plaintiffs.

*Roll and Prior* for the Shrewsbury and Birmingham Railway Company.

*Bethell* in reply.

JUDGMENT.

The VICE-CHANCELLOR, after stating the terms of the notice of motion, said, the material facts of the case are as follow:—The plaintiffs, the Shrewsbury and Chester Railway Company, have a railway from Chester to Shrewsbury, opened the whole way. The defendants, the Shrewsbury and Birmingham Railway Company, have a railway from Shrewsbury to Wolverhampton, and so on to Birmingham—that is, a complete railway to Wolverhampton, and from thence they go at present by the line of the London and North-Western Railway Company. Of course it became as the two railways (the Shrewsbury and Chester and the Shrewsbury and Birmingham) united, and I believe had a common terminus at Shrewsbury, the common interest of both to provide for what they called "the through traffic"—that is, traffic from Chester to Wolverhampton or Birmingham, and from places north of Chester coming to Chester, and so on to places through Birmingham and south of Birmingham and beyond Birmingham. They did this or supposed they had done it by an agreement of the 12th July, 1850, under which each company was authorised to run their engines and carriages through both lines; and provisions were made for ascertaining the share of each company in the amount of toll received in respect of such transit over the two lines. Either company was to be at liberty to terminate that arrangement by giving three years' notice, but then the company receiving the notice was to have liberty for ever of using the railway of the other company on certain stipulated terms,—I think, of paying half the toll, or some arrangements the details of which it is not material for me to go into. This contract was dated in July, 1850, received the seals of both companies, and its terms had, in fact, been acted upon and agreed to from a time long anterior, namely, from October, 1849, and it has continued in operation up to the present time. It seems now that a large part of the shareholders of the Shrewsbury and Birmingham Railway Company have become anxious to get rid of this arrangement, and a special general meeting of the company has been duly convened, and is to meet



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to-morrow, the object being to obtain the sanction of the shareholders to an agreement to be entered into between the Shrewsbury and Birmingham Company and the London and North-Western Company, by which the former company (the Shrewsbury and Birmingham Company) are in fact to lease their line to the latter company (the London and North-Western Company) for twenty-one years. There was a good deal of transaction between the parties previously to the convening of the special general meeting. I need not advert to those circumstances, because it all ended in the fact that a special general meeting for the purpose of taking this matter into consideration was duly, according to the provisions of the Act, convened for the 4th of April, and consequently is to meet to-morrow. The terms of the present proposition, that the proposed arrangement should take place appear embodied in a paper, the nature of which I need not enter into, a printed copy of which is put into my hands, intitled "Supplementary Report of the Committee of Inquiry of the Shareholders of the Shrewsbury and Birmingham Company," and the material terms are these:—"The London and North-Western Company to work over the Shrewsbury and Birmingham line (and the Madeley branch of and when made), and to have the stations and other conveniences, and all the powers and facilities for that purpose of the Shrewsbury and Birmingham Railway Company, from the 25th of March, 1851, till the 25th of March, 1872—that is, twenty-one years, on the following terms:—The traffic to be fairly and fully worked by the London and North-Western Company, with a view to its development, and a competent amount of through traffic to be accounted for over the line by the London and North-Western Company; the Stour Valley line to be opened within six months from this time; the Shrewsbury and Birmingham Company themselves to cease being carriers, and to keep an account of the maximum tolls calculated in all traffic carried over the line, except by the London and North-Western Company, and also of all their (the Shrewsbury and Birmingham Company) receipts from all other sources, and all these sources of revenue to be made as profitable to the Shrewsbury and Birmingham Company as possible. The London and North-Western Company to pay to the Shrewsbury and Birmingham Company such a proportion of their gross earnings as carriers over the Shrewsbury and Birmingham line [and branch if made] as will make up when added to the maximum tolls and other receipts and revenues mentioned in the last article, the following sums annually, plus an annual sum in each year of 500l." I take it that these supposed receipts from the maximum tolls and other sources in fact are merely put in by way of embellishment. Nothing was, in fact, ever calculated as likely to arise from that. What they were in fact to pay was this. The interest on the debenture debt for the time being owing by the Shrewsbury and Birmingham Railway Company; secondly, the dividend payable upon the preference stock now issued by the Shrewsbury and Birmingham Railway Company amounting to 135,000l.; and, thirdly, interest upon the ordinary share capital of the Shrewsbury and Birmingham Railway Company at the following rates, and to be payable half-yearly, that is to say, for the first two years at the rate of 3l. per cent. per annum, for the second two years at the rate of 3l. 10s. percent. per annum for the remainder—that is, seventeen years—"at the rate of 4l. per cent." Then there are some provisions about the Stour Valley Company. "The capital account to be at once ascertained as accurately as may be, not exceeding 1,000,000l. of ordinary stock, 135,000l. of preference, and 21,700l. of debentures, 5,000l. being added to meet casualties." Therefore the sum that would eventually have to be paid would be interest at 4l. per cent. on a capital supposed to be about 1,000,000l. besides 135,000l. of preference and 21,000l. of debentures, which would make an annual payment of about 50,000l. a year. I do not know that I have calculated it quite accurately, but I think pretty nearly. "The London and North-Western Company to take over the stock of engines, carriages, &c.; the amount to be invested, when agreed, in the Madeley branch or other new works required, or after mentioned, or in reduction of the debt till such investment, the London and North-Western Company to pay 4l. per cent. thereon," and to adopt certain contracts that had been entered into. I do not know that any of the other terms are at all material to be alluded to. Now, there can be no doubt of the fact, that the proposed agreement is an agreement altogether inconsistent with the contract of July 1850. There could no longer be three years' joint traffic, nor after that time a perpetual right in the plaintiffs to use the line if the contract was entered into, and the object of the bill is to enforce the former agreement, and to prevent the Shrewsbury and Birmingham Company from entering into the proposed contract with the London and North-Western Company. The ground of the plaintiffs' case is, that they are in fact seeking the specific per-

formance of the partnership contract; and there is no doubt, I take it, of the jurisdiction of this Court to prevent one partner from excluding another from, or from so acting as to prevent the continuance of the partnership according to its terms. That is, in fact, an application substantially for specific performance. If two parties agree to devote their whole time to a partnership concern, this Court will not permit one of them to exclude the other from the partnership, or to separate business which makes it impossible that he should perform his partnership obligation; and the bill seeking to restrain the violation of such a partnership contract, though it seeks nothing but an injunction, is in substance a bill for a specific performance, or at least a bill to be dealt with on principles analogous to those on which the Court acts with regard to specific performance. Now here the plaintiffs rest their title to relief upon that principle. Their argument is, that the bill shews a partnership contract, or what is in truth just like a partnership contract, and that it shews an intention not only to violate, but to destroy the subject matter of it, and so the plaintiffs say that the bill seeks an injunction to restrain the defendants from thus violating their contract; in substance, it seeks the specific performance of the contract of July 1850. The defendants resist this mainly upon the ground that the alleged partnership contract is invalid. I say "mainly," because there are some other points which are made about a contract with the Great Western Company, to which I shall not find it necessary to advert at any length. The defendants resist it mainly on the ground that the alleged partnership contract is invalid in law, and being so, they say they have now an opportunity of entering into an agreement with the London and North-Western Company which would be very advantageous to them, and that the meeting to be held to-morrow has been convened for the purpose of obtaining the sanction of the shareholders to this agreement. The question therefore really is, whether I ought to restrain the shareholders at this meeting from sanctioning, and the company from entering into the proposed agreement, or any agreement of a similar nature. The main drift of the agreement addressed to me was directed to the obtaining of an injunction restraining the defendants not from doing any acts interfering with the due enjoyment of the rights under the agreement of July 1850, nor to prevent them from excluding the plaintiffs' carriages from their line while engaged in through traffic, but to restrain them from entering into a contract, the due performance of which will have that effect. And this appears to me to be a most important distinction. The resolution at the meeting to-morrow will not, and the entering into the agreement will not, affect the plaintiffs; but the acts likely to be sanctioned by the one, and contracted for by the other, will. Now I do not mean at all to say that this Court will not, under some circumstances, prevent parties from entering into contracts relating to subject-matters of litigation. By such alienations on contracts no eventual injury could in general result to the plaintiff, but it may impose on him the necessity of making additional parties, and may delay and embarrass him in the assertion of his rights. In some cases it may even tend to destroy the subject-matter in dispute, as would clearly have been the case in *Wilson v. Wilson*, 14 Sim. 405; 9 Jur. 148, which was a suit for the specific performance of an agreement between husband and wife for separation, and pending that suit proceedings were instituted or carried on in the Ecclesiastical Court for establishing the restitution of conjugal rights. Of course, if that suit were dismissed, it would do no harm nor affect the case at all; but if once the Ecclesiastical Court had decreed restitution of conjugal rights that would substantially have put an end to the subject-matter of litigation. Therefore, in that case the Court interfered. This Court, therefore, will, where the necessity of the case requires it, interfere by injunction, during litigation, not only to preserve property in *statu quo*, but sometimes also to prevent the defendant from affecting it by contracts or conveyances or other acts. But this latter interference, I must remark, is by no means a matter of course, and that was stated by Lord Eldon in one of the cases, I think, referred to in the argument. I allude to the case of *Spiller v. Spiller*, 3 Swanst. 557. In that case the defendant Spiller had contracted to sell to the plaintiff Spiller certain copyhold property. I believe the contract was a verbal contract, but possession had been taken, and a part of the purchase-money paid, and he afterwards became insolvent, or under some obligation to convey all his property to the other defendants, Bunscombe and Wakeley, as trustees. This bill was filed by the purchasers, the Spillers, against the defendant Spiller, and those other persons, and it prayed the specific performance of the agreement, and for an injunction restraining the defendant Spiller from surrendering the copyhold premises to the other trustees. There can be no doubt that by doing so he would not, if the plaintiffs had a right to specific performance, eventually prejudice them, because *pendente lite*

their rights could not be affected. An injunction, however, was prayed. A motion was made on certificate of bill filed. Mr. Buck was for the motions. The Lord Chancellor says this:—"The plaintiffs are, under the circumstances, entitled to an injunction." Unfortunately, what the circumstances were we do not know; but I must infer from that expression that there were some circumstances in that case. "But," he says, "I wish it to be understood as my opinion, that in general on a bill for the specific performance of an agreement to sell,"—just the same principle must apply to that which is *quasi* a specific performance of the partnership contract,— "the plaintiff is not entitled to restrain the owner from dealing with his property; a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed." One sees at once the good sense of that; under the circumstances the Court may interfere if the circumstances require it; but it is a monstrous proposition to say, "I will prevent you from exercising a legal right because somebody else is trying to establish against you an equitable right." Therefore Lord Eldon says, though the Court will do it under the circumstances, it is by no means a matter of course. In that case he did grant the injunction. Now when the Court is called on to interfere in this case to preserve the property *pendente lite*, there are, I apprehend, two points on which the Court must satisfy itself; first, it must satisfy itself, not that the plaintiff has a right, but that he has a fair question to raise as to the existence of such a right. That was so stated by Lord Cottenham in the case to which such frequent reference was made during the argument of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, 12 Jur. 106; 2 Ph. 597. Lord Cottenham there, after saying that the Court will in certain cases interfere to preserve property in *statu quo* during the pendency of the suit, says, "It is true that no purchaser *pendente lite* would gain a title, but it would embarrass the original purchaser in his suit against the vendor, which the Court prevents by its injunction." Then he refers to two or three cases, and among others to that of *Spiller v. Spiller*. "It is true," he says, "that the Court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose it is not necessary for the Court to decide upon the merits in favour of the plaintiffs." That, therefore, is the first point on which the Court has to be satisfied, not as Lord Cottenham says positively that the plaintiff is right, but that he has at all events a fair title, a fair question to raise. But I do not understand Lord Cottenham there as meaning to say that which, if he had said, he would have been saying at variance with what Lord Eldon said, that in every case where there is a *prima facie* or probable case suggested, the Court will interfere. That I cannot conceive to be the doctrine of the Court. It would be inconsistent with what Lord Eldon says, and inconsistent with common sense; for I conceive that even where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference on a balance of convenience and inconvenience to the one party or the other is or is not expedient? Where the alternative is interference, or probable destruction of the property, then of course the Court will be very ready to lend its immediate assistance even at considerable risk, that it may be encroaching on what may turn out eventually to be the legal right of the defendant. That was the case in *Wilson v. Wilson*. But where, on the other hand, the only evil to result from non-interference is that the plaintiff may by contract or deed be retarded or embarrassed in his litigation, there, I apprehend, the Court will be far more ready to listen to any suggestion of the defendant, shewing that interference during litigation will prejudice his rights. Now, acting on those views, the first thing I have to satisfy myself of is, whether there is a real question between the parties under the deed of July, 1850. *Prima facie* that deed gives the plaintiffs a perfectly good title. The question is, whether the defendants have any real ground for disputing its validity. This is the converse of the question argued in the case before Lord Cottenham; but I think exactly the same principles apply. Now I do not feel myself called on to give an opinion as to whether that is a legally valid contract or not. If I were so called on, I certainly should feel very great difficulty in according to the laboured argument of Sir Fitzroy Kelly, that the arbitration clauses make this a contract of necessity void at law, as having been something done *ultra vires*—something militating against the well-known maxim, "*Delegatus non potest delegare*." I should have a doubt about it. I have much more doubt as to its validity on another part of the contract, namely, the 7th and 8th sections of it, whereby the stipulation being, that either party



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might terminate it by giving three years' notice, it was agreed that for all time afterwards the party receiving the notice shall be at liberty, on certain stipulated terms to use the railway of the party giving the notice, for that does seem to me to be *quasi* a lease of it for ever, or at least something like it, but even on that I give not the least opinion whether that is a legal objection or not. I certainly do not feel myself called on to decide, or competent to decide, that that is so entirely a frivolous and ridiculous objection, that I shall treat it as being utterly worthless, and act against the party just as if he had raised no such point at all. There is another point which has struck me. Suppose it is invalid, query whether this is not a divisible contract, so that the Court might perform part of it? It is a contract under seal, and there may be a question whether the consideration is not entire and running throughout; and indeed I see a great number of questions that may be raised on this point, satisfying me that it is not a mere pretence to say that there are doubts entertained about the validity of the contract. I cannot say that I am so entirely clear on that, that I can treat the parties as being guilty of a sort of fraud or imposition on the Court in pretending that there is any doubt as to its validity. Then that being so I have this before me—a contract sought to be enforced by means of this injunction, and as to which I think not only have the plaintiffs probable ground for saying there is such a contract, but if I were to determine it, the leaning of my mind is in their favour, that it is a valid contract, still I think there is a *bond fide* dispute as to whether that is valid or not. Then it is said, in that state of things I ought to be governed by that which occurred in the case of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, which it is said is precisely the same case. In that case the defendants, the Birmingham and Oxford Company had entered into a contract to sell their railway to the plaintiffs, the Great Western Company, and the bill was filed by the Great Western Company against them, praying the specific performance of that agreement, and it alleged that they were obliged to take such proceeding because the Birmingham and Oxford Company contending for the invalidity of their contract with the Great Western Company were proceeding to enter into a contract to sell to the North Western Company, and the bill there, as here, prayed that the defendants "might be restrained by injunction from entering into any agreement for the sale of that railway to the London and North-Western Railway Company, or from in any manner dealing with such railway, or with the property or effects thereof, except with the approbation of the plaintiffs, and from doing or omitting to do, or procuring the doing or omission, of any act, matter, or thing, the doing or omission of which was, or might be, in breach or violation of, or repugnant to, or inconsistent with the said agreement." Now, it is said, the case now before me is precisely the same, and undoubtedly I feel that there is a very great resemblance indeed. Lord Cottenham, in that case, did interfere. Then what was pressed on me was, ought not I to interfere just in the same way, almost so to say blindfold, because I certainly should be the last to dispute the proposition that where a matter has been decided by a Superior Court, even if I doubted its propriety, I am bound to follow it. I have acted on that principle in several cases, restraining parties from obtaining compensation. I have only reversed my own decision or discharged an injunction which I granted myself, because since I acted on that decision of Lord Cottenham, the present Lord Chancellor has made a decision which appears to me, with all deference to him, although he says it does not mean to overrule the other, to be in direct opposition to the decision of Lord Cottenham. Therefore, if I found this case of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, an express authority guiding me, I should feel I was bound to act on it, even if I felt a doubt as to its propriety; but I cannot say that on full consideration I do come to that conclusion, and I will state why. In the first place, Lord Cottenham's arguments here are directed to the demurrer; it is true that on that demurrer being overruled the injunction that had been granted by the Vice-Chancellor was also established. Unfortunately for me, at least for my peace of mind, in this matter we have none of the arguments that were urged upon the injunction; nor have we, which is much more material, any of the affidavits that were before the Court. If it is to be assumed that, as a matter of course, because the bill was not demurrable, therefore an injunction was to issue, I should say then I have to decide between what Lord Eldon says and what Lord Cottenham says. It is quite clear Lord Eldon says, that it is not the law of the Court—it cannot be; and I come to that conclusion, because, although Mr. Bethell, who was counsel in the case, I think, stated (I have no doubt perfectly accurately) that the injunction was sustained, because there were no circumstances brought before

the Court putting the propriety of the injunction, and the decision on the demurrer at all in conflict, the one with the other. Not having the affidavits before me in that case, I do not know what there was to shew any countervailing inconvenience that would result from issuing the injunction. Probably there was none; and if so, it would be true that as a matter of course, when I once determine that here is a bill for the specific performance of an agreement, and the party, it is said, is going to enter into a contract that will embarrass me in my litigation, the first impulse of the Court would be to prevent that. If there were nothing else to hold their hands it would be right to do so, and I must take for granted that, if the injunction went, it was because there was nothing of that sort brought forward. I cannot but suppose that if there had been a conflict on the point, namely, what quantity of inconvenience resulting to the defendant would induce the Court to hold their hands, that would have been argued, and the affidavits would have been contrasted, and Lord Cottenham would have given some opinion on it. Now, then, is that the case here? I must say here, that so far from that being the case, I think that, by granting the injunction in the terms in which I am asked to grant it, I should be occasioning to these defendants irreparable injury to an extent that it is fearful to contemplate. They are proposing to enter into a contract with the London and North-Western Company, under which the London and North-Western Company bind themselves, as I understand it, to pay to them a sum which amounts to 40,000*l.* or 50,000*l.* a year, for twelve years; that is the advantage which they are to have. Supposing it were to turn out in the result, if I were to issue this injunction, that the defendants are right, and that the Court of Q.B. or the Court of Ex. or the Court of C.P. should hold that the agreement which you entered into is invalid, that it is invalid *in toto*, that therefore there was no legal bar to your entering into this contract; and Mr. Chesshire has made an affidavit that he believes this contract to be most highly beneficial to the defendants, and that he believes the London and North-Western Company are now ready to enter into it, but that he verily believes that if it is delayed they will not be willing to enter into it, in what predicament would this Court then find itself if it should have issued an injunction restraining the defendants from entering into a contract, *ex hypothesi* a valid contract, which there was no legal ground to prevent them from entering into, and then afterwards they should be unable to enter into it, and so lose 50,000*l.* a-year for twenty-one years? Therefore, whatever may have been the case of *The Great Western Railway Company v. The Birmingham and Oxford Railway Company*, in this case it is obvious the effect of my injunction will or may be likely to cause enormous injury to all the shareholders in the company who are the present defendants. Now, that is the ground on which I feel myself bound in this case to refuse the injunction. I have explained it shortly, and, as I hope, clearly, so that the parties may see the ground upon which I am going. It is this: that although I am perfectly satisfied of the authority of this Court to issue an injunction not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the Court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the Court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference, the balance greatly preponderates in favour of the defendant and against the plaintiff. Now, here the injury to the plaintiffs in comparison to the injury to the defendants is extremely small. The contract may be put an end to in three years. The present rate of through traffic seems to be something like 12,000*l.* a year. Three years would be something like 36,000*l.* that is on both lines, so that it would be the half of that. They would be entitled, if there was no other remedy, to an action for that, and though it may not be quite easy for them to prove the exact amount they lose, yet that is a matter not altogether incapable of being estimated, and, on the whole, the conflict between the convenience and inconvenience, on the one side or the other, seems to me beyond all measure to preponderate in favour of the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction. I think it is necessary for me to add that I had some little doubt whether I ought to issue an injunction only in the terms of the last part of the notice of motion in which I am asked to restrain the party "from doing, or omitting to do, or procuring the doing or otherwise of any act, matter, or thing, the doing or omission of which is or may be in breach or violation of or repugnant to or inconsistent with the agreement." But on full consideration I do not think I ought. My decision refusing this injunction does not at all prejudice the question

whether if this proposed agreement or any similar agreement should be entered into, the plaintiffs may not be entitled to an injunction restraining the defendants, or rather in that case restraining the North-Western Company, from so acting under that agreement as to exclude them, the plaintiffs, from the Shrewsbury and Birmingham line or from conducting the through traffic according to the terms of that contract. My refusing this injunction does not at all prejudice that question, and I think I should be very much embarrassed in the case if I were to grant an injunction on that which in truth was not the point argued before me. The point mainly, almost entirely, argued before me was as to the holding of this meeting and entering into the contract. I think I ought not to embarrass it for two reasons: In the first place I think I ought not to interfere to restrain parties, not from doing anything which they at present are going to do, but which it is supposed they will, under a contract which they will enter into, authorise other persons to do. I think that would be an unnecessary anticipation of an evil that never may happen. I cannot tell that the meeting may sanction this agreement, or that it will be entered into. I cannot tell that it may not be so modified as to secure to all parties the rights they may have under this agreement of July 1850; and, after all, the parties to be restrained in such a case would have to be made parties by supplemental bill, or in some other way, namely, the London and North-Western Company. Upon the whole, therefore, on full consideration, my opinion—on the ground I have stated, namely, the enormous preponderance of inconvenience there might be in granting the injunction over any possible inconvenience there might be in refusing it—is, that I ought to refuse the injunction.

*Injunction refused.*

VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Wednesday, August 6.

LESLIE v. TOMPSON.

*Special case—Vendor and purchaser—Compensation—Particulars—Conditions of sale—Excess and deficiency of acreage.*

*Where property was sold by auction by particulars of sale, and one of the conditions was, that any mistake or error in the description should not annul the sale, but that compensation should be given or taken either way, and it appeared that out of four lots bought one was found to be much more than the quantity set forth in the particulars, and the three others to contain some acres less, the question of the vendor's title to compensation being submitted to the Court on a special case, it was*

*Held, that the purchaser must make compensation for the extra quantity in the one lot, and was entitled to compensation for the deficiency in the other three lots; and it was held that the presumption of the intention to sell the property in a lump is negatived where there is beyond the description a statement of the acreage "more or less."*

This was a special case under the statute 13 & 14 Vict. c. 35 (Sir George Turner's Act) for the opinion of the Court. The plaintiffs were the vendors of an estate sold by auction; the defendant was the purchaser. The case stated, that on the 29th of August, 1850, certain lands and hereditaments situate at Iver, in Buckinghamshire, were put up for sale in several lots by auction, pursuant and subject to certain particulars and conditions of sale, with a map or plan annexed to or forming part of such particulars. That a printed copy of such particulars and conditions of sale, with a map or plan denoting the various lots, by different colours, had been sent by post to the defendant and others by the auctioneer a few days before the sale. That the defendant attended the auction, and was declared the purchaser of lot 1, at the price of 2,800*l.* That he also became the purchaser of lots 2, 3, and 4. That lot 1 was stated by the particulars to consist of a country residence, park, and grounds called "Dromenagh Lodge," and the nature and quantity of the land comprised in the said lot were set forth in the particulars in the words following, viz.—The well-timbered park is inclosed by thriving plantations and strong oak paling. There is a neat lodge entrance containing neat sitting-room, three bed-rooms, with good garden and strong entrance-gate. The long coppice is a gradually sloping wood to a pure running stream abundantly supplied with fish, and is studded with numerous rustic lodges and seats. This lot comprises about 70 acres and 24 perches, divided in the following manner:—

1. Residence, offices, garden, lawn, and fish-pond .....	a. r. p.
2. Stabling, yard, and kitchen-garden .....	3 0 30
3. Lodge and park .....	2 0 30
4. Long coppice .....	18 0 4
Total acres, more or less .....	46 3 0

Total acres, more or less .....

## V. C. TURNER'S COURT.

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That lots 2, 3, and 4 were described in the particulars as comprising certain messuages, outbuildings, &c. together with certain quantities of arable, pasture, meadow, and wood lands, amounting in the aggregate to 321a. 2r. 30p. more or less. That by the 11th of the conditions of sale it was provided that if any mistake or error should appear in the description of the property, or any error whatever appear in the annexed particulars, such mistake or error should not annul the sale, but, except where otherwise provided for by the conditions, a compensation or equivalent should be given or taken as the case might require, to be settled by two referees or an umpire, to be nominated by them before entering on the business, one referee to be nominated by each party within seven days after the discovery of the error and notice thereof given to the other party, and in case either party should refuse or neglect to name a referee within the time appointed the referee of the other party should alone make a final decision. That after the sale had been effected it was found that lot 1 comprised 89a. 29p. instead of 70a. 24p. and that lots 2, 3, and 4, comprised in the aggregate 310 acres 3 roods 18 perches, instead of 321 acres 2 roods 30 perches. That the quantities of the lands assigned to the different lots had been inserted in the particulars under a mistake, and that in the preparation of such particulars, and for the purpose of describing the property therein, the plaintiff's solicitor had referred to and taken the several descriptions from printed particulars of the estate prepared by another solicitor on a former occasion, and from a surveyor's report made on such occasion, which they believed to be correct, and therefore relied thereon. That the whole of lot 1, with the exception of the stabling and the kitchen-garden, which were separated by a road from the residue of the lot, was in a ring fence, bounded on the south-south-west and south-east sides by roads and wooden palings, and on the western side by a hedge or fence, and on the north and north-east by the stream or brook. That the plaintiffs (the vendors) claimed an increased amount of purchase-money to be paid to them by way of compensation for the extra quantity of land comprised in lot 1, and offered to pay compensation to the defendant for the other lots. The plaintiffs then submitted that they were entitled to compensation for the excess of the quantity of land comprised in lot 1 over and above the number of acres so by mistake stated in the particulars, offering and submitting to pay or allow to the defendant a fair compensation for the deficiency in lots 2, 3, and 4, if the Court should be of opinion that the plaintiffs were entitled to the compensation they claimed in respect of lot 1.

*Malins and J. V. Prior* relied on the part of the plaintiff on the fact of the mistake stated in the particulars, and which was not questioned. Without the 11th condition the vendors would have been entitled to relief, but with that condition the case for relief was plain and obvious. The quantity was stated in acres, and in such cases the presumption was that the price fixed had reference to the quantity; nor was that varied by the words "more or less." They could not cover an excess of one thirtieth of the whole quantity of lot 1. The cases on that point were *Winch v. Winchester*, 1 Ves. & Bea. 375; *Hill v. Buckley*, 17 Ves. 394; *Portman v. Mill*, 2 Russ. 570; and *Gall v. Watson*, referred to in 1 Sug. Vend. & Pur. 10th ed. 529.

*Prendergast* for the defendant.—This property, unlike that in each of the cases cited, is not described in the particulars of sale by superficial measure, but is designated by reference to metes and bounds, and a map is referred to by which the boundaries appear to be plantations, roads, and a stream of water. No mistake can, therefore, he inferred, as to what was the property intended to be sold; it was made clear and manifest to the eye. The mistake, if it can properly be considered one, was of such a gross and culpable nature that the plaintiffs ought not to be declared entitled to any additional payment, whether with or without the 11th condition of sale. (*Martin v. Cotten*, 3 Jones & Lat. 496.) Compensation will not be given where there does not exist the means of ascertaining its amount, and here there are no such means, for the excess cannot be said to be in any one part, either the park, the garden, or the coppice. (*Sherwood v. Robins*, 1 Moo. & Mal. 194; *Lord Brooke v. Roundthwaite*, 3 Hare, 298.) He also cited *O'Kell v. Whitaker*, 1 Phill. 338; and *Higginson v. Clowes*, 15 Ves. 516.

*Malins* in reply.—The intention here was to sell not in the lump, as seems to be contended for by the defendant, and that is shewn by the addition of the number of acres in the particulars of sale. No difficulty as to the mode of assessing the compensation stands in the way, because, if the 11th condition is not sufficient, the Court can have the assistance of the Master on a reference for that purpose.

## JUDGMENT.

The VICE-CHANCELLOR.—In this case there has been a sale by auction of property in four lots. In the particulars of lot 1 there has been an understatement in the amount of the property comprised therein by about twenty acres; and in lots 2, 3, and 4, there has been an overstatement of about ten acres. The question which I have to consider is, whether the purchaser is bound to pay compensation for the surplus in lot 1, and to receive compensation for the deficiency in the other lots. The conditions of sale, amongst other things, contain a provision that mistake or error in the description of the property in the conditions of sale shall be made the subject of compensation. That condition is as follows:—"That if any mistake or error shall appear in the description of the property, or any error whatever shall appear in the annexed particulars, such mistake or error shall not annul the sale; but, except where otherwise provided for by these conditions, a compensation or equivalent shall be given or taken as the case may require, to be settled by two referees, or an umpire to be nominated by them; before entering on the business, one referee to be nominated by each party within seven days after the discovery of the error, and a notice thereof given to the other party; and in case either party shall refuse or neglect to name a referee within the appointed time, the referee of the other party shall alone make a final decision." I think the mistake or error meant to be referred to by that condition is such mistake or error as on the part of the vendors would vitiate or annul the contract for sale. The question to be considered is, whether, in this state of circumstances, the vendors could, on bill filed, have been relieved from their contract, on the ground of the mistake they have made in the particulars? or, whether the purchaser could have enforced it against them? I entertain some doubt whether, under the circumstances of this case, the vendors could have been relieved if they had filed their bill to have the contract delivered up to be cancelled. I am rather disposed to think that under the circumstances stated on the special case they might possibly have been relieved, for it there appears that the particulars of sale were prepared from previous conditions of sale, and the estimate of a surveyor prepared on a former occasion, which were erroneous. I am disposed to think, therefore, that as the vendors have, in preparing the particulars, proceeded on former conditions of sale drawn up on the report of a surveyor, which is erroneous, and have therefore entered into the contract under a mistaken conception of the amount of property comprised in the particulars, they would be entitled to relief. Whether that would be so or not, I am strongly of opinion that the purchaser could not enforce the contract in the face of that mistake, which is proved to have existed, unless, indeed, he were willing to adopt the condition by which compensation is prescribed for any excess in the quantity of land taken. One argument put by Mr. Prendergast weighed upon my mind during the discussion of the case. It was, that the vendors did not intend to sell the lot by measurement, but that they meant to sell the lot in the lump. It was upon that point that I felt a hesitation during the discussion before me. The conclusion, however, at which I have arrived is this, that the actual designation of the number of acres contained in the lot negatives the presumption of any intention on the part of the vendors to sell in the lump. I am of opinion that there is not a sufficient ground appearing in the case to exonerate the purchaser from making compensation for the extra quantity of land. Another argument urged on behalf of the purchaser was, that in the event of the purchaser being held bound to make compensation there was no means of estimating the amount of such compensation. That, however, is pointed out by the condition of sale, which provides that the amount of compensation shall be settled by arbitration. At all events, if the parties cannot get it settled, this Court will get it done by a reference to a Master. I declare, therefore, that in this case the purchaser is bound to make compensation for the extra quantity of land comprised in lot 1, and is entitled to receive compensation in respect of the deficiency in lots 2, 3, and 4. I will give no costs on either side.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Commissioner LAW.)

Thursday, August 7.

RE E. GOODING.

*Discharge of debtor in execution for debt after vesting order made on creditor's petition—Effect of upon claim of creditor to prove for dividend before adjudication.*

Quære, does the discharge of a debtor in execution by the plaintiff operate a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend made under a creditor's petition, filed previous to the discharge, and under which no schedule had been filed?

Held, that a discharge of the debtor before adjudication is satisfaction; but that after adjudication it is not.

This was a claim by Mr. Loosemore to prove for a dividend under circumstances which are distinctly stated in the judgment. The Court delivered its opinion upon the claim to prove to-day.

## JUDGMENT.

Mr. Commissioner LAW said.—The question is raised, whether, in this case, the discharge of the debtor in execution by the plaintiff operates a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend. The vesting order was made on a creditor's petition; the insolvent did not file schedule; and that creditor, Mr. Loosemore, discharged him from custody. Mr. Loosemore now claims to prove. It happens that, after so discharging the defendant, he procured himself to be appointed assignee; and it is manifest that the Court, on appointing him, was led to suppose that the insolvent was remaining in custody. These circumstances, however, do not affect the question of proof. That question is the same as if the claim were by some other person, not being petitioner nor assignee. The case is one of dividend without adjudication. The Court comes to the business in ignorance of creditors, and acts under the instruction of the 62nd section of the statute, which in such case requires the dividend to be made among those who shall prove their debts. Can, then, Mr. Loosemore prove? I think not. The law says that one who has had his debtor in execution and discharged him, has ceased to be a creditor. It has been urged that property which passed by the vesting order, is held in trust for those who were creditors at the date of the vesting order. Such are not the terms of the vesting order. The words are, "in trust for the creditors who shall be entitled to share in a dividend." This sends us for information to the dividend clause which I have already mentioned, by which we find that those are entitled who shall prove their debts. Mr. Loosemore has no debt. He has done that by which he ceased to be a creditor. This Court has decided that where the debtor has been discharged by his plaintiff after adjudication, the right to dividend is not lost. But it is not inconsistent with this, to decide that in the present case it is lost. When dividend is made after adjudication, the same 62nd section gives a different criterion of the right to dividend, expressly referring us to the sworn schedule. There may be errors in the schedule, and these are open to correction; but if it has been correctly sworn to, the debts which it discloses are the debts on which dividend is to be paid. A debt which had been already lost by discharge of the person from execution, would not properly stand as an existing debt on swearing to the schedule. This distinction, thus warranted by the words of the Act, rests upon an intelligible principle. An insolvency without adjudication will not interfere with a creditor's right of suit. He holds his right untouched by the insolvent law. He holds it, then, on the usual terms, namely, that if after execution against the person he discharges the person, he discharges the debt. An adjudication alters the law between the parties, substituting a new relation between them under the decree of this Court. The mode henceforth of acting against property is through the judgment which stands on behalf of the whole body of creditors, and which can only be put in execution under the discretion of the Court. In the liability of person also a new state of things ensues. The unlimited power of the creditor is gone together with its incidents. It may be pronounced that in future no creditor shall take or detain the person. Or it may be that some or all are permitted to do so for a limited time; but it is no part of the decree of this Court, nor in the spirit of it, that any creditor, though such qualified power is accorded to him, shall be required to exercise it. Those who have not already arrested an insolvent are not compelled to procure a detainer. So one who has before arrested is not compelled to continue a detainer. It would be a compulsion, and a compulsion resting on no principle if, by discontinuing the detainer, he should forfeit his claim to dividend. I say, then, that without adjudication an insolvency has no prospective consequences; is not pleadable; avails nothing for the debtor: a plaintiff detains him as long as he thinks fit; but, if he voluntarily discharges him, he cannot be retaken; and the satisfaction of the debt, which was inchoate by the capture, becomes complete. This is quite consistent with the principle that, when an insolvency has been attended with adjudication, the qualified right of detainer exists only under the special sanction of this Court; so that he who is left for some specified time at the mercy of his creditors may be discharged by those who have had him in custody, and may remain unmolested by the rest; or, till the period arrives, he may be more or less deprived by them of his liberty. It is no part of the law of this Court, that when the insolvency shall be referred into adjudication, the creditor who originally detained shall be incompetent to waive the privilege which, by the terms of that adjudication, may be continued to him. The justice of the distinction, namely, that a discharge before adjudication is satisfaction; but that after adjudication it is not.

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tion is satisfaction and after adjudication is not, will easily be recognised. We are all familiar with the practice for a detaining creditor to send a discharge shortly before the hearing, thereby making it impossible for the debtor to obtain for himself the benefit of an insolvency. In 1838 I proposed a remedy for this injustice, and pressed it upon the authorities when the Act of 1 & 2 Vict. was in progress. But they were deaf to my remonstrances, and the injustice is unremedied. Surely it is fit, that one who thus perversely sends his debtor a discharge, should do so on the usual condition that such discharge operates a satisfaction of his particular debt; that, while it damages the debtor, it should also have its usual result to the creditor. A plaintiff in such case causes the insolvency to be abortive for the other party, and prevents the contemplated change of relation between him and his creditors from being matured; from the moment of that discharge he remains liable to each of those who continue creditors: the insolvency has done something against him, nothing for him. It is then a just consequence to him whose act causes such defeat of hopes, that that act should have to himself the ordinary effect. He takes from the defendant the benefit of the statute: why not then from himself also? It is, however, no less clear that, in the other case, when an insolvency has been perfected by coming to judgment, and the debtor has got for himself the benefit of it, the same thing would not be a just consequence. The law is newmodelled. Individual satisfaction can never again be sought by any process. The law has interposed, not in the ordinary way between A. and B. but between A. and the entire body of his creditors; and, though the policy of the law does in certain cases still prescribe a limited liability of person, there is no ground for saying, that the law exacts, against the discretion of a creditor, that he should be the inflictor of the penalty. He is entitled to say that his position is changed; he has acted for others as well as for himself; he can no longer wield the power which the general law gave him as a plaintiff; but he has gained other objects in its place: title to existing property for all creditors, and special means, through this Court, of resorting to future property if it should arise. The rights of all, with the duties and the risks of all, are made the same. In the present case, Mr. Loosemore knowingly substituted one state of things for another, as affects himself. He discharged the judgment-debt, taking a fresh written promise having its own dimensions. On this the insolvent remains liable. Mr. Loosemore has the benefit of it. It was by his own act, the liberation of the debtor, that he got that benefit. That act made adjudication impossible. If there had been adjudication, a new promise would not have availed for that debt. The claim would have remained cognisable in this court, and this court only. Mr. Loosemore has made his election. He has discharged the debt which otherwise he would be competent to prove, and he has acquired a new right, on which there can be no proof.

*Claim to prove disallowed.*

Monday, Aug. 18.  
(Before Mr. Commissioner LAW.)  
*Re JAMES ELLIS.*

*Bail—Opposition—Privileges of attorneys.*

The rule or instruction by the Court respecting oppositions by attorneys, upon application of insolvents to be admitted to bail till their hearing, under 1 & 2 Vict. c. 110, is thus indorsed upon the "Original notice of sureties":—"Any creditor, by himself, by counsel, or by his attorney or attorney's agent, may there object to the proposed sureties, or otherwise object to such application."

This insolvent, lessee or proprietor of Cremorne Gardens, applied to be admitted to bail till the day appointed for his hearing.

*Bursell*, an attorney, appeared to oppose for Mr. Thos. Foulkes, detaining creditor.

*Cooke*, for the insolvent, objected that Mr. Bursell was not the attorney named on the record, or his agent, and therefore he was not entitled to oppose.

*Bursell* said, in reply to the learned Commissioner, he certainly was not Mr. Foulkes, attorney in the action, nor the attorney's agent; but he had lately been employed by him in professional business as his attorney; and meeting him that morning, he had instructed him to oppose on his behalf.

Mr. Commissioner LAW observed, that he was not aware whether this point had ever been discussed. The matter should be considered upon principle.

*Cooke* referred to the invariable practice of the Court, and continued—It was not competent for a man to meet any attorney in the street and say go and oppose for me. There would be nothing to show that an attorney so situated was properly instructed, and it might lead to great abuse. He should, at all events, come there fortified with something in writing to show that he was authorised to appear. There had been no order of the Court to change attorneys in the action upon which insolvent was detained in custody.

*Bursell* contended that when a judgment was recovered there was no necessity for a change of attorneys by rule of Court. The rule of Court recognised agents. He could appear in the same way as Mr. Foulkes.

*Cooke* said there was a case many years ago before the Chief Commissioner. Mr. Lewis was agent of a country attorney, and as such he appeared to oppose the bail. His privilege to oppose was questioned, as the attorney for whom he appeared as agent had an agent in London in Common Law matters. The Chief Commissioner declined to allow Mr. Lewis to oppose.

Mr. Commissioner LAW inquired why had the Chief Commissioner refused to hear Mr. Lewis?

*Cooke*.—Because he did not come strictly within the phrase in the rule "Attorney's agent." Mr. Lewis had not done the business in the action upon which the insolvent was detained. That was the case in the present instance. This gentleman was neither the attorney upon the record nor the attorney's agent. The privilege to oppose bail was an indulgence to the attorney upon the record, and to him only, and not a general permission to the detaining creditor to employ whom he pleased. He was just informed that this gentleman could not get the discharge of the insolvent in this action, not even by the consent of the client, without the consent or authority of the attorney upon the record.

*Bursell* said that that was so if his costs had not been paid; but if his costs had actually been paid, an action would lie against him if he refused to consent.

Mr. Commissioner LAW said, the only matter that had caused him to doubt at all the propriety of excluding this gentleman from the privilege of opposing for the creditor under these circumstances, was the suggestion that it might happen that the proceedings in an action might be of some standing, and the communication between the attorney and client might have ceased, and therefore it might not be reasonable to require the client to apply to the same attorney. Supposing there might be a case of that kind, it had nothing to do with this case. The reason why they allowed attorneys to appear without counsel, was not that the Court allowed attorneys to usurp the province of the Bar as they did in some places, but the reason of the exception was, that it was in favour of liberty. As the time was too short to instruct counsel, attorneys were permitted to appear, and under such circumstances it was reasonable that they should be allowed to do the business in person. That was the reason, and the only reason, why they allowed attorneys to transact business upon these occasions akin to the business of the Bar. It was true, that attorneys appeared upon dividends, proof of debts, and so on, in business which resembled the old bankruptcy business, and it was not unreasonable that they should be allowed to appear in matters of accounts, &c.; but in the trial of an issue they did maintain the privilege of the Bar. He thought that this gentleman should not be allowed to oppose.

*Opposition by Mr. B. disallowed.*

Mr. Commissioner LAW observed that this had been a discussion limited in its extent, as it only concerned detaining-creditors and their attorneys and agents, and therefore all other creditors who have not sued must be at liberty to employ any person they please.

*Cooke* said that if there was no suit, parties might just as well employ counsel as attorneys.

Mr. Commissioner LAW.—Our rules, say any attorney. I do not recollect ever to have spoken to the commissioners about it. We have not quite discussed the whole question.

*Re THOMAS FULLER.*

*Privilege—Attorney—Attorney's clerk.*

The attorney for the creditor may oppose bail, but not his clerk.

This insolvent came up for bail, and the clerk of the creditor's attorney appeared to oppose.

Mr. Commissioner LAW intimated that a clerk could not appear.

*Opposition by attorney's clerk disallowed.*

The creditor himself then conducted his own case.

Ecclesiastical Courts.

ARCHES COURT.

Reported by Dr. WADDILOVE, of Doctors' Commons.

June 18 and July 17.

CORDY, PALMER, and LEWIS v. BENTLEY.

*Church-rate—Minority of vestry.*

A parish church and district chapel being both in want of repair, a monition was granted, calling on the churchwardens to take the necessary steps to procure their repair. A vestry was convened, the majority of rate-payers present, in effect, voted against the rate; the minority then

passed a resolution in favour of the rate. A libel pleading these facts was admitted to proof.

This was a cause of subtraction of church-rate, promoted by James Cordy, Richard Palmer, and John Lewis, as churchwardens of the parish of St. Nicholas, Brighton; it was brought by letter of request from the Consistorial Court of the Bishop of Chichester. The question now before the Court was, whether the libel was admissible, this involved the question, whether a rate made in conformity with a resolution passed by the minority of the rate-payers in vestry assembled, could, where the repairs of the church were urgent, and a monition had issued from the proper ecclesiastical authorities, calling on the churchwardens to take the necessary steps towards putting the church in repair, be enforced. The material averments in the libel are contained in the judgment.

*Curteis* and *R. Phillimore*, in support of the libel, relied on *Goaling v. Veley* (the Braintree case), 14 Jurist, 406; 12 Q.B. 328.

*Jenner* and *Harding*, contra, contended, that that case being under appeal, the Court would not consider it a binding authority; and also that the rate was invalid, since it included the cost of articles not necessary to the performance of public worship.

Sir H. JENNER FUST.—This case has been allowed to stand over, in the hope, rather than the expectation, that some final result might have been arrived at with respect to the Braintree case, and which might have furnished the Court with some rule or principle upon which it might decide these questions. Unfortunately that hope has not been realised, and the Court must therefore give its opinion without that aid. The suit is brought to the Arches Court by letters of request from the official principal of the Consistory Court of Chichester. The citation was returned on the 6th of August, 1850. The rate having been made on the 9th of December, 1849, but no explanation was given to the Court why the churchwardens were so dilatory in instituting these proceedings to enforce payment of the rate. The libel consists of twenty-two articles, many of which might have been dispensed with without detriment to the ends of justice or affecting the merits of the case, inasmuch as they refer to occurrences which took place antecedent to the making the rate in dispute. It appears that, in the years 1846 and 1847, vestry meetings were held, at which a church-rate was proposed, but the rate was on each occasion negatived by a majority of the persons present. No further proceedings towards making a rate appear to have been adopted until application was made by the vicar of the parish to the Court of the Archdeaconry of Lewes praying for a monition against the churchwardens calling upon them to shew cause why they did not take the necessary steps towards effecting the repairs of the church and chapel. The articles to which I have referred as being unnecessary relate to that application only, and therefore do not affect the present question. As, however, the expense of bringing in those articles, and the exhibits annexed to them, has been incurred, the Court would not reject or alter them, provided the libel were generally admissible. The article which is of most importance pleads that the ancient church of St. Nicholas and the chapel of ease of St. Peter still continuing respectively in urgent need of repair, and the churchwardens having no funds in hand wherewith to effect such repairs, they, and divers of the most substantial and others of the parishioners and inhabitants, ratepayers of the parish, on the 9th of December, 1847, met together in vestry, pursuant to public notice, and in obedience to the monition issued, at which meeting the Rev. H. M. Wagner, the vicar, presided. The churchwardens exhibited to the meeting a survey or specification and estimate of the repairs necessary to be immediately done to the church of St. Nicholas and the expenses thereof, which were computed to amount to 278l. 3s. 8d. and also the repairs necessary to be done to the chapel of ease of St. Peter, amounting to 157l. 17s. 4d. They also produced estimates of other necessary and lawful expenses incident to the execution of their office for the current year, amounting to 188l. 6s. and 101l. 3s. 9d. and of the expenses of rate-books and making the rate, amounting to 75l. Mr. Cordy proposed a rate of 1d. in the pound, which was seconded by Mr. Williams, whereupon an amendment was moved to the effect "That the reparations and clean keeping of the church be done by voluntary contributions, in accordance with the statute law of the land." The Court does not know where that statute law is to be found. The chairman refused to put the amendment, on the ground that it was illegal, and another amendment was then proposed, to adjourn the consideration of the rate for six months, which the chairman also declined to put, on the same ground. The original motion was then submitted to the meeting, and negatived by a large majority, the numbers being, 47 for it, and 90 against it. The chairman declared that the votes against the motion were illegal, and thrown away, and that the motion



## CIRCUIT REPORTS.

was carried. Upon which the chairman and other parishioners assembled in vestry, and made the rate, which would amount to about 800l. The sum assessed on Mr. Bentley was 19s. 13d. There could be no doubt that the vestry was duly called, and that the estimates and specifications were laid before it. Under the Acts of Parliament (58 Geo. 3, c. 45, and 3 Geo. 4, c. 72), the parishioners were liable to the repairs of the chapel as well as of the church. The postponing of the making of a rate for six months has been held to be equivalent to its refusal, and the Court must so regard it in this case. In the course of the argument some observations have been made with respect to the Baintree case, but the Court is not inclined to enter into that question; the decision of the Court in that case not having hitherto been impeached. From the principle laid down in it the Court is by no means inclined to depart. The principle was, that the repair of a church is a common law obligation, which, according to the opinion of that very learned judge, the late Chief Justice Tindal, the parish was bound to discharge, and had no right to discuss whether they would repair the church or not. When the necessity for repairs was shewn, the funds necessary to defray the expenses must be provided, and if the majority refused to make a rate, the minority might make it. So far as the repairs of the church and the providing of things necessary for the decent celebration of divine worship were concerned, they came under the principle of the Baintree case. There were, however, certain other things which did not stand on the same footing of the ancient common law, but which nevertheless had become so necessary to the due performance of divine service, and the decency of its performance in large populous places, that it had repeatedly been held that it was competent to a majority of the vestry to determine that the expense for them ought to be incurred, and the sum might be recovered in a suit for subtraction of church-rates. It is not necessary to go through the articles, but they are comprised in what is denominated the ornaments of the church, the repair of the bells, the organ, the salaries of the organist, pew-openers and beadies. If the majority adopted those expenses, they formed a part of the church-rate, if they rejected them they could not be enforced. In the present case items of that character had been included in the estimates laid before the vestry, and no objection had been made to them until it was taken by counsel at the bar. It was now said with respect to St. Nicholas' Church, that there was no necessity for the pew-opener, the beadies, books for the use of the minister, and registry books for the church. Objection was also taken to the churchwardens' visitation fees, charges for stationery and printing, and removing chalk from the new burial-ground. With regard to the chapel of St. Peter, the following items were objected to:—Attending to the public clock, beadies' salaries, and repairs to the organ. The principal objection, however, was taken to a charge for matting for the galleries, carpeting for the altar, and the cost for rate-books and making the rate. There being, however, no objection raised to those items in the vestry, the Court must consider whether that was not an assent to the propriety of the articles being procured for the purposes stated in the estimate. It had been argued by one of the learned counsel for Mr. Bentley, that it was not incumbent on the parishioners to take the objection and separate the legal from the illegal articles. The Court might be told that there being no law which threw that necessity upon them, if it should be of opinion that it did rest upon them, it would be judge-made law. I am afraid that a great deal of law is judge-made law. Unless an Act of Parliament makes a specific provision in every particular, the application of one principle to another constitutes the law, and that must be considered to a great extent judge-made law. Whether that is good law or bad I am of opinion, as at present advised, that those articles which might be called "ornaments" are, if not necessary, proper at least for the due and decent performance of divine service, and were properly objects of a church-rate when they were laid before the vestry, and every parishioner had an opportunity of expressing his assent to or dissent from them. If parishioners will not take the trouble to object to estimates, they must take the consequences upon themselves. I am of opinion that the libel at present before the Court is admissible, and I shall, therefore, admit it. What the result may be hereafter it is impossible to say.

## Circuit Reports.

## OXFORD CIRCUIT.

Reported by J. E. DAVIS, Esq. Barrister-at-Law.

## WORCESTER SUMMER ASSIZES, 1851.

Monday, July 21.

(Before Mr. Justice ERLE.)

REG. v. ATTWOOD.

Confession—Inducement.

To caution a prisoner that what he said would be

used against him on his trial if committed, is not an inducement to him to make a statement so as to exclude that statement from being given in evidence on the trial.

The prisoner was indicted for uttering at Pershore on the 16th of May, 1831, a certain forged order for the payment of the sum of five pounds and fifteen shillings, with intent to defraud one William Jeremy.

A police officer, who took the prisoner into custody, was called on the part of the prosecution. He stated that the prisoner made a communication to him, which he took down in writing, and the prisoner signed his name to it. Before he made the statement, the witness said, "I told him to be careful; it would be used against him on his trial if committed by the magistrates."

On the statement so signed by the prisoner being tendered in evidence,

W. H. Cooke, for the prisoner, submitted that it was not admissible in consequence of the terms made use of by the witness. Mr. Justice Maule had so decided with respect to precisely the same state of circumstances. Where a magistrate told a prisoner "What you say will be given in evidence against you," that learned judge said,—"It is not proper for a magistrate to tell a prisoner that what he says will be given in evidence against him. It has been held that to tell a prisoner that what he says will be used against him or for him, is an inducement, and to say that it will be given in evidence against him, comes to the same thing, for the statement is made upon an understanding that it will be given in evidence; and it does not signify that he is told that it will be used against him, for if he is told that it is to be used at all, it may induce him to say something that he may suppose may make for him. It did not become necessary, however, to decide the point. *Reg. v. Jones*, Gloucester Summer Assizes, 1843, sanctioned by Rolfe, B. Gloucester Winter Assizes, Dec. 15, 1843, in *Reg. v. Holmes*, 1 C. & K. 248. (a)

ERLE, J.—Giving the proper force to expressions, treating language in its obvious sense, it is impossible to say that an inducement was held out to the prisoner to make any statement. I have not a doubt of the admissibility of the evidence in this case.

The statement was accordingly put in, and the prisoner was convicted.

Skinner, for the prosecution.

W. H. Cooke, for the prisoner.

## REG. v. STANTON AND OTHERS.

Statute 9 Geo. 4, c. 31.—Conviction and imprisonment for assault a bar to subsequent indictment for felony.

The statute 9 Geo. 4, c. 31, provides (sec. 27) for the summary conviction of persons for common assaults and batteries, and gives power to two justices of the peace to order the offender to pay a fine, with imprisonment in case of non-payment; or, if the offence be not proved, or is of so trifling a character as not to merit punishment, to dismiss the complaint and make out a certificate under their hands, stating the fact of such dismissal, such certificate to be delivered to the party against whom the complaint was preferred.

Section 28 enacts, "That if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." "Provided always (sec. 29) and be it enacted, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act," &c.

Semble, that a conviction for an assault under the above statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault, charging an assault, and wounding with intent to murder, &c.

The prisoner, Samuel Stanton, together with Francis Tombs and two other persons, was indicted for feloniously assaulting and wounding William Tombs, with intent to kill and murder him. There were other counts in the indictment, alleging the intent to be to maim, &c.

In the course of the trial it appeared that the prisoner, Samuel Stanton, had been summoned by

(a) The case of *Reg. v. Jones* was cited from a MS. note of Mr. Greaves, Q.C.—[J. E. D.]

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the prosecutor before two magistrates for this same assault and had been fined, and in default of payment of such fine, had been imprisoned in Worcester gaol. A true bill had been subsequently found against the prisoners at the Spring Assizes, for the felonious assault, upon which indictment they were now tried. The jury acquitted the prisoners of the felony, and found them guilty of a common assault.

ERLE, J. Inquired why the conviction by the magistrates had not been pleaded in answer to this indictment, in pursuance of the statute 9 Geo. 4, c. 31? (a)

Skinner, for the prisoner Stanton, said, that independently of the fact that he was not instructed until after the prisoner had pleaded, there seemed to be a difficulty in pleading the conviction for the assault in answer to an indictment for the felony.

ERLE, J.—In my opinion, the conviction would have been an *estoppel* to the indictment for the felonious assault and wounding, if pleaded; and although it has not been pleaded, I am bound to consider the charge as having been already adjudicated upon, and the prisoner as having undergone the punishment allotted for it. I think the justice of the case will be answered by all the prisoners entering into their own recognizances to appear and receive judgment when called upon, and to keep the peace to the prosecutor for one year.

The prisoners entered into their recognizances accordingly in 40l. each, and were discharged.

Huddleston and Lovey, for the prosecution.

W. H. Cooke, for the prisoner Francis Tombs.

Skinner, for Samuel Stanton.

## Irish Reports.

## COURT OF CHANCERY.

Reported by J. BLACKHAM, Esq. Barrister-at-Law.

Jan. 30, Feb. 10 and 11.

O'REILLY v. SMITH.

Will, to fulfil trusts of marriage settlement—"Not included in our marriage settlement"—Construction.

In a devise, the words "not included in our marriage settlement" apply to such property, or the interest on it, which at the period of the devise is out of the power or disposition of the testator. A money-fund was vested in trustees upon certain trusts, for the benefit of the wife. The husband being seized of certain freehold lands, devised them to other trustees, "to fulfil the trusts of his marriage settlement," then over: Held, that, under the circumstances, the widow did not, under the will, take any interest in these lands.

This was a suit to establish the will of John Edward O'Reilly, and that the plaintiff, Janette Martha O'Reilly, might be declared to be absolutely entitled, for her separate use, to the moneys due for principal and interest upon a mortgage of the 5th of June, 1847, for 4,000l. and also to an estate for life in the mortgaged premises, and in certain other lands in the pleadings mentioned. It appeared that the plaintiff, being possessed of a sum of 7,364l. by indenture of marriage settlement, bearing date the 4th day of May, 1847, it was witnessed that the sum of 7,364l. should be vested in trustees, upon trust, that if the said John Edward O'Reilly should secure by mortgage certain premiums belonging to the testator, for the payment of 4,000l., that then the trustees should pay to him out of the trust-money the sum of 4,356l. for his own use and benefit. The trustees were to invest the residue of the trust-money, &c. and to pay the dividends or interest during the joint lives of the plaintiff and of the testator to the plaintiff for her sole and separate use, then to the survivor, and at the death of the survivor to hold the principal for the child or children of the intended marriage, and if but one child, in

(a) The statute 9 Geo. IV. c. 31, provides for the summary conviction of persons for common assaults and batteries, and gives power to two justices of the peace to order the offender to pay a fine, with imprisonment in case of non-payment; or, if the offence be not proved, or is of so trifling a character as not to merit punishment, to dismiss the complaint, and make out a certificate under their hands, stating the fact of such dismissal, such certificate to be delivered to the party against whom the complaint was preferred.

Sec. 28 enacts, "That if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." "Provided always and be it enacted (sec. 29), that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act," &c.



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trust for that child. But in case there should be no child, then upon trust, if the plaintiff should survive the testator, for the plaintiff, her executors, &c.; but if she should die in the lifetime of the testator, then upon such trusts as the plaintiff should appoint. The trustees of the mortgage were to pay the interest to the testator during his life, after his death to the plaintiff, and after the death of the survivor, the trustees were to hold for the benefit of the children, and should there be none, for the testator absolutely.

The testator executed the mortgage and died on the 3rd of September, 1848, having, by a will bearing date the 7th of November, 1848, devised all his real and personal property to trustees, first, "to fulfil the trusts of my marriage settlement, then for my nephew, C. J. Smith, esq. for his life, and, after his death, to his child or children, as he shall appoint; should he die without issue, then to the sole use of my sister Margaret for her life, and to her children as she shall appoint; in default of such appointment by her, to her children share and share alike as tenants in common for their lives, her daughters to hold as *femes sole*, notwithstanding coverture, and at the demise of said children of said Margaret, to my right heirs, if women, as *femes sole*. As to my funded property, my trustees are to hold 500*l.* of  $\frac{3}{4}$  per cent. stock, for the sole and absolute use of Isabella Cusack, and to pay it only on her sole and separate receipt notwithstanding her marriage; the remainder of said stock I bequeath for the sole and separate use of said Margaret Reilly, her husband or his creditors to have no interference therewith whatever; if she do not survive me, then for the use of her children in equal proportions, their executors, administrators, or assigns, the women to hold as *femes sole*. I wish to alter a portion of that part of my will above relating to the funded property bequeathed for Margaret or her family. Should my wife have a child by me, they are to pay C. J. Smith, esq. 500*l.* sterling out of it; should such child or children survive me, my heirs, though life tenants, can cut, sell, and carry away turf bog off said lands, and cut timber, as well off the demesne of Annagh as in the churchyard therein. I give to my beloved wife all our furniture, horses, and moveables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a *feme sole* should she marry again. I direct my furniture at Annagh shall be sold, the carriage we travelled in from London (with the exception of the pictures and engravings, which I leave to my wife), and produce handed to my cousins, and to C. J. Smith, his executor, who proved the will."

*Christian, Q.C. Francis Fitzgerald, Q.C. and R. R. Warren*, for the plaintiff, cited *Strode v. Russell*, 2 Ves. 621; S. C., Eq. Ca. Ab. 210, pl. 18; 3 Ch. Russ. 169, affirmed on appeal; *Vorn Lytton v. Lady Falkland*, 3 Bro. C. C., Tom. Ed. 24; *Chester v. Chester*, 3 P. W. 56; *Glover v. Spenslowe*, 3 Bro. C. C. 337; *The Incorporated Society v. Richards*, 1 Dr. & War. 258; 4 Ir. Eq. R. 177.

*Green, Q.C. Deasy, Q.C. and Hemphill*, for the defendant, Margaret Reilly, cited, as to the first clause in the will, *Adams v. Adams*, 1 Hare, 537; *Doonan v. Smith*, 9 Ir. Ex. 426; *Gough v. Andrews*, 1 Col. 69; *V. C. Sonday's case*, 9 Co. 127. On the second clause, *Cooke v. Oakley*, 1 P. W. 302; *Church v. Munday*, 15 Ves. 396; *Welby v. Welby*, 2 V. & B. 187; *The Attorney-General*, 8 Ves. 256, 294; *Daniel v. Miles*, 6 East, 494; *Straugh v. Teatt*, 2 Burr. 912.

*Bolleston, Q.C. J. Maley, and John McMahon*, appeared for other parties.

*F. Fitzgerald* replied.

The Lord Chancellor having expressed his then opinion, subsequently desired to have the case re-argued. It is not necessary to state this opinion, as he repeated it in his final judgment.

*Monday, Feb. 10.*—The case was now re-argued by *F. Fitzgerald, Q.C. and R. R. Warren*, for the plaintiff.

*Green, Q.C. and Deasy*, for the defendant.

*Warren* replied.

*Tuesday, Feb. 11.*—The LORD CHANCELLOR.—On consideration, I see no reason to change the opinion which I originally formed upon the first question raised in this case. It has been contended that under the first part of this devise the testator could not have intended to confine the trusts of the will to the money fund already secured by the mortgage of the lands specified. I cannot yield to that distinction. It is first to be observed that the testator does not devise the lands therein mentioned to the trustees of the marriage settlement, but to new trustees, and it seems to me the words "to fulfil the trusts of my marriage settlement" will be satisfied by holding the entire lands to have been devised as a security for that mortgage debt, and to me there appears to be nothing incongruous in including it in those words. On the second question which has been argued, I am of opinion the plaintiff must succeed. After some bequests, the testator says, "I give to my beloved wife all our furniture, horses,

and moveables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a *feme sole*, should she marry again." If this question turned merely on the words "not included in our marriage settlement," it would not be distinguishable from that decided in the case of *Strode v. Russell*, 2 Ves. 621. In that case the deviser had an absolute power over the estate, and the devise was of all the testator's land "out of settlement." These words were there used in the same sense as the words "not included," or as bearing the interpretation of being "not mentioned" in the previous settlement. I think it might more properly be read to mean not "bound by." In *Chester v. Chester*, 3 P. W. 56, S. C.; 2 Eq. Cases, A. 330, p. 9; Fitz. ib. 150, the words used were "not by him (the testator) formerly settled, or thereby by him otherwise disposed of." *Glover v. Spenslowe*, 4 Bro. C. C. 337, is still nearer the case before me. "All my lands not settled in jointure upon my wife;" and in *Richards v. The Incorporated Society*, 1 D. & W. 258, the words were "my said unsettled real estate." These devices appear to me to mean and apply to the property, or the interest in it, at the period of the devise, not taken out of the power or disposition of the testator; and in the will before me I would read these words as meaning a fund not bound by the settlement, so as to take it out of my power; and in this view this case is stronger than those cited. But the case does not stop there, for it appears to me to have been the intention of the testator to give to his wife this additional sum of money. The marriage settlement included two funds, one settled to the sole use of the wife, the other not settled; and it was the meaning of the testator to give her the fund not being already settled for her own use; but yet as a *feme sole* "if she should marry again." The word "fortune" applies only to the provision made for the lady, and could not be considered as comprising only the unsettled money-fund, that is, such money as she had independently of the money settled upon her, and the testator introduced the words "as well as her own fortune," meaning that which was already her own by settlement; and there are no expressions in the will applicable to this portion of the testator's property, unless it be in these words. The testator's intention more probably was to restore to his wife that of which she had given up one-half without any equivalent. With this indication of intention, and the probabilities of the case, I think the safest conclusion I can arrive at is, that Mrs. O'Reilly is entitled to the bequest of the 4,000*l.*

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

July 19 and Aug. 7.

WATTS v. JEFFERYES, *ex parte* REECE.

*Judgment debt—Charging order—Stop order on fund in court to which the judgment debtor is entitled—Construction of 14th sec. of 1 & 2 Vict. c. 110.*

*A judgment creditor who has obtained a charging order against a fund standing in the name of the Accountant-General of the Court of Chancery, to secure the payment of an annuity to which such debtor is entitled, may obtain a stop order upon petition before the expiration of the six months from the date of the charging order, during which the 14th sec. of 1 & 2 Vict. c. 110, provides that no proceedings shall be taken to have the benefit of such charge.*

In this case, a petition had been presented by Richard Reece praying a stop order on the dividends of a sum of 6,867*l.* Bank Three per Cent. Annuities, standing in the name of the Accountant-General, in trust, in the cause *Cape v. Jefferyes*, No. 1, the annuity account of Alexander Taylor, and Vice-Chancellor Knight Bruce having refused to make the order, and directed the petition to stand over, the petitioner appealed to the Lord Chancellor.

The petition was presented in several causes, instituted for carrying into execution the trusts of the will and codicils of Thos. Cape, the testator in the causes, who by the second codicil to his will, dated the 16th day of June, 1847, bequeathed an annuity of 200*l.* to Alexander Taylor, the respondent in this petition, and directed his executors and trustees, as soon as conveniently might be after his decease, to appropriate and set apart sufficient funds wherewith to pay and satisfy the said annuity clear of all income and property tax. By an order made in these causes, dated the 18th of November, 1850, it was ordered that the acting executor of the said testator should transfer to the credit of *Cape v. Jefferyes*, No. 1, to the annuity account of Alexander Taylor, certain sums of money, amounting together to 6,867*l.* Bank Three per Cent. Consolidated Annuities; and it was ordered that the dividends there-

after to accrue thereon should from time to time, until further order, be paid to Alexander Taylor to answer his annuity.

The petition then stated that Alexander Taylor had executed a bond to the petitioner, dated the 19th day of November, 1835, conditioned for payment to the petitioner for his life of an annuity of 104*l.* 2s. 6d. and that in the year 1843 the petitioner brought an action on the bond in the Court of Exchequer against Alexander Taylor for recovery of the arrears then due on the annuity, and recovered judgment in the action for the penal sum of 3,000*l.* marked with execution to issue for 381*l.* and costs. That sum was levied under a writ of *fiat facias* on a cheque by the Accountant-General for 500*l.* the arrears of Alexander Taylor's annuity, which formed the subject of a former petition in these causes. The petition then stated that in Hilary Term last the petitioner caused a writ of inquiry to be issued for the purpose of assessing the damages due to him on further breaches of the condition of the bond by nonpayment of the annuity, which were assessed at 953*l.* 15s. 7d. and costs, for which execution was then to issue. By a rule made *ex parte* in the action by Martin, B. dated the 25th of February, 1851, on the application of Reece, the petitioner, it was ordered that unless cause was shewn to the contrary to the judge at chambers on the 15th of March, the sum of 6,867*l.* Bank Three per Cent. Consolidated Annuities before mentioned should stand charged with the payment of 940*l.* 6s. 1d. being the amount due to the petitioner; and by a rule dated the 15th day of March, it was ordered that the rule nisi was made absolute, and that the said Bank Annuities should stand charged with that amount. The petition then stated that the time was not yet elapsed, after which the petitioner would be at liberty, according to the statute, to enforce his charge, but claimed to be entitled to a stop order, to prevent Taylor from receiving the dividends to accrue on the annuities. That the respondent was resident out of the jurisdiction, and that on a former petition Messrs. Chauntler and Westwood, of Gray's-inn, had acted as his solicitors. The original petition was heard *ex parte* on the 25th of June, when Vice-Chancellor Knight Bruce made an interim stop order on the funds till the 9th of July, and directed that service of the petition on Messrs. Chauntler and Westwood should be good service on the respondent Taylor. The petition again came on to be heard before the Vice-Chancellor, when the interim order was discharged, and the petition was ordered to stand over until after the end of six calendar months from the date of the charging order. Against that order the petitioner appealed.

*Bacon and Smythe* supported the appeal petition. They contended that the intention of the Act was not to prevent proceedings to prevent the fund being appropriated by the judgment-debtor during the interval between the date of the charging order and the end of six months; and that the effect of the charging order was to give the judgment-creditor a present lien on the fund set apart for payment of the annuity. The 14th section of 1 & 2 Vict. c. 110, provided that if any person against whom a judgment should have been entered up should have any Government funds or annuities, or any stock or shares of any public company, &c. standing in his name, in his own right or in the name of any person in trust for him, it should be lawful for a judge of one of the Superior Courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares should stand charged with the payment of the amount for which judgment should have been so recovered, and interest thereon, and such order should entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment-debtor; "provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order." By the 3 & 4 Vict. c. 82, the provisions of the 1 & 2 Vict. c. 110, were extended to funds standing in the name of the Accountant-General. That the words of the proviso at the end of the 14th section, if taken literally, were opposed to all the rest of the Act, and would leave the fund at the mercy of the debtor during the six months.

The LORD CHANCELLOR.—It is clear the creditor has a benefit from the charging order, therefore the words of that proviso must for some purposes have a restricted sense.

*Bacon*.—Had this been a fund in the hands of trustees, they would have been served with notice of the charging order, and would then have parted with the dividend now due at their own peril.

The LORD CHANCELLOR.—Suppose the debtor had given a judgment with a restraint in such words as are found in the Act, by way of agreement, the creditor could not get the rents falling due in the intermediate time?

*Bacon*.—He might give notice to the trustees or to the tenants. There might be some difficulty in such a case. (*Bristed v. Williams*, 3 Hare, 259.) Benefit means payment. A stop-order is not within

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the Act. (They referred to the 13th section, and other parts of the Act, of 1 & 2 Vict. c. 110, as bearing out their construction.)

The *Solicitor-General* and *Welford* for the respondent, contended, that the fallacy of the argument used for the petitioner was that a stop-order was not a benefit, to obtain which the Act expressly forbids the judgment creditor obtaining a charging order to take any proceedings. Benefit in the language of the 14th section means fruits. In order to obtain a stop-order the applicant must have a present interest. It is clear the creditor is not entitled to the fruits of a charge which occur within six calendar months from the date of the charging order. This was plain from the 13th section, which relates to real estate; there, after enacting that a judgment entered up shall operate as a charge upon the lands of the debtor at the time of entering up the judgment, it is provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment. The debtor, therefore, necessarily has receipt of the rents until the judgment creditor puts himself in possession, which he cannot do during twelve months after the date of his judgment. (*Smith v. Hurst*, 1 Col. C.C. 705; *Mackinnon v. Stewart*, 1 Simons 76; *Churchill v. The Bank of England*, 11 M. & W. 323; *ib.* 57.) In the latter case it was expressly held, that after the charging order had been made absolute, the Bank of England was not restrained from transferring stock or paying dividends to the trustees legally entitled, and against whose *cestui que trust* a charging order had been obtained. The second Act of 3 & 4 Vict. only extended the operation of the first Act to stock and dividends standing in the name of the Accountant-General.

*Smythe*, in reply.

## JUDGMENT.

*Thursday, Aug. 7.*—The LORD CHANCELLOR, after stating the facts and circumstances, and referring to the provisions of the two Acts of Parliament, said—The question is, whether, before six months from the date of the charging order expires, the proviso contained in the 14th section of 1 & 2 Vict. c. 110, excludes the right of the judgment creditor to a stop order, and I am of opinion that it does not. The intention of the Act is to give a judgment creditor a charge on the stock and dividends of the debtor, though with a restraint of proceedings to enforce that charge for six months, during which time the creditor is not to receive any benefit. His lordship here referred to the several clauses of the Act, and proceeded—It is clear the debtor, in this case, is not entitled to any stock, but only to the dividends of a sum of stock which has been invested to answer the annuity bequeathed to him by Major Cape's codicil. If the respondent's construction is correct, the security is different where the debtor has stock, and where he is entitled to dividends. In this case the respondent has no right to the stock, but only to the dividends during his life, and therefore the effect of holding the petitioner is not entitled to a stop order may be to deprive him of all security whatever under his charging order. I think the correct construction of the Act to be, that though no steps may be taken by the judgment creditor for giving immediate effect to his charge, he may take steps to prevent the diminution of the security on which he is entitled to a charge at the end of the six months. I am of opinion that the petitioner is entitled to the order he by his petition prays.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

*Saturday, April 26.*

*Re HUGH'S ESTATE.*

*Will—Construction—Revocation of devise.*  
*A. B. by his will devised real estate to C. and D. as trustees. By a codicil he appointed E. to be a trustee and executor of his will in the place of D. whom he did not wish to act as executor.*  
*Held, that the testator had, by the codicil, revoked the devise to D.*

This was a petition under the Trustee Act, 1850, for a reference to the Master to approve of new trustees of a will dated the 8th of February, 1837. The testator had, by his will, devised his real estates to John Loman and John Howard, in fee, upon certain trusts. By a codicil dated the day after the date of his will, the testator thus provided, "I do hereby nominate and appoint Fisher Redhead to be a trustee and executor of my will, in the place of John Howard, whom I do not wish to act as executor." Mr. Loman and Mr. Redhead having disclaimed, the present petition was presented by thirty of the persons interested under the will.

*Freeling* appeared in support of the petition.

*Swinburne*, for one of the persons interested, ob-

jected that although Mr. Howard was, by the codicil, removed from the office of trustee, the devise to him was not revoked, and therefore the legal estate remained in him. He also contended that as a claim in respect of this testator's estate had been filed, no order should be made in the present petition until that was heard.

The VICE-CHANCELLOR said that he considered, according to the true construction of the codicil, the legal estate was taken out of Mr. Howard. There were quite enough persons interested who asked for the order on this petition, and he should, therefore, grant the reference to the Master.

*Re RUSSELL'S ESTATE.*

*Practice—Infants—Next friend.*

*A petition by infants for the appointment of a guardian must be presented by their next friend.*  
*Jolliffe* appeared in support of this petition, which was presented by infants for the appointment of a guardian. The petition was presented by the infants alone.

The VICE-CHANCELLOR directed that a next friend should be named in the petition.

*Friday, May 2.*

*HOUGHTON v. BARNETT.*

*Answer—Sufficiency.*

*A defendant, in the schedule of documents admitted by the answer to be in his possession, described one item as "banker's pass-book," merely: Held, that this description was sufficient.*

An exception was taken to the defendant's answer in this case for insufficiency, one of the items in the schedule of deeds and documents, admitted to be in the defendant's possession, being described as "banker's pass-book," merely.

*Malins and Southgate*, for the plaintiff, contended that the defendant should have stated whose pass-book it was, and with what bank. They cited *Isman v. Whitley*, 7 Bea. 337.

*Baggallay*, for the defendant.

The VICE-CHANCELLOR said that he thought the answer was sufficient.

*Saturday, May 10.*

*Re Cook.*

*Infants—Guardian.*

*Where it is sought to make a mother the guardian of her children, some information as to the father's family must be given to the Court.*

*Shapter* stated that this was the petition of two infants, praying that the income of two sums of 95l. to which they were entitled, might be paid to their mother, and that their mother might be appointed their guardian, the father being dead, and they living with their mother. He asked that the appointment might be made without a reference, to save expense.

The VICE-CHANCELLOR said, that in no rank of life would he appoint a mother to be guardian to her children without some information as to the father's family. He would, however, order the income to be paid to the mother for the maintenance of the children.

*Thursday, May 29.*

*BACKHAM v. COOPER.*

*Practice—Claims—Non-appearance of plaintiff.*  
*Where on the calling on of a claim for hearing the plaintiff does not appear, the defendant is not entitled to the dismissal of the claim with costs without production before the rising of the Court of an affidavit of service of the writ of summons.*  
Upon this claim being called on, the plaintiff did not appear.

*Walford*, for the defendant, asked that the claim should be dismissed with costs.

The VICE-CHANCELLOR inquired whether he had an affidavit of service of the writ of summons.

*Walford* replied that he had not.

The VICE-CHANCELLOR said that if such an affidavit was dispensed with by the other branches of the Court, he would follow the practice; but if not he should act upon his own opinion, and require the production of an affidavit.

*Osborne (amicus curiæ)*, said that such an affidavit was required by Sir George Turner.

*Walford*, at a subsequent part of the day, produced an affidavit of service, and the

*Claim was dismissed with costs.*

*Saturday, July 12.*

*Re ATKINSON'S TRUST ESTATE*, and the 10 & 11 VICT. c. 96.

*Insolvency—Notice in Gazette—Purchase for value of an equitable fund.*

*A. B. entitled to a reversionary interest in a fund in the hands of a trustee, became insolvent in 1830, and again in 1834. In 1835 A. B. assigned his interest in the fund for valuable consideration to C. D. who did not know of the prior insolvencies, and who gave notice of his assignment to the trustee. It did not appear that the trustee had ever received notice of either insolvency.*

*Held, that A. B. was entitled to the fund, to the exclusion of the provisional assignee.*

This was a petition for the payment out of Court of a sum of 955l. 19s. 10d. Three per Cent. Consols. *Agnes Atkinson*, by her will, dated in 1814, bequeathed a legacy of 700l. to her three executors, upon trust to invest, and to pay the income to *Ann Argles*, widow, for her life, and after her decease the testatrix directed that the fund should be divided among all the children of *Ann Argles* who should be then living. In 1821 the testatrix died. In January 1851, *Ann Argles* died, leaving three children her surviving. The present petitioners were the purchasers of these children's shares, and as to the share of one of the children (*Alfred Argles*), a question in the case arose. In 1835 *Alfred Argles* assigned by deed, for valuable consideration, all his interest in the legacy to *John Richard Cook*, one of the petitioners, who immediately gave to the trustees notice of the assignment. In 1848 the surviving executor and trustee paid the fund into court under the Trustee Relief Act, and in a schedule to the affidavit required upon such payment, the several assignments of which notice had been received, were stated, and among these assignments was that from *Alfred Argles* to *J. R. Cook*, but no mention was made of any insolvency of *A. Argles*. On serving the present petition upon the representatives of the surviving executor and trustee, the petitioner, *J. R. Cook*, was informed that it had been ascertained that previous to the assignment to him, *Alfred Argles* had been twice insolvent, once in 1830 and afterwards in 1834. The provisional assignee was accordingly served with this petition. By an affidavit *J. R. Cook* stated that at the time of his purchase he did not know, and had received no notice directly or indirectly, of the insolvency of *Alfred Argles*.

*Frith*, in support of the petition, contended that the provisional assignee of *A. Argles* had no interest in the fund. *Mr. Cook* was a purchaser for valuable consideration without notice of any prior insolvency, and he had given immediate notice to the trustee of the assignment to him. The publication of the insolvency in the *Gazette* was not a sufficient notice of the provisional assignee's claim on the fund. The present petitioner had, therefore, gained priority by his notice to the trustee. (*Deane v. Hale*, 3 Russ. 1; and *Elty v. Bridges*, 2 Y. & C. C. 486.) It had been held that neither the issuing a fiat in bankruptcy nor the publication of the adjudication in the *Gazette* was sufficient notice to a purchaser (*Sowerby v. Brooks*, 4 Barn. & Ald. 523; *Hovill v. Browning*, 7 East, 161); and there was no clause in the Insolvent Act (7 Geo. 4, c. 57) similar to the 83rd section of 6 Geo. 4, c. 16. He referred also to 1 Sch. & Lef. 152; *Sugden's Vendors and Purchasers*, 948, 1,051; and *Cooke's Insolvency*, 68.

*Follett*, for the provisional assignee, contended that all an insolvent's estate and interest were so absolutely vested in the assignee that the insolvent could have nothing to assign to a purchaser. The purchaser must be held to have had notice from the *Gazette*.

*Goldfinch* for the trustees.

The VICE-CHANCELLOR (without hearing *Frith* in reply) said that he was not aware of any Parliamentary enactment that publication of an insolvency in the *Gazette* was to be deemed notice to all the world, and in the absence of that he must infer from the evidence before him, that this share of the fund was bought for value, without notice of the insolvency. But then it was said that the Act vested everything in the assignee. In his Honour's opinion, nothing more passed than would pass by the fullest assignment the insolvent could have made; and the fact of a second of two incumbrancers for value of an equitable fund without notice of a former one, giving prior notice to the trustee had more than once been held in this court to give him priority over the first. Then the assignee had full means under the Act of investigating and discovering the insolvent's property when he presented his petition; and unless the insolvent committed perjury, the assignee might have ascertained the existence of this fund. Under this circumstance his Honour was of opinion, that the petitioner was entitled to his proportion of the fund against the assignee. He entertained no doubt upon the subject, although the case did not appear to have been previously decided; but he considered it a question of considerable importance (so far as he could be said to consider any question of importance), about which he had no doubt, and he made this intimation to Mr. *Follett*, in case the provisional assignee should wish to appeal from his decision. (c)

By arrangement, 40s. costs were given to the provisional assignee.

(a) The following case decided at the Rolls on the 19th of January, 1849, has been furnished to the reporter:—

*Re the 10 & 11 Vict. c. 96, and the Trusts of the Will and Codicils of the Hon. Frances Fenton Cawthorne*, deceased, and of Vane Jada.

By the petitions of Mrs. Jane Hare and of Mr. John Cooper, presented in the above matters, it appeared that by the second codicil to the will of Mrs. Frances F. Cawthorne (who died in 1809), a legacy of 1,000l. was be-

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**VICE-CHANCELLOR TURNER'S COURT.**

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Monday, May 12.

Re DICKSON'S TRUST.

**Will—Construction—Condition—Forfeiture.**

A testator gave the interest of 10,000*l.* to his daughter for life, and after her death he gave the capital among her children, and if she should have no child, then equally between A. and B. By a codicil he declared that if his daughter permanently associated herself with any Roman Catholic establishment, he revoked the bequest to her, and excluded her from all benefit. The daughter became a nun.

Held, that (the condition having been decided to be good) the life interest only of the daughter was forfeited.

Major-general Dickson by his will bequeathed as follows:—"I bequeath the sum of 10,000*l.* sterling unto my wife, Harriet Dickson; my son, Samuel Auchmuty Dickson; and my sons-in-law, John Neeld, esq. and the Hon. Mortimer Sackville West, their executors, administrators, and assigns, upon trust, to invest the same and to pay the annual produce thereof to my daughter, Mary Eleanor Dickson, for her life, and, after her decease, the said sum of 10,000*l.* and the stocks and securities thereof, and annual produce thereof, shall be in trust for all and every the child and children of my said daughter Mary Eleanor Dickson, who having a son or sons, shall respectively attain the age of twenty-one years, or being a daughter or daughters, shall respectively attain that age, or marry under that age with the consent of —, to be equally divided between or among them, if more than one, for their respective absolute benefit; and if there shall be no child of my said daughter Mary Eleanor Dickson, who being a son shall live to attain the age of twenty-one years, or being a daughter shall live to attain that age, or be married with such consent as aforesaid, then the said sum of 10,000*l.* and the stocks and securities thereof, shall, subject to the trust aforesaid, be in trust for my two sons, Samuel Auchmuty Dickson and William Thomas Dickson, in equal proportions absolutely." By the codicil the testator said—"Finding that my daughter contemplates remaining in a Roman Catholic convent, and becoming a nun, I consequently hereby declare that in the event of her carrying out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she would forfeit all claim to or benefit from the said sum of 10,000*l.* and I hereby in that case revoke the said bequest, and in order to prevent any portion of my property from being appropriated to other purposes than the benefit of my family, I hereby exclude my said daughter Mary Eleanor Dickson from all reversionary advantages whatsoever from my said will." The daughter became a nun, and a member of the nunnery at Hammer-

quested to Vane Jadis, and Vesey Thomas Dawson, Esq. was appointed the executor of her will.

By an indenture dated 18th January, 1841, Vane Jadis assigned his interest in the legacy for securing to Mrs. Hare an annuity of 24*l.* for her life, with a power of re-purchase upon payment of 312*l.*

The testatrix's estate was then being administered in this Court in certain causes of *Wild v. Lockhart*, and *Lee v. Lockhart*.

By another indenture dated 11th October, 1842, Vane Jadis again assigned the legacy to Mr. Cooper for securing 800*l.* and interest.

In January, 1841, Mr. Dawson received notice from Mrs. Hare of the assignment to her, and in December, 1843, he also received notice from Mr. Samuel Sturgis, the provisional assignee of insolvent, that on the 18th of January, 1837, the estate and effects of Vane Jadis had become vested in him under the 7 Geo. 4, c. 57, and that judgment had been entered up under the warrant of attorney executed by the insolvent.

On the 16th of November, 1843, Mr. Cooper obtained the usual stop order on the fund in the above mentioned causes, but did not appear to have given any other notice to the trustees until March 1847, when he gave Mr. Dawson notice of the deed of October 1842.

The legacy, with other money, was transferred from the cessante to Mr. Dawson, who, on the 25th of July, 1846, paid the amount into Court in the above matters, accompanied by the usual affidavit, in which he stated the notices he had received.

Mrs. Hare's petition prayed that a sufficient portion of the fund might be set aside for the purpose of providing for the regular payments of the annuity; and Mr. Cooper's petition asked that the annuity might be repurchased out of the fund, and that the residue might be paid to him in part discharge of the principal and interest due on his mortgage of the 11th of October, 1843.

Turner and J. Parker, jun. appeared in support of Cooper's petition; Beales, in support of Mrs. Hare's petition; and Follett, for the provisional assignee under Vane Jadis's insolvency.

An order was made by the Master of the Rolls on both petitions, which, after reciting, "and the Court being of opinion that any right or interest which the said Samuel Sturgis might have had in the said legacy and interest is subject to the rights and interests of the petitioners," directed the fund to be applied in accordance with the prayer of Mr. Cooper's petition.

smith. In the suit it had been decided by Lord Cranworth that the condition was good. The present was a petition presented for the purpose of having the decision of the Court to what extent the 10,000*l.* legacy had become forfeited. For the residuary legatee it was argued that the gift to the daughter having been, under the circumstances, revoked, all the dispositions following the benefits conferred on her had failed, and that, therefore, the whole fund fell into and became part of the residue of the testator's estate. On behalf of the children of the lady, should any ever come into existence, as might be the case if the lady should change her determination of professing herself a nun, which she had not yet done, it was contended that the gift in reversion to them was not in any way affected by the forfeiture of her life interest, supposing the Court should hold that life interest to have been forfeited. The two sons of the testator, to whom the ultimate interest in the 10,000*l.* legacy was given, by their counsel insisted that they were entitled at any rate to the reversionary interest bestowed on them, and that the proper mode of treating the question was the same as would have been applied to a devise before the Reformation, namely, to treat the legatees as civilly dead as a devisee would have been on becoming a monk professed. The question on behalf of the daughter, Mary Eleanor, the legatee, was raised whether she was not, as one of the next of kin of her father, entitled to a share of the 10,000*l.* as having, under the circumstances, lapsed in favour of the next of kin instead of the same having fallen into the residue.

**Rolt** for the residuary legatees.

**Hobhouse** for the trustees, on behalf of the unborn issue of the legatee.

**Elmsley** for the two sons of the testator.

**Fleming** for Mary Eleanor Dickson, as one of the next of kin.

The VICE-CHANCELLOR held that the life interest only was forfeited, and that such life interest fell into the residue of the testator's estate as part of the capital of such residue. He also held that, upon the decease of Mary Eleanor Dickson, her children, if any, would become entitled to the 10,000*l.* among them; but if there were no children of Mary Eleanor Dickson, the gift over to the sons, Samuel Auchmuty Dickson and William Thomas Dickson, could take effect.

Thursday, July 3.

PITMAN v. KING.

**Will—Construction—Survivorship—Vesting.**

A testator gave personal estate to A. for life, and after her death, to all his, the testator's, children, with benefit of survivorship: the sons to have their shares paid at 21, the daughters' shares to be settled on their marriage.

Held, that the share of a daughter who married and died before the death of A. vested at 21 or marriage, and her administrator was entitled.

A testator by his will gave his personal estate to trustees upon trust for his widow for her life, and after her death in trust for all his children with benefit of survivorship among them. He directed the shares of his sons to be paid at twenty-one years of age, and the shares of daughters to be settled on their marriage. One of the daughters married and died before the widow of the testator. The suit was instituted by her husband as her administrator claiming her share of the fund. The defendants were the other children, or their representatives, or trustees, claiming their share under the clause of survivorship.

**Bethell, Tylloston, Goodree, Baggallay, Morris, and Waller** for the parties.

The VICE-CHANCELLOR.—The words "benefit of survivorship" refer, in my opinion, to the case of the death of a daughter before she attains the age of twenty-one, or before she marries. As the legacy vested at one or other of those periods, I think that the operation of the words relating to survivorship ceased. The husband is, therefore, entitled to their share of the fund as the administrator of his wife.

Tuesday, July 8.

HANDLEY v. WOOD.

**Legacy charged on Land—Interest—Stat. 3 & 4 Wm. 4, c. 27.**

The 42nd section of the above statute is an absolute bar to the recovery of more than six years' interest on a legacy charged on land, notwithstanding that the legacy was not actually payable by reason of litigation respecting the will, which lasted a greater length of time.

The question raised in this case was, whether a legacy of 5,000*l.* given by a testator by his will to his executors for certain purposes, and which legacy was, pursuant to a power under a settlement, charged on real estate, should bear interest for more than six years. A suit was instituted in the Ecclesiastical Court, which was carried by appeal to the Judicial Committee of the Privy Council, the litigation arising in which continued for thirteen years from the death of the testator. A demand was made against the

testator's estate by the executors, in respect of this legacy of 5,000*l.* for interest from the usual time after the death to the time of payment, and not for six years only.

**Schomberg** for the executors. The executors are entitled to interest for the whole time, and not for the six years mentioned in the statute 3 & 4 Wm. 4, c. 27, for the limitations of actions and suits. It is true, the 42nd section of that Act declares that "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due;" yet that cannot be held to apply to a case in which the legacy was not due until some person was empowered by the Ecclesiastical Court to receive it; and no such person existed until after the litigation had ceased before the Judicial Committee.

**Wright, De Gez, Burton, and Small**, for other parties interested.

The VICE-CHANCELLOR.—The statute is, in my opinion, an absolute bar to any claim of interest beyond the period of six years, notwithstanding the litigation extending beyond that time on the question of the probate of the will. The statute is imperative, "no arrears of rent or of interest [in respect of any sum of money charged upon or payable out of any land," shall be recovered after six years. Under such words interest can no more be given to parties in the situation in which the plaintiffs stand, than it could be given to the executor of a mortgagee in a like case.

Wednesday, July 16.

ECCLÉS v. CHARD.

**Claim—New trustees—Amendment—Cost.**

A claim was filed for appointment of new trustees on the ground of misconduct in the present trustees, and for the administration of a trust estate. The plaintiff was the administrator of a party as one of the children of whom he was entitled to a share, and all other parties were very numerous. The claim was abandoned, excepting as to the administration of the estate. The Court dismissed the claim as to the appointment of new trustees, with costs, but as to the remainder gave leave to amend the claim, stating that it adhered to the course not to send a claim to the Master's office, when it is necessary to originate proceedings there on which a decree was ultimately to be made, or where the facts were not so stated in the claim that it could be seen that inquiries ought to be directed.

This was a claim filed for the administration of an estate made subject to certain trusts by a deed of settlement which was vested in trustees, the defendants. The plaintiff was a party interested in the fund, and sued as the administrator of a daughter of the settlor. The claim alleged and charged against one of the trustees misconduct in the management of the trust, and charged the other trustees with wilful neglect and default in permitting such mismanagement. The appointment of new trustees was asked in the place of the present trustees, whom it was prayed might be removed.

**Rolt and W. T. S. Daniel**, for the plaintiff, abandoned all the relief sought by the claim except so much as related to the trust estate, which they asked might be administered under the direction of the Court.

**Malins and Collins**, for the defendants, the trustees, contended that the plaintiff was not entitled to any interest in the trust estate in the character in which he sued, namely, as the administrator of a daughter of the settlor. He might be entitled and interested in his own right to a share of the fund as one of the children of that daughter, but clearly not as her administrator. Besides this objection, the difficulties and intricacies of the case were such, and the number of parties interested under the settlement and otherwise were so many, that it was not the proper subject of a claim. Considering all this, and considering also that the greater part of the case had been abandoned at the bar, they asked that the claim might be dismissed with costs. If the Court thought it right, the decree might add with liberty to file a bill.

The VICE-CHANCELLOR.—The orders of 1850 were intended to provide for the care of numerous parties, and to avoid the expense of bringing them all before the Court in the first instance; returning to the practice as it seems to have existed in the time of Lord Hardwicke, of allowing the parties to come in before the Master. I adhere to the course I have heretofore taken not to send a claim to the Master's office, if it is necessary to originate the proceedings there upon which a decree is ultimately to be made, or where the facts are not so stated in the claim that the Court can see that inquiries ought to be directed. In this case I shall dismiss the claim as to the appointment of new trustees, and as to the charges of misconduct, neglect, and default; and the plaintiff must pay the costs of the affidavits as to those charges. The plaintiff may amend the claim by stating that

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he is one of the children of the daughter, and upon such amendment the inquiries as to parties will be directed, and upon the parties interested being summoned to attend before the Master, the accounts will be taken.

## Common Law Courts.

## COURT OF QUEEN'S BENCH.

Reported by ADAM BITTLESTON and PAUL PARNELL,  
Esqrs. Barristers-at-Law.

June 6 and 13.

THE CHELSEA WATERWORKS COMPANY v.  
BOWLEY.

## Waterworks—Pipes—Land-tax.

*The proprietors of waterworks are not liable to be assessed to the land-tax in respect of the land in, under, and through which their mains, pipes, and similar apparatus are laid for the conveyance and supply of water to the inhabitants of the neighbourhood.*

This was an action of trespass brought by the plaintiffs against the defendants for seizing and selling certain goods and chattels of the plaintiffs. The defendant pleaded "Not guilty by statute," on which issue was joined; and by consent, and by a judge's order, the following case was stated for the opinion of the Court:—

The Chelsea Waterworks Company were incorporated in pursuance of stat. 8 Geo. 1, c. 26, by a charter of incorporation granted to them March 8, 9 Geo. 1, by the name and style of "The Governor and Company of Chelsea Waterworks," for the purpose of providing and supplying the inhabitants in and about the city of Westminster and the liberty thereof, and divers other places in the county of Middlesex with good and wholesome water from the River Thames in manner in the said Act mentioned; and the company were authorised by the said statute and charter (amongst other things) for that purpose to have, purchase, receive, enjoy, possess, and retain to them and their successors, messuages, lands, tenements, rents, and hereditaments, not exceeding in value 1,000*l.* per annum in the whole, with certain powers, liberties, and privileges touching the directing, ordering, appointing, and making such waterworks, and maintaining, preserving, and supporting the same as in the said Act and charter particularly mentioned.

The company were further empowered, from time to time, without molestation or disturbance, by their servants and workmen to lay pipes from their waterworks and branches from the main pipes in or through any of the streets, passages, or common grounds or places in or about Westminster, and the parts adjacent, for conveying water to serve and supply the said inhabitants, and for that end to break up the pavements and ground, and dig and sink, &c. for laying, amending, and repairing, such pipes or branches from time to time.

By virtue of the stat. 8 Geo. 1, c. 26, and the said charter the said company had power to, and did form a joint stock, which represented and constituted the whole capital of the company, and was transferable and assignable under the said Act and charter, the water therein mentioned having been long before that time brought into the grand reservoir at the time of the passing of such Act, intended to be, and which was soon afterwards made, at or near Oliver's Mount, in the said Act and charter mentioned.

Further letters patent, dated Oct. 11, 7 Geo. 2, were also granted to the said company, and their powers were further enlarged by stat. 49 Geo. 3, c. 157.

In pursuance of the powers so granted, the company purchased, and still hold to them and their successors, lands of less value than 1,000*l.* per annum, and which are situated wholly in the parish of St. George, Hanover-square, in the county of Middlesex, on which the water works of the company are erected; and the company have also from time to time, under the same powers, laid down main pipes from the said waterworks in, under, and through various streets, passages, and common places in the said parish of St. George, Hanover-square, and other main pipes and branches communicating with, and extending from, the last-mentioned pipes, in, under, and through various streets, passages, and common places in the adjoining parishes of St. Margaret and St. John, Westminster, for the purpose of supplying the inhabitants of such parishes respectively with water, and the said pipes and branches continued to be, and were so laid down and used by the said company for the purpose aforesaid in the said parishes respectively, under the powers in the said charter and Acts of Parliament, before and at the times of the making of the assessment and of the seizure of the goods of the company hereinafter mentioned. The company have not, and never had, any interest in the land or soil in the said parishes of St. Margaret and St. John, Westminster, in, under, and through which their

said pipes and branches are so laid, other than such right as may be conferred on them by the said statutes and charters of laying pipes, as therein mentioned, and which right they have so exercised as aforesaid. The company do not pay, and never have paid, to any person or persons any rent or sum of money for, or in respect of, the land or soil in the said parishes of St. Margaret and St. John, Westminster, in, under, and through which their said pipes and branches are so laid. The company do not receive any profit from the land or soil in the said parishes of St. Margaret and St. John, Westminster, in and through which their said pipes and branches are laid, unless the profits, which arise upon the sale of the water supplied by the said company, through such pipes and branches to the inhabitants of the aforesaid parishes can be so considered. The amount of such last-mentioned profits does not depend on, nor is the same regulated by, the length or distance of the pipes through which the water is conveyed.

On June 15th, 1847, the assessors of the land tax duly appointed and acting under the statutes 38 Geo. 3, c. 5, and 38 Geo. 3, c. 60, for the division of St. Margaret and St. John, Westminster, in the county of Middlesex (which does not comprise any part of the said parish of St. George, Hanover-square, but which comprises the said parishes of St. Margaret and St. John, Westminster), in and by their certificate of assessments, a duplicate whereof was duly signed by the commissioners authorised in that behalf, and delivered to the collectors, made an assessment, which was and is entered in the books of the said commissioners as follows:—

Rentals.	Names of Proprietors.	Names of occupiers.	Names or description of Estate or Property.	Sums assessed and exonerated.	Sums assessed and not exonerated.
£					£ s. d.
500	.....	The Governor and Company of the Chelsea Waterworks.	Land occupied by the mains and pipes and other apparatus of the said Governor and Company for the conveyance and supply of water.	.....	14 11 8

The mains, pipes, and other apparatus mentioned and referred to in the fourth column of the said assessment were and are the same mains, pipes, and branches so laid by the said company in the said parishes of St. Margaret and St. John, Westminster, within the division aforesaid, and through which water was so supplied by the said company as aforesaid. On the 24th day of February, A.D. 1848, the defendant, by the authority of the said commissioners, distrained goods and chattels of the company for the sum of seven pounds, five shillings, and ten pence, being one-half of the said assessment, which is the trespass for which this action is brought.

The warrant of distress, entry, and seizure, and notice of action are admitted, and by agreement of the parties the sole question for the opinion of the Court is, whether the company are liable to be assessed towards the payment of land-tax within the said division of St. Margaret and St. John, Westminster, under the circumstances above set forth.

The judgment was to be entered according to the directions of the Court.

*Crowder* (with him *Brett*) for the plaintiffs. The only ground upon which it can be contended that the company is liable, is a supposed analogy between rateability to the relief of the poor and liability to the land-tax. But the cases are not similar, and the rule under which these companies have been assessed to the poor-rate will not be extended. The distinction is clear and manifest. By stat. 43 Eliz. c. 2, it was intended to impose a tax upon the tenant as distinguished from the landlord, and upon all tenants who derived any benefit, direct or indirect, from the occupation of the land. The land-tax Acts all contemplate a tax to be paid by the landlord as distinguished from the tenant, a tax upon the enjoyment of the land itself as such, and a tax capable of being redeemed. Here, there is no land occupied at all. The company have a statutable easement over the lands of the public and private owners, which they do not buy and cannot sell, and which ceases the moment the pipes are withdrawn.

*Willes* for the defendant. There is no distinction in principle between the mode in which the poor-rate and that in which the land-tax is to be imposed, although in most cases they are paid by different persons. This is within sect. 4 of stat. 38 Geo. 3, c. 5, a holding of land or hereditaments. The company occupy the land by their pipes, and by reason of such occupation, exclude the owner of the land

from so much of it as is occupied by the furniture of the company. The land belonging to an individual is diminished to him in its assessable value by means of the pipes passing through it, and unless the company are assessable for their occupation, the land tax assessable upon the amount by which the individual owner's property is diminished in value, is wholly lost to the revenue. The words of the land-tax Acts are sufficient to reach this case, and the company cannot be exempted except by this Court overruling the decided cases upon the subject of poor-rates.

*Crowder*, in reply.

The following authorities were referred to: Stat. 43 Eliz. c. 2, s. 1; *Rex v. The Mayor and Corporation of Bath*, 14 East, 609; *Rex v. The Chelsea Waterworks Company*, 5 B. & Ad. 129; *Rex v. The Rochdale Company*, 1 M. & S. 634; *Rex v. Birmingham Gas Light and Coke Company*, 1 B. & C. 506; *R. v. Mitcham*, Cald. 276; *Hydev. Hill*, 3 T. R. 377; *Whitfield v. Brandwood*, 2 Stark. 440. Stats. 39 Geo. 3, c. 13, sched.; 38 Geo. 3, c. 5, ss. 4, 17, 40, 57, 124; 38 Geo. 3, c. 60; 39 Geo. 3, c. 22; 42 Geo. 3, c. 116, ss. 2, 9, 126; 8 Geo. 1, c. 26, ss. 8, 9, 57, 70, 71. *Cur. adv. vult.*

*Friday, June 13.*—Lord CAMPBELL, C.J. delivered the judgment of the Court.—In this case we are of opinion that the Chelsea Waterworks Company are not liable to be assessed towards the payment of the land-tax within the division of the parishes of St. Margaret and St. John, Westminster. We should have had no difficulty in arriving at this conclusion, had it not been for the decisions holding this and similar companies liable to be assessed to the relief of the poor, under the stat. 43 Eliz. c. 2, in respect of the subject-matter of land; the present assessment is rested on the 4th section of the stat. 38 Geo. 3, c. 5, whereby it is enacted that all bodies corporate, having or holding any land or hereditaments shall be charged with the land-tax. The question is, whether in respect of what the company have done and now enjoy, under the powers conferred upon them by the 8th and 9th sections of the stat. 8 Geo. 1, c. 26, they can be said to have or hold any lands or hereditaments. Although it has been considered for more than a century, that they were not liable, they could not resist the assessment if they ever were liable to be assessed to the land-tax; but we think that the parishes through which their pipes passed have acted properly in omitting to assess them. The right in question, when exercised, appears to us to be in the nature of an easement, and not in the nature of the possession or occupation of land or hereditaments. The right is to convey water through the land of another; whether the water is to be conveyed upon the surface of the ground or in covered drains or in pipes, appears to us for this purpose to be immaterial. This is a mere power to carry the pipes in the land, and cannot be considered as land or hereditament. Neither do we think that the pipes when laid can be so considered within the meaning of the Land-tax Acts. These Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant, as property the land-tax of which might be redeemed. The whole scope of the Act is to throw the tax as a charge on the landlord, and the tenant having paid it, is authorised by sec. 17 of the 38 Geo. 3, c. 5, to deduct it out of the rent. The company are not the owners of the land where the pipes lie, nor are they tenants of the land; and there is no rent from which they could deduct the amount of the assessment when they have paid it. Again, the provisions of the stat. 42 Geo. 3, c. 116, for the redemption of the land-tax, are wholly inapplicable to such a subject, although it was clearly intended that the land-tax on property which could be considered as land was to be capable of being redeemed. The moment the company take up the pipes which they have laid under the streets in any particular parish, all pretence for saying that they have a certain right in the parish will be gone; but after the pipes are removed all the land in the parish would remain, and would be as it was before. The Bath, Rochdale, and Chelsea Waterworks cases, touching the assessment of companies to the relief of the poor in respect to pipes for the conveyance of water and gas as occupiers of land, have been very properly much relied upon, for they appear to be closely in point, and we by no means feel ourselves at liberty to overrule those cases, or even to express a doubt whether they were rightly decided. But "land," like the word "inhabitants," which likewise occurs in the stat. 43 Eliz. c. 2, has various meanings, and it may, in that statute, which was passed for making a charge upon the occupier, mean the ground on which the chattel is deposited in the exercise of an easement, although in other Acts of Parliament it means a legal interest in the soil. This is the meaning which we think it bears in the Land-Tax Acts, and if so, the company have not, nor ever had, any land or hereditaments to render them liable to be assessed to the land-tax, and therefore they are entitled to our judgment.

*Judgment for the plaintiffs.*



## EXCHEQUER CHAMBER.

## EXCHEQUER CHAMBER.

## ADMIRALTY.

## EXCHEQUER CHAMBER.

Reported by C. J. B. HERTLETT, Esq. of the Middle Temple, Barrister-at-Law.

## ERROR FROM THE EXCHEQUER.

(Before PATTERSON, MAULE, WIGHTMAN, CRESSWELL, ERLE, and TALFOURD, JJ.)

## OWENS v. BREESE.

County Court—Action under 20l.—Writ of trial—3 & 4 Wm. 4, c. 42, and 9 & 10 Vict. c. 95.

The 3 & 4 Wm. 4, c. 42, s. 17, provides that in any action in any of the Superior Courts for a demand under 20l. the Court or a judge may order that the issue joined be tried before the sheriff of the county where the action is brought, or any judge of any Court of Record for the recovery of debt in such county. The County Courts Act, s. 3, enacts that every court holden under that Act shall be a Court of Record:

Held, that the County Courts established under 9 & 10 Vict. c. 95, are not such courts as are contemplated by the 3 & 4 Wm. 4, c. 42, and that, therefore, a writ of trial under that statute cannot be directed to a judge of a County Court established under 9 & 10 Vict. c. 95.

This was a writ of error to the judgment of the Court of Exchequer. It appeared that the action was brought for a sum of 3l. 1s. and that an order had been made for a writ of trial under 3 & 4 Wm. 4, c. 42, s. 17. The order was in the following form:—

“Breese } Upon hearing the attorneys or agents on  
v. } both sides, I do order that a writ issue  
Owens. } out of her Majesty's Court of Exchequer  
of Pleas at Westminster, directed to the judge of  
the County Court of New Town, Montgomeryshire,  
commanding him to summon a jury to try the issue  
joined herein, and that the said sheriff return such  
writ, with the finding of the jury indorsed thereon,  
to the said Court, on a day certain to be named on  
such writ, pursuant to the statute. Dated the 13th  
day of March, 1851. “WM. WIGHTMAN.”

The writ was afterwards issued directed to the judge of the County Court, and the cause was tried by him and a jury of twelve. The defendant appeared at the trial by his attorney, and a verdict was returned for the plaintiff. Subsequently (May 9) a rule was obtained, calling on the plaintiff to shew cause why the order of Mr. Justice Wightman, and all subsequent proceedings, should not be rescinded or set aside, or why the verdict found for the plaintiff, and all subsequent proceedings thereon, should not be set aside with costs, and all proceedings stayed in the meantime, on the ground that the judge had no power under the 3 & 4 Wm. 4, c. 42, s. 17, to direct a writ of trial to a judge of a County Court, and also that the writ itself was bad in directing the sheriff to return it. That rule, on its coming on to be argued, was discharged, and the defendant now brought his writ of error against that decision of the Court below.

*Lush*, for the plaintiff in error, having stated the facts of the case, was stopped by the Court, and

*Bramwell*, for the defendant in error, was called upon.—The question is not as to the constitution of the Court, but whether the judge is a judge of a Court of Record, trying cases not exceeding 20l. The jurisdiction is given to the person, not to the Court. If the Act is read as merely designating the person by reference to his office, all difficulty is at an end. The writ is to go to the judge, and to command him to summon a jury, and the judge is to try in the same manner the sheriff would try. [PATTERSON, J.—The 72nd section of the 9 & 10 Vict. c. 95, provides that the sheriff shall furnish to the clerk of the County Court a list of persons qualified and liable to serve as jurors within the jurisdiction of the Court; and when the cause is to be tried by a jury, the clerk is to summon them, so that the judge has materials for trying by a jury, but the Act says he shall try by five jurymen.] The judge of the County Court is appointed under the 9 & 10 Vict. and is required to act in precisely the same manner as the judge of any other Court of Record would do if a writ of trial were sent to him, it then becomes his duty to summon a jury, and to proceed to try the cause. The 17th section of the 3 & 4 Wm. 4, c. 42, enacts, that in any action depending in any of the Superior Courts for any debt or demand, in which the sum sought to be recovered, and endorsed on the writ of summons, shall not exceed 20l. it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts (if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding

him to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon, endorsed, at a day certain in term or in vacation to be named in such writ; and thereupon such sheriff or judge shall summon a jury and shall proceed to try such issue or issues. The judge of a County Court has power to try causes therefore under that section, he being a judge of a court of record. And the 18th section of the above Act gives the judge to whom a writ of trial is directed all the powers of a judge at Nisi Prius. The County Courts are expressly made courts of record by the 3rd section of the 9 & 10 Vict. c. 95, which, after defining the jurisdiction of the Courts, &c. expressly enacts that every court holden under that Act shall be a Court of Record. This action was for the recovery of a debt under 20l. and was within the county, consequently it is within the statute, and the order is valid. The practice is now to direct writs of trial under such circumstances to judges of the County Courts instead of the sheriff as heretofore. Such orders are frequently made; the judges of these courts are better qualified to try a cause than the sheriff or undersheriff, and there is no reason why the practice should not continue. *Farmer v. Mountford*, 8 M. & W. 266, was cited by the other side, to shew that a writ of trial directed to the recorder of a borough commanding him to summon a jury of his county was irregular; and in the same case (9 M. & W. 100), where a writ of trial was directed to the recorder of a borough, directing him to summon a jury of the borough duly qualified according to law, it was held regular, and that it was not necessary under the 3 & 4 Wm. 4, c. 42, s. 17, that the jury should be taken from the county. That case merely decided that the recorder must summon a jury from his own jurisdiction, not that he had no authority to try the cause. Lord Abinger there said, “It appears to me that the right construction of the statute is, that the inferior judge to whom a writ of trial is directed shall summon for the trial such a jury as by law and usage he is entitled to summon.”

*Lush*, for the plaintiff in error.—In the first place it becomes necessary to see what courts were in existence at the time the 9 & 10 Vict. c. 95, was passed, in order to ascertain whether it was the intention of the Legislature that these County Courts should be the Courts of Record contemplated by the 3 & 4 Wm. 4, c. 42. At the time the 9 & 10 Vict. c. 95, passed, there were then subsisting various descriptions of minor courts—Courts of Request, Borough Courts, and County Courts, as originally constituted. The new County Courts are in fact only substituted for the previous Courts of Request, with some additional powers; and the judge possesses rather the powers of the judge of the ancient Courts of Request than of a Court of Record. When that Act passed, all the then existing Courts of Record proceeded according to common law, and tried causes by a jury of not less than twelve in number. The object of the statute of Wm. 4 was to give assistance to the judges of the Superior Courts, by enabling the inferior Courts of Record to try certain actions. The 16th and 17th sections of that Act assume that the judge has power to summon a jury, which is not the case with the County Courts. If it were intended to confer new powers, there would have been framed special provisions for carrying out such intention. The 23rd section of that statute allows amendments to be made in the record in certain cases; but how can that apply to the County Courts, where in fact there is no record? The section of the County Court Act which has been referred to as making those Courts Courts of Record, certainly uses those general words, but it was only intended that they should be Courts of Record for certain purposes. Those Courts, as constituted, cannot carry out the directions of the writ. The jury is to come from the county where the action is brought. Section 72 of the County Courts Act only authorises the summoning a jury from the district. What jury is the County Court judge to summon under this writ? What number—five or twelve? Where from—from the county or only from the district; and what is to be the qualification? The qualification of jurors are different. Again, under 3 & 4 Wm. 4, c. 42, the judge could not examine the parties, yet the County Court judge can.

PATTERSON, J.—The reading of these Acts together causes much difficulty. I am inclined to think that the 3 & 4 Wm. 4, c. 42, is applicable to Courts of Record whose proceedings are conducted according to the common law. Then, are these new County Courts such Courts of Record? If they are, and a writ of trial can be sent to them under this statute, the proceedings must be conducted, not according to the County Courts Act, but in compliance with the general rules of law which govern the Court from whence the writ issues. But the County Courts Act has, in fact, extended the jurisdiction of Courts of Request, and the Courts established under it are of a similar nature; they do not proceed according to common law, but their proceedings are limited, controlled, and directed by the statute under which they were established; and they

are not, therefore, such Courts as were contemplated by the 3 & 4 Wm. 4, c. 42.

*Judgment for the plaintiff in error.*

## ADMIRALTY COURT.

Reported by Dr. WADDILOVE, of Doctors' Commons.

Friday, May 16.

## THE WAVE.

Bottomry bond—Liability of cargo—No notice to owners of ship or cargo.

A British vessel being damaged by tempestuous weather, put into the port of Elsinore for repairs. During the progress of the repairs, Messrs. S. and Co. who had given the orders for, and superintended them, corresponded with the owner of the vessel and part owners of the cargo, but gave no notice to them or to the master of their intention to take a bottomry bond as a security until the vessel was almost on the point of sailing:

Held, that the bond could not be enforced by reason of the repairs having been, in the first instance, undertaken on personal credit, and there having been no notice given that a bond would be required.

This was a case touching the validity of a bottomry bond. The case was argued at some length; but the substance of the arguments and the facts of the case appear sufficiently in the judgment.

Adams and Twiss were heard in support of the bond.

Sir J. Dodson, Q.A. and Harding for the owners of the cargo.

Dr. LUSHINGTON.—The question for the decision of the Court is, whether a bottomry bond, bearing date December 6, 1849, is valid, so far as relates to the cargo shipped on board this vessel and the freight due. The action is entered against the ship, cargo, and freight. The case is in some of its circumstances peculiar. The bond was executed at Elsinore in favour of Messrs. Severin, Steison, and Co. of that place, for the sum of 1,012l. 12s. 11d. at a premium of eighteen per cent. It purports to bind the ship, cargo, and freight. The original voyage was from Cronstadt to Bristol, with tallow. The action was commenced on the 3rd January, 1850; no appearance was given for the owner of the ship, but the owners of the cargo appeared and gave bail for that and the freight. The ship has been sold, and the net proceeds, 274l. 13s. 8d. have been brought into court. After some delay the case came on for hearing on the 3rd December, 1850. After the case had been partly heard leave was given to the proctor for the bondholder to produce the master, with a view to his examination, *visâ voce*; that took place on the 3rd of April. In the original act brought in on behalf of the bondholder it is stated, that in consequence of tempestuous weather, the vessel put into Elsinore in a damaged state; that repairs being necessary, and neither the master nor the owners having any personal credit, the former took up the necessary monies on bottomry of Messrs. Severin, Steison, and Co. merchants of that port. The defence of the owners of the cargo, that is, the grounds on which they allege the bond to be invalid, are, first, that Messrs. Severin, Steison, and Co. were the agents of the owner of the ship, Mr. John Beara, of Bideford; and that, as such agents, they undertook the entire management of the ship, and gave all directions respecting her; that Elsinore is only four days' post from England; that a regular correspondence was carried on between Mr. Beara and Messrs. Gwyer and Co. the owners of part of the cargo, but that notwithstanding no information was given them that a bottomry bond would be required, the first intimation of it was contained in a letter dated December 5, when the ship was about to sail. Then comes a very material averment: that no application was made by the master to Messrs. Severin, Steison, and Co. to advance the necessary sums on bottomry, and that the repairs were completed before any intimation of the bond was given; that commission at the rate of three per cent. was charged by them as agents. In the reply general agency is denied, but Messrs. Severin, Steison, and Co. allege that they were agents for the owner of the vessel, for defraying the customs charges and sound dues; that they drew on Gwyer and Co. for such duties to the amount of 144l.; that on the 18th of October they informed Gwyer and Co. of what had happened to the vessel, but received no answer; that Messrs. Severin, Steison, and Co. at the request of, and in conjunction with, the master, gave directions for the necessary repairs; that by letters dated the 20th of November, 1849, they informed Messrs. Gwyer and Co. of the repairs being nearly completed, and that the 144l. was still unpaid; and no answer being given to these letters, and the master having no credit, he agreed to give the bond; but when he agreed to give the bond is not stated in the reply. These are very important facts. It appears, then, to me, that from these facts two questions arise: first, whether any bond ought to have been given without previous communication

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with the owners of the ship or of the cargo. The law does not in all cases require such communication, but there may be cases in which it is indispensable; and if it be necessary to go into this case at all, this must be the question, whether, under the peculiar circumstances of this case, the law does require any such communication. The second question is, whether the bond was invalid because Messrs. Severin, Steison, and Co. had ordered the repairs on personal credit without any understanding or agreement for a bottomry bond. Of course, before the question can be properly dealt with, this fact must be ascertained. It will, for the present, be enough to remark, that the reply does not very satisfactorily join issue on this point. It does not meet the direct averment contained in the answer with anything like a direct contradiction—a mode of pleading which generally produces more trouble to the Court than advantage to the parties adopting it. The evidence of the master is always in these cases of the very first importance; from his being necessarily conversant with all the facts of the case he must know all the circumstances under which he signed the bond. There was on the first hearing of the case no affidavit whatever produced from the master; and the Court did not think any satisfactory reason was given why that affidavit was not produced. The Court was of opinion that the reasons assigned for the absence of that affidavit were wholly and altogether unsatisfactory; but from an anxiety to have the case decided upon its real merits, the indulgence—for such it certainly was—of further time, was given to the bondholders to enable them to produce the master as a witness. He has been produced and examined by counsel on both sides; I am, therefore, entitled to presume all the facts are now before me; all the facts, at least, on which the bondholders rely in support of the validity of this bond. I shall, in the first instance, address my attention to the second question, for it may prove immaterial to discuss the first, namely, whether the repairs were done on the responsibility of Messrs. Severin, Steison, and Co. by their order, and without any contract, undertaking, or understanding that a bottomry bond should be given to them; and if such be the fact, of course I must see and inquire what is the law applicable to such a state of circumstances. As regards the law, I believe the general rule to be that if a merchant order repairs, for which he makes himself responsible, without an undertaking by the master that a bond shall thereafter be granted, he cannot protect himself by a bond. Exceptions to this rule are possible, as in cases where the master is dead, where the urgency is extreme, where the merchant advances money, intending from the first to require a bottomry bond, and gives the owners the earliest possible notice of such being his intention. In such cases, although no original agreement had been made, the bond might be upheld. These, however, are very peculiar cases, and cases of exception. The general principle is laid down in *The Augusta*, 1 Dods. Adm. Rep. 283. To me this rule appears to be founded on sound reason, and on practically useful principles in commercial affairs. It is necessary the master should be apprised of the intention to take a bottomry bond that he may have time and opportunity to exercise his discretion as to entering into the contract, or trying at least to take some means of avoiding the necessity,—time and opportunity to advise with the owners of the ship and cargo; or if this be not practicable, to consult, at least, with those persons who are on the spot. A ship arrives in a damaged state; the master goes to a merchant; he may or may not be the agent of the owners of the ship; to him the master applies for assistance, and, considering the class of men that masters of ships generally are, probably in vague and indefinite terms; all the master knows is that repairs are wanting, that the owner must ultimately pay for them, and that he himself has no personal credit. The merchant, surely, is not authorised to give the orders for the repairs, or advance money, and then demand a bottomry bond, without previously making the master or owners aware of such intention. Surely the merchant, the man of business, is bound to declare to the master what course he will pursue—to say whether he will advance the necessary funds on personal credit, or become responsible for the necessary repairs on personal credit, or at once declare that if he does at once advance or become responsible, he shall require a bottomry bond. I do not assert that the bond would be absolutely invalidated by that circumstance; certainly not, because cases may have occurred in which a master has been held justified in incurring such expenses for the sake of bringing a cargo to a port of destination, notwithstanding those expenses have swallowed up, and more than swallowed up, the whole of the ship. But the master must have an opportunity of considering and deliberating upon what is best for the interests of all concerned. He may, considering the heavy expenses of a bottomry bond, be of opinion that it is more advisable to towship the cargo, and he must have an opportunity of judging of the extent

to which the expense will go, the amount involved, or communicate with those interested, and await an answer. The present case is, I think, a striking instance of the truth of what I have said. The ship has been sold for half the sums expended upon her. Look at the case in another point of view. A bond is a contract in consideration of something to be done; but if the money be advanced or responsibility be incurred without a previous contract, there is no consideration for the bond. In short, with the exception of some advances, made as a matter of necessity, as for pilotage, or demands of that kind, I apprehend the rule of law to be, that the agreement for bottomry must precede the advances, or the incurring responsibility. All advances made without such agreement can only be advances on personal credit, and the case of *The Augusta* is a direct authority that no advances on personal credit can afterwards be converted into a bottomry transaction. That case has now stood the test of nearly forty years. It stands not simply on the high authority of Lord Stowell, who decided it, but has, I believe, been universally acquiesced in from that time to this. This, then, I apprehend to be the rule, and such the reasons on which it may be founded; but care must be taken not to apply it to cases which, though apparently in some respects similar, are still distinct. Take, for instance, the case of a master ordering repairs and supplies on credit given to him personally; those who gave the credit cannot take a bottomry bond, but a merchant, a stranger to such transactions, or even an agent not having made himself responsible, may advance the money on bottomry to liquidate such demands; or the ship might be detained, and the voyage defeated. In this latter case the distinction is apparent; the advance of the money is the consideration for the bond. In the former case a bond is engrafted on a debt due, incurred on personal credit, without any consideration for such conversion. Then to apply this principle to the present case. The evidence in support of the bond consists of the affidavits of Mr. Beara, the owner of the ship, of Messrs. Severin, Steison, and Co. and the evidence of the master, together with some documentary evidence. With regard to the proof, it cannot be said in this case that the bottomry bondholders have been in any difficulty from the opposition offered to them by the owner of the ship, or by the master of the ship, for the owner of the ship has admitted the validity of the bond, and submitted to any loss which might occur to him. The ship has been sold, and the proceeds must go to satisfy the bond. He has not only done this, but he has very properly come forward to make an affidavit in the case, and if that affidavit contains a true statement of all the facts necessary to be known for the elucidation and decision of this case, the Court would approve of such conduct; for there is no reason whatever, because he is himself a sufferer by the execution of the bond, and has submitted to what he considers the justice of the case, in surrendering his property, that he should not also give full and fair testimony in the dispute which took place between the owners of the cargo and the holders of the bottomry bond. But it is more especially with a view of shewing that the holders of the bottomry bond have on this occasion been placed in no peculiar difficulty that I make these remarks. They have, on the contrary, rather had an advantage which seldom occurs in these cases, by the owner of the ship assisting them to obtain justice. I must briefly advert to this point. The master states that after the vessel had met with an accident she put into Elsinore; that he applied to Messrs. Severin, Steison, and Co. for their advice and assistance with reference to the damaged state of the vessel, whereupon the cargo was discharged. Now there is an hiatus, and I am sorry to say I do not find that he states in any degree what occurred subsequently, but I presume he was personally unacquainted with what did occur. He says the cargo was discharged, and a complete survey made, under the immediate inspection of Lloyd's agent, by the surveyor for Lloyd's. I have no affidavit from the surveyor of Lloyd's; I have a survey, and no doubt there was necessity for extensive repairs. "And the deponent further maketh oath, that William Pickard, the master of the said vessel, immediately the survey was made, wrote to the deponent, as the owner of the said vessel, with a copy of the survey; and Messrs. Severin, Steison, and Co. informed the deponent that they should be able to manage so as to avoid drawing on him (the deponent) for the repairs of the said vessel." Now, in the first place, I should have expected to have had annexed to this affidavit the letters the master so wrote home; and, secondly, I should have expected to have found the answer. The answer to the master is the most important point. What directions did Mr. Beara give to the master when he found that his ship had incurred this tempestuous weather, had met with this damage, and required these extensive repairs? Did he instruct the master that he was to take up money on bottomry, or what measure he

should pursue at all? All this part of the transaction is, singularly enough, kept in the dark, and a single passage is extracted from the letter of Messrs. Severin, Steison, and Co. "that they should be able to manage so as to avoid drawing on him (the deponent) for the repairs of the vessel." During the discussion, I watched narrowly for the solution which might be given to this statement, but I found none that was satisfactory. I should have been glad to know what impression was made on the mind of Mr. Beara when he was informed—he having distinctly sworn that he had no credit—that all this would be managed and no draft would be drawn upon him, in what way he supposed these repairs were to be paid for, the necessary expenses incurred were to be liquidated. To these questions there is no explanation given. The very documents I have inquired for, which might have solved the question, are not brought forward before the Court. I must presume these documents would have been brought before the Court if advantageous to the case of the bottomry bondholders, because I plainly perceive, from the whole tenor of the case, that Mr. Beara has rendered every assistance in his power, and I think the master too. Then he goes on to swear, "That deponent at such time was very much surprised to find, from the said Messrs. Severin, Steison, and Co. that they could manage to get the said vessel repaired without drawing on him." Now that is a fact in the case; and I am not the least surprised at it myself, for I think his astonishment must have been great, "particularly as," he says, "he had no credit in any way with the said Messrs. Severin, Steison, and Co. or any other person at Elsinore to whom the master of the said vessel could apply for assistance, and was at a loss to know how the same was to be arranged." I think it is rather to be lamented, being placed in this state of difficulty and astonishment, or rather being so agreeably surprised at this, that he did not avail himself of the opportunity when it appears he was making some little inquiry how this wondrous contrivance was to be brought to bear; but he leaves the Court in the dark. He then goes on at once to enter on the subject. "He made oath that the said vessel having been repaired, and ready for sea, the said cargo was reshipped, and immediately on the sailing of the said vessel the said William Pickard, the master, wrote to him (the deponent), informing him that he had executed a bottomry bond, being the bottomry bond now proceeded for in the cause." And he then goes on to say,—"Messrs. Severin, Steison, and Co. never were, nor acted as, the regular agents of him (the deponent) for the said ship *Wave*, or any other ship over which he has any control, neither has he any regular agent at Elsinore, or any credit there; and in consequence thereof, it is entirely at the option of the master of the said vessel as to whom he may employ." He says at the conclusion (it is not necessary to go through the whole),—"He further makes oath, that if the said William Pickard, the master of the said vessel had applied to him (the deponent) to remit the amount of the outlay made upon the said vessel *Wave*, he could not at such time have paid the same, and therefore, unless Messrs. Gwyer and Co. of Bristol, the owners of the cargo, and who were aware of the accident which had befallen the said ship, as before set forth, and of the necessity of the same being repaired, had arranged for the payment of the cash necessary for such purpose, the master of the said vessel had no alternative but to raise the amount upon bottomry." This may all be true; but it is singular enough the idea should not occur to him when informed of these particulars; the necessity of a bottomry bond, if no one else advanced the money, was just as clear when he received the first letter as when he made this affidavit. That is the affidavit of Mr. Beara. There is an affidavit from Messrs. Severin, Steison, and Co. and they swear generally to the facts and in the words of the Act on petition, that they were applied to for their advice and assistance. They go on to state that a survey was made, and so forth, and they say no answer was received to the letters addressed by Messrs. Severin, Steison, and Co. (I will consider the letters presently), "who at the request of, and in conjunction with, the said William Pickard, the captain of the said schooner, gave directions for the necessary repairs of the said schooner." Then, the repairs having been set forth, they state that they demanded a bottomry bond. Now, I am looking at the question of the law, and I find a statement in the original affidavit that their giving the orders for the doing of these repairs was in conjunction with the master, which is of no importance, for the repairs were evidently made on their responsibility, and that long before even the mention of any bottomry bond; for throughout this affidavit there is not one single word stated, that from first to last, until four or five days preceding the date of the bond, the 6th December, they ever mentioned the word "bottomry" either to the master or any one else, and they say, speaking of the letter, that they, Severin, Steison, and Co. wrote to inform the owner they would be able so to manage as to avoid requiring an immediate remit-

## ADMIRALTY.

tance, but not saying they thereby meant that they intended taking a bottomry-bond. On referring to the letters we shall see that nothing was said on that subject at all. Proceeding a step further in the case there has been the evidence of the master, of which I may in a few words state the substance. The master was examined, and every possible attempt was made to induce him to give evidence to the effect, that there was some understanding, if not an agreement, that a bottomry-bond should be granted, but the master would not swear. He stated, on the contrary, that it was not till the repairs were all but finished, towards the end of November, and after the arrival of the second letter, that a bottomry bond was mentioned to him at all; the evidence of the master, therefore, does not in the slightest degree support that which was the material averment,—the fact that there was either an agreement or an understanding for the advance of this money. So much then for the evidence of the witnesses. We will now refer to the correspondence. Annexed to this affidavit of Messrs. Severin, Steison, and Co. is a letter dated 18th of October. In this they request to be paid the Sound dues; and I may mention, there was a great deal of argument in the course of these proceedings. It was stated to be very unlikely that Messrs. Severin, Steison, and Co. would advance money, unless on bottomry, seeing that their draft for 14*l.* for Sound dues on the cargo had not been paid. So the matter stood, but I thought it right, in the administration of justice, having given the other party the opportunity of producing the master,—an opportunity they had forfeited by not doing so at an earlier period in the cause,—that I should admit an affidavit from the agent of the owners of the cargo at Elsinore; and it appears from that affidavit that Messrs. Severin, Steison, and Co. refused to take the 14*l.* when it was tendered to them. The following is the letter to which I more particularly allude; it is dated the 18th October:—"Gentlemen,—Referring to our last respects of the 15th inst. we beg leave to inform you by the present, that the *Wave*, Captain Pickard, had the misfortune, on the 17th inst. to get ashore, on account of the current, on the Castle Point, where she got so leaky that she has been obliged to put into the harbour, where she will have the cargo discharged, and be repaired, as you will observe from the inclosed copy of the survey. We hope soon to bring the *Wave* under way again; and remain, meanwhile, gentlemen, your most obedient, humble servants,—Severin Steison, and Co." We will consider briefly the effect of this letter. The slightest intention of requiring a bottomry-bond is certainly neither directly nor indirectly indicated. Indeed, the last clause, which I have just read, does to a certain degree negative the idea that a bottomry-bond would be required, for it states that they hope soon to bring the ship under way again. That is the whole of the statement, but to prevent mistake, I must make this observation upon the letter—if this was a question such as has previously occurred in other cases, whether this was a sufficient indication to the owners of the cargo of the state the vessel was in, I should hold that it was; and if the agreement, *ad initio* had been made upon this, for advances upon a bottomry bond, I should have held that the owners of the cargo had sufficient knowledge, not of the intention, but of the state and condition of the vessel. But the purpose for which I am now looking at it is this, to ascertain the fact whether there was any agreement or understanding for a bottomry bond at all, because if there had been one, it was the duty of Messrs. Severin, Steison, and Co. to have communicated that intention to the owners of the cargo at the moment the letter was written, but no such intimation is given. We now take a letter of the 20th November:—"We beg leave to inform you by the present, that the *Wave's* repairs are now so far advanced that she will begin to take in her cargo after to-morrow, and we hope to be soon able to inform you of her departure. We shall be glad to learn that you have settled our assign on your good selves for Sound dues, 14*l.* which we have paid to the custom-house for your valuable account per said ship." The same total silence, no intimation of bottomry then, on the 20th November. There is one other letter that completes the letters annexed to the affidavit. It is the letter marked "No. 6," addressed to John Beara, esq. and dated the 7th November, 1849:—"Captain Pickard has just received your favour, and we beg leave to state we shall manage the average so as to make no drafts at all on your good self." That is the whole of the letter, no other intimation whatsoever of the course they intended to pursue, no intimation of any necessity for a bond, and no information of any fact; for I am not at this moment very clear, nor is it of much consequence, in what sense they use the word "average." As I have stated, Mr. Beara was informed that no drafts would be drawn on him, and no such information was given to the owners of the cargo at that time that any such letter had been written to Mr. Beara, the owner of the ship. There are one or two letters to which I will

now advert. The first letter I believe to be a mere duplicate. It is that which contains the survey, and is dated the 18th October. The next letter is addressed to Messrs. W. and G. Gwyer, Bristol, who were part owners of the cargo, which is somewhat in the words I have read before: "We beg leave to inform you by the present, that the *Wave's* repairs are now so far advanced that she will begin to take in her cargo." The next letter, dated 5th December, is in these words: "We beg leave to inform you that the *Wave's* average is finished, and the ship ready for sea, and will proceed on her voyage by first good wind and weather." Then comes a postscript: "The average amounts to 1,012*l.* 2*s.* 7*d.* where against Captain Pickard signed a bottomry-bond at 18*l.* per cent. premium." This is dated the 5th December, 1849. The vessel met with her accident the 17th October, and the communication of that accident was made by Messrs. Severin, Steison, and Co. to the owners of the cargo on the 19th October. All this time elapsed, and they were not informed of the intention to take a bond until the bond had actually been taken and signed. So much, then, with reference to that fact. There is another letter or two which I think it may be as well to read, annexed to the affidavit of Mr. Brooke Smith:—"Elsinore, October 18, 1849. John Beara, esq. Bideford.—Dear Sir,—We beg leave to inform you that your *Wave*, Captain Pickard, had the misfortune, on the 17th inst. in getting under way, to come, on account of the current, ashore on the Castle Point, where she got leaky in such a manner that she had to put into this harbour, where the cargo shall have to be discharged, and the ship repaired, as you will observe it from the inclosed copy. We shall pay our best attention to this affair, and now and then inform you of particulars; meanwhile we remain, dear Sir, your most obedient humble servants, Severin, Steison, and Co. Captain Pickard will write to you to-morrow." By this it is seen that they undertake the matter as agents, charge as agents, and give no intimation as to the amount, or whether they shall draw upon him. Then comes another letter of the 27th of October:—"Referring to our last respects on the 18th inst. we by the present beg leave to inform you that the *Wave*, after having taken out her cargo, was had down to-day with starboard side up, where she will have to be caulked over all, and some yards of planks to be taken out. We shall write to you again when the other side comes up; and by the next mail Captain Pickard will write to you." There is nothing more except a postscript of no importance. So that a correspondence was going on throughout the whole of this period, and that is the particular reason why I advert to it. There is nothing important in the letter; I read it to show that there was a continuous correspondence with the owners of the ship and cargo, and it is rather the negative I look to, namely, that throughout there is no mention of a bottomry-bond. Then follows the letter from which I have already read an extract, dated 17th November, stating their intention of not drawing on Mr. Beara. I do not think it necessary to enter more minutely into the evidence. I have gone through all the important letters of the case; the question is, what is the result of this evidence? Now, in my opinion, the result of this evidence is perfectly clear; it is, that there was no understanding, no agreement, and nothing had passed with the master with regard to a bottomry-bond until the receipt of the second letter from the owner of the vessel, at the end of November, six or seven weeks after the accident occurred; that there was most ample opportunity for Messrs. Severin, Steison, and Co. of which they availed themselves, to correspond both with the owner of the ship and with the owners of the cargo; that they did so from time to time, and never upon any occasion intimated an intention to take a bottomry-bond. Now if, under these circumstances, I come to the conclusion, as I do, that there was no agreement or undertaking for the bottomry-bond until the repairs were completed, they having been ordered on the responsibility of the house of Messrs. Severin, Steison, and Co. I cannot escape the conclusion of law, that a bond so taken is invalid; and I have no wish, in this case, to escape from that conclusion of law, because, when I look at the amount, and the charges made, and I see that these gentlemen must have been apprised, if they intended to take a bottomry bond at all, of the necessity of so doing at the earliest possible period, I consider it was their bounden duty to advise the owners of the ship and cargo, with whom they were in correspondence, of such intention, and they did not do it, but kept back and concealed such intention, if ever they entertained it, till the very period of taking the bond. I pronounce for the invalidity of the bond, and certainly do so with satisfaction to my own conscience. It is not only illegal in point of law, but not justifiable as a mercantile transaction. And I, therefore, pronounce against the bond with costs.

## ADMIRALTY.

## INSOLVENCY.

## INSOLVENT COURT.

## INSOLVENT COURT, DUBLIN.

Reported by J. LEXY, Esq. Barrister-at-Law.

July 1851.

Re M'NEVIN.

*Solicitor—False representations—Opening statement of opposing counsel—Agent.*

*If a solicitor obtain a loan of money for a client upon property, by untruly asserting that there is no incumbrance affecting it, and that the lender omits to make the necessary searches, it will not be a ground of remand.*

*If counsel, in his opening statement, makes no reference to alleged frauds on the face of a schedule, he will not be allowed to refer to them at the close of the case. Where the money of a client is misapplied by the agent of the attorney and by his directions, it will be no breach of trust by the agent.*

The insolvent, who was a solicitor, was opposed by Coffey and Levy for Miss Kane, a creditor; and by Mullen for Rose Reilly, another creditor.

The case on the part of Miss Kane was this. Her brother, who was a solicitor, saw an advertisement in some newspaper, stating that a party wanted a loan of 400*l.* on an assignment of a charge upon fee simple property in the county of Galway—application to be made to the insolvent. Miss Kane having the money to lend, a treaty for a loan was entered into with M'Nevin, who wanted the money for a client named Burke. M'Nevin stated that the charge which was to be assigned as security for the loan was the first incumbrance upon Burke's estate, whilst at the same time he was speeding a commission of lunacy against Burke's mother, to whom an arrear of jointure of 1,600*l.* was due, and with which the estate was chargeable. Kane took M'Nevin's word without making the necessary searches or inquiries. The money of Miss Kane was likely to be lost, the estate being little more than sufficient to pay the arrear of jointure. It appeared also that out of the 400*l.* loan M'Nevin deducted a sum of 120*l.* for costs and for cash advanced to Burke. It appeared by the insolvent's schedule, that shortly before his insolvency he made a post-nuptial settlement, pursuant to an ante-nuptial agreement, by which he vested considerable property in trustees for the benefit of his wife and children; and also made an assignment to other parties. This was done when he was in a state of insolvency.

Coffey, in opening the case against him, contended that he obtained the money by false representations and through interested motives, having deducted out of it a certain debt due to him by Burke, and costs of issuing the commission of lunacy; that he knew the arrears were due at the time he made the representation; and as evidence of that fact, an affidavit made in the lunacy matter was produced, to which insolvent's name appeared as solicitor. Counsel, in his opening statement, did not refer to the schedule or the *prima facie* fraud apparent on it.

Creighton, with whom was Beatagh, sustained the insolvent. There was no representation made that the solicitor could not have ascertained the truth of the marriage-settlement under which the jointure accrued due was not only registered, but the opposing creditor had been furnished with a copy of it. The principle of *caveat emptor* applied, and the solicitor for the lender was bound to make the necessary searches and inquiries. He was making his own breach of duty a ground of remand.

Levy, in reply, contended that the schedule presented a clear case of making away. There was the post-nuptial settlement and two other deeds of assignment, which were evidently executed with a fraudulent intent. He was proceeding to comment on the deeds—

The COMMISSIONER.—There was nothing said by the counsel who opened the opposition about these deeds, or about the alleged fraud on the face of the schedule, nor was the insolvent questioned about these deeds when under examination, and I cannot allow these grounds of opposition to be gone into now.

Levy contended, that without asking the insolvent any question on the part of the opposing creditor, the Court was bound to examine the schedule, and if fraud was apparent on the face of it, the Court should remand him or dismiss his petition.

The COMMISSIONER.—I will hear the case *de novo*, if you wish, but I will not permit a new ground of opposition to be opened now.

Counsel was accordingly confined to the first ground of opposition, and the case was referred to the officer of the Court to inquire and report what portion of the 400*l.* was retained by the insolvent for his own purposes, and the report found that he kept 50*l.* which he had advanced to Burke pending the negotiation for the loan; 50*l.* towards the cost of the commission of lunacy, in which Burke, the borrower was petitioner, and 20*l.* as for costs of the loan.

The COMMISSIONER, in giving judgment, said



## INSOLVENCY.

## NISI PRIUS.

## CIRCUIT REPORTS.

that as to the false representation about the charge on which the money was lent being a first incumbrance, the solicitor for the lender was bound, in the exercise of his professional duty, not to take any man's word when he had the means within his power of ascertaining the fact. The case differed from the ordinary misrepresentations where property was obtained without the parties having the means of at once satisfying themselves of the truth of the statements made, and there was a duty incumbent on the solicitor to have made the necessary searches, and having omitted to do so, he was making his own neglect a ground for remand against the insolvent. Then, had he motives for misrepresentation? The report found that he kept 120*l.* out of the loan; 50*l.* was for advances whilst the loan was pending; 50*l.* for costs of the commission of lunacy, which was sued out on the petition of the borrower; and 20*l.* for costs connected with the loan; he thought there was nothing wrong in that part of the transaction, and the first ground of remand should fail. With regard to the pointed observations made about the schedule, and the facts disclosed on the face of it, they might form a very good ground for remand, if counsel who opened the case had averted to them, or had examined the insolvent with regard to them. He did not think it right to permit the opposing creditors to keep a battery in reserve to open at the end of the case, and upon these grounds he thought the second ground of opposition should also fail. With regard to the case made on the part of Rose Reilly, it was attempted to establish a breach of trust; but it appeared that the money that came into the insolvent's hands belonging to her was received by him as the agent of his father, and although it had been applied by him to the payment of his father's debt, it could not be said to be a breach of trust, as long as he was the father's agent, and not the agent or solicitor of the person to whom the money belonged. The insolvent was discharged.

**Re JOHN SCOTT MILLS.**  
*Trustee—Breach of trust.*

*Quere, has the Insolvent Court power to discharge a trustee under the Court of Chancery from a debt due or default made in his capacity of trustee before he is in custody under process of contempt from the Court.*

*Crighton and Phillips* opposed. *Power and Maher* were for the insolvent, who was a solicitor.—It appeared that he had got himself appointed as trustee under the Court of Chancery, and in that capacity had received considerable sums of money belonging to some of his own family connections, whom he returned as his creditors to the extent of the defalcations of which he was alleged to have been guilty. This defalcation was clearly a contempt of the Court, for which the insolvent was liable to be attached and imprisoned; and it was argued by counsel opposing him, that until brought before the Court in custody for such contempt, it had no power to discharge him from the debt. The 18th section of the Irish Act (English analogous, 1 & 2 Vict. c. 110, s. 35), enacts that if a person be confined upon any process whatsoever, by reason of any debt, damages, costs, sum or sums of money, or for or by reason of any contempt of any Court whatsoever for nonpayment of any sum or sums of money or of costs taxed or untaxed, either ordered to be paid or to the payment of which such person would be liable in purging such contempt, or in any manner, in consequence or by reason of such contempt, the Court shall have power to discharge such person, &c. It was not a debt contracted with parties entitled to the fund, and it was not analogous to a debt or defalcation on the part of an ordinary trustee where the Court of Chancery did not intervene. The insolvent had no doubt returned the debt in his schedule, but the way to test the authority of the Court to deal with it would be this:—Suppose the Court did discharge him from the debt, and that, after undergoing a remand for a breach of trust, he would still be liable to be attached by the Court of Chancery for not accounting; for that Court would not take for answer to his defalcation that he had been discharged by the Insolvent Court; the debt should be ascertained by the taking of the account before the Court of Chancery.

Counsel for the insolvent contended that the Court had authority, and that they should send the matter before the chief clerk to take the account, and, when ascertained, set it forth correctly and truly in the schedule as so much money really due by him to the *cestui que trust* for money that came into his hands belonging to them.

The Court thought it was a case that should be very fully considered. Their opinion was, that they had not jurisdiction to discharge him from the debt till brought up in custody for the contempt of not paying the money into the Court of Chancery.

The difficulty was got rid of by both parties consenting that the debt should be struck out of the schedule, and the insolvent was accordingly discharged.

## Re WILLINGTON.

*Receiver—Judgment creditor—Breach of trust.*  
*Quere, has the Insolvent Court power to discharge a receiver who becomes insolvent from defalcations in his accounts?—Is such defalcation a breach of trust as regards the judgment creditor?*

This case was somewhat similar to that of Mills. The insolvent was a receiver appointed by, or extended to a judgment creditor named Fitzgerald. He gave the usual security by recognisance to the Court of Chancery, but he applied some portion of the moneys that came into his hands to his own use, and failed to account. He now came up to seek the benefit of the Insolvent Act, but, unlike the case of Mills, he did not return the judgment creditor in his schedule.

*Phillips* opposed him, and *Hickie*, attorney, supported. Counsel now took a different line of argument from that pursued in the case of Mills; he contended that the insolvent should insert the debt in his schedule, and then the Court should deal with it as a breach of trust. It differed from the case of Mills in this, that an order of the Court had been obtained directing the insolvent to pay the moneys received, or certain moneys he ought to have in hand, to the judgment creditor, without lodging it in court, and thereby a direct privity was established between them, the relation of trustee and *cestui* trust was created—he violated the trust, and the object of the opposition was to obtain a remand, which would end in a settlement of the claim of the judgment creditor.

*Hickie* contended that the Court had no power to deal with the case, no debt was, in point of fact or in point of law, established. The insolvent had further to account in the course of another month or two, and *non constat* that any thing would be found due by him upon the taking of the account; but even if there were, he did not seek to be discharged from it—his sureties were liable; he asked an adjournment till the account was taken.

The Court were inclined to the opinion that they had not jurisdiction, but they would adjourn the case till the account was taken before the Master. Suppose they had jurisdiction, and the amount of his defalcation was inserted in the schedule, would it be a breach of trust as regarded the judgment creditor? It would be time enough to consider that if the case were to come before them again. It was to be presumed that the Court of Chancery had obtained solvent sureties for him.

## Nisi Prius.

Reported by D. T. EVANS, Esq. Barrister-at-Law.

## WELSH CIRCUIT.

Chester, Aug. 14.

(Before WIGHTMAN, J. and a Special Jury.)

*Doe dem. HYDE v. CORPORATION OF MANCHESTER.*

*Effect of description of parcels in a plan annexed to conveyance—Operation of deed-poll executed by promoters of a public undertaking under 8 Vict. c. 18, s. 77, after full notice of the quantity of land required to be taken by promoters.*

*Quere, if a conveyance be made of lands of A. from a given bound in Red-close, containing twenty acres, and a plan be annexed describing the lands conveyed as bounded on the other side by lands of B. in Green-close, whether all Red-close between the two bounds passes, though the same extend over twenty-one acres?*

*If A. having notice that certain portions of his own and the neighbouring lands of B. are required for a public undertaking, and receive money by way of compensation for all the lands so required, but suffer an erroneous description of the property to be acted on by the promoters, whereby a small parcel of his own land is treated in the plans and conveyances as the land of B.: Semble, he is estopped afterwards from objecting that in the conveyance executed by himself only the twenty acres passed, and that the one acre which intervened between the said twenty acres and the lands of B. did not pass.*

This was an action of ejectment brought to recover a small portion of land less than one acre, which had been taken possession of by the defendants as the proprietors of the Manchester Waterworks.

*Welshy and Bevan*, for the plaintiff.  
*Evans, G.C. Jones, Serjt. and Pulling*, for the defendants.

It appeared that previous to the Manchester Waterworks Act being obtained, plans and books of reference had been deposited with the Clerk of the Peace, as directed by the statute, in which certain portions of the adjoining lands of Mr. Hyde and the Duke of Norfolk were described as proposed to be taken for the purposes of the works. After the Act was passed a notice to treat was served on Mr. Hyde, with a plan annexed nearly corresponding with the parliamentary plan, Mr. Hyde's land being coloured red and marked as containing 21a. 2r. the land bound-

ing it on the south being coloured green, and described as the land of the Duke of Norfolk. Mr. Hyde having refused to treat, arbitrators were appointed, and ultimately an umpire was selected, before whom Mr. Hyde claimed compensation not only for the 21a. 2r. in question, but the additional strip now in dispute, and the umpire, who was called as a witness, swore that the question of title to this additional strip of land was fully gone into before him, evidence being given as to the extent of the boundaries of Mr. Hyde's land, and that he, the umpire, had in his award purposely given compensation to Mr. Hyde for all the land which Mr. Hyde claimed. Mr. Hyde, however, was dissatisfied with the award, and refused to execute any conveyance of the land so taken from him by the defendants, and the defendants thereupon duly executed the deed-poll prescribed by the 8 Vict. c. 18, s. 77. Mr. Hyde had subsequently obtained a rule in the Court of Q.B. to set aside the umpire's award, but the rule was discharged with costs, and a great deal of litigation had since taken place between the parties on the same subject. It did not appear to be disputed that the defendants had paid the full price for the whole land taken possession of by them, but Mr. Hyde contended that the strip of land now in dispute had throughout been treated by them as the land of the Duke of Norfolk, and that the price had been paid to his Grace instead of Mr. Hyde. Evidence was now given, on the part of Mr. Hyde, that the real boundary-line of his property extended as far as the end of the strip of land now claimed by him, and that the maps and plans used by the defendants had throughout only contained a description of a portion of Mr. Hyde's land, viz. the 21a. 2r. above the strip of land now in dispute. The plaintiff's counsel contended, therefore, that the 21a. 2r. only passed to the defendants.

On the part of the defendants, however, it was contended that the description of Mr. Hyde's land in the map annexed to the notice to treat was sufficient to make the deed poll pass all the land of Mr. Hyde up to the real boundary of the Duke of Norfolk's property; and *Shepherd's Touchstone*, 247, was quoted, where it is stated, that "if one grants in this manner all my meadow in D. containing ten acres, whereas in truth his meadow then doth contain twenty acres, it seems this is a good grant for the whole twenty acres." And the decision of the House of Lords in *Jack v. McIntyre*, 12 Clark and Fennelly, was relied on, where a lease, granting "all that part of the townland of B. containing 509 acres arable, meadow, and pasture, bounded on the S. by D. on the N. and E. with L. N. and on the W. with T. and W.'s land, with all rights thereto belonging," &c. was held to pass also 400 acres of bog and reclaimed from bog, which were situated within the ambit of the specified boundaries.

*WIGHTMAN, J.* told the jury that they were, first, to consider whether they were satisfied that Mr. Hyde had proved title to the strip of land now disputed. [The jury answered this in the affirmative.] The learned judge then directed the jury, that it was for them to consider whether Mr. Hyde had made claim before the umpire for the land now in dispute, and the umpire had awarded compensation for such land; as in that case the deed-poll executed by the defendants would have the effect of vesting the estate and interest therein in the defendants.

The jury found a verdict for the plaintiff.

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## OXFORD CIRCUIT.

Reported by J. E. DAVIS, Esq. Barrister-at-Law.

HEREFORD SUMMER ASSIZES, 1851.

Monday, Aug. 4.

(Before ERLE, J.)

CLEAVE v. JONES.

*Attorney and client—Privileged communication—Statute of Limitations—Acknowledgment.*  
The defendant, executrix of P. J., in 1840 gave the plaintiff a promissory note for 330*l.* the amount of a debt due from the testator. The plaintiff, being also the defendant's attorney, applied in 1846 to the defendant for a statement of account, shewing her position with reference to the testator's estate, in order to prepare a case for the opinion of counsel on a question relating to the right of the defendant as executrix, and in accordance with that request a statement of account was sent to the plaintiff, in which the defendant debited herself with the interest on the promissory note.

Held, that in an action on the note, the plaintiff could not make use of the account to take the note out of the Statute of Limitations, such account being a privileged communication.

A witness, called by the defendant for the sole purpose of proving that the account was furnished to the plaintiff in his character of the defendant's attorney, is properly sworn on the voir dire.

A letter was written by the defendant, directing

*\* If the money had been executed by the lender he would doubtless be estopped from disputing that the whole land passed but here Hyde had not and the company could not by executing create an estoppel. Their only authority is to convey that which they have*



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the appropriation of certain moneys that were to come to the plaintiff's hands for her as executrix, and stating that if a certain creditor did not press for payment, "the following debts" were to be paid, and, amongst them, was 100*l.* to the plaintiff, without specifying whether on account or otherwise:

*Held*, that such letter was not an unequivocal admission of the debt of 330*l.* so as to take it out of the Statute of Limitations.

This was an action for debt, commenced in 1848, on a promissory note for 330*l.* made in 1840 by the defendant, as executrix of her husband. There was a plea of the Statute of Limitations. The case was tried at the Summer Assizes, 1849, before Rolfe, B. when the plaintiff, in order to take the case out of the statute, tendered in evidence an entry in an account furnished by her to him of the payment of 17*l.* interest on the note in 1847. This entry was in the defendant's handwriting, but not signed by her; and Rolfe, B. in accordance with the case of *Willis v. Newham*, 3 Y. & J. 518, ruled that it was not sufficient to take the case out of the Statute of Limitations. To this ruling the plaintiff's counsel tendered a bill of exceptions, and the question was lately argued in the Court of Ex. Ch. when the case of *Willis v. Newham* was reconsidered and overruled, and the ruling of Rolfe, B. in the present case held erroneous, and a *venire de novo* was awarded.

*Whateley*, Q.C., *Keating*, Q.C. and *Cleave*, for the plaintiff.

*Greaves*, Q.C. and *Gray*, for the defendant.

*Whateley*, Q.C. in stating the case, said the question was, whether the plaintiff, Mr. Cleave, an attorney and solicitor, in Hereford, and who had also for many years been the clerk of the peace for the county, was entitled to recover from Mrs. Sarah Jones a sum of about 400*l.* which he claimed to be due upon a promissory note, and for interest accruing upon it. The defendant, Mrs. Jones, was the widow of the late Philip Jones, esq. of Sugwas, who died some few years ago possessed of a very considerable estate in this county, leaving as his executors his son, Edmund John Jones, and his wife, the present defendant. The question which arose was this—whether or not there had been a sufficient acknowledgment in writing under the Statute of Limitations to enable the plaintiff to recover upon this note. After alluding to the former trial, Mr. *Whateley* proceeded to state that, at the time of the late Mr. Jones's death, he was indebted to the plaintiff in the sum of 35*l.* 18*s.* 4*d.* for business done as an attorney, and for money lent. This sum was reduced to 630*l.* (the balance of 5*l.* 18*s.* 4*d.* being carried forward), and for that amount a promissory note was given. In March 1840 this note was broken in two parts, and a note was given by the defendant for 300*l.* at three months, which was afterwards paid. In May of the same year another note was given by her for 330*l.* and this was the note upon which the plaintiff was now suing. In order to prove that there had been a sufficient acknowledgment in writing to enable the plaintiff to recover upon this note, he should lay before the Court an account made out by Mrs. Jones herself, containing an entry in her own handwriting. This entry referred to the sum of 350*l.* The learned counsel also said he should rely on a letter written by the defendant to plaintiff in July 1845.

Mr. J. K. Hastings, manager of the Herefordshire Banking Company, was called to prove the note and account produced to be in the handwriting of the defendant.

On cross-examination a letter was put into the witness's hands, which he stated was in the handwriting of the plaintiff.

The promissory note having been put in and read, the account-book was also tendered. It purported to be a debtor and creditor account between the defendant and her son and co-executor, Edmund John Jones, and also between herself and the estate, and debited herself with the sum of 17*l.* for interest to the plaintiff on the promissory note now sued for.

*Greaves*, Q.C., objected to its being received in evidence on the ground that it was a privileged communication furnished to the plaintiff in his character of the defendant's attorney, and he proposed at this stage of the case to put in evidence, and call a witness to prove that fact.

A letter was then put in, written by the plaintiff to the defendant, dated 29th December, 1846 (being the letter already proved, by the witness Hastings, to be in the plaintiff's handwriting). This letter requested the defendant to furnish him with a statement of accounts in order that he might prepare a case to lay before counsel on her behalf.

*Greaves* then said, he should call a witness to prove that the account now tendered in evidence was furnished in consequence of that letter. He submitted that the witness must be sworn on the *voir dire*. He and his learned friend, Mr. Gray, had considered the point, and thought that was the proper course to adopt.

*ERLE*, J., observed that the usual oath to a witness was to speak the truth before the Court and

jury sworn touching the matters in dispute between the parties; but here the question was one not for the jury, but simply for him as to the admissibility of certain evidence, and consequently the witness should be sworn on the *voir dire*.

Sarah Jones was then called as a witness for the defendant, and sworn accordingly. She stated that she was a daughter of the defendant, that the plaintiff had been the defendant's attorney. In 1846 a question was raised as to the defendant's right to distrain for rent on her co-executor Edmund John Jones, and the plaintiff said he should prepare a case for the opinion of counsel. Witness recollected his letter of the 29th December, 1846, being received by the defendant. It was in consequence of that letter that the account-book in question was made out. The accounts in it were partly furnished to him, which he objected to, and ultimately the account-book was made out and sent.

Upon this evidence it was submitted by the counsel for the defendant, that the account-book was inadmissible, as being a privileged communication, furnished by the defendant to the plaintiff in his character of solicitor.

*Whateley*, Q.C. and *Keating*, Q.C. contra, contended that the case was not within the rule of privileged communications.

*ERLE*, J. however, ruled that the account was not admissible. He said it appeared to him that Mr. Cleave would not have had the communication made to him if he had not been Mrs. Jones's attorney. She would not have communicated the account to him unless she reposed confidence in him as her attorney, and confidence so reposed was for the benefit of the client, and solely for the benefit of the client. If information passed from the client to the attorney by reason of the relation of client and attorney, it was the privilege of the client that that information should not be disclosed to the prejudice of the client; and if this were true when the fact to be ascertained was a matter in dispute between third parties, it was much more so when the fact to be ascertained was in dispute between the attorney and the client.

A letter was next given in evidence which the plaintiff's counsel used as an acknowledgment of the debt. In this letter, dated 24th Dec. 1845, Mrs. Jones, in directing the appropriation of certain moneys that were to come to Mr. Cleave's hands for her, as executrix of her husband's estate, said, that if a certain creditor did not press for payment, 100*l.* amongst other moneys, out of a certain sum of 1,500*l.* was to be paid towards her debt. But it was objected for the defendant that the plaintiff was her attorney, and that this meant possibly a debt due to him from her in that character, and that it was not an acknowledgment of the debt sued for.

*ERLE*, J. held that this was not an unequivocal admission of the debt. The defendant said she was going to pay the "following debts," including 100*l.* to the plaintiff. The construction of this would be, that it was an entire debt which was to be discharged by that payment, and not that it was a payment on account of a debt of a larger amount. It appeared quite clear that this was executorial money, and executorial debts which she was about to pay; but it was by no means clear that there was no other liability between the plaintiff and the defendant, because it was in evidence that plaintiff had been her legal adviser for several years. Upon this ground it might be taken that there was a possibility of there being another debt due from defendant to plaintiff, as from client to attorney. He could not take this letter as an unequivocal acknowledgment of the debt of 330*l.* and of the appropriation of the 100*l.* as part payment. These payments not having been made out so as to take the case out of the statute, the plaintiff's case must fail. *Plaintiff nonsuited.*

## OXFORD CIRCUIT.

Reported by J. E. DAVIS, Esq. Barrister-at-Law.

GLOUCESTER SUMMER ASSIZES, 1851.

Thursday, Aug. 14.

(Before Mr. Justice ERLE.)

SNEAD v. SMITH.

*Set-off*—Promissory note—Accord and satisfaction. C. as security for B. joined him in a promissory note to A. payable two months after date. On the note becoming due, B. was unable to take it up, and applied to A. to allow a renewal; A. consented, and received the discount for a further period of two months. On B.'s saying he would procure the new note as soon as he could see the surety, A. observed that it did not signify—it might stand over, as it would save the stamp. C. declined to agree to this, and a new note was prepared and repeatedly tendered to A. who, however, did not take it, alleging that he had not got the old note with him, and that he was busy, and consequently B. retained the new note, and A. continued to hold the old one.

*Held*, that if A. agreed with B. that the old note was satisfied by the payment of the discount and a renewed note, and if the old note was held by

A. for B. and B. held the new note for A. the old note could not be pleaded by way of set-off to an action by C. against A. and that on the above facts there was evidence for the jury that the old note was so satisfied.

This was an action of debt for work and labour as an attorney, and on an account stated.

The defendant pleaded never indebted, except as to 41*l.* 19*s.* 9*d.* and as to 33*l.* 19*s.* parcel, &c. a set-off on a promissory note for 34*l.* made by the plaintiff and delivered to the defendant, and payment into court of the balance of 8*l.* 0*s.* 9*d.*

The plaintiff replied, denying the set-off.

*Whateley*, Q.C. and *Gray*, for the plaintiff.

*Alexander*, Q.C. and *Macnamara*, for the defendant.

The issue lying on the defendant, the following note was produced and proved:—

"Gloucester, March 3, 1851.

"Two months after date we jointly and severally promise to pay Mr. John Smith or order, 34*l.* for value received.

"RICHARD CHANDLER,

"J. B. SNEAD."

*Whateley* then opened the case for the plaintiff.—The action was brought to recover the amount of an attorney's bill. The defendant was a money lender and bill discount. Richard Chandler had pecuniary transactions with him, and became indebted to him in the sum of 34*l.* as security for which he gave the joint and several note of himself and the plaintiff, who signed his name as security for, and at the request of, Chandler. This note was renewed from time to time, Chandler paying the discount. The note of the 3rd of March, 1851, became due on the 6th of May. Chandler, being still unable to take it up, offered to renew, which the defendant agreed to do, and Chandler paid 1*l.* 14*s.* discount for two months. Smith said there was no occasion for a new note; but Snead said a new note must be given. A new note was accordingly prepared, and several times offered to the defendant; but he excused himself from taking it, on the ground that he was busy, or had not got the old note with him to deliver up. The old note, however, it was submitted, was satisfied, and the defendant could not make it the subject of set-off, and the substituted note did not become due until after the commencement of the action. A tender had, moreover, been made of the amount of the renewed note after it became due, when the defendant refused to take it, saying, "I have parted with the note."

Richard Chandler was then called as a witness. He said—"In 1849 I was indebted to Smith, the defendant, in 39*l.* I afterwards paid him 5*l.* reducing it to 34*l.* Smith required security, and Snead, my brother-in-law, joined me in a promissory-note for 34*l.* The first note was given August 27, 1850. The note was renewed from time to time every two months, on payment of 3*s.* I ultimately gave the note for 34*l.* of 3rd March, 1851. When that note became due, namely, on the 6th of May, Smith called on me; I was unable to pay it. I told Smith I should want it renewed; he consented. I paid him 1*l.* 14*s.* at the Fountain Inn in Gloucester, where he has a room for carrying on his business. I told him I would get the new note as soon as I could see my brother-in-law. Smith said, 'It does not signify—let it stand over; it will save the stamp.' I afterwards saw the plaintiff Snead. A renewed note was drawn within two or three days afterwards, which I produce. [This note was dated the 6th of May, and identical in all respects with the note of the 3rd of March.] I made several attempts to see Mr. Smith. I saw him three or four days afterwards, and offered to give him the note and requested to have the old note. On one occasion he said he was busy, and a person was waiting for him; on another, that he had the note upstairs. We afterwards met in the street, and he said, 'I thought of bringing you the old note; but I took a drive.' I had the new note with me on these occasions, and showed it to him. At another time he said he would call on me with the note; he did not call, and I retained possession of the new note. I went with Mr. Thomas to the defendant on the 16th of July and offered the money to him. I put it on the table, 34*l.* 1*s.* The defendant hurried out of the house. I and Thomas followed him, and produced the money and note. The defendant said he had not got the old note, he had indorsed it away. I again demanded the old note; he said he had not got it, I had better go to his attorney, Mr. Wilkes." On cross-examination, the witness said: "Snead told me to offer the money, and he told me to take Thomas, his attorney's clerk, with him. I have had the new note ever since."

Henry Thomas, clerk to Mr. Smallbridge, the plaintiff's attorney, confirmed the evidence of Chandler as to the tender.

*Alexander*, Q.C. submitted that this evidence afforded no legal answer to the set-off. Even supposing the right of action to have been suspended on the note of the 3rd of March, still the right of set-off existed. The case of *Ford v. Beech*, 17 Law J. 114, Q.B. decided that there was a distinction, there-

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fore, between the right to sue and the right to set off.

**BALE, J.**—But if the note was satisfied by the subsequent agreement, if the new note and interest were taken in satisfaction of the note falling due on the 6th of May, an action on the satisfied note could not be brought. This is the way the plaintiff frames his case, and if the jury should be of opinion that the new note was held for Smith, and in satisfaction of the former note, the plaintiff is entitled to a verdict, the set-off not being established.

**Alexander.**—The note was not satisfied. There was an incipient bargain, it is true; but the defendant afterwards said, I will hold the old note, and he continued to hold it.

**BALE, J.**—If Speed agreed to that, your view would be correct; but Speed and Chandler preferred that a new note should be given; and although that note was not actually delivered to the defendant, yet if it was held by a third intermediate party, as his agent, that is equivalent.

**Alexander.**—Then the defendant is without remedy?

**BALE, J.**—Yes. It may be rightly so, if the defendant's desire was to defeat Speed's claim. He does not tell Chandler, "I repudiate the new note," but leads him to infer that he assents to the arrangement. In *Ford v. Beech* it was held—it is difficult to know why—that a right cannot be suspended by agreement; but here there is satisfaction.

**Alexander** then suggested, that accord and satisfaction could not be given in evidence under these pleadings. Payment could not be given in evidence under them.

**Gray, contra.**—Payment is admissible. The replication alleges that the plaintiff is *not*, and never was, indebted.

**BALE, J.**—It comes to this. If the jury are of opinion that as between Smith and Chandler, 11. 14s. and a new note were taken in satisfaction, they must find for the plaintiff. The case is very near *Ford v. Beech*; but I think the distinction I have stated exists.

**Alexander** then addressed the jury on the question whether there was any satisfaction of the note.

**BALE, J.** in summing up, said:—In general it is perfectly indifferent whether the principal or the surety is the party sued, but in this case I think you should bear in mind that the money was lent to Chandler, Speed joining as surety. The surety was safe as long as the discount ran. If Smith on the 6th of May agreed with Chandler that the old note was satisfied by payment of 11. 14s. and a renewed note, and the old note was held by Smith for Chandler, and Chandler held the new note for Smith, then the plaintiff is entitled to your verdict. If that is not made out, you will find your verdict for the defendant. If Chandler and Speed had fallen into the proposal "not to mind the new note, it will save the stamp," there is no doubt the old note would not have been satisfied. But if I were on the jury I should find whatever the parties intended others should believe at the time, was in fact the agreement. Did Smith intend that Chandler should believe that the old note was satisfied? When he is applied to for it, he does not assert a right to hold it, but makes some excuse for not delivering it up at that particular time.

**Verdict for the plaintiff for 34l. 19s.**

**BALE, J.** observed, that the only question now to be raised was, whether there was any evidence to go to the jury in support of the verdict. After some discussion as to the best course to be pursued to avoid unnecessary expense, the plaintiff undertook to discontinue if a rule for a new trial was obtained and made absolute.

## WELSH CIRCUIT.

Reported by D. T. EVANS, Esq. Barrister-at-Law.

Chester, Aug. 15.

(Before WIGHTMAN, J. and a special Jury.)

**BOSTOCK v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.**

**Action on the case for a nuisance.**—Application of *a. maxime*, sic utere tuo at alienum non laedas.

A reservoir was formed in the valley of Y. in 1797, for the purpose of feeding the T. and M. Canal with water. The Canal Acts reserved to the neighbouring landowners the right of fishing, shooting, &c. and of having pleasure-boats on the reservoir, which continued to be used for fifty years for the sole purpose of supplying the canal with water; and during this time many of the neighbouring landowners had laid out ornamental grounds and built private residences on the banks of the reservoir. The N. S. Railway Company, who had purchased the T. and M. Canal, together with the reservoir, held, in 1851, two regattas on the reservoir, bringing there many thousand persons by excursion trains on their own railway. Many noisy amusements were provided for the multitude, who committed trespasses on the neighbouring lands and ornamental grounds adjoining the residence of A. and greatly

disturbed the fish in the reservoir, and the game in the neighbourhood:

**Held, by WIGHTMAN, J.** that the action would lie, and that it was for the jury to decide whether any and what injury had been actually sustained by A. in consequence of the holding of the regattas.

This was an action on the case, directed by Vice-Chancellor Knight Bruce, to be brought by Miss Bostock, a lady of landed property, residing at Cliffe-park, on the borders of the Ruddyer Lake or reservoir, near Leek, in Staffordshire, against the defendants, who had become the proprietors of the Trent and Mersey Canal, together with the said lake or reservoir, to try the right of the defendants to hold regattas on the said lake or reservoir.

**Evans, Q. C. Welsby, and Pulling, for the plaintiff.**

**Grove and Beavan for the defendants.**

The declaration stated, that the plaintiff was lawfully possessed of a certain mansion-house, lands, and premises, &c. in which said mansion-house she, the plaintiff, at the several times in this count herein-after mentioned, inhabited and dwelt with her family; that the defendants were possessed of certain land covered with water, to wit, a certain lake or reservoir of water, called Ruddyer Reservoir, with the appurtenances adjoining, and near to the said mansion-house, lands, and premises of the plaintiff; yet the defendants, well knowing the premises, but contriving, &c. on the 21st of April, 1851, and on divers other days, &c. caused and procured to be had and held in and upon the said lake and reservoir of water divers regattas and boat races, and other aquatic sports and pastimes; and upon the occasion of so having and holding the same, the defendants also caused and procured divers large numbers of idle and disorderly persons to assemble and gather together upon and near to the said lake or reservoir of water, and then and there to make, and the said persons being so assembled and gathered together did then and there make, divers noises and disturbances and tumults; and the defendants also, on the said several days and times, wrongfully and injuriously suffered and permitted divers steam-boats and other boats and vessels to be and ply for hire in and upon the said lake or reservoir of water, and also there discharge and shoot off in, upon, and near to the said lake or reservoir of water, divers guns, pistols, and pieces of ordnance and artillery, by means of which said several premises the plaintiff at the said several times, &c. was greatly annoyed, disturbed, incommoded, and prejudiced in the proper use, occupation, and enjoyment of her said mansion-house, lands, and premises.

Second count set out a several right of fishery.

The defendants pleaded first, not guilty; and, secondly, traversed plaintiff's right of fishery.

From the evidence it appeared, that the Trent and Mersey Canal Company, under an Act of Parliament obtained in 1797, formed a reservoir of water for feeding the canal, in the Ruddyer Valley, near Leek, which reservoir having in course of time been extended over nearly two miles of the valley, and being a very picturesque object, obtained the name of the *Ruddyer Lake*. The company's Acts provided for the use of the reservoir only as a feeder to the canal, the regulations as to navigating boats, &c. being confined to the canal itself, and the rights of fishing, shooting, digging minerals, and using pleasure-boats on the reservoir, &c. being expressly reserved to the neighbouring landowners, many of whom had since laid out extensive ornamental grounds, and erected mansions on the borders of the reservoir, and up to the present year none but the private pleasure-boats of the landowners had been allowed on the reservoir.

The plaintiff was owner and occupier of Cliffe Park, which extended for half a mile along the borders of the reservoir, the mansion-house being only 187 yards from it. The defendants had, by an Act of Parliament, passed in 1845, obtained possession of the whole property of the Trent and Mersey Canal Company, and having brought their railway within a very short distance of the reservoir, they opened a temporary station near the reservoir, and in April, 1851, announced that excursion trains would run to the Ruddyer Lake, and that a regatta would be held there, with a variety of popular amusements, on Easter Monday. The plaintiff, and several other of the neighbouring landowners protested against this proceeding on the part of the defendants; but the regatta took place, and upwards of 6,000 persons assembled on and in the neighbourhood of the reservoir. A steam-boat and a large number of pleasure-boats were brought to the reservoir by the defendants, and plied for hire during the day. There were boat races, accompanied by the discharge of artillery and small guns on the reservoir; and there were amusements also provided on some land of the defendants adjoining the plaintiff's grounds, such as jumping in sacks, rifle shooting, &c.; many of the crowd committed trespasses on the plaintiff's grounds, and throughout the day the crowd conducted themselves in a noisy

and disorderly manner, to the personal annoyance of the plaintiff. The fish in the reservoir were greatly disturbed and the wild-fowl scared away. Notwithstanding the urgent remonstrance of the plaintiff, a second Ruddyer Lake regatta was announced by the defendants for Whit-Monday, and took place, with nearly the same accompaniments and the same result. The Vice-Chancellor, on an application for an injunction had directed the present action to be brought to try the right of the defendants to use the reservoir in the mode described, they undertaking to forbear from doing so until after the action had been tried.

**Grove, for the defendants, contended that there was no precedent for the present action.** The defendants, being the proprietors of the reservoir, had a perfect right to use it in any way that was most advantageous to themselves, and they could not be held responsible for any excesses which had been committed by persons over whom they had no control. The company were not liable for trespasses committed by the crowd.

**Evans** referred to *R. v. Moore*, 3 B. & Ad. 184, where an indictment was held sustainable against a party keeping a pigeon shooting-ground for occasioning the collection of idle and disorderly persons to shoot at stray birds, the nuisance being the probable consequence of the defendants keeping the pigeon shooting-ground.

**WIGHTMAN, J.** said that the defendants had in this instance themselves brought the crowd of people to the reservoir, and were responsible for any damages which could reasonably be traced to the circumstance of the crowd assembling there. Disorderly conduct might reasonably be expected from a collection of such a large number of persons. The law would clearly deem it to be a private nuisance to collect for any length of time such a crowd of people in the neighbourhood of a man's house, as to obstruct him in the enjoyment of his home, and if the jury were of opinion that the plaintiff had sustained any injury by the assembly of the crowd at the regattas held by the defendants, the latter would be liable to make compensation for such injury. The defendants were not confined in their enjoyment of the reservoir to the uses originally contemplated by the Canal Company; but if the reservoir was used by them in such a manner as to cause a nuisance to the neighbouring landowners, or to interfere with their enjoyment of the rights of fishery and sporting, the defendants would be clearly liable.

The jury could not agree, and ultimately, by consent of both parties, they were discharged. The defendants "undertaking" to be continued until further order of the Court.

## Equity Courts.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

MINN v. STANT.

Tuesday, July 29.

**Pleading—Parties—Suit by one of several parties interested.**

A piece of freehold land was conveyed to trustees on trust for building a Dissenting meeting-house and schools thereon, the same to be used as such by a particular denomination of Dissenters. The trusts of the deed also enabled the trustees, when required by the major part of the men-subscribers to the trust, to raise such sums of money as they should be directed by mortgage of the premises; and they were thereby also enabled to sell the whole or part thereof with the like consent. The premises were accordingly mortgaged, as alleged, with a power of sale, to a person who sold them, or, as the bill alleged, transferred the mortgage to another, who sold to a railway for a much larger sum than he had given. Some of the trustees filed a bill against the others, and against the mortgagee and transferee and some of the men-subscribers, to recover the difference between the amount of the mortgage and the price paid by the railway. All the men-subscribers were not made parties, nor was the consent of the majority obtained at any meeting duly convened for that purpose.

**Held, that the record was defective in respect of parties.**

**Quere, whether, if the whole or the major part of the men-subscribers had, at a meeting duly convened prior to the institution of the suit, sanctioned the sale or the institution of the suit to obtain the benefit of the sale, that would have cured the defect? And quere whether all the men-subscribers existing at the institution of the suit must be made parties?**

In such a case as this the interests of the cestui que trusts may be at variance with the course which the trustees pursue, and therefore the authorities

## ROLLS COURT.

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## ROLLS COURT.

as to trustees filing a bill to get back a trust fund without making their cestui que trusts parties have no application.

By indentures of lease and release of the 14th and 15th of May, 1829, a piece of freehold ground in Shrewsbury was conveyed by one Jones in consideration of the sum of 100*l.* to certain trustees therein mentioned, for the purpose of building thereon a Dissenting chapel, &c. The deed was duly enrolled, and the land was to be held by the trustees on trust, first, to build thereon a meeting-house and school-house; secondly, to allow the same to be used for public worship by certain Protestant Dissenters, called Particular or Calvinistic Baptists; thirdly, to raise, when required, by the major part of the men-subscribers such sums of money as they should be directed, by mortgage of the premises; and, lastly, to hold the money derived therefrom, and the buildings, &c. while unsold, for the said Dissenters called Particular or Calvinistic Baptists, or for such purposes as the major part of the men subscribers, being members and communicants, should direct. By indentures of lease and release of the 28th and 29th of November, 1830, the trustees conveyed the premises by way of mortgage, with power of sale, to John Hawley, in consideration of 500*l.*; and Hawley subsequently conveyed the premises to Joseph Stant, on being repaid by him the sum so advanced. Stant having sold the premises to the Shrewsbury and Stafford Railway Company for the sum of 1,100*l.*, considered himself entitled to put the 600*l.* the difference between the sum advanced by him and the price paid him by the company, in his own pocket; but the trustees of the premises denied his right so to do, and demanded payment of the 600*l.* which was refused, and the present suit was instituted to enforce payment. The original bill was filed by Robert Minn and five other trustees, against the three remaining trustees, and against one Teigs (a solicitor, who was engaged in the transaction in question), John Hawley, the mortgagee of the chapel, and Joseph Stant, the transferee: and the object of the bill was to make Stant a trustee of the surplus money received by him from the railway company as vendor of the premises, beyond the mortgage money; and the nature of the case set up was, that Hawley was a mere mortgagee, and that Stant became a mortgagee by a transfer of the mortgage from Hawley, and not an absolute purchaser, as alleged under the power of sale in the mortgage deed; that Stant therefore had no power to sell, but that the plaintiffs did not dispute the sale, but would confirm it to the railway. The prayer of the bill was, that it might be declared that Stant was no more than a mere assignee of the mortgage; and as to the 1,100*l.* that he might be declared a trustee of 600*l.* part thereof, for the purposes of the deed of trust, and that an account might be taken, &c. Stant, by his answer, alleged that the property in question was mortgaged by the trustees, with a power of sale, and vested in Hawley, who absolutely sold it to him (Stant) under the power, and that he afterwards sold it *bona fide* to the railway company. The answer, moreover, stated that the congregation for whose use the chapel was built was dispersed, and that its affairs were being wound up, whereas the bill alleged that the congregation still continued. The answer then raised an objection for want of parties, or rather two objections, of which one only was pressed, viz. that there ought to be some person or persons made parties to represent the congregation, inasmuch as they were not represented by the trustees, who were not alleged by the bill to be members, or to be suing on behalf of themselves and the congregation, and if a decree were made without the congregation being represented, it might be set aside. At all events, the men subscribers ought to be before the Court. On this objection the plaintiff set down the rule for argument in pursuance of the 39th General Order of August 1841, and it was held to be a valid objection by the late Lord Langdale, and leave was given to amend. (See 13 Law T. 462.) The bill was accordingly amended by making some of the men subscribers parties, and an objection being again taken to the bill as being defective in respect of parties, on the ground that there could be no representation of men subscribers by making a few only parties, the case came before the Court for argument.

R. Palmer and Giffard, in support of the objection, cited *Carlisle v. The Eastern Counties Railway Company*, 1 M. & G. 688, 689; *Richardson v. Larpent*, 2 Y. & C. C. 507; *Harrison v. Stewardson*, 2 Har. 530, 533.

Rouppell and S. Cracknell, contra.

The MASTER of the ROLLS.—I think this is a fatal objection; and not only do I think it a fatal objection, but I think it comes before me in a more fatal form than it came before Lord Langdale. The nature of the case is this,—it is a bill filed by trustees to confirm a sale to a railway company by a mortgagee of the property belonging to a chapel, to treat him as a trustee of the purchase-money for their benefit, and upon paying him what is due to him for principal and interest, to make him pay over the

remainder to trustees for the benefit of the congregation. It is obvious that this transaction might be looked at in two points of view, and it was competent for the persons, whoever they are, interested in the transaction, either to say (whichever was most for their benefit) "It is a transaction of which we will take the benefit, or it is a transaction which we choose to have set aside altogether, and in which we will have the benefit of redeeming the mortgage and having the estate against the railway company;" or they might say it was sold for a much lower price than its value. In either point of view it is impossible to proceed without those persons being here. If it were the case of a sale, it appears by the deed which is set out in the bill that the trustees have no power to sell without the consent of the major number of the men-subscribers. Could they institute or support a bill to gain the benefit of a sale of this property without their consent, in the same manner as if they were themselves about to sell? I do not think they could; and the Court would require the sanction and the consent of that party to the transaction. Now it is admitted that that consent has never been given, and consequently the Court would require to have that consent given, at the time when the decree was made, by the persons who are the men-subscribers, as was justly observed by Mr. Rouppell and Mr. Campbell, at the time at which the decree was pronounced. I do not say it is not possible that that defect might not have been cured if there had been a meeting previously to the bill being filed, and all the men-subscribers had been called for the purpose in the manner prescribed by the deed, and they had sanctioned the institution of the bill—if there had been evidence of that it might have cured the defect. It is evident that the fluctuating nature of the body creates a great difficulty. If the body at the time being had sanctioned the sale, or had sanctioned the suit for the purpose of gaining the benefit of the sale, it is possible that this objection (and that is my present impression) might not be capable of being sustained. But the difficulty is still greater when it is observed that this transaction may be looked at in two points of view; and what has been observed is very correct, that not only have the men-subscribers not sanctioned it, but that any one of the cestui que trusts, or of the congregation, might say, this is a transaction which, not having been properly sanctioned, you ought to have filed a bill for the purpose of setting aside altogether, and of giving the congregation the advantage of redeeming the mortgage and obtaining the benefit of the increased value of the land from the position in which it is placed. I do not say, nor would it be proper for me on this question which is now before me, with respect to the objection for want of parties, to determine whether this is a transaction which it would be competent to consent to or not; but this is manifest to me, that any one of the men-subscribers who have not confirmed the transaction might file a bill tomorrow for the purpose of setting aside the transaction, and saying that transaction is binding on no person not actually parties to the suit at the time it was instituted. I cannot doubt that that was in substance what Lord Langdale determined when he came to the determination in the case that is reported. This objection might have been met in this way, that if you had a meeting of the men-subscribers beforehand, you might, with respect to the majority (if they had not been unanimous) who had sanctioned the proceeding, have dispensed with their attendance, making those who dissented parties to bind their interest on the record; but as the matter stands, I feel it would not be possible for the Court to proceed and do justice in the present state of the record. In saying this, I do feel that in allowing this objection, it is of a serious and fatal nature; and that was strongly pointed out to me by Mr. Russell and the gentlemen who have followed him. It is said, undoubtedly, that this Court will endeavour to mould all its rules for the purpose of carrying into effect and effectuating justice in the manner it best can, and that is true; and for that purpose these rules, with respect to representation have always been introduced, but they have been introduced—and to that extent I agree with the qualification stated by Mr. R. Palmer—they have been introduced where you could represent persons who have so far a common interest with the persons who were parties to the record, that it was clear that they had one common interest for the purpose of the suit; and there might be afterwards some question of distribution between the parties, but not where any of the parties would have been precluded from instituting a suit for the purpose of setting aside the whole transaction sought to be affirmed by the suit before the Court. It is true that this Court does all that it can for the purpose of administering justice in the best manner it can; but it would be no justice at all to Mr. Stant or any defendant on this record, if a decree were made in this transaction, affirming this, and compelling him to pay over the amount of the purchase money after he had been paid his mortgage in

full; and if after that had been done a suit should be instituted against him and the railway company for the purpose of setting aside the whole transaction, and making him liable, which he probably would be, to the railway company in respect of their being deprived of the land that had been taken in that respect. I concur in the observations made by Mr. R. Palmer, and I think the observations of Lord Cottenham in *Carlisle v. The Eastern Counties Railway Company* are strictly applicable, and bear very strongly on the present case, that in that case you could only bind the rights of the parties by binding all those persons, either by previous meeting or by making them themselves parties by previous acquiescence, or by making them themselves parties where their rights were inconsistent, and at issue with those who are bound on the record, and who could not be in fact bound by the proceedings in this suit. It would bind the parties made parties here, but no other parties whatever. Now, the cases which are cited of trustees who filed a bill to bring back a trust fund without making the cestui que trusts parties have no application to this case whatever, because this is a case in which the interests of the cestui que trusts may be at variance with the course which the trustees are pursuing in this case. I am of opinion that in this case it is totally impossible for me to hold that the men-subscribers should not be made parties to this suit. I consider that Lord Langdale has in point of fact decided it when he said that he had not "heard any answer to the argument that if the plaintiff succeeds he will still be left open to another bill at the suit of the subscribers." Will he not be left open to another bill at the suit of the subscribers, unless the men-subscribers are all bound by the decree which the Court shall make? It is manifest to me that he will, and it is manifest to me, therefore, that the principle of his decision goes to that extent; and it was very difficult for Mr. Rouppell and Mr. Campbell, in argument, not to admit in substance that the matter was concluded by Lord Langdale's decision, and in my opinion it is. The observation that there ought to be an amendment "by making some of them parties" I can only consider to be an observation of Lord Langdale on a question that was not brought before him, and which he had not the opportunity of considering the effect of, and it is not possible for me to allow this suit to proceed, if it be possible that the defendant should be sued—I will not say for the same matter (that is for the purpose of affirming the transaction)—but in respect of the same matter in a different form, and probably in a more serious form, which I am satisfied might be done if this objection did not prevail. I must allow the objection for want of parties.

R. Palmer.—The declaration is that the men-subscribers are proper parties to the suit, and with that declaration let the cause stand over, the defendants to have the costs of the day.

Rouppell.—Undoubtedly the point was opened before Lord Langdale, and argued in Court, and we have followed what appeared to be his decision.

The MASTER of the ROLLS.—Yes, I shall not give any costs after that observation. I am of opinion that the railway company are not necessary parties in a suit to affirm a transaction.

Rouppell.—Might we ask the opinion of the Court that the parties should be the present men-subscribers, or the men-subscribers at the time the suit should be amended?

The MASTER of the ROLLS.—I do not wish to be bound by any observation I now make, and I am not sure that it is proper for the Court to do any thing in the nature of advice, but my impression is that the defect could not be cured without having the men-subscribers before the Court at the time when the decree was made, unless they had been bound by a previous meeting or some previous decision.

Rouppell.—It is important to the parties to have that observation even thrown out in that way.

Campbell.—The usual form of order is to declare the parties should be at liberty to file a supplemental bill or amend, as they may be advised.

The MASTER of the ROLLS.—Amend as they may be advised for the purpose of adding parties.

Campbell.—The usual mode would be to amend as to those who remained parties at the date of the bill.

The MASTER of the ROLLS.—I am not at all clear that, in fact, the nature of the objection I have allowed is not as Mr. Giffard suggested—an objection which goes to the frame of the record. I am not at all clear that that is not the effect of it. I have felt it to be the more serious on that account in allowing the objection, but upon that I give no opinion whatever.

R. Palmer.—Liberty to amend the bill or file a supplemental bill for the purpose of bringing new parties before the Court.

The MASTER of the ROLLS.—Yes, giving them power to bring new parties before the Court either by supplemental bill or by amendment, as they may be advised.

V. C. KNIGHT BRUCE'S COURT.

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**VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.**Reported by GEO. S. ALLSUTT, Esq. of the Middle Temple.  
Barrister-at-Law.

Friday, April 25.

**BENSUSAN v. NEHEMIAS.****Will—Breach of trust—Satisfaction.**

In 1822 a sum of stock was vested in A., B. and C. upon the trusts of the marriage-settlement of D. (the daughter of A.) In 1831 A., B. and C. transferred 2,000*l.* to E. the husband, who sold it out. In 1841 B. became bankrupt; and in November, 1847, C. and E. who were partners, became bankrupt. In October, 1847, A. died, having by his will, dated in 1844, directed a sum of 6,000*l.* stock to be placed in the names of the trustees of D.'s settlement, and G. whom he appointed his executor; and further, that none of his legacies should be paid until six months after his decease, and that his debts should be paid. In one part of his will A. thus expressed himself, "for giving my dear daughter D. her legacy of the above-mentioned 6,000*l.*" &c. &c.

Held, that the legacy of 6,000*l.* stock was in satisfaction of the 2,000*l.* stock due in respect of the breach of trust.

By indenture dated the 27th of November, 1822, and made between Menahem Levy Bensusan of the first part, Joshua Levy Bensusan (of Gibraltar), Samuel Levy Bensusan, and Abraham Levy Bensusan, of the second part; and Jacob Levy Bensusan and Sarah Levy Bensusan, his wife, of the third part, after reciting that on the 26th day of June then last a marriage was duly had and "solemnized between the said Jacob Levy Bensusan and Sarah Levy, his wife, and upon the treaty for such marriage the said Joshua Levy Bensusan (the father of the said Sarah Levy Bensusan) agreed to transfer as an advancement in marriage with his said daughter, the sum of 5,250*l.* New Four per Cent. Consols; and the said Menahem Levy Bensusan (the father of the said Jacob Levy Bensusan) also agreed to transfer the like sum of 5,250*l.* New Four per Cent. Consols in the joint names of the said Joshua Levy Bensusan, Samuel Levy Bensusan, and Abraham Levy Bensusan, upon the trusts thereafter declared thereof for the benefit of the said Jacob L. Bensusan and Sarah Levy, his wife, and their child or children (if any); and after reciting that each of them, the said Joshua L. Bensusan, and M. L. Bensusan, in pursuance of the respective agreements on their parts, did on the 26th day of November instant transfer the sum of 5,250*l.* New Four per Cent. Consols, making together the sum of 10,500*l.* of the same annuities, unto the said Joshua L. Bensusan, S. L. Bensusan, and A. L. Bensusan, it was declared that the trustees should have possession of the said stock upon trust for Mrs. Bensusan for her life, for her separate use, without power of anticipation, and after her death for Jacob L. Bensusan, her husband, for his life, and after both their deaths upon trust for the children of the marriage; and by the said indenture the trustees were empowered, with the consent of the husband and wife, or of the survivor of them, and after both their deceases, then at the discretion of the trustees, to sell out the said stock and to invest the moneys arising thereby in or upon any other parliamentary stocks or public funds of Great Britain or any real securities in England. The indenture also contained a power for the trustees to lay out any part of the stock in the purchase of freehold estate in England with powers of resale. There were twelve children of the marriage. In September 1831 all the trustees concurred in making a transfer of 2,000*l.* part of the stock, to Jacob L. Bensusan the husband, for the purpose of the same being sold out, and the same was sold out without the consent or knowledge of the wife, and the produce was lent to the partnership firm in which he and S. L. Bensusan and M. L. Bensusan, two of the trustees, and one other person were partners, no security being taken for the same. In November 1841, Abraham L. Bensusan, one of the trustees, became bankrupt, and in November 1847 S. L. Bensusan, Jacob L. Bensusan (the husband), M. L. Bensusan, and their partner became bankrupts. The dividend on each of the estates was very small. By his will, dated the 12th of March, 1844, Joshua L. Bensusan, the only solvent trustee, among other bequests, gave and bequeathed as follows:—"I will, leave, and direct the sum of 6,000*l.* New Three-and-a-Half per Cents. be bought and transferred to and placed in the names of the trustees of the marriage settlement of my dear daughter, Sarah Levy Bensusan, and in the name of Mr. Abraham Nehemias, whom I appoint to be a trustee in my name and stead, and for this purpose my dear wife, Mrs. Judith Levy Bensusan, to be my executrix, and my brother-in-law, Mr. Abraham Nehemias, to be my executor, none of the legacies to be paid until six months after my decease. For giving my dear daughter, Sarah Levy Bensusan,

her legacy of the above-mentioned 6,000*l.* New Three-and-a-Half per Cents. I order and direct that whatever foreign bonds the house of Messrs. Menahem Levy Bensusan and Co. of London, should have of mine in their possession, as specified in my waste book, folio 398, shall be sold, and the produce thereof, with my balance of accounts with the said house, shall be added for purchasing the aforesaid legacy. I direct the said Messrs. Stone, Martin, and Stones, to pay all my dividends, and my balance of account with them, to my dear wife, Mrs. Judith Levy Bensusan, after my decease, during her life, after having paid my legacy and debts." The testator died on the 27th of Oct. 1847, about a month before the bankruptcy of his son-in-law and his co-trustee, Samuel L. Bensusan. Two suits were instituted by Mrs. Jacob L. Bensusan, the first of which was against Mr. Nehemias, the executor, and others, and sought that it might be declared that the estate of the testator was liable to make good and replace the 2,000*l.* New Three-and-a-Half per Cent. Annuities, together with the amount of dividends which would have been payable thereon in case the same had not been transferred or sold from the time of the transfer or sale up to the then present time, and for an account of the amount due to the plaintiff in respect of such dividends. The defendant Nehemias, by his answer, admitted that there were at the time of the death of the said testator, and were then standing in his name, large sums of stock, amounting to the sum of 5,550*l.* Three per Cent. Consols, and 31,250*l.* Three-and-a-Quarter per Cent. Bank Annuities; but whether such last-mentioned sums, or whether or not together with the other personal estate and effects of the said testator, were then liable to satisfy, and ought to be applied in satisfaction of the plaintiff's demands in the suit, and the other debts of the said testator, he submitted as a matter of law to the judgment of the Court. The second suit was an administration suit, also instituted by Mrs. Bensusan against the executor, Mr. Nehemias and other persons, seeking that the trusts of the will of the testator, so far as related to the bequest of 6,000*l.* to the trustees of the settlement of the plaintiff, might be performed and carried into execution under the direction of the Court, and that the defendant, Abraham Nehemias, might either admit assets of the testator sufficient to pay and satisfy the said 6,000*l.* and that he might be decreed to pay or secure the same accordingly, or that he might account, and that the 6,000*l.* might be paid out of the testator's estate, or otherwise secured, as to the Court should seem fit, and that the rights and interests of the plaintiff in the said sum of 6,000*l.* and of any other person or persons (if any) interested in the said bequest might be ascertained and declared, and that the same might be secured for her benefit and the benefit of such other person or persons respectively.

J. Parker and Hetherington, for the plaintiff, contended that the gift by the testator's will of the 6,000*l.* could not be intended as a satisfaction for the 2,000*l.* as the will contained a direction to pay the testator's debts, and also as the capital was given to the testator's daughter, while her claim could only be in respect of the interest of the 2,000*l.*

Bacon and Leach for the children.

Swenson and Stevens for Mr. Nehemias.

Rogers, Remshaw, and Goodeve for other parties.

The following cases were cited:—*Carr v. Easta-brooke*, 3 Ves. 561; *Randall v. Powell*, 1 P. Wms. 297; *Nicholls v. Judson*, 2 Atk. 300; *Haynes v. Mico*, 1 Bro. Ch. C. 129; *Matthews v. Matthews*, 2 Ves. sen. 635; *Goldmid v. Goldmid*, 1 Swanst. 211; and *Clarke v. Sewell*, 3 Atk. 96.

The VICE-CHANCELLOR said he thought that according to the true construction of the will, the gift of the stock was one neither to the trustees beneficially nor to the daughter. The only plausible argument in favour of any claim of the daughter to take the fund beneficially, was upon the testator's saying, "for giving my dear daughter, Sarah Levy Bensusan, her legacy of the above-mentioned 6,000*l.*" Then came the question on the words directing the non-payment until six months after the testator's decease, and the mention at the close of the will of the payment of the testator's debts. Without giving any opinion, or making any observation upon any other case, his Honour was clearly of opinion in the present case that these two circumstances were much too slight to be of any weight, or to make any difference in this case. The testator, by means of a breach of trust, was indebted to a trust fund, of which he was a trustee, in a sum of 2,000*l.*; he gave the same trust fund, 6,000*l.* His Honour was of opinion on that statement that the presumption of law must be satisfactory. He thought there was not anything in this case to convince or persuade him that such presumption was displaced or answered. He was of opinion that it was a satisfaction in the sense in which that term might be used; that was, a satisfaction as between all persons interested under the settlement—interested in that respect—and the testator's estate. Without giving any opinion as to the discharge or absence of dis-

charge of any other person from the consequences of this breach of trust, he considered that the testator's estate was liable to make good the fund. As to who was or was not entitled after the death of the daughter, it was not necessary to say anything; but she was entitled for life, and as to the arrears of income or the arrear of interest due in respect of the daughter's life interest, there was nothing to put this stock on a different footing. There was certainly some difficulty in saying a demand, which was in a sense an entire demand, could be applied in satisfaction of part and not of the rest. That point presented itself to his Honour's mind, and most material it was. He did not think, however, it ought to make any difference in what appeared to be the truth and substance of the case. He was of opinion, however, that that point ought to be decided: there was satisfaction by the 6,000*l.* stock; and those who wished to show that there was no satisfaction of the income due must address themselves to that point.

Counsel having been heard on this point,

The VICE-CHANCELLOR made (by arrangement) a decree to the following effect:—"Declare the 6,000*l.* a satisfaction of the 2,000*l.* with interest from the time of the testator's decease. As to the arrears due to the wife, declare, with the consent of all parties competent to consent, and with the sanction of the Court as to parties not competent, that it is for the benefit of the testator's estate that the plaintiff should take one-half of the arrears from 1831 to the testator's decease, and let the same be paid to her out of the testator's estate: let her costs be paid of the legatee's suit, except so far as they have been increased by the other suit, &c.

Friday, July 4.

**NOWLAN v. WALSH.****Will—Construction—Residue.**

A testator bequeathed to his wife, E. W. "the interest arising from his property which it was his will and wish should be collected in as soon after his decease as convenient, and placed in the public funds, and the income arising therefrom it was his will and wish his wife should have and enjoy during her natural life, as well as the income arising from any other property he should die possessed of." After giving his furniture to his wife, and bequeathing certain pecuniary legacies, he left the remainder of his property at the disposal of his wife if she remained a widow, but if she married again he gave her an annuity for life and directed that the remainder of his property should be divided among certain other persons. The widow did not marry again, and died intestate.

Held, that her representative was entitled to the general residue of the testator's property.

Andrew Walsh, by his will, dated the 21st of May, 1828, bequeathed as follows:—"I hereby will and bequeath unto my wife, Elizabeth Walsh, the interest arising from my property of every description, which it is my will and wish should be collected in as soon after my decease as convenient, and placed in the public funds, and the income arising therefrom it is my will and wish my wife should have and enjoy during her natural life, as well as the income arising from any other property I should die possessed of. I also will and bequeath all my furniture, plate, china, watches, trinkets, horse and chaise to my wife to keep, enjoy, or dispose of as she may think proper after her death. I will and bequeath unto the children of my brother, Mr. Thomas Walsh, 6,000*l.* subject to the support and maintenance of their father, if living, when dead to be equally divided amongst them, and paid as they arrive at the age of twenty-one years. I will and bequeath unto my sister's son, W. F. M'Evoy, 1,000*l.*; the remainder of my property I leave at the disposal of my wife, if she remains a widow; if she should marry, it is my will and wish she should have no control over my property, but my executors or the survivors of them, should pay her an annuity during her life, of 400*l.* per annum, upon her own receipts, no husband to have any power to receive the same; but in case of such an event, it is my will and wish the remainder of my property, after paying the legacies devised, should be divided amongst my brother's children and my sister's son, W. F. M'Evoy, their shares to be computed *per capita*."

Elizabeth Walsh, the testator's widow, did not marry again, and died intestate and without having made any specific disposition of the residue of the testator's property. The plaintiffs in the case were the administrators of Elizabeth Walsh and the husband of the administratrix. The defendants were the next of kin of the testator and his representative. The question was, whether Elizabeth Walsh took the residue absolutely, or for life only, with a power of disposition.

Russell and Swrage, for the plaintiffs, were stopped by the Court.

Wigram and Hoare, for one of the testator's next of kin, cited *Anon.* 3 Leon. 71, pl. 108; *Bradley v. Westcott*, 13 Ves. 453; *Reid v. Shergold*, 10 Ves.



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370; *Doe v. Thorley*, 10 East, 438; 1 Roper on Legacies, 644, 4th edit.; *Keith v. Seymour*, 4 Russ. 263; and *Archibald v. Wright*, 9 Sim. 161.

*Craig*, for the other next of kin, referred to 1 Sugden on Powers, 125, 7th edit.

The VICE-CHANCELLOR.—Where property is given to a person for life, and is directed, after the death of that person, to be at his disposal, and nothing more appears either one way or the other on the instrument, it is difficult, if not impossible, to give the taker more than an estate for life, with a power of disposition, because there is no special reason for more. But where an intention to give an interest for life, and an absolute interest afterwards, can be rationally collected from the instrument, the same reason does not apply. In this case, the testator gives all the interest to his wife for life; then he gives certain legacies, which were not to be paid to her prejudice, but were to be paid and were to be saved—her power is not to prevent that;—then he says, “the remainder of my property to.” [His Honour read the rest of the will, as above set forth.] There is nothing in the word “disposal” which, in my opinion, necessarily points to power more than to property. Here I can see several reasons why it should mean property. He meant his wife to have every thing, subject only to the legacies, and to the contingency of her marrying again. This would have been my opinion independently of the authorities. With regard to the authorities that have been cited, the present case appears to me materially distinguishable from all of them, except possibly,—I say possibly,—*Keith v. Seymour*, and *Archibald v. Wright*. I would rather not express an opinion whether it is distinguishable from those cases, considering as I do that it is clearly so from all the others. My judgment is in favour of the plaintiffs.

## V. C. LORD CRANWORTH'S COURT.

Reported by W. H. BENNETT, Esq. of Lincoln's-inn, Barrister-at-Law.

Tuesday, July 29.

GILPIN v. MAGEE.

Practice—Claim.

*A residuary legatee who seeks an account against executors for the administration of an estate, and also at the hearing wishes for inquiries before the Master touching the effect of certain of the trusts in the testator's will as to whether they were or not created for “superstitious uses,” should not proceed by claim.*

*Where accounts are denied which can only be directed after evidence taken in the usual way, a bill must be filed.*

This was a claim filed by the residuary legatees, devisees, and next of kin of Ann Tucker, late of Holywell-street, Westminster, who died in July last year. The claim was set down as a short claim, and was filed to administer the estate of the testatrix.

*Bethell and Kinglake*, for the plaintiffs said that what was now sought was to obtain the direction of the Court that certain inquiries should be made which had become necessary under these circumstances. The testatrix, who was a Roman Catholic, upon the 6th July, 1849, made her will, which was alleged to have been drawn by Mr. John Athanasius Cooke, and by which, after appointing as her executors the very Rev. Monsignor Anthony Magee, clerk, D.D. priest of the Roman Catholic Chapel in Romney-terrace, Westminster; John Athanasius Cooke, barrister-at-law; and her brother-in-law, Joseph Tucker, she gave certain pecuniary legacies and household furniture among her relatives. The testatrix then gave the following legacies:—To the most Rev. John Bernard Palmer, clerk of Mount St. Bernard, near Loughborough, Abbot of the Monastery and Abbey Church of Our Lady of La Trappe there, 100*l.* clear of legacy duty. Then followed gifts to several relatives; after which the testatrix gave:—“To the person who, at the time of my death, shall be superiors of the convent of the Good Shepherd at Hammersmith, 19*l.* 19*s.* for the benefit of the convent; to the Roman Catholic Orphan Girls' Asylum at Hampstead, connected with the St. Patrick Roman Catholic charity school, 19*l.* 19*s.*; to the institution of the Charitable Sisters in the Virginia-street district for furnishing linen to poor pregnant women (to which I have been in the habit of subscribing), 10*l.*; to the Rev. John Moore, priest of Virginia-street chapel, 19*l.* 19*s.* to be applied as he may think fit towards the erection of the new Roman Catholic chapel in such district, but not for the purchase of land, to the Rev. Thomas Doyle, clerk, D.D. priest of St. George's Chapel, St. George's-fields, 10*l.*; to the Rev. Anthony Magee, for the poor-school, 10*l.*; to the Rev. Richard North, priest of the church of our Blessed Lady the Star of the Sea, at Greenwich, 19*l.* 19*s.*; to Bishop Davis, of Wales, 40*l.*; to the Right Rev. Bishop Waring, of Northampton, bishop and vicar apostolic for the eastern district of England, 10*l.*; to the Rev. Edward Kenny, clerk, of Bridport, 10*l.*; to the Rev. G. Holding, priest, of

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Whitehaven, 5*l.*; to the officiating priest of Maryport, Cumberland, 5*l.*; to the priest officiating at Vauxhall-street Chapel, Jersey, 5*l.*; to the Rev. Harding Ivers, clerk, priest of St. Alexis, at Kentish-town, 5*l.*; to the priest officiating at Hackney, 5*l.*” Then followed a gift of rings to her relatives; 19*l.* 19*s.* to her executors, Dr. Magee and William Tucker. The testatrix then gave her property to her executors, on trust, to pay her debts, funeral expenses, and legacies, and subject thereto on trust to be divided into four parts, two fourth parts for Dr. Magee, a third fourth share for her brother, William Leathers, and her sister, Sarah Gilpin, equally. As to one-half of the remaining fourth part upon trust for the Rev. Mr. Palmer and the Rev. William Joseph Daley, clerk, priest of the Immaculate Conception, at Penzance, equally, and as to the other one-half of such remaining fourth part in trust for her nephews and nieces, the children of her deceased brother, Joseph Leathers. The testatrix then went on to provide that in case of the death of any of the legatees described as bishop, prior, abbot, clerk, or priest, the legacy should not lapse, but be paid to his successor; and in case no successor was appointed, then the legacy was to go to the bishop, abbot, priest, or clerk who shall officiate for the said district. The testatrix also declared that in case any legacy should be void by the operation of any rule of law, the gift was not to go to her heirs, or next of kin, but was to be part of her residuary estate, which ultimate residue of her estate she bequeathed to the Rev. Anthony Magee, his heirs, executors, administrators, and assigns. Then followed the usual power for the appointment of new trustees. The witnesses to the will were Edward Power, barrister, of the Middle Temple, and J. Welsh, North-street, Westminster. The inquiries which the plaintiff now asked the Court to direct had become necessary in consequence of the conduct of the defendants, which gave rise to the suspicion that these legacies to different Roman Catholics were intended to be trusts for the performance of certain ceremonies and acts which the law declared to be “superstitious uses.” On this supposition the gifts would fail, and the sums thus given become part of the residuary personal estate. What was therefore asked was, a reference to the Master to inquire whether any, and what part of the residuary estate of the testatrix given and bequeathed by her will were or was given or held upon any and what secret or other trusts. Affidavits had been filed in support of this claim stating that the will of the testatrix had been prepared by Mr. John Athanasius Cooke (which was not denied), and that it was believed that the bequests to the several Roman Catholics were not intended for their personal enjoyment, but subject to some secret trusts; that a correspondence had been had between the parties and solicitors to ascertain what those trusts were; and in a letter from Mr. J. A. Cooke, he stated that he had sent an “explanatory statement” to Mr. Froggatt, Dr. Magee's solicitor, in writing, which would answer those inquiries, but he was not at liberty to disclose the facts without Dr. Magee's consent. This, the explanatory statement had, however, never been procured. Dr. Magee had also made an affidavit, swearing that to the best of his belief there was no secret trust.

*Kenyon Parker and Bagshaw* appeared for Mr. Palmer, one of the legatees.

*Waller*, for Dr. Magee.

The VICE-CHANCELLOR said he was clearly of opinion that he could not grant the relief which was asked. It was always a matter of great anxiety with him to save expense, but he thought that it was never intended that such an order as was now asked for should be made upon a claim. The plaintiffs asked for accounts which, in the case of a bill being filed, could only be had at the hearing and after evidence in the usual way had been gone into. Supposing the affidavits made out the case, as to which he (Lord Cranworth) desired it to be understood he expressed no opinion, that was not the case made by the claim. A plaintiff must proceed not only *secundum probata*, but *secundum allegata*, and therefore, under these circumstances, he thought that he could not make the order which was asked.

BOLLAND v. BOLLAND.

Practice—Certificate of counsel as to the effect of deeds.

*Binsley*, in support of a petition under the Trustee Act, had occasion to refer to certain deeds, by the legal effect of which he stated that the Court could make a vesting order under the 28th section of the Act; and also to shew that a legacy of 4,000*l.* had been invested in three separate sums, and that it was thus duly secured by certain mortgages.

The VICE-CHANCELLOR said that he would read the deeds in his private room at the rising of the Court rather than take the assurance of counsel as to their tenor and legal effect. He did this, stating that he had had a conversation with the Lord Chancellor, in which he (the Lord Chancellor) had ex-

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pressed a doubt as to the jurisdiction and propriety of the Court accepting the assurance of counsel as to the legal effect of deeds.

## VICE-CHANCELLOR TURNER'S COURT.

Reported by J. HENRY COOKE, Esq. Barrister-at-Law.

Thursday, July 24.

ANDERSON v. GUTCHARD.

Claim—Receiver—Costs.

*A claim was filed for the appointment of a receiver, there being two wills of the testator, one made in England, the other abroad, and the right to probate being in dispute in the Ecclesiastical Court. At the hearing, the Court ordered the costs to be taxed, and paid out of the fund in court, and the receiver to be continued.*

This was a claim filed by a person who was the executor appointed by the testator, Mr. Anderson, by a will made by him in England. A suit was instituted in the Ecclesiastical Court to prevent probate of his will being granted, an executor of a will alleged to have been made in France having propounded that instrument. Money was paid into court in the present suit, the receiver having been appointed according to the prayer of the claim.

*Swagger* for the plaintiff.

*Elderton* for the defendant.

The VICE-CHANCELLOR.—I am not aware of any instance of a suit of this kind having ever before been brought to a hearing. It has probably happened in this case in consequence of the proceeding having been taken by this new process of claim. The only order I can make is to direct the costs to be taxed and paid out of the fund in court, and that the receiver be continued.

July 26 and 29.

WILLIAMS v. FOWLES.

Practice—Supplemental suit—Parties.

*Where an objection for want of parties was allowed at the hearing, and the party decided to be necessary was made a party by a supplemental bill, the Court*

*Held, that the supplemental bill was defective, the defendant in the original suit not being a party to the supplemental suit.*

The original bill was filed by the heir-at-law of a vendor of an estate, to set aside the sale made by his ancestor, on the ground of fraud. At the hearing, an objection was taken for want of parties, the executor not being made a party to the suit. This objection was allowed, and a supplemental bill was filed, bringing the executor before the Court. The two suits now came on for hearing.

The Solicitor-General and W. M. James objected that the suit was defective, for the original defendant was not made a party to the supplemental suit.

*Bethell, Rolt, and Kinglake*, for the plaintiff, argued that this technicality was a modern refinement, and ought not to be allowed. The effect of it was to postpone the suit for no reason of justice.

The VICE-CHANCELLOR.—I am satisfied that the substantial justice of this case will not be promoted by allowing the objection now taken, and if I can overrule it consistently with the practice of the court, I will certainly do so. I will look into the point as one of practice.

Tuesday, July 29.—The VICE-CHANCELLOR allowed the objection; but gave leave to the plaintiff to amend the supplemental bill.

Thursday, July 31.

WRIGHT v. WOODHAM.

Special case—Appearance for infant—Statute 13 & 14 Vict. c. 35.

*Although in a claim parties may appear by the same solicitor, the interests of infants must be protected by separate counsel.*

This was a motion for leave to set down a special case for hearing.

*Cankrien*, in support of the motion, stated that all parties *vis juris* consented, and the guardian who had been appointed in due form, according to the provisions of the statute 13 & 14 Vict. c. 35, to the infant party, also consented.

The VICE-CHANCELLOR.—Counsel duly instructed must appear on behalf of the infant. The parties may appear by the same solicitor; but the interests of the infant must be protected by separate counsel. If this is not so, if any other practice prevails, the whole policy of the Act, so far as it seeks to guard the interests of persons not *vis juris*, would be defeated.

Friday, Aug. 1.

WILLCOX v. MAULE.

*Claim for legacy—Affidavit of deficiency of assets. A testator bequeathed 200*l.* for certain parish festivities. A claim was filed for payment. The executor offered at the hearing to produce an affidavit that the debts had absorbed the whole*

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estate; but the Court decreed the accounts to be taken, holding the affidavit, if made, to be an insufficient defence.

A testator bequeathed a sum of 200l. to the plaintiff as a trustee, and directed him to invest the same and apply the dividends and income annually in furnishing the children of the parish in which the testator resided, with plum pudding and with ribbons and banners, for the purpose of regaling them and enabling them to march in procession on Waterloo day in every year. The claim was filed for the payment of this legacy or for an account of the personal estate of the testator.

*Smythe*, for the plaintiff.

*Schomberg*, for the defendant, the executor, said, no affidavit in opposition had yet been filed, but in the course of the day he should be prepared to prove by affidavit that the debts of the testator had absorbed the whole estate, and, therefore, that there were no means of satisfying this or any other of the legacies left by the will.

The VICE-CHANCELLOR said that the plaintiff was clearly entitled to have the account taken, and it was useless to let the cause stand over for the proposed affidavit; for even if made it would not constitute a sufficient defence. With or without such an affidavit the title of the plaintiff to the account was clear, and the usual decree must, therefore, be made.

Monday, Aug. 4.

NEWMAN v. CLUTTON.

**Special Case—Will—Construction—Advancement.** Trustees had a power of advancing part of a contingent share of the benefit of a legatee. The trustees sold out 1,000l., and advanced the funds partly according to the power, and partly to the legatee personally. With a view to indemnify the trustees insured the legatee's life. He died before the legacy was vested.

Held, that the indemnity fund belonged to the widow of the legatee, excepting so much as would repay to the estate the money paid to him personally, and the costs of the special case.

This was a special case upon the construction of a power in a will, and as to the right to a certain fund. The testator in the case by his will, after bequeathing funds to trustees for the benefit of his children, the shares of his sons to be vested at the age of twenty-five years, authorised his trustees to advance any sum, part of the expectant or vested portion of each son, not exceeding 1,000l. for the purchase of a commission in the army, the expenses of either university or of any of the Inns of Court, for the preferment or advancement of such son in any profession or employment. The trustees, while a son was under twenty-five, and therefore his share was vested, sold out 1,000l. Consols, and advanced the proceeds partly in establishing the legatee in a farm, and partly in payments to him personally, which payments were not satisfactorily proved to have been made in respect of his entering upon the business of the farm. With a view to indemnify themselves and the estate from loss, the trustees insured the life of the legatee in 1,000l. The legatee died under the age of twenty-five years, and after his death the insurance-money was paid. The widow of the legatee took out administration to his estate, and the question submitted to the Court by her as plaintiff was, whether she was not entitled to the insurance-money called the "Indemnity Fund," the same having been claimed by the person interested in remainder under the testator's will, and who were the defendants in the case.

*Bethell* and *H. Stevens*, for the plaintiff, contended that as the power authorised the advance of the 1,000l. the testator's estate had no title whatever to the fund received from the insurance office.

*J. Baily* and *Lewis*, for the executors of the testator, argued that the "Indemnity Fund" formed part of the estate, and as the shares never became vested the money received ought to be applied in replacing that which was taken.

The VICE-CHANCELLOR said that under the terms of this power the trustees were justified in advancing the portion of the fund allowed by the will for the purpose of establishing the legatee in the business of a farmer. As, however, the whole money was not proved to have been advanced for that purpose, but certain payments were made to the legatee himself which were not satisfactorily shewn to have been applied to that purpose, such sums must be disallowed. The effect would be that so much of the indemnity fund as was needful to replace those disallowed payments would belong to the testator's estate, and would be retained, as would also the costs of the special case, the remainder would be paid to the plaintiff as the administratrix of the legatee, her husband.

## Common Law Courts.

## EXCHEQUER CHAMBER.

Reported by G. J. B. HENTLEY, Esq. of the Middle Temple, Barrister-at-Law.

## ERROR FROM THE EXCHEQUER.

(Before Lord CAMPBELL, C.J., and PATTESON, COLERIDGE, MAULE, WIGHTMAN, and CRESSWELL, JJ.)

Monday, May 19.

PARTRIDGE v. GARDNER.

Issues in law and in fact—Costs—4 Anne, c. 16, s. 5.

*A plaintiff has no right to costs under the statute 4 Anne, c. 16, s. 5, unless the defendant succeeds in one or more issues; therefore, to a declaration in assumpsit, where the defendant had pleaded several pleas, upon which issues were joined, and also one to which the plaintiff demurred, the issues being found for the plaintiff, and afterwards judgment being given for the defendant on the demurrer:*

*Held, that the plaintiff was not entitled under the above statute to the costs of the issues found for him, no issue, in fact, having been found for the defendant.*

This was a writ of error from the judgment of the Court of Exchequer.

*Declaration in assumpsit.*

*Pleas.*—1. *Non assumpsit*; 2, 3, 4, 5, and 6. *Tra- verses* to allegations in the declaration; 7. In confession and avoidance.

The plaintiff joined issue on the first five pleas, and demurred to the 6th and 7th. The issues were tried and found for the plaintiff, but afterwards on argument the demurrer failed, the Court holding that the declaration was insufficient.

*Phipson* for the plaintiff.—The question is, whether the plaintiff is not entitled to costs under the statute of Anne, on the issues on which he has succeeded. The fifth section of that statute (4 & 5 Anne, c. 16), provides that if any of the matters pleaded be judged insufficient on demurrer, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall be given in like manner, unless the judge who tried the cause certify, &c. The words are, "if a verdict shall be found," not "if the plaintiff shall have judgment." It may be that the authorities are somewhat conflicting. The case of *Bird v. Higginson*, 2 A. & E. 696; 5 A. & E. 83, S.C. is in point. There the declaration contained two counts, and there were two pleas to the first count and one to the second. Issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The issues, in fact, were tried and a verdict was found for the plaintiff on the issue on the first count, and damages assessed, and for the defendant on the issue on the second count. Afterwards the defendant had judgment on the demurrer, and it was held that the plaintiff was entitled to the costs of the issue on which he had succeeded. The policy of the statute was to give the plaintiff costs. [COLERIDGE, J.—Do I understand you to say that if the judgment for the plaintiff is arrested on the ground that the declaration is bad, he is still entitled to costs?] I need not go to that extent, although I believe there is no case to shew he is not so entitled. *Jervis*, C.J. in his judgment in the late case of *Callendar v. Howard*, 20 L. J. 66, confirming *Bird v. Higginson*, and *Clark v. Allatt*, 4 C. B. Rep. 335, goes fully into all the cases. His lordship said, in reference to the judgment of this Court, in the cases of *Partridge v. Gardner*, 4 Ex. 303; and *Howell v. Rodbard*, 4 Ex. 309, which cases overruled *Bird v. Higginson*, "I think that the statute will not, on consideration, be found to bear the construction which has been put upon it by the Court of Ex. That Court thought that it was bound by authority to take a different view from the Q. B. and to hold that when a plaintiff succeeds upon some issues of fact only, he is entitled to the costs of those issues; but yet, that when he succeeds on all of them, he cannot have any costs." In *Clark v. Allatt* and *Callendar v. Howard*, the defendant succeeded in his plea; is there any distinction when the plaintiff fails because his declaration is bad? [Lord CAMPBELL, C.J.—The statute of Anne supposes that the declaration is good; it may be a case of hardship, but we must be bound by the existing law.] Without the statute of Anne the defendant could not have pleaded the plea that was demurred to. The words and policy of that statute will bear out the plaintiff unless this is to be taken as a case equivalent to an arrest of judgment. It is not stated in terms that in the case of *Bird v. Higginson* the declaration was bad, although it may be inferred that it was, and if that were so that case is identical with the present. The statute of Anne is founded on a totally

different policy from the statute of Gloucester. [PLATT, B.—The statute of Anne gives to the defendant certain costs which he had not before, but puts him in peril of paying for a bad plea. In this case, if the defendant had demurred to the declaration the plaintiff could not have succeeded, so that the fault arose before any plea. MAULE, J.—Suppose an action in which there are several pleas under the statute of Anne—an action in which there are no damages. Yet the plaintiff, under the words of that statute, would be entitled to the costs of the issues in those counts on which he succeeds. There was a late case in the C. P.—an action of trover. No damages being recoverable in an action of trover, there would be no costs under the statute of Gloucester. Still the statute of Anne would give costs to the defendant if he succeeded in some of the issues upon the pleas pleaded by the tenant. Therefore, although the declaration may not shew a good title to damages, and, therefore, according to the statute of Gloucester, no right to costs, yet he may be entitled to costs under the statute of Anne.]

*Ogle*, for the defendant.—It being conceded that the declaration is bad, the defendant is entitled to the judgment of the Court on the assignment of errors. It appeared that a company was liable, and the action was against three individuals. The wrong parties had been proceeded against, and the defendants were not personally liable. The plaintiff having demurred to the 6th and 7th pleas, he might have argued the demurrer, and having obtained the judgment of the Court, perhaps the defendant might have withdrawn his other pleas; but he goes to trial and succeeds in the issues of fact, but fails in the issues of law. This is not a case for a writ of error; the words of the statute are, "That if such matter shall upon a demurrer-joined be judged insufficient, costs shall be given at the discretion of the Court." [MAULE, J.—That is only as to the amount. All the statutes relating to costs use those words. Lord CAMPBELL, C.J.—This is trying to subvert established practice. In *Cooke v. Sayer*, 2 Burr. 73, the point was raised and decided; and it was again raised and the decision confirmed in *Duberley v. Page*, 2 T. R. 391.] According to the true construction of the statute of Anne, the verdict must be found on issues in respect of which there may be judgment. There is nothing in the report of *Bird v. Higginson* to shew that the declaration was bad, and that will be found to be the distinguishing feature in all the previous cases. Here the case is totally different. The fact here is, that the declaration is bad in its foundation. If the defendant had joined issue and gone to trial, and afterwards judgment had been arrested, because of the badness of the declaration, the plaintiff could have had no costs. In the present case the defendant has judgment upon the whole record; but that cannot entitle the plaintiff to them. The case is the same as immaterial issues found for a defendant, and judgment afterwards entered for the plaintiff *non obstante veredicto*, in which case neither party is entitled to costs. He cited *Cook v. Sayer*, 2 Burr. 758; *Goodburne v. Bowman*, 9 Bing. 667.

MAULE, J.—It is difficult to say that that which is wholly immaterial is found in favour of any one, for it matters not to either party which way it is found.

*Phipson*, in reply.—*Goodburne v. Bowman* does not affect the question. The 23 Hen. 8, c. 15, was the first statute that gave costs. That was followed by the statute of James I, and those by the statutes under which the defendant is entitled to costs. In *Goodburne v. Bowman* it was decided that under the statute of Henry and of Gloucester no costs were awarded; but then came the statute of Anne, and the question is whether, if the plaintiff fails in some issues, he is not entitled to some costs. If the defendant had pleaded *non assumpsit*, and then moved in arrest of judgment, he would have had no costs, but by pleading another plea it is now contended that he is entitled to all the costs. The statute of Anne did not mean to give him any advantage, it was intended by that statute that the plaintiff should have the costs of those issues on which he succeeded, and he has here succeeded on an issue within the meaning of the statute of Anne, though not within the meaning of the statute of Gloucester.

Lord CAMPBELL, C.J.—Mr. *Phipson* in his argument has referred us to no case in which costs have been given to the plaintiff, his declaration being bad. If judgment had been arrested there would have been no costs, and why should not the same principle apply? The statute of Anne proceeds on the assumption that there is originally a good cause of action disclosed in the declaration, and if there is not, the plaintiff is not entitled to costs.

*Judgment for the defendant.*

## JUDGES' CHAMBERS.

## JUDGES' CHAMBERS.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Saturday, Aug. 9.

(Before Mr. Justice PATTESON.)

**SHEPHERD v. GEO. DE LA POER BERESFORD, Bart.**  
*Operation of the Irish Insolvent Debtors Act in England—Discharge in Ireland from English debts—Effect of in England.*

*Held, that a discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 10, operates as a bar to debts due from the insolvent in Ireland and also in England.*

This was an application for a discharge of the defendant, Sir Geo. De la Poer Beresford, bart. from the custody of the Sheriff of Middlesex, upon the ground that he had been discharged from the debt for which he was arrested by the Irish Insolvent Debtors Act.

Judgment was signed in the action *Sheppard v. Geo. De la Poer Beresford, bart.* prior to the discharge in Ireland, and a *ca. sa.* issued also before the discharge, and was renewed afterwards for 1,426l. 1s.; but before the defendant was arrested in this action, he was arrested upon another proceeding in Ireland, and became a prisoner for debt in the gaol of the Four Courts Marshalsea, in Ireland, and while there he filed a petition under the Insolvent Debtors Act, 3 & 4 Vict. c. 107, on the 7th of September, 1843, and was duly discharged on the 9th of May, 1845. Subsequently he came to England, and for the last fifteen months had resided here until he was arrested on the 5th of August last upon the original judgment obtained in the Court of C.P. An affidavit of these facts was sworn at Sloman's on the 7th of August, 1851, and to-day

*Lewis* (of Ely-place) applied for the discharge of the defendant out of custody, he having been arrested for a debt from which he had been discharged by the law of Ireland. He produced the original adjudication under the Irish Act, in which the plaintiff's name duly appeared in the list of creditors. He relied upon *Ewart v. Jones*, 14 Mees. & W. 784; 31 L.O. 115, in which it appeared that Maule, J. had directed a discharge under similar circumstances, and an action was brought by the defendant against the plaintiff for having arrested him at all. The Irish Act (s. 61) provided for notice to be given to creditors in England, and there could be no object in that unless the Legislature meant the discharge to apply to debts incurred in England.

*PATTESON, J.* observed, upon looking into *Ewart v. Jones*, that there was a Newfoundland case, which decided that a certificate of an insolvent obtained in Newfoundland is a bar to a debt contracted in England previous to the insolvency. (a)

*Gibbons*, for the plaintiff, said that the affidavit did not show the plaintiff was named in the schedule. In fact, there was not a word about the schedule and the adjudication, and an insolvent was only protected in respect of debts inserted in the schedule.

*Lewis* said that the form of the old Insolvent Acts were somewhat different from the present, and the adjudication formally enumerated the creditors from whose demands the insolvent was discharged. With respect to the affidavit it said that the insolvent was opposed at his hearing in respect of this creditor's debt, and that the debt for which Sir George Beresford was now arrested was the same as that inserted in the adjudication.

*PATTESON, J.*—The affidavit says it is the same debt as appears in the adjudication. They have arrested this gentleman with their eyes open. They must have known that they had no right to arrest the defendant.

*Gibbons* said, that the Act expressly enacted that it should not extend to Scotland or England, except where otherwise mentioned.

*Lewis* said, that there was an express decision on that point.

*PATTESON, J.*—Where was judgment recovered?

*Lewis*.—It is an English judgment.

*PATTESON, J.*—I am called upon to set aside a writ issued upon an English judgment.

*Lewis*.—In *Ferguson v. Spencer*, the objection that the Act should not extend to England was considered and overruled. (b) In *Stein's* case, 1 Rose, 476, it was held that an English commission car-

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ried property in Scotland, and that the English certificate discharged the Scotch debts. (a) In *Rattray v. White*, the Scottish judges overruled the objection that the English Insolvent Act did not extend to Scotland, and held that it transferred heritable property in Scotland to the English assignees. (b) In *Edwards v. Ronald*, 1 Knapp's Privy Coun. Cas. 259, it was held that a certificate obtained in England is a bar to debts previously contracted at Calcutta, although the creditor had no notice of the fiat, and was resident at Calcutta.

*PATTESON, J.*—The question is whether the Irish Insolvent Act does not discharge the insolvent from this English debt. I think it does, and if I do not discharge him no one else will.

*Gibbons* contended that the Irish Act only applied to Irish judgments. He was a prisoner for debt in Ireland, and he petitioned the Insolvent Court to be discharged from debts within its jurisdiction.

*PATTESON, J.*—The Irish Act vests the defendant's property in England.

*Gibbons*.—Yes, my lord, but the question is what is the benefit of the Act.

*Lewis* said that the 61st sect. expressly directed notice of the insolvency to be given in England.

*Gibbons*.—If the defendant signed a warrant of attorney to confess judgment in Ireland that would not be a charge upon lands here. There could be no charge upon his future property here under the warrant of attorney. The 81st and 82nd sections must be read with reference to Irish judgments and Irish courts unless otherwise declared. There was not a single word in these sections that he should be protected from English process under English judgments.

*Phillips v. Allan* (8 Barn. & Cres. 477), was a discharge under the *cessio bonorum* in Scotland, and it was held to be no discharge at all in England.

*Lewis*.—That was overruled in *Jones v. Anstruther*. See Manning and Grainger's Reports.

*Gibbons*.—That is a Scotch sequestration.

*Lewis*.—Well; that is the same. The 79th section of the Act makes the property of the insolvent "in Ireland and elsewhere" liable.

*Gibbons* referred to *Story's* Conflict of Laws, to show that there were cases which fell short of a full discharge. There were also several cases in which the Courts had said that they would not interfere summarily, but leave an insolvent to plead his discharge. This was a doubtful point, and he submitted that it ought to be discussed before the full Court. He submitted that the insolvent was not

The Solicitor-General, and Manning, Serjt. (in Michaelmas Term) showed cause.

*F. Kelly* and *Drummond*, in support of the rule.

After a *cr. ad. val.*

*TINDAL, C.J.* delivered the judgment of the Court, and intimated that their opinion was that the certificate obtained under the Irish Commission by the bankrupt barred all his liabilities both as to his Irish and his English creditors. The Court thought the point had been decided by two cases in the Irish Court. (*Tronson v. Callan*, in the Court of King's Bench in Ireland, 1 Hudson & Brooke, 118; and *Rogers v. Low*, in the Irish Court of Exchequer, 1 Hudson & Brooke, 484, n.) In the former case (*Tronson v. Callan*) the question arose under 6 Geo. 4, c. 16, and it was held that the assignees under an English fiat might sue in Ireland for a debt contracted there; and in the latter case (*Rogers v. Low*) it was held that an English certificate was a bar to an action for a debt contracted in Ireland. The 18th section of 6 Geo. 4, c. 16, contains a restriction against the extending of the English statute either to Scotland or Ireland in terms precisely similar to those employed in the 181st section of the Irish Act; and yet, observed Lord Chief Justice Tindal, notwithstanding the restrictive clause, the Court of King's Bench in Ireland held that the debts in Ireland due to the bankrupt vested in the assignees under the English Commission.

(a) *Royal Bank of Scotland v. Scott, Smith, and Co.* John and Robert Stein, T. Smith, R. Smith, and J. Stein carried on business as bankers and insurance brokers in Edinburgh, under the firm of Scott, Smith, Stein, and Co. They were also partners in a trade in London, under the firm of Smith, Stein, and Co. The Scottish firm became bankrupt in 1813; the English firm was also insolvent of course. In August 1813, a commission of bankruptcy issued in England against the partners described as carrying on trade in Fenchurch-street, London, under the firm of Smith, Stein, and Co. and a provisional assignment was executed the same day. The Royal Bank of Scotland holding two bills of the Scottish firm, made the company bankrupt, and applied for sequestration, but not till after the English commission was issued. The question was, whether the English commission excluded the Scottish sequestration by priority. On the part of the bank, we had no conception of questioning the doctrine of *Brothers and Reid's* case, which would have been very desperate; but the distinction we took rested on the difference between the case of an individual and that of a company, the former having necessarily only one domicile, the company having in this case manifestly two, one in England and one in Scotland; having distinct sets of creditors in those two countries, who gave them credit as separate and distinct companies, and who were entitled to rely on the bankrupt laws, and the course of administration and payment therein prescribed, as one of the grounds of their credit. This distinction, however, was not held sufficient to ground a different determination from that given in the case of *Brothers*, and the Court therefore stopped the Scottish sequestration. (*Blackburn's* Cases, 280; 1 Rose, 463, and 15 F. C. 72.)

(b) See this important case decided under the existing English Insolvent Act, fully reported in *Macrae's* Insolvent Practice, p. 311.

## BANKRUPTCY.

protected from arrest here by the discharge in Ireland, and if there was any doubt, that his lordship would not discharge him summarily.

*PATTESON, J.* said that it was clear that the Irish Insolvent Debtors Act vested all the defendant's property in England in the Irish assignees for the benefit of the creditors, and it would be monstrous to suppose that when all his English property was taken away he was not to be protected here. The just principle, as it appeared to him, was that a man should be protected to the extent to which his property vested; and if his property in this country vested for the benefit of all his creditors, he ought certainly to be protected here. If this Act was permitted to operate upon Irish property only, then he could understand why he should not be protected in this country. There was not an argument nor the shadow of an argument to detain this defendant longer in custody, except these words, "shall not extend to England or Scotland, except where otherwise expressed," but that has been several times before the Superior Courts in this country and in Scotland and Ireland, and, after full consideration, overruled. He was obliged to act as the statute directed, that if the insolvent was arrested he must apply to the Court, out of which the process issued for his discharge.

The defendant was discharged from the detainer in this action, and in the course of the following Monday from fifteen other detainers, his lordship being satisfied with the argument in this case. Each party paid his own costs.

## BANKRUPTCY.

VIC-CHANCELIER KNIGHT BRUN'S COURT, reported by G. S. ALLNUTT, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FOWLER, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, DUBLIN, reported by J. LEWIS, Esq. Barrister-at-Law.

## COURT OF BANKRUPTCY, HASTINGHALL-STREET.

Friday, Aug. 8.

(Before Mr. Commissioner FOWLER.)

Re THOMAS.

*Where a bankrupt had absconded, taking money with him, leave to surrender will not be given until the money be accounted for.*

The bankrupt had absconded, taking with him a sum of money. The proper day for the surrender had passed.

*Lawrence* (solicitor for bankrupt) applied for leave to surrender.

Mr. Commissioner FOWLER.—I make it a rule in all cases like the present, that until the bankrupt shall have made amends, by accounting for the money taken by him, no such grace as leave to surrender can be allowed to him.

## INSOLVENT COURT.

Reported by DAVID CATO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Monday, Aug. 18.

(Before Mr. Commissioner LAW.)

Re JOSEPH BRIE.

*International law.*

*Quere, will a discharge in England from French debts operate as a protection in France? Held, that the Court will not take notice of service on French creditors.*

This was an application to be admitted to bail till the hearing.

Mr. Commissioner LAW, upon looking into the schedule, observed that all the creditors were in France, at Paris.

*Lewis* said that the question of the effect of the discharge under the Insolvent Acts in Ireland had lately been discussed before *Patteson, J.* at chambers, and he had given effect to a discharge in Ireland.

Mr. Commissioner LAW.—Ireland and France are not the same thing. The Act requires an advertisement in the *London Gazette*. How long has the insolvent been in this country?

*Lewis* said since 1849.

Mr. Commissioner LAW.—He was bankrupt in Paris just before, in 1848.

*Lewis*.—Yes; the debts in the schedule are the debts of that bankruptcy.

Mr. Commissioner LAW.—The people living abroad have had no notice. (a) Our rules do not embrace those creditors. If they did they would not have five days' notice. If the Court thought that they were to have notice, they would not have named five days for them.

*Lewis* said that the communication between the countries was now so rapid, that he would undertake they should all have notice.

(a) In point of fact the French creditors had notice, but what the learned Commissioner meant was, that as the rules did not embrace a provision for service on those creditors, he should decline to take notice of such service. This will be evident from the context.—*BARONET.*

(a) *Philpots v. Reed*, 1 Brod. & B. 204.

(b) In 1840—Common Pleas, *Ferguson v. Spencer*, 3 Scott's N. C. 229—625, and M. & G. Rep. The assignees under an Irish commission of bankruptcy (under 6 & 7 Wm. 4, c. 14), may maintain an action here to recover a debt contracted with the bankrupt in this country. And a certificate under this statute operates as a bar as well of debts due from the bankrupt in England and Scotland, as of those incurred by him in Ireland.

In this case it was contended that a certificate under the Irish Bankrupt Act was no bar to an action for a debt contracted here, but the Chief Justice (Tindal) held that it was.

*F. Kelly*, in *Hilary Term*, 1850, obtained a rule for a new trial, having cited *Jeffery v. M'Taggart*, 6 M. & S. 126 (decided in 1817).

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Mr. Commissioner LAW.—I take no notice of service on French creditors, late or not late. The services here are regular. *Bail allowed.*

[NOTE.—A bankrupt who has assigned his property to his assignees under a French commission of bankruptcy, cannot afterwards be sued in the British dominions for a debt proved under it. (*Quelin v. Moisson*, 1 Knapp's Priv. Coun. Cas. 259.)]

## Irish Reports.

## COURT OF CHANCERY.

Reported by J. BLACKHAM, Esq. Barrister-at-Law.

Feb. 5 and 6, and May 19.

HEWSON v. CAROLIN.

*Statute of Wills*, 1 Vict. c. 26.—*Rent charge created by will—Extinguishment of, by subsequent conveyance of part of premises to devisees of rent.*

If a testator devise an annuity to B. and thereby charge it on certain premises, and subsequently convey a portion of the premises charged to the devisees of the rent-charge, the rent-charge is thereby extinguished. A will speaks from the death of the testator (1 Vict. c. 26, s. 24), but if after the execution of the will, and before the death of the testator, an act is done by him which has the effect of extinguishing or revoking the bequest as to the portion, it is so revoked. The will is not set up by the 24th section of the statute.

This was a suit by Catherine Hewson by her next friend. The bill stated, that Edmund Carolin, by his will bearing date the 6th December, 1838, bequeathed to the defendant, Frederick Carolin, nine houses, to hold for ever, subject to an annuity of 70*l.* charged thereon for the plaintiff during her life. That shortly previous to his death the testator, by a deed of indenture bearing date the 7th of March, 1846, conveyed three houses in Talbot-street, in the city of Dublin, and which were three of the houses previously conveyed to the defendant, to trustees upon trust, to pay to or permit the said Catherine Hewson to receive the rents and profits thereof to her separate use, during her life, with a power of appointment, and in default of appointment by her to heirs, executors, and administrators of the plaintiff. The testator died in June 1846 without having altered his will. The bill prayed that the annuity might be declared to be well charged on the houses bequeathed to the defendant, exclusively of those conveyed to the plaintiff by the deed of March 1846.

*Brewster, Q.C., F. Fitzgerald, Q.C.* with *Escham*, for the plaintiffs.—This is a devise of realty, and does not come within the rule as to the ademption of legacies. They cited *Brown v. Peck*, 1 Eden. 140; *Stanley v. Patton*, 2 Cox, 183; *Pym v. Lockyer*, 5 Myl. & Cr. 29; *Davys v. Boucher*, 3 Yo. & Col. 368; *Rider v. Wager*, 2 P. W. 327. By the operation of the 20th, 23rd, and 24th sections of the Statute of Wills, 1 Vict. c. 26, this bequest cannot be revoked.

*Christian, Q.C., Deasy, Q.C.* and *Overend*, for the defendant.—The rule as to ademption applies to real estate as well as personal. (*Wood v. Cant*, Free. on Ch. 182.) They cited *Dawson v. Clarke*, 15 Ves. 414; *Hall v. Hill*, 1 Dr. & War. 94; *Booker v. Allen*, 1 Russ. & M. 270; *Maier v. Lenigan*, 2 Ir. Jur. 74.

His LORDSHIP having shortly expressed his then opinion, the case stood over for further consideration.

Monday, May 19.—The LORD CHANCELLOR.—This is a question of some novelty. [His lordship stated the facts.] The will of Mr. Carolin was made after the Statute of Wills, 1 Vict. c. 26, came into operation, and he died without further noticing either deed or will; under these circumstances this suit has been instituted by Mrs. Hewson, claiming her annuity as well as the three houses conveyed to her. The case has been argued upon the doctrine of ademption or satisfaction. In my view of this case it is not necessary to consider that question. It appears to me that the devise of the jointure being out of all the houses, it would be difficult to contend that a subsequent conveyance of these houses operated as a satisfaction of the previous devise of the annuity. (*Rider v. Wager*, 2 P. Wms. 333; *Davys v. Boucher*, 3 Yo. & Col. 397, V.C.) The question which I conceive I have to decide is, what is the effect of this deed, having regard to the facts of the rent-charge being one issuing out of all the houses, and to the well-established rule of law that if a man has a rent-charge and becomes the grantee of a part of the bond out of which the rent issues, the whole rent is extinguished. (*Litt. I. 222*.) (a) Assuming for an instant in this case, that the testator, instead of devising this rent-charge to the plaintiff, had conveyed it to her by deed, and had subsequently conveyed a portion of the premises out of which it issued to her, *ipso facto*, the rent-charge would be extinguished; and even after the death of

(a) And see *Gilbert on Rents*, 182.

## IRELAND.

the grantor, if the plaintiff had taken a conveyance of these houses, the effect would be the same—it would extinguish the rent-charge. I am unable to distinguish the case from either of those positions. If, then, the fact of the plaintiff's taking this rent-charge as a devisee does not distinguish this case from that I have referred to, and if I am right in saying that the rent-charge is extinguished, the will is inoperative to that extent; it is a specific bequest ceasing by the act of the parties to exist. In *Brudenell v. Boughton*, 2 Atk. 272, Lord Hardwicke says, "Besides these express revocations there are virtual ones, even since the making of the statute, as by extinguishing or destroying the thing devised; and when that is done by the testator in his lifetime, it must prevail, and this is founded upon maxims of law,—*cessante causa cessat effectus*; therefore these are out of the statute, and remain as they did before." As to the admission of parol evidence, to shew the intention of the testator, Vice-Chancellor Wigram, in *Kirk v. Eddowes*, 3 Hare, 509, held, that evidence was admissible, as constituting an essential part of a transaction subsequent to and independent of the will, of which subsequent transaction there was no evidence in writing; and that parol evidence was not receivable as evidence of revocation or alteration of any part of the will. In *Maier v. Lenigan*, there was no room to doubt the intention. If, then, this conveyance has the effect of extinguishing the rent-charge, the question arises, whether the operation of the recent Statute of Wills has any effect upon the case. The 23rd section [his lordship read it] does not apply to this case. The 24th section enacts that every will is to speak from the death of the testator, unless a contrary intention appear. The case has been argued as if there was a devise of the residue of the houses charged with a jointure, but the cases clearly establish this proposition, that the republication of a will after revocation will not set up the will as to the portion revoked. (*Carver v. Bowles*, 2 Russ. & M. 300; *Powys v. Mansfield*, 3 Myl. & Cr. 359.) If I am right in the view I take of this case, then the operation of the Act would be as a conveyance of the rent-charge at the time of the death of the testator, but if the rent-charge be then given it cannot be again set up, and that is the construction which has been already put upon this statute in the cases of *Farrer v. The Earl of Winterton*, 5 Beav. 1; and *Mow v. Raisbeck*, 12 Sim. 123. Viewing the case in this light, so far the will has operation as if it were executed at the death of the testator, but rendered inoperative by acts intervening after the execution and before the time of the testator's death, and it cannot be again set up. If I could hold that the will was set up, I should then admit of the doctrine of election; but the will I think must be read *in toto* or not at all: to give the full operation to the will would be devising the property of one person to another. I am therefore of opinion that the rent-charge was extinguished by the effect of the deed of 1846. The bill must, therefore, be dismissed with costs.

*Bill dismissed with costs.*

Friday, December 6.

(Before BROOKE, M.C.)

THE ATTORNEY-GENERAL v. FITZGERALD.

A testator bequeathed the residue of his estate to his two executors, "to be by them appropriated to the educating of the children of the poor in Ireland, principally those in and about Limerick, as they (my executors) in their better judgment shall deem meet, to give this bequest the most extensive efficacy." The testator and his two executors were members of the Established Church, schools having been established by the Court under the trusts of the will:

Held by Brooke, M.C. on a reference to him to appoint governors of the charity, all the other Masters of the Court concurring in the like opinion, that he was bound to appoint members of the Church to which the testator belonged.

In this case a bill was filed for the administration of the trusts of the will of a person named Leamy, who, after providing by his will for various relatives and friends, bequeathed the residue of his estate, amounting to about 14,000*l.* to his executors, "to be by them appropriated to the educating of the children of the poor in Ireland, principally those in and about the city of Limerick, as they (my executors) in their better judgment may shall deem meet, to give this bequest the most extensive efficacy." By a decree of Lord Chancellor Sugden, of the 19th Nov. 1843, a scheme was settled for the regulation and establishment of schools, by the third article of which scheme it was provided that the governors for the time being, or the majority of them, who should be present at a meeting duly convened for the purpose, should, upon the death of any governor, or his becoming incapable of acting, or refusing to act, or being desirous of discontinuing to act as governor, have power to appoint any other person residing or having property within the city of Limerick, or within twenty miles thereof, to be a governor, subject to the approval of the Court of Chancery in Ireland.

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By the 11th article of the scheme it was provided that part of the daily instructions in the said schools should consist in reading the Holy Scriptures without note or comment; and that for that purpose the scholars should, at any hour each day, to be fixed by the governors, be placed in two separate rooms,—the Protestants in one room, and the Roman Catholics in another,—and that while therein the Protestants should read the Holy Scriptures without restriction, and that the Roman Catholics should read such portion or portions of the Holy Scriptures as are contained in the volumes entitled "Scriptural Lessons," now read in the schools under the Board of National Education. The testator and the two executors whom he had by his will appointed were proved to have been Protestants. Two of the governors having resigned, the others elected the Roman Catholic Bishop of Limerick, and Dr. Geary, also a Roman Catholic, in their room; and presented a petition to the Lord Chancellor, praying him to ratify the appointment, and for a reference to the Master to inquire and report whether it would be for the advantage of the charity to recodify the 11th article of the scheme so as to admit of the schools being placed under the control of the Board of National Education. On the 13th of November an order was made by the Lord Chancellor, referring it to Master Brooke, to inquire and report whether it would be for the benefit of the charity, that any modification in the 11th article of the scheme should be made so as to enable the petitioners to place the schools in connection with the Board of National Education; and, secondly, to approve, if he should think fit, of the selection of governors made by the petitioners.

Berkeley appeared on behalf of the Attorney-General, and urged on the first question that the modification of the 11th article of the scheme, which the petitioners sought, was not in contravention of the testator's intentions; and that the schools would be rendered more useful and efficient by being placed in connection with the Board of National Education; and, on the second question, he contended that the governors who had been selected were proper persons to be appointed, for that though the testator was a Protestant, the benefit he contemplated was of a general and not a sectarian character; and that it was for the benefit of the poor of Limerick in general that a bishop of the same religious persuasion as themselves should be appointed, and that the question was decided by the fact of two of the governors, who were appointed by the original decree of Sir Edward Sugden having been Roman Catholics.

MASTER BROOKE.—In this case two distinct subjects have been referred to me by the Lord Chancellor respecting Leamy's free schools in the city of Limerick, first, to inquire and report whether any, and what variations, should be made in the scheme approved of by Sir Edward Sugden, and embodied in the decree in this cause pronounced by him; so as to enable the governors to place the schools in connection with the National Board of Education. Secondly, I am directed to appoint two governors of these schools, in the room of two gentlemen who have resigned. As to the former question I have, after much consideration, formed a very clear opinion that no such alteration ought to be made, and that these schools ought not to be placed in connection with the Board of National Education, my reasons for this conclusion shall be fully stated in my report to the Lord Chancellor; at present it is enough to mention two; first, that having requested the now acting board of governors to furnish me with their individual advice and opinion on the subject, five out of the eight, have, through their solicitors, protested against the change, and most of them condemn it, not only as unwise, but also as extremely offensive to their own conscientious principles; my second reason is a purely legal one,—these schools are at present under the control of the Court of Chancery; the Court cannot divest itself of this duty and responsibility. The proposal is to place the schools under the control of the National Board of Education, a body over which this Court has no authority whatever. How can the Charity at once serve two independent masters? And what right has the Court of Chancery to depute its duties to another? to a body which it cannot control,—a body, too, appointed by the Crown and removable at its pleasure, and which is not, like a Court of equity, bound by fixed and well-known rules, but is guided solely by its own discretion. I know of no precedent or principle which would justify such an act; and it seems to my judgment so unconstitutional, that all the prospects of increased funds and enlarged usefulness for the school, which have led to the proposal, ought not to induce me to sanction it. My principal object at present, however, is to explain the grounds upon which I feel myself constrained to act with reference to the second branch of the order, namely, the appointment of two new governors, which involves a very serious and important question. Mr. Leamy, the testator, by whose munificent bequest those schools were founded, appears to



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have been originally a Roman Catholic; but it was proved in the cause, and so found by Master Townsend, that he became a Protestant and so continued until his death; by his will, after providing liberally for relatives and friends, he bequeathed the residue, amounting to about 14,000*l.* to his two executors, also Protestants, in these words:—"To be by them appropriated to the education of the children of the poor in Ireland, principally those in and about the city of Limerick, as they, my executors, in their better judgment shall deem meet to give this bequest the most extensive efficacy." This charitable bequest came to be administered in this Court. A scheme was approved of by Sir Edward Sugden, when Lord Chancellor; a Board of Governors was appointed, schools have been built, and are now in active operation; there are now eight governors actually in office, all of them members of the Established Church, and at a meeting, at which four of them attended, men of the highest character and station, they selected to fill the vacancies, and have submitted to the Court for its approbation the names of two Roman Catholics, one of them a bishop of that church, and the other a physician and a magistrate. The question, then, for my decision is simply this, can I, with due regard to the intentions of this Protestant testator, appoint two Roman Catholic trustees to execute those trusts of his will which relate to education. It gives me great satisfaction that in the case before me this question assumes its most abstract form. I have not in my mind the slightest doubt as to the individual merits of the gentlemen thus put in nomination. The characters of the governors who made the selection is a guarantee that their choice fell upon men every way worthy of confidence. But placed as I am in a position every day demanding the frequent consideration of such questions—having before me at this moment a reference to settle a scheme for education under the will of a Presbyterian—likely at any moment to be called on to do the same under the bequest of a Roman Catholic—I am forced to consider such cases with a view to the establishment of a general and impartial rule. Suppose the testator had lived and died a Catholic, and had intimated in the very words of this will a similar bequest to two executors of his own faith, and that this Court was called on to nominate a Protestant bishop and a Protestant layman among the trustees, I should anticipate an honest and indignant remonstrance on the part of zealous Roman Catholics. They would urge that the testator, in committing the execution of his purpose to the judgment and discretion of trustees of his own communion, had clearly shewn his intent that the government of the charity should lie in the hands of members of his own church; when this Court undertakes to carry into execution the trusts of a will, it engages to fulfil all the lawful intentions of the testator, so far as they can be gathered from the words of the will, or from the circumstances in which he was placed at the time of writing it. It is my duty, therefore, on this reference, to appoint such trustees as I, in my conscience, believe he would himself have selected. I represent him on this occasion, and must act as I presume he would have acted. These considerations apply with augmented force in a country like this, where there exists so much diversity of religious opinion; and, therefore, the Masters of this Court feel doubly anxious to hold an even balance in all cases involving the rights of conscience. In the case I have supposed of a Roman Catholic testator, who selected Roman Catholic executors, would it not imply a total disregard of his intentions if I were to introduce Protestants, and still more a Protestant clergyman, among his trustees? Would not such an act, wherever it was heard of, offend the religious feelings of all denominations of Christians? Feelings which this Court is bound to respect, and which cannot be slighted without lowering its character and usefulness. Every parent knows that his children may possibly become wards of Chancery, and be educated under its control; every donor of a charitable trust fund knows that it may come to be administered here; justice and sound policy equally demand that these powers, intrusted to this Court for the public good, should be exercised by fixed and known rules, intelligible to all, and such as the moral sense of every candid man will recognise as fair and equal rules, which will be available to every class of Christians alike, as a barrier against the intrusion of hostile influences, and securing to each in its turn its just and reasonable claims. On these grounds it is that, in all ordinary cases, wards of Chancery are committed to the care of guardians and instructors of their own communion; on these grounds I conceive that religious and educational trusts should always be continued under the control of persons whose sentiments on such subjects correspond with those of the donor, and of the original trustees selected by himself. Every one who dedicates a large sum to the education of the poor is a public benefactor, and such benefactors are chiefly to be found among men of strong religious impressions. Would it not then seriously discourage such acts of

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mercy, if it were to go abroad that the Court of Chancery administers such trusts according to its own views, without regarding the professed opinions of the donor? Such are the principles upon which I have always acted since I sat here, in every case to which they are applicable; and they seem to me so just, that if this were the case of a Roman Catholic trust, I should, without scruple or delay, have rejected the nomination of Protestant governors. But being myself a Protestant, and fearing lest that circumstance should in any degree bias my judgment, I requested the opinion of my brother Masters upon the question in its most abstract form; for this purpose I stated the precise words of the bequest—as I have already read them; and that on a reference to nominate governors, it was proposed to have a mixed board of Roman Catholics and Protestants, and I added three queries, viz.—first: Supposing the case of a Roman Catholic testator appointing two Roman Catholic trustees, and considering the presumable intent of the testator, would it be a due execution of the trusts of his will to appoint such a mixed board? Secondly, suppose the same facts, with this only difference, that the testator and his two executors were of the Established Church, how would the Masters deem it just and prudent to act? Thirdly, suppose the same state of facts, only the testator and executors were Presbyterians, connected with the Synod of Ulster, would the Masters introduce either Roman Catholics or members of the Established Church among the guardians? Upon these questions I have been favoured with the following answers:—Master Henn's opinion is as follows:—"In the several cases above put I would, in the absence of any positive evidence of intention, presume that the founder of the charity wished that his instructions should be carried out by persons of the same religion that he had himself professed; and therefore I would, in such case appoint trustees of that religion, unless I could clearly perceive that by doing so I would frustrate, instead of effectuate, the object of the founder. It is clear in each case put that he must have thought his intentions could have been carried out by persons of his own religion, and his selection of them raises, in my opinion, a strong presumption that he preferred having those intentions carried out by them. On that presumption unless rebutted by sufficient evidence, I should act. If he had appointed executors of different religious opinions, I should appoint mixed trustees, although I might be of opinion that, under existing circumstances, it might not be the most eligible mode of having the trusts effectually carried out, still I would feel myself bound to give it a fair trial, believing, as I would in that case believe, that it was the founder's own wish that they should be so executed; what the founder himself did I would presume he would under similar circumstances do again, unless, as I have said, the contrary should be clearly shewn, or that it could be shewn that by so doing his intentions could not be carried out. Master Litton says, on first query: "In my opinion, it clearly would not." On second query: "I should deem it my duty clearly to appoint as governors members of the Established Church and none others." On third query: "I should not. I should appoint in such cases Presbyterians connected with the Synod of Ulster. I do not feel any doubt or difficulty in respect of the opinions I have above written in reply to Master Brooke's queries. The duty of a Court of Equity is in such cases to carry out, as far as it shall be practicable, the wishes of the testator, expressed or implied, and in the several cases put by Master Brooke, the subject of his queries, the wishes of the testator, cannot, in my opinion, admit of any doubt." Master Murphy says,—"I fully concur in the replies given to those queries by Master Litton." And Master Lyle,—"I altogether concur in the opinion as expressed by Master Henn, and in the reasons he gives for it." I feel very grateful to my brethren for their assistance, and cannot but think that this unanimous judgment of men of so much ability, learning, and experience, is for me a conclusive authority, and will prove a very valuable guide in future cases of this kind, if in this instance it shall meet with the approbation of the Lord Chancellor. The governors inform me that they consider the question concluded by the fact that among the governors appointed by Lord Chancellor Sugden were two Roman Catholic gentlemen. If that eminent judge had ever considered and decided the question, it would of course have been to me a binding authority; but I was myself of counsel at the hearing, and certainly I have no recollection that any such question was argued, or even raised, on that occasion, neither does any such appear in the decree. Every lawyer knows that no acts of a judge are of any weight as authority, unless done advisedly and upon discussion; and therefore I must consider this question as quite unaffected by the circumstance which I have mentioned. The result is, that I must report to the Lord Chancellor that I do not approve of the candidates selected by the present board. If

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I am wrong in this decision, his lordship will set me right; if not, it is for him to order the Board to proceed to a new nomination.

February 6 and 17.

MURPHY v. KELLER and OTHERS.  
Award—Rule of Court—9 & 10 Wm. 3, c. 15—  
Jurisdiction of Court of Equity.

*If a submission to arbitration be made a rule of Court, under the provisions of the 9 & 10 Wm. 3, c. 15, the court where the rule is made is the proper place to apply to set aside the award, if it be obtained by partiality or corruption. But, if the award be on the face of it a nullity, the Court will treat it as if no award had been made; and on a bill or petition (13 & 14 Vict. c. 89, *fr.*) to take the partnership accounts, will exercise its jurisdiction, notwithstanding that the submission has been made a rule of a court of law, and will direct a reference to take the accounts.*

This was a cause petition, and prayed a reference to the Master to take partnership accounts between the petitioner and the respondents. The partnership agreement, after stating the terms upon which the partnership was to subsist, contained a clause to the effect that if disputes should arise, the arrangement of them should be left to arbitration; disputes having arisen, the partners by deed of submission dated in February 1848, covenanted "well and truly to stand to, observe, perform, fulfil, and keep the award, arbitration, final end, and determination of M. M. and F. L. arbitrators, indifferently chosen as aforesaid, to arbitrate, award, judge, and determine upon the matters to them referred, &c. so as the said award be made in writing under their hand and seals, ready to be delivered to the said parties on or before the first day of May next;" and then agreed that "this submission should be made a rule of her Majesty's Court of Queen's Bench in Ireland." (a) The submission was made a rule of Court, but the arbitrators did not deliver their award till after the 1st of May, 1848; nor did they make it under their hands and seals, as required by the deed of submission. A case of acquiescence was endeavoured to be established by the affidavits of the respondents.

Brewster, Q.C. with Thomas Jones, for the petitioner, cited *Thain v. Thain*, Pal. 109; *Gardenfield v. Lane*, Ib. 121; *Henderson v. Williamson*, 1 Str. 116; *Boerard v. Patterson*, 2 Marsh. 302, 304; *Kennard v. Harris*, 2 B. & C. 801.

Christian, Q.C. and Lawless, contra.—The jurisdiction of a Court of Equity is ousted if the submission be made a rule of a Court of Common Law. (*Nichols v. Roe*, 3 Myl. & K. 431; *Nichols v. Chalie*, 14 Ves. 265; *Auriol v. Smith*, 1 T. & R. 121; *Heming v. Swineston*, 2 Phil. 79; *Guinnell v. Bannister*, 14 Ves. 430; *Davis v. Gelly*, 1 Sim. & Stu. 411.) An award, though irregular, may be enforced if it be acquiesced in by the parties. (*Hawkesworth v. Bramall*, 5 Myl. & Cr. 281; *Kent v. Elstob*, 3 East, 18; *Morgan v. Mather*, 2 Ves. jun. 15; *Wrightson v. Bywater*, 3 M. & W. 199; *Anderson v. Darcy*, 18 Ves. 447; *Fuller v. Fenwick*, 3 C. B. 705; *Norton v. Moscale*, 2 Vern. 24; *Routh v. Peach*, 2 Aus. 519; *Brown v. Brown*, 1 Vern. 157.) As to errors in accounts by arbitrators they cited *Phillips v. Evans*, 12 M. & W. 309; *Hagger v. Baker*, 14 M. & W. 9; *Winn v. Nicholson*, 7 C. B. 819.

Monday, Feb. 17.—THE LORD CHANCELLOR.—A petition was presented in this case to take certain partnership accounts. An objection has been raised by the respondents on the ground that while there existed a submission to refer these matters of account to arbitration, on which a rule of Court had been entered, and there was a binding award thereon, it was not competent for the petitioner to seek redress in a court of equity. It appears upon evidence that there was a submission that the partnership accounts were to be referred to arbitration, with a proviso that the award was to be published within a certain time, and to be made under hand and seal. This agreement was to be made a rule of the Court of Q.B.; and this having been done, it is contended that the only mode of now getting rid of this award is by an application to the Court of Q.B. It appears that the award was not made in due time, nor in the manner proposed, and it is contended that it is therefore defective, and should be set aside, and that the accounts should be laid before the Master. As to the objections that have been urged by the petitioner against the accounts taken, as being erroneous, I cannot enter into such matters. The substantial objection is to the award itself, it being made contrary to the term of the deed of submission, after the time stipulated, and being not under seal. I have, therefore, no doubt that this is not a valid legal award under the submission by which it is regulated; but an objection has been made that even under these circumstances the remedy is to be sought in the Court of Q.B.; and an application should be made to that Court to set aside this award.

(a) Under the provisions of the 10 Wm. 3, c. 14, *fr.*; this is similar in its terms to the 9 & 10 Wm. 3, c. 15, *Eng.* (Rep. 3.)

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and that is insisted upon as resting on the construction of the statute, 9 & 10 Wm. 3, c. 15, and several cases on this statute have been cited to prove that the jurisdiction of this Court is ousted, and the question is reduced to this—whether an award which is plainly on the face of it void, is to be permitted to stand in the way of a party seeking justice in this Court, because the submission happens to have been made a rule of a Court of Common Law. The parties in this case did not apply to the Court of Law, but it is said that having acted on this award, they are bound by it. There is some evidence that this award has been acted upon, the petitioner having referred a debtor who had applied to him to the person who had been appointed under this award to manage the outstanding assets of the partnership. This act was of an equivocal character, and cannot be relied upon. It is also urged that the Court should not grant this application, as there would be a great difficulty in taking the accounts, the accountant having gone to England, and taken with him the partnership accounts. On the whole, apart from the legal objection, I do not think these are grounds sufficient for me to refuse a motion to take the accounts. The chief question in this case is, whether the authorities sustain the proposition for which they were adduced, that this Court can not entertain this suit while the submission is a rule of court in the Q. B. The cases referred to all turned upon the clause of the statute providing “that any persons desirous of ending any controversy, suit, or quarrel, may agree that the submission of their suit to the award or umpirage of any person or persons, shall be made a rule of any of her Majesty’s Courts of Record;” and that the trustees are to be bound by an award made in pursuance of the terms of the deed of submission. Now in this case, the time agreed upon had elapsed, and the arbitrators have not affixed their seals to the award; it is therefore impossible to contend that the award has been made, pursuant to the submission, when upon the face of it the award is obviously defective. The clause in sec. 2 providing that awards may be set aside “by any court of law or equity,” seems to give that power to the Court of which the submission is made a rule of Court, solely when there are allegations of corruptions and undue means, but these are not the grounds upon which the power in the present case is questioned; but Lord Eldon, in the case cited in *Gwinnett v. Bannister*, 14 Ves. 533, decided that the words of the statute, “any court of law or equity,” must be taken to mean the Court of which the submission has been made a rule. It would seem, under this Act, that the submission should be made a rule of Court before the award is published, but this is not insisted upon in the present case, and it is not probable that the Court could interfere on such grounds. The question to be settled in this case is, not whether a party can obtain redress, relying upon the informal or irregular nature of the award itself, but whether he can institute substantive proceedings for the purpose of defending himself from its defects. What, then, do the cases cited establish, and what objections to awards fall within these decisions? In *Gwinnett v. Bannister*, 14 Ves. 530, the statement was, that the arbitrators duly made their award, and the only objection was, that the arbitrators proceeded upon an erroneous statement of the accountant. In *Watson on Awards*, c. 14, p. 387, ed. 3, it is said, “the only mode of obtaining relief against an award which had been made under circumstances of fraud or corruption on the part of the arbitrators (unless the reference was by rule of Court or by order of a judge), was by bill in equity; and now if there be fraud or partiality, or other irregularity in the proceedings of the arbitrator, unless the submission is or may be made a rule of a court of law under the statute.” The case of *Auriol v. Smith*, 1 Tur. and Russ. 121, has been greatly relied upon, and a distinction has been taken that the objection must appear upon the face of the award. It was there held, that though there be fraudulent misrepresentation, a Court of Equity cannot interfere if the award on the face of it be entire. In *Nicholls v. Roe*, 3 M. & K. 231, the question arose as to the case made by the plaintiff, that the arbitrator had not made a full and final arbitrament of the matter referred to him, and that the award was defective, and should be set aside. In *Davies v. Getty*, 1 Sim. & Stu 411, no objection was taken to the validity of the award. In *Heming v. Swineston*, 1 P. Coop. tem. Cot. p. 386, all the cases are collected. In that case the bill was filed to set aside an award; and in that case, as well as in all the authorities which have been cited in support of the proposition that an award can only be set aside in the court of which the submission has been made a rule, seems to refer to awards obtained by corrupt or undue means, or for partiality, and have been decided on grounds external to the award; but no case decides that an award, which on the face of it appears to be a nullity, and which could not be enforced at law, and could not be pleaded, that this Court should not interfere to set it aside. In the

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case of *Doe v. Brown*, 5 B. & C. 385, Abbott, C.J. says:—“This is clear where an award may be considered as a nullity, and nothing can be done upon that by suit. The Court will not interfere to set aside the award, because any suit brought to enforce must fail.” And in the case of *King v. Joseph*, 5 Taunt. 453, Gibbs, C.J. says:—“Nor will the Court set aside the award, because it would deprive the other party of his action; and if the award is, according to the plaintiff’s own doctrine, void, it would be superfluous to do so.” Therefore, when an award is void at law, and cannot be enforced, there appears to be no authority for saying that a Court of Equity will refuse its aid; and in the present case I am of opinion that the objection made to this award is conclusive, and that, in point of fact, there is no award in existence between the parties. To send the plaintiff into the Court of Q. B. would only occasion additional delay and expense, as the result that must be then arrived at would be, that the Court would declare this award to be a nullity. I shall, therefore, refer the matter to the Master, &c.

Reference granted.

## Equity Courts.

## LORD CHANCELLOR’S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Dec. 17 and 20.

RUSSELL v. THE EAST ANGLIAN RAILWAY COMPANY.

Receiver—Execution on property in the hands of receiver—Examination pro interesse suo dispensed with.

A bond creditor of the railway company held to have no lien on the company’s effects, and that such effects were liable to be taken in execution at the suit of a judgment creditor.

The company having agreed with a simple contract creditor to suffer judgment to be entered up against the company at a future day, entered into an arrangement with the bond and many of the simple contract creditors for postponing the enforcement of their claims for seven years; but the simple contract creditor, to whom judgment had been given prospectively, declined to accede to such terms. One of the bond creditors then filed a bill against the company to enforce an alleged equitable lien, and a receiver was appointed by consent. The simple contract creditor having sued out execution, and on petition leave was given to him to levy upon the goods of the company, notwithstanding the order for the receiver.

And where all the facts were undisputed, and had been fully brought before the Court, the usual reference to examine the petitioner pro interesse suo was dispensed with.

In this case the Court had made an order directing the sheriff of Norfolk to withdraw from possession of the effects of the East Anglian Railway Company, on an execution issued at the suit of Messrs. Bowes and Co. who were simple contract creditors of the company, and had obtained a judgment by consent. A receiver had been appointed in this suit by consent, and the Court had directed the sheriff to withdraw, and pay the costs of a motion to commit him for contempt in order to vindicate the authority of the Court; but leave was given to Messrs. Bowes and Co. to make an application to this Court. They now presented their petition, praying either that the receiver might be ordered to pay to them the amount of their debt and costs out of the company’s moneys in his hands, or that they might be at liberty to enforce their judgment, and that the sheriff might be at liberty to execute the writ of *feri facias* against the company. The petition stated that by the East Anglian Railway Act, 10 & 11 Vict. c. 275, the Lynn and Ely Railway Company, the Ely and Huntingdon Railway Company, and the Lynn and Dereham Railway Company, were dissolved, and the Acts relating thereto were repealed and the proprietors united into a company for the purpose of completing and working the railways and works made, or authorised to be made, by or for such dissolved companies, or any or either of them, under the authority of the repealed Acts, or any of them, and for such purposes were incorporated by the name of the East Anglian Railway Company; and that thereby also the Companies Clauses Consolidation Act, and other Acts therein mentioned, were incorporated with and made to form part of that Act, save as to such parts thereof as might be modified by, or were inconsistent with, the provisions of that Act; and that by the same Act all the railways and works so to be made by or for the use of the dissolved companies respectively, with the appurtenances and also the estate and effects of such dissolved companies respectively, were vested in, and made to belong to, the East Anglian Railway Company, thereby incorporated for their absolute benefit. In the

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month of March, 1849, the company became indebted to the petitioners in the sum of 1,147l. 13s. 4d. for coke theretofore supplied to the company; that on the 25th October, 1849, they commenced an action against the company for the amount; that on the 6th December, 1849, the company having no defence to the action, consented to give a judge’s order, making the said debt and interest payable on the 30th June, 1850, together with their acceptances for the amount of such debt and interest, also payable on that day. The petition then stated in substance, that after the judge’s order was drawn up and the acceptances given, the directors of the company, at a meeting of the company duly convened, and in accordance with the bond-holders, mortgagees, and certain of the simple contract creditors of the company, presented a report, containing certain propositions for the adoption of their shareholders, which, if assented to by the whole body of their creditors, would have relieved the company from all actions or suits until 1857, and was in substance to place all the creditors, whether by specialty or simple contract, on the same footing, the company in the meantime undertaking to pay 5l. per cent. interest to their creditors, but that these propositions, though adopted by the company and assented to by a large body of their creditors, were, on the 28th June, 1850, repudiated by the petitioners. The petition then stated that default was made by the company in payment of the amount agreed to be paid pursuant to the judge’s order, and that the acceptances were dishonoured, and that thereupon final judgment was, on the 2nd July, 1850, duly signed in the action of the petitioners against the company, and that on the 3rd July, 1850, the petitioners caused a writ of *feri facias* to be issued upon the said judgment, directed to the sheriff of Norfolk. That various communications had taken place between the solicitors of the company and the petitioners with a view to induce them to assent to the propositions recommended for adoption at the meeting as above stated, but that there had not been the slightest intimation given to them of the fact that a receiver of the estate and effects of the company had been appointed in this suit or otherwise of the intention to institute this or any other suit, but that such fact and intention were studiously concealed from the petitioners; and that they had not any notice whatever of any receiver having been appointed, or in fact that the suit had been instituted until several days after the writ had been lodged with the sheriff of Norfolk. The petition then stated the fact of the filing of the bill on the 20th June, 1850, by Mr. Russell, and that the relief thereby sought was exclusively for the benefit of the bond and mortgage creditors of the company, and that the rights and interest of the simple contract creditors were in no way thereby sought to be protected or provided for; nor could they attain payment or satisfaction of their claims in the suit. The petition then stated that the suit was instituted for the express purpose of preventing the petitioners from obtaining the benefit of the judge’s order, and that the company and the defendants, the other bond and mortgage creditors, had arranged, previously to the filing of the bill, to appear by counsel, and consent to an application to be made by the plaintiff for a receiver, so that he might take possession of the estate and effects of the company before the petitioners could issue execution under their judgments; that on the 25th June, 1850, the plaintiff moved, before the Vice-Chancellor Knight Bruce, for the immediate appointment of Mr. Seppings as receiver, and that thereupon, and by consent of the parties to the suit, an order was made, appointing Mr. Seppings to take and have the management of the estate and effects of the company, and to have the direction and superintendence of the working of the several railways belonging to or under the control of the company, and of all other business of the company, and to collect and receive the tolls and other assets and effects belonging to the company; and that it was ordered that the company should deliver up to Mr. Seppings, as such manager and receiver, all the plant, stock, goods, books, accounts, and other estate and effects belonging to the company, and that Mr. Seppings should pass his accounts before the Master, and from time to time pay the balances which should be reported due from him into the bank with the privy of the Accountant-general of the court, to be there placed to the credit of the causes, subject to the further order of the Court. That, on the 23rd June, 1850, Mr. Seppings took possession of all the moveable and other goods, chattels, estate, property, and effects of the company, and was still in possession; that by reason of such possession the petitioners had hitherto been prevented from enforcing their legal rights against the company under the judgment; that such possession was inconsistent with the provisions of the several Acts of Parliament in the petition mentioned, and to the policy of the law; that the plaintiff had not such an interest in the estate and effects of the company, and especially in their moveable goods and chattels as entitled him to have a receiver appointed by the Court of Chancery.

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or, at all events, such receiver as was appointed by the order; and that in any case the plaintiff was not entitled to the benefit of the order, it having been obtained by collusion. The petition concluded by stating that Mr. Seppings, as such receiver, held in his hands large sums of money more than sufficient to pay and satisfy the petitioners' debt, interest, and costs, and that all the capital, as well of the dissolved companies as of the East Anglian Railway Company, was fully paid up. The following portions of the Companies Clauses Consolidation, Act 8 Vict. c. 16, and of the company's special Act, were referred to. By the 36th section of the Companies Clauses Consolidation Act, it is enacted, that if any execution, either at law or in equity, shall have been issued, against the property or effects of the company, and if there cannot be found sufficient whereupon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the company not then paid up. By the 38th section, the company, if authorised by its special Act to borrow money on mortgage or bond, may do so, and for securing its repayment may mortgage the undertaking, and the future calls on the shareholders, or give bonds in manner therein-after mentioned. The 41st section refers to the schedule to the Act in which the forms of the mortgage-deed and bond are given, and in accordance with which, if a mortgage, the company are empowered to assign the undertaking, and in case the loan shall be in anticipation of the capital authorised to be raised, to assign all future calls on shareholders, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same unto the mortgagee until the principal and interest is satisfied; and in the case of a bond the obligation of the bond in the schedule is that the company, in consideration of the sum of

£ paid to them, bind themselves and their successors unto the obligee in the penal sum of £ 1, the condition avoiding it if paid on the day specified therein. By the 2nd section it is enacted that the respective mortgagees shall be entitled, one with another, to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders if comprised therein according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage or the meeting at which the same was authorised. By the 44th section it is enacted that the respective obligees in such bonds shall proportionately, according to the amount of the moneys secured, thereby be entitled to be paid out of the tolls or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorised, or otherwise howsoever. By the 45th section provision is made for keeping a register of mortgages and bonds. By the 53rd section it is provided that where, by the special Act, the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the Superior Courts of Law or Equity, require the appointment of a receiver by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the Superior Courts of Law or Equity, may, if his debt amount to the prescribed sum alone, or, if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees, whose debts being so in arrear after demand, as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided. By the 54th section it is enacted, that every application for a receiver in the cases aforesaid shall be made by two justices by order in writing after hearing the parties, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest or such principal and interest, as the case may be, until such interest or until such principal and interest, as the case may be, together with all costs, including the charge of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made, all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed, and the money so to be received, shall be so much money received by or to

the use of the party to whom such interest, or such principal and interest as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed, and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such receiver shall cease. By the 32nd section of the special Act, it is provided that the respective mortgagees and bond creditors shall be entitled to be paid out of the tolls and other estate and effects of the company hereby incorporated, the several and respective sums advanced by them, with the interest thereon rateably and in proportion one with the other, and without preference the one above the other of them, and in all other respects the provisions in the said Companies Clauses Consolidation Act, 1845, relative to mortgages and bonds shall be applicable and extend to the mortgages and bonds hereby authorised to be granted. By the 33rd section it is enacted, that it shall be lawful for the mortgagees or bond creditors of the company hereby incorporated, to enforce the payment of the arrears of principal and interest due on any such mortgage or bonds, by the appointment of a receiver; and in order to authorise the appointment of such receiver, in the event of the principal money due on such mortgages or bonds not being duly paid, the amount owing to the mortgagees or bond creditors by whom application shall be made shall not be less than 25,000*l.* in the whole.

*Roll and Toller*, for the petitioners, cited *Dixon v. Smith*, 1 Swans. 457; *Empringham v. Short*, 3 Hare, 461.

*Bethell, Lee, Bacon, and Miller*, for the plaintiff, referred to *Doe dem. Myat v. St. Helen's Railway Company*, 2 Q.B. Rep. 364; *Pondet v. Basingstoke Canal Company*, 3 Bing. 433, N. C.; *Whitworth v. Gangan*, 3 Hare, 416; S.C. Cr. & Phil. 325; *Jefferys v. Smith*, 1 Jac. & W. 298; *Ex parte Ford*, 7 Ves. 617; *Waters v. Taylor*, 15 Ves. 10.

*Malins and Martindale*, for defendants, who were bondholders, cited *Martindale v. Booth*, 3 B. & Ad. 498; *Melcarfe v. The Archbishop of York*, 6 Sim. 224; S. C. 1 Myl. & Cr. 547; *Langton v. Horton*, 1 Hare, 549.

*J. Parker and Goodeve*, for a bondholder, whose interest was in arrear, but the principal not due, mentioned *Mellish v. Brooks*, 3 Bea. 22; *Mitford's Pleading*, 94, 4th edit.

*Pryor*, for another class of bondholders.

*Dickinson*, for mortgagees, cited *Dickinson v. Valpy*, 10 Barn. & C. 128.

*Wood and Rogers*, for another mortgage creditor whose debt was not due, but his interest was in arrear, mentioned *Dumville v. Ashbrooke*, 3 Russ. 98, n.; *Blanchard v. Cawthorne*, 4 Sim. 566.

*Calvert and Baggallay*, for the company.

*Roll*, in reply, referred to *Perkins v. The Deptford Pier Company*, 13 Sim. 277.

## JUDGMENT.

**Tuesday, Dec. 17, 1850.**—THE LORD CHANCELLOR.—The question in contest turns upon the construction of certain clauses in the Companies Clauses Consolidation Act (8 Vict. c. 16), and the Special Act under which the East Anglian Railway Company is established. In the Companies Clauses Act the material sections are the 36th, 41st, 42nd, 43rd, 44th, 53rd, and 54th; and in the Special Act, the 32nd and 33rd sections. It is not necessary to advert to many of the arguments brought before me by the various counsel. I have looked into the authorities cited, but in order to explain the grounds of my judgment it will not be necessary to go through them. The petitioners complain that a receiver has been appointed in this suit by an arrangement between the parties to the cause, and the ground of their complaint is, that the effect of it was to mislead the Court into making an order for the express purpose of impeding the petitioners in their legal remedies; they insist that the plaintiff was not entitled to this order, and that the Court would not have made it if the facts had been disclosed as the petitioners assert they ought to have been, and they therefore ask for liberty to pursue their legal remedy, notwithstanding the order for a receiver. On the other hand, the respondents insist that the plaintiff was entitled to the order complained of, and that there was no impropriety in the company giving their consent to that order being made; and they say they were justified in expediting the proceedings for the purpose of intercepting the petitioners' execution. The ground on which it is contended that the receiver was properly appointed is, that the plaintiff in this suit was a bond creditor of the company, and that the defendants appeared on behalf of themselves and the rest of the bondholders and the mortgagees of the company. It is then insisted that under the provisions of the Act of 8 Vict. c. 16, and the Special Act, the mortgagees and bond creditors acquired a specific equitable lien on the tolls, estate, and effects of the company, and that the bill filed in this suit, and the appointment of a receiver were proper proceedings with a view to give effect to that security. Thus, there are two questions to be decided, the first being whether, upon the construction of the statutes I have mentioned, a specific equitable lien

is given to the mortgagees and bond creditors of the company upon the estate and effects generally of the company; and the second, whether, if upon the construction of these Acts no such lien is given, will or not the absence of such lien entitle the petitioners to any and what order on the present application. The clause upon which the first question principally depends is the 44th section of the Companies Clauses Consolidation Act, the point being, whether a specific lien on the general effects of the company is thereby given. That section does not specify any particulars on which the lien is to attach; it says that the parties are to be entitled to be paid out of the tolls, property, or effects of the company. Of course, the parties must be paid out of the tolls, property, or effects of the company, for such are the only sources which could enable payment to be made, and it is therefore saying in effect that the company are to pay out of their means. I conceive there must have been a reason for inserting this clause; and first, as to the mortgage creditors. The mortgagees having rights under the 42nd section, and the bond creditors under the 44th section, the latter might have been intended rather to limit than extend their remedies; for it might be intended to shew that the bond creditors were not entitled to all the remedies which had been before given to the mortgagees. Such might have been one of the objects of the clause; but it must be construed in connection with the 36th section of the same Act. [His lordship having then read and commented on the two sections, said.] The meaning, then, of the 44th section, I apprehend, was to prevent any argument that the rights and remedies of the bond creditors therein referred to as having certain particular remedies, were limited to those remedies, and the effect of it was to shew that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the company, in common with all the general creditors of the company, as well as being entitled to any particular remedies which might be given to them in terms. Though it may not be very safe to argue with reference to particular intent in these clauses, it may be remarked that a remedy given to the general creditors against the property and effects of the company is inconsistent with the whole property and effects being made subject to a specific equitable lien on the part of any particular class of creditors. These companies cannot be carried on without large credit being given, and the Legislature could never intend to exclude the general body of creditors from all remedy for their debts by giving a specific lien on the whole effects of the company to a particular class of creditors. It is said, however, that effect may be given to the plaintiff's construction of the Act by allowing the bond-creditors or the mortgage-creditors at any particular moment to assert their right, and that their right may be in suspense until they have asserted it. But such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this, to a great extent, is. When I look at the remedies it appears to me that none of those which the Act provides are at all applicable to the case supposed. One remedy is by a receiver, and it is material to attend to the manner in which the receiver is provided for. The receiver mentioned in the Act is not to oust any other remedy at law or in equity which the mortgagees or bond-creditors may have. They may get execution, and that looks as if something might be seized independently of what the receiver was to take, namely, tolls and money. The execution could only be levied on the chattels, and thus the bond-creditors and mortgage-creditors have this great advantage over the general creditors, that they have a fund which the general creditors cannot take, namely, the tolls and sums of money, and may also take in common with the other creditors by an action at law if maintainable. It does not appear consistent with the fact of giving a receiver over the property for a particular purpose, that the property should be first subject to a lien on the part of the class of creditors to whom the several remedies are given. It is material also to refer to the 54th section of the Companies Clauses Consolidation Act, which shews how the receiver is to be appointed by the justices, and points out what he is to do when appointed. But it is said that by the 33rd section of the special Act there is another receiver pointed at. If there were two receivers, a Chancery receiver and a justices' receiver, I should have expected some regulation to work out so anomalous a provision, but there is none. [His lordship then referred to the 32nd and 33rd sections of the special Act, the 44th, 53rd, and 54th sections of the Companies Clauses Act, and said that the only receiver contemplated was a justices' receiver, and then said.] I think the effect is generally to declare that the rights of the mortgagees and bond creditors are not limited to the specific remedy of a receiver, given to them in the Companies' Clauses Act, but that they are also to stand as general creditors entitled to all those remedies against the estate and effects of the company to which other creditors are



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entitled. This bill is filed upon the equity of a supposed specific lien, and in the course of the argument it has been substantially shown, that if there was no such lien there was no foundation for the bill. It appears to me to be quite inconsistent with the whole purview of the special Act to suppose any such specific lien was intended to be given, and that therefore this bill has no equity upon which the remedy sought could be founded, and that the order which was made ought not to have been made, and would not have been, if instead of being obtained by arrangement between the parties to the suit, the Court had been made aware of all the circumstances. The Court was not aware that the receiver was asked for with the view, or would have the effect, of interfering with the rights and remedies of other persons. Under these circumstances the question that remains is, what ought to be the effect of this opinion on the present application, and to what consequences will it lead? I do not suppose the parties intended to commit any fraud, or that they thought they were doing more than running a race with another creditor, and that they were perfectly entitled to reach the goal first if they could do so by legal means. They would have acted with greater caution, considering that the question depended on the construction of those Acts of Parliament which cannot be said by any one to be free from doubt, if they had stated the question to the Court. The execution creditors, if there is no equity disclosed in this bill, and if the order has been obtained, not upon the judgment of the Court, but by consent of the parties, and the Court shall now be of opinion, that if the circumstances had been brought under its notice it would not have been granted; that an order so obtained ought not to be allowed to interfere with and impede their legal right. On the other side it is said that even then, the petitioners ought not to have the relief they ask in the present shape. It is said they ought to file a bill, or they should be examined *pro interesse suo*. Although I am impressed with the importance of forms to secure the due administration of justice, and to prevent that arbitrary course of decision for which the absence of form gives too much opportunity, and which those who are so anxious to dispense with all form do not sufficiently appreciate and perceive, still I should never be desirous to adhere to form where the purposes of justice do not require it. In the present case there are no facts suggested as necessary to be ascertained by further inquiry, nor any materials required to enable the Court to pronounce its judgment, and I therefore shall not interpose summarily or hastily in declaring that the order made ought not to stand in the way of the execution-creditors. The cases warrant me in saying that the order ought not to be allowed to interfere with the execution-creditors. The principles laid down in *Dixon v. Smith*, 1 Swanst. 457; *Evelyn v. Lewis*, 3 Hare, 472; *Drewry v. Thacker*, 3 Swanst. 529; *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306; *Gooch v. Haworth*, 13 Beav. 428, entirely warrant me in saying that the case is now ripe for my decision upon the question between the parties. In the case of *Gooch v. Haworth*, a receiver was in possession for the benefit of the tenant for life; then there was an execution-creditor, who petitioned to be at liberty to levy, and the Court thought that, notwithstanding the receiver, who, though in possession as the officer of the Court, was in possession for the benefit of a particular party, it was not consistent that that should be allowed to interfere with the prosecution of a legal remedy against that party. The principle of that case and of the other cases to which I have referred is this, that where the Court has granted a receiver, and where a writ of sequestration has issued, and in other cases where an application has been made, which can bring before the Court all the materials which the most lengthened and expensive inquiry can produce, it is the duty of the Court at once to pronounce its opinion. The present case is in that situation, and therefore, notwithstanding the existence of the order obtained under the circumstances I have mentioned, the execution creditors may be at liberty to levy their execution after the expiration of four weeks, the company, in the mean time, undertaking to keep within the bailiwick property sufficient to answer the petitioners' demand, and the petitioners being at liberty, at the end of that time, to levy execution, unless in the meantime security to the satisfaction of the Master be given, to await the further orders of the Court. I only let the petitioners levy because I do not see that I can render them secure by any other mode; that which I have directed will not operate oppressively upon the defendants, because, if the petitioners are allowed to levy and sell the engines and other property of the company, the company and the mortgage and bond creditors will sustain a loss; but if the receiver is allowed to remain in possession, the company can sustain no injury by undertaking to answer for the value, upon which value the parties can agree. I have passed by the arguments founded on public policy and many other considerations, because, however cogent, they

cannot avail the petitioners as giving them any right: at the same time, having considered the Acts of Parliament, I think it is well worthy the attention of the parties themselves to consider, whether they can safely go on in their present course; and I think that the receiver ought to be well advised as to his position.

*Friday, Dec. 20, 1850.*—The order ultimately made stated, that his lordship being of opinion that the petitioners ought to be at liberty to levy on the goods of the defendants, the East Anglian Railway Company, the amount of the judgment recovered against the company, notwithstanding the possession of the receiver appointed in this cause, did order that the petitioners might levy accordingly, unless 1,400*l.* should be paid into court in this cause within one week from the service of the order on the plaintiff's solicitors, in the manner in the order directed.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple,  
Barrister-at-Law.

*Thursday, Jan. 23.*

CLOWES v. BECK.

*Sea shore—High and low water mark—Custom—Prescription—Encroachments of the sea—Right to carry away sand, shingle, &c.—Overseers of highways—Injunction—Crown—Grant of manors.*

*King Henry VIII. granted a manor, with land between high and low water mark as appurtenant thereto; the overseers of the highways of the parish in which the manor was situate claimed the right to carry away the sand, shingle, &c. thrown up on dry land for the repair of the highways, either by custom, prescription, or immemorial usage. The lord of the manor alleging that he suffered irreparable damage by the removal of the stones, sand, &c. which formed a barrier to the encroachments of the sea in that quarter, already sufficiently great to produce much loss of land, filed his bill for an injunction, which he obtained on motion, and the defendant having put in his answer, and moved to dissolve, it was continued.*

This was a motion on behalf of the defendant, George Beck, to dissolve an injunction as against him, which had been obtained by the plaintiff, Thomas Clowes, on the 16th of August last, whereby the defendants, George Beck and Richard Septimus Clowes, were restrained from removing any stones, shingle, gravel, sand, soil, or other matter or thing, from any part of the sea shore, between high and low water mark, lying within or being appurtenant or adjacent to the manor of Caister Bardolf, parish of Caister, in the county of Norfolk. It was alleged by the bill, that in the thirty-sixth year of the reign of King Henry VIII. the manor of Caister Bardolf, comprising divers lands forming part of and belonging to the said manor, and particularly a large tract of land, forming the sea shore, between high and low water mark, and appurtenant to the manor, was granted by letters patent under the great seal, to William Paston, together with all the lands and rights of the said manor, and all the inheritance of his Majesty King Henry VIII. in Caistor St. Edmund, Caistor St. Trinity, and other parishes therein mentioned; and that by divers mesne conveyances the plaintiff is now, and has ever since the year 1803, been seised in fee simple of the said manor and lands, &c. thereunto belonging and appurtenant, and that he and his predecessors in title under the said grant, have, ever since the date of the said grant, exercised, and do still exercise, every right of absolute ownership over the said lands forming the sea shore between high and low water mark. That the said tract of land forming the sea shore between high and low water mark consists of stones commonly called shingle, or beach, and of sand, and the sea is now making, and has for some time past been making, great inroads upon the sea shore, and it is consequently of great importance that no stones or sand should be removed therefrom, and the plaintiff being, as in fact he is, the absolute owner and proprietor under the said grant, as such lord of the manor as aforesaid, of the said stones and sand, hath, by public notice affixed in a conspicuous place in the said manor on the said sea-shore, and particularly by written notices served on the surveyors of the highways for the parish of Caister next Great Yarmouth, in which the said land forming the sea-shore is situate, and by written notices circulated amongst the other parishioners of the said parish, prohibited the removal of any stones or sand from the said land forming the sea-shore within the said manor; but that, notwithstanding these notices, the said defendant, George Beck and Richard Septimus Clowes, the present surveyors of the highways in the said parish, had on certain days therein particularly mentioned, caused to be removed large quantities of shingle from the said land forming the sea-shore within the said manor, and had caused

such shingle to be carted away to other places in the said parish, and applied in repair of the highways in the parish. That there are banks of sand covered with grass on the sea-shore aforesaid, called "Mar-rums," and that on the 1st of February, 1850, the plaintiff circulated a notice, prohibiting parties from trespassing on these marrums, and from taking soil, sand, sea-weeds, stones, or gravel therefrom, and that copies of this notice were delivered to the defendants. That on the same day the plaintiff caused to be affixed on the sea-shore the following notice:—"Notice is hereby given, that no sand, stone, gravel, or weeds, are to be taken from the beach but by my order.—THOMAS CLOWES." That on the 6th of May, 1850, the plaintiff served a notice upon George Beck, and upon the 7th of the same month upon Richard Septimus Clowes, stating that he was lord of the manor of Caister Bardolf, and forbidding them to trespass on the lands lying within the same, and especially that part of the land called the sea-beach, between the limits therein mentioned, or to dig up, cart, or carry away, or permit, suffer, or sanction the digging-up, carting, or carrying away the gravel, shingle, rocks, stones, sand, or soil of or upon the said sea-beach, or belonging thereto. That nevertheless the said defendants threaten and intend, unless restrained by injunction, to remove large quantities of shingle and sand from the said sea-shore, and that the consequence of such removal will be, that the sea will greatly encroach upon and overflow and absorb and destroy a large quantity of land, forming part of the demesne lands of the said manor, and of which lands the plaintiff is seised in fee simple, and upon which the plaintiff's mansion-house stands, and thereby great and irreparable damage will be occasioned to the plaintiff and his said property. And the bill charged that not only by reason of the plaintiff's ownership of such shingle as aforesaid, but by reason of the provisions of the General Highway Act passed in the session of the 5th and 6th years of the reign of King William the Fourth, it was unlawful for the said defendants to remove the said shingle and sand, and it prayed that the defendants, George Beck and Richard Septimus Clowes, might be restrained by injunction from removing any stones, shingle, gravel, sand, soil, or other matter or thing from any part of the sea shore between high and low water mark, lying within or being appurtenant or adjacent to the said manor of Caister Bardolf.

The plaintiff having filed his bill, put in an affidavit, which contained the like allegations as those in the bill, and stated that the sea-shore appurtenant to the manor extended from north to south a distance of upwards of two miles, and that the mansion-house stood at about a third of that distance from the southern extremity, and about 100 yards from the present high-water mark; that within the last ten years the sea had gradually encroached, so as to produce a loss of upwards of fifty acres of land to the plaintiff, and that within the last twelve months, the encroachments by the sea opposite the mansion-house, had been fifteen yards in a direct line towards the house, and that in consequence of such encroachments it had become necessary to take down two buildings standing theretofore on the land, and that while being removed, the materials of them had been partly swept away by the tide; that the encroachment of the sea in the adjoining parish was of very limited extent, and towards Great Yarmouth there had been no encroachment, but, on the contrary, an increase to the beach. On this case so made out the plaintiff moved for and obtained an injunction.

The defendant, Beck, who is the acting surveyor of highways, then put in his answer, stating that the sea-shore between high-water mark and low-water mark, consists ordinarily of sand only, but that during fair weather considerable deposits of stones take place thereon which never happens in foul weather, and that the sea along the neighbouring coasts to Caister at times recedes, and at other times gains; and that to the south of plaintiff's land, and nearly adjoining it, the sea had receded within a few years then last. The defendant also set up a custom or prescription or immemorial usage, justifying the abstraction by him of shingle, &c. for the highways. The defendant now moved to dissolve the injunction.

*Roupell and Terrell* for the motion.

*Turner and Craig*, contra.—The answer asserts no title in the defendants, for they claim by custom or prescription; and in either case their claim is ill-founded, for as to prescription, they must be capable of taking by grant, which they are not, as not being a corporation, at least for this purpose, and moreover overseers of the highways, being created within the period of legal memory, viz. by the statute of Philip and Mary, cannot take by prescription at all as such overseers, and it is not alleged that the inhabitants of the parish, or these overseers as inhabitants, make such claim. There can, therefore, be no valid claim founded on prescription or usage from time immemorial. Besides, those lands were in the Crown within the time of legal memory, and



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nobody can prescribe against the Crown. Then as to custom. The right cannot exist by custom to carry away gravel or soil from another man's land, or for an easement, as an easement *alieno solo* is bad in law. The following cases were cited:—*Blewitt v. Tregonning*, 3 Ad. & E. 554; *Lockwood v. Wood*, 6 Q.B. 31; *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272; *Calmady v. Roe*, 6 C.B. 861; *The Duke of Beaufort v. The Mayor of Swansea*, 3 Ex. Rep. 413; *Scrutton v. Brown*, 485; *Viner Prerog. I.* (b)—K.; 12 Hargr. Law Tracts, 12, 14; 1 Co. Rep. 46; *General Highway Act*, Phil. & Mary.

The MASTER of the ROLLS.—In this case of *Clowes v. Beck* the defendants had taken away sand from the shore between high and low water mark, and by that act had taken away from the plaintiff's house and land protection from the encroachments of the sea; and he had obtained an injunction upon affidavit to restrain them from doing that. The defendants then put in their answer, and having put in their answer they then moved to dissolve the injunction so standing. They state that there is no right in the plaintiff to have that portion of the land which lies between high and low water mark, but that if there is any right at all, there is a right on the part of the defendants. They say that they have a right to do it by custom. I think that was inferred from the words of the answer. They also claim a right by prescription, but which does not now seem to be persisted in; and they say that they had it by custom, and if they had it not by custom they have it under the powers of an Act of Parliament, which enables them to get stones from and between high and low water mark. The answer which is made by the plaintiff is—"I have clearly a right, under a grant of the Crown, to the shore between high and low water mark, but whether I have this right or not, it is clear that you cannot have this right, for you cannot maintain such a claim as you have set up; you cannot claim a right to do this under Act of Parliament." Then it is to be observed that all these things are legal rights, and nothing else but legal rights. Now, I do not wonder, as I have said before, that the parties who are engaged in this litigation have been very desirous of coming to a speedy conclusion as to the matter in difference. But it is, I think, perfectly plain, from the commencement of this case that the questions which are raised must of necessity have to be decided by a Court of Law, and cannot be decided here. The question for the Court is what course it ought to pursue with reference to the injunction now sought to be dissolved; and no doubt the Court must in different cases pursue different modes, or adopt different modes of proceeding. It may be that the Court will not continue an injunction for a day unless the party consent to bring an action immediately. In other cases where it is continued the Court will say that the party may bring such action as he may be advised. There has been a great argument here on the effect of the grant. Certainly if I had the inclination to decide upon the effect of that grant I could not decide upon it, it is impossible. These cannot be regarded other than as doubtful questions of law, and must be decided there. But what I have clearly to consider is which party is likely most to suffer by the continuance or dissolution of the injunction. Now it appears to me most distinctly that the plaintiff is likely to suffer most materially from the conduct which he desires to restrain the defendants from pursuing. They are taking away the shore or shingle from a part of the coast on which the sea is continually encroaching. The distance is only 100 yards, and in one year that distance has been diminished no less than fifty-five yards, and there are other adjoining parts where, in the course of some years, there has been a loss of a very considerable quantity of land. Now, I do not think that I have before me much distinct evidence of what is likely to be the effect of that, because we must all see that there may be a portion taken away at a considerable distance from this part, and the effect of it may be to divert the current in such a manner as to make it most prejudicial to this gentleman, but that is not distinctly proved. Nor is it within the jurisdiction of this Court, or the duty of this Court, where it sees matters resting in doubt in point of law, and sees mischief accruing from one party pursuing a course of conduct which may in the highest degree prejudice the other, and does not see anything of mischief to be incurred from restraining the other party. [Rousell].—Your lordship will remember that they state explicitly that, except upon the beach, there is no other place where stones can be had for miles.] Except upon the beach there is no other place for miles where stones can be had. Upon looking at this case in all its points of view, I think I ought to act in such a manner as to prevent mischief to the party likely to suffer most; and what I shall do is to continue this injunction. I have had very considerable doubts whether I ought not to put the parties immediately to bring an action. As far as Mr. Clowes is concerned, as to the points raised by the defendants, I think he

should do so, but I am afraid to say he must do so. I will therefore not allow the existence of this suit to prevent his doing that. I therefore give him leave to commence such action as he may be advised for the purpose of establishing his right. The defendants will be entitled to make him go on with the suit, and bring it to a hearing.

Rousell.—The costs will be costs in the cause.

The MASTER of the ROLLS.—The costs of this motion. I am very desirous of doing that which I cannot do—to give a conclusion on this matter.

Terrill.—Unless the costs of the defendant are mentioned specially, we should not get them. The Court will be good enough perhaps to mention them specially, because the costs of the defendant are not costs in the cause without being mentioned specially.

The MASTER of the ROLLS.—The costs of this motion to be costs in the cause.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple, Barrister-at-Law.

Friday, March 14.

HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.

Contract by railway company—Tenant for life—specific performance.

A railway company having a bill before Parliament for making a railway from X. to Y. with a line diverging to Z. ascertained that an objection raised to the diverging line would be removed if they purchased an estate of which A. B. was tenant for life. Accordingly the company entered into an agreement with A. B. to purchase the estate, and to perform all such acts as might be necessary to enable A. B. to sell. The bill was then passed, and by it no authority was given for the diverging line, and no powers enabling the purchase of A. B.'s estate, but the Act empowered the company to purchase for extraordinary purposes connected with the railway any quantity of land not exceeding thirty acres. The company afterwards altogether abandoned the formation of the line from X. to Y. and refused to purchase A. B.'s estate. Upon a suit by A. B. the Court decreed a specific performance of the agreement, and directed that the purchase-money should be paid into Court.

Under the will of Henry Hawkes, deceased, dated the 25th of February, 1836, the plaintiff in this suit was entitled as tenant for life to a messuage and small estate, consisting of about six acres near Spalding, in Lincolnshire. In 1847 the Eastern Counties Railway Company introduced a Bill before Parliament for the purpose of making a railway from Wisbeach to Spalding. The proposed line passed just within the plaintiff's estate, and the line of deviation passed through the centre of it. It was also proposed by the bill that there should be a line from the Wisbeach and Spalding line to join the Ambergate, Nottingham, and Boston line. This diverging line having been opposed in committee on the ground of its crossing the London and York line, the company directed inquiries to be made whether the junction could be effected in any other way. From these inquiries it was found that the junction could be effected without the objection before mentioned, if the whole of the property of which the plaintiff was tenant for life, and certain other property were entirely purchased by the company. Accordingly, an agreement dated the 27th of May, 1847, and under the seal of the company was made between the Eastern Counties Railway Company and the plaintiff, and was as follows:—"Whereas the said company are now promoting a bill before Parliament entitled 'A Bill to enable the Eastern Counties Railway Company to make a railway from Wisbeach to Spalding.' And whereas the said proposed railway is intended to pass near to the residence of the said Henry Hawkes, situate at Spalding aforesaid, in such a manner as will most seriously damage the same, and render it unfit for habitation. And whereas the said Henry Hawkes has hitherto opposed the passing of the said Bill into a law, but has consented to withdraw his opposition upon the said company entering into the agreement hereinafter contained. Now it is hereby agreed by and between the parties hereto that, in the event of the said Bill in its present, or any amended, modification, or altered form for the like objects, or any or either of them (and to which the said Eastern Counties Railway Company shall be parties or promoters), passing into a law, the said Eastern Counties Railway Company, their successors or assigns, shall and will purchase, and they do hereby in such case agree to purchase, of and from the said Henry Hawkes and his heirs, and the said Henry Hawkes and his heirs shall and will sell, and he doth hereby accordingly agree to sell to the said company their successors or assigns all that capital messuage, &c. for the price of 8,000*l.*, to be paid by the said company within eighteen calendar months

next, after the passing of such Bill as aforesaid; and further that, in addition to such purchase money or sum of 8,000*l.*, the said company, their successors or assigns, shall and will at the same time pay to the said Henry Hawkes, his executors, administrators, and assigns, the sum of 5,000*l.*, as a compensation for the personal annoyance and inconvenience of compulsory eviction from his said residence. And further that, inasmuch, as the said Henry Hawkes, under the will of his late father, is only tenant for life of the said capital messuage, and of the other greater part of the said hereditaments, with remainders over in strict settlement, the said company will obtain all such powers and authorities, and do and perform all such acts and things, and adopt all such measures, and pursue all such courses, either in or by such bill as aforesaid, or otherwise, as are, is, or shall, or may be, necessary or required for enabling the said H. Hawkes, and all other necessary parties, to sell and convey, and the said company to purchase, the said hereditaments and premises from the said H. Hawkes and his heirs, so as the same may become vested in the said company, on payment of the said several sums aforesaid, for an estate of inheritance in fee-simple in possession." Upon obtaining this agreement the company gave up the divergent line marked out in their plan, and to which the objection had been made, and the Act for making the railway from Wisbeach to Spalding received the Royal Assent on the 22nd of July, 1847. By the 18th section of this Act it was provided, that nothing herein contained should be held to authorise the company to make the railway delineated in the plan between the divergence there marked, and the Ambergate, Nottingham, and Boston Railway; by the 14th section the company were empowered to purchase for extraordinary purposes connected with the railway, any quantity of land not exceeding thirty acres; and by the 15th section it was enacted, that the powers of the company for the compulsory purchase of lands should not be exercised after the expiration of three years from the passing of the Act. The company afterwards altogether abandoned the formation of the Wisbeach and Spalding line, and upon their declining to take any further steps with regard to the plaintiff's property, this suit was instituted against them to compel a specific performance of the agreement before mentioned. At the hearing of the cause a decree was made declaring that the contract should be specifically performed, and referring it to the Master to inquire whether a good title could be made to the property, and when such title was first shewn, and in making such inquiry the Master was to have regard to the said contract, and particularly to the clause therein contained relating to the property of which the plaintiff was therein mentioned to be tenant for life under the will of his father, and to the provisions of the Lands Clauses Consolidation Act, 1845. The Master reported that a good title could be made, and that it was first shewn on the 4th of May, 1850. To this report exceptions were taken by the company, and now came on to be heard.

Russell, Malins, and Grove, in support of the exceptions, contended, that at the time the agreement was made the company were not authorised to purchase lands, and therefore the present plaintiff having only a limited interest in these lands, could not, under the 7th section of the Lands Clauses Consolidation Act, contract for the sale of them. The contract was also bad, as no valuation pursuant to the 9th section of the Lands Clauses Act had been made. Further, under the special Act obtained by the company, the line of deviation passed through the centre of the plaintiff's property, and enabled the sale of a part only of the property, and as this contract was for the whole of the estate, it must be treated as invalid, because there could not be a division of the contract. Besides this, the plaintiff could only convey to the company his life estate, there being no power to enable him to convey the fee; it would, therefore, be unjust towards the company to compel them to give for the life estate what they had agreed to give for the fee. The 14th section of the company's Act related to land necessary for stations, &c. and could not be construed to give them a power to purchase this estate.

Wigram and Follett for the plaintiff.

The VICE-CHANCELLOR said, that he did not consider the contract to be void, on account of the omission of a valuation under the 9th section of the Lands Clauses Act, as that omission might now be supplied if the company desired it, by having a valuation made under the section in question. As to the plaintiff being able only to convey to the company the life estate, the objection could be met by the purchase money being paid into court; and the persons entitled in remainder would not be allowed to have it paid out without confirming the purchase. But the body who contracted with the tenant for life had notice of the limitations of the property. It was by no means new in this or any other court that a man with an objection to title might so act.

V. C. KNIGHT BRUCE'S COURT.

special powers or without being placed in particular circumstances, the plaintiff could not sell more than the estate for life. Knowing that, they took upon themselves to enter into the contract. The language used was, "and further, that inasmuch as the said Henry Hawkes, under the will of his late father, is only tenant for life of the said capital messuage and of the greater part of the said hereditaments, with remainder over in strict settlement, the said company will obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures, and pursue all such courses in and by such Bill as aforesaid, or otherwise, as are, is, or shall, or may be necessary or required for enabling the said Henry Hawkes and all other necessary parties to convey, and the company to purchase the said hereditaments from the said Henry Hawkes; so that the same may become vested in the company on payment of the said several sums aforesaid for an estate of inheritance in fee simple in possession." The purchasers so contracted, and they omitted and failed to perform it, and said, that by reason of this tenancy for life the vendor had no title. The objection was one of pure dishonesty, and he overruled it accordingly. The decree, after overruling the exceptions, directing taxation of costs, &c. proceeded as follows:—"And the plaintiff by his counsel submitting to have the whole of the said sums of 8,000*l.* and 5,000*l.* mentioned in the said agreement, treated as if the same were purchase-money arising from estates devised to the uses of the will of Henry Hawkes, the father; and the defendants declining to state any election, or to express any wish, as to what account, or in what manner, the said moneys should be paid; and the defendants not requiring that a valuation of the said premises, or any part thereof, by two surveyors shall be made in the manner prescribed in the 9th section of the Lands Clauses Consolidation Act 1845. It is ordered that, upon the plaintiff executing and delivering to the defendants, at the expense of the defendants, according to the said agreement, a proper conveyance of the said estate and premises contained in the said agreement, such conveyance to be settled, &c. the said defendants, the Eastern Counties Railway Company, do pay the said sums of 8,000*l.* and 5,000*l.* making together 13,000*l.* and the interest thereon, into the bank to the credit 'Ex parte the Eastern Counties Railway Company in the matter of the Eastern Counties, Wisbeach, to Spalding Railway Act,' subject to the further order of the Court."

Friday, Feb. 28.

MORGAN v. MORGAN.

*Accumulations—Thelusson Act.*

*Disposition of income arising from a fund created by income accrued between the testator's death and twenty-one years after his death.*

This case, which is reported *ante*, p. 114, was mentioned again, to obtain the judgment of the Court as to the disposition of the income of the fund arising from the income of the 5,000*l.* legacy, accrued between the testatrix's death and the expiration of the twenty-one years from her death.

Russell, Goldmid, Wigram, Cotton, R. Palmer, Wickens, Ferrers, Roll, and Metcalfe, appeared for the several parties.

The VICE-CHANCELLOR directed that the income accrued and to accrue between the expiration of twenty-one years from the death of the testatrix, and the death or marriage of Miss Frances Sarah Gyles, on such part of this fund as arose from the income of the 5,000*l.* accrued between the death of the testatrix and the death of Mrs. Hanham, the tenant for life, should be paid to the personal representatives of Mrs. Hanham, and that the income accrued and to accrue between the expiration of the twenty-one years from the death of the testatrix and the death or marriage of Miss F. S. Gyles, on the remainder of the fund should be paid to the residuary legatees in remainder after Mrs. Hanham's death.

Monday, May 5.

PAWSEY v. BARNES.

*Claim—Statute of Limitations.*

*Real estate was devised to A. B. and C. D. upon trust to sell and to divide the produce between A. B. and other persons. In February, 1816, the testator died, and A. B. and C. D. the two executors, proved the will in the following August. In October, 1817, A. B. died. In 1849, C. D. died. In June, 1850, E. F. took out letters of administration to A. B. and filed a claim against the executor of C. D. in respect of the produce of the sale of the real estate. The Court dismissed the claim, but without prejudice to a suit instituted by bill.*

This was a claim filed by William Pawsey and Mary Ann, his wife, against the defendant Barnes, under the following circumstances:—John Dennant, by his will, dated the 13th of January 1816, devised all his real estate to John Pollard and James Hearn, and their heirs upon trust for sale, and after payment of certain sums out of the moneys produced by

such sale, to divide the remainder of the moneys between John Pollard and certain other persons in the will named: and the testator appointed John Pollard and James Hearn executors of his will. The testator died in February, 1816, and his will was proved in August, 1816, by both the executors. In October, 1817, John Pollard died, leaving James Hearn surviving. In 1849 James Hearn died, having, by his will, appointed the defendant Barnes his sole executor and trustee. In June, 1850, letters of administration of the estate of John Pollard were granted to Mary Ann Pawsey, the wife of William Pawsey, the plaintiffs in this case. The claim was filed in respect of John Pollard's share in the produce of the sale of John Dennant's real estate. The plaintiffs, in an affidavit filed by them in support of their claim, stated their belief that the whole, or the greater part of the estates, were sold in 1835.

Wigram and Elderton, for the plaintiffs, contended that the lapse of time was no bar to their claim. By the 3 & 4 Wm. 4, c. 27, s. 25, it is provided that when any land shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him to recover such land shall be deemed to have first accrued at and not before the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him. They cited *Ward v. Arch*, 12 Sim. 472.

Molins and Glasse, for the defendant, said that the claim was barred by lapse of time, as by the 40th section of the 3 & 4 Wm. 4, c. 27, it is enacted that no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent at law, or in equity, or any legacy but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same. The produce of real estate must be considered as a sum charged upon or payable out of land, and therefore within the operation of the Act. (*Prior v. Horneblow*, 2 Y. & C. (Ex.) 201; *Christian v. Devereux*, 12 Sim. 264; and *Adams v. Barry*, 2 Coll. 290.) Independently of the statute, the plaintiff was barred by lapse of time, the Court having the right to refuse relief to stale demands, a right which was reserved by the 27th section of the 3 & 4 Wm. 4, c. 27.

Wigram, in reply.

The VICE-CHANCELLOR said that, considering the testator died in the early part of the year 1816; that his will was proved in August 1816, by the two executors and trustees named in the will, it followed that somewhat more than thirty-three years had elapsed since the right of the plaintiffs arose, inasmuch as the death of John Pollard, of whose estate they were administrators, occurred on the 10th of October, 1817. Considering also that there was no trace of any claim during the whole life of Mr. Hearn, who did not die until 1849, and that the letters of administration to Mr. Pollard were not obtained until after the death of Mr. Hearn, who probably would have been able to give more information on the subject than could now be obtained, his Honour was of opinion that, independently of the statute, and without reference to it, this was a case of great doubt and difficulty. Independently of the circumstances of the case, there was also a difficulty or possible difficulty upon the construction of the statute, and his Honour considered that if anything were to be made of the case by the plaintiffs, it must be by a suit instituted by bill. He should therefore dismiss the claim without prejudice to the plaintiffs' filing a bill.

Wednesday, June 4.

LOCK v. DE BURGH.

3 &amp; 4 Wm. 4, c. 22—Apportionment.

*Lands were, by indentures dated in 1828, settled to the use of A. B. for life, with a power of leasing. After the passing of the 3 & 4 Wm. 4, c. 22, A. B. granted certain leases, and he died in 1847.*

*Held, that A. B.'s personal representatives were entitled to a proportion of the rents between the last periods of payment and his death.*

In this suit the following question arose under the Apportionment Act (3 & 4 Wm. 4, c. 22). Certain lands were, by indentures dated the 16th and 17th of January, 1828, conveyed to the use of William Lock for life, with divers remainders over, and a power of leasing was given to William Lock, the tenant for life. Under this power, William Lock, after the passing of the 3 & 4 Wm. 4, c. 22, in 1834, granted certain leases of portions of the settled property, and he died on the 9th of December, 1847. By the 2nd section of 3 & 4 Wm. 4, c. 22, it is enacted that from and after the passing of that Act all rents and services reserved in any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted

after the passing of the Act), and all rent, charges, and other rents, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or becoming due at fixed periods, under any instrument that shall be executed after the passing of the Act, shall be apportioned as and in such manner that on the death of any person interested in any such rents, his or her executors, administrators, or assigns, shall be entitled to a portion of such rents, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person. The question was, whether the personal representatives of William Lock were entitled to a proportion of the rents of the property leased by him under the power between the last periods of payment and his death.

Calvert and Brett, for the plaintiff.

Wilcock and Keene, for the defendants.

The case of *Knight v. Boughton*, 12 Bea. 312, was cited.

The VICE-CHANCELLOR said, that as the leases were instruments executed after the passing of the Act, he thought the estate of Mr. Lock was entitled to a proportion of the rents up to the time of his death.

Saturday, June 14.

Re SIMPSON'S Settlement.

*Settlement—Power of appointment.*

*By a settlement made on the marriage of H. S. and M. D. real estate was conveyed to trustees upon trust for the benefit of H. S. for life, and after his decease for M. D. for life, and after the decease of the survivor, for such one or more of the children of the marriage as H. S. and M. D. should jointly appoint; and in case of the death of H. S. in the lifetime of M. D. before any such appointment should be made, as M. D. should appoint. H. S. and M. D. exercised the joint power of appointment as to two-fourths of the estate, and H. S. died, leaving M. D. surviving. M. D. afterwards appointed the remaining two-fourths:*

*Held, that the latter appointments made by M. D. were valid.*

By indentures of settlement made on the marriage of Henry Hanson Simpson and Mary Ann Duberly, and dated the 14th and 15th days of June, 1797, certain real estates, the property of M. A. Duberly were conveyed to trustees upon trust for H. H. Simpson for life, and after his death for M. A. Duberly, his intended wife, for life; and after the decease of the survivor of them "to the use of any one child, or any two or more children, of the said H. H. Simpson, on the body of the said M. A. Duberly, to be begotten, in such parts, shares, and proportions (in case there should be two or more such children), and for such estate and estates, and in such manner, and with, under, and subject to such powers, proviso, conditions, and restrictions, and with such limitations over (but such limitations over to be for the benefit of some or one of the said children) as the said H. H. Simpson and M. A. Duberly, at any time or times during their joint lives, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them and each of them sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, should direct, limit, and appoint; and in case of the death of the said M. A. Duberly in the lifetime of the said H. H. Simpson, before any such direction, limitation, or appointment should be made, then as the said H. H. Simpson at any time or times during his life, after the decease of the said M. A. Duberly, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto to be by him signed, sealed, and published in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint; but in case of the death of the said H. H. Simpson in the lifetime of the said M. A. Duberly, before any such direction, limitation, or appointment should be made, then as the said M. A. Duberly, at any time or times during her life, and whilst she should be sole and unmarried, after the death of the said H. H. Simpson, by any deeds or deed, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil thereto to be by her sealed and published in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint; and in default of all such direction, limitation, or appointment as aforesaid," &c. There were four children of the marriage. In March 1821 Mr. Simpson and his wife by deed jointly appointed one fourth part of the property which was subject to the trusts of the set-

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tlement, to one of the children; and in October 1833 they by deed jointly appointed another fourth part of the property to another of the children. In 1835 Mr. Simpson died. In February 1836 the two remaining fourth parts of the property were by two separate deeds appointed by Mrs. Simpson to the two other children. In 1850 Mrs. Simpson died. The trustees of the settlement transferred two fourth parts of the consols which represented the estate settled, to the two children in whose favour the joint appointments had been made, but they transferred the residue of the fund into Court under the Trustees' Relief Act. The present petition was presented by the two children, to whom the appointments by Mrs. Simpson, in February 1836, had been made, and the persons claiming under them, praying for a transfer of the stock so transferred into Court. The question on the petition was whether by the terms of the settlement, the joint power of appointment having been exercised by Mr. and Mrs. Simpson, the power of appointment by Mrs. Simpson alone could have been exercised.

*J. Parker and Walford* for the petitioners.  
*K. Parker and Briggs, Mains and Austen, and Bacon and Boyle*, for the respondents claiming adversely to the petitioners.

*Russell and B. L. Chapman* for the trustees.  
The case of *Simpson v. Paul*, 2 Ed. 34, was cited. The VICE-CHANCELLOR said, that the words "any such appointment" must be taken to mean a complete appointment of the whole estate, and that, whatever the words were, the meaning to be collected from the whole instrument was, that whatever was not appointed by Mr. and Mrs. Simpson jointly, should, in the event of Mr. Simpson's death in the lifetime of Mrs. Simpson, be subject to her sole appointment. His Honour, therefore, considered that Mrs. Simpson's appointments were valid, and that the petitioners were entitled to the fund.

Common Law Courts.

JUDGES' CHAMBERS.

Reported by DAVID CARO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Thursday, July 3.

(Before Mr. Justice WILLIAMS.)

TURNER v. WILKS and ANOTHER.

*Protection statutes—Imprisonment of debtor beyond twelve months—Discharge of insolvent.*

*By the 7 & 8 Vict. c. 96, s. 28, it is enacted, "that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition."*

*The Insolvent Debtors Court refusing to discharge an insolvent petitioner who had been in custody more than twelve months:*

*Held, by Mr. Justice Williams, after consulting Mr. Baron Parke, that a judge at Chambers may discharge him.*

The insolvent, the defendant in the action, filed a petition for protection under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in the Court for Relief of Insolvent Debtors, and came up for his examination before Mr. Commissioner Law, on the 19th of April, 1851, when he was opposed by the plaintiffs in this action, and a day was named for making the final order. On the last-named day the insolvent was again opposed, and the learned commissioner (Mr. Law) adjourned the case *sine die*, without protection; on the 11th of May, 1850, being the day after the last examination, the insolvent was arrested in execution in the action, and committed to the debtors' prison. After the lapse of about six months an application was made to the learned Commissioner to grant him a protecting order under the 7 & 8 Vict. c. 96, s. 28, but the application was refused. Subsequent applications were made to the learned Commissioner, but were attended with the same result. To-day,

*Lewis* (of Ely-place) applied for the discharge of the insolvent, the defendant in the action, out of custody, upon affidavit of the foregoing facts, and also that more than twelve months had elapsed since the filing of the petition and the final hearing of the petitioner.

*Martin*, the plaintiff's solicitor, opposed the application.

*WILLIAMS, J.* doubted his power to discharge the insolvent.

*Lewis* admitted that he had no precedent, but relied entirely upon the words of the statute. Perhaps his lordship would be good enough to mention the nature of this application to Parke, B. who was also at Chambers.

*WILLIAMS, J.* acceded to this request, and immediately consulted with Parke, B. after which he returned, and made an order for the insolvent's discharge, grounded upon the affidavit and the words of the Act of Parliament.

The insolvent was accordingly discharged.

BANKRUPTCY.

*Note.*—This is the first case that has arisen under these statutes, and should be noted by practitioners. —REPORTER.

BANKRUPTCY.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT, reported by G. S. ALLFUTT, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, LONDON, reported by JOHN A. FORBES, Esq. Barrister-at-Law.  
COURT OF BANKRUPTCY, DUBLIN, reported by J. LEVY, Esq. Barrister-at-Law.

VICE-CHANCELLOR KNIGHT BRUCE'S COURT.

Monday, March 3.

*Ex parte BIRD, re BOURNE.*

*Proof—Forged acceptances.*

*A. acted as the agent of B. in a certain trade, and representing himself as such, applied to a bank to discount, without A.'s indorsement, bills drawn by B. and apparently accepted by C. To this the bank agreed, and the money was paid to A. The signature of C. proved to have been forged by B. A. became bankrupt. The bank tendered proof of the amount of the bills against A.'s estate, and the commissioner allowed the proof. There was no proof as to what became of the money paid to A. on account of the bills. On appeal, the Court referred the matter back to the commissioner, with liberty to either party to add to the evidence.*

This was a petition of appeal from the decision of the commissioner allowing the proof by the manager of the Union Bank of Liverpool against the bankrupt's estate of 3,600*l.* in respect of two bills of exchange, dated respectively the 22nd of February and the 8th of March, 1850. In September 1849, Bourne, the bankrupt, who was living at Liverpool, became the agent of Threlfall, who resided in Yorkshire, for the purpose of buying and selling cotton. In December 1849, Bourne took to the Union Bank of Liverpool a bill of exchange, dated the 8th of December, 1849, and apparently drawn by Threlfall, and accepted by the Hull Flax and Cotton Mill Company, and informed the manager of the bank that the bill was Mr. Threlfall's, for whom he, Bourne, was buying cotton, and that Threlfall had requested Bourne to get the bill discounted. Bourne then inquired of the manager whether the bank would discount the bill without requiring his, Bourne's, indorsement of it, and if so, on what terms, it being understood that no recourse was to be had to him, Bourne. The manager agreed to discount the bill without requiring Bourne's indorsement, and the bill was discounted by the bank accordingly. This bill was duly paid. Between December 1849 and April 1850, the bill dated the 22nd of February, 1850, for 2,000*l.* and that dated the 8th of March, 1850, for 1,600*l.* and several other bills apparently drawn by Threlfall, and accepted by the Hull Flax and Cotton Mill Company, were discounted by the bank through Bourne's agency in the same manner and on the same terms as before mentioned, with regard to the bill of 8th December, 1849, and Bourne received the money on the bills. The signatures of the acceptors of the bills of February 22nd and March 8th, 1850, proved to have been forged by Threlfall, who was tried for the forgery, and sentenced to transportation for life. The circumstances before mentioned as to Bourne's transactions with the bank appeared from his examination, and he also stated that in April, 1850, he brought to the bank two other bills dated in that month, and apparently drawn and accepted as those before mentioned, but that on that occasion his, Bourne's, indorsement, was required by the manager, and he accordingly indorsed these two bills, and they were discounted. The bank did not offer any evidence. It was stated at the bar, though there was no inquiry before the Commissioners on the subject, that though the money on the bills in question had been received by Bourne, there had been subsequent dealings between him and Threlfall, and that Threlfall became largely indebted to Bourne, and that Bourne's bankruptcy was owing to his dealings with Threlfall.

*Crompton and Glasse*, in support of the petition.

*R. Palmer and Mellish* for the Union Bank of Liverpool.

The following cases were cited:—*Fuller v. Smith, Ry. & Moo. 49; 1 Car. & Pay. 197; Jones v. Ryde, 5 Taunt. 488; Bruce v. Bruce, ibid. 495; Stephens v. Badcock, 3 Barn. & Adol. 354; Stead v. Thornton, ibid. 357, n.; Buller v. Harrison, Corp. 563; Wilkinson v. Johnston, 3 Barn. & Cres. 428; Williams v. Deacon, 4 Ex. 397; Omerod v. Huth, 14 Me. & Wels. 651; Rawlings v. Bell, 1 C. B. Rep. 951; Evans v. Collins, 5 Q. B. 804; and Cos v. Prentice, 3 Mau. & Sel. 344.*

The VICE-CHANCELLOR said, that in the present state of the evidence he took it to be proved that Mr. Bourne was perfectly innocent, and was ignorant of the invalidity of the bills; that he acted in

INSOLVENCY.

the transaction solely as the agent or servant of Threlfall; that he so represented himself from the beginning and throughout; and that the bank understood that he was so dealing, and did deal with him in that character with the marked exception of the two bills, which were indorsed by Mr. Bourne. The only question then remained as to what became of the money paid to Mr. Bourne; his Honour was of opinion that it was for the bank to show that the money remained in Mr. Bourne's hands in such a state that it could be recalled. He thought that it was highly improbable that it did so remain. He was of opinion that upon the present state of the evidence the proof was wrongly admitted, and he should therefore refer the matter back to the Commissioner, with liberty for either party to add to the evidence.

Wednesday, April 23.

*Ex parte HOLLINGWORTH, re HOLLINGWORTH.*

*Certificate.*

*A. B. became bankrupt in 1833, his estate paying 3s. 6d. in the pound. In 1835 he made a composition with his creditors. In 1846 he made a composition with his creditors, paying 5s. in the pound. In June 1849 he placed a declaration of insolvency in his solicitor's hands, and afterwards incurred several debts. In June 1850 he again became bankrupt:*

*Held, that the bankrupt was not entitled to be placed in a more favourable position as to his certificate than he would have been under the 6 Geo. 4, c. 16, s. 127.*

This was a petition of appeal from the decision of the commissioner refusing the bankrupt his certificate. Hollingworth, the bankrupt, was a shipowner and insurance-broker at Hull. In 1833 he became bankrupt, and a dividend of 3s. 6d. in the pound was paid. In 1835 he made a composition with his creditors. In 1846 he made a composition with his creditors, and paid them 5s. in the pound. In June 1849 he signed a declaration of insolvency, and placed it in the hands of his solicitor. In August 1849 he, being in insolvent circumstances, became indebted to Mr. Huntley, who resided in London, in 110*l.* and to Mr. Hay in 432*l.* for stores furnished for a vessel belonging to the bankrupt. In May 1850 Hollingworth again became bankrupt, and the debts proved against his estate amounted to 3,400*l.* his assets realising only 584*l.*

*Bacon and W. R. Ellis* in support of the petition.

The VICE-CHANCELLOR said that under the circumstances of the former bankruptcy, and the compositions with creditors, he considered that the bankrupt ought not to be placed in a more favourable position than he would have been in under the 127th section of the 6 Geo. 4, c. 16. He should not, therefore, at any rate give the bankrupt more than protection for his person. Upon the question whether he should give even this, he would hear the counsel for the opposing creditors.

*Swanston and Rosburgh* for Mr. Huntley, and *Selwyn* for Mr. Hay.

*Bacon* in reply.

The VICE-CHANCELLOR said, that at the conclusion of the petitioner's case he had expressed his opinion that the former bankruptcy, the former compositions, and the former insolvency, had imposed on the petitioner the burden of shewing that if he was entitled to any certificate he was entitled to something more than protection for his person. From that the bankrupt had not discharged himself. The case against the bankrupt remained in his Honour's mind in an unsatisfactory state, from his conduct between the time that he placed in his solicitor's hands the declaration of insolvency of June 1849, and the bankruptcy, which took place in May 1850. He was of opinion that the dealings of the bankrupt with his property and his creditors in that interval were not justifiable. A certain amount of indulgence might be given to persons in failing circumstances, and the same rule was not to be applied to them as to persons in easy circumstances. But there were limits to such indulgence, and the transactions of the petitioner must be declared to be wrong. His Honour thought that justice would be done by imposing a delay of three calendar months from that day before granting the certificate. The certificate to be then granted would only be of the second class, and merely protect the bankrupt's person from arrest. The costs of the respondents and the assignees must be allowed out of the estate.

INSOLVENT COURT.

Reported by DAVID CARO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

(Before Mr. Commissioner LAW.)

Thursday, January 3, 1850.

*Re RICHARD HENRY TOLSON.*  
*Creditors' petition—Refusal to file schedule—Setting aside half-pay—1 & 2 Vict. c. 110, s. 56.*  
*Upon the refusal of an* *a schedule*

## INSOLVENCY.

## NISI PRIUS.

## NISI PRIUS.

*upon the presentation of a creditor's petition, the Court, notwithstanding, may proceed to set aside a portion of his half-pay for the benefit of the creditors.*

This insolvent held the brevet rank of major in the army, and was in the receipt of the half-pay of an officer of that rank. He was arrested on the 7th of December, 1832, and committed on the 31st of December, in the same year. A creditor's petition was filed on the 27th of February, 1849, and a vesting order made upon it, dated February 28, 1849. He had, however, refused to file a schedule. The case was before the Court upon a former day, when, upon application to that effect, the Court granted further time. To-day,

Cooke, for the creditors, renewed his application that 50l. per annum of the major's half-pay might be set aside for the benefit of the creditors. Mr. Tolson had not told them what he had received in the prison, and there was a probability that he was receiving a great deal more than his half-pay of 127l. per annum. As this gentleman appeared very obstinate, the only way to affect him was to make this rule absolute.

Sturgeon shewed cause against the rule upon various grounds.

Mr. Commissioner LAW.—An application was made in March by this insolvent for time to file his schedule. On the 25th of April he asked time again, and from the state of his health, and the alleged difficulty of his accounts, he wanted and obtained more time. The case now came again before the Court, and although the insolvent had been seventeen years in custody, this was the first time that this Court had any power of acting at all. It now came before the Court in the shape of an application to which he was disposed to accede. There was a certainty that by following this course it could not do any harm, which might follow if this rule were pledged to last any certain period; but it is not, and if he granted it to-day he might revoke it to-morrow. It was a matter of pure discretion. The insolvent gave no information of his affairs. This was an application by one of a great many creditors that a certain portion of his half-pay should be set aside for their benefit. Upon the last occasion it was said that a schedule would be filed; to-day there was not a word said about it, therefore the Court was set at defiance, and, the probability was, misled formerly by misrepresentation. He kept the Court in ignorance of everything; he would tell them nothing. The rule must be made absolute; there would be no harm done if the insolvent was disposed to file a schedule. There was a particular form of reference to the War-office, and if it took effect, his half-pay could not be taken till the next quarter; therefore the insolvent, by filing his schedule, could compel the Court to review its decision. The Court would then have certain information of his income, property, debts, and expenses; therefore, knowing that it could not injure him, and that there was a prospect of benefiting him, he granted the application.

Cooke said that this gentleman had remained twelve years in custody upon detainers amounting only to 245l. It was really quite painful to think that a gentleman would devote himself for the remainder of his life to a prison under such circumstances.

Sturgeon said, the real estates to which he had expectations of succeeding amounted to 25,000l. per annum, and he did not wish to pass through the Court.

*Rule absolute.*

The Court declined to allow costs at present, but observed, it might be a very fit case for an assignee.

Note.—This insolvent subsequently filed a schedule, which was finally adjudicated upon on the 12th April, 1850, when the insolvent was discharged. No portion of his half-pay appears to have been appropriated to creditors.—REPORTER.

Monday, August 18.

Re WILLIAM MINGAYE.

Creditors' petition—Refusal to come up for hearing—Setting aside half-pay—1 & 2 Vict. c. 110, s. 56.

Upon refusal to come up for a hearing, the Court may deal with the insolvent's half-pay for the benefit of creditors.

This insolvent was a post-captain in her Majesty's service on half-pay, amounting to 14s. 6d. per day. It appeared that Ann Harrison, executrix of Horatio Harrison, deceased, had obtained judgment against him for about 70l. She had filed a creditor's petition on the 24th Dec. 1850, upon which a vesting order was made the day following. The insolvent had filed a schedule on the 7th June, 1851, but refused to come up for a hearing, which had been fixed for the 1st July. His debts amounted to about 1,125l. To-day,

Parnell applied for a rule to shew cause why a portion of the insolvent's pay should not be set apart pursuant to the provisions of the 1 & 2 Vict. c. 110, s. 56.

Mr. Commissioner LAW granted the application.

The Court fixed a day for the return of the rule, so as to give the insolvent an opportunity of coming up for a hearing in the interval, or on that day, if he chose.

*Rule nisi.*

Nisi Prius.

## COURT OF QUEEN'S BENCH.

Reported by W. J. METCALFE, Esq. of the Inner Temple, Barrister-at-Law.

## SITTINGS AT WESTMINSTER AFTER TRINITY TERM.

Thursday, June 26, 1851.  
(Before Lord CAMPBELL, C.J.)

DAVID v. MYERS.

*Railway—Compensation—Damages—Deposited plans—Deviation—8 Vict. c. 20, s. 11.*

*An action is maintainable for any damage done by a railway company which is not justified by Act of Parliament, but not for damage which is so justified. Such damage only entitles the sufferer to compensation.*

*8 Vict. c. 20, ss. 11 and 50 controls the deposited plans and sections, and permits a deviation of two feet from the datum line therein described. It also permits a slope of 1 in 20, though a slope of 1 in 125 is indicated in the plans and sections.*

This was an action of trespass for breaking the plaintiff's house, nailing boards upon it, and throwing up earth against it.

M. Chambers, Q.C. in opening the plaintiff's case, said that the defendant, who was the contractor for the East and West India Docks and Birmingham Junction Railway, had blocked up the access to the plaintiff's house, had nailed planks across his door, and had raised the road in front of and against his house much higher than he was entitled to do. As to the nailing planks, the defendant had suffered judgment by default, and the plaintiff required the jury to assess the damages for the injuries confessed, and to award him damages for the other injuries complained of.

Lord CAMPBELL, C.J.—We have laid down as a general rule, that an action may be maintained for any injury which is not justified by statute; but that for any thing so justified, compensation only can be claimed.

The facts were proved as opened.

O'Malley, Q.C. for the defendant, said that he justified under the Railway Act. He contended that the plaintiff ought to have sought for compensation under the Act, whereas no claim even for compensation had been made. As to nailing boards on the plaintiff's house, it was done by mistake, judgment by default had been suffered, and the jury would say to what damages the plaintiff was entitled in consequence; but as to raising the road, it was done to give the necessary inclination to the bridge over the railway, and was justified by the Act. For such injury, therefore, the plaintiff ought to have claimed compensation, but was not entitled to maintain an action.

Lord CAMPBELL, C.J.—It is quite clear that the plaintiff is not entitled to recover damages in this action for any thing which has been done under an Act of Parliament.

O'Malley, Q.C.—The question, then, will be—Has the road been raised and the work complained of been done substantially within the Act?

M. Chambers, Q.C.—We say that the defendant has deviated from the deposited sections; that he has made the bridge and the road higher than he was authorised by them.

O'Malley, Q.C.—The rail passes under High-street, Poplar, a short distance from the plaintiff's house. The street is then carried over the railway by a bridge. It is admitted that the elevation of the bridge and of its approaches is greater than that indicated by the deposited plans and sections; but sec. 11 of the Railway Clauses Act (8 Vict. c. 20) permits a deviation from the plans and sections of two feet either above or below the datum level. The line of railway is elevated two feet above the level indicated on the plans, and of course the bridge is elevated in proportion from the elevated line.

The deposited plans and sections shewed that the bridge was to be 1 foot 9 inches above High-street at the point of passing. The bridge was built two feet higher, or 3 feet 9 inches above the street, but was in every other respect conformable to the Act. According to the deposited plans and sections the slope from the plaintiff's house to the crown of the bridge was to be 1 in 125, but in order to approach the bridge after the increased elevation, it was necessary to make the slope 1 in 20, and for that purpose to raise the road in front of the plaintiff's house.

Brown, for the defendant, cited the Railway Clauses Act, 8 Vict. c. 20, s. 50, which provides that the ascent to such bridges shall not be greater than 1 in 20. He also cited *Beardner v. The London and North-Western Railway Company*, 5 Railway Cases, 7, to shew that the plans and sections, unless

expressly incorporated in the special Act, were binding as to the datum line only.

M. Chambers, Q.C.—What is the right construction of the Act as to the alteration of slopes? The special Act refers to the plans and sections.

Lord CAMPBELL, C.J.—But that is controlled by the Railway Clauses Act. Sec. 19 of the special Act, after reciting the deposit of plans and sections, enacts "that subject to the provisions in this Act and in the said recited Act (8 Vict. c. 20) contained, it shall be lawful for the said company to make and maintain the said railway and works in the line and upon the lands, delineated upon the said plans, and described in the said books of reference; and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

O'Malley, Q.C. cited *Abrahams v. The Great Northern Railway Company*, in this court (since reported 20 Law J. 322, Q.B.).

Lord CAMPBELL, C.J. (to the jury).—As to the second point, the plaintiff says, "You (the defendant) did me the permanent injury of raising the soil against my shop and house." He charges the defendant, who is merely the contractor, with all the damage for so doing, though ample power is given by the Acts to obtain from the company compensation for such injury, and it would then be paid for out of the funds of the company, who of course receive the benefit. But in this action, whatever damages you award must be paid by the contractor. It would have been much better if the plaintiff had made his claim upon the company, and he would then have been fully indemnified. He has, however, chosen to charge the contractor as a wrongdoer, and you must therefore say whether, in your opinion, he is so. The defendant says that he is justified by the Act in doing what he has done. And on the part of the plaintiff it is admitted that he is justified in all respects but one. The plaintiff says the bridge and the approach to it are raised too high. I shall ask you whether they are raised higher than the Acts allow, and if you think they are not, the defendant is entitled to your verdict. The deposited plans and sections prescribe 1 foot 9 inches as the elevation of the bridge above the street, and 1 in 125 as the incline from the plaintiff's house to the bridge; but the General Act allows a deviation of 2 feet from the datum level, and enacts that the slope or incline shall not be more than 1 in 20. The datum line was raised 2 feet; the bridge was, in consequence, raised 2 feet, and, instead of 1 in 125, 1 in 20 then became apparently the proper and necessary slope for the approach to the bridge. If, therefore, you are of opinion that the increased elevation of the bridge was not more than 2 feet from the elevation indicated on the plans and sections, and that the slope was not more than 1 in 20 from the bridge to the plaintiff's house, you will find your verdict for the defendant as to the second count.

*Verdict for the plaintiff on the first count—damages, 100l.; for the defendant on the second count.*

M. Chambers, Q.C. and Clark, for the plaintiff.  
O'Malley, Q.C. and J. Brown, for the defendant.

## COURT OF COMMON BENCH.

Reported by W. J. METCALFE, Esq., of the Inner Temple, Barrister-at-Law.

## SITTINGS AT WESTMINSTER AFTER TRINITY TERM.

Saturday, June 28, 1851.

(Before Chief-Justice JERVIS.)

MARSHALL v. YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

*Contract—With whom made—Master and servant—Assumpsit.*

*A nobleman travelled upon a railway with his servants, and paid all the expenses for the carriage and luggage of himself and his servants; during the journey a portmanteau belonging to one of the servants was lost:*

*Semble, as the contract for its safe carriage was with the master, and not with the servant, the latter could not maintain an action for its loss.*

This was an action of *assumpsit*, charging the defendants as common carriers with a breach of duty, in not safely carrying and delivering a portmanteau which they had undertaken to carry.

It appeared that Lord Adolphus Vane came up by the railway with his servants; that during the journey a portmanteau belonging to one of his servants was lost, but that Lord Adolphus Vane paid for all the tickets for himself and his servants. The servant was the plaintiff in the present action.

Knowles, Q.C. and H. Hill, for the defendants, submitted that the plaintiff must be nonsuited. The declaration averred that the company received the plaintiff with his luggage, and then alleged a breach of duty against the company as common carriers, in not safely carrying such luggage. The declaration was founded on a contract, but it was proved that the contract was with Lord Adolphus Vane, and not



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with the plaintiff. "For reward in that behalf" in the declaration meant reward moving from the plaintiff; but that was disproved; the plaintiff had failed to prove the bailment.

*Willes, contra.* The master pays for himself and his servant; it is part of the relation of master and servant; and by virtue of such position the master acts as agent for the servant in entering into such contract; he, in fact, makes the contract for the servant, and, when made, it is the contract of the servant, and will be treated in law as if made by him personally. I do not wish to amend.

JREVIS, C.J.—I shall nonsuit the plaintiff, with leave to him to move to enter a verdict.

*Plaintiff nonsuited.*

*Willes, for the plaintiff.*

*Knowles, Q.C. and H. Hill, for the defendants.*

## Equity Courts.

## LORD CHANCELLOR'S COURT.

Reported by RICHARD GRIFFITHS WELFORD, Esq. of the Inner Temple, Barrister-at-Law.

Thursday, Aug. 7.

R. HEWSON, a Lunatic.

*Allowances out of a lunatic's surplus income.*

In this case an application was made on behalf of a gentleman employed as a clergyman in India, who is also the heir-at-law and one of the next of kin of the lunatic, for an allowance of 200*l.* a year out of the surplus income, though no such allowance had ever been made by the lunatic herself.

The LORD CHANCELLOR.—I find it difficult to ascertain the origin of the power of the Court to deal with the property of a lunatic. In all cases I find the Court acts with great caution, and exercises the power only in those cases in which the lunatic may be presumed, from circumstances, to dispose of his property in favour of relations. There is nothing more agreeable to people than to be generous and kind with other person's property, and for that reason people consider it very harsh to refuse them. In this case, assuming that I have jurisdiction, I find every other circumstance favourable to the application made to me; this lady is rich enough, having an income exceeding 4,000*l.* a year, and 1,500*l.* out of that income allowed for her own maintenance is ample enough to afford her all the comforts she may be accustomed to; she has one sister, and one niece and a nephew,—to the sister she used, when of sound mind, to allow 20*l.* a year, the niece had no allowance. The nephew is a clergyman laudably employed in spreading Christianity in India, and the application is to allow him 200*l.* a year out of the lunatic's surplus income; he is her heir-at-law, and he is also one of her next of kin; there is no evidence of any disposition being ever shewn by his aunt to be generous in respect to him, it has not been shewn that he was ever an object of her care or consideration, in such a case it would be an abuse of words to speak of exercising the jurisdiction of the Great Seal in respect to the property of a lunatic. If any will existed in which it might be seen that this lady made any provision for this gentleman, or if there was an application shewing that she ever used any expressions of kindness towards him, or shewing any disposition on her part to exercise liberty towards him, his lordship would in that case be disposed to make the order that was asked for in his favour. I do not think this a case in which I can accede to the application for the allowance asked.

Thursday, Feb. 6.

(Before the LORD CHANCELLOR COTTENHAM and the MASTER of the ROLLS.)

THE GRAND JUNCTION CANAL COMPANY v.

DIMES.

*Injunction—Stay of proceedings—Interest of Lord Chancellor as shareholder in plaintiff's company—Appeal—Second rehearing.*

The defendant having committed a breach of the perpetual injunction awarded by the decree in this cause, which was affirmed by the Lord Chancellor on appeal, discovered that the Lord Chancellor was a shareholder in the canal company, moved to state proceedings in the cause, and to take the bill off the file on the ground that the Lord Chancellor's interest rendered the decree void:

Held, that the decree was sufficient, and that the objection that the Lord Chancellor's interest did not appear on the record or otherwise in the cause did not prevent the defendant appealing to the House of Lords, or from obtaining a second rehearing. When the Lord Chancellor signs the decree or order of a subordinate judge it becomes in form a decree or order of the Lord Chancellor.

In this cause, in which the defendant Dimes was a principal defendant, a decree had been made by the Vice-Chancellor of England, making an injunction which had been awarded against Dimes perpe-

tual, to restrain him from interfering with the plaintiff's canal. That decree had been confirmed on appeal by the Lord Chancellor.

Defendant Dimes then prepared to appeal to the House of Lords, and whilst doing so he discovered that the Lord Chancellor (Lord Cottenham) held a considerable number of shares in the company, and he then moved to set aside the order made on the appeal on the ground of the Lord Chancellor's interest. This by the Lord Chancellor's direction was heard before the Master of the Rolls, for the Lord Chancellor, who advised that the motion should be dismissed with costs. (15 Sim. 402; 12 Beav. 63; 9 Q. B. Rep. 469.)

Dimes having then brought an action of trespass against the company, who moved to commit him for breach of the injunction, and Dimes made a cross motion to take the bill off the file, the Vice-Chancellor refused to make any order on either motion. Dimes then impeded the navigation, and the company moved again to commit him for breach of the injunction, when the Vice-Chancellor made the order.

Dimes then moved, by way of appeal, to set aside the order made on the original appeal, and to take the bill off the file. Such appeal motions came on to be heard before the Lord Chancellor or the Master of the Rolls.

*Daniel and Smythies* supported the appeal motion, and referred to *Earl of Derby's* case, 12 Rep. 114; *The Chancellor of Oxford's* case, 3 Blackstone's Commentaries, p. 299 in S. C.; Year-book, M. 8, Hen. 6—20; *Great Charter v. Kennington*, 2 Str. 1173; *Anonymous*, 1 Salk. 396; *Brooke v. Earl of Rivers*, Hardres, 503; *The King v. The Inhabitants of Yarpole*, 4 Term Rep. 71; *Reg. v. The Commissioners of Cheltenham*, 1 Q. B. Rep. 467; *Reg. v. The Justices of Hertfordshire*, 6 Q. B. Rep. 753; *Rolle's Abr. "Tit. Judges,"* A. pl. 11; *Esdaile v. Lund*, 12 Mees. & Wels. 734; *Reg. v. The Inhabitants of Upton St. Leonard's*, 10 Q. B. Rep. 827; *Lord Mostyn v. Spencer*, 6 Beav. 135; *Rothschild v. Brookman*, 5 Bl. N. S. 165; *Drewry v. Thacker*, 3 Swans. 529; *Ex parte Baddeley*, 5 Rail. cases, 542; *Carus Wilson's* case, 7 Q. B. Rep. 984; 8 Vict. c. 18, s. 39; *Bridgman v. Holt*, Show P. C. 111.

*Stuart, James Parker, Bush, Randall, and G. L. Russell*, for other parties, were not called on.

## JUDGEMENT.

The MASTER of the ROLLS.—It would certainly have been a very great satisfaction to me if I had heard anything in the course of this long argument which could induce me to think that Mr. Dimes was at this time entitled to any relief; a satisfactory thing it cannot be to any judge to have the notion that under an order which he has made, or which he sanctions, a party is imprisoned, and thinks himself to be imprisoned unlawfully. I confess, however, that I have heard nothing which tends in any degree to vary the conclusion to which I came upon the motion that was made before me at the Rolls, or to induce me to think that the altered relief which is prayed for by this notice of motion ought to be granted. Mr. Dimes is in prison under the order made by the Vice-Chancellor of England, followed by the signature of the Lord Chancellor, and by the warrant of apprehension which was signed by the Lord Chancellor for the breach of an injunction granted on the 6th of July, 1839, restraining him from interfering with the navigation of the Grand Junction Canal; that he has interfered, and interfered in direct violation of the order and of the injunction is so far from being denied, or from being attempted to be excused, that it is sought to be justified on the ground that the order, and the injunction founded upon the order were both of them illegal, and such as he is under the obligation to obey. If he had come here, stating, as I have understood he alleges to be the fact, that his object in committing that act of disobedience was in order that he might obtain the opinion of the Court of Law upon the legality of the proceedings here, and that he had made the attempt to get that opinion, and failed in procuring it, if he had, and then suggested that for the disobedience to this Court he had suffered sufficient punishment, I should have felt most strongly inclined to give my humble opinion to the Lord Chancellor that he might be released, not thinking that it would be right or in any degree necessary, in order to maintain the authority of this Court, that an imprisonment suffered under such circumstances should be unnecessarily prolonged; that, however, is not the course which he has adopted. He comes here avowing and justifying, and apparently continuing and intending to continue the disobedience. If I had the authority to state or to think otherwise, it would give me very great satisfaction to do so. The question then comes simply to this, whether the proceedings have, under the circumstances, been legal or illegal, and upon this I have heard nothing which in any degree tends to alter the opinion that I expressed at the Rolls. The inconvenience which may arise from the necessity of the Lord Chancellor interfering in some cases cannot be very easily doubted, but I reject as altogether

unwarranted the notion that I have ever said that the Lord Chancellor had in such cases any direction other than that which is accompanied by all the responsibilities which affect a judge. Seeing, therefore, no reason to alter my former opinion, I must take the liberty of again advising his lordship to make the order pursuant to the recommendation which I then submitted to him, and for the same reasons which were then offered, and which have been, without the least impropriety, discussed by the counsel for Mr. Dimes. I was surprised when it was said that I had admitted that there were circumstances under which the Lord Chancellor was incapable to make an order, for I never said anything which would justify that statement. I adhere to the opinion which I formerly gave, and I do not know that there is any occasion for me to repeat or to vary the language in which I then expressed it. I only desire that that judgment may be construed according to the ordinary meaning of the terms used; and for reasons there stated, which I see no occasion to alter, I now take the liberty of recommending to his lordship to make the order which I then recommended. There is another point in the argument which I do not wish to pass over, and which was not at all before me at the Rolls, namely, that this bill should be taken off the file. Now I do not think that it would be proper to make an order for that purpose. Why should the bill be taken off the file? The reason alleged at the Bar is, because the bill was not addressed to her Majesty in her Court of Chancery; but I have not heard any authority or reason sufficient to induce me on this ground to recommend that the course proposed should be taken. A great part of this case seems to have been argued as if Mr. Dimes had no means of getting justice—a proposition very difficult to maintain when it comes simply to this, whether he is to obtain a rehearing in the Court of Chancery, or to submit to the decree such as it is. Another argument was used, drawn, I think, from the form of proceedings in Courts of law, that, as the objection taken does not appear on the record, it is not an objection which can be brought before a Court of appeal. I consider, however, that there is a mistake in likening the proceedings in the Court of Chancery to the proceedings in a Court of law. I do not exactly know whether the result of the case cited of *Bridgman v. Holt* very clearly appears; but however that may be, that case does not apply to the present, and for this reason, that there is not the least doubt that Mr. Dimes has a perfect right to appeal from the decree; and any orders made in this Court to the House of Lords to enable him to do that, nothing is wanting but the enrolment, which enrolment I take the liberty of saying I think it would be the duty of the Lord Chancellor to warrant in order that Mr. Dimes might appeal either from the Vice-Chancellor's decree or from the decree of the Lord Chancellor, affirming that of the Vice-Chancellor, and dismissing the petition of rehearing, the same observation equally to the order to be made now every order which is made on petition or motion, or in any mode in which this Court can interfere, is subject to an appeal to the House of Lords, and therefore, if the order, which is now to be made by his lordship, should be an order of which Mr. Dimes has reason to complain, he has nothing to do but to procure the enrolment of the order, and he may then carry the question raised on this occasion, as well as the questions raised on the merits of the case, to the House of Lords, and on this appeal he will have the advantage of every objection which can be taken on the merits of the case, or for want of technicality, in the form of the proceedings; it is therefore the grossest mistake to suppose that Mr. Dimes has no remedy if it is not given in the way which he asks; all that passes here, and every order that is made here, must be subject, of course, to appeal, and if Mr. Dimes is in any way aggrieved by the orders which are made he can have redress in the highest tribunal the country affords, and perfectly free from any such objection as is raised on the recent occasion. One other observation I wish to make on the course which Mr. Dimes has adopted in the Court of Chancery; a decree of one of the subordinate judges once reheard by the Lord Chancellor usually finishes there; if, however, it is enrolled the matter must go to the House of Lords, but it is by no means without example that a decree made on a rehearing by the Lord Chancellor is, if the circumstances of the case require it, heard over again; there are instances of rehearsings of decrees made upon a rehearing, and if the special circumstances of this case should require it, that might be done here; it was on this account that, on the former occasion, I more than once asked whether Mr. Dimes wished this course to be taken; he apparently did not; the question was not brought forward in that form; the application, in fact, being, that the case should be restored to the paper of the Lord Chancellor's, subject, of course, to all the objections which have been raised against any proceedings whatever being taken in it by the Lord Chancellor being unable then to

## LORD CHANCELLORS' COURT.

see any reason for altering the opinion which I formerly gave, and thinking there is no ground for the application to take the bill off the file, being fully persuaded, also, that Mr. Dimes is not in the least degree without redress, if he is suffering any grievance, but that the merits of the case, as well as the propriety or impropriety, or the order now to be made, may be brought under the consideration of the House of Lords on an appeal, properly framed for the purpose, and thinking that Mr. Dimes has not applied under circumstances under which even a rehearing could be granted; on all these grounds I think I am bound to give my humble advice that this motion be refused, and with costs.

**THE LORD CHANCELLOR.**—I am much indebted to the Master of the Rolls for the assistance which he has afforded me in hearing this application, and it is not my intention to enter at all into the subject which has been discussed, or to make any observations on the conclusion to which his lordship has come, having asked for his assistance, because my own jurisdiction, or at least the propriety of my entertaining any judicial function upon the subject of this suit, was disputed, I should be undoing the act which I thought proper to adopt of requiring his assistance, if I should at all interfere with or hesitate to adopt the advice which the Master of the Rolls has tendered to me. I have, however, the satisfaction of feeling, that the opinion he has expressed is precisely the same as I should myself have entertained if I had taken on myself to deliver judgment without his assistance. I should not have said one word on the present application if it had not been for certain statements made by the learned counsel for Mr. Dimes, to the effect that I had advised the application to be made that was ultimately heard before the Master of the Rolls, and that therefore it was very inconsistent that I should give effect to the advice tendered by the Master of the Rolls that the motion should be refused with costs; and further, that the circumstance of my being a holder of shares in the Grand Junction Canal had led to improper communication with the parties,—not by myself personally,—that I think was acquiesced in as a fact—but by my principal secretary. [His lordship here explained what had really occurred, shewing that both the statements referred to were equally unfounded,—in fact that no communications had taken place in consequence of the position in which his lordship was placed as a holder of shares, nor any other communications, except only that Mr. Dimes himself had on his own application communicated with one of his lordship's officers, in order, if possible, to set himself right on a point of form in reference to a petition of right presented by Mr. Dimes, and in which he, Mr. Dimes, had made a mistake. His lordship then proceeded as follows.] Having, however, said thus much, and without at all interfering with the view the Master of the Rolls has taken of the merits of the case, or entering into them, I will only state that difficulties may exist, and no doubt do exist, where there is an interest arising from the jurisdiction I am called on to exercise; and from my having the sole power of exercising that jurisdiction, if the Lord Chancellor is party to a suit, there is no difficulty, because the law has provided for it; but if there be merely an interest, in consequence of having which he would be anxious to avoid the duty of adjudicating on the slightest suggestion by either party that his judgment would be influenced by having that interest, a difficulty does arise from the position in which the chancellor is placed. I think, however, that that would be as nothing compared with the remedy suggested, namely, that when the fact is known the chancellor may exercise his jurisdiction, if one party asks him to do so, but cannot do it at the instance of the other party; I will put, for example, the present case: the cause goes on in its regular course, and is heard by the Vice-Chancellor of England, who makes a decree; the party opposed to the company then discovers that the Lord Chancellor who at that time may have heard nothing whatever of the case, is in some way interested as a shareholder. According to the argument used, if the party is dissatisfied with the decree the cause is to go on, but if the company is dissatisfied they have no remedy, unless the opposite party thinks proper to give the jurisdiction. Now that cannot possibly be the state of the law. It must either be that there is no jurisdiction at all, and that the whole matter is void from the beginning, or that owing to the constitution of the court the jurisdiction can only be exercised in the way in which it has been exercised, namely, by the Lord Chancellor assuming it; he cannot assume it for one party and refuse to assume it for the other. In the present case I have the satisfaction of knowing that the position of the property is not in the slightest degree affected by anything I have done; it stands entirely on the injunction originally granted by the Vice-Chancellor, which remains untouched. When that injunction came before me I did not think upon the merits it ought to be disturbed, and if I

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had declined to interfere, as I should have done had I known of Mr. Dimes' objection, the injunction would have still remained; again, at the hearing of the cause the decree was made by the Vice-Chancellor, and that decree remains; all that I have done in the cause is, leave the orders of the Vice-Chancellor untouched, so that if the injunction, or the decree, is wrong, it is not wrong from any miscarriage in point of judgment on my part, but rests entirely upon the orders made by the Court below; with regard to a decree when it is not enrolled, I do not apprehend the Lord Chancellor signs it; it is merely drawn up, passed, and entered, but if it be enrolled it becomes my order in point of form. So as to the injunction on the writ issuing it becomes my order in point of form, but as to any opinion on the merits, or as to any disadvantage which Mr. Dimes may be supposed to have sustained by the decision of the cause, or the granting the injunction, the case does not rest on anything I have done, but on the orders of the Vice-Chancellor alone, and the utmost that Mr. Dimes can complain of is, that I have not upon the appeal varied the orders or the decree which the Vice-Chancellor has pronounced. That is all I propose to say on the matter, except this, that if that infirmity exists in this Court which has been suggested, some parliamentary enactment must of necessity take place, or otherwise there will be a total failure of justice; or the Lord Chancellor, when he accepts the Great Seal, must look about him and see what interest he has in any company or association, and must divest himself of every such interest. I do not know how he is to do that, because he may be a holder of stock in the public funds; and most people who are honoured with the confidence of the Crown are, from these circumstances, likely to be holders of stock. Take the case of the Barons of the Court of Ex. whose duty it is to decide on matters of revenue. Suppose one of the Barons is a holder of Three-per-Cents. and a question comes before the Court touching the Consolidated Fund, there is precisely the same sort of interest that I have in the Grand Junction Canal; no doubt it is more minute and remote; and it is not likely that any decision to which the Court may come will affect the dividend. The point is not however argued on the question of quantity or degree, but on the abstract principle that any interest in the result of the matter to be decided upon is to incapacitate the judge, and take away his jurisdiction. Now there is no matter that can affect the general revenue of the country which does or may not, to a certain degree affect the Consolidated Fund. It is an extreme case, I admit, but questions of principle are sometimes properly tried by the extreme cases. However, I give no opinion upon the point. Fortunately for me, this case has been under the consideration of the Master of the Rolls, and the Bar have heard the opinion expressed. The result, therefore, is, that the order advised by the Master of the Rolls is made an order of the Court, and the present application is refused with costs.

## ROLLS COURT.

Reported by J. MACAULAY, Esq. of the Inner Temple, Barrister-at-Law.

Wednesday, January 15.

LOGAN v. EARL COURTOWN.

*Calls on railway shares—Abandonment of part of line—Interference by one company with another—Misapplication of funds—Directors acting as such in two companies—Parliamentary sanction. The bill alleged that one railway company (A.) was assisted by another company (B.) in fraudulently obtaining an Act of incorporation, B. having illegally subscribed for shares in A., and the affairs of A. by the same means, and by the use of illegal votes were carried on contrary to the wishes of the bona fide holders of shares. B. then applied to Parliament and obtained an Act sanctioning, as alleged, the subscription for shares in A. and the appointment of B. directors to the A. directory. Subsequently A. abandoned part of its line, and endeavoured to obtain parliamentary sanction for so doing, but that step was not persevered in, and the directors resolved to wind up. On a bill being filed to restrain the making part of the line only:*

*Held, on motion, that an injunction was unnecessary, as there had been a resolution to wind up, but liberty was given to apply to the Court in case of the works being proceeded with or resumed:*

*Held, also, that after the parliamentary sanction had been obtained to the acts alleged to be originally illegal, the Court would not restrain the directors of the one company from acting as directors of the other:*

*Held, also, that, though the acts of the directors of A. appeared to be improper, the Court would not restrain them from enforcing the payment of calls, inasmuch as there might be legal liabilities*

*to discharge. The injunction was refused without costs.*

This was a motion for an injunction by a shareholder against the directors of a railway company. The bill was filed on the 20th of March, 1860, by Charles Logan, who is a shareholder in the Waterford, Wexford, Wicklow, and Dublin Railway Company on behalf of himself and all other the shareholders, except the defendants, against Earl Courtown, Sir Thomas Edmonde, and the other directors of that company, and against the company, and also against the South Wales Railway Company under the circumstances which are sufficiently set forth in the judgment. According to the allegations in the bill the Waterford, &c. Railway was a project set on foot by the South Wales Railway Company and the Great Western Railway Company to secure to themselves the traffic along the east coast of Ireland, five of the defendants and a considerable number of the promoters of the scheme being directors of those companies; that the directors of the South Wales Company got their servants, agents, &c. to subscribe some 15,000 shares, on the understanding that they were not to be personally responsible, and that, in fact, these persons never paid the deposit; that by this colourable subscription they fulfilled the requirements of the Parliamentary contract, but that the deposits, even if paid, would not have amounted to the sum required by the Standing Orders of the House of Lords to be deposited with the Accountant-General before the Bill could be read a third time, and that the directors of the South Wales Company advanced out of its funds, or out of funds borrowed from the Great Western Company, sufficient sums to provide for the deposits on the 15,000 shares, together with the deficiency required to be made up to comply with the Standing Orders of the House of Lords; and that after the Irish Act was passed, the borrowed money was all returned. The bill alleged various steps taken by the directors of the Irish Railway to defeat all opposition to their views; and that ultimately an Act was obtained sanctioning all that had been done; and the subscription to the funds of that company, and the appointment of directors of the South Wales Railway Company to the directory of the Irish Company. Ultimately it was found impossible to construct the whole of the Irish line, and the directors resolved to abandon part, and endeavoured to obtain the sanction of Parliament to their so doing, but they did not persevere, and it appeared that they had thoughts of winding up. Calls were made, but the bill alleged that they were unnecessary for any lawful purpose of the company. The bill prayed for a declaration, that it was not within the powers of the Waterford, Wexford, Wicklow, and Dublin Railway Company, or of its directors, to construct a railway from Kingston to Wicklow only, or to make or enforce any calls, or apply the capital or funds of such company for the purpose of making such railway from Kingston to Wicklow only, or otherwise than for making and constructing the entirety of the line and works as authorised by Parliament, and that it might be declared that the transfer of certain shares of the Irish Company registered in the name of the South Wales Company was illegal and void, and that the latter company was not authorised to interfere in the affairs of the former, and that the directors of the Irish Company were bound to indemnify it for all losses, costs, &c. incurred in consequence of their illegal acts. It also prayed for an account, and for an injunction to restrain the directors from constructing part of the line only, and from making and enforcing calls; and the directors of the South Wales Company from voting or interfering in the affairs of the Irish Company, &c. The plaintiff now moved for an injunction.

R. Palmer and Cole for the motion.

Turner, Walpole, and G. L. Russell, contra.

K. Parker and Karlake for the South Wales Railway Company.

The following cases were cited:—*Blain v. Agar*, 1 Sim. 37; *Green v. Barrett*, 1 Sim. 45; *Seddon v. Connell*, 10 Sim. 74; *Harvey v. Collett*, 15 Sim. 332; *Colt v. Woollaston*, 2 P. W. 154; *Cridland v. Lord De Mauley*, 1 De G. & Sm. 459; *Wentner v. Shairp*, 4 C. B. 404; *Bell v. Lord Wrexborough*, 5 Railw. Cas. 149; *Graham v. Birkenhead, &c. Railway Company*, 12 Beav. 460; *Cohen v. Wilkinson*, 12 Beav. 125; *Lovell v. Andrew*, 15 Sim. 581; *Apperly v. Page*, 1 Ph. 779; *Richardson v. Hastings*, 11 Beav. 17; *Ex parte Earl Mansfield*, 2 Man. & G. 57; *Salomons v. Laing*, 1 Q. B. 338, 377; *The Attorney-General v. The Corporation of Norwich*, 16 Sim. 225; *The Attorney-General v. Andrews*, 2 Man. & G. 225.

**THE MASTER OF THE ROLLS.**—According to the bill and the arguments on behalf of the plaintiff, the promoters of the undertaking and the directors of the company have, from the first conception of the scheme down to the time when the bill was filed, been engaged in the commission of a constant succession of frauds. I do not think it proper on the present occasion to inquire into the circumstances

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and means by which it is alleged the Act of incorporation was obtained, or to investigate minutely into very many of the imputed frauds with the statement of which this bill abounds. The plaintiff is seeking relief from the Court, and may at the hearing prove himself entitled to relief on some of the grounds, but at present I have principally to consider the statements on which the plaintiff asks for an order on this motion; and of these the first is an allegation that the company being authorised to make a railway of the length of about 150 miles, and having power given for that purpose, have become and are unable to complete the line, and are now about to apply money subscribed for the construction of the whole line in the construction of a part only. It appears very probable that at the time the bill was filed the fact was as it is alleged to have been; and if such was the case now, I should be of opinion that the plaintiff was entitled to the injunction for which he asks in this respect. But the case appearing by the answer is this:—That the company being unable to obtain funds for the completion of the whole line, became and were desirous to apply the funds which they had in the construction of the part which extended from Dublin to Wicklow, and made an attempt to obtain the authority of Parliament to abandon the rest of their undertaking; but it afterwards appeared that they could not construct even that portion of the line; and on the 3rd of July last the directors came to a resolution that, upon the receipt of a requisition signed by a sufficient portion of the shareholders requiring the directors to wind up the affairs of the company, in the event of the arrangement not being made for the transfer of the line to other parties, such immediate and decisive steps should be taken as the directors might be advised to be necessary and expedient for the final winding-up of the affairs of the company, and the prevention of any additional expenditure. After this resolution had been entered into, the Bill then before Parliament for limiting the line was withdrawn; and the defendants admit that the undertaking is in a hopeless state, incapable of being extended, or of producing anything but loss, and that they intend to abandon the whole of the line, and that the works should be immediately stopped. Upon this statement, of which there seems no reason to doubt the accuracy, it does not appear that it is necessary, or that it would be proper for me to grant the injunction asked; and all I think necessary to state on the subject is, that, if the works should be resumed, the plaintiff must be at liberty to apply to this Court; and unless the affairs of the company and the state of the concern shall be very different from what they are now, I shall think that an injunction ought to be granted; but at present, believing that it is not intended to do that which is sought to be restrained by the injunction, and that the interference of the Court is not necessary for the protection of the shareholders, I decline to grant the injunction first sought by this notice of motion. The next part of the motion relates to the 11,200 shares registered in the Waterford, Wexford, Wicklow, and Dublin Railway Company, in the name of the South Wales Railway Company, and that that company may be restrained from voting or acting in the Waterford, Wexford, Wicklow, and Dublin Railway Company in respect of their shares; and the facts as to this seem to be that, in December 1846, the Waterford, Wexford, Wicklow, and Dublin Railway Company having great difficulty about raising the money of which they had need, proposed applying to Parliament to divide their appointed capital, which was to be two millions, into two portions, one a million and a half and the other half a million, and applied to the South Wales Railway Company for assistance. That company considered it expedient to contribute a sum not exceeding 250,000*l.* for the object specified, the Waterford, Wexford, Wicklow, and Dublin Railway Company obtaining proper Parliamentary sanction, and that in the meantime the sum of 16,800*l.* should be advanced as a deposit on the 11,200 shares. Now, the South Wales Railway Company had no authority to hold shares in the Waterford, Wexford, Wicklow, and Dublin Railway Company, but they agreed to request Messrs. Alston, Barlow, and Lewis to act as trustees for the South Wales Railway Company, in subscribing to the Waterford, Wexford, Wicklow, and Dublin Railway Company, namely, Alston 3,733 shares, Barlow 3,734 shares, and Lewis 3,733 shares. These persons paid the deposits on such shares, and were registered as shareholders in the Waterford, Wexford, Wicklow, and Dublin Railway Company. The funds for the payment of the deposits were provided by the South Wales Railway Company, and the transaction appears to me to have been unauthorised and improper, and such as the shareholders in the South Wales Railway Company had great and just reason to complain of. This transaction seems to have taken place in the expectation of obtaining Parliamentary authority for it; but I am of opinion that these companies have no right to engage or pledge their funds or entangle their affairs in unauthorised transactions, on the speculation that they

may afterwards obtain Parliamentary authority for doing acts which are beyond their power at the time they are done. Though I think the transaction with reference to the South Wales Railway Company was at the time unauthorised and wrong, it does not follow that Alston, Barlow, and Lewis were not bound by the subscription made, with their assent, in their names. They may have been entitled to act, and may have been responsible as shareholders in the Waterford, Wexford, Wicklow, and Dublin Railway Company, though they could not have obtained indemnity from the South Wales Railway Company. It is said that a Parliamentary sanction was attempted to be obtained for this proceeding in the year 1847, but failed at that time from some want of sufficient notice; but in the year 1848 the 11 & 12 Vict. c. 29, was passed. The parties differ entirely as to the alleged object and effect of this Act of Parliament. The bill alleged that the South Wales Railway Company exercised great influence and control over the Waterford, Wexford, Wicklow, and Dublin Railway Company, through the instrumentality of the 11,200 shares, on which the three persons who acted as their trustees had paid up all the calls out of their corporate funds; but they determined to exercise that influence in a more convenient manner by procuring this Act of Parliament; but when the Bill for the Act was introduced, the Parliamentary contract for a subscription of 250,000*l.* was signed, or pretended to have been signed, and the same, with a deposit of 10*l.* per cent. was deposited in the proper office, apparently with a view to a future subscription to be *bond fide* made, and the assent of Parliament was given to authorise and sanction that future subscription, and not to confirm and give validity to the resolution under which Alston, Barlow, and Lewis had subscribed for 11,200 shares. The defendants deny positively the allegation that it was not disclosed to Parliament that the South Wales Railway Company had previously subscribed for the 11,200 shares in the Waterford, Wexford, Wicklow, and Dublin Railway Company; and they insist that the object and intention of the Act was to confirm what had been done. I need not say I can know nothing of the intention of the Act, except from the words in which it is expressed, applied to the facts existing at the time; and I am far from being satisfied that all was rightly disclosed or done in the proceedings to obtain the Act. I think, indeed, there is considerable ground for suspicion, bearing in mind what had been resolved in 1846, not finding anything but a resolution and agreement then made, on which the Act would be obtained. I am unable, in the present state of the case, to come to the conclusion that that Act of Parliament had not the effect of confirming the former transaction. It is open to question, but not so doubtful as to make it proper for this Court to prohibit the South Wales Railway Company from exercising those rights which Parliament may have given them, and which may now be vested in them; and as their money is engaged in this unfortunate undertaking, it appears to me that they have an interest to attend in the final settlement, and that they might be very greatly and unjustly injured, if they were at this time prevented from interfering. The third question relates to the calls. Many shareholders have fully paid up their calls, others have not, and money is wanting to satisfy the legal obligations of the company. It is alleged that the company seek to enforce the calls for illegal purposes. That is denied, and it is stated that there are legal obligations to a considerable amount, which cannot be satisfied without procuring payment of the calls. And under these circumstances I am of opinion that I cannot grant the injunction prayed—that I must refuse the motion altogether. I have come to this conclusion from the consideration of those facts which relate exclusively to the subject of the motion; but having carefully read the whole of the evidence, I feel myself bound to express my opinion that the proceedings of the defendants have been, in many particulars, conducted in a very improper manner, and so as to afford strong ground for complaint on the part of the shareholders in the Waterford, Wexford, Wicklow, and Dublin Railway Company; and as matters stood at the time the bill was filed there appears to me to have been good reason for applying for the injunction. I, therefore, give no costs on this occasion. In the circumstances in which the company is now placed there seems to be no doubt but that the company ought to be dissolved, and its affairs wound up and settled. No reason has been given why that course should not be adopted, and it appears to be the plain duty of all parties to concur. If I had jurisdiction, and a proper application were made to me, I should on the evidence now before me, supposing myself to have no other, make an order for that purpose. The plaintiff has stated that the object of his present motion is to obtain such an order, or to induce the defendants to consent; but his formal proceeding in this suit has quite a different object, and I cannot make the particular order asked for, and to which I

do not think the plaintiff is, under the circumstances, entitled, for the purpose of compelling the defendants to do something else, which, however desirable in itself, is not the object of the present bill.

Thursday, July 31.

LADY BEREFSFORD v. DRIVER.

*Practice—Production of documents for inspection—Title-deeds—Agent's claim to retain.*

*Rough calculations and memoranda made by land agents, though alleged to have been so for their own use, and to assist them in computing and assessing the fines payable by the copyhold tenants of the manor of which they are the agents and receivers, will be ordered to be produced for inspection, and are not privileged.*

*Maps, plans, &c. made by them in the course of their employment as such agents were also ordered to be produced for inspection.*

*It was held, also, that the several papers and documents being made for the private use of the agents themselves, and their not having been paid for by the principal, did not afford any ground for protection; nor did it make any difference that the cost was not covered by the poundage which it was stipulated the agents were to receive as remuneration for their services.*

This was a motion for production and inspection of documents under the following circumstances:—It appeared that under the will of her former husband, Samuel Peach, the plaintiff, Dame Amelia Berefsford, became entitled in fee to the manor of Waterbeach, in the county of Cambridge, and divers lands belonging thereto; and the Messrs. Driver, who had been employed by Mr. Peach as his agents and receivers to collect the rents and fines, and to transact the general business of the manor, were, after his decease, continued by the plaintiff in the same capacity. As a remuneration for these services the Messrs. Driver were to receive a poundage at the rate of five per cent. upon the rack-rents, and upon the amount of the fines assessed upon the copyhold tenants, which poundage it was expressly stipulated as alleged by the plaintiff, but denied by the defendants, was to include and cover all charges and expenses.

It further appeared that when the Messrs. Driver first entered upon their duties Mr. Peach delivered to them several deeds, maps, plans, rent-rolls, books of reference to maps and plans, papers and memoranda, and that they, in the course of their employment, made divers other maps, plans, rent-rolls, books of reference to maps and plans exclusively relating to the said manor lands and hereditaments for the convenient management thereof and collection of the rents and fines. It was alleged that these documents were prepared from the documents delivered to the defendants without any right except as the agents and for the use and benefit of the plaintiff, and that they were paid for so doing by the poundage allowed to them, and that such maps, plans, &c. had now become muniments and evidence of title. It was also alleged that the defendants had divers letters from the tenants of the manor and lands, and also other papers and documents relating to the estate and to the business transacted for the plaintiff. In June, 1850, the plaintiff discharged the defendants from being her agents and receivers, and an application was made to them for delivery up of all the maps, plans, papers, documents, &c. relating to the manor and lands, some of which the Messrs. Driver did deliver up, but refused to deliver up others, the numbers and particulars of which were not known to the plaintiff, but the bill charged that they ought to be set forth, and it prayed that they might be delivered up.

The defendants stated, by their answer, that they had been employed by the stewards of the manor to make assessments of the fines, and that they had done so, and delivered the assessments to the stewards, but had made no charge for their trouble, and that they had received the fines and accounted for them. They stated also that they had made different rough calculations and memoranda in paper books and upon several pieces of paper for the purpose of calculating and assessing the fines, which were kept by them for their own private use and guidance; that the original plans and documents had been delivered up, but that they had retained the rough calculations and memoranda and paper books as to fines and private memoranda and rental and cash-books, and also the field books and other books containing fair copies of the accounts from 1833 to 1850, together with various other papers, &c. lithographed plans, &c. for letting the farms, &c. prepared at the expense of the defendants themselves, and several of which were delivered up before the filing of the bill. There were also various letters and copies of letters from the tenants, &c. to the defendants, and several receipts and vouchers, some of them relating to the final account between plaintiff and defendants, not yet signed nor approved by plaintiff. There was also a bundle of letters and other papers relating to new



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buildings and repairs upon the estate, and letters, &c. between plaintiff's solicitor and defendants' solicitor, and these, the defendants alleged, were or might be material to them to produce at the trial of an action which they had brought against the plaintiff to recover certain sums which they claimed to be due to them from the plaintiff, for business done for her. The defendants did not claim to be protected from production on the ground of these being privileged communications. The plaintiff conceiving that these papers, or some of them, might aid her in her defence to the action, filed her bill for discovery, &c. and thereby prayed that the plaintiff might be declared not to be chargeable with any compensation in respect of the claim set up by the defendants; and that they might be directed, if necessary, to bring an action, or that an issue should be directed, the plaintiff undertaking to pay any amount of compensation to which the defendants should be declared to be entitled at the trial, if any, and that the defendants should be restrained by injunction. The defendants having put in their answer, and having admitted therein and set forth in the schedule thereto the papers referred to, the plaintiff now moved for their production and inspection.

*Lloyd and Shapter* in support of the motion.

*Roupell and Hallett* for the defendants. The work done, and for which compensation was claimed, had been paid for in the poundage, and the estate had got the benefit thereof in the results arrived at by means of the memoranda and calculations; but the method of arriving at those results was the property of the defendants, and part of the machinery of their trade, every agent and receiver having his own particular mode of making his calculations, and attaining results to be applied to practical purposes. The defendants accordingly had worked out those results in detail in their own way, and had been paid for the results by the poundage, but not for their particular mode of working out the results, nor for instructing others to work out results; nor were the rough calculations made for the inspection of others, but for their own private purposes, and might be applicable to other estates as well as to the plaintiff's. To expose the defendant's method, therefore, was to deprive them of the benefits of their experience and assiduity, and their care in preserving the means by which they arrived at particular results. If these documents, or even if copies of them, were obtained, it would enable the plaintiff to make an agent of a very uneducated person. The field book was a work of the defendants, and not paid for, and the settled accounts were their discharge and indemnity for the vouchers. As to the lithographed plans, they were pictures of the estate, and though they were agents, there was nothing to prevent them exercising their artistic skill in delineating or reducing to canvas a view or a field of the estate of which they were the agents. A man's experience was most satisfactorily gained from the business in which he was professionally engaged, but if his private books and private memoranda were to be taken from him and exposed, it would prevent his reaping the advantages he might have reasonably expected. The plaintiff denied her liability for preparing the necessary matters, with a view to a sale of the manor and estate, which had been ordered, and various letters had been written respecting the business, and it was now sought to obtain an inspection of them without satisfying the demands of the defendants. As to the documents generally, they were the property of the defendants, and ought not to be produced, since, if copies should be obtained, the originals would cease to be of any value, and, in fact, a decree would be obtained at once. They cited *Lingen v. Simpson*, 6 Madd. 290; 1 Sim. & Stu. 600; *Peacham v. Dawe*, 6 Madd. 98.

The MASTER of the ROLLS.—I am of opinion the plaintiffs are entitled to production. I make no decree at present, nor do I give any expression of opinion as to the right. The bill is for delivery of all documents which were in the possession of the defendants while they were agents. I do not say that all are to be delivered at the making of the decree, but we cannot say which are to be so till we see them. This, therefore, comes within the case where, as between principal and agent, it is necessary for the purposes of the former to have production of documents by the latter, though not delivery of all. And the case of *Lingen v. Simpson*, cited by Mr. Hallett, shews this. For instance, if agents in this case have taken pictures or views of the grounds, delivery of these cannot be enforced. The documents must be produced, including those in reference to the action at law.

## V. C. KNIGHT BRUCE'S COURT.

VICE-CHANCELLOR KNIGHT  
BRUCE'S COURT.

Reported by GEO. S. ALLNUTT, Esq. of the Middle Temple,  
Barrister-at-Law.

Saturday, June 14.

HAMER v. HAMER.

*Thellusson Act—Portions.*

*A testator, after giving to A. B. an annuity of 50l. for her life, gave real and personal estate to trustees upon trust to accumulate and invest the proceeds during the life of A. B., and after her decease to stand possessed of the same, and the accumulations upon trust for the children of A. B. equally; and as to the share of each child, in trust for such child for life, and afterwards for his or her children equally, and the heirs of their bodies, with cross-remainders. The testator then, after reciting that A. B. might have children born after his decease who would not take any interest except upon the contingency therein mentioned, gave to each such child the sum of 5,000l. with interest from A. B.'s death, such legacies to be vested at twenty-one; and the testator empowered his trustees to raise so much money as might be necessary for paying these legacies, either by the rents and profits of the trust estates, or by creating a term of years thereout:*

*Held, that this was not a provision for raising portions within the 2nd section of the Thellusson Act; and that the accumulation stopped at the end of twenty-one years from the testator's death, and the income from that time belonged to the heir-at-law and next of kin.*

Thomas Dickon by his will, dated the 15th of June, 1827, devised all his freehold and copyhold estates unto and to the use of William Dickon, William Dickon the younger, Thomas Dickon, and Richard Poppleton, their heirs and assigns, upon trust to pay to his sister, Mrs. Ann Clarke, for her life an annuity of 45l. 8s., and to his niece, Mrs. Ann Hamer, an annuity of 50l. for her life, the annuities to be paid to their separate use, and upon trust to permit Mrs. Ann Clarke, during her life, to occupy a certain messuage, and the appurtenances therein described, and subject as aforesaid upon the trusts afterwards mentioned. The testator also gave his personal estate to the said trustees, upon trust to pay thereout certain legacies therein mentioned; and as to the residue, upon the same trusts as were thereby declared concerning his freehold estate. The will then proceeded thus:—"And I declare and direct that my said trustees, their heirs, executors, and administrators, shall stand seized of the said freehold and copyhold estates, and be possessed of the surplus of my said personal estate, upon trust during the life of the said William Dickon the elder, to permit and suffer him, and after his decease then for the survivors of them to receive the rents and profits of the same estates arising in the lifetime of my said niece, and the interest and dividends to arise in the like time from my said personal estate, and to lay out and invest the same in the joint names of my trustees for the time being, in the public stocks or funds in Great Britain, or upon bonds or mortgages of freehold estates, to the intent the same may accumulate, and upon trust from time to time, during the life of the said Ann Hamer, when and as often as the said William Dickon, William Dickon, the younger, Thomas Dickon, and Richard Poppleton, or the survivors or survivor of them, his heirs, executors, and administrators, shall think proper and advantageous, to lay out and invest the said accumulations, and also the surplus of my personal estate aforesaid, in their or his own names or name, in the purchase of freehold lands, tenements, and hereditaments of inheritance in fee simple, or of copyhold estates of inheritance in the county of York (so that such copyholds do not exceed one-quarter in proportion of the whole of the premises so directed to be purchased as aforesaid), but upon the trusts and for the intents and purpose hereinafter expressed and declared of and concerning the same; and from and after the decease of my said niece, Ann Hamer, I declare and direct that the said Wm. Dickon, Wm. Dickon the younger, Thos. Dickon, and Richard Poppleton, their heirs, executors, administrators, and assigns, shall stand seized of all the estates hereby given and devised and to be purchased as aforesaid, upon trust for all and every the child and children of my said niece, Ann Hamer, now living or hereafter to be born in my lifetime in equal shares, as tenants in common for such estates, and in such manner as hereinafter mentioned (that is to say), as to the share of each of such children, in trust for such child for and during the term of his or her natural life, and from and after his or her decease, then to, for, and amongst all and every his or her child or children in equal shares and proportions as tenants in common, and the heirs of their respective bodies lawfully issuing, and on the death and failure of issue of any of the said children, the original as well as accruing shares of him, her, or them so dying to be in trust

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for the other or others of them in equal shares, if more than one, as tenants in common, and the heirs of their respective bodies lawfully issuing, and in case of the failure of all such issue as aforesaid, then upon trust for all and every such child and children of my said niece Ann Hamer, as may be born after my decease, if more than one in equal shares as tenants in common and the heirs of their respective bodies lawfully issuing. And whereas my said niece, Ann Hamer, may have children born after my decease, who will not take any interest whatever under the aforesaid trusts, except upon the contingency last mentioned, I therefore give and bequeath to each such child as there may be the legacy or sum of 5,000l. with lawful interest for the same, from the decease of the said Ann Hamer, he, she, or they receiving so much of such interest only as may be necessary for his, her, or their maintenance and education until he, she, or they shall respectively attain the age of twenty-one years, and direct the same legacies to be vested in them at their said age of twenty-one years, and not before, and to be paid with the remaining interest on his, her, and their respectively attaining such age. And I empower my said trustees, and the survivors and survivor of them, and his heirs, executors, and administrators, to raise so much money as may be necessary for paying the said legacies, either by the rents and profits of the said trust estates or by creating a term of years thereout as may be most convenient. And in case any of the parties entitled to any share or interest in my said trust estates, shall at any time before the ultimate partition and division thereof sell or dispose of the same or any part thereof to the other or others of them, or to any other person or persons whomsoever, such sale or disposition shall operate as an extinguishment of his, her, or their said share or interest, and the same shall immediately thereupon descend, as would have been the case in event of the death of the party so selling or disposing." The testator also appointed the said persons named as trustees to be executors of his will. The testator died shortly after the date of his will, leaving his sister, Ann Clarke, his only next of kin and heiress at law. Ann Clarke afterwards died, leaving Ann Hamer her sole next of kin and heiress at law. The present suits were for the administration of the estate, the three adult trustees having refused to act, and administration *durante minore etate* having been granted to S. R. Hamer and Ann his wife. The question discussed was as to the application of the Thellusson Act (39 & 40 Geo. 3, c. 98) to the trust for accumulation, it being contended that this trust was a provision for raising portions for the children of a person taking an interest under the will, and therefore within the exceptions mentioned in the second section of the Act.

*Malins and Jervis* for the plaintiff.

*Levin, Bacon, Chandless, J. Parker, Beales, Hardy, Cooper, Deere Salmon, and W. M. James* for other parties.

The cases of *Phipps v. Kelynge*, 2 Ves. & Bea. 57, n.; and *Morgan v. Morgan*, 15 Jur. 319, were cited.

The VICE-CHANCELLOR said his opinion was, that this case was not at all of the same class to which *Phipps v. Kelynge* belonged. As he read this will, it was one very plainly to be interpreted, as directing an accumulation in the most extensive sense of the term, during the whole of the life of Mrs. Hamer. Whether there were an investment or not the parties were to be bound during the life of Mrs. Hamer, and the rents were to be accumulated as income. The next question was whether the provision, for one of the children or grandchildren, or any of them, of Mrs. Hamer, was a provision for the "child or children of any person taking any interest" under the will, according to the true meaning of the Act of Parliament. That point his Honour expressly declined deciding. He thought it not material, for he was of opinion that, according to the just construction this was not a "provision for raising portions." If the legislature had intended any provision, it probably would have said, "any provision or provisions." It seemed, however, to him plainly to point out a particular kind or species of provisions, for it was a provision not only for portions, but a provision for raising portions. It was impossible, on a reasonable interpretation of the Act of Parliament, to say that such provision, as this testator had made for the children and grandchildren of Mrs. Hamer, children tenants for life, and grandchildren tenants in tail in remainder, was a provision for raising portions within the 2nd section. He was of opinion that the direction to accumulate being for more than twenty-one years, the accumulation at the end of that time stopped, and that the income from that time till the death of Mrs. Hamer would go as undisposed of to her as heir-at-law, or next of kin, as he understood Mrs. Hamer to be sole heiress-at-law, and sole next of kin. His Honour apprehended that Mrs. Clarke, if she were alive, would be entitled, if the accumulation had not been directed. This gift was of the nature of real estate, and all the residue was of personal estate. The Act



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of Parliament made it an intestacy from the end of twenty-one years. From that time, then, Mr. and Mrs. Hamer would take the income.

Saturday, June 28.  
MATTHEWS v. PINCOMB.  
Leave of Court to file claim.

A motion was made to take a claim off the file for irregularity, the leave of the Court to file it not having been obtained; and the Court directed that the motion should come on to be heard with the claim. Upon the hearing of the claim, the Court being of opinion that the plaintiff was entitled to the relief asked by the claim, gave the leave to file nunc pro tunc, the plaintiff paying the defendant his costs of the motion.

By his will, dated in November, 1838, William Pincomb bequeathed a legacy of 100l. to Miss Matthews, the plaintiff, to be paid to her at the age of twenty-one years, with interest from his death; and he appointed the defendant his executor. The testator died in May, 1848, and his will was shortly afterwards proved by the defendant. Miss Matthews attained the age of twenty-one years in March, 1850, and filed a claim for the legacy of 100l. and interest from the time she attained her majority. In December 1850, on the claim coming on to be heard, a decree was taken, with the consent of the defendant, for payment of the legacy and interest from the date of the majority; and the legacy and interest was afterwards paid. Shortly after the payment of the money the plaintiff discovered that she was entitled to interest from the testator's death, and accordingly applied to the defendant for the amount still due to her for interest. This application not having been acceded to, the plaintiff filed a claim for payment of the residue of the interest. For the filing of this claim the leave of the Court was not obtained, and a motion was made on behalf of the defendant to take it off the file for irregularity. This motion the Court ordered to come on with the claim.

Archibald Smith for the plaintiff, contended that the leave of the Court was not necessary for the filing of this claim, as it might be treated either as an original claim, or as a supplemental claim, under the 25th of the Orders of April, 1850. He cited *Dormer v. Fortescue*, 3 Atk. 124; *Forrest v. Scholefield*, 14 Jurist, 845; and *Scargill v. Hurry*, ibid. 847.

Southgate for the defendant.  
The VICE-CHANCELLOR said, that he considered the plaintiff was entitled to the relief she asked for. He thought, however, that it ought to have been made the subject of a special claim, but he would give the leave to file the claim nunc pro tunc. The plaintiff must pay the defendant the costs of the motion to take the claim off the file.

Saturday, July 12.  
Re FARRANTS' TRUST.

Trustee Act, 1850.—Service of petition.  
A petition for the appointment of new trustees of a term of years should be served upon the reversioner.

This was a petition for the appointment of new trustees. By a deed, dated in 1841, certain lands were demised to two trustees for the term of 1,000 years, upon trust, to raise a certain sum of money, the interest thereof to be paid by the trustees to Mrs. Farrant for life, and after her death the principal to be divided among her children on their attaining twenty-one or marriage. The trustees afterwards died, and, there being in the deed no power to appoint new trustees, the present petition was presented under the Trustee Act 1850, by Mrs. Farrant and her only child.

Wickens in support of the petition.  
The VICE-CHANCELLOR inquired whether the petition had been served upon the person entitled to the reversion in the lands.

Wickens replied that it had not.  
The VICE-CHANCELLOR said that unless with the consent of the reversioner, or upon service on him of the petition, he could not make the order.

Thursday, July 24.  
WHITE v. SMITH.

Will—Construction.—Trust for sale of real estate.  
A testator gave real estate to trustees upon trust for his wife for life, and after her decease for his son for life, and after his decease upon trust to sell, and he directed his trustees to apply the proceeds of the sale in manner hereinafter mentioned; the testator then, after giving some pecuniary legacies, directed the investment of sums due to him, and other moneys, and after the decease of his son the trustees to apply the income from his "capital stock or fund" for the maintenance of his son's children, and upon their attaining twenty-one to transfer and convey the "aforesaid capital stock or fund estate and effects" to such children, and in case they should die under age and without leaving issue, the testator gave certain sums out of the "said capital stock," and bequeathed the

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residue of the "said capital stock, funds, and dividends, and interest thereof" as therein mentioned. The son died without issue, the real estate not having been sold:

Held, that, subject to the life estates of the wife and son, the trust for sale had converted the real estate into personality.

Moses Banks, the testator in this cause, by his will, dated the 24th of June, 1822, after making certain specific devises and bequests, proceeded as follows:—"I give and devise my said freehold estates and the fee-simple and inheritance thereof unto my friends Mr. George Osborn, of, &c. and Mr. Thomas Caldwell, of, &c. and their heirs upon this special trust and confidence nevertheless that they, my said trustees, do and shall, from and after the decease of my said wife, receive the rents, issues, and profits during the natural life of my dear son Moses Banks, and pay over or otherwise apply the same unto and for the benefit of my said son during the term of his natural life as the same shall become from time to time due and payable, and not by way of anticipation, or otherwise permit my son to occupy the same premises or any part thereof during his free will and pleasure, and from and immediately after the decease of my said son upon further trust that they, my said trustees, do and shall make sale or dispose of the said estates and the fee-simple thereof respectively, either by public sale or private contract, and in one or more lots as shall to my said trustees appear respectively to be most expedient, and the net proceeds to arise by such sale, I direct to be applied and disposed of by my said trustees in manner hereinafter mentioned, and if it shall be more to the interest of my estate that the said freehold estates or any part thereof should be demised by lease during my son's natural life, and he shall not choose to reside in or occupy the same, then I hereby direct my said trustees to demise in the usual way the said premises or any part thereof during my said son's life, so as that the lessee covenants to repair and the best yearly rent be reserved." Then followed the usual receipt clause, and after bequests of certain pecuniary legacies, he directed the investment of sums due to him and all other his moneys in the public funds or on Government securities. After the decease of the testator's son, the trustees of the will were to apply the income from the testator's "capital stock or fund," for the maintenance of his son's children, and upon their severally attaining their ages of twenty-one years, to pay, assign, transfer, and convey the aforesaid capital stock or fund estate and effects, to such children: and in case all his son's children should die under age, and without leaving issue, the testator gave certain sums out of the "said capital stock," to different legatees, and bequeathed the residue of "the said capital stock, funds, and dividends and interest thereof," as therein mentioned. The testator died in 1824, and his widow died in 1834. Moses Banks, the son, died in 1850, without ever having been married. The testator's real estate had not been sold, and the question arising in this suit was as to the beneficial title to the real estate.

W. M. James, for the plaintiff.  
J. Parker, Collins, W. Taylor, and Fane, for the defendants.

The following cases were cited; *Smith v. Claxton*, 4 Madd. 484; *Davenport v. Colman*, 12 Sim. 610; *Fitch v. Weber*, 6 Hare, 145; and *Sewell v. Denny*, 10 Bea. 315.

The VICE-CHANCELLOR said that it might possibly be a question whether, even in the events which had happened, the beneficial interest in the produce of the real estate was not given by the will, and also whether, even if the testator's son had left issue, the beneficial interest would have been given by the will. His Honour, however, thought it unnecessary to decide either of those questions. The effect of the will was to give the real estate to the testator's wife for life, remainder to his son for life, and then "upon further trust," &c. [His Honour read the words of the will as given above.] The trust for sale was absolute and unconditional, and there was nothing to fix a condition on the sale. That, subject to the life interests of the wife and the son, converted it into personality. It was competent to the son during his life to say, "if I do not leave issue there shall not be a sale." He did not do so. His Honour's opinion was, that if he took anything as heir, he took it as personality; the question then was between his real and personal representatives.

W. M. James asked that this question should be decided without argument.

The VICE-CHANCELLOR wished that the parties should arrange the distribution between themselves, as he thought the meaning of the words "in manner hereinafter mentioned" very doubtful.

A decree was accordingly made by arrangement.  
Note.—See *Wright v. Wright*, 16 Ves. 188; and *Fletcher v. Ashburner*, 1 Bro. Ch. Ca. 497, Appendix.

## COMMON BENCH.

## Common Law Courts.

## COURT OF COMMON BENCH.

Reported by JOHN THOMPSON and DANIEL THOMAS EVANS, Esqrs. Barristers-at-Law.

Saturday, April 26.

Ex parte WILLIAM VIOLETT.

Habeas corpus—Insolvent debtor—1 & 2 Vict. c. 110, ss. 76, 78—Validity of order of discharge.

A prisoner under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 76, was ordered by the commissioner to be discharged in respect of all his debts except four, at the end of six months; and by sec. 78 of the same statute, he was ordered to be discharged at the end of sixteen months in respect of the four excepted debts:

Held, that whether the commissioner had or had not power to adjudicate a further imprisonment under the 78th section, still he had not released the prisoner as to the four excepted debts, and therefore as the detainers with respect to them remained in force, this Court could not discharge him.

Lush moved for a writ of habeas corpus to discharge one William Violett, a prisoner, out of the custody of the keeper of the Queen's prison. The affidavits state that the prisoner, an insolvent debtor, had petitioned on the 26th of October, 1850, under the 1 & 2 Vict. c. 110, for his discharge, and on the 28th of October the vesting order was made, and on the 3rd of March, 1851, an order was made by the commissioner, on the 28th of October, 1850, for the prisoner's discharge in respect of all debts except four, due to different persons, and particularly described in the order, so soon as he should have been in custody at the suit of one or more of the creditors for those debts six months computable from the date of the vesting order; "and forasmuch," proceeds the order, "as it appears to the said Court that the said prisoner has contracted the said four last-mentioned debts severally by means of a breach of trust, it is adjudged and ordered that he, the said prisoner, shall be discharged from custody and entitled to the benefit of the said Act, as to the several last-mentioned debts, so soon as the said prisoner shall have been in custody at the several suits of the said four creditors for the same debts respectively, for the period of sixteen calendar months, to be computed from the time of making such vesting order, as aforesaid." The six months having expired, and the prisoner being still in confinement, the detainers at the suit of the four creditors being enforced against him, it is sought of this Court to give him relief, and order his discharge. The 76th sect. of 1 & 2 Vict. c. 110 empowers the commissioner to adjudge that the prisoner be discharged forthwith, or so soon as he shall have been in custody at the suit of one or more of the creditors, as to whose debts such discharge is, so adjudicated, for a period not exceeding six months from the making of the vesting order. And by the 78th section it is enacted, "that if it appears that the prisoner has contracted any of his debts fraudulently, or by breach of trust, then the commissioner may adjudge that the prisoner be discharged forthwith, except as to such debts; and as to them, that he be discharged so soon as he has been in custody at the suit of the creditor for the same, for a period not exceeding two years, to be computed as aforesaid." Here the commissioner has put together the 76th and 78th sections of the statute, and has made an order for release at the end of six months from the general debts, and at the end of sixteen months in respect of four specified debts. He cannot do this. This statute does not contemplate the detention of the prisoner for two separate periods, by two classes of persons—the general body of creditors, and then by particular persons in respect of specified debts. The period of six months having expired, the prisoner cannot be liberated, for by ordering imprisonment and release under the 76th section, the commissioner has exhausted his power, and is *functus officio*. [CRESSWELL, J.—If a debtor is before the Court for six debts, and the commissioner says, "as to three of the debts you shall be discharged at the end of six months," and as to the remainder, at the end of ten months, do you say the prisoner is discharged at the end of six months?] Yes. The adjudication for the first three debts relieves the prisoner as to the others. The whole order is bad. [JERVIS, C. J.—If that be so, why should not the prisoner remain in custody?] The exception as to the four debts is evidently bad, and the Court should strike it out from the order. The commissioner having acted on the 76th section, the effect of which is to discharge the prisoner altogether, the Court will strike out from the warrant the illegal part ordering further imprisonment. The commissioner having exhausted his power, and the six months' imprisonment being completed, it is submitted the prisoner is entitled to his discharge.

JERVIS, C. J.—It is unnecessary to decide whether the commissioner was right in adjudicating under 76th and 78th sections upon both classes of debts.

## EXCHEQUER.

It is plain that, on the adjudication and the judgment, the prisoner, as to the four excepted debts, is not discharged, because the order says that he shall be discharged, "except as to the four specified debts," at the end of six months; and if the first part of this adjudication is to be regarded as a full and complete exercise of the commissioner's authority, the debtors as to those four are still in force against the prisoner, and we cannot release him. If we are to strike out anything from the order, it is quite as simple to strike out all the words subsequent to the words "so soon as the said prisoner shall have been in custody," &c. as that which we have been asked to strike out.

CRESSWELL, J.—I entirely agree. It is impossible to hold that because the commissioner says "you shall be discharged from debts one, two, three," he is to be released as to debts four, five, and six.

WILLIAMS and TALFOURD, JJ. concurred.

Rule refused.

## COURT OF EXCHEQUER.

Reported by C. J. B. HENSLER, Esq. of the Middle Temple, Barrister-at-Law.

June 28 and 30.

FOSTER, EXOR. v. DAWBER.

*Promissory note—Pleading—Exoneration and discharge—Breach before demand—Receipt in full of all demands—Statute of Limitations.*

A. being the holder of certain promissory notes of B. payable on demand, proposed to give him a release for the same, a 10s. receipt stamp was obtained, and the following receipt written:—"Hull, 16th February, 1846. Received of Richard Dawber the sum of 1,080l. being the principal and interest on two notes, dated 7th December, 1845, and 20th January, 1846, and in full of all demands." On an action by A.'s executor to recover the amount of the notes:

Held, that the onus lay on the plaintiff to prove that the receipt in full was not true. That evidence of the above transaction did not support a plea of payment.

The defendant pleaded that after the making of the promissory notes therein respectively mentioned, and before any demand of the sums of money therein mentioned, or either of them, or of any interest thereon, and before breach, the said Josh. Clarke exonerated, absolved, and discharged the defendant from, and waived the performance of, the promises therein mentioned, and payment of the notes and sums of money therein mentioned:

Held, that no demand having been made, the exoneration was before breach, and the plea proved by the evidence of the above transaction. That the obligation to a bill of exchange may be discharged by express waiver, and that this rule applies to immediate as well as remote parties to a bill, and that the same law applies to promissory notes.

The defendant had further pleaded the Statute of Limitations:

Held, that the renewal of certain promissory notes for principal and interest, no payment having been made, could not be considered as a part payment or acknowledgment, so as to take the case out of the statute.

This was an action brought by the executor of one Clarke, on two promissory notes payable on demand. The first count in the declaration was on a note for 500l. dated 7th December, 1845; the second count on a similar note, dated 20th January, 1846; the third and fourth, money lent, and an account stated. The defendant had pleaded, first, payment; secondly, as to the first and second counts of the declaration, that after making the notes, and before demand and before the breach of the alleged promises, the testator had exonerated the defendant from and had waived the performance of the promises; thirdly, "and for a further plea to the first and second counts, the defendant says, that after making the promissory notes it was agreed between the said Joseph Clarke and the defendant, that he, the said defendant, should purchase a piece of paper, marked with a certain receipt stamp, to wit, a 10s. receipt-stamp of great value, to wit, of the value of 10s. with the moneys of him, the defendant; and that he should then fill up and write on the same to the tenor and effect following; that is to say, 'Hull, 16th Feb. 1846.—Received of Robert Dawber the sum of 1,080l. being the interest and principal on two notes, dated 7th December, 1845, and 20th January, 1846, and in full of all demands;' and that he, the defendant, should suffer and permit the said Joseph Clarke to sign the same; and that such agreement and purchase of the said piece of paper so stamped, and such writing on and filling up by the defendant as aforesaid, and suffering and permitting the said Joseph Clarke to sign the same as aforesaid, should be accepted and taken by the said Joseph Clarke, in full satisfaction and discharge of the said several causes of action in the introductory part of this plea mentioned." Fourthly,

## EXCHEQUER.

Statute of Limitations; and seventhly, accord and satisfaction to the money accounts. At the trial before the Lord Chief Justice at Kingston, a verdict was found for the defendant on the second, third, and seventh issues. The important part of the pleadings will be found more fully set out in the judgment. In Easter Term last *M. Chambers* obtained a rule pursuant to leave reserved to set aside the verdict and to enter a verdict for the plaintiff on the above issues, with 1,200l. damages, or to enter judgment for the plaintiff *non obstante veredicto*. It appeared that the testator was the grandfather of the plaintiff and the father-in-law of the defendant. On the 8th of December, 1849, he made his will, and bequeathed the two notes in question for the benefit of his widow, and afterwards for the benefit of his daughter, the defendant's wife, and then to her children. On testator's death, the plaintiff, his executor, called on the defendant to pay the notes, when he alleged that he had received a receipt in full from the testator. Subsequently, a bill of discovery was filed; and by the defendant's answer it appeared that some years before he had borrowed two sums of 500l. from the testator, for which he had given two promissory notes, and that he had from time to time paid interest, which was indorsed on the backs of the notes as received. In 1845, these notes became so damaged from use, that it was agreed that two new ones should be given; and it further appeared that at that time there were between 70l. and 80l. due for interest on the old notes. On the 16th of February, 1845, the testator visited the defendant at Hull, and said he meant to give him the 1,000l. secured by the notes, and wished to give him a release, and would give him a receipt in full before he left; accordingly a 10s. receipt stamp was purchased, and the following receipt given:—"Hull, 16th February, 1846. Received of Richard Dawber the sum of 1,080l. being the interest and principal on two notes, dated 7th December, 1845, and 20th January, 1846, and in full of all demands. (Signed) Josh. Clarke."

Shee, Serjt. now shewed cause.—The second plea was, that before the breaches mentioned in the declaration, or either of them, the said Jos. Clarke exonerated and discharged the defendant from, and waived all claim on the defendant. It was contended on the other side that a release was necessary to exonerate after breach, but a simple contract may be waived or discharged without a deed before breach, although after breach a release by deed is necessary (Byles on Bills); and the same law applies to promissory notes. Lord Campbell directed the jury to find for the defendant on that issue, and stated that he thought the transaction was before breach, no demand having been made; that until after demand made there could be no breach. Before this transaction the indorsements of the payment of interest had been regularly made afterwards, such indorsements had ceased. The testator was a man of property living with his daughter, who had married the defendant, and the whole transaction was most natural, and the probability is, that the testator ordered the defendant to go and purchase a receipt stamp and to write out the receipt, intending to give him the amount of the notes. [PARKE, B.—Yes, he intended to give him the amount of the notes: true, but the third plea alleges that it was in consideration of the defendant getting the receipt stamp and paying for the same.] The whole transaction was most natural and probable, and there is evidence in support of these allegations. [ALDERSON, B.—There is no evidence that this was a bargain; it is, in fact, a gift from beginning to end. PARKE, B.—If two men make a bargain, and A. says, "I will give you 1,000l. if you will write out a receipt," that is a contract, and good enough; but here there is nothing of the sort, it was a mere gift; you cannot convert a voluntary gift into a contract.] Any consideration is sufficient if there be mutuality, if at the time words were used which required the defendant to do something, that is a sufficient consideration. The learned judge at the trial said, he thought there was evidence to go to the jury in support of this plea, and the plaintiff might have leave reserved to move.

*Bramwell* on the same side. The plaintiff was desirous not to have the opinion of a jury on this plea. It is a question of amount of evidence, and it was attempted to cast ridicule on this plea, but if the circumstances are examined, it will be found perfectly reasonable, and consistent with the facts of the case. The answer in Chancery supports this, and that was sworn to by a man who could not know the effect of his evidence in Chancery on these pleas; although the consideration may be inadequate, the motive is amply sufficient. If the agreement stated in this plea had been reduced into writing, it would have been binding. With respect to the plea of exoneration, there are two points,—the one concerning the form, the other the substance of the plea. Here is a promissory note payable on demand; the payee exonerates the defendant at a time before he could have maintained his action. The plea is proved; it may be bad, but

it is proved. It was competent to the payee to exonerate at any time previous to the demand.

PARKE, B.—The only question is, whether this exoneration is a sufficient discharge of the duty. No demand is necessary. The payee might have maintained his action without. Mr. Willes, you may confine yourself to the exoneration.

Willes, in support of the rule.—In this case the parties wanted in fact to make a will, and they have done it without having two witnesses and the necessary formalities. They wanted to give a thing, and they did not take the proper means of delivering it. There is no proof of exoneration. The case of *King v. Gillett*, 7 M. & W. 55, explains the meaning of an exoneration from a promise; and Alderson, B. in his judgment in that case, refers to the cases of *Holland & Conier's case*, 2 Leon, 214, and *Langden v. Stokes*, Cr. Car. 383. He referred also to *Paillet's Manuel de Droit Français*, tit. "Remise de la dette." It is a canon recognised by the Courts, that when evidence is capable of two constructions, the one against the person propounding the evidence is to be taken. A gift, which this is called in the answer, is a onesided transaction. If these notes are to be treated as chattels, they ought to be delivered, and a gift of them is not good *inter vivos* or *mortis causa*. Making a present of money cannot be construed as an exoneration under any circumstances. The evidence does not support the plea as pleaded. The plea must be taken to be an exoneration after the making of the note and after it was due, it is bad in substance, and cannot be sustained unless there is something to take it out of the ordinary rule of contracts. This was a direct debt for money lent, and when the money is not handed over as a gift, there is an immediate liability; the doctrine of *la remise de la dette* has never been imported into this country. Then there is evidence to take the case out of the Statute of Limitations. It appears that six years had not elapsed since the payment of interest and indorsement. Again, the notes given in account were a payment made on account; a bill of exchange given for a debt is a payment of the debt, and so were the new notes. [ALDERSON, B.—There has been no payment of interest since February 1844, and this action was brought in October 1850; therefore, there has been no part-payment, and no promise in writing, within six years, unless you can make out that the new notes given in 1846 amounted to a promise to pay the old debt. They are a promise to pay a sum, but not the old debt.] They must be taken to have been given as a payment on account. (Byles on Bills; *Diagwall v. Dunster*, 1 Doug. 247; *Ross v. Hughes*, 7 T. R. 350, n.; *Ellis v. Gallindo*, 1 Doug. 250, n.; *Anderson v. Cleveland*, 13 East, 430, n.; *Whitley v. Tricker*, 1 Camp. 35; *De la Torre v. Barclay*, 1 Stark. 7; *Cartwright v. Williams*, 2 Stark. 340; and *Farquar v. Southey*, 2 C. & P. 427, were also cited.)

## JUDGMENT.

Saturday, June 28.—PARKE, B.—The two points on which we are disposed to give our opinion at present are, in the first place, whether the plea is proved which states that the amount of these two notes was paid. We are of opinion, in accordance with the Chief Justice, on that part of the case, that the transaction related in this answer does not amount to a payment of those notes. What took place, as it is described, is this,—that the testator was desirous of making a present to the defendant of these notes, and that they met together on the 16th of February, 1846, on which occasion it was agreed between the said Joseph Clarke and the defendant, that he, the defendant, should purchase a piece of paper marked with a certain receipt stamp, to wit, a ten-shilling stamp of great value, to wit, of the value of ten shillings, with the moneys of him, the defendant, and that he should then fill up and write on the same to the tenor and effect following, that is to say:—"Hull, 16th February, 1846. Received of Robert Dawber the sum of 1,080l. being the interest and principal on two notes, dated 7th December 1845, and 20th January 1846, and in full of all demands." When that receipt in full was produced, it was *prima facie* evidence against the plaintiff that the amount stated on it was paid. It was not conclusive evidence, because it was perfectly competent for the parties to contradict such a receipt by shewing that the money was not paid, unless in those cases where a receipt estops them from making that defence. Now in this case, both Clarke and the defendant knew perfectly well that the interest and principal of 1,080l. was not paid; both parties knew the truth of the transaction. I think it was, therefore, perfectly competent to throw upon the plaintiff's executors the onus of shewing that this receipt in full was not true. Then it is said it afforded an inference of the agreement of the parties, that although the money was not paid they should be precisely in the same situation as if it had been paid. I think that this receipt in full cannot go so far as that,—as to part them in the same situation as if the money had been paid by the defendant in discharge of his promissory

## EXCHEQUER.

note, and afterwards given back to the defendant;—I think that a good deal more was required than a mere receipt in full to prove that the transaction was of that nature. I think, therefore, the plea of payment in this case is not proved. It differs entirely from a case where parties settle an account,—where one admits a set-off against the other,—in order to give it validity and to make it binding. The Courts consider that under those circumstances they are upon the same footing as if the debt due from the plaintiff to the defendant were paid by the plaintiff to the defendant, and paid by the defendant to the plaintiff instead of going through the process of one set-off against the other. The next question is upon the other part of the case, which my lord left to the jury, and reserved for our consideration whether we thought there was evidence to go to the jury on one of the pleas in which it is averred there was accord and satisfaction between the two parties. It is averred that there was a bargain between the plaintiff and the defendant in the nature of accord and satisfaction. "And for a further plea to the first and second count the defendant says that after the making of the promissory notes it was agreed between the said Joseph Clarke and the defendant that he, the said defendant, should purchase a piece of paper marked with a certain receipt stamp, to wit, a 10s. receipt stamp of great value, to wit, of the value of 10s. with the moneys of him, the defendant, and that he should then fill up and write on the same to the tenor and effect following, that is to say, 'Hull, 16th February, 1846. Received of Robert Dawber, the sum of 1,000*l.* being the interest and principal on two notes dated 7th December 1845 and 20th January 1846, and in full of all demands,' and that he, the defendant, should suffer and permit the said Joseph Clarke to sign the same, and that such agreement and purchase of the said piece of paper so stamped, and such writing on and filling up by the defendant as aforesaid, and suffering and permitting the said Joseph Clarke to sign the same as aforesaid, should be and should be accepted and taken by the said Joseph Clarke in full satisfaction and discharge of the said several causes of action in the introductory part of this plea mentioned." Now, in order to support that plea the defendant must shew that there was a bargain made with him as a consideration for giving up these notes of 1,000*l.* that the defendant should go and purchase a stamp, procure a piece of paper, and write out a receipt upon it; and that the agreement between the parties was that the sum of 1,000*l.* should be the compensation to be paid for it. If you look at the evidence it is perfectly impossible to suppose that that was the real meaning of the parties, because it has already appeared, from what I have stated in the answer, that the transaction commenced from the testator saying that he was willing to make a present of the debt. There is nothing in the nature of a bargain that he would make a present, if the other would be at the trouble of making out a receipt and purchasing the stamp. The conversation began, after talking over family matters, by the statement of Joseph Clarke, "that he intended to give the defendant the 1,000*l.* secured by the said two promissory notes;" that is the commencement of it;—"that he wished to give defendant the 1,000*l.* secured by the said two promissory notes, and that the said Joseph Clarke wished to give defendant a release and discharge from the same, and for the interest due thereon before he left Hull, and the said Joseph Clarke directed defendant to write out a receipt for such 1,000*l.*"—not by way of bargain, that if he should do it, he should have the promissory notes,—otherwise not. It appears, from the first, the intention of Clarke was to make a present of the amount of these promissory notes. It goes on to state that the defendant afterwards did purchase the 10s. stamp, for the purpose of writing a receipt thereon. If you take this altogether, really it is too much to say that you can have the least idea that it was parcel of this bargain that the 1,000*l.* should be given up if the defendant wrote the receipt, but should be retained by the testator if he did not. It was nothing more than a circumstance incident to the intended gift by the testator. That gift would just as soon have taken place if Clarke himself had had to write out the receipt as if the defendant had. In taking a reasonable view of the evidence in this case, I am clearly of opinion, in which my brothers entirely agree with me, that there was no evidence that would warrant the jury in supposing that there was a bargain, approaching to so absurd a bargain as that which is stated. Therefore we think the verdict ought to be entered for the plaintiff. With respect to the other two points we will take a little time to consider. Those two points are, whether there is by law merchant a different rule with regard to bills of exchange than there is as to ordinary contracts; and, secondly, whether there should be a new trial upon the ground that there is no sufficient evidence to take the case out of the Statute of Limitations; and whether the law as to bills of exchange extends to promissory notes.

*Cur. adv. vult.*

## EXCHEQUER.

*Monday, June 30.*—*PARKE, B.*—In the case of *Forster v. Dawber*, the argument in which was concluded on Saturday, the Court delivered its opinion upon all the points in the case except two. One was with respect to a plea in an action on two promissory notes for the sum of 500*l.* each, and there was a special plea. "For a further plea the defendant says that after the making of the promissory notes therein respectively mentioned, and before any demand of the sums of money therein mentioned, or either of them, or of any interest thereon, and before any breach of the promises in those counts respectively mentioned, or either of them, the said Joseph Clarke in his lifetime, to wit, on the 16th day of February, in the year of our Lord, 1846, exonerated, absolved, and discharged the defendant from, and then waived performance of the promises therein mentioned, and payment of the said notes respectively, and of the sums of money and interest thereon mentioned." It appeared on the trial, in proof of that, that on the 16th of February, 1846, the testator was desirous of releasing the defendant from these two notes. A meeting took place, and he desired the defendant to procure a receipt stamp; that he gave a receipt in full for 1,000*l.* the amount of the two notes, and 80*l.* supposed arrears of interest for two years; and there is no doubt that the effect of the transaction was to indicate as clearly as possible that the testator meant to discharge the defendant from all liability upon the notes. But then it was contended by Mr. Willes that the plea was not proved, because this was not, properly speaking, before breach. Now, this plea is certainly artificially drawn, and is a plea copied from a similar plea to be found in the precedents of the discharge of an executory contract. It was competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. It is not competent to the parties, where there is an executed contract, to discharge it in any way, except by release under seal, according to the nature of the obligation, on payment, if the obligation may be performed by payment—performed and not discharged. Now, a promissory note or a bill of exchange appears to be on a different footing. Mr. Willes contended that this plea was not proved; but we think the words before breach, when they are spoken with reference to a promissory note, are either idle or absurd. We think they are of that character, or if they have any meaning in this plea they must be read in conjunction with the context. Then, taking the plea altogether, it is an allegation that the testator discharged the defendant from all liability before any demand of the sum of money mentioned in the note,—if that is the true meaning of the plea, it was proved at the trial; because it was proved that the testator exonerated the defendant before he called on him to pay the amount of those notes; therefore we are of opinion that this plea is proved. The next question is, liberty being reserved, in case that the plea should be proved and a rule granted to give the plaintiff judgment *non obstante veredicto*, whether this plea is a good plea after verdict. In the first place, it was disputed by Mr. Willes that there was any such law that an obligation on a bill of exchange could be discharged by parol; and he questioned the decisions, and he said that, at all events, they went no further than this, that they might be discharged as to remote parties, but not discharged with respect to the obligation of one immediate party to pay another; because that obligation, he considered, was not created by the law merchant, and it was only by the law merchant that a bill of exchange could be discharged. It has been so often laid down and acted upon, although there is no case immediately to the point, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late to question the propriety of those decisions. Several cases were cited by Mr. Willes and referred to, and the matter is laid down in the text-books as law, although my brother Byles in his book uses the words "it is said." We see no reason to dispute that law; we think it valid and good law; nor do we see any reason to draw a distinction between the liability of an immediate party or the liability of one party to another; where there are intermediate parties the liability of both equally turns on the law merchant, for no one person is liable on a bill of exchange except through the law merchant, and this law merchant being introduced into this country, and differing very much from the simplicity of Common Law, probably at the same time was introduced into it that rule which Mr. Willes quoted from Pallet, that by the laws of foreign countries there may be a release and discharge from the debt by express words, although unaccompanied with satisfaction or any solemn instrument. That appears to be the law of France, and probably it was for that reason it was adopted. At all events, it is too late now to say this is not a branch of the law merchant with respect to bills of exchange. Then Mr. Willes said, though it might be true with respect to bills of exchange, it was not true with respect to promissory notes,—for that they are not put upon the same

footing as bills of exchange by the statute law. There is no doubt the obligation on promissory notes was created by the statute of 3 & 4 Anne, c. 9, which recites that "notes in writing, signed by the party who makes the same, whereby each party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorseable over" (that is one of the properties promissory notes are recited not to have), "within the custom of merchant to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note shall be assigned, endorsed, or made payable, could not within the said custom of merchants maintain any action upon such note against the person who first drew and signed the same." That appears to apply both to cases of original liability on a note, and also to cases where the note is assigned. We think the statute 3 & 4 Anne, c. 9, put promissory notes entirely on the same footing as bills of exchange; and the same law applies to them. Now, bills of exchange and promissory notes differ from other contracts at common law in two important particulars. In the first place they are assignable, whereas choses in action at common law are not. In the second place, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In those two important particulars bills of exchange differ from contracts at common law, and in those same particulars are put in the same footing by the statute of Anne; therefore we think the same law applies to promissory notes as applies to bills of exchange; and that was considered by the Court, although their opinion was certainly not necessary to be expressed to that extent in order to decide the case. In *Mayhew v. Kerr*, a case which was tried before me, in which there was such a plea on the record that a promissory note was waived and discharged by parol, the Court, though it was not necessary to the decision of that case, decided that it was so. We think, therefore, the rule in this case for entering the judgment for the plaintiff, *non obstante veredicto*, must be discharged. The remaining question is on the motion for a new trial. The plea that the note was discharged was pleaded only to the note. But on the count for money lent and advanced there was no plea that the note was given, and the defendant was exonerated from that note by the testator; to the count for money lent and advanced nothing is pleaded but the Statute of Limitations. Now the money that was lent and advanced by the testator in the year 1835 was 300*l.* and in the year 1842 500*l.* more. For each there was given a promissory note payable to the testator or order, and interest on those notes was paid up to the year 1844. In the beginning of the year 1846 that transaction took place which the defendant pleaded as the payment of the note, and which we consider to be an exoneration by the testator of the defendant. These two notes, the backs of them having been in fact covered by acknowledgments of interest, two other notes were substituted in the year 1846, one was dated, 17th December, 1845, and the other 20th January, 1846; and in the succeeding month, on the 16th of February, 1846, the testator intimated his intention to the defendant to give him a discharge from both notes; and accordingly a receipt stamp was procured, and Clarke, the testator, gave a receipt in full to the defendant for the amount of these notes, and also for the sum of 80*l.* which was calculated to be the amount that was then due for interest, being about two years' interest or some little more. Then a receipt was given, which receipt was given in these words, "Received of Robert Dawber the sum of 1,000*l.* being interest and principal on two notes dated 7th December 1845, and 20th January 1846, and in full of all demands." Now to take the case out of the Statute of Limitations, it was argued for the plaintiff at the trial that this transaction, which occurred in February 1846, must be considered as part payment, and so that the case was taken out of the statute. Now, on consideration of the case, we are of opinion that that argument is unsatisfactory; there was no proof of any actual payment of the sum of 80*l.* for interest in the month of February. It was all parcel of the same transaction; and the supposed payment, which was only by construction a payment of two years' interest, was only a parcel of the transaction in which the defendant by no means promised to pay the note; but the contrary. It was no "part payment" within the Statute of Limitations (supposing it to be proved within the statute), because part payment within the statute means payment of a portion, accompanied with an acknowledgment of a greater demand being due, that is the only ground on which a part payment takes the case out of the statute. This transaction on the 16th of February was a transaction in which the defendant meant to pay the whole in full, and if there was any payment it was a payment of the note, and considered evidence of payment or acknowledgment; it was payment of

## INSOLVENCY.

the note in full, and there was no acknowledgment whereby the defendant took on himself to pay any portion of the money whatever. Therefore we think the transaction on the 16th of February cannot be considered as any acknowledgment to take the case out of the statute. Then the only question is, as it occurred to the Court on the first view of the case, that there might be sufficient to take the case out of the statute, whether the renewing of the two promissory-notes by fresh ones in January 1846 could be considered as a promise, so as to render the defendant liable by a new promise to pay the original two loans of 500l. Now we think that they could not. All that can be inferred from these two notes is, that the defendant meant to give a fresh security, limited to those two notes; that it was a promise to pay the testator, or the legal holder of those notes, and no intention on the part of the defendant to renew his liability on the original demand. The promise was confined to the notes themselves; and we think there was no sufficient evidence to take the case out of the Statute of Limitations in regard to the original debt, and that the plea ought to have been found for the defendant. Inasmuch as that point was not reserved, there must be a new trial.

*Rule for judgment non obstante veredicto discharged. Rule absolute for a new trial.*

## INSOLVENT COURT.

Reported by DAVID CARO MACRAE, Esq. of the Middle Temple, Barrister-at-Law.

Tuesday, Sept. 16.  
(Before the CHIEF COMMISSIONER.)  
PROTECTION CASE.

Re JOSEPH BELL.

*Discharge ad interim—7 & 8 Vict. c. 96, s. 6—Attachment from the Court of Chancery for the nonpayment of money as ordered by the Court. A petitioner under these statutes who is in custody, and applies for his discharge ad interim under the 7 & 8 Vict. c. 96, s. 6, will not be discharged unless he is "a prisoner in execution upon a judgment obtained in an action for the recovery of a debt."*

This insolvent applied for his discharge under the 7 & 8 Vict. c. 96, s. 6.

Cooke supported.

Dowse opposed the application, and drew the attention of the Court to the words of the statute,—"And be it declared and enacted, that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, &c. . . . to whom an interim order of protection shall have been given, shall not only be protected from process as provided by the said recited Act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule, and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such prisoner in custody by virtue of such execution to discharge him," &c. This insolvent was a shareholder in a joint-stock banking company; and upon the winding up of its affairs in the Court of Chancery, it was found by Master Farrer, to whom the matter was referred, that Joseph Bell was a debtor to the concern to the amount of 1,027l. and an order was consequently made upon him to pay that sum into Court; but that not being done, an attachment was issued from the Court of Chancery for the nonpayment of this sum, under which the insolvent was taken and now detained in custody under that attachment. It was clear that no description of persons could be discharged except those specified in the Act of Parliament. The printed notice of these applications, which were usually forwarded to the detaining creditors, and which was in accordance with the language of the statute, had in this instance been altered, and the printed words "being a prisoner in execution upon a judgment obtained in an action for the recovery of a debt" were struck out, and written words inserted, "being a prisoner under an attachment from the Court of Chancery for the nonpayment of a certain sum of money," &c. This alteration was made by the officer of the Court, to make it suit the fact which entirely excluded the petitioner from the class of persons mentioned in the statute. He was therefore clearly not entitled to have this application granted.

Cooke, for the insolvent, said—Certainly the words of the Act were as mentioned, but the question was, whether, in the equitable jurisdiction of the Court they would not extend the construction of those words to all orders and decrees in the nature of executions upon judgments for debt. The 1 & 2 Vict. c. 110, s. 18, enacted, that all decrees and orders of Courts of Equity whereby any sum of money shall be payable to any person shall have the effect of judgments in the Superior Courts of Common Law, and the persons

to whom such moneys shall be payable, shall be deemed judgment-creditors within the meaning of the Act. By this section this order for the payment of money by the Court of Chancery was made equivalent to, and had the effect of, a judgment of a Court of Common Law. He therefore submitted that this petitioner was equitably within the language of this Act of Parliament.

The CHIEF COMMISSIONER.—Had it been so intended, it might have been inserted in this Act of Parliament. But it is not. Here is the Protection Act, and here is the rule founded upon it. The form, as printed, was in accordance with the rule and the statute, but it had been altered to suit the fact, and was now not in accordance with either. It had been argued that it was intended that these orders of the Court of Chancery should have the effect of judgments of Courts of Common Law. That might be so for the purposes of that portion of that statute (1 & 2 Vict. c. 110), which was for extending the remedies of creditors against the property of debtors. To use the language of the section (s. 18), those who had orders and decrees of the Court of Chancery for the payment of money to them "shall be deemed judgment-creditors within the meaning of this Act." That clause was not, however, applicable to the purposes and objects of this Act. The application must therefore be refused.

Cooke applied for short notice to creditors of the first examination.

*Interim order granted, but no discharge to issue. First examination appointed for September 29th.*

Re GEO. NEWMAN.

*Petition under 5 & 6 and 7 & 8 Vict. c. 96—Petition under 1 & 2 Vict. c. 110—Collateral proceeding. An insolvent files a petition under the Protection Acts, but does not come up for his first examination:*

*Held, that as the petition, under the 5 & 6 and 7 & 8 Vict. c. 96, had not been dismissed, a petition subsequently filed under the 1 & 2 Vict. c. 110, could not be sustained.*

This insolvent came up for his hearing. He had formerly petitioned under the Protection Acts, but he said he did not appear for his first examination, expecting to be taken in execution, as there was an execution out against him.

Cooke for the opposing creditor objected, that as the insolvent had petitioned under the Protection Acts, he ought to have continued that proceeding or applied to have the petition dismissed before petitioning under the 1 & 2 Vict. c. 110; as he had not applied for leave to file this petition, it ought to be dismissed.

Sargood, for the insolvent, said he was afraid that the two petitions could not stand together.

The CHIEF COMMISSIONER dismissed the petition. *Petition dismissed.*

Re JOHN HOWARD.

*Damages in an action for seduction—Practice—Adjudication.*

*The Court in delaying the discharge of an insolvent in custody for damages in an action for seduction will be guided solely by the amount of the damages and the situation in life of the parties. Circumstances of aggravation or extenuation are for the consideration of the jury at the trial.*

This insolvent came up for his hearing, and was opposed by Dowse, for the detaining creditor.

Cooke supported the insolvent.

Dowse called Hammond, solicitor, who deposed that in July a writ was issued by him for the detaining and opposing creditor, in an action for the seduction of his daughter. The action was tried on the 4th November, before Platt, B. at Westminster, when the jury gave a verdict of 200l. damages against the defendant, the insolvent. The situation in life of the plaintiff was a brick burner on the Great Northern Railway, which was not then completed. The insolvent was also in the same business.

Dowse.—What was the age of the plaintiff's daughter?

Cooke objected.

Insolvent examined by Cooke.—His counsel, Mr. Serjt. Wilkins, called no witnesses at the trial. He had witnesses to call.

Cooke intimated that if the Court desired it he would call those witnesses now.

The CHIEF COMMISSIONER.—It would be going in the teeth of all the decisions of this Court if such a course were permitted.

Cooke said that he knew the practice, but would rather that the insolvent should hear it from his lips.

The CHIEF COMMISSIONER.—This Court is guided by the amount of damages alone in connection with the situation in life of the parties. Circumstances of extenuation or aggravation are for the consideration of the jury at the trial. He might recollect that his learned brother, Mr. Law, and the Commissioners, had laid down that rule years ago. If there was a verdict by surprise, &c. they might

have applied for a new trial. There stands the verdict, and by its amount the Court is guided in delaying the insolvent's discharge.

Cooke was quite aware that the Court was bound by the verdict, and that they could not inquire what the character or conduct of the young woman might be.

The CHIEF COMMISSIONER said that this was one of those cases expressly provided for and set out as a ground of delay in the discharge under the 7th section of this Act, where a variety of cases had been stated, descriptive of the different kinds of improper conduct for which insolvents may be remanded, confining the period of prolonging the imprisonment to two years. Now, that Court had again and again declined to try these cases over again. It had been submitted to a jury, and he could suppose that every thing necessary had been submitted to the jury. He could not understand this sort of excuse, that witnesses had not been called. Very likely his own counsel thought it was the best course to follow. All that they could do was to have regard to the amount of the damages, and the situation in life of the parties before the Court, because what would be heavy in one situation of life might be extremely light in another. These parties were in a very humble sphere of life, and 200l. damages was therefore no inconsiderable sum; and it is manifest the jury did not consider it a slight case of the sort. He therefore, acting upon the principles to which he had adverted, namely, the amount of the damages and the situation in life of the parties, his adjudication was, that the insolvent be declared entitled to the benefit of the Act, except as to the suit of this creditor, at whose suit he would be discharged when he should have been in custody for a period of ten calendar months from the date of his vesting order.

*Remanded for ten calendar months.*

The CHIEF COMMISSIONER said that it was extremely likely that the jury took into consideration the fact of this plaintiff being a married man, and therefore incapable of making the only reputation in his power.

Re JAMES FISHER.

*1 & 2 Vict. c. 110—Allowance of costs of opposition.*

*The allowance of the costs of opposition in individual cases of opposition, under the 1 & 2 Vict. c. 110, is the exception and not the rule of practice.*

This insolvent had been heard before Mr. Commissioner Law, and opposed by Cooke for a creditor. The learned counsel again appeared to ask for judgment.

The Court remanded the insolvent for six calendar months, under the discretionary clause (s. 76).

Cooke applied for the costs of opposition.

The CHIEF COMMISSIONER would allow the costs of opposition in this case, but he wished it to be understood that the allowance of the costs of opposition in individual cases of opposition, under the 1 & 2 Vict. was the exception and not the general rule of practice. *Costs allowed.*

Re BENJAMIN HOPE.

*Bail—Amending description of.*

*Where the residence of a surety is misstated in his affidavit, the Court will not allow it to be amended, and the bail will not be accepted.*

This insolvent applied to be admitted to bail and tendered sureties for his appearance at the hearing. It transpired upon the examination of one of the proposed bail by the attorney of the detaining creditor, that his son was really the landlord of the house in which he resided generally, and which was given in the affidavit of bail as his residence, but that he had advanced the money to him to take the business which he carried on there and paid all necessary expenses of rent and taxes, which the son was unable to pay. He himself also carried on the business of a manufacturer there and had property elsewhere.

Cooke having been heard for the insolvent,

The COURT rejected the bail.

The bail said he had a residence in Market-street, and if the description was incorrect it was an error of the attorney.

Cooke applied to amend the description, by substituting Market-street.

The CHIEF COMMISSIONER refused the application.

THE following buildings are certified as places duly registered for solemnising marriages, pursuant to the Act of the 6th and 7th Wm. 4, c. 85:—The Wesleyan Methodist Chapel, Bury, Lancashire. William Harper, superintendent registrar. The Sion Chapel, Fron, Carnarvonshire. Owen Owen, superintendent registrar. The Ebenezer Chapel, Cuckfield, Sussex. S. Waller, superintendent registrar. Bethel, Monachlogddw, Pembrokeshire. Blanconin, Llandissilio, Pembrokeshire. Wesleyan Chapel, Ashton-under-Lyne, Lancashire.



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To Readers and Correspondents.

"We know of no book on this subject alone. It is usually mingled with other branches of Magistrates' Law. Saunders's Supplement to Burn contains all the Parish law decided and enacted during the last five years. It is useless to ask the question as to Copyholds; as a matter of course the original is enrolled. B.—We believe not. Anonymous communications are never noticed."

TABLE OF CHARGES FOR ADVERTISEMENTS.

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Advertisements from the Country should be accompanied on order upon the Agent in Town, or a Post-office (payable at 180, Strand) for the amount.  
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cannot undertake to return rejected communications. However is intended for insertion must be authenticated the name and address of the writer; not necessarily publication, but as a guarantee of his good faith notice can be taken of anonymous communications.

THE LAW TIMES.

SATURDAY, MARCH 29, 1851.

TO SUBSCRIBERS.

THE time since we announced a contemplated improvement in the arrangement of the contents of the LAW TIMES, so as to permit of Reports being placed consecutively in the same volume; and we requested that readers who disapproved of the suggestion would so inform us, that we might be guided by their opinions.

That notice produced very many communications, expressing the warmest approval of the plan, and not a single dissentient. We did not, therefore, hesitate to adopt it, when commencement of a new volume should permit.

The present number opens the seventeenth volume, with the new arrangement. The Reports will now be placed separately from the other contents of the Journal, so that they occupy consecutively the first portion of bound volumes; in the latter portion of it the general legal history of the half-year will now run in like order. This will greatly facilitate reference, besides being a vast improvement in the appearance of a work, whose value in the Library has been found to be greater even than interest and utility as a weekly gathering of the entire Law of the time, and of whatever respects to the progress and welfare both of the Law and of the Lawyers.

There was another reason for the adoption of this new arrangement. The Reports of the LAW TIMES have grown to an importance originally contemplated for them. Not only are they the earliest in point of time, but they are by far the largest collection of law reports that the Practitioner possesses. Whole series of reports, as Bankruptcy, Insolvency, & Nisi Prius, are reported only here. From the other Courts a greater number of cases

VOL. XVII. No. 217.

are reported than are to be found elsewhere. Its system of preserving a note of every case in the Common Law Courts, has produced almost a perfect record of the proceedings of those Courts for seven years past, the worth of which is daily becoming more and more apparent, as all other records of them are lost. It boasts the possession of the only complete transcript of all the written judgments which have been delivered in the Courts of Common Law during that period; and not a few of these, though seeming at the moment to be of no worth, and therefore omitted by the other reports, have proved ultimately to be of great importance, and have owed their preservation wholly to the strict observance of that system of reporting which is adopted by the LAW TIMES alone,—and which is, to record every case, and to print in full every written judgment which is delivered in the Common Law Courts.

The consequence has been, that the LAW TIMES has come to be cited daily in all the courts, from the House of Lords downwards, and to be received as an authority for any case, until its appearance in due course in those higher authorities which are termed "the regular reports," when, of course, the latter take precedence of authority. But as hundreds of cases are reported in the LAW TIMES which are never reported in "the regular reports," its permanent uses are not the less, for many of the requirements of the practitioner. Hence it is that it has lately found so considerable a circulation in Ireland, in the colonies, and even in Scotland and America.

Reports so extensively read and cited are entitled to a more formal recognition, by giving to them the first place in the volume, and severing them from matter of more temporary interest.

It will be observed that we have further facilitated reference to them by placing at the head of each column the name of the Court there reported.

In preserving the numbers of the current volume, we would recommend the reader immediately to separate the reports (which will occupy the central leaves) and arrange them in his portfolio in the order in which they will be bound, placing the reports together, and the general division together. To aid this arrangement, portfolios have been prepared, which have two compartments, separated by stout pasteboard, so that, as the numbers come in, week by week, they may be at once arranged in the order in which they are paged, and in which they will be most convenient for reading or reference. This portfolio may be had at the office, or through any bookseller in the country. The sheets are fastened by elastic strings, very conveniently and simply, so as to be as firm as if bound.

It is unnecessary to say anything by way of promise for the future. The past is the best pledge that the LAW TIMES will at least endeavour to deserve the continuance of that favour which has given to it, as the journal of the Legal Profession, an influence, both within and without its circle, which it trusts always to direct towards the advancement of the permanent well-being of those to whose confidence and support it is indebted for its position.

PROFESSIONAL COSTS IN THE COUNTY COURTS.

WE are violating no confidence in announcing to the Profession, that Lord BROUGHAM, after giving the kindest attention to the earnest remonstrance which we took the liberty, on behalf of our readers and in their names, privately to address to him, has consented to introduce into his Bill for the extension of the County Courts the provisions we have proposed for securing a fair remuneration for professional services, instead of the insulting fixed fees of 30s. 15s. and 10s. His Lord-

ship has framed, in accordance with our suggestions, clauses which repeal the restrictive provisions of the County Courts Act, so far as respects all suits for sums above 10l. and substitutes a scale of fees for each proceeding in a suit, to be framed by the Judges of the Superior Courts, and by which the costs, as between party and party, and as between attorney and client, are to be taxed by the clerk of the County Court, with an appeal from him to the Judge, who is to have power, under certain circumstances, to increase or diminish such costs.

The inadequacy of the present scale of professional remuneration in the County Courts, and its essential injustice and absurdity, were too palpable to be persisted in when once attention was directed to them. But not the less is Lord BROUGHAM entitled to the thanks of the Profession, for having thus readily consented to adopt so material a modification of the system on which the County Courts have hitherto been conducted; and we are thus more desirous to give expression to such thanks, on behalf of our readers, because there is a prevalent impression among the Lawyers that the noble and learned leader of the Law Reformers is hostile to the Profession personally, and desirous of curtailing its emoluments and lowering its position. His willing acceptance of the plan which, on behalf of the Profession, we took the liberty of placing in his hands, will go far to remove from the minds of the Lawyers the unfavourable impressions they had received.

The introduction of these provisions gives to the County Courts Bill an importance to the Profession which should awaken them to vigilance, not merely to secure the earliest possible success for the measure that contains them, but to prevent those provisions from being expunged or curtailed in the progress of the Bill through Parliament. Its value cannot be over-estimated. The vast business of the County Courts, so soon to be enormously extended, is at present almost unproductive, to the Profession, of anything but loss; for, with the restricted fees, the increased business of the County Courts does not compensate for the decline of the business of the Superior Courts. But if those restrictions are repealed in all cases where the sum in dispute properly admits of it, and a fair scale of professional remuneration be substituted, proportioning the payment to the work done, the County Courts must become a source of far greater revenue to the Attorneys than that they have lost by the diminished business of the Common Law Courts, and the future of the Profession will be at least as prosperous as its past.

The other amendments in the Bill, some of which also were suggested by us, are noticed in the department devoted to the County Courts, in a subsequent page.

THE CASE OF THE BIRDS.

PROBABLY few, even of the Lawyers, are aware that the present termination of this remarkable case is as strange and anomalous as its entire progress has proved. The prisoners have been sentenced, but they are punished without trial. Such is the injustice and absurdity of the law, that although, in felony, if a prisoner pleads that he has been before tried and acquitted for the same offence, and upon that issue being tried it is found against him, he can then be tried for the offence itself, it is not so in misdemeanor. There it has been held, that the plea of *autrefois acquit* is final, and that although the only question tried by the jury is, whether the offence now charged is the same as the offence before charged, yet that, if this be decided in the negative, the prisoner cannot have the right of being tried upon the charge itself, so as to answer or explain it, but it is treated as if he had pleaded guilty, and punished accordingly!!

This is the case with the Birds. They are sentenced to sixteen months' imprisonment upon a charge for which they have not been tried, which they have had no opportunity of answering, and of which they have not been convicted by a jury.

And this palpable injustice occurs in a case in which six judges out of the fourteen are of opinion that the prisoners were entitled to an entire acquittal, and that their sentence is contrary to law, and on which the Lord Chief Justice of England has publicly declared the proceedings to be a violation of right as well as of reason.

It is, however, by no means certain that the case has ended. A writ of error might yet try this question, if it be indeed the law that a plea of *autrefois acquit* in any case is to deprive the subject of his privilege of a trial by a jury of his peers. Principle and reason are against such a conclusion: only one case supports it, and a fair opportunity would now be given for a review of the question, and the establishment of a more just, rational, and constitutional practice.

#### ANOTHER SHAM LAWYER.

Nor the least curious specimen we have received of the doings of this numerous fraternity is the following:—

H. Clark's  
Arbitration Court?  
That Justice and  
Benevolence be Arbitrators.

Derby, September 1, 1847.

Sir,—I am authorised by Mr. Thomas Clay, butcher, to apply to you for payment of 2s. 6d. and to receive the same, which he claims from you. Justice demands payment as follows:—Firstly, now, if you are able,—Secondly, If not so able, by periodical instalments of as much as is in accordance with Justice,—Thirdly, by turning over any debtors that you may have, for a part or the whole satisfaction of this application. If you have any objections to the claim here made, you will be desired to state them in the presence of your creditor, and one who will honestly give an opinion on the dispute. If you will not submit the claim here made to the aforementioned conditions, you will drive it into Court, where you will incur the following conditions.—1st, Exposure of family affairs to a public Court.—2nd, 4s. the least costs for this claim, if within one mile of the Court-house. If more than one mile from the Court-house, there will be per mile.—3rd, Liability to forty days' imprisonment on detection of fraud,—and the expenses attending this step will be added to your debt, which you will be obliged to pay, or partake again of the said fate, *add infinitum*. There is no certain escape for you, but by ceasing to be.

After the receipt of this, if you do not come forward, in a reasonable time (say four or five days), and tender arrangements, you will cause the last-mentioned conditions to be put into execution on yourself, thereby being your own executor.

Yours, HENRY CLARK.

Office, 1 Court, Corn Market,  
Opposite the Post Office, Derby.

#### ANOTHER ADVERTISEMENT.

The following appeared in the *Catholic Standard* of Saturday last:—

#### TO INSOLVENT TRADERS AND OTHERS.

Traders and others whose affairs are embarrassed, and who are struggling in the vain attempt to overcome their pecuniary difficulties, can be speedily extricated at a small expense, in most instances without publicity, under the recent Acts for facilitating arrangements between debtors and their creditors.

Apply by letter or personally to Mr. MARCH, No. 20, Clifford's-inn, Fleet-street.

#### THE LEGISLATOR.

Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

BILLS READ A FIRST TIME.

Friday, March 21.

Court of Chancery, Ireland—Regulation Act Amendment.  
Monday, March 24.

Steam Navigation.

Thursday, March 27.

Apprentices to Sea Service, Ireland.

#### BILLS READ A SECOND TIME.

Monday, March 24.

Designs Act Extension.

Tuesday, March 25.

Ecclesiastical Titles Assumption.

Thursday, March 27.

Enfranchisement of Copyholds.

#### BILL READ A THIRD TIME AND PASSED.

Tuesday, March 25.

Consolidated Fund, 8,000,000*l*.

#### PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Monday, March 24.

Appleby, Kendal, &c. Turnpike Road.

Tuesday, March 25.

Leicester Sewerage

Ouseburn Bridge and Approaches, &c.

Thursday, March 27.

Dewsbury Gas

Downham Market, &c.

Laird's Patent

Millthorpe and Levens Turnpike Road

Newington St. Mary Parish

Scarborough Gas.

#### SESSIONAL PRINTED PAPERS.

Par. Num.

127. Stationery, &c.—Copies of Treasury Orders, &c.

128. Bills—Enfranchisement of Copyholds

131. — Designs Act Extension

133. — Court of Chancery (Ireland) Regulation Act

Amendment

134. — Medical Charities, Ireland

134. — Steam Navigation

119. Joint Stock Companies—Report by the Registrar

126. Spanish Vessels—Return

129. Committee of Selection—Fourth Report

17. East India—Copy of Acts

63. Local Acts—Reports of the Admiralty

Cape of Good Hope, Kafir Tribes—Correspondence

113. Dispensaries, &c. Ireland—Return

132. Spirits—Account.

#### HOUSE OF LORDS.

##### COUNTY COURTS EXTENSION.

FRIDAY, March 21.—The second reading of the County Courts Bill was moved by Lord Brougham, in a speech supporting the principle of the changes which it would make, and explaining some modifications in the measure. He would introduce a clause to provide that on new trials the venue should be changed to another judge; he would give the Courts jurisdiction in cases of arrears of tithe rent-charge to the amount of 50*l*.; and would propose to absorb in the County Courts a number of ancient local courts of varying jurisdiction—such as the Tolzey Court of Bristol, the Recorder's Court of Manchester, the Court of Salford Hundred, &c. Lord Brougham hinted that other extensions and improvements—such as equity jurisdiction, &c.—might be looked for at a future time. He is going forward slowly, but surely; and will never shut out the hope of grafting any new improvement. The Lord Chancellor and Lord Cranworth reserved detailed objections till the Bill should be in committee. The Bill was read a second time.

##### REGISTRATION OF ASSURANCES.

MONDAY, March 24.—The second reading of the Registration of Assurances Bill was moved by Lord CAMPBELL on Monday. He at considerable length, and with much vivacity of manner, recounted the great evils which a general registry of deeds would cure; with chronological detail sketched the repeated endeavours which have been made to enact such a general registry—from the time of Sir Matthew Hale and his successors, when the measure often approached near to being passed by the Legislature, to these latter days, when the country solicitors have very successfully opposed it. Then he explained his own bill. The main features of his plan are, that he will have one register-office in the metropolis for the whole kingdom, and not a registry locally distributed in the provinces round centres in the country towns; that he will register the original deeds dealing with the interests in the land of the kingdom, and not memorials of those deeds, as is the use in some existing local registries; and that reference to the land dealt with will be made, not in the present mode of setting out the bounds and metes by wordy descriptions, but by simple letters of reference to an index-map prepared from the maps of the whole country which are now available under the Ordnance survey, and the official surveys which have been made for the purposes of tithe commutation and parochial assessment. Lastly, he proposes to do away with the existing doctrine of notice, and to enact that no third person shall be affected by any deed that is not registered, whether he have notice [knowledge, direct or indirect] or not.—Lord BROUGHAM testified his high satisfaction that the country is about to reap the inestimable benefits of a general registry; but everything will depend upon the details of the measure. The registry might well be made to include wills before as well as after the death of the testator; for many important documents are lost—put aside in old chests, or stuffed by accident into the fire-grate, as he has actually known—for want of a safe depository.—Lord BRAUMONT entered into further explanations of the measure;

displaying the result of extensive inquiry and careful thought on the subject as one of the commissioners who sat on the question. On the ground of analogies suggested by his own experience as an extensive copyhold proprietor—copyholds, with all their other disadvantages, having generally the one highly appreciated advantage of a simple title shown by the registry of the court-roll—he stated his belief that a good general registry will enormously increase the value of land, both as an investment and a security for money.—Lord CRANWORTH wished it to be generally known that there is no legal mystery in this question, and that any member of the Legislature is able to appreciate its bearings. At present, on selling an estate, you must prove a negative—that there are no other deeds affecting the estate: a registry will throw the onus on the other side, and demand proof against you that there are other deeds.—Bill read a second time, and referred to a Select Committee.

##### COUNTY COURTS.

TUESDAY, March 25.—Lord BROUGHAM, in moving for a return of the number of writs of prohibition issued from the Superior Courts to stay proceedings in the County Courts, took occasion to observe, that the return already presented of the number of writs of *certiorari* issued to remove causes from the County Courts shewed an average of only 1 in 4,000, the total number of writs being 40, and the number of causes tried 400,000.—The County Courts Further Extension Bill then passed through committee, several clauses being added thereto *pro forma*.—The Commons Inclosure Bill went through committee.

##### COUNTY COURTS FURTHER EXTENSION BILL.

THURSDAY, Feb. 27.—Lord REDESDALE brought up the report on this Bill (with amendments).—Lord BROUGHAM moved that the Bill be re-committed. The first amendment remedied a defect which had been pointed out in the clauses respecting attorneys and attorneys' clerks, and their powers to practise in these courts. The second referred to the salaries of the judges of County Courts. At present, in numerous cases, in consequence of the increase of business caused by recent legislation, the salaries of these judges were far too low.—Lord BEAUMONT complained that there had been no opportunity yet given of discussing the clauses of this Bill.—He hoped that the bill would be re-committed.—Lord BROUGHAM replied that the Bill would of course be re-committed.—The amendments were then ordered to be printed, and the Bill was ordered to be re-committed.

#### HOUSE OF COMMONS.

##### CHANCERY REFORM.

##### PROSECUTIONS BILL.

TUESDAY, March 25.—In answer to Mr. DRYDEN, Sir G. GREY said, that clauses had been inserted in the Bill in accordance with what was understood to be the general sense of the committee. But as it was thought advisable that those clauses should be in the hands of members several days before the next stage of the Bill came on, he proposed to postpone the Bill till Wednesday week.

THURSDAY, March 27.—Lord J. RUSSELL moved for leave to bring in a Bill for the better administration of justice in the Court of Chancery. He began by stating the changes made in that Court since the period of the first appointment of a Vice-Chancellor, and the increase of business which ensued, the effect, he believed, of the addition to the judicial strength of the court. The state of business in that court in 1849 and 1850, in which, owing to the illness of Lord COTTENHAM, there was a considerable arrear, shewed how essential it was that the judges should not relax their exertions. In 1850 and 1851, when there were only two Vice-Chancellors, an accumulation of business took place; the number of causes, &c. on the first day of Michaelmas Term, 1850, being 772, and, on the first day of Hilary Term, 1851, it was 1,015. This accumulation, however, was very much owing to certain Acts of Parliament, and would be kept down by the appointment of an additional Vice-Chancellor. He then considered the functions of the Lord Chancellor, who, besides presiding in his court and in the House of Lords, was a member of the Cabinet, consulted upon political and constitutional questions, and likewise an adviser of the Royal family; and he stated the advantages and disadvantages attending the present functions of this great officer. He then detailed the various plans which had been proposed for changing the functions of the office. One was that there should be a permanent judge in the Court of Chancery, a permanent Lord President in the House of Lords, and a Lord Keeper, or Minister of Justice, connected with the Administration. However plausible such a proposition might be, he did not think this separation of the judicial and political functions of the office would be in practice beneficial, or that the objection to the union of those functions in the judge of such a court was well founded. He should be afraid that, if this plan were adopted, the country would lose the advantage



which it had enjoyed since the Revolution, of having, belonging to the Executive Government and presiding in the House of Lords, a man of the most eminent legal ability, without any equivalent gain. Another plan was to have a permanent judge in the court, detaching him from any duties in the Court of Chancery, and making him an appellate judge in the House of Lords. He owned that this plan had very great advantages over the preceding; at the same time he did not think a judge who presided in the House of Lords, who had no practice in any court, would possess sufficient weight and authority. A third scheme, proposed by Sir E. Sugden, contemplated an intermediate court of appeal, composed of the Vice-Chancellors; the objection to which was that, by depriving the several courts of their judges, the action of those courts would be paralysed. The bill went upon the foundation—first, that it was desirable to have more than one judge in the Lord Chancellor's court; secondly, that, considering the great wear and tear occasioned by the exercise of so many functions, it was desirable that the Lord Chancellor should be able to devote a greater portion of time to the questions before him. It proposed that there should be a court, to be called the Supreme Court of Chancery, or the Lord Chancellor's Court, in which should sit the Lord Chancellor, the Master of the Rolls, and one of the judges in the Courts of Law to be summoned from time to time; that any two of them should have the power of hearing causes, and that, in the absence of the Lord Chancellor, the other two judges should have the same power. The salary of the Lord Chancellor it was proposed to fix at 10,000*l.* leaving the retired allowance the same as now—namely, 5,000*l.* It was further proposed to vest the ecclesiastical patronage now administered by the Lord Chancellor in the Crown, to be exercised by the First Minister taking the pleasure of the Crown.—Mr. STUART observed that the proposal was entirely new, and suggested various objections to which he considered the plan was open. Although Lord J. Russell had declared it to be inexpedient to separate the judicial and political functions of the Lord Chancellor, the Bill would enable the business of the Court of Chancery to be transacted without any Lord Chancellor at all. He strongly objected to the transfer of the ecclesiastical patronage from the Lord Chancellor to the First Minister of the Crown.—Mr. ROUNDALL PALMER believed that the measure would not give satisfaction either to the Profession or to the suitors. If the Lord Chancellor was to be relieved from close attention to the details of the court, the Master of the Rolls, the only equity judge, must inevitably take his place, and what then would become of the Rolls Court? Such an interference with the business of any court tended to create delay. Mr. Palmer suggested other objections to the plan, not, he said, in a spirit of hostility, but with a sincere view of aiding the Government.—Mr. S. WORTLEY objected that the plan was defective in respect to the appellate jurisdiction in the House of Lords, where a case heard before the Lord Chancellor, the Master of the Rolls, and a Common Law judge, would be decided in the last resort by the Lord Chancellor alone.—Mr. HEADLAM protested against the closing of the Rolls Court, and thus reducing the judicial strength of the Court of Chancery. Leave was given to bring in the Bill.

## VICE-CHANCELLOR BILL.

On the report upon the appointment of a Vice-Chancellor Bill, Sir H. WILLOUGHBY objected to the amount of the retiring pension, and moved that it be reduced to 3,000*l.*—The ATTORNEY-GENERAL opposed the motion, on the ground that, if the retiring allowance was reduced, either the salary must be increased, or the public would lose the services of the most efficient persons.—Upon a division, the motion was negatived by 49 to 32.

## CHARITABLE TRUSTS.

WEDNESDAY, March 26.—Mr. MULLINGS wished to ask the right hon. gentleman the Home Secretary whether it was the intention of the Government to bring in any Bill in the present session with regard to charitable trusts?—Sir G. GREY.—Yes; I believe a Bill is prepared, and will be introduced into the other House of Parliament in a short time.—Mr. G. BERKELEY wished to hear from the right hon. gentleman in the chair what was the exact position of those hon. members who had notices of motions on the paper for that evening, with regard to the adjourned debate, as he understood the House had last night come to a resolution that that debate should take precedence of the notices.—The SPEAKER.—That those hon. members who had notices of motion on the paper would not be entitled to bring them on until after the first order of the day for the adjourned debate was disposed of.

## THE OFFICE OF MASTER OF THE ROLLS.

Lord J. RUSSELL, in answer to a question from Mr. W. Williams, said it was intended to preserve the office of Master of the Rolls, subject to any alteration Parliament might think fit to make with regard to the salary.—Mr. HUME wished to ask when the House might expect the proposed measure

of Chancery reform.—No answer was made to the question.

THE MAGISTRATE,  
AND PAROCHIAL AND MUNICIPAL LAWYER.

## Summary.

THE report of the memorable case of *Reg. v. Bird et Uxor*, 16 LAW T. 556, is the only one relating to this branch of the law contained in our last. Long as it is, it was necessarily much abbreviated. Of the judgments, those only of the Chief Justices are given *verbatim*; the others are stated shortly; and of the arguments there is but a fraction. To have given the case in full, would have occupied more than two entire LAW TIMES, to the exclusion of all other matters—a sacrifice which our readers would not desire, and the less necessary, because practitioners in Magistrates' and Criminal Courts can obtain the whole case, fully reported, with all the pleadings at the Assizes (without which the arguments and judgments are scarcely intelligible), and the other points incidentally raised and decided in the case, in the 1st part of the 5th vol. of *Cox's Criminal Law Cases*, which is almost wholly occupied with it, being a report of the proceedings at the Assizes; giving the indictments, plea of *autrefois acquit*, and replication; the arguments there; the arguments at both the hearings before the Criminal Appeal Court; and the judgment of all the judges *verbatim*;—indeed, it is the only full report of the case that has been, or can be, published.

And it is probable that the case will not rest where it is. The question is yet open to be tried, on a writ of error, whether the prisoners are not entitled to plead over, so as to be tried upon the second indictment. As it is, they have been punished *without trial*; and it will be a proper question for the judges to consider whether so monstrous and unjust a proposition is the law. It rests upon a single case only—all reason and propriety being against it; and the question will probably be submitted to the Court by a writ of error, if the costs of that remedy be not too great.

## REG. v. DADSON—16 LAW TIMES, 514, 560.

## TO THE EDITOR OF THE LAW TIMES.

SIR,—In your last number is stated the "actual point" in the above case. You are in error as to the *real* point in issue. You may more correctly state it in this way:—

Cutting wood in a coppice is a misdemeanor, and where there has been a previous conviction for a misdemeanor, it is a felony. A person has no right to discharge a gun at another who is only committing a misdemeanor; and though in this case the offence of cutting the wood was a felony, inasmuch as there had been a previous conviction against the party, but as such previous conviction was *not known* to the person shooting and attempting the arrest, he could not avail himself of such *legal* felony, and he must be dealt with as if such second offence was in fact only the misdemeanor. Dadson was sentenced to one day's imprisonment.—I am, Sir, yours, &c.

Pump Court, Temple.

F. J. S.

JOINT-STOCK COMPANIES' LAW  
JOURNAL.

## WINDING UP.

AN equal call of 200*l.* has been made upon each of some seven or eight contributories in the *Direct Exeter and Plymouth Railway Company*, who are such by reason of their having attended meetings as members of the provisional committee, and sanctioned the appointment and acts of the managing committee. A question being raised as to the extent of their liabilities, the call was delayed, that one of the cases might be taken to the Court for determination on appeal.

The question is important, but not difficult. Assuming that they were personally parties to the appointment of the managing committee, and attended meetings at which the reports of the managing committee were received, and otherwise recognised their acts, the managing committee became thereby the agents of the persons who so appointed them, and were authorised to contract debts on their behalf; and such persons would be clearly liable *pro rata* for the debts incurred within the scope of that authority, which would be construed to be a power to enter into all such contracts as were reasonably required for the execution of the object. If all were parties to the original appointment of the managing

committee, all will be liable, in equal proportion, for the whole of the debts incurred by such committee. But persons who joined *after* the appointment will be liable only for their proportions of expenses incurred from the period of their joining; and if any quitted the concern, after distinct notice of such abandonment to the managing committee, their liability would cease from the period of such notice.

It will be observed that this differs broadly from the case of a mere provisional committeeman, who had done no act in the management, but merely taken shares, for in this latter case there is neither the personal incurring of a debt, nor an authority given to others to contract debts on his behalf; whereas in the case now to be sent before the Court the liability arises from an *express authority* given to the managing committee to act on behalf of the appointers, and to incur the necessary costs of carrying forward the concern.

E. W. C.

PROCEEDINGS IN WINDING UP DURING  
THE WEEK.

(From our own Reporter.)

YESTERDAY the London and South Western Railway Company put in their replies to the interrogatories requiring them to enter into a detail of the share property in their possession belonging to Mr. Chadwick, Chairman of the Madrid and Valencia Railway.

The call of £200 a-piece upon the members of the provisional committee in the Direct Exeter, Plymouth, and Devonport Railway, is to be appealed against.

In the case of the Barbadoes Railway, a charge similar to that in the Madrid and Valencia is to be brought against the directors calling on them to appear and account for £9,039 received by them as deposit from the shareholders.

JOINT-STOCK COMPANIES.—According to the report of the registrar, the number of joint-stock companies provisionally registered in the year 1850 was 159, and of those completely registered 57. There had been no applications during the year for the enforcement of penalties for failure to register. By an order of the Lords of the Treasury, dated the 2nd of November, 1850, it was ruled that in lieu of five clerks, each with a salary commencing at 80*l.* and increasing 10*l.* yearly up to 150*l.* as then sanctioned, there should be one senior clerk with a salary commencing at 150*l.* and increasing 10*l.* yearly up to 200*l.* and three junior clerks, each with a salary commencing at 80*l.* and increasing 10*l.* yearly up to 150*l.* The clerks so appointed are—George Deane (senior clerk), Henry Tucker, Thomas Joseph Betty, and Devoy M'Mahon (junior clerks). The fees received at the Registration-office in London during the year amounted to 2,656*l.* and those received in the branch office in Dublin to 75*l.* making a total of 2,731*l.* The only joint-stock company returned as having become bankrupt during the year is that entitled "The General Commission, Ship, Loan, and Insurance Company."

BARBADOES RAILWAY.—On Tuesday Mr. Ainger, the official manager, and Messrs. Tucker and Sons, his solicitors, made their report on the state of this company's affairs, setting forth that by the accounts of the company the directors appear to have retained upwards of 900*l.* as remuneration for their services and for travelling expenses, being at the rate of twenty-two guineas for each meeting composed on an average of six or seven persons, some of the contributories alleging that such a charge exceeds the "reasonable remuneration" to which the directors were entitled under the deed of settlement. Similar objections are made to the payment of a sum exceeding 2,500*l.* to two of the directors who proceeded to Barbadoes to obtain the concurrence of the colonial authorities. It is also alleged that the directors took a larger deposit than by the Registration Act they were entitled to take. A charge is to be issued against the directors, similar to the one in the Madrid and Valencia Railway, calling upon them to account for the 9,039*l.* received in the shape of deposit, and compelling their personal appearance for the purpose of examination thereon.—*Daily News*.

DIRECT WESTERN RAILWAY.—On Tuesday, after hearing the statements of Messrs. Johnson, Son, and Weatherall, and of Messrs. Harting, the solicitors for the parties on both sides, his Honour Sir George Rose intimated his intention of reporting to the Court that it was expedient the affairs of this company should be wound up under the Act.—*Daily News*.

LONDON AND SOUTHERN RAILWAY.—On Thursday, a meeting was held before Sir George Rose, to consider the winding-up of this company's affairs. It appeared from the report of the official manager, Mr. Hutton, that out of the 20,000 shares allotted, only 85 had the deposit paid upon them, and that the principal claim, now outstanding against the

estate, was one of 852*l.* paid in pursuance of a judge's order by Mr. T. B. Batard, who was chairman of the company, to Mr. Bailey, engineer, for the plans and surveys; the object now sought to be obtained by Mr. Batard, who was the petitioner for winding up the company, being to compel his co-committeemen to pay their proportion of this sum. Messrs. Scott and Tahourdin, on behalf of Mr. Batard, contended that those members of the committee of management who were present when directions were given to the engineer, ought also to be held liable, and, after considerable discussion, the meeting was adjourned, his Honour intimating that he thought some method might be adopted for an adjustment of the payment as between Mr. Batard and his co-committeemen.

**CHILTERNHAM HOTEL COMPANY.**—On Thursday, his Honour Master Brougham, settled the list of contributories in this company, consisting of all those who had signed the deed. Mr. Roxburgh, counsel for Mr. Hutton, the official manager, estimates the liabilities at 20,000*l.*; and the assets, consisting of the hotel property, at 14,000*l.* leaving 6,000*l.* to be provided for by a call on the contributories. The call proposed is 30*l.* per share.—*Daily News.*

**ROYAL BANK OF AUSTRALIA.**—On Thursday a further meeting was held for the consideration of the question of the debenture holders, but the parties not being in a position to proceed, after a desultory discussion it was agreed to adjourn the consideration of the specific cases until those represented by Mr. Dobie, and which involve some 60,000*l.* shall first have been considered, it being thought that a decision in their case will govern a majority of the others.

**DOVER, HASTINGS, AND BRIGHTON RAILWAY.**—On Thursday Master Brougham proceeded with the settlement of the contributory list, and struck out the name of Mr. Frewen, whom it was sought to make liable as a provisional committeeman. Several other cases were gone into, but the presence of the secretary being deemed necessary, the meeting was postponed generally for that purpose.

**DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY.**—On Saturday a meeting was held before Sir William Horne, to make a call of 200*l.* each upon the following contributories in class 2, to pay off liabilities: Messrs. G. Arden, S. Davies, J. Hoppood, S. Maunder, T. Worthing, E. Williams, R. Arscott, J. S. Deudney, and Captain J. Williams; these gentlemen having been placed upon the list as members of the provisional committee, who had attended meetings at which the managing committee were appointed, received their report, approved and adopted it at meetings of the provisional committee, and passed resolutions as to the mode of discharging the debts that were incurred. It appearing, however, after considerable discussion, that no case precisely of this sort had been before the courts above, and it being thought desirable that a judicial construction as to liability consequent on such acts should be obtained, the call was adjourned, on an arrangement that an appeal shall be taken in some one selected case, to try the question, on the first seal day of next Term.—*Daily News.*

**LONDON AND BIRMINGHAM EXTENSION RAILWAY.**—On Friday, after considerable discussion before Master Blunt, it was agreed that the claim of Mr. Prichard, the engineer, of 5,000*l.* should be referred to the arbitration of counsel. There are between 15,000*l.* and 20,000*l.* of claims disputed to be brought in by Mr. Croysdill, the official manager, and his solicitors, Messrs. Hanalip and Manning.—*Daily News.*

**HULL PUBLIC BATH COMPANY.**—On Friday Sir Wm. Horne placed on the list, with five exceptions, eighty shareholders in class 2, of contributories who had agreed to take one share each, on production of the share certificates which had endorsed on them that the parties had paid the first and second call. The five cases in question were excused on the production of affidavits stating that the payments made by the parties were in the nature of "charitable donations." The whole of the third class having been expunged, the list of contributories is now settled, and the next matter will be a call.—*Daily News.*

**SEA, FIRE, LIFE ASSURANCE COMPANY.**—On Friday a claim of Mr. C. T. Pratt, in respect of a bill of exchange for 300*l.* was brought in to be allowed under this estate. It was opposed by Galeworthy, solicitor to the official manager, Mr. Ernest, on the ground of informality on the face of the bill, and its being negotiated by Mr. Augustus Collingbridge, the managing director of the company (by whom it was drawn in his own favour) after the company had failed. His Honour intimated that he should send the claim to be tried at common law.—*Daily News.*

**NATIONAL DISINFECTED AND DRY MANURE COMPANY.**—On Wednesday, at the instance of the official manager, Mr. Harding, a meeting was held, before Master Farrer, to declare a further call of 2*l.* per share on all the shareholders included in the lists of contributories. The contributories in attend-

ance took several objections, both special and general, against the call being made at present, and ultimately the Master directed that it should be declared, subject to one of the contributories (Mr. Alexander) shewing cause on Monday next against its imposition.—*Ibid.*

**EASTERN COUNTIES JUNCTION AND SOUTHERN RAILWAY.**—On Monday a meeting was held before Master Sir William Horne, to consider the cases of some provisional committeemen, which had been adjourned from the last occasion. In the case of Mr. North, whom the official manager sought to have placed on the list in respect of 100 shares, Mr. Glaspe, who represented the former, contended that the name of his client should be struck off, on the ground that he had applied by letter for 100 shares of 20*l.* each, whereas it appeared that he had been allotted that number at 25*l.* each share. His Honour, considering the objection insurmountable, directed the name of Mr. North to be expunged from the list. The other cases taken were again postponed, and none of them presented any features of general interest.—*Chronicle.*

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]

**Sligo and Shannon Railway Company.**—To settle, on 14th April, the list of members and contributories so far as relates to class A.; and on the 15th April to settle list as to all persons therein not included in class A.—*Farrer.*

**Tontine Life Assurance Company.**—Call of 30*s.* per share, by March 29.—*Horne.*

#### REAL PROPERTY LAWYER AND CONVEYANCER.

A. GAVE an estate to trustees on trust (subject to an annuity to the widow) to assign same equally between his eight children when they should attain the age of twenty-one; in the meantime to pay to his wife, or otherwise to apply, the proceeds of their respective shares towards their respective maintenance and education; and in case of the death of any one under age, that share, with the accumulation, to go to the children attaining the age of twenty-one. The mother had maintained the children, and it was held that she was entitled in respect thereof to receive the rents and profits of the estate without accounting for the same. The principle to be deduced from this case was thus stated: "that where the interest of children's legacies is given to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children." Another will case is that of *Mortimer v. Hartley*, 16 Law T. 551. The devise was to testator's son J.:—"I will that my son J. being attained twenty-five years of age, be let into possession of all my property, real and personal, which remains on this express and unalterable condition—that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate, &c. But mark, if the trustees do not sell the coal, but mortgage the estate, I empower J. or his heirs to sell it to pay off the mortgage, but not otherwise; and in like manner I debar him and his heirs from selling or transferring those cottages, &c. it being the desire that they be kept in the W. name. 12th. If it should happen that my son J. die without leaving lawful issue, it is my will that my daughter Ann shall have his share, subject to the same restrictions, &c. 13th. Now if it shall please God to take away both Ann and John under age, and without leaving lawful issue, I give and bequeath to my brother Joseph W. and his heirs for ever, all those," &c. J. attained twenty-five and died without issue. Ann died an infant. It was held that Joseph took an estate in remainder, and that the devisee of J. took no estate, the first gift to him being deemed an estate tail, and not an estate in fee:—

The debate on the *Registration of Assurances Bill* is much too long to be extracted here; but some points of it will be useful for reference. Lord CAMPBELL introduced it with a very interesting and learned review of the experience of the Registration of Deeds so far as it had been partially adopted in this country. He pointed out the present difficulties and expenses attendant upon an investigation of title.

And in considering this subject one could not avoid noticing the heavy expenditure incurred in negotiating a mortgage, mainly caused by there

being no system of registering deeds. When a sum of money was to be borrowed, an abstract of the title of the property on which money was to be lent was made for the assurance; this proceeding was attended with an expense varying from four to seven per cent. and after it was incurred the landed owner was still at the mercy of the insurance office, which might either refuse to lend or extort a higher degree of interest than was at first contemplated. It was much better for the proprietor to pay the price demanded than again subject all his title-deeds to inspection. The same thing was to be observed with land, where the same set of deeds represented property in which a variety of persons had different interests; and this state of things may often have existed without a subdivision of property existing. In these instances, if a person wanted to sell his interest, the inconvenience of not being able to get his deeds was enormous. They were sometimes lost. Yet if he wanted to sell his property he was bound to give attested copies of the deeds, and to produce them when required; and, if he did not do so, he was liable to heavy damages. The expense of these attested copies was enormous, which would be entirely avoided if there were a regular depository where all deeds were required to be registered. When he was on the commission of inquiry into the state of the burdens on landed property, a case was brought before the notice of the commissioners, in which a gentleman sold a small property, and he entered into the usual covenants that he would give attested copies of the deeds, and produce the originals. He soon found this to be an alarming burden which he had taken upon himself. A sheriff's attorney opposed him, who filed a bill in Chancery to compel him to produce the attested copies. Upon examination it was found that they would amount to more than the whole sum of the purchase-money. The generous attorney then consented to waive all right to the attested copies, if the gentleman waived all right to the purchase-money—a proposition to which the latter was obliged to consent.

His Lordship then stated the outlines of the proposed measure:—

The Bill proposed that there should be one registration-office for the whole kingdom of England and Wales. He had no doubt that was greatly preferable to having a number of provincial offices. When he was a member of the Lower House of Parliament, there was an offer made to him that if he would allow his Bill to be changed into a Bill for establishing registration offices in every county in the kingdom, all opposition would be withdrawn. He objected to that proposition for many reasons; for not only would the expense be infinitely greater, but the business would not be nearly so well managed. There would not be the same uniformity of system. They must either have large districts, and then the inconvenience was just as great as if they had but one, or they should have small districts, and then the number of officials would be multiplied to such an extent as to leave no chance of uniformity besides encumbering the country with a heavy expenditure. Therefore, the Bill proposed that there should be but one registration-office. Then with regard to the mode of registry. In Yorkshire, in Middlesex, and in Ireland, the registration is made by giving a short synopsis of the deed, stating the parties to it, and sometimes the protective part of the deed. This was found ineffectual, and did not answer the whole purpose of registration. It did not give the necessary or required information. The Bill required that the deed itself, or a copy of it, should be deposited. This would be less expensive, as a copy could be made by any person, whereas an abstract would require the services of a professional man. The next point was with regard to an index. Although there was to be but one registration-office for all England and Wales, there should not be only one index. The country should be divided into districts, and it was suggested that the poor-law unions should be adopted as the basis of that division. Then came a very important point, on which the commissioners were divided, namely, the mode by which the entries should be made in the index, in order to secure an easy reference to the exact deed. The bill which he had introduced in the Lower House was chiefly drawn by one of the most accomplished and able lawyers in the profession—Mr. Duval. He would relate to their Lordships an anecdote which was illustrative of his entire devotion to his professional pursuits. A gentleman one day said to Mr. Duval, "But do you not find it very dull work poring from morning until night over those dusty sheep skins?" "Why," said the other, "to be sure, it is a little dull, but every now and then I come across a brilliant deed, drawn by a great master, and the beauty of that recompenses me for the weariness of all the others." Mr. Duval invented a system for the indexing of deeds. Before his time the only mode of reference was by means of an alphabet of the names of the grantors, but this was found to be extremely unsatisfactory. And where, in Middlesex, they had 100 Joneses and Smiths executing deeds of all descriptions every day,

the only way you could be quite sure that Jones or Smith had not executed a deed prior to yours was by looking at every deed that Jones or Smith ever made. To obviate this difficulty Mr. Duval devised the following plan:—The first deed affecting the property was put on the register, and to that he gave a symbol, which symbol was put upon the index, and when you wished to know what deeds were made affecting the property you looked to the symbol, and you found that they were all registered under that symbol. There was this difficulty—to identify the deed so symbolized on the index. Although he concurred in the value of the plan, he had some misgivings respecting it, and he had a longing after maps. It was then objected that efficient maps were not easily obtainable, and would be very expensive. That difficulty had been greatly supplied by the Ordnance survey. Maps had been made for the Tithe Commissioners, and there had been also maps made for the poor-law assessment valuation. In fact, there were public maps for the larger portion of the land of the kingdom. Inasmuch as this Bill proposed that maps should be used instead of the symbol, he considered it was an improvement upon the former. It was true that Mr. Humphrey, whom his noble friend upon the woolsack had promoted to a Mastership in Chancery—which appointment, he begged to say, met with the unanimous approbation of the profession, and was an earnest of the manner in which his noble friend would bestow his patronage—it was true that he and Mr. Browne were averse to this arrangement, but, having paid a great deal of attention to the subject for many years, he was a convert to the maps. This public map should be divided into compartments, and then there would be a corresponding reference in the index to those maps. All the person making inquiry had to do was to go to the map of the district, and see the marks of the land, and then go to the number of the index, which would tell him whether there had been any deed registered affecting the land. What he was afraid of in Mr. Duval's plan was that there was nothing to connect the deed symbolised with the deed conveying interest away in the land. But now they had the map marked with the number of the land to be conveyed, which fully and at once identified the property. The next great question was with respect to notice. At present the law provided that if a person to whom notice has been given that a deed affecting the property has not been registered, that notice is held sufficient to prevail. He believed that to be a great evil. No such custom existed in France, nor did it prevail in Scotland. But in England Lord Hardwicke had laid it down that a person who claimed under a registered deed was to have that claim postponed in favour of a prior deed unregistered, if it could be shown that notice had been given of its non-registration. More uncertainty and more litigation had been caused by this doctrine than almost by any other, and the rule, therefore, had been laid down that no person should be affected by any deed which is not registered, and that the doctrine of documentary notice shall be exploded. With regard to the general objections to the Bill, he would shortly notice them. In the first place it was said this was a great innovation. On the contrary, it was a return to the ancient simplicity of the common law of England. Besides, this custom prevailed in some counties in England and in Scotland, and had been found, notwithstanding its defects, to be most beneficial in Ireland. Almost in every country in the world they had a register of some kind or another, and in no country had it been found to work prejudicially. Then, with regard to the expense of a registry-office, he remembered it had been proved in the committee, that for a sum of 20,000*l.* there might have been an iron building erected which would hold all the deeds registered in a century. Then, ten or fifteen shillings would defray all the expenses of the transmission of the deed to London, which was a small sum to pay for the enormous advantages which accrued therefrom. It had never entered into their imagination to make this Bill retrospective; and with regard to the exposure which it was alleged would be consequent upon this registry, all transactions such as mortgages were generally pretty well known already in the neighbourhood of the property where they took place; but means could be taken to prevent impertinent curiosity.

Lords BROUGHAM and BEAUMONT approved the Bill.

Lord CRANWORTH promised his cordial assistance in perfecting and passing it into a law. His lordship added:—

The observation he wished to make had reference to what was said, most truly, by his noble and learned friend, that this was not a matter of such legal interest that any member of their lordships' House might not perfectly apprehend it. It was important that that should be understood, in order to the eventual success of the measure. It was, perhaps, not altogether useless to those members of their lordships' House who were not of the legal profession, to point out in a word the advantage of

this Bill to them. For the future, if a register of assurances was established, the proposition which would have to be established on every sale or mortgage, would be a positive and not a negative one. Every man disposing of property had now to prove, negatively, that there were no other deeds than those he produced affecting the title; but, under the practice which this Bill sought to introduce, that proposition would be established positively. Now, that was a very simple proposition, and one which every member of their lordships' House ought constantly to bear in mind in looking at the Bill before them.

The Bill was read a second time and referred to a select committee.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—A measure for the Registration of Deeds will be found of great public security, and this every practitioner must allow. But in order to make it really useful it should unquestionably be a county or district registry,—a metropolitan register would not only be very expensive, but, in point of utility, next to useless.

I think it must be admitted that the person who is called upon to make searches should have some previous knowledge of the title in respect of which the search is to be made. If this be conceded, then it becomes obvious that a purchaser could not afford to pay the London agent, and his country attorney also, for perusing the abstract; and it is equally clear the country attorney would not feel comfortable in delegating to his agent a duty so important, and himself retain the personal responsibility which attaches to him in seeing that his client has a good title given him.

If each county had its register, and the larger counties had two district registries (as there are two now in Yorkshire), an attorney would in that case generally arrange to make two or three searches as to different titles at the same time, and, in like manner, register deeds, apportioning his expenses between his clients, which, I believe, is frequently done in Yorkshire. I am, Sir, yours, &c. A. B.

#### NINTH REPORT OF THE COPYHOLD COMMISSIONERS.

Copyhold Commission, Dec. 30, 1850.

SIR,—We have the honour of presenting to you our ninth report and annexed list of enfranchisements, which have been completed, or nearly completed, since our last report. They exceed in importance and extent the enfranchisements effected in any preceding year since the commission was established, and we have reason to suppose that many others are in progress; but the measure will not get into complete operation while the prospects of further immediate legislation on the subject are doubtful.

We believe that a very general wish exists for the granting additional powers and facilities to a complete enfranchisement of all copyhold lands.

Without alluding to questions doubtful or likely to be disputed, we may mention two points which would probably be easily conceded.

The first is the allowing commutations and enfranchisements to be effected for money rent-charges. By the existing Acts they can only be effected for corn rent-charges.

The other point is to allow three-fourths of the tenants in number and value in a manor, with the consent of the lord, to bind the remaining fourth in enfranchisements. This power has already been conferred on the lord and tenants in commutations.

The concession of these points would, we believe, considerably increase the number of enfranchisements.

On wider measures for compulsion, we do not think it necessary to add anything to the substance of our former reports.

We have the honour to be, Sir,

Your obedient and faithful servants,

WM. BLAMIRE,

T. WENTWORTH BULLER,

RD. JONES.

The Right Hon. Sir G. Grey, Bart. M.P. &c.

#### REPORT OF THE TITHE COMMISSIONERS.

Tithe Commission Office, Feb. 24, 1851.

SIR,—It is our duty to report to you the progress of the Commutation of Tithes in England and Wales to the close of the year 1850.

We have received notice that voluntary proceedings have commenced in 9,634 tithe districts; of these notices one was received during the year 1850.

We have received 7,070 agreements, and confirmed 6,778; of these two have been received and two confirmed during the year 1850.

6,966 notices for making awards have been issued, of which 213 were issued during the year 1850.

We have received 5,529 drafts of compulsory awards, and confirmed 5,260; of these 173 have

been received, and 218 have been confirmed during the year 1850.

We have received 11,424 apportionments, and confirmed 11,246; and of these 320 have been received, and 333 confirmed during the year 1850.

In 12,038 tithe districts, as will be seen from the above statement, the rent-charges to be hereafter paid have been finally established by confirmed agreements or confirmed awards.

We have in our possession agreements and drafts of awards as yet unconfirmed, which will include 561 additional tithe districts, and make a total, when completed, of 12,599 districts, in which the tithes will have been commuted.

652 altered apportionments were made by the Tithe Commissioners up to the 31st December, 1850, of which 522 were confirmed.

At that date exchanges of glebe lands were effected in 358 places, and 39 such exchanges were in progress.

At the close of 1850 we had confirmed 12,344 distinct mergers of tithes.

As the term for which this commission has been renewed is more nearly approached, it becomes evident that although the great work of commutation is substantially achieved, there must remain for a time unfinished portions of it, which must be completed before a quieting Act finally extinguishing all tithe can properly be passed.

It is also clear that powers connected with tithes and rent-charges must exist somewhere at the expiration of the present Tithe Commission. Of these powers some must be permanent, some temporary.

Of the work remaining finally to complete the commutation, and prepare a quieting Act, it may be found expedient, to prevent delays, agitation, and expense, to deal with a part summarily instead of by those regular processes by which the bulk of the tithes have been commuted.

It may be useful to say a few words on each of these heads of future arrangements. The powers that must permanently exist relate—

1. To the custody and use of documents and maps, and a legal power of giving attested copies of them.
2. To re-apportionments on the division of estates, and to the separation of gross rent-charges into distinct portions, when the interest in such rent-charges becomes divided among two or more persons.
3. To the creation of extraordinary charges for hops and market gardens.
4. To the redemption of small rent-charges.
5. To the setting out and defining glebe where its position and boundaries are unknown, and to exchanging ecclesiastical lands and rent-charges.
6. To authorizing mergers where lands and rent-charges now held separately come into the same hands.

The powers which will be necessary only for a time relate to—

1. The sale of tithe barns and buildings.
2. The taxation of valuers' bills, and the giving of authority to collect them.
3. A power of confirming such apportionments as cannot be got in before the extinction of the present Commission.
4. To the completion of cases now litigating in the Superior Courts.

5. To the applying the powers as to old and imperfect agreements for giving land for tithes, created by 5 & 6 Vict. c. 54, s. 7, to the case of a few enclosure awards, of which the arrangements have not been legally completed, if Parliament shall be pleased to extend those powers for that purpose.

In some cases, where the lands and tithes are reported to us to belong to the same person, we find it impossible to get in mergers; and if we are to map lands and apportion rent-charges in such cases, great agitation would be created, and a vast unnecessary expense incurred. Perhaps it might be advisable to merge the tithes by Act of Parliament in such cases, reserving the rights of all parties interested in the tithes at the time. In a very few cases, where different parties have interests in the tithes and in the lands, some litigation might follow; but in most, even of these cases, after full notice, this litigation would proceed from the neglect of the parties, and be a much less evil than the compulsory commutation and apportionment of the whole of such tithes.

In another class of cases minute rent-charges must be established, which it will be probably found impossible to persuade the parties to redeem or apportion voluntarily, and which will create disproportionate burthens if they are apportioned compulsorily. For instance, the township of Great Claybrook, in the county of Leicester, consists of 1071 acres, and contains ninety-eight houses; the only tithes remaining to be commuted are the tithes of pigs, worth 20*s.*; and the tithes of a mill, worth 5*s.* To establish a rent-charge of 25*s.* and to proceed by map and apportionment to finish the commutation would be a harsh and burthensome proceeding.

There are apparently 100 cases of like character in the North of England, in which it would be impossible to complete a formal commutation at an expense amounting to less than from fifty to 100

years' purchase of the annual value of the rent-charge; and of this the expense to the public would amount to a considerable proportion.

It is true the landowners might redeem these rent-charges; but where they are numerous, we find it impossible to persuade them to do so.

In such cases we think the rent-charges might, in the first instance, be charged on the parish rates.

It might be made the duty of the parish officers to call a meeting, and attempt to get the parties to agree to a voluntary apportionment, to be enrolled in the parish books; and if such agreement could not be obtained, the overseers might call magistrates to apportion and make a like enrolment, and thus the enormous expense of maps and all the regular processes of apportionment would be avoided; or it might be preferable that in cases of such trifling amount the rent-charge should be compulsorily redeemed.

The redemption might be fixed at twenty-four years' purchase on the sum awarded, and the money might, in the first instance, be made payable by the overseers and churchwardens of the parish, who might be directed to make a rate and levy the amount upon the parties, giving dissentients a right of appeal to the magistrates of the district.

These are rather rough measures, though we believe them to be justifiable.

What we have next to recommend would perhaps smooth the operation, or at all events greatly reduce the number of cases.

The final consummation of the commutation must be an Act declaring tithes to have ceased to exist, and forbidding courts of justice to entertain claims for them.

We do not think this should be hastily done.

When the Tithe Commission expires, most of its powers should be maintained in some hands.

Full notice should be given by Parliament, that after a reasonable period, perhaps three years, all claims to tithe would be annihilated; and towards the end of that period, the mergers and small rent-charges remaining, might, without tenable ground of complaint, be dealt with in the summary manner we have pointed out.

There are a few, perhaps not more than one or two, cases of small acreable moduses, which we are of opinion should be left as they are, with an option of future redemption.

We have the honour to be, Sir,

Your very obedient servants,

WM. BLAMIRE,

THOMAS WENTWORTH BULLER,

RD. JONES.

To the Right Hon. Sir G. Grey, bart. M.P. &c.

## THE MERCANTILE LAWYER.

### Summary.

A QUESTION of considerable importance in Bankruptcy has just been decided in the Court of Review. In *Ex parte Dornford*, 16 Law T. 553, it was held, that upon the question of granting the bankrupt his certificate, the conduct of the trader, previous to the passing of the Bankruptcy Consolidation Act, in 1849, in the trade in respect of which he is subsequently made a bankrupt, may be taken into consideration. The judgment, which is extremely elaborate, examines what acts of the bankrupt are to be considered as "conduct as a trader," within the meaning of that Act. In *Re Neal*, 16 Law T. 556, it was held, that where the certificate had been suspended, and the bankrupt died before the time for granting it had arrived, the representatives of the bankrupt must apply for it, and that the fact of the death should appear on the certificate; and in *Re Dennis*, 16 Law T. 556, it was held, that on an adjudication against an uncertificated bankrupt, new assignees should be chosen.

From the Admiralty Court we have a report of a case of *salvage*. In *The Henry*, 16 Law T. 553, it appeared that the salvors had agreed to assist a vessel for a stipulated sum. Afterwards they refused to accept it, on the ground that the master had misstated to them the value of the cargo. But, inasmuch as there was no evidence of intentional fraud in the matter, the agreement was held to be binding. An important principle was also laid down by the Court thus:—"I cannot assent to the proposition that by the value of the cargo the salvors are to determine the amount of the agreement. . . . Salvors are not entitled to make an agreement on any other grounds than these: the extent of danger to which the pro-

perty to be salvaged is exposed, the degree of labour they will have to undergo, the risk to which they themselves may be exposed, and the length of time to be occupied; but they are not to speculate on the value of the cargo."

### BANKRUPTCY.

A PARLIAMENTARY paper on this subject, moved for by Mr. Milner Gibson, presented to the House of Commons, and ordered to be printed on the 17th July last, has just been delivered. It is an abstract of the expenses in the distribution of the property of bankrupts in the district courts, shewing the gross claims proved, gross assets realised, total charges, amount ordered to be divided, and the amount of remuneration paid to each of the present official assignees, distinguishing expenses of offices, clerks, &c. The period for which the list of bankruptcies are given is from January 1848, to August 1849.

**BIRMINGHAM.**—In the department of Mr. James Bittleston, official assignee, 60 cases: gross claims proved, 121,671l. 6s. 2½d.; gross assets realised, 23,733l. 16s. 9½d.; total charges, 6,072l. 15s. 5d.; expenses of offices and clerks, 5,900l.; net amount of this official assignee's remuneration from 11th Nov. 1842, to 25th March, 1850, 3,522l. 11s. In the department of Mr. James Christie, 77 cases: gross claims, 243,914l. 3s.; assets, 35,501l. 15s. 8d.; charges, 19,247l. 18s. 5d.; divided, 6,721l. 2s. 2d.; office expenses, 5,406l. 13s. 4d.; remuneration for six years and ten months, 10,704l. 12s. 9d. In the department of Mr. Richard Valpy, 97 cases: gross claims, 495,090l. 18s. 8d.; gross assets, 178,444l. 14s. 1d.; charges, 29,321l. 14s. 3d.; divided, 53,877l. 14s. 11d.; office expenses, 6,000l.; paid to this assignee to 31st August, 1849, 4,913l. 11s. In the department of Mr. Whitmore, 90 cases: gross claims, 106,181l. 8s. 6d.; gross assets, 33,367l. 18s. 3d.; charges, 28,995l. 19s. 4d.; divided, 7,229l. 16s.; office expenses, 2,400l.; remuneration from January 1848 to August 1849, 1,039l. 19s. 8d.

**BRISTOL.**—In the department of Mr. A. J. Acraman, 71 cases: gross claims, 120,144l. 10s. 3d.; assets, 28,533l. 1s. 10d.; charges, 25,380l. 17s. 11d.; divided, 9,821l. 9s. 2d.; office expenses, 2,400l.; remuneration, 1843 to 1847, 2,895l. 16s. 3d. In the department of Mr. T. R. Hutton, 73 cases: gross claims, 91,141l. 9s. 5d.; assets, 21,205l. 6s. 2d.; charges, 7,409l. 19s. 11d.; divided, 4,700l. 10s. 3d.; office expenses, 4,355l.; remuneration from 1843 to August, 1849, 3,077l. 13s. In the department of Mr. E. M. Miller, 86 cases: gross claims, 564,667l. 3s. 11d.; assets, 29,387l. 4s. 11d.; charges, 24,400l. 0s. 10d.; divided, 8,628l. 1s. 7d.; office expenses, 2,400l.; remuneration from 1843 to 1847, 3,661l. 6s. 7d.

**EXETER.**—In the department of Mr. F. Herniman, 49 cases: gross claims, 250,403l. 6s. 10d.; assets, 190,529l. 9s. 6d.; charges, 17,927l. 11s. 6d.; divided, 94,604l. 17s. 9d.; office expenses, 400l. per annum; remuneration from December, 1842, to 31st December, 1847, when an annual division between the two official assignees of this district took place, 2,715l. 14s. 8d. In the department of Mr. H. L. Hirtzel, 63 cases: gross claims, 201,470l. 2s. 1d.; assets, 50,231l. 1s. 3d.; charges, 14,627l. 3s. 3d.; divided, 33,216l. 3s. 5d.; remuneration from 1842 to 1847, 4,470l. 11s. 2d.

**LEEDS.**—In the department of Mr. T. Carrick, 18 cases: gross claims, 31,009l. 13s. 3d.; assets, 7,987l. 1s. 8d.; charges, 3,889l. 1s. 7d.; divided, 4,758l. 11s. 1d.; remuneration from 1st June, 1848, to 1st August, 1849, 33l. 13s. 3d. In the department of Mr. H. P. Hope, 62 cases: gross claims, 248,386l. 4s. 3d.; assets, 38,567l. 4s. 8d.; charges, 17,628l. 14s. 6d.; divided, 18,985l. 3s. 4d.; office expenses, 3,500l.; remuneration, from November 1842 to 1849, 6,372l. 12s. 2d. In the department of Mr. G. W. Freeman, 47 cases: gross claims, 203,723l. 0s. 1d.; assets, 274,576l. 6s. 1½d.; charges, 8,830l. 7s. 5d.; divided, 17,511l. 10s. 5d.; office expenses, 4,900l.; remuneration from 1843 to December 1849, 7,172l. 14s. 9d. In the department of Mr. G. Young, 72 cases: gross claims, 433,825l. 7s. 7½d.; assets, 64,825l. 12s. 3d.; charges, 16,007l. 4s. 2d.; divided, 21,805l. 11s. 6d.; office charges, 3,900l.; remuneration from 1843 to December 1849, 6,996l. 2s. 10d.

**LIVERPOOL.**—In the department of Mr. W. Bird, 53 cases: gross claims, 337,815l. 12s. 9d.; assets, 129,875l. 3s. 6d.; charges, 10,999l. 18s. 3d.; divided, 21,299l. 18s. 3d.; office charges, 3,669l. 8s. 1d.; remuneration from 1842 to 1849, 6,096l. 2s. In the department of Mr. J. Cazenove, 64 cases: gross claims, 1,324,857l. 15s.; assets, 1,051,760l. 12s. 7d.; charges, 18,134l. 11s. 11d.; divided, 25,016l. 3s. 1d.; office expenses, 3,488l. 3s. 3d.; remuneration, 1843, to 31st July, 1849, 5,437l. 0s. 6d. In the department of Mr. C. Morgan, 50 cases: gross claims, 477,053l. 12s. 7d.; assets, 369,392l. 19s. 4d.; charges, 17,341l. 19s. 7d.; divided, 21,783l. 4s. 9d.; office expenses, 2,921l. 1s. 8d.; remuneration, January 1844 to August 1849, 5,314l. 5s. In the department of Mr. C. Turner, 63 cases: gross

claims, 1,688,888l. 14s. 9d.; assets, 647,786l. 12s. 2d.; charges, 76,219l. 11s. 7d.; divided, 80,471l. 9s. 7d.; remuneration charged from January 1848 to August 1849, 4,251l. 4s. 6d.

**MANCHESTER.**—In the department of Mr. J. Fraser, 68 cases: gross claims, 390,050l. 7s. 3d.; assets, 42,741l. 17s. 7d.; charges, 18,135l. 15s. 8d.; divided, 48,155l. 2s. 3d.; office expenses, 2,841l. 11s. 7d. In the department of Mr. J. S. Pott, 68 cases: gross claims, 123,479l. 18s. 4d.; assets, 42,120l.; charges, 20,414l. 16s. 9d.; divided, 16,609l. 12s. In the department of Mr. R. P. Hobson, 125 cases: gross claims, 1,465,148l. 11s. 7d.; assets, 275,986l. 16s. 5d.; charges, 63,050l. 19s. 3d.; divided, 184,087l. 12s. 3d.; office expenses, 1,707l. In the department of Mr. J. S. Pott (No. 2), 16 cases: gross claims, 1,878,461l. 19s. 8d.; assets, 136,537l. 13s. 9d.; charges, 23,269l. 9s. 7d.; divided, 112,882l. 12s. 9d.; office expenses, 840l. (A division of the emoluments between these official assignees having some time since been determined upon, a return of their net remuneration is not given.)

**NEWCASTLE-ON-TYNE.**—In the department of Mr. T. Baker, 136 cases: gross claims, 221,131l. 6s. 4d.; assets, 59,328l. 12s. 7d.; charges, 21,906l. 15s. 8d.; dividend, 21,132l. 3s. 3d.; office charges, 6,623l. 19s. 7d.; remuneration from November, 1842, to 31st August, 1849, 7,641l. 19s. In the department of Mr. J. Wakley, 146 cases: gross claims, 690,715l. 5s. 5d.; assets, 61,692l. 3s.; charges, 21,615l. 6s. 7d.; dividend, 30,832l. 14s. 6d.; office expenses, 4,017l. 15s. 9d.; remuneration from February, 1844, to the 31st August, 1849, 4,065l. 3s.

The return therefore shews that in these district courts there were, between the 1st January, 1848, and the 31st August, 1849, 1,654 cases investigated, the gross amount of claims proved being 11,699,231l. 18s. 9d.; gross amount of assets realised, 3,794,113l. 3s. 8d.; total charges, 517,352l. 6s. 9d.; and the amount divided, 853,203l. 17s. 4d.

## COUNTY COURTS.

### Summary.

LORD BROUGHAM has introduced into his County Courts Extension Bill so many improvements, that it has become almost a new measure. Among them are some which we took the liberty of suggesting to his Lordship, who received those suggestions in a manner the most kindly, gave them attention, and has embodied them into his Bill, with others which are equally calculated to improve the practice of the Courts, and to raise their character and position.

The first amendment which we submitted to his lordship, and which he has adopted, is that of a provision for professional remuneration. We represented to his Lordship the extreme injustice of fixing a fee of a few shillings for each case, without reference to its length or difficulty, and its practical worthlessness for any purpose of protecting clients, its sole effect being to throw the costs of a suit upon the injured instead of the injurer. In accordance with our suggestion, his Lordship proposes to empower the judges of the County Courts to frame a scale of professional fees to be taken in the County Courts, by which the costs of actions above 20l. are to be taxed by the County Court clerk. We proposed that this scale of fees should extend to all disputed cases, and all suits above 10l.; but his Lordship has preferred the higher limit.

A second suggestion which we ventured to intrude upon his Lordship he has also adopted, namely, to require that in all cases in which a claim is disputed, the defendant shall give notice to the clerk, who shall apprise the plaintiff of it, that he may come prepared to prove his claim, and that in the absence of such notice judgment shall go by default, with power to the Judge to adjourn upon terms, should he be of opinion that the merits of the case require time to be given to the defendant, and also to prevent surprise. This will put an end to one of the greatest inconveniences of the County Courts, the necessity for a plaintiff proving his debt, or at least coming prepared to prove it, often at great cost, although it is not disputed.

A third proposal was, that defended causes should be taken at courts held specially for them, so that the Profession might be enabled to attend and form a regular Court, without having, as now, to sit out the hearing of a hundred undisputed cases.

LORD BROUGHAM also proposes that in case of a new trial, the venue should be changed, so that the cause should not be heard again before the same judge; and a judge of the Superior Courts is to be empowered to change the venue in any action in the County Court, on good cause shewn.



Another extremely important addition is to be made to the jurisdiction, and which will give universal satisfaction. At present there is no remedy for the owner of title rent-charge! but distress. A clause has been introduced into the Bill, giving to the County Courts jurisdiction for the recovery of such rent-charge, to the extent of 50l.

We very much regret that Lord BROUGHAM has not seen fit to yield to the earnest representations that have been made to him from many quarters, and give to the County Courts an *original* equity jurisdiction, which is more wanted than all other law reforms put together. Without stating reasons, he declined to take this course "for the present." But as it would certainly require to be effected by a measure specially devoted to the subject, and the framing of which would demand a great deal of deliberation, we hope that it is this difficulty alone which induces the delay, and that Lord BROUGHAM's attention will be immediately directed to the subject, with a view to legislation, in the next session.

His Lordship proposes the abolition of the Local Courts that exist in various parts of the country, with due provision for compensations, &c.

It seems that he persists in the project for Courts of Reconcilements, but, as we have already observed, they will be harmless, because they are not likely to be resorted to.

The plan for *professional remuneration* being of the utmost moment to our readers, we give it in his Lordship's own words:—

He was anxious, however, to take steps which might prevent any loss to the Profession as much as possible, and to check its going further than was absolutely necessary. A clause had been most improperly inserted in the County Courts Bill of 1846, of which he was not aware till lately, enacting for the first time that no barrister should appear in court unless instructed by an attorney; and lately an attempt had been made to follow up this in one of the courts at Westminster; but the Lord Chief Justice of the Q. B. shewed there was no foundation for such a practice, and that any barrister had a right to appear in any court without being instructed by an attorney. But, at the same time, the learned judge said it was contrary to professional etiquette; and another learned judge, a friend of his, had enforced the rule which the custom of the Profession had made. But observe the position of a barrister in the County Courts. The attorneys might practise and run away with the whole of the fees of the business, but if this improper restriction were removed, the barrister had a fair chance with an attorney. There would, however, be one inconvenience follow from a barrister practising without instructions from an attorney. He must, in that case, see and examine his witnesses before the case came on, or he could not do his duty to his client, and would thus, in effect, be obliged to do the duty both of advocate and attorney. There would be under the proposed measure two separate courts, presided over on different days by the same judges; the first, or lower court, would take cognizance of causes under 20l. and in those courts attorneys would be allowed to practise as advocates; the second, or higher court, would take cognizance of all causes above 20l. and not exceeding 50l. where barristers only would be allowed to practise as advocates. It was expected that by this arrangement a considerable saving of expense would be effected. With respect to the selection which had been made of persons to preside as judges over the County Courts, he was happy to know that some very learned, able, and judicious persons had been found willing to fill that important office. But a most false economy was practised in this case; an economy false in two respects; first, in underpaying those learned judges, and secondly, in grudging compensation to the persons who formerly presided as judges in the County Courts. By this false economy the means of choice on the part of his learned friend the late Lord Chancellor was restricted. It was a merciful circumstance, notwithstanding he was so bounded, that he found so many able and worthy men as he did. Another piece of false economy was the throwing the expense of the building of the County Courts upon the suitors in those courts; as if it were not one of the first duties of the Government to give all parties coming to the courts protection in return for their allegiance. The provisions of the Acts of last year, and of 1846, were exceedingly defective in limiting the amount of fees to be paid to legal men, and in making that limitation according to a scale founded on the amount of the sum sued for, as if there was any more trouble in a cause for the recovery of 50l. than in one for the recovery of 50s. The trouble was totally independent of the amount of the cause of action. Instead of tying down the fees to a particular amount, he proposed to give to the judges of the Superior Courts power, from time to time, to prepare tables of costs. Unlike the members of any other Profession, those who dealt in law as a business were under great restrictions and control; and it was his

belief that, if clients knew the peculiar position in which men of the Legal Profession were placed, it would be better both for them and for the Profession itself. No client was obliged to pay his attorney a single farthing of his bill of costs until that bill had been taxed by an officer appointed by the court in which the action was brought.

The LORD CHANCELLOR protested against the union of the functions of Advocate and Attorney, and we are glad to adduce so high an authority in support of a position which we have strenuously maintained, and for urging which we have incurred some censure.

With respect to that portion of the measure which proposed to unite, as it were, the two functions of attorney and barrister in one and the same individual, he confessed he entertained considerable doubts as to the wisdom of such an alteration of the present system. Many American gentlemen with whom he had conversed had stated that they found a great advantage in the fact of the attorneys of this country intervening between the client and the counsel. Attorneys and solicitors, although well versed in the practical operation of the law, were not on that account the men best calculated to advocate a cause before a judge. Lloyd's Committee was composed of merchants, underwriters, and men who had risen to eminence by means of their great commercial experience, and among whom were to be found men of education of the very first class, and yet he did not apprehend that their lordships would consider the Committee at Lloyd's a sufficient tribunal for the decision of commercial questions; or that such questions would be better decided by commercial men than by courts of justice.

LORD BROUGHAM thereupon explained, that "so far from its being his object to combine the attorney and the barrister in one and the same person, his wish and desire was to keep them *quite distinct* from each other."

LORD CRANWORTH took the same view of this question of the union of the functions of advocate and attorney. He said—

That the explanation just made by his noble and learned friend suggested to him the extreme importance that their lordships should not commit themselves until they knew the details of the Bill, for he had understood his noble and learned friend just in the same manner as his noble and learned friend on the woolsack had done, and thought that his noble and learned friend proposed as a part of his system to unite the attorney and the advocate in one and the same person. If that plan were adopted he was sure of this, that the barrister would make a particularly bad attorney, and that the attorney would make a very bad advocate. At the same time, in actions for small sums it was desirable that the costs should be kept down, though it was impossible to say that there should not be two practitioners employed. It was, in fact, a choice of evils. He concurred with the Lord Chancellor that many of the provisions of the Bill would be eminently useful.

COUNTY COURTS EXTENSION.—Lord Brougham's Bill further to extend the jurisdiction of the judges of the County Courts, was printed on Thursday last, as amended in committee.

### ASSURANCE CHRONICLE.

The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY.—The annual meeting of this society was held at Glasgow on Thursday week, when the report of the directors was presented to the meeting. The society has, within the last eighteen months, established a London branch. During the past year the amount of capital sums assured during that period was 356,367l. and the premiums were 12,273l. 0s. 8d.; the net increase to the total sums assured since the commencement of the society, deducting for policies emerged, &c. being 272,354l. 9s. and the net increase of premiums, 8,764l. 15s. For single premiums for assurances and annuities, 4,962l. 12s. 9d. was received. The policies issued during the year were 944. The rate of mortality among the society's members during last year was only one per cent.

PROFESSIONAL LIFE ASSURANCE COMPANY.—On Thursday the annual meeting of this company was held at the chief office, No. 76, Cheapside, and was very numerously attended. The chair was occupied by Major Staines, the chairman of the board of directors. The report stated that the number of policies effected in the year 1850 was 453; that the amount assured was 172,292l., producing new premiums to the amount of 5,610l. 16s. 9d.; while, from the 1st of January last, 178 policies have been

granted, creating an annual revenue from new premiums of upwards of 1,600l. The total income of the company at the present time, derived from premiums, after deducting assurances lapsed by death and other causes, amounts to upwards of 11,450l.; the total number of policies issued is 1,155, and the amount assured, 354,513l.—The Chairman, in moving the adoption of the report, congratulated the shareholders on the rapid increase and gratifying prosperity of the company.—Mr. Taylor suggested that in future the annual balance-sheets should be read separately, in order that they might contrast the one with the other, and see whether economy had been duly observed.—Mr. Baylis said the company had never practised any disguise, that the books were always open for inspection, and that next year the annual balance-sheet would be submitted. It was rational to suppose that the expenses of any new company must be considerable; in fact, it has cost this company an expenditure of 24,000l. to establish an income of 12,000l.—Mr. Taylor knew that the expenses in the first instance must have been very great. He found an item, for instance, of 3,000l. for commission on premiums of 13,000l. He also found 7,000l. for salaries. If they were furnished with annual balance-sheets they could ascertain whether economy had been duly practised. At the same time he felt bound to say that he was delighted with the present position of the company.—Mr. Thompson thought that if the balance-sheets were printed and circulated, an endless and expensive correspondence would be opened. He should like to see the company advertised in every newspaper and respectable publication of the day, feeling satisfied that in such a case their business would be trebled. As it was, he felt convinced that their future and most triumphant success was placed beyond the shadow of doubt.—Mr. Walton, as the agent of the company at the Cape of Good Hope, said that in that colony, in the short space of twelve months, 650 shares had been sold out of 1,000. The benefits of the institution were highly appreciated there, particularly by the Dutch settlers—an excessively cautious race.—The report was unanimously adopted.—Upon the motion of Mr. Thomas Taylor, the four retiring directors, Messrs. Williams, Winthrop, Cooper, and Durham, were re-elected.—Upon the motion of Mr. Hart, the Rev. Henry Hamilton, of Monkstown, near Dublin, and of Montague-square, London, was elected a director, to fill up a vacancy at the board.—In reply to a proprietor, Mr. Cooper said that if any of the shareholders brought business to the office, there would be no objection to pay them the commission usually given to agents.—Mr. Birmingham moved that the allowance to the directors be increased from one guinea to two guineas a sitting.—Mr. Taylor seconded the motion.—Mr. Gladding moved as an amendment, that in the present circumstances of the company, it was inexpedient to increase the allowance.—Mr. Thompson seconded the amendment.—The question was put, and 19 hands being held up for the amendment, and 38 for the motion, the latter was carried. The allowance to the auditors was, upon the motion of Mr. Taylor, increased from 40 to 50 guineas.—After an address from Mr. Baylis, upon the advantages of the company, its progress, and its triumphant success, votes of thanks to him, the medical officers, the solicitor, and the directors were passed, and the meeting separated.

### THE LAWYER.

#### Summary.

EQUITY PRACTICE.—Vice-Chancellor BRUCE has made some useful remarks upon the best mode of taking evidence in disputed matters of fact, that is to say, as between interrogatories and affidavits. He gives the preference to the latter, and assigns elaborate reasons for his opinion, which will be read with interest and profit, in *Attorney-General v. Lord Carrington*, 16 Law T. 549. But to Lawyers accustomed to the *vivâ voce* examinations, it will appear to be rather a question of comparative demerit than of advantage between the two methods of written examination, and we cannot say that we agree with the views of the Vice-Chancellor in giving the preference to affidavits. They are shorter and cheaper, but not so well adapted for ascertaining the truth; for very little experience will have taught the practitioner how easy it is to give a colouring to a case, without departing from the facts, and, without positive perjury, to shape a case according to its requirements.

COMMON LAW.—In *Adcock v. Wood*, 16 Law T. 552, the Court of Ex. has decided that a plea of *non tiel award* only puts in issue the fact of an award being made concerning the matters in difference, and does not put in issue the validity of the award itself, which is a question for the Court.

## LEGAL INTELLIGENCE.

ROLLS' COURT, Tuesday, March 25.

## RESIGNATION OF LORD LANGDALE.

MR. TURNER rose, and addressing Lord Langdale said—In consequence of his lordship's intended resignation, he was desired publicly to express to his lordship the anxious hopes of the bar that many years might be spared to him of happiness in the bosom of his family. The bar and the whole profession were deeply indebted to his lordship for the exertions he had made to simplify the process and practice of the Court, and to lessen delay. He (Mr. Turner) abstained from entering into particulars, but those exertions had already led to many beneficial consequences, and would lead to more.

LORD LANGDALE said, he confessed he was overpowered and deeply felt the kind expressions that had been made use of. If he could flatter himself that he merited what was so kindly attributed to him, it would be his highest reward, but that might not be. He was sensible of shortcomings. At a cooler moment a more rigid scrutiny would be made of his judicial character. The reports would shew what he had done and what he had not done, and at the same time would shew how greatly he had been assisted by the learning, the industry, and the integrity of the Bar. Little did people who only looked upon the surface know how very little could be done by a judge without the honest co-operation of those most useful assistants, a learned and honourable Bar. He had to express his gratitude for the greatest assistance from a Bar of that character, and he retired with the strongest feelings of gratitude and respect.

The new Vice-Chancellorship will be given to Mr. George Turner, or to Mr. Kinderley; but it was said yesterday in Lincoln's-inn that the chances are in favour of Mr. Turner, who is at present member for Coventry.—*Morning Chronicle*, Thursday.

## THE CASE OF THE BIRDS.

We give the conclusion of this remarkable case, or rather its present determination, for it is probable that the question whether they were entitled to a trial will be taken into error.

*Exeter, Wednesday, March 19.*  
(Before Baron MARTIN.)

After the delivery of the charge, his lordship directed Robert Courtice Bird and Sarah Bird, his wife, to be placed at the bar.

On Mr. Slade and Mr. Cox coming into court, the male prisoner entered into a short but earnest conversation with them, and during the proceedings the male prisoner paid great attention and repeatedly conversed with his wife, as if informing her of the various points. After the learned judge commenced addressing them, she appeared much distressed.

HIS LORDSHIP, addressing Mr. Slade, said—I understand you have something to say to the Court.

Slade replied that he had not, as neither himself nor Mr. Cox had been instructed.

MARTIN, B. then said,—Robert Courtice Bird and Sarah Bird, it is my duty to pass the sentence of the Court upon you for an offence which now by law must be passed upon you; but in doing so I wish you to understand that I am exercising no discretion or judgment of my own, but I am merely carrying into effect the directions of the learned commissioner before whom you were tried, and the sentence is entirely his, and in no respect mine, and were it not that it must be satisfactory to you and the public to know the circumstances under which the sentence is passed, I should merely order the punishment to be recorded; but it is convenient that all should know the practice of the criminal law. At the Spring Assizes of 1850 you were tried here for the alleged murder of Mary Ann Parsons. Evidence was given against you, shewing, as I am informed, that you had committed various acts of cruelty upon this girl, but clearly shewing that she died from a blow of which no proof was given that either of you inflicted it. The inevitable consequence was that the jury were directed to acquit you. At the last Summer Assizes you were indicted for a misdemeanour, in assaulting Mary Ann Parsons with intent to injure her, and with intent by such injury to do her some grievous bodily harm. There were various other counts in the indictment. To that indictment you pleaded *autrefois acquit*, or, in other words, that you had been tried for this offence at the previous assizes, and acquitted; and, as by the law of England no person can be tried twice for the same offence, the learned commissioner who tried you was of opinion upon leaving a certain question to the jury, and so directed that a verdict should be entered against you, but he reserved the question for the opinion of the fifteen judges. That opinion has been had, and a great diversity of opinion existed—there was a division of opinion among the judges—eight were of opinion the conviction was right, six were of opinion that it was wrong, and as I

formed one of that minority, it is only necessary to state that whatever my opinion may have been, or may be, I am as much bound to submit to the opinion of those eight judges as if it were the judgment of the House of Lords, and, in consequence of that judgment, you are now called up for sentence. Although you have had no opportunity of making your defence, and your story has never been heard, if you feel inclined to make any affidavits on your own part, stating the circumstances of the case, I am not disposed to pass sentence upon you at the present moment, but will send up the affidavits to the learned commissioner. I cannot but feel that you stand in the condition of persons whose case has not been heard. If you wish me to postpone the sentence until you can make affidavits, I will do so. On the other hand, I will proceed at once to state the sentence I am directed. I do not wish you to make your decision hastily. If you want half an hour I am perfectly willing to give it you.

Slade.—Had I been instructed, I should have asked your lordship to let us have our trial.

MARTIN, B.—Then I should have been obliged to have decided against you, and drive you to a writ of error.

Slade.—The expenses of which would have been so great that the prisoners would not have been enabled to take advantage of it.

Cox, who appeared for the female prisoner, then consulted with the prisoners (for no attorney appeared in the matter), and then said they would prepare affidavits.

MARTIN, B.—You had better do so directly, and I will send them to Mr. Russell Gurney.

Rowe said, he appeared on the part of the Crown. He was not there to press severely upon the prisoners; at the same time it was his duty to see justice done, and without venturing to object to the course proposed, he hoped it would not be asking too much if he begged to be admitted to see those affidavits, and if necessary to answer them.

MARTIN, B.—That may postpone the matter for some time.

Rowe.—We came here prepared to meet a legal argument, and my application is that, if the affidavits are made, we may have the opportunity of seeing them, and of answering them if need be.

MARTIN, B.—If you could have the affidavits handed to Mr. Rowe this evening, so that they may go to town to-morrow evening, so that the learned commissioner might have an opportunity of reading them and returning them on Monday, will that answer?

Rowe.—We did not bring the witnesses here, as we believed the point of law was clear, and that your lordship would put them to error.

Cox said that the prisoners had sent for an attorney, and if he should receive the necessary instructions immediately, the draughts of the affidavits should be submitted to his friend this evening.

Rowe.—That will be perfectly satisfactory.

MARTIN, B.—Perhaps the better course will be for me to pass the sentence, and to make an application to the Secretary of State for a mitigation under the very peculiar circumstances of this case. I feel it to be a great hardship that the prisoners should be punished without a trial, and with no opportunity given to them of answering or explaining the charge laid against them in this indictment.

Slade.—That will meet the justice of the case, and avoid inconvenience.

Rowe made some observation which we could not catch.

MARTIN, B. then addressed the prisoners:—I have only to say, and I may take this opportunity of publicly stating, that everything that industry and ability could do in arguing your case by your learned counsel was done by them on your behalf, and that was the opinion of all the learned judges. It seems to be the opinion that the better course will be that I should at once pass the sentence, which, I repeat, is not mine, and that an application may be made to the Secretary of State; but the sentence is, that you be imprisoned, with hard labour, for sixteen months (this being an imprisonment of two years from the trial in July last).

The prisoners were then removed.

CONVICTION OF SHAM LAWYERS.  
NORTHERN CIRCUIT.

*York, Tuesday, March 11.*  
(Before Baron PLATT.)

Hugh Williams and Edward Kay were indicted for conspiring together to obtain money under false pretences from John Cockcroft, and also from John Horsfield.

Hall and Hardy prosecuted; Matthews was assigned by the learned judge as counsel for the prisoner Williams; the prisoner Kay defended himself.

It appeared that the prisoners had advertised a kind of off-shoot of the defunct Heir-at-Law Society, offering a cheap redress of grievances, and legal assistance to those who had claims and were too poor

to assert them. They had also issued a circular, of which the following is a copy:—

"1846,  
"The Legal and Equitable Protection Office, 267, Strand, London, opposite St. Clement's Church. Established for the purpose of providing professional advice, aided by adequate funds, to afford relief, assistance, and protection to the lawful claimants of property, otherwise lost to them from being illegally or fraudulently withheld by usurpers and impostors.

Managers, Messrs. John Martin and Co.  
Secretary, Mr. William Bennett."

Attached to this circular were a long list of cases, in which it was alleged the society had given successful assistance, concluding with the terms on which such valuable aid was to be obtained, which were, that advances should be paid by the applicants for counsel's fees and preliminary proceedings, with a charge of 10l. per cent. on the sums recovered in case of success. It appeared that this society consisted of the prisoner Williams (who had formerly been connected with the Heir-at-Law Society), who resided in London, and the prisoner Kay, who lived in Leeds. A person named John Cockcroft, who claimed to be entitled to a small piece of land near Burley-wood Head, made the acquaintance of Kay at Leeds, to whom he made known his claim. This led to a correspondence between the "society," which was carried on by the prisoner Williams in London, and Cockcroft, in the course of which various sums were demanded from and sent by Cockcroft as necessary for preliminary expenses and counsel's fees, amounting altogether to near 20l. Nearly all these demands were proved to be false pretences. Under the advice of the society, however, an action of ejectment had been commenced by Cockcroft, and by this means money to carry on the action had been extorted from Cockcroft. In one letter from the prisoner Williams put in, it was stated, "Mr. Horry, the barrister, and myself, have carefully perused the papers, and advise the action." This appeared to be false, as he had never consulted Mr. Horry, nor had Mr. Horry advised on the case. By this and various other pretences, as "for expedition money to get the action commenced before Term," various small sums had been obtained from Cockcroft. It also appeared that a person named John Horsfield, who lived near Leeds, and who claimed some property in Duke's-place, London, had been persuaded by Kay to write to Williams, and let him undertake his case, and from him the two prisoners had together obtained 10l. 4s. 6d. under pretence of counsel's fees. In this case it was proved that Kay wrote to Williams, and told him that as it was very like a case which had come before the Heir-at-Law Society, in which Mr. Horry, the barrister, had given an opinion, Williams might copy that opinion and send it down to Horsfield, and put the fee in their pockets. Williams wrote back indignantly that he could not think of forging counsel's opinion as suggested. Nevertheless, in spite of the old adage of "honour among thieves," on seizing Williams' papers, the draught of Mr. Horry's opinion, with the signature forged, was found in Williams' handwriting, he having put the fee in his own pocket and robbed the "society" to that extent. This opinion was proved to be a forgery by Mr. Horry, who was called and examined. That gentleman, in his examination, said he had never advised any proceedings, either with reference to Cockcroft or Horsfield, nor ever permitted Williams to make use of his name. On being cross-examined, he said Williams brought people to his chambers, and he saw them, and they always paid him, and not Williams; and that he had once gone to Liverpool on some business for Williams.

HIS LORDSHIP inquired how it happened that Mr. Horry had treated Williams as an attorney. Horry said Williams told him once he was an attorney, but had not taken out his certificate, but that he intended to do so. He always saw the parties with him.

HIS LORDSHIP said such a practice was very irregular. It was for the safety of the public that the proceedings should be carried on by an attorney who was an officer of the court, over whom there was a summary power, which was not possessed over other persons.

Horry said it was not unusual to see the parties themselves in London, and in that respect the practice differed from the country.

HIS LORDSHIP said it was a very irregular and improper mode of proceeding.

Matthews having addressed the jury with great ingenuity on the part of the prisoner Williams,

HIS LORDSHIP proceeded to sum up the case. He spoke in high terms of the honourable position of the British Bar, one of whose body had that day, at a moment's notice, without fee or reward, undertaken the defence of the prisoners, and in that defence had exhibited as much energy and ability as the wealthiest client could obtain. It was, however, most important that the two branches of the Profession should be kept distinct. It was highly necessary for the position and integrity of the Bar, as well as for the interests of the public, that barristers

should not have interviews with their clients without the intervention of an attorney, or in the presence of an attorney. He made these observations because a learned counsel who had given evidence that day had not thought it derogatory to his position to pursue an opposite course. Having gone through the evidence to the jury,

The jury, without hesitation, found both the prisoners Guilty.

#### The Circuits.

##### NORFOLK CIRCUIT.

CAMBRIDGE, March 20.—The commission for this county was opened yesterday afternoon. The two learned judges sat for the despatch of business this morning, but there was only one cause for trial in the Nisi Prius list, and the Lord Chief Justice Jervis, who presides in the Civil Court, has been engaged for the greater part of the day in trying prisoners. The calendar contains the names of forty-one persons, of whom twenty-eight are from the county of Cambridge, excluding the town of Cambridge and the Isle of Ely; five from the Isle of Ely, and eight from the town of Cambridge. Six of the prisoners are charged with arson, four with burglary, three with night poaching, one with manslaughter, one with rape, one with felonious wounding, two with sheep-stealing, one with coining, one with perjury, and the others with larcenies.

NORWICH, March 26.—The commissions for the county of Norfolk and the city of Norwich were opened yesterday afternoon, after which the learned judge of assize attended divine service in the Cathedral. Both the courts were opened for the despatch of the county business this morning at eleven o'clock. The cause list contains one special jury and three common jury causes—but the calendar is very heavy. No fewer than sixty-five names appear in this document. The charges include one of murder, two of manslaughter, six of malicious stabbing and wounding, three of highway robbery, five of rape, six of night poaching, three of perjury, two of forgery, one of arson, two of burglary, two of bigamy, and several larcenies, besides one case in which the prisoner is charged with unlawfully obstructing a train by putting a screw wrench on the line of rails. In the city there is no cause list, but the calendar for that jurisdiction contains the names of fifteen prisoners. Among these are two attorneys, who are charged, in conjunction with a third party, with conspiring to defraud a client. The cases tried on the Crown side were uninteresting. In the Nisi Prius Court an action for trover, *Clark v. Bunn*, to recover the value of a flock of ewes, a verdict was returned for the plaintiff—damages 250l.

##### OXFORD CIRCUIT.

SHEWSEBURY, March 20.—The commission was opened here yesterday. To-day the business began. There were only five causes, and twenty-five prisoners for trial. Of the offences, six are charged with larceny, five with housebreaking and burglary, five with robbery from the person, two with cutting and wounding, one (a gamekeeper) with shooting with intent to disable, two with rape on one woman, one with infanticide, and one with assaulting and wounding a constable with intent to do him grievous bodily harm. Two of the civil causes were arranged by the parties, two were tried, and the fifth, being for a special jury, stands over till to-morrow morning; the usual business of the day was over at two o'clock.

COVENTRY, March 21.—The calendar for this division of Warwickshire contains the names of forty-eight prisoners. The charges include one of murder, one of forgery, one of night poaching, one of burglary, one of robbery, one of embezzlement, and the rest of larceny. There is no business on the civil side.

##### NORTHERN CIRCUIT.

LIVERPOOL, March 25.—The learned judges, Mr. Justice Cresswell and Mr. Baron Platt, arrived in the town from York yesterday afternoon, and opened the commission, and this morning, after attending divine service, their lordships opened the court at twelve o'clock. Mr. Justice Cresswell taking his seat in the Crown Court, Mr. Baron Platt in that appointed for the Nisi Prius business. The criminal calendar is very heavy, and the character of the crimes is of a worse description than usual. There are 112 prisoners, of whom 3 are charged with murder, 6 with manslaughter, 14 with burglary, 7 with stabbing, 24 with robbery attended with violence, 10 with forgery, 4 with rape, the rest for minor offences.

##### WESTERN CIRCUIT.

BODMIN, March 26.—The commission for the county of Cornwall was opened in this place yesterday, by the Lord Chief Baron and Mr. Baron Martin. This morning the learned judges attended divine service, and then proceeded to the Assize

Court; the Lord Chief Baron presiding in the Crown Court, and Mr. Baron Martin at Nisi Prius. The cause list contains an entry of seven causes for trial, of which two are marked for special juries. Of the common juries, three were undefended, and one was settled this morning. The calendar contains a list of 59 prisoners for trial; but the offences are for the most part of a very light character. The charges are, child murder, 1; manslaughter, 1; unnatural, 1; attempt to commit rape, cutting and wounding, 1; arson, 8; housebreaking, 5; night poaching, 1; highway robbery, 2; sheep stealing, 2; uttering base coin, 1; threatening letter, 2; larceny, 36; receiving, 1.

##### HOME CIRCUIT.

KINGSTON, March 27.—The commission for the county of Surrey was opened on Wednesday, and this morning both courts proceeded to business, the Lord Chief Justice presiding on the civil side, and Mr. Baron Parke in the Crown Court. There are 54 cases entered for trial, 12 of which are special jury cases, but a good many of the common juries are undefended. On the Crown side there are 45 prisoners for trial, but the only case of importance is that of the prisoners charged with the murder of the Rev. Mr. Hollest, at Frimley.

##### SOUTH WALES CIRCUIT.

HEREFORD, March 22.—Mr. Justice Talfourd opened the commission here this afternoon. There are but three causes entered for trial, of which two are between the same parties, and substantially in the nature of cross-actions. The prisoners are only twenty-one in number, of whom one is charged with murder, one with manslaughter, two with cutting and wounding, three with highway robbery, four with robbery with violence, three with burglary, one with housebreaking, three with night poaching, two with concealment of birth, one with perjury, and one with uttering counterfeit coin.

COURT OF CHANCERY.—MARCH 28.—At the sitting of the Court this morning, Sir John Romilly (late Attorney-General) having been appointed Master and Keeper of the Rolls, appeared and took the usual oaths before the Lord Chancellor.

THE LATE SIR JOHN PIRIE, BART.—The will of the late Sir John Pirie has been proved at Doctors'-commons, and the property sworn under 30,000l.

## PROCEEDINGS OF LAW SOCIETIES.

### SOCIETY FOR THE AMENDMENT OF THE LAW.

A MEETING of this Society was held on the 10th inst. at their rooms, 21, Regent-street. The principal business was the reception of the reports of the Committees on Law and Equity Procedure, and on the law concerning dissenting places of worship, Lord BROUGHAM in the chair.

R. LOWE, Esq. read the first report of the Committee on Law and Equity Procedure. The system of equity arose in the end of the fourteenth century, when combinations of circumstances, for which the law had not provided, presented themselves, and when the legal power was in the hands of the clerical chancellors. Those judges endeavoured to supply by reasonings the place of fixed rules. The law of equity at first applied to special cases; but, in the end, it was exercised from precedent, and now was as fixed as common law. The distinction between law and equity was so little, that very often it could not be discerned by the best lawyers; the common law judges were obliged to act according to strict law, when injustice was often committed, and obliged the parties to go to equity. There were cases in which parties had incurred great expense in equity, and were then told that their relief was at common law, and when the parties went to common law the proceedings were afterwards set aside from being contrary to equity. By parties having often to go to the two courts great expense was often incurred, when one court could have decided the matter. The decisions at law and equity were often antagonistic, as was instanced in numerous cases, and nothing could be more unsatisfactory than that one court of law could only come to one decision, and another the reverse. The division of two courts produced a great multiplication of labour, and thereby increased expenses. The question arose, could the jurisdiction of both courts be included in one. The experience of the State of New York shewed that it could be with great advantage to suitors. The committee were of opinion that one code should be enacted which should include both law and equity in its proceedings.

J. STEWART, Esq. moved that the report be printed and circulated among the members, and discussed at their next meeting. He was very desirable, he said, to establish a system of administra-

tion of deceased persons' estates as efficient as in bankruptcy with reference to bankrupts' estates.

LORD BROUGHAM said the report was most valuable, and its only defect was a paucity of details in the mode recommended for uniting the two jurisdictions. In 1833 it occurred to his lordship that it would be highly inexpedient to add to the business of the Court of Bankruptcy, under its present name, and wished a Court of Trusts to be formed out of that court, for its machinery was most efficient, and much of the business of the Court of Chancery might be transferred to it, especially that relating to the administration of the trusts of deceased persons' estates.

J. STEWART, Esq. read the report of the committee relating to disturbances in places of public worship; and the propriety of amending the law as to licensing places for religious worship; and remarked that it was a grievance that if twenty persons met together to pray and read the Bible without being licensed, they became liable to fine or imprisonment. By the Toleration Act of William and Mary persons were allowed to meet in places for religious worship: previous to that time the conventicle had been looked upon as a place of sedition as well as worship. The committee were of opinion that the performance of religious worship might be permitted without being licensed. In these days of religious knowledge there were many persons who wished to spread religion, without being confined to particular denominations, which they could not do at present, for they must take some name by which to be registered, as well as keep their doors open for any one to enter who chose. They might meet there for almost any purpose whatever, and read any book they pleased except the Bible, for if they read that and prayed, being above twenty in number, they became liable to certain penalties, and this law had actually been enforced during the last year.

LORD BROUGHAM thought the subject of such great importance that another evening should be devoted to its consideration.

The meeting then adjourned till the 24th of March, when the proposed amendments in the patent laws will be considered.

### LINCOLNSHIRE LAW SOCIETY.

The half-yearly meeting of the members was held at the Great Northern Hotel, Lincoln, on the Thursday in the assize week, when the accounts were audited, and a balance of 63l. 12s. 7d. found to be in the hands of the treasurer to the credit of the society. Two new members, viz. Mr. Guy, of Gainsboro', and Mr. Plaskitt, of the same place, were elected.

Mr. Hett, of Brigg, succeeded to the office of president for the ensuing year. Mr. Staniland, of Boston, was elected as vice-president. Mr. E. A. Bromhead, of Lincoln, re-elected secretary and treasurer; and the committee for the past year, with the addition of Mr. Banks and Mr. Jno. F. Burton, was re-appointed.

The treasurer reported that the amount of funded property in the names of the trustees was now 1,700l.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to appoint Matthew Davenport Hill, of Lincoln's-inn, in the county of Middlesex, esq. to be one of the Commissioners of the Court of Bankruptcy, to act in the prosecution of flats in bankruptcy, in the country, in the room of Ebenezer Ludlow, Serjeant-at-law, deceased.

The Lord Chancellor has appointed Edwin Bonall, of Brighton, in the county of Sussex, gent.; Parkin Wigelsworth, of Donnington, Lincoln, gent.; and Bruges Fry, of Cheddar and Axbridge, in the county of Somerset, gent. to be Masters Extraordinary in the High Court of Chancery.

The Lord Chancellor has appointed Francis Green, of Carmarthen, in the county of Carmarthen, gent.; Henry Fenwick, of Liverpool, in the county palatine of Lancaster, gent.; also Thomas Eddy, of Liverpool, in the county palatine of Lancaster, gent. to be Masters Extraordinary in the High Court of Chancery.

The Right Hon. Sir John Jervis, knight, has appointed Henry Hall, of Clitheroe, in the county of Lancaster, gentleman, to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women in and for the county of Lancaster; and Thomas Wilkinson, of the city of Canterbury, gentleman, to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the city of Canterbury; also in and for the county of Kent.

Sir Alexander Cockburn has been promoted to the office of Attorney-General, in place of Sir John Romilly, and is succeeded as Solicitor-General by Mr. Page Wood.—*Globe* of yesterday.

MEMBER RETURNED TO SERVE IN THIS PRESENT PARLIAMENT FOR THE BOROUGH OF DUNGARVAN.—The Hon. Charles Frederick Ashley Cooper Ponsonby, of St. James's-place, London, in the room of the Right Hon. Richard Lalor Sheil, who has accepted the office of Steward of Her Majesty's Chiltern Hundreds.

MEMBER RETURNED TO SERVE IN THIS PRESENT PARLIAMENT FOR THE BOROUGH OF THIRSK.—Sir William Payne Gallwey, bart. in the room of John Bell, esq. deceased.

COMMISSION SIGNED BY THE LORD LIEUTENANT OF LANCASHIRE.—James Lomax, esq. to be Deputy-Lieutenant.

## COURT PAPERS.

### COURT OF CHANCERY.

#### COSTS AND FEES.

The following important order of Court was made by the Lord Chancellor on Saturday last. It will materially affect the costs of all present and future proceedings in Chancery, as it will greatly reduce the fees payable in the various offices of the court during the progress of suits through their various stages:—

#### "ORDER OF COURT.

"Saturday, March 22, 1851.—Whereas it is expedient that some of the fees heretofore payable in respect of certain proceedings in the Court of Chancery should be abolished, and that others should be reduced in amount, now I, the Right Hon. Thomas, Baron Truro, Lord High Chancellor of Great Britain, with the advice and concurrence of the Right Hon. Henry, Baron Langdale, Master of the Rolls, and the Right Hon. the Vice-Chancellor Sir James Lewis Knight Bruce, do hereby order and direct, that from and after the 31st day of March, 1851, such of the fees heretofore received and taken by the clerks to the Masters in ordinary, the Taxing-Masters and their clerks, the registrars and their clerks, the Master of the Reports and Entries and his clerks, the clerk of affidavits and assistant-clerks of affidavits, the examiners and their clerks, and the clerks of records and writs and their clerks, as are set forth in the first schedule hereto, shall be and the same are hereby abolished. And that such of the fees heretofore received and taken by the clerks of the Masters in ordinary, the registrars and their clerks, the Taxing-Masters and their clerks, and the clerk of affidavits and assistant-clerks of affidavits, as are mentioned in the second schedule hereto, shall be reduced in amount, and in lieu thereof the fees set forth in the said second schedule shall be received and taken respectively by the clerks of the Masters in ordinary, the registrars and their clerks, the Taxing-Masters and their clerks, and the clerk of affidavits and assistant-clerks of affidavits, and shall be by them severally and respectively paid into the Bank of England in the name of the Accountant-General, to be placed to the credit of the account entitled 'The Sutors' Fee-fund Account.'

#### "FIRST SCHEDULE ABOVE REFERRED TO.

#### "FEES TO CEASE ON AND AFTER THE 31ST DAY OF MARCH, 1851.

#### "IN THE OFFICES OF THE MASTERS IN ORDINARY.

	£	s.	d.
For investigating every title brought in before the Master to be settled, and perusing the abstract thereof, upon the first twenty-five folios thereof	0	6	8
Upon every succeeding twenty-five folios thereof	0	3	4
For every advertisement issued by the Master	1	1	0
For every peremptory advertisement for the sale of property with the approbation of the Master, in addition to the foregoing fee, to be repaid if the property shall not be offered for sale	3	0	0
For signing the allowances of every deed, recognizance, set of interrogatories, account, or other document allowed and signed by the Master	0	5	0
For every order upon a warrant	0	5	0
For perusing and settling the draught of every deed brought before the Master to be settled (except a lease for a year), where such deed shall not exceed thirty folios	1	0	0
Where such deed shall exceed thirty folios and not exceed fifty folios	1	10	0
And where such deed shall exceed fifty folios and not exceed 100 folios	2	10	0
And where such deed shall exceed 100 folios	3	0	0
Fee on preparing recognizance	1	1	0
For an examination fee on each witness, exclusive of oath	0	5	0

For examining engrossment of deeds, each skin	0	3	4
For comparing deeds, books, and papers with the schedule, on their being deposited or delivered out, where the schedule shall not amount to fifty folios	0	6	8
Where the schedule shall amount to fifty folios	0	13	4
For expunging scandal or impertinence out of every record or document referred, on every such record or document	1	0	0
IN THE OFFICES OF THE TAXING-MASTERS.			
For signing the allowance to every set of interrogatories, account, or other document	0	5	0
For an examination fee on each witness, exclusive of oath	0	5	0
IN THE REGISTRAR'S OFFICE.			
For every certificate signed by the Registrar for the sale or transfer of annuities, stock, or Exchequer Bills, or for delivery out of the latter	0	2	6
For every other certificate signed by the Registrar	0	1	0
For every copy of minutes of any decree or order, per side	0	1	0
For every exhibit proved <i>videlicet</i> in court	0	2	6
For entering every plea or demurrer	0	1	0
For setting down causes, exceptions, further directions, pleas, and demurrers, each (except for setting down causes on the Registrar's days)	0	1	0
For setting down causes on the Registrar's days	1	1	0
IN THE REPORT OFFICE.			
For every attendance, with a report at the Masters' offices, for any material alteration to be made therein	0	6	8
AT THE ENTERING SEATS.			
For every certificate in Master's report	0	1	0
For entering every attachment	0	0	2
IN THE AFFIDAVIT OFFICE.			
For registering every affidavit, for each side	0	0	4
For expunging impertinence from an affidavit	1	0	0
IN THE EXAMINER'S OFFICE.			
For every certificate signed by Examiner	0	3	4
For drawing every folio of depositions, where no office copy is taken, when two terms shall have elapsed without the examination of any witnesses	0	0	10
For every interrogatory added	0	1	0
For every <i>subpoena</i> notice	0	1	0
IN THE RECORD AND WRIT CLERKS' OFFICE.			
For sealing every <i>dedimus</i> to take an answer	0	10	0
For sealing every special <i>dedimus</i> by order of Court	0	18	0
For filing every answer or demurrer	0	10	0
For every consent	0	7	0
For filing every note	0	7	0
For filing replication	0	10	0
For entering every memorandum of service of copy bill on every defendant	0	7	0
THE SECOND SCHEDULE ABOVE REFERRED TO.			
FEES TO BE RECEIVED AND TAKEN BY THE CLERKS TO THE MASTERS IN ORDINARY.			
For entering accounts of receivers, consignees and committees in each book (in lieu of the present fee of 6d. per folio), per folio	0	0	4
For entering accounts of parties accounting before a Master in a book, if required (in lieu of the present fee of 6d. per folio), per folio	0	0	4
FEES TO BE RECEIVED AND TAKEN BY THE TAXING-MASTERS AND THEIR CLERKS.			
Per centage on amount of every bill of costs as taxed, in lieu of the present fee of 3l.	2	10	0
FEES TO BE RECEIVED AND TAKEN BY THE REGISTRARS AND THEIR CLERKS.			
For every order for payment of money out of court, where the sum or sums thereby directed to be paid shall exceed 100l. and shall not exceed in the whole 500l.; and for transfer out of court or sale of any sum or sums of Government Stock or South Sea Annuities (excepting Long Annuities or annuities for terms of years), when the sum or sums thereby directed to be transferred or sold shall exceed 100l. and shall not exceed in the whole 500l.;			
And for payment out of court of any annuity or annuities exceeding 5l. and not exceeding in the whole 25l. per annum, or of any interest or dividends upon stock or annuities exceeding 5l. and not exceeding in the whole 25l. per annum; and for no other purpose, in lieu of the present fee of 2l. 10s.	1	0	0
For every office copy thereof, in lieu of the present fee of 1l.	0	10	0

For every other order for payment or transfer out of court, in lieu of the present fee of 2l. 10s.	2	0	0
FEES TO BE RECEIVED AND TAKEN BY THE CLERK OF AFFIDAVITS AND ASSISTANT-CLERKS OF AFFIDAVITS.			
For every office copy of an affidavit (in lieu of the present fee of 4d. per side, and 4d. per side for registering), per folio	0	0	4

"TRURO, C.

"LANGDALE, M.R.

"J. L. KNIGHT BRUCE, V.C.

"J. Collis, Registrar."

### BUSINESS AT THE OFFICES OF MASTERS IN CHANCERY.

MASTER HUMPHRY, the junior Master in Chancery, has issued the following notice:—

"Proposed course of proceeding in Master Humphry's office after the Easter vacation, 1851.—The Master will take, every morning, at the commencement of his sitting, short matters of the following description,—viz. applications for time to answer, to enlarge publication, for leave to amend bills, to consider decrees and orders, for bringing in books and papers, for nominating commissioners, and unopposed creditors' claims. On Wednesdays, the Master will also take other short matters ready for hearing consecutively, in the order in which they are set down. On every other day the Master will take in like consecutive order, causes and matters ready for hearing, and not coming under any of the above descriptions, and in very long matters the Master will exercise a discretion in adjourning the hearing from time to time, as circumstances may require. Any matter set down as a short matter, and appearing to the Master as not properly coming under that description, will be transferred to, and placed at the end of the other list, unless the Master, upon cause shewn, shall direct otherwise. In all cases where it shall be desired to have the Master in rotation ballotted for on the day on which any decree or other document shall be left in this office for that purpose, it is requested that such decree or document be left before twelve o'clock.

"By order of the Master.

"March 25, 1851."

### BIRTHS, MARRIAGES, AND DEATHS.

#### MARRIAGES.

SANDARS, Thomas Collett, esq. Fellow of Oriel College, Oxford, and of Lincoln's-inn, barrister-at-law, eldest son of Samuel Sandars, esq. of Lockers, Herts, to Margaret, second daughter of William Hamner, esq. of Bodnol, Denbighshire, on the 25th inst.

WILLIS, James, esq. of Lincoln's-inn, barrister-at-law, to Amelia, second daughter of the late William Robinson, esq. of Connaught-square, Hyde-park, on the 25th inst. at St. Saviour's, Upper Chelsea.

#### DEATHS.

ADAMS, John Hilditch, late of Calcutta, solicitor, formerly of Old Jewry-chambers, London, on the 12th of December last, whilst at sea, on his passage to this country.

COOMBS, Thomas William, son of Mr. Thomas Coombs, jun. solicitor, on the 21st inst. at Dorchester, aged 15 months.

DACER, Lord Thomas, on the 21st inst. at the Hoe, Herts, aged 77.

LUDLOW, Ebenezer, esq. serjeant-at-law, and one of the Commissioners of Bankruptcy for the Bristol district, on the 18th inst. at Almondsbury, near Bristol, aged 74.

NEWCOMB, Richard, esq. Justice of the Peace, of Stamford, on the 18th inst. aged 67.

WALTER, Eliza, relict of the late H. Walter, esq. of the Willows, near Windsor, on the 34th inst. at Sandgate.

WANSLEY, Mr. George, chief clerk of the County Courts of Hampshire, on the 18th inst. at Southampton, aged 35.

WANNER, Elizabeth Mary, daughter of John Wanner, esq. barrister-at-law, on the 23rd inst. at 11, Montagu-street, Russell-square, in her 9th year.

### JOURNAL OF PROPERTY.

#### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	shut	..	..	..	..	..
3 & 4 Cent. Reduced Annuities	shut	..	..	..	..	..
3 & 4 Cent. Consols Annuities	96	96	96	96	96	96
Consols for Account	96	96	96	96	96	96
New 3 & 4 Cent. Annuities	..	..	..	..	..	..
Long Annu. (exp. Jan. 5, 1860)	..	..	..	7	..	..
Do. 30 yrs. (exp. Oct. 10, 1859)	..	..	..	..	..	..
Do. 30 yrs. (exp. Jan. 5, 1860)	..	7	..	..	..	7
India Stock, for Account	..	..	264	..	..	..
India Bonds (1,000l.)	62	60	..	..	..	..
Do. do. (under 1,000l.)	62	67	..	61	..	..
South Sea Stock	..	..	..	..	..	..
Do. do. New Annuities	..	..	..	..	..	..
Exchequer Bills, 1,000l.	55	55	..	54	50	53
Do. do. 500l.	55	..	..	54	50	53
Do. do. Small	55	..	..	51	50	53
Do. do. Advertised	..	..	55	..	..	..

\* Premium.



## THE GAZETTES.

## Bankrupts.

Gazette, March 25.

AVANX, ROBERT, fellmonger, Canterbury, April 4 and May 6, at twelve, Basinghall-st. Off. as Cannan. Sols. Venour, Gray's-in-square, and Furleys and Mercer, Canterbury. Petition, March 18.

BRITTON, THOMAS, wine merchant, Suffolk-lane, City, April 1, at half-past one, May 1, at twelve, Basinghall-st. Off. as Bell. Sols. Sewell and Co. Old Broad-st. Petition, March 22.

COLTHER, ADAM, jeweller, Dover, April 1, at one, May 1, at eleven, Basinghall-st. Off. as Johnson. Sol. Harris, Moorgate-st. Petition, March 15.

CROSSFIELD, AARON, coal merchant, Ty Mawr, Glamorganshire, and Newport, Monmouthshire, April 9 and May 7, at eleven, Bristol. Off. as Miller. Sols. James, Merthyr Tidal, Glamorganshire, and Bevan, Bristol. Petition, March 20.

GLASPOOL, JOHN, ladies' shoe maker, Regent-st. April 8 and May 6, at one, Basinghall-st. Off. as Groom. Sol. Wreford, Golden-square. Petition, March 24.

JACKSON, RICHARD, farmer, Selby, Yorkshire, April 14 and May 6, at eleven, Leeds. Off. as Hope. Sols. Weddall, Selby, and Bond and Barwick, Leeds. Petition, March 19.

STEELE, JOHN, brewer, Spotland-bridge, Lancashire, April 10 and May 2, at eleven, Manchester. Off. as Mackenzie. Sols. Hitchcock and Co. Manchester. Petition, March 22.

WESTMACOTT, ROBERT, nurseryman, Fulham-road, Chelsea, April 4, at half-past one, May 6, at eleven, Basinghall-st. Off. as Whitmore. Sol. Holcombe, Ebury-st. Pimlico, and Chancery-lane. Petition, March 21.

Gazette, March 28.

ARMSTRONG, SAMUEL, glass and china dealer, Bolton-le-Moors, Lancashire, April 14 and 28, at twelve, Manchester. Off. as Fraser. Sol. Marland, Bolton-le-Moors. Petition, March 15.

BILLING, HENRY CHRISTOPHER, silversmith and jeweller, 98, Chesapeake, April 7, at eleven, and May 12, at one, Basinghall-st. Com. Holroyd. Off. as Edwards. Sol. Peddell, 143, Chesapeake. Petition, March 26.

COLTHER, ALLEN, jun. (not Adam, as advertised in last Gazette), jeweller, Dover, Kent, April 1, at one, and May 1, at eleven, Basinghall-st. Com. Evans. Off. as Johnson. Sol. Harris, Moorgate-st. Petition, March 15.

GARHAM, GEORGE, farmer and banker, Rougham, Suffolk, April 11, at half-past twelve, and May 9, at half-past eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sols. Hensman, Basing-lane, Bow-lane, Chesapeake, and Wayman and Co. Bury St. Edmunds. Petition, March 22.

GLASPOOL, JOHN, ladies' boot and shoemaker, 319, Regent-st. April 8 and May 6, at one, Basinghall-st. Com. Holroyd. Off. as Groom. Sols. A Beckett and Symson, 7, Golden-square. Petition, March 24.

JACKSON, RICHARD, tanner (not farmer, as advertised in last Tuesday's Gazette), Selby, Yorkshire, April 14 and May 6, at eleven, Leeds. Com. Ayrton. Off. as Hope. Sols. Weddall, Selby, and Bond and Barwick, Leeds. Petition, March 19.

JAY, SAMUEL TURNER, miller, Badley, Suffolk, April 9, at half-past one, May 9, at twelve, Basinghall-st. Com. Fonblaque. Off. as Stansfeld. Sols. Trinder and Eyre, 1, John-st. Bedford-row, and Archer, Stowmarket, Suffolk. Petition, March 24.

M'DOWALL, WALTER, printer, 10, Little Queen-st. Lincoln's-inn-fields, April 5, at eleven, May 9, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Edmunds, 12, South-square, Gray's-inn. Petition, March 28.

MILLER, ROBERT, and STREET, ALEXANDER, builders and contractors, Lancaster, April 7 and 29, at twelve, Manchester. Off. as Pott. Sol. Blackhurst, Preston. Petition, March 25.

MIDWORTH, HENRY, grocer, Wisbech St. Peter, Cambridge, April 6, at half-past one, May 9, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sols. Abbott, Jenkins, and Abbott, 8, New-inn, Strand, and Watson, Wisbech. Petition, March 26.

PAGE, RICHARD, wine merchant, Brighton, April 14, at half-past one, May 10, at eleven, Basinghall-st. Com. Goulburn. Off. as Pennell. Sols. Bridger and Collins, 37, King William-st. City. Petition, March 21.

POWELLAND, JOHN, dealer in seeds, South Tawton, Devonshire, April 15, at one, and May 6, at eleven, Exeter. Com. Bere. Off. as Hirtzel. Sols. Fulford, North Tawton; Tanner, Crediton; Stogdon, Gandy-st. Exeter. Petition, March 21.

WILLIAMS, WILLIAM GRIFFITHS, woollen and linen draper, Carnarvon, April 10 and May 15, at eleven, Liverpool. Com. Stevenson. Off. as Bird. Sol. Williams, South Castle-st. Liverpool. Petition, March 26.

## Dividends.

BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

Amos and Sutherland, merchants, fourth, 6-6ths of a 1d. Stansfeld, London.—Boyer, R. grocer, first, 2s. 8d. Valpy, Birmingham.—Coall, W. J. J. grocer, further, 23d. Hirtzel, Exeter.—Devey, F. coal merchant, second, 23d. Edwards, London.—Doming, J. currier, first, 3s. 2d. Hirtzel, Exeter.—Fenton, W. F. lead and glass merchant, second, 5d. Stansfeld, London.—Houghton, C. ironmonger, second, 4d. Edwards, London.—Humphrey, W. wine merchant, second, 2d. Stansfeld, London.—Kite, J. wine merchant, first, 6s. 8d. Hirtzel, Exeter.—Loosemore, R. scrivener, further, 2d. Hirtzel, Exeter.—Martin, T. W. tailor, fourth, 10d. Groom, London.—Matthews, J. and C. D. bankers, fourth, 13d. Valpy, Birmingham.—Pine, W. H. maltster, further, 10d. Hirtzel, Exeter.—Pittfield, W. bleacher, first, 3s. 11d. Leo, Manchester.—Portway, A. tea dealer, second, 24d. Stansfeld, London.—Robson, J. coach currier, second, 24d. Edwards, London.—Roden, J. draper, first, 5s. 6d. Stansfeld, London.—Sligh, B. W. A.

newspaper proprietor, 1s. 3d. Groom, London.—Starky, J. carpenter and builder, second, 3s. Edwards, London.—Taylor, W. G. W. surgeon, first, 2s. Hirtzel, Exeter.—Wetherill, C. ironmonger, second, 24d. Stansfeld, London.

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Cary, G. merchant's clerk, 84d.—Lloyd, H. attorney, 94d.—Matthew, J. cotton yarn dresser, 20s.—Treble W. publican, second, 3d.—Puntun, A. baker, 11s. 14d.—Thomas, J. lieutenant in the army, 2s. 11d.—Williams, C. jun. grocer, 4s. 2d.

Dobb, W. earthenware manufacturer, 14d. Apply to Mr. Carter, solicitor, Pontefract.—Geere, R. surgeon, &c. 2s. 10d. Apply at the County Court, Lewes.—Hurdus, P. earthenware manufacturer, 34d. Apply to Mr. Carter, solicitor, Pontefract.—Purkas, W. lieutenant, &c. 74d. Apply to H. T. Archer, solicitor, Great Portland-st. Oxford-st.

## Assignments for the Benefit of Creditors.

Gazette, March 18.

Beale, J. grocer, Newbury, Berkshire, March 8. Trusts. C. Ruck, jun. King William-st.; J. Holmes, grocer, Reading; and E. J. Morgan, soap manufacturer, Tottenham-court-road. Sol. W. J. Cowper, Newbury.—Brown, J. farmer, Pettsree, Suffolk, March 6. Trusts. F. Alexander, banker, Woodbridge, and W. Sawyer, farmer, Tunstall. Sols. C. Moor and Son, Woodbridge.—Harris, C. A. corn dealer, Lamb's Conduit-street, Feb. 20. Trust. W. Burrows, corn merchant, Bagnigge-wells-road. Sol. G. Brown, Finsbury-place.—Kempley, The Rev. R. W. clerk, and Kempley, A. E. spinster, Ledsham, Yorkshire, Feb. 25. Trusts. J. Clarke, gentleman, Sherburn; J. Garland, builder; and E. Bolton, accountant, both of Leeds. Sols. Ward and Son, Leeds.—Mudd, J. and R. farmers, Darmsden, Suffolk, Feb. 20. Trusts. G. Mudd, linen draper, Ipswich, and J. Gentry, farmer, Washbrook. Sols. Josselyn and Westhorp, Ipswich.—Phipps, J. baker, Long Lawford, Newbold-upon-Avon, Warwickshire, Feb. 27. Trusts. H. Hewitt, Clifton-mill, Clifton-upon-Dunsmore, and G. Spokes, Long Lawford, millers. Sols. Harris and Son, Rugby.—Wilcock, E. bookseller and stationer, Preston, Lancashire, Feb. 27. Trusts. L. Spencer, surgeon, and H. Oakley, bookseller, both of Preston. Sols. Haydock and Son, Preston.

Gazette, March 21.

Adams, F. victualler and colliery proprietor, Cwmillery, Monmouthshire, March 7. Trust. R. M. Toogood, accountant, Newport. Sol. J. Philipotts, Newport.—Brotherton, H. grocer, Boroughbridge, Yorkshire, March 14. Trusts. J. Lofthouse, merchant, and M. L. Smith, grocer, both of Boroughbridge. Sol. W. Hirst, Boroughbridge.—Edwards, R. linendraper, Sudbury, Suffolk, Feb. 24. Trusts. S. Morley, wholesale hosier, Wood-st. and W. H. Holyland, warehouseman, Watling-st. Sols. Hardwick, Davidson, and Bradbury, Weaver's-hall, Basinghall-st.—Hewett, T. farmer, Irvingdon Farm, Goring, Oxfordshire, March 14. Trusts. M. Taylor, Goring, and J. Whitfield, Goring Heath, farmers. Sol. S. Hurford, Oxford.—Miller, T. builder, Great Smith-st. Westminster, Feb. 27. Trusts. J. Patient, Throgmorton-st. C. Haynes, Stockwell-villas, Surrey, and E. Simms, Wilton-road, Pimlico, timber merchant. Sol. H. D. Draper, Vincent-square, Westminster.

## Partnerships Dissolved.

Gazette, March 18.

Alexander and Palmer, ladies' shoemakers, Cross-street, St. Leonard, Shoreditch, March 15.—Anderson and Haughton, nail and chain manufacturers, Billinge, Wigan, Jan. 1. Debts by Anderson.—Armstrong and Hurst, cotton spinners, Hamer-hall, Rochdale, and Manchester, Dec. 31.—Barnes, J. and R. grocers, Haalingdon, March 14.—Bucktrout, T. and J. painters, &c. Bedale, March 17. Debts paid by T. Bucktrout.—Carr, Taylor, and Company, cotton spinners and manufacturers, Glossop and Manchester, March 13.—Chapman and Hoopes, silk throwsters, Macolesfield, March 13.—Clarkson J. and Parry, painters, Liverpool, March 4. Debts paid by Clarkson.—Combeere, W. and Allsup, C. glass and china dealers, Maidstone, Feb. 22. Debts paid by Allsup.—Corson and Bateman, architects, Leeds, Jan. 13, 1846.—Fluck, C. and Atkins, C. grocers and provision dealers, Wotton-under-Edge, Feb. 24.—Good-year, Turner, and Company, manufacturing chemists, Huddersfield, March 15. Debts paid by Turner.—Hill, Smithies, and Nelson, slate merchants and slaters, Bradford, March 7. Debts paid by Hill and Nelson.—Keighley, Sutcliffe, and Booth, millwrights and ironfounders, Leeds, as regards Booth. Feb. 26. Debts paid by remaining partners.—Knight, C. and Poole, T. W. smiths, Pudding-lane, March 14. Debts paid by Knight.—Lofthus and Whitaker, innkeepers and postmasters, Nantwich, March 15. Debts paid by Lofthus.—Mansell and Pegge, land, estate, and house agents, Hastings, March 14.—Mellor and Donaldson, coal merchants, Liverpool, March 1.—Oetmann, J. R. A. and Clarke, A. general dealer, Brewer-st. Somers-town, St. Pancras, March 13.—Rayner and Co. or Rayner and Brooks, bakers and flour dealers, Pendleton, March 3. Debts paid by Rayner.—Reeves, J. and R. merchants and factors, Birmingham, March 15. Debts paid by R. G. Reeves.—Swale and Saville, bricklayers, Leeds, March 15. Debts paid by Swale.—White, G. M. and Stanger, G. E. surgeons and apothecaries, Nottingham, March 15.—Whitmore and Company, linendrapers and mercers, Stowmarket, March 14.—Wilson, J. and Sons, thread manufacturers, Whitehaven, as regards J. Bouch, sen. March 8, 1850.

Gazette, March 21.

Allen and Robertshaw, trimming sellers, Crawford-st. Saint Marylebone, March 15. Debts paid by Allen.—Briston-ferry White Lead Company, white lead manufacturers, Briton-ferry, Dec. 25.—Dando, J. and C. T. hat manufacturers, Bristol, Dec. 31. Debts paid by J. Dando.—Davidson and Lamb, van builders, Leeds, March 17. Debts paid by Davidson.—Davis, Saunders, and Hicks, land agents and surveyors, Oxford and Banbury, March 1. Debts paid by Davis and Saunders.—Evans, W. and Rayson, C. cabinet makers, &c. Salford, Feb. 17. Debts paid by Evans.—Fisher, D. and Heathcote, S. common brewers, Pendleton, Feb. 25. Debts paid by Heathcote.—Gold, Brothers, jewellers and goldsmiths, Birmingham, March 7. Debts paid by G. Gold.—Hart, Johnson, and Co. starch

manufacturers, Greenwich, as regards Hart, March 18. Debts paid by Johnson and Pilcher.—James, E. and Falser, J. B. paper manufacturers, Woodland-mills, near Stroud, Feb. 13.—Mitchell and Allen, joiners and builders, Chorlton-upon-Medlock, March 18. Debts paid by Mitchell.—Morgan and Arnold, bakers, Bristol, March 18. Debts paid by Morgan.—Ozanne and Hunt, surgeons, &c. Saint Helens, July 18.—Porter, J. and Muddison, T. E. farmers, Darfield, Feb. 17.—Raistrick and Atkinson, tailors and drapers, Bradford, March 17. Debts paid by Raistrick.—Rares and Taylor, cotton spinners, Waters-headings, within Oldham, March 7.—Stockdale, R. and Alderson, R. wheelwrights and house carpenters, Hawes, March 15.—Strong, J. and T. stereotypers, Crown-court, Chancery-lane, Dec. 31. Debts paid by T. Strong.—Wadhams, F. G. and Rymill, T. W. paper agents, Paul's-wharf, Thames-st. March 17.—Debts paid by Rymill.—Webster and Roberts, joiners and cabinet makers, Rawten-stall, March 17. Debts paid by Roberts.—Whiteley and Nadin, common brewers, Salford, March 17.—Williams, H. and Noel, E. civil and mineral engineers, Moorgate-st. March 17.

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# LAW FIRE INSURANCE SOCIETY.

Offices—Nos. 5 and 6, Chancery-lane, London.  
Subscribed Capital, 5,000,000.

## TRUSTEES.

The Right Hon. the Lord High Chancellor.  
The Right Hon. the Earl of Cottenham.  
The Right Hon. the Earl of Devon.  
The Right Hon. the Lord Chief Baron.  
The Right Hon. Sir H. Jenner Fust (Dean of Arches, &c.)  
William Baker, esq. (late Master in Chancery).  
Richard Richards, esq. M.P. (Master in Chancery).

Insurances expiring at Lady-day should be renewed within fifteen days thereafter, at the Offices of the Society, or with any of its agents throughout the country.

E. BLAKE BEAL, Secretary.

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Capital, 1,000,000.

Life Policies may be effected with this office, adapted to every contingency, at rates of premium economically graduated.

Annuities are granted by the Company on terms exceedingly favourable to the assured.

Fire Insurances.—Policies issued against almost every description of risk. T. BELL, Secretary and Actuary.

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The Association, by its Act of Parliament, is subject to the annual supervision of the Board of Trade. It gives security for the fidelity of persons in situations of trust, and thereby provides to the employer a safeguard against loss arising through dishonesty or failure to account, in lieu of the uncertain protection afforded by private guarantees.

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B. S. STRICKLAND, Secretary.

# LOANS IN CONNECTION WITH LIFE ASSURANCE.

# PELICAN LIFE INSURANCE COMPANY.

—Established 1797.

NOTICE.—The Directors are prepared to receive Proposals for Loans on approved Security, whether real or personal, in sums of not less than 500*l.* coupled with one or more policies of insurance to be effected in the Pelican Office.—Applications to be made to the Secretary, at the Chief Office of the Company, No. 70, Lombard-street.

# LAW REVERSIONARY INTEREST

AND INVESTMENT SOCIETY.

Offices, 30, Essex-street, Strand, London.

In shares of 25*l.* each.

Not more than 1*l.* to be called for at one time, nor at less intervals than three months.

This Society was partly formed three years ago, and a great number of shares were subscribed, but the depression of the money market compelled its postponement.

The improved state of the country causing safe and profitable investments to be sought for, suggests the propriety of now proceeding to complete the establishment of a society whose design has met with such extensive support.

Another peculiarly advantageous circumstance is the means now afforded by the formation of the *Law Property Assurance and Trust Society* for the conducting of the business of the *Law Reversionary Interest and Investment Society* at a comparatively trifling cost, it being proposed to make an arrangement with the former flourishing Society for the use of its offices and officers, instead of incurring the great expense of a separate establishment, thus immensely increasing the profits of the *Reversionary Interest Society*.

The plan is shortly as follows:—

1. The *Law Reversionary Interest and Investment Society*, to be formed of holders of shares of 25*l.* each. Deposit, 2*l.* 6*d.* per share.

2. Calls not to exceed 1*l.* per share, nor at less intervals than three months.

3. The business to be conducted at the offices and by the establishment of the *Law Property Assurance and Trust Society*; but entirely as a distinct Society, with distinct books, accounts, &c.

4. The Profession to have the advantage of a fair commission on all business its members may bring to the office.

5. To the public it will offer the advantage of fair prices or Reversionary Interest and Policies of Assurance, with an option of converting Reversionary Interests into present income, so as to make provision for immediate wants, and otherwise to facilitate family arrangements.

6. For persons having money which they desire to invest both securely and profitably, and in any sum, small or large, it is well known that there is no such safe and advantageous method of doing so than in such a Society, which differs from all others in this, that there is no risk, for the whole of its funds being secured, its profits can be calculated with accuracy, and the capital is only called for as it is wanted to be profitably employed. Any persons may be members of it, so that solicitors can recommend it to their clients as a desirable investment.

It is remarkable that, while boasting of so many flourishing Assurance Offices, the Legal Profession has not yet sought to secure for itself the still greater advantages resulting from a *Reversionary Interest Society*. That defect will now be supplied, under peculiarly favourable circumstances.

Applications for shares, in the form below, to be addressed to the Secretary, at the offices of the *Law Property Assurance and Trust Society*, 30, Essex-street, Strand. HERBERT COX, Secretary pro tem.

March 14, 1861.

## FORM OF APPLICATION FOR SHARES.

To the Promoters of the Law Reversionary Interest and Investment Society.

Gentlemen,—Be pleased to allot me shares in the Society, on the terms named in the Prospectus.

Yours, &c.

Dated .....

Name .....

Address .....

N.B. Unless the Society is formed, the entire deposit will be returned, and the expenses paid by the promoters.

# EQUITY and LAW LIFE ASSURANCE SOCIETY.

The Business and Interest of the Etonian Assurance Company having been transferred to this Society, the holders of Etonian Policies may, on application at the Office, 28, Lincoln's-inn-fields, obtain the endorsements necessary for entitling them to the benefits of the Assured in the Equity and Law Life Assurance Society.

# EQUITY and LAW LIFE ASSURANCE SOCIETY,

No. 28, Lincoln's-inn-fields, London, and Law Society's Rooms, Manchester.

## TRUSTEES.

The Right Hon. Lord Montague.  
The Right Hon. Lord Cranworth.  
The Right Hon. the Lord Chief Baron.  
The Hon. Mr. Justice Coleridge.  
The Hon. Mr. Justice Erle.  
Nassau W. Senior, esq. Master in Chancery.  
C. P. Cooper, esq. Q.C., LL.D., F.R.S.  
George Capron, esq.

The Business and Interest of the Etonian Assurance Company have been transferred to this Society.

"Free Policies" are issued, at a small increased rate of Premium, which remain in force although the Life assured may go to any part of the World.

The Tables are especially favourable to young and middle-aged Lives, and the Limits allowed to the Assured, without extra charge, are unusually extensive.

Eighty per Cent. of the Profits are divided at the end of every fifth year among the assured.—At the first Division to the end of 1840, the addition to the amount Assured averaged above fifty per cent. on the Premiums paid.

The usual Commission allowed.

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## To Readers and Correspondents.

"**LAW.**"—Mr. Harris has stated no more of the law of libel, as it used to be, than was absolutely necessary to make the subsequent decisions intelligible. We agree with him that the existing law is quite enough to occupy us without troubling ourselves with the past; and that rule we request all our contributors to observe.

"**J. W. W.**"—We have suggested to Lord Brougham a provision for a more adequate remuneration of the County Court clerks.

"**T. C. W.**"—An indictment would lie, provided it were proved that the person knew the fact which was neglected by the affidavit.

*We are much gratified to receive an universal approval of the new arrangement of the contents of the Law Times, and at the more substantial expression of it in a large accession of subscribers.*

## SCALE OF CHARGES FOR ADVERTISEMENTS.

Under Fifty Words..... 20 5 0  
For every additional Ten Words..... 0 0 6

Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.

Advertisements ordered for the first page are charged one-half more. If not so ordered, they will take the balance of position.

*We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.*

## THE LAW TIMES.

SATURDAY, APRIL 5, 1861.

## LORD JOHN RUSSELL'S CHANCERY REGULATION SCHEME.

THIS Bill will experience the usual fate of half-measures. It will offend the opponents of change, and it will not conciliate the support of reformers. The improvement it can effect will not reward the toil and trouble of the conflict. The same efforts that will be required to secure the success of this modicum of reform would suffice to carry a measure of real and effective reform.

Last year it was more than intimated by Lord JOHN RUSSELL that he contemplated the severance of the judicial and political functions of the Chancellor, by placing a permanent Judge in the Court, and having a moveable Lord Keeper as Chairman of the House of Lords. The Premier does not tell us wherefore he has changed his mind, and why this arrangement, which was almost unconsciously approved, is not adopted. But so it is that he has abandoned the scheme, which had obtained considerable popularity by anticipation, and now proposes, not to sever the offices, but to keep the Lord Chancellor as a Minister, and with nominal duties as a Judge, giving to him as assistants, who will be, in fact, substitutes, the Master of the Rolls and one of the Common Law Judges.

The objection to this proposition is, that it is manifestly a make-shift. The Lord Chancellor is to be relieved of his judicial labours by a contrivance. Nominally, the Court of Chancery will be his; really, it will be conducted by his colleagues. Thus there will be another sham, for wits and revolutionists to make a mark of, to the great damage of the law.

VOL. XVII. No. 418.

Either the Lord Chancellor is wanted in the Equity Court, or he is not. If wanted there, a substitute will not satisfy the suitor, and he cannot do his duty at once to the business of the court and the cares of a Cabinet Minister, and the offices ought to be severed. If not wanted, there is no reason for preserving that judicial office at all, and the wisest course would be to form a Court of Appeal out of the existing judicial staff, and avowedly to confine the Chancellor to his political duties.

But the scheme is wholly worthless for its professed purpose as a reform of the Court of Chancery. The present complaint is, that the work cannot be despatched by the existing Courts, because so large a portion of the time of one of the Judges is occupied in political affairs. Lord JOHN RUSSELL proposes to remedy this by taking a Judge from one of the other Courts to put into the neglected Court—an expedient closely resembling that of the Irish carpenter, who sought to lengthen his door by cutting off a slice from the bottom to put at the top. If the Rolls Court is to be closed while the Court of Chancery is sitting, not only is there no gain, but there is positive loss of so much work as is now performed when, as frequently happens, the Courts sit at the same time.

And Lord JOHN RUSSELL entirely fails to remove by this plan the principal objection to the existing system—the frequent change of Judges.

In fact, we are at a loss to understand what is the expected advantage of the measure, beyond the substitution of an Appeal Court composed of two Judges, for an appeal to a single Judge.

And even this is questionable. Many of the most distinguished jurists prefer a tribunal consisting of one Judge. JEREMY BENTHAM was a strenuous advocate for what he uncouthly termed "single-seatedness." Without expressing any confident opinion, we must avow our own impression to be, that, upon the whole, one Judge is preferable to many.

Altogether, this long-promised Chancery reform is a change, without being an improvement—a miserable performance after such mighty promises.

## PROFESSIONAL REMUNERATION IN THE COUNTY COURTS.

WE have received a copy of the Extension Bill, as amended by the Committee, containing the provisions for securing better remuneration in the County Courts, which it has been our good fortune to be the means of obtaining for the Profession, through the courtesy of Lord BROUGHAM, in giving attention to the arguments with which we endeavoured to support the suggestions we took the liberty of submitting to him.

The House of Lords has cordially adopted that suggestion, and introduced into the Bill, almost in our very words, the provisions we proposed. Thus improved, the practice of the County Courts must become a source of great and steadily increasing emolument to the Profession sufficient to command the attention of every member of it, and which will more than compensate the decline of business in the Superior Courts of Common Law.

These provisions are embodied in clauses 29 and 30 of the amended Bill, as follows:—

29. So much of the 13 & 14 Vict. c. 61, s. 6, as provides that the expense of employing a barrister or an attorney shall not be allowed in taxation of costs, unless by order of the judge, is hereby repealed; but the judges of the County Courts shall from time to time determine in what cases such expenses shall be allowed in taxation, giving public notice of their determination, to be affixed to the walls of the court-houses wherein they sit.

30. The judges empowered to make Rules of Practice by the 78th section of 9 & 10 Vict. c. 95, shall, from time to time, frame tables of fees to be paid to attorneys in the County Courts, and to be allowed as between attorney and client, and as between party and party, by the clerk of each such court in taxing the bills, but the judge of such court

shall have power, on revising the clerk's taxation, to direct that a greater or smaller sum shall be allowed, in the particular circumstances of the case, than is allowed by the table.

These provisions, which are almost in the very words we had suggested, will, we believe, accomplish all that the Profession could desire, and will entirely remove an injustice which we had begun to fear was not only hopeless of redress, but likely to be extended.

It will be observed, also, that the provision is not limited to any sum: it will be applicable to all suits in the County Courts, whatever their nature or amount.

## CLERKS IN THE COUNTY COURTS.

WE have not yet seen Lord BROUGHAM's last amended Bill, but it was with some amazement that we read in one of the daily papers a statement to the effect that a clause had been introduced permitting the clerks of attorneys to appear for their employers as advocates in the County Courts.

It would be difficult to suggest anything that would more certainly lower the County Courts in public estimation, and damage the Profession.

The objections to it are numerous:—

First, it would certainly deter the better class of the Profession, of either branch, from practising in the County Courts. How could an attorney meet in the conflict of advocacy the writing clerk of his neighbour? Would he endure to have a servant set up to be his public rival? How could a barrister in a public Court, with any regard to his position, enter into a formal discussion with a clerk? Would it be becoming? Is it not to confound all distinctions of rank, and practically to hand the whole business of the County Courts over to a new class of practitioners? For,

Second:—There would soon arise a class of Attorneys who would link themselves with some clever sham Lawyer, who would be designated the clerk, in consideration of a division of the spoil. It would be impossible to avoid evasions of this kind, and thus the rules that have hitherto cleansed the Courts from agents, and such-like vermin, would be set at naught, and all the mischiefs ensue which it has been the successful endeavour of the Judges to avoid.

Third:—It will degrade the County Courts in public esteem. Seeing that clerks are not allowed to practise in other courts, the public will naturally conclude that Courts which admit them must be inferior in degree, and thus they will fall into contempt.

The proposal must have proceeded either from some clerks who are naturally desirous to be raised from the desk to the office of Advocate, or from a few attorneys, who, being incompetent to conduct their own cases in the County Courts, and, unwilling to employ another attorney, desire at once to relieve themselves, to shew their contempt for Courts which they dislike, and to annoy their adversary by pitting their writer against him.

We trust that the most earnest remonstrances against this provision will be at once addressed to Lord BROUGHAM by our readers, and, be necessary, that a formal opposition if offered to it in both Houses of Parliament. Great as are the advantages secured to the Profession by other portions of this Bill, it would be far better to sacrifice them than that they should be accompanied with a provision so damaging and destructive as this, both to the well-being of the Profession and to the reputation of the County Courts.

## THE AMENDED COUNTY COURTS EXTENSION BILL.

THIS Bill has been submitted to a committee of the Lords, and has received in its progress considerable additions. The Bill, as thus altered, is now before us, and we propose to describe the alterations so made; but it should be stated that it has since

been recommitted for the purpose of further amendments, the particulars of which have not yet reached us.

The first series of clauses (Nos. 1 to 5) relates to arbitration. It permits parties in any matter of dispute to refer it for arbitration to the judge of the County Courts, who thereupon is to become vested with all the powers of an arbitrator, and his award is to be enforced by the ordinary process of the Court.

Clauses 6 to 12 relate to the Court of Reconciliation. They empower any person having a claim against another, in any matter of any kind, to cite such person before the judge of the County Court in whose district the defendant resides. Courts for this purpose to be holden at a convenient time during or after the ordinary sittings of the Court. The party cited is not to be compelled to appear, but he is to give the party citing notice whether he intends to appear or not; and such notice may be put in evidence on any subsequent trial of the case, for the purpose of affecting costs. When the party cited has given notice that he intends to appear, and then at the time appointed shall fail to appear, he shall be liable to pay to the other party reasonable costs, to be taxed by the clerk. When the parties appear, the judge is to hear them state their "respective claims or demands, and defences or answers, in the presence of each other, and shall give them his opinion and advice thereupon; and it shall be in their option to follow and abide by this advice or not, as they shall think fit. If they agree to abide by such advice the substance of it is to be entered in the Reconciliation Book, and to be final and binding on the parties, and shall have the effect of a covenant under seal in all Courts whatever."

Clauses 13 to 23 relate to the new Equity Jurisdiction of the County Courts. Power is given to any Equity Judge, in any matter before him, to direct that "any accounts or inquiries that may require to be taken," shall be taken or made by one of the judges of the County Courts, by whom they shall be taken in the same manner as by a Master in Chancery, and the report and evidence is to be filed. Power is also given to take pleas, answers, and examinations. The judges are constituted examiners of witnesses in the County Courts, and witnesses are bound to answer all questions put to them by the judge, in the same manner as if they had been contained in written interrogatories. The Lord Chancellor is to make orders for regulating the practice, and as to the mode of examining witnesses, and to sanction a table of fees to be allowed to the judges and clerks for the business done by them; such fees to be carried to the account of the fee fund.

Clause 25 empowers any two judges on Circuit to hear and determine appeals from the County Courts. But it does not provide for the case of *Wales*, in which there is only one judge on each Circuit.

The 26th clause repeals the enactment of the first County Courts Act, which forbids a Barrister to be heard unless instructed by an attorney; thus leaving matters in this respect in the former condition, to be regulated by the etiquette of the Profession. Certainly, to exclude Barristers alone from a right of audience, which is permissive with respect to all other persons, was an unjust and somewhat insulting provision. The matter was one solely for the internal regulation of the Profession, and not for Parliament to dictate. The repeal, therefore, of this restrictive proviso is right; although we should, as a matter of practice, strenuously deprecate any approach to the union of the functions of Barrister and Attorney in the same person. It could not advance the true interests of either branch of the Profession, and it would tend to the degradation of both.

The 27th clause is a slight extension of a provision of the County Courts Extension Act of last session, which empowers the County Courts to try by consent disputes unlimited in amount, but preserving the exceptions from the jurisdiction of the County Courts in the first Act. This clause empowers the Courts to try, by consent of the parties, all actions, whatever the amount claimed, and of whatever kind, and in such cases the parties may, in the memorandum of consent, agree upon the manner in which it shall be tried, as with or without a jury, &c. or with or without the examination of parties, &c. and in all other respects; and from decisions in such trials an appeal is to lie as in other cases.

Clauses 29 and 30 are those adopted by Lord BROUGHAM at our suggestion, and which provide

for the proper remuneration of the Profession. These are noticed above.

Clause 31 requires the venue on a new trial to be changed to another district on the application of either party.

Clause 32 was also adopted at our suggestion. It requires defendant to give notice of his intention to defend the action, in default of which he will not be permitted to dispute the claim, with power to the judge to give time and adjourn upon terms, in case of surprise or ignorance. The object of this is to save to plaintiffs the cost and inconvenience to which they are now put in being obliged to come to the Court prepared to prove their debts, even although the defendant may not have contemplated the disputing of them.

By clause 34 the summons is to contain a notice of conditions on the fulfilment of which proceedings are to be stayed.

Clause 35 provides that suits for upwards of 20*l*. and those under the voluntary jurisdiction of the Act of last session, "shall be tried at special sittings to be holden for the trial of such suits only at such intervals, although exceeding one calendar month, and at such of the several places within the district of such County Court for the time being appointed for the trial of cases," as the Lord Chancellor shall direct.

Clause 36 relates to the recovery of arrears of tithe rent-charges; and clauses 37 to 39, to the abolition of existing local courts.

## THE LEGISLATOR.

### Summary.

THE Legal business of Parliament has not made much progress. The Chancery Reform Bill is universally condemned, and will probably perish in its present embryo stage. The Prosecutions Bill has been amended, and is proceeding rapidly. This is all the news from the Commons.

In the Lords, the County Courts Bill has been twice before a committee, each time to receive additions and amendments. It has grown from very small dimensions to be a formidable Bill of nearly forty clauses. It is passing through its stages without opposition, supported by all parties and by all the Law Lords.

The Assurance of Titles Bill has made no further progress. Time is allowed for the country to digest the plan. As yet there has not been the slightest appearance of opposition to it from any quarter. Indeed, the only doubtful point is as to the propriety of a local instead of a general registry, and for that an effort should be made.

LORD CAMPBELL'S Criminal Law Amendment Bill also slumbers during the absence of the Lord Chief Justice on circuit.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

Friday, March 28.

General Board of Health  
Acts of Parliament Abbreviation Act Amendment  
Small Tenements Rating Act Amendment.

Saturday, March 29.

Marine Mutiny.  
Process and Practice, Ireland.

Monday, March 31.

Charitable Institutions Notices  
Landlord and Tenant  
Audit of Railway Accounts, No. 2.

##### BILLS READ A SECOND TIME.

Monday, March 31.

Marine Mutiny  
Mutiny  
Prisons, Scotland  
Steam Navigation.

Tuesday, April 1.

Medical Charities, Ireland  
Acts of Parliament Abbreviation Act Repeal.

Wednesday, April 2.

Audit of Railway Accounts.  
Thursday, April 3.  
Apprentices to Sea Service, Ireland  
General Board of Health  
Process and Practice, Ireland.

##### BILL READ A THIRD TIME AND PASSED.

Friday, March 28.

Appointment of a Vice-Chancellor.

Monday, March 31.  
Apprentices and Servants.

Thursday, April 3.

Marine Mutiny  
Mutiny.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

Monday, March 31.

Cheltenham and Gloucester District Turnpike  
Cheltenham and Painswick Road  
Durham Markets  
Hartlepool Freemen's Lands, &c.  
Reading Cemetery  
Tenterden and Woodchurch Roads  
Magneto-Electric Telegraph Company.  
Thursday, April 3.  
Manchester Parish Highways  
Sheffield and Glossop Road  
Whitby Waterworks.

##### SESSIONAL PRINTED PAPERS.

Par. Num.

142. Window Duty—Return
106. Roman Catholic Bishops (Australia)—A connected Copy of Letter
- Turnpike Trusts—Reports of the Secretary of State
- 36 (3). Ceylon—Appendix and Index to the Third Report (Session 1860)
123. New South Wales—Copies of Despatches
125. Freight Money (Greenwich Hospital)—Return
- Turnpike Trusts—Reports of the Secretary of State
- Poor Law Board—Third Annual Report
- Population of Great Britain—Forms and Instructions
- Australian Colonies (South and Western Australia, and Van Diemen's Land)—Papers; Part 3
- Court of Rome—Correspondence
130. Convict Discipline and Transportation—Copies of Petitions
147. Dartford Savings Bank—Return
154. British Guiana—Copies of Correspondence
63. Local Acts—Reports of the Admiralty
100. Corn—Account
140. Public Income and Expenditure, &c. (1823 to 1860)—Accounts
143. Orange-street Waterworks—Return
150. Trade and Navigation—Accounts
97. Arctic Expeditions—Return
145. Bills—Designs Act Extension—Lords' Report
149. — Apprentices to Sea Service (Ireland)
159. — Small Tenements Rating Act Amendment
169. — Process and Practice (Ireland)
144. — Valuation (Ireland), as amended by the Select Committee
157. — General Board of Health
158. — Acts of Parliament Abbreviation Act Repeal
146. — Hainault Forest

## HOUSE OF LORDS.

### COURT OF CHANCERY BILL.

LORD LYNHURST called the attention of the House to the Bill for the reform of the Court of Chancery about to be introduced in the House of Commons, and to that respecting the appellate jurisdiction of the House of Lords, which would shortly be brought before their Lordships. He could not help thinking that these two Bills were part and parcel of the same measure, and he conceived that he had just cause to complain that such a measure should have been first discussed in the House of Commons. There had never been a precedent for such a proceeding, and it was the more uncalled for at the present time as the House of Lords had never been so well furnished with eminent men capable of deliberating on so grave a subject. The noble lord then detailed his objections to the proposed Bills, and concluded by asking why the usual practice with respect to Bills relating to the Court of Chancery had been departed from on the present occasion. The LORD CHANCELLOR, though not so well acquainted with the rules of the House as LORD LYNHURST, could not help thinking that his noble friend had entirely forgotten those rules. The Bills which he had been commenting upon were no Bills at all, for they had not yet been introduced into either House. The question of Chancery reform was one of immense difficulty, and discussions on it had often taken place in their lordships' House. Under such circumstances, he did not think it extraordinary that LORD JOHN RUSSELL should have brought forward a similar discussion in the House of Commons. He would only add in conclusion, that he thought the course taken by his noble friend in plunging into this irregular discussion, was little calculated to increase the respect felt for their lordships' House. LORD BROUGHAM said that the Lord Chancellor had called Lord Lyndhurst's question irregular and extraordinary, but he thought his noble friend's answer still more extraordinary, inasmuch as it was no answer at all, for certainly there must have been a reason for introducing the Bill into the House of Commons in the first instance, and yet they were not told what that reason was. After some further discussion, in which LORD GORE and LORD REDCLIFFE joined, the matter dropped.

### COUNTY COURTS EXTENSION.

THURSDAY, APRIL 3.—LORD BROUGHAM moved that the House resolve itself into committee on the County Courts Extension Bill, but was opposed by the Lord Chancellor, who, after enumerating his objections to the measure, moved that it be considered in committee that day six months. LORD BROUGHAM warmly defended the Bill, and it was ultimately agreed that



it should be committed *pro forma*, and reconsidered on Monday next, after the introduction of further amendments.

#### COUNTY COURTS.

FRIDAY, April 4.—Lord REDESDALE moved the adoption of the report on the County Courts further Extension Bill.—After a few words from Lord Abinger and Lord Brougham, the report was received, and the Bill was ordered to be re-committed on Tuesday.

#### HOUSE OF COMMONS.

##### EXPENSES OF PROSECUTIONS BILL.

WEDNESDAY, April 2.—On the motion of Sir G. GREY, this Bill was committed *pro forma*, for the purpose of printing some additional clauses.

##### CHARITABLE INSTITUTIONS.

THURSDAY, April 3.—Mr. MULLINS obtained leave to bring in a Bill to provide for the service, by post, of notices relative to the proceedings of charitable institutions, and to make further provision for the services of such notices in future.

##### LANDLORD AND TENANT.

Mr. MULLINS obtained leave to bring in a Bill to improve the law of landlord and tenant, in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures.

##### DIMINUTION OF JUDGES.

Mr. BRIGHT asked whether it was the intention of the noble lord (Lord J. Russell) to carry out the recommendation for the diminution of judges in Scotland and Ireland?—Mr. W. PATTEN was understood to ask whether the recommendation of the committee with regard to the office of Vice-Chancellor was to be carried into effect?—Lord J. RUSSELL, in reply to the question of the hon. member (Mr. Patten), said it was his intention to introduce a Bill similar to the one of last session, when he would make a statement on the subject. Regarding the reduction of the number of the judges he had received strong representations from Scotland, and, in deference to these opinions, the Government thought there should be no reduction in Scotland.—Mr. BRIGHT said the noble lord would be able to inform the House whether the opinions he had received from Scotland were those of the legal profession, as there existed in Scotland considerable difference of opinion on the subject between the legal profession and the public?—The question was not answered.

##### FRIENDLY SOCIETIES.

Mr. BREMERIDGE wished to ask the Chancellor of the Exchequer whether the salaries provided for the registrars of friendly societies in England, Scotland, and Ireland respectively, under the provisions of the Friendly Societies Act, passed last session, viz. the 13 & 14 Vict. c. 114, have been and are henceforth to be paid to them out of the consolidated fund of the United Kingdom, in addition to the fees provided for and made payable to the said registrars under the said Act, or whether such fees are to be brought into account, and paid into such consolidated fund, or retained by the said registrars, in part, or in full discharge of such salaries (as the case may be), in the same manner as was provided under the former Act (now repealed) of 9 & 10 Vict. c. 27?—The CHANCELLOR of the EXCHEQUER said, that with regard to Scotland and Ireland, fees had been received as heretofore. No salaries had been paid. As to England, no change had been made from what took place before the last Act. By some accident in the committee, a clause on the point in question had been omitted from that Act.

#### Bills in Progress.

PATENT LAW AMENDMENT BILL.—Lord Brougham's Bill to amend the law touching letters patent for inventions has been published. It proposes that the Lord Chancellor, the Master of the Rolls, the Attorney-General for England, the Solicitor-General for England, the Lord Advocate, the Solicitor-General for Scotland, the Attorney-General for Ireland and the Solicitor-General for Ireland, for the time being respectively, should be commissioners of patents for inventions, "having power to make rules and orders respecting applications for and the making and issuing of letters patent, &c. and to appoint such officers, clerks, and servants as may be necessary for the execution of their powers. The persons appointed by the commissioners shall report upon petitions for letters patent, and the commissioners shall cause a warrant for sign manual to be made, on the receipt of which the Lord Chancellor shall issue letters patent of like force as heretofore, subject to the condition that the powers and privileges granted cease at the expiration of three years and seven years respectively, unless 40*l.* additional stamp duty be paid before the expiration of the third year, or 70*l.* additional stamp duty at the expiration of the seventh year. Specifications and drawings shall be preserved for reference, and copies of the specifications of all letters patent left open to inspection, printed, and published. Memoranda of alterations entered

by the patentee shall be deemed part of the letters patent. The fees proposed to be taken and paid in the Great Seal Patent-office are as follows:—On leaving petition for grant of letters patent for an invention for the United Kingdom of Great Britain and Ireland, 10*l.*; on warrant for her Majesty's sign manual and for letters patent for the United Kingdom, 8*l.*; on filing specification of such letters patent, and for registration thereof, 2*l.*; registration of payment of further stamp duty of 40*l.* before the expiration of the third year of such letters patent, and for certificate, 5*s.*; for every search for and inspection of any record at Great Seal Patent-office, 1*s.*; for record of notice of disclaimer or memorandum of alteration, 5*s.*; for record of every caveat or notice of opposition, 5*s.* The stamp duties proposed to be levied and taken under the Act are—stamp duty on granting letters patent for an invention for the United Kingdom of Great Britain and Ireland, 10*l.*; additional stamp duty on such letters patent to be paid on or before the expiration of the third year from the date of such letters patent, 40*l.*; additional stamp duty on such letters patent, to be paid on or before the expiration of the seventh year from the date of such letters patent, 70*l.*

NEW ACT FOR COMMONS INCLOSURE.—The Act (14 Vict. c. 2) to authorize the inclosure of certain lands, in pursuance of the sixth annual report of the commissioners, was yesterday printed. The inclosure of the following places is to be proceeded with:—Tanworth, Warwick; Bromsbrough-heath, Gloucester; Abergwilly, Carmarthen; Cellan Mountain, Cardigan; Kingston, Hereford; Rogglet and Mininther, Monmouth; Blaenpenal, Cardigan; Colby-moor, Westmoreland; Meppashall, Hertfordshire and Bedfordshire; Twyford-down, Southampton; Owalebury, Southampton; Lurkenhope-common, Salop; Ash, Surrey; Marshfield, Gloucester; Smallridge, Devon; Ipplepen, Devon; Towednack, Cornwall; Ludgershall, Wiltshire; Compton Abbas, Dorset; Draxford, Southampton; Stourpaine and Ash, Dorset; Whitley, Berkshire; Shinfield-green, Berkshire; Scaleby-moss, Cumberland; and Newton, Cambridge.

RELIGIOUS HOUSES.—The Bill brought in by Mr. Lacy and Mr. Spooner to prevent the forcible detention of females in houses wherein persons bound by religious or monastic vows are resident or associated, provides that such house shall be registered by the clerk of the peace of the county in which it is situate; that the justices for every county in which any religious house shall be registered shall appoint six or more justices of the peace to act as visitors of each house, who shall be sworn to keep secret all such matters as shall come under their knowledge in the execution of their office as visitors, except when required to divulge the same by legal authority, or for the better execution of their duty. Registered religious houses shall be visited twice a year, and if it appear to the visitors that any female is desirous of leaving the religious house in which she is resident, they shall have power to remove her, and to place her under the care of the matron of the union in which the religious house is situate. Superiors not causing their religious houses to be registered, or wilfully making any false statement in respect of such houses, or obstructing or impeding any of the visitors on their way to, at, or in, or returning from any such religious house, shall be deemed guilty of a misdemeanor. Any person assaulting a visitor in the religious house shall be deemed guilty of a felony. Concealment of any part of a religious house, or the premises appertaining thereto, or of any person residing therein from the visitors, or the production of a false list of the inmates, shall be looked upon as a misdemeanor.

#### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

##### SUMMARY.

SIR George Grey has made material amendments in the Prosecutions Bill, so far as respects the salaries of magistrates' clerks and prohibiting them to conduct prosecutions. The latter provision is, indeed, withdrawn, and in lieu of it they are to be permitted and required to conduct prosecutions when so directed by the committing magistrate. There can be no doubt that, in the rural districts, many prosecutions would go to the assizes without preparation, if magistrates' clerks were forbidden to conduct them.

It will be observed that, in the case of *Reg. v. Gardner*, 17 Law T. 7, the costs of the prosecution were allowed on an indictment for fraudulent winning of money at cards, &c., under 8 & 9 Vict. c. 109, s. 17, and as being within the statute 7 Geo. 4, c. 64, s. 23, which

empowers the Court to order the costs of prosecutions in indictments for "knowingly and designedly obtaining any property by false pretences." And in *Reg. v. Dunning*, 17 Law T. 8, a person who was residing in a house entered by burglars, and who, by fastening them in a room, detained them there till aid was obtained and they were captured, is within the meaning of the statute (1 Geo. 4, c. 64 s. 8), which enables the Court to order payment of a reward to any person who appears to have been active in the apprehension of offenders.

E. W. C.

#### JOINT-STOCK COMPANIES' LAW JOURNAL.

THE *Lands Clauses Consolidation Act* is one of the most fruitful sources of litigation. Seldom a week passes without one or more decisions upon it being reported. There was another in our last number. It appears that a railway company, after the completion of their works, received a notice from a certain owner of land in the neighbourhood of the railway that it had been damaged by the construction of the works, and claiming 550*l.* as compensation, and that if not paid within twenty-one days (according to sec. 68 of the above statute), the company were required to summon a jury to assess compensation. The company filed a bill for an injunction to restrain further proceedings, denying that the property was damaged. It was held to be a purely legal question whether the owner was entitled to such compensation, and the injunction was refused. (*South Staffordshire Railway Company v. Hall*, 17 Law T. 2.)

A question of very great interest in the law of Joint-stock Companies has been kindly forwarded to us by a correspondent in Sunderland. In *Kearney v. The Sunderland Marine Insurance Company*, 17 Law T. 8, the point was raised, in what manner a corporation can enter into recognizances? The company in question was required to do this, in order to obtain a new trial in a case that had been tried in the Court of Pleas, Durham. They proposed to do so by their directors. But, after a hearing before Baron ROLFE, it was decided that a company (being a corporation) can only do so by appointing, by power of attorney, under the common seal of the company, signed by two directors, and duly stamped, an attorney to appear in the Court, or before a justice thereof, and for and in behalf of the company with two sureties to enter into a recognizance. The form of this recognizance is given in this report, and may be useful as a precedent, should a similar case occur in the practice of any of our readers who may be the legal advisers of companies.

E. W. C.

#### WINDING UP.

V. C. BRUCE could see no distinction between *Ex parte Hirschel*, 17 Law T. 1, and those relating to the liability of allottees, previously decided by Lord CRANWORTH. To us, not merely is the distinction palpable, but its consequences are most material. The former cases, which decide the non-liability of allottees, proceeded upon the principle that the terms of the contract between the committee and the company were nothing more than a conditional offer to take, and a conditional acceptance of, so many shares, provided the proposed company were formed, and, that, falling there was no membership, and therefore no liability. But, in the above case, the prospectus of the company expressly stated that the deposits were to be applied to the payment of the preliminary expenses. The application for shares was made, of course, upon the terms of the prospectus, which the applicant would be presumed to know, because the fact of application for shares proves his knowledge of the existence of the proposal as stated in the prospectus; and an application for shares is, in such case, upon the terms so stated, and which, therefore, form a part of the contract, which may be thus stated. "I agree to take so many shares in the company, if formed, to pay the deposit required, and I consent to such

deposit being applied to the payment of the preliminary expenses." Such is clearly the nature of the agreement, and which it be good in law. The only objection to it could be want of consideration. But we have no doubt that the expected advantages to be derived from the establishment of the company of which the applicant is to be admitted a member would be held to be a sufficient consideration for an agreement by him to pay a proportionate share of the expenses incurred in endeavouring to form such company. Nevertheless, the allottee was held not to be a contributory, as coming within Lord CRANWORTH's decisions in the case of allottees. The question is of considerable importance, and ought to be taken to the House of Lords.

In *ex parte Craston*, 17 Law T. 1, the point was raised as to the precise period of time to which a transfer of shares was liable in respect of them. The deed of settlement provided that no shareholder should be liable for calls after transfer of his shares, and should thenceforth be discharged from all liabilities in respect thereof. The Master placed the transfer on the list of contributories, as a person who had signed the deed, and was liable up to the day of the transfer. But the Court held that he was not a contributory, the provisions of the deed discharging shareholders from all liabilities after transfer, even such as were incurred previously to the transfer. But with all deference to the Vice-Chancellor, we would suggest that, inasmuch as no provisions of the deed could take away the rights of creditors, and the shareholder is liable at law for the debts recovered previous to the transfer, and the Winding-up Act has expressly declared that the provisions shall not affect the legal or equitable rights or liabilities of parties, the shareholder, being still liable at law for debts due to the time of his transfer, is a contributory within the Winding-up Acts. E. W. O.

**PORT OF LONDON SHIPOWNERS' INSURANCE COMPANY.**—On Friday the first meeting to settle the list of shareholders brought on by Mr. Hatton, the official manager, and Mr. Colley, his solicitor, was held before Master Tinney. In the process of settlement it appeared that the signature of the attesting witness to the deed occurred in many places in juxtaposition with a blank, shewing that the signature of the attesting witness was placed there by anticipation. On the name of Mr. Augustus Collingridge, the promoter of the measure, being called, the only answer was the return of the official manager's summons through the dead-letter office. Several individuals attended, and complained of having been cajoled into the concern. A practice appeared to have prevailed of getting parties indiscriminately to sign the deed by power of attorney prepared for the purpose, and which in law holds the parties equally liable as though they had actually signed the deed. A lady alleged that in this way she had been induced by Costello, a Jew, who was very active in promoting the measure, to sign one of these powers of attorney, on a representation that the shares would be worth her having, and that at any rate she might dispose of them directly. Mr. Aaron L. Hammond, who protested against ever having signed the deed, or given a power of attorney for the purpose, was struck off the list, it appearing, moreover, that his signature to the deed was misspelled. A person who signed the deed for four of his children was held to be individually liable.—*Daily News*.

**THE RUGBY, WARWICK, AND WORCESTER RAILWAY.**—On Friday there was a numerous meeting of the shareholders to discuss the expediency of a call. Mr. Daniels and Mr. Vallance appeared as counsel for Mr. Wryghte, the official manager; and Mr. Roxburghe, Mr. Jesse, Mr. Field, Messrs. Galsworthy, Smith, Yeats, and others, for various parties who opposed the call. The report of Mr. Wryghte, the official manager, as to the necessity of a call, set forth that the total shares allotted were 28,115, out of which the directors bought up by the brokers in the market 5,655, leaving 22,460 in circulation; and on 21,620 of which, as appeared from the books of the company, the holders had received back 15s. per share, leaving 1,890 shares held by parties who had not received any thing. The claims upon the company at present ascertained were as follow:—The Northamptonshire Banking Company, 3,420l.; Messrs. Preece, 480l.; G. H. Weller, 1,000l.; T. Red, 264l.; T. Hodgson, 157l.; C. Jones, 152l.; Messrs. Wright and Welchman, 190l.; G. Pell, 500l.; sundries, 1,000l.; total claims, 6,264l. Cost of winding up to this period, 10,000l. The official manager stated his opinion that a call of 10s. per share would be necessary to meet these arrangements, independent of any proceedings that might be taken against the directors for the recovery of 15,430l. misappropriated by them in purchasing 5,655 shares with the company's funds in the market. Ultimately the Master determined that a call of 4s. per share should be made on all

those who had received back 15s. per share from the directors.—*Morning Chronicle*.

**DOVER, HASTINGS, AND BRIGHTON JUNCTION RAILWAY.**—On Thursday the first meeting to settle the list of contributories, brought in by Mr. Nevins, the official manager, and his solicitors, Messrs. Wilkinson and Gurney, was held before his Honour Master Brougham. The list taken contained the names of fifteen members of the committee of management, who had attended meetings for the transaction of the company's business, and whose qualification was fixed in the subscribers' contract for forty shares.

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]

*Sligo and Shannon Railway Company.*—To settle list of contributories in Class A, on 14th April; and on 15th, all not in Class A.—*Farrer*.

*National Distaffed and Dry Measure Company.*—Call of 2s. per share on all the contributories by 10th April.—*Farrer*.

*Imperial Salt and Alkali Company.*—To settle list of contributories, on 26th April.—*Tinney*.

*Kilham's Railway Locomotive and Carriage Improvement Company.*—Call of 9s. per share on all contributories, so far as the list has been settled, by 17th April.—*Kindersley*.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

A VERY large class of cases in the *Law of Wills* relates to the question, what words will pass real estate. In *Morrison v. Hopper*, 17 Law T. 1, the testator directed certain stocks "to be added to my other property," and divided among his daughters, and afterwards he declared his will to be "that the property so left" to them should be settled, &c. It was held that the general term "property" passed the real estate, and this, although he had referred to the income arising from his said "property" by the terms "dividends" and "interest." Another case on the construction of a will was *Lane v. Green*, 17 Law T. 1. There A. gave 100l. a piece to the four sons of B. by her former husband. The only issue of B.'s former marriage had been three sons and one daughter. It was held, nevertheless, that these latter took 100l. a piece.

It seems to be settled now, after a great deal of controversy, that by no contrivance can a married woman charge or convey her reversionary interest. This was again affirmed by Vice-Chancellor Bruce in *Hobby v. Collins*, 17 Law T. 2, in which it was contended that the Fines and Recoveries Act might enable her to do so. But his Honour said that the point was not new to him, he had often considered it, and was clearly of opinion that a wife could not deal with land in which she had a reversionary interest.

Another case on the construction of a will, involving some very nice questions as to the law of remoteness and the doctrine of contingent remainders, is that of *Doe dem. Evers v. Challis*, 17 Law T. 4. It will suffice to refer the reader to it for the particulars, which are too minute to be satisfactorily described in this summary.

A fourth *Will Case* is reported from the Ex. In *Doe dem. Jones v. Hughes*, 17 Law T. 5, the question was, as to the extent of powers vested in the executrix. The will contained this clause: "I subject and make liable all my real and personal estate with the payment of my just debts, funeral and testamentary expenses, and charges attendant thereon, the legacy hereinafter by me bequeathed and subject thereto, and to the payment thereof, I give and devise the rents and profits of all and singular my messuages, tenements, farms, and lands (except my Bala houses), to my wife," and appointed her sole executrix. It was held that this charge to pay debts did not give an implied power to sell or mortgage. "There is not," said PARKES, B. "a single case or a single authority which says that the simple charge of the estate with the payment of debts does more than make a charge upon the estate in the hands of the devisee, if the estate is devised, or in the hands of the heir-at-law, if the estate devolves upon him by the law of inheritance. This will only subjects the estate in the hands of the heir-at-law to a charge for funeral and testamentary expenses, and the charges attending the proof of the will, which the executrix must enforce through the medium of a Court of Equity, and therefore we think in this case she had no power to sell or mortgage that estate."

#### THE MERCANTILE LAWYER.

##### Summary.

THE question of what is a *fraudulent preference* is continually arising in the practice of the legal advisers of traders; therefore, every case on this subject is interesting to them, and should be read with attention. In *Newham v. Stevenson*, 17 Law T. 5, the goods of A., a trader, were seized by the sheriff on June 21st, under a *fi. fa.* and assigned to plaintiff by bill of sale on 21st of June, under a judgment signed upon a warrant of attorney, given by A. to the plaintiff in the preceding February. The goods remained on the premises occupied by A. until Sept. 11, when plaintiff took possession of them, and A. quitted the premises. On Oct. 5, while plaintiff was in possession of the goods, defendant distrained. On Oct. 8 A. filed a petition in bankruptcy, and assignees were appointed on the 23rd. The assignees never interfered with, or demanded, the goods, but they commenced an action of trover against the plaintiff for the conversion of the goods. The plaintiff brought an action against the defendants for excessive distress, and the question was, whether, the warrant of attorney being fraudulent and void, as having been given voluntarily by A. for the purpose of securing the plaintiff against the other creditors, the bill of sale conveyed a property to the plaintiff, who, if not the owner, was not entitled to maintain the action. The Court held that such was not the effect of the finding of the jury. "The intention of the bankrupt was to pass the property to the plaintiff, who, but for the bankruptcy, would have been indefeasible owner in possession, and must have maintained an action. The effect of the bankruptcy, and the fraudulent preference, is not to put the goods into the same situation as if they had passed to the assignees, so as to vest them at once in the assignees by the bankruptcy, independently of election on their part, but by the transfer, which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, and the title by that transfer is perfect, except so far as it is invalidated by the assignees."

The liability of a husband for his wife's debts is a continual subject of discussion in the Courts. In the case of *De Gruchy v. Bruyeres*, 17 Law T. 7, it was ruled that, where they are living apart, the husband is liable for necessities supplied to the wife, unless he makes her an allowance fairly proportioned to his means. But it is difficult to understand upon what principle the rights of third parties are regulated by the private arrangements of others, and that, too, without shewing that they have come to his knowledge.

In the same case it was intimated, but not positively decided, that a letter to the wife directing her to get in and send to him a list of her debts, that some arrangement might be made respecting them, will not make him liable where there is an adequate allowance, nor even although, for three months after the letter, he did not remit the dividends of property settled to her separate use.

#### COUNTY COURTS.

##### Summary.

LORD BROUGHAM has introduced some further amendments into his County Courts Extension Bill, and again sent it into committee; but it is to be passed rapidly through the Lords, who have already agreed to its provisions, with a few additions and alterations proposed by the Lord Chancellor and Lord CRANWORTH, and it will probably be sent down to the Commons before the Easter holidays. It is not likely to meet with any serious opposition there, as the history of the Bill of last Session, carried against the Government by immense majorities, sufficiently proves. When it has received its final shaping by the Lords, we will again present our readers with an outline of the completed structure. We understand that the

clause permitting Counsel to appear unrepresented by an Attorney is to be withdrawn, a decided objection being entertained by all the Law Lords to the union in the same person of the functions of Advocate and Attorney, and as a substitute it is to be provided that in cases below a certain amount Attorneys may perform the double duty, but above that amount the offices shall be kept distinct, as hitherto has been the custom in this country.

Some points of practice have been reported in insolvency, and should be noted in *Macrae's Practice*. In *Re Braine*, 17 Law T. 6, it was held that a creditor receiving due notice of the hearing of an insolvent, and not appearing to oppose until an adjourned hearing, is not entitled to be heard.

In *Re Taylor*, 17 Law T. 6, it was decided that debts may be contracted in trade without reasonable or probable expectation of payment; and in *Re Powell*, 17 Law T. 6, it was intimated that neglecting to make payments, pursuant to the terms of the proposal made at the granting of the final order, is a contempt of Court, and might be dealt with as such.

### COSTS IN THE COUNTY COURTS.

[FROM A CORRESPONDENT.]

LEGISLATION, like "vaulting ambition," sometimes overlaps itself: in its eagerness to provide against some specific evil, or procure some certain advantage, it encroaches upon interests collateral to the object; inflicting hardship on classes or individuals. In a recent instance, the Legislature, in running a tilt against expensive litigation, has introduced a strange anomaly into the law of costs, and occasioned a peculiar hardship to those who occupy the position of recipients—an anomaly so absurd, and a hardship so oppressive, as to render it highly desirable that an enactment should be framed to assimilate the practice, and remove the injustice.

The Act constituting the County Courts restricts the fees and costs of attorneys in relation to suits in them, in language somewhat ambiguous, but the meaning of which may be regarded as having been settled by subsequent decisions. The material part of the 91st section of the 9 & 10 Vict. c. 95, runs as follows,—"No person, not being an attorney admitted to one of her Majesty's Superior Courts of Record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court; and no attorney shall be entitled to recover therefor any sum of money, unless the debt or damage claimed shall be more than 40s. or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 50s.; or more than 15s. in any case within the summary jurisdiction given by this Act." It was at first thought, and so decided in the Court of Queen's Bench, in *Ex parte Green*, 12 Jur. 1004, that this provision absolutely excluded attorneys from the recovery of any further costs than those specified for the whole of the business in relation to which a hearing in the County Court took place, whether before, or at, or after the hearing. But the absurdity and injustice of this construction was subsequently pointed out in *Re Keighley*, 19 Law J. 166; C. P. and *Ex parte Green*, overruled. In that case the Court of C. P. extended the words "for appearing or acting on behalf of any other person in the said court" to, and made them govern and restrict the three following members of the clause, so as to read the provision where 10 shillings or 15 shillings may be had or recovered, as applicable only to fees and costs for such appearing or acting in court. Nothing can be more convincing than the reasons given by the Court of C. P. for this construction; nothing more apparent than the absurdity and hardship attendant upon that made in *Ex parte Green*. According to the latter construction, an attorney would be entitled to recover costs for what was done out of court in cases not exceeding 40 shillings (the words taking away costs in such cases referring clearly only to the costs of appearing in court); but where more than that amount should be recovered, to restrict his costs absolutely to 10 or 15 shillings: and its effect would further be to make a contract for work and labour—which the employment of an attorney is—not binding, if the employment should end in a County Court, but binding if it should not. Both of these consequences are adverted to by the Court in their judgment in the case of *Re Keighley*. The Court of Q. B., in a recent case, *Re John Toby*, 20 Law J. 508; Q. B., overruled their decision in *Ex parte Green*, and confirmed *Re Keighley*: the conclusion to which the Court had arrived being expressed by Lord Campbell, to be "that the restraining clause applies only to the appearing and acting of the attorney in court, and not to his services out of court, in advising or getting up the case." The correctness of this construction there is therefore no reason to doubt.

But, unfortunately, in the analogous provision of the Act for Extending the Jurisdiction of the County Courts (the 13 & 14 Vict. c. 61, s. 6), the

language of the corresponding section of the prior Act is departed from, and new doubt and difficulty introduced. It may be gravely questioned whether this provision does not introduce a greater anomaly and hardship than that pointed out by the Court of C. P. as the result of the first decision of the Court of Q. B. The costs are restricted, not to the appearing in court, but absolutely and without reservation. The part of sec. 6 pertinent to this consideration is as follows: "And be it enacted, that the fees to be taken by barristers-at-law and attorneys practising in the said courts, in cases brought within the jurisdiction given by this Act, shall be as follow: an attorney shall be entitled to have or recover a sum not exceeding 1l. 10s. for his fees and costs, where the debt, damage, or demand claimed in any plaint in covenant, debt, detinue, or assumpsit, shall not exceed 35l. or 2l. in any other case within the jurisdiction given by this Act." Consequently, according to the meaning given by the Courts to the 91st section of the 9 & 10 Vict. c. 95, an attorney will be entitled, as in ordinary cases, to his costs, for labour done in a suit in the County Court, save the cost of appearing and acting in court, where the sum claimed does not exceed 20l.: where it is above that amount, he will be entitled, by sec. 6 of the 13 & 14 Vict. c. 61, only to 1l. 15s. or, at most, 2l. "for his fees and costs."

The absurdity this must produce in practice is too palpable to require comment. It reverses the ordinary rule of remuneration for services, whether the labour be legal or otherwise, and, inverting common sense, makes the greater the labour bestowed, or the higher the benefit produced, the less the remuneration.

### TO THE EDITOR OF THE LAW TIMES.

SIR,—I am very glad to observe from your comments on Lord Brougham's new County Court Extension Bill, that he proposes to secure proper remuneration for professional men. Will you allow me to call your attention to another part of the subject, connected with the clerks of courts? Government are now reaping the profits of the increase of business which accrues to them under the last Extension Bill upon judges' fees, and the general fund, and are also saved by a clause therein from paying any rent for court-houses, although they still take from the suitor the fund which was originally exacted for the purpose of meeting these and other general expenses.

The judges are paid the same as, and the clerks no better than, before. It happens here and there in large districts that the clerk realises a very considerable sum by his fees, but in many cases the clerk does not realise above 30s. per annum. However this may be, he has to keep office and be open to the public from ten to four daily, to keep six books, attend all audits, make out all summonses, warrants, forms, orders, &c. attend court every month, and in a great number of cases is unavoidably compelled gratuitously to act in advising and drawing plaints, &c. for poor suitors upon points really of nicety and difficulty which are not governed by the amount of claim. Perhaps it would not be out of the way to suggest that some of the surplus moneys which go to the Treasury should be appropriated in remedying this, so as to give each clerk a fair salary.

I think your views as to the separate functions of advocates and attorneys perfectly correct.

I am, Sir, yours, &c.

March 31, 1851. A CONSTANT READER.

### COUNTY COURTS EXTENSION.

TO THE EDITOR OF THE LAW TIMES.

SIR,—You lead us to suppose that something has been done by your suggestion, with respect to the contemplated measure, and one and all, the public and the profession, will feel obliged to you without any doubt. But, do you, Sir, see that (as the daily papers report) it is proposed that attorneys' clerks should become advocates; and have you nothing to say against such a mischievous and useless provision?

The only persons in the kingdom seeking it are a few solicitors of large practice, who would set their clerks to do what they profess to be ashamed of themselves,—namely, to attend to County Court practice. If it become law, both the profession and the public must suffer: the former in position, the latter in estate. Surely, reasons and instances are needless. Of all things that the County Courts want, that which they have not as yet, is *respectability*; and this provision would, as you must know, more than anything else, tend to lower the character of the Courts.

Then, Sir, if you have any weight, you will, I should think, consider this an occasion to bring it to bear. This one thing would more than counterbalance all the good contemplated by the Bill, because it would be lowering the *status* of the Courts.

There are hosts of reasons, perhaps better considered than expressed, for my making this suggestion to you. I am, Sir, yours, &c.,

April 2, 1851.

C. R. G.

THE BANKRUPTCY JURISDICTION.—In Lord Brougham's Bill to give the judges in the County Courts jurisdiction in matters of bankruptcy, Durham was not inserted in Schedule A as a place where such courts were to be holden; but the whole of that county was to be dragged to Newcastle, although the number of bankrupts in that county during the last three years has been nearly double of those in Northumberland and Newcastle joined. Through the energy of the professional gentlemen in that city, among whom we may mention Messrs. W. Scruton and H. Marshall, petitions were signed from the different places in the county and sent to Lord Brougham, who thereupon inserted Durham in the schedule. This shows what the Attorneys may do for themselves if they will.

According to a return to the House of Lords, obtained by Lord Brougham, 126 writs of *certiorari* have been issued to remove proceedings from the County Courts into the Court of Q. B. between the 15th March, 1847, when the Act came into operation, and the 15th of last February.

### THE LAWYER.

#### SUMMARY.

COMMON LAW.—A point of practice as to costs was reported last week. *Rumbelow v. Whalley*, 17 Law T. 3, was an action of debt. Defendant pleaded, as to 10l. *sumquam indebitatus*; as to another 10l. payment of 10l. 1s. into Court, with a further plea of payment as to another and different 10l. parcel, &c. The plaintiff took out the 10l. paid into court, in satisfaction of the causes of action to which it was pleaded, and joined issue on the two other pleas. The defendant failed on the plea of the general issue, but succeeded on the plea of payment, and thus was entitled to the general costs of the cause. The plaintiff was held to be entitled to all his costs as to such causes of action, in respect of which the money was paid into court, up to the time of the replication to the plea of payment into court, including the costs of the replication.

Two interesting questions on evidence were raised in *The Fishmongers' Company v. Dimsdale*, 17 Law T. 7. A. and B. were parliamentary agents for the promotion of a Bill, which passed. It was held that statements made by them for the purposes of the Bill were admissible against the promoters, without any further evidence of authority. It was held, also, that if an attorney appears in obedience to a *subpoena duces tecum*, and objects that he held the deed for a client, secondary evidence of such deed is admissible, although it is not proved that the client objects to the production of it or has had notice to produce it.

### LIBEL CASES UNDER LORD CAMPBELL'S ACT. (a)

IN continuation of the above subject, we have now to consider the several decisions which have been made on points arising out of the 6 & 7 Vict. c. 96, commonly called Lord Campbell's Act; to get he with the other more recent cases respecting the law of libel.

In the following case it was held that the general issue, and a special plea of apology and payment of money into court under 6 & 7 Vict. c. 96, s. 2, to the same cause of action, will not be allowed. (*O'Brien v. Clement*, 15 L. J. Ex. 285.) In this case the plaintiff declared on a libel published in a newspaper called *Bell's Life in London*. The declaration contained only one count. The defendant had obtained a judge's order for leave to plead three pleas: the general issue, a justification as to part, and a special plea of apology and payment of money into court, under section 2 of the above statute. The plaintiff obtained a rule to amend that order, and the rule of Court drawn up thereon, on the ground that the special plea given by the statute ought not to be allowed to be pleaded to a cause of action covered by the general issue. The Court directed the rule to be made absolute to amend the order and rule of Court, by confining the general issue to such part of the declaration as the plea of payment into court did not apply to.

PARKE, B. in delivering the opinion of the Court,

(a) By GEORGE HARRIS, Esq. Barrister-at-Law.

observed that the intention of the Act in question plainly was to give to certain actions of libel the benefit of the plea of payment of money into court, as it existed in other forms of action. Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been; and under the general issue you may deny the publication of the alleged libel, or show that it was not of an injurious nature, or show that it was published on some lawful occasion.

A declaration in libel alleged, that the libel stated that the plaintiff, who was seeking admission into a club, gave an entertainment a few days before he was to be elected; that he was afterwards black-balled, and on the next morning bolted, and some of the poor tradesmen had to lament the fashionable character of his entertainment. The defendant pleaded in justification, that the plaintiff did suddenly leave and quit the town without paying every one, and all of the debts contracted by him with divers persons in the town, and without notice to them, and with intent to defraud and delay them, whereby the said persons, to wit, on &c. remained unpaid and defrauded. It was held, on special demurrer, that the plea was bad, in not stating the names of the tradesmen alleged to have been defrauded. (*O'Brien v. Clement*, 16 L. J. 76, Ex.) The declaration set forth a libel stating that the plaintiff, who was seeking admission into a club, gave an entertainment a few days before he was to be elected; that he was afterwards black-balled, and on the next morning bolted, and some of the tradesmen had to lament the fashionable character of his entertainment. The defendants pleaded by way of justification; that on the following morning the plaintiff suddenly left and quitted the town and neighbourhood of P. leaving divers of the tradesmen of that town and neighbourhood, to whom he owed divers sums of money, unpaid, to wit, T. T., W. S. &c. It was held that the plea was bad, as not amounting to a justification of the libel, which imputed to the plaintiff a fraudulent evasion of his creditors. (*O'Brien v. Bryant and Others*, 16 L. J. 77, Ex.) The declaration averred that the defendant used the words "blacklegs and black-sheep," to denote persons guilty of fraud, and persons of disreputable character; that divers persons had formed a club, called "The Royal Western Yacht Club;" that the defendant, intending to cause it to be believed that the plaintiff was a confederate of persons guilty of fraudulent play at cards, and of being blacklegs and black-sheep in the sense aforesaid, in a certain newspaper called, &c. published, of and concerning the plaintiff, the following libel:—"Royal Western Yacht Club, expulsion of two blacklegs" (meaning an expulsion from the club of two persons, being blacklegs in the sense in which that word was used as aforesaid). The declaration then stated that suspicion had attached to two members (meaning the aforesaid two persons) of the club, owing to two gentlemen having been plucked at cards, at the residence of one of the two suspected members, in a manner that seemed to indicate foul play; that an inquiry took place, which resulted in the expulsion of the two suspected persons. The declaration then stated that a person, known to be a confederate of the expelled parties, sought admission into the club; his name was "O.B." meaning thereby the plaintiff. It was held on motion in arrest of judgment, that as it appeared from the innuendoes, coupled with the prefatory averments, that the defendant had published libellous matter of and concerning the plaintiff, it was not necessary to allege in the declaration that the libel was published of and concerning the Royal Western Yacht Club, and the other prefatory averments. (*O'Brien v. Clement*, 16 L. J. 77, Ex.)

As already stated in our previous article on this subject, the 2nd section of 6 & 7 Vict. c. 96, enables a defendant in an action of libel to plead, by way of defence, a certain special matter therein stated, and enacts that, "to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." It was held in the case of *Chadwick v. Herapath*, 16 L. J. 104, C.P. that the replication under this statute need not deny all the facts stated in the plea, but the plaintiff may traverse as much of it as he thinks necessary.

A declaration in libel stated as inducement, that the plaintiff was a surgeon and member of the College of Surgeons, which said college had the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cases. The libel was alleged to be

published of and concerning the plaintiff, as such surgeon, and of and concerning the said college and its said power. One of the libels complained of, contained a statement that the college had the power of expelling its members. The second plea was, that the plaintiff was not a surgeon and member of the College of Surgeons, having the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cases. It was held that the traverse put in issue the power of the college to expel, and that the statement in the libel itself was not sufficient evidence of such power. (*Wakley v. Healey and Cooke*, 18 L. J. 426, Ex.)

Allegorical terms of a defamatory character of well-known import, such as imputing to a person the qualities of "the frozen snake" in the fable, are libellous *per se*, without innuendoes to explain their meaning. To write to the members of a charitable institution, calling on them "to reject the unworthy claims of Miss H.," and stating that "she squandered away the money which she did obtain from the benevolent, in printing circulars abusive of Commander D.," the secretary of the institution, is libellous. *Hoare v. Silverlocke*, 17 L. J. 306, (Q. B.) COLERIDGE, J. in delivering his opinion in this case, observed, it is said that without an innuendo we cannot understand that these words are libellous. If we cannot so understand them then we are different from all the rest of mankind. Supposing that it was said of a person that he was a Judas, would that want an innuendo to explain its meaning? We ought to attribute to the jury and court the knowledge of such terms, whether they be allegorical, historical, or fabulous. If such terms, whether historical, fabulous, or allegorical, have passed so much into common use as to have obtained a fixed meaning to persons of ordinary knowledge, then we should take notice that such is their meaning.

In an action for libel, the statement complained of in the seventh count of the declaration was thus alleged: "There is good reason for believing that a very considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name in the books of the Bank of England by power of attorney, obtained (from him by undue influence after he became mentally incompetent to perform any act requiring reason and understanding, (meaning thereby that the said plaintiff and J. H. S. had transferred, or caused to be transferred, the said money from the said W. T.'s name, &c., by means of a power of attorney obtained by them from the said W. T. by undue influence exercised by them over the said W. T. and at a time when he was mentally incompetent)." &c. The jury found a general verdict for the plaintiff. On objection in arrest of judgment, it was held that the terms of the libel were not unduly extended by the innuendo, and that the seventh count of the declaration was good. (*Turner v. Merryweather*, 18 L. J. 155, C.P.) MAULE, J. in delivering his opinion in this case, observed: "It seems to me that the part of the declaration now objected to, taking it as a separate count, does state something that is actionable. It states that the defendant published certain libellous matter concerning the plaintiff, thereby meaning that he had caused to be transferred from the name of William Turner certain moneys standing in his name in the books of the Bank of England, by means of a power of attorney obtained by the plaintiff from the said William Turner by undue influence, and at a time when he was mentally incompetent to give such a power. I agree that there are some of the older cases decided on the principle that in actions of libel and slander words are to be construed *in strictiori sensu*, and that a plaintiff is not to be permitted by averment to attribute to them any stronger meaning. Those decisions have been long overruled, and consistently with *Solomon v. Lawson*, 15 L. J. 823, Q.B. explained as it has been by my brother Colman, the modern practice may be sustained and applied to the present case. If *Solomon v. Lawson* is to be taken as having decided that where a libellous statement is impersonal it cannot be averred to have been intended to apply to the plaintiff, I should not be satisfied with it. But I do not think that decision requires the affirmative of that proposition to be maintained."

In *Merryweather v. Turner*, 19 L. J. 10 C. P. where the case last cited was determined in the Ex. Ch. it was held that, although libellous words point at no particular person, yet if they impute in substance that some one has been guilty of an offence, the plaintiff may, by innuendo, apply them to himself; and it is a question of evidence whether

they apply to him. An innuendo that the libel meant to impute that the plaintiff and J. H. T. had actually transferred the stock, was held not too large, since the words of the libel, that there was strong reason for believing the stock had been transferred, were capable of the interpretation thus put on them; and that after verdict the Court would presume that the jury had found that they bore the meaning averred in the innuendo, as regards the requisite evidence of publication of a libel.

In an action against the proprietor of a newspaper for a libel, the evidence given of publication was, that the plaintiff had, many years after the libel was printed, sent a person to the newspaper-office to buy a copy of the newspaper in which it appeared, and to whom a copy was accordingly sold at the office. It was held sufficient evidence of publication. (*The Duke of Brunswick v. Harmer*, 19 L. J. 20 Q.B.) In this case it was also determined that where the first count set out a libel, which was referred to in the subsequent counts alleging other libels, and the original cause of action of the libel in the first count was barred by the Statute of Limitations, but a republication of it within six years was proved, it was held that the judge was not bound to direct the jury to give damages for the libel in the first count with reference only to its republication.

(To be continued.)

## LEGAL INTELLIGENCE.

### THE NEW LAW APPOINTMENTS.

FROM the addresses of the new law officers to their constituents we take the following passages on the topics most interesting to our readers:—

The MASTER of the ROLLS says:—"I venture to think that the duties of the high judicial office to which I have been appointed will be in no degree incompatible with those of a member of Parliament; and I believe that my continuing to act as your representative will give me greater opportunities—as it will impose upon me greater obligations—to promote all those measures of legal reform which are essential to the permanent prosperity of the country."

The ATTORNEY-GENERAL (Cockburn) says—"Gentlemen, when I first presented myself to your notice, I stated to you that one of my great objects in entering the Legislature would be to contribute, as far as in me lay, to the improvement of the law. With this view, I gave my best support to the measure for extending the jurisdiction of the County Courts, as a means of procuring a short, simple, cheap, and yet efficacious, administration of justice. I am happy to state to you that great and extensive changes are not only in contemplation, but in progress, with a view to a like result in the higher courts of judicature. In these great improvements I shall be happy and proud to co-operate, and I shall be enabled to do so with greater effect if to the legal office I have now the honour to hold I add the weight which is derived from being the representative of a numerous and enlightened constituency."

The SOLICITOR-GENERAL (Page Wood) says—"I now again solicit your confidence and support upon the vacancy occasioned by my having accepted the honourable appointment of Solicitor-General to Her Majesty. The offer of this appointment was unsought for and unexpected. In many respects I should have preferred retaining the independent position which was alone my object in entering upon public life. I am, indeed, far from insensible to the honour conferred upon me, justifying, as it does, your selection of me as a person qualified for the arduous duties of a member of Parliament; but this consideration alone would not have induced me to accept the office."

COURT OF CHANCERY, Saturday.—Sir John Romilly, the Master of the Rolls, came into Court this morning with the Lord Chancellor, and the Clerk of the Crown being in attendance, the usual oaths were taken by the new Judge, in the presence of a very crowded Bar. Mr. Walker, as the senior Queen's Counsel present on the occasion, moved that the usual entry be made on the records of the Court, and the Master of the Rolls retired.

APPOINTMENT OF A VICE-CHANCELLOR.—On Thursday the Act which received the Royal assent on Tuesday (14th Victoria, Chap. 4), to enable Her Majesty to appoint a Vice-Chancellor in the room of Sir J. Wigram, resigned, was printed. It is declared by the preamble that the state of business renders it "expedient" that a Vice-Chancellor should be appointed in the place of Sir James Wigram. The new Vice-Chancellor (Mr. George Turner) is to have a secretary, usher, and trainbearer. The Lord Chancellor may appoint one or more persons to keep order in court at not more than 50*l.* a-year each. The salaries of the other officers to be the same as



regulated by the Act appointing the Vice-Chancellor, whose salary will be the same as enjoyed by Sir J. Wigram, 5,000*l.* a-year. The new Vice-Chancellor will not take his seat on the bench before the first day of the ensuing Easter Term.

**THE ATTORNEYS' TAX.**—A deputation on the subject of the proposed repeal of the certificate duty on attorneys, solicitors, proctors, and others, consisting of Lord Robert Grosvenor, M.P., Mr. Charles Cowan, M.P., Mr. Richard Harrison (President), Mr. Benjamin Austin, and Mr. John Coverdale (Members of Council of the Incorporated Law Society), and Mr. Robert Manganham (Secretary), had an interview with Lord John Russell, at his official residence in Downing-street, on Tuesday.

### The Circuits.

#### OXFORD CIRCUIT.

**MONMOUTH, March 27.**—Mr. Justice Talfourd opened the commission here yesterday at 2 o'clock. There were 31 prisoners in the calendar. Of these 11 were charged with burglary, three with robbery from the person with violence, two with rape, two with bigamy, one with concealing a birth, one with embezzlement, one with obtaining goods by false pretences, one with forging an order for the delivery of a shilling's worth of beer, and the remainder with larceny. Eleven were marked as unable to read or write; seventeen as imperfectly educated; one, who is charged with embezzlement, is marked as having received a superior education; and of two the state of education is not mentioned. Of five causes entered, four were marked for special juries, and one for a common jury.

#### WESTERN CIRCUIT.

**TAUNTON, April 2.**—The commission for the county of Somerset was opened here yesterday. This morning the judges attended Divine service, and then repaired to their respective courts. The Chief Baron presiding in the Crown Court, and Mr. Baron Martin sitting at Nisi Prius Court. The number of prisoners at present in the calendar is 102, and the following is a summary statement of the offences with which they stand charged:—Murder, 4; manslaughter, 1; maliciously wounding, 5; arson, 1; robbery, 11; forgery, 2; burglary, 9; rape, 4; housebreaking, 9; larcenies, 44; perjury, 2; bestiality, 1; uttering counterfeit coin, 2; concealment of birth, 2; assaults, 2; exposing a child, &c. 1; night poaching, 2. The cause list contains 9 cases.

### PROCEEDINGS OF LAW SOCIETIES.

#### LAW STUDENTS' DEBATING SOCIETY.

##### QUESTIONS FOR DISCUSSION.

Tuesday, April 8, 1851.

39. Ought the case of *Morton v. Tibbett*, 19 L. J. Rep. (N.S.) Q.B. 382, to be reversed on appeal? XXXVII. Would it be of advantage to introduce the law of partnership *en commandite* into this country?

### PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to constitute and appoint Sir John Romilly, *knt.* to the office of Master and Keeper of the Rolls and Records in Chancery, vacant by the surrender thereof by the Right Hon. Henry Lord Langdale.

**WHITEHALL, April 2.**—The Queen has been pleased to direct letters patent to be passed under the Great Seal of the United Kingdom of Great Britain and Ireland, appointing George James Turner, *esq.* one of her Majesty's counsel, to be a Vice-Chancellor, in the place of the Right Hon. Sir James Wigram, *knt.* resigned.

The Queen has also been pleased to confer the honour of knighthood upon John Kerle Haberfield, *esq.* mayor of the city of Bristol.

Mr. G. J. Turner, Q.C. of the Chancery Bar, M.P. for Coventry, will, it is understood, be the new Vice-Chancellor, when the Act authorising the appointment, and which has passed through both Houses, shall receive the royal assent.—*Observer.*

**WHITEHALL, March 21.**—The Lord Chancellor has appointed Alfred Kingsford Cornelius, of Canterbury, in the county of Kent, *gent.* to be a Master Extraordinary in the High Court of Chancery.

George Watley, *esq.* is appointed Provost Marshal of St. Christopher's; Edward Murray, *esq.* Marshal of the Island of Trinidad. John Losh, *esq.* is nominated a Member of the Legislative Council of Trinidad. Algernon Montagu, *esq.* Stipendiary Magistrate of the Falkland Islands, is appointed a Member of the Legislative and Executive Councils of those islands.

The Master of the Rolls has appointed Mr. Brett, of the Chancery bar, his chief secretary, and Mr. Knight, his first gentleman of the chamber.

### COURT PAPERS.

#### COURT OF CHANCERY.

**NOTICE.**—The Registrar's and Reports Offices of the Court of Chancery will be open for vacation business from eleven till one o'clock daily, and will reopen for general business on April 10.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTHS.

**BOWEN.**—On the 27th ult. at Port of Spain, Island of Trinidad, the lady of H. T. Bowen, *esq.* Puisse Judge of that island, of a son.

**BLAKE.**—On the 29th ult. at Blackfriars-road, Mrs. James J. Blake, of a daughter.

**COLE.**—On the 27th ult. the lady of Alfred W. Cole, *esq.* barrister-at-law, of a son.

**SMITH.**—On the 29th ult. at 33, Edith-villas, North-end, Fulham, the wife of Frederick James Smith, *esq.* barrister-at-law, of a son.

##### MARRIAGES.

**EDWARDS, John, esq.** of Uppingham, Rutland, surgeon, youngest son of the late Samuel Edwards, *esq.* of Spalding, Lincolnshire, solicitor, to Mary Elizabeth, eldest daughter of James Tomlinson, *esq.* of Norton Grange, on the 27th inst. at East Norton, Leicestershire.

**FRASER, Patrick, esq.** advocate, Edinburgh, to Margaret Anne, eldest daughter of William Sharp, *esq.* the Larches, near Birmingham, on the 27th inst. at Aston, Church, Warwickshire.

**STEVENS, James Wilberforce, Fellow of St. John's College, Cambridge, barrister-at-law, and eldest son of Sir George Stephen, to Katharine Rose, fourth daughter of the late Rev. Bowater James Vernon, formerly senior chaplain in the Hon. East India Company's service, on the 27th inst. at East Norton, Leicestershire.**

##### DEATHS.

**ALLISON, Ann, widow of the late William Allison, esq.** of Foxbury, Yorkshire, and mother of J. P. Allison, *esq.* of Thirsk, Solicitor, on the 27th ult. at South Kilvington, near Thirsk, aged 75.

**CHALMERS, Lady, wife of Major-General Sir William Chalmers, of Glenaricht, Perthshire, at Dundee, on the 22nd ult.**

**MONCRIEFF, Sir James Wellwood, bart.** on the 30th ult. at his house, 47, Moray-place, Edinburgh, aged 74.

**MONROSE, Elizabeth Jane, second daughter of the late Henry Richmond, of Humsburgh, in the county of Northumberland, esq. J.P.** on the 29th ult.

### JOURNAL OF PROPERTY.

#### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	216½					
3½ Cent. Reduced Annuities	96½	96½	96½	96½	96½	96½
3 Cent. Consols Annuities		96½	96½	96½	96½	96½
Consols for Account						
New 3½ Cent. Annuities	97½					
Long Annu. (exp. Jan. 5, 1860)						
Do. 30 yrs. (exp. Oct. 10, 1859)						
Do. 30 yrs. (exp. Jan. 5, 1860)			7½			7½
India Stock, for Account						
India Bonds (1,000 <i>l.</i> )			61	62	63	61½
Do. do. (under 1,000 <i>l.</i> )	57	62	63	62	63	
South Sea Stock						
Do. do. New Annuities						
Exchequer Bills, 1,000 <i>l.</i>	51½	54½	53½	55½	53½	57½
Do. do. 500 <i>l.</i>	54½			55½		57½
Do. do. Small	54½	54		52½	57½	
Do. do. Advertised						

\* Premium. † Account.

### THE GAZETTES.

#### Bankrupts.

Gazette, April 1.

**BURY, JAMES, jun.** cotton waste dealer, Smeinton, Nottinghamshire, April 11, at ten, May 9, at eleven, Nottingham. Off. as Bittleston. Sol. Brown, Nottingham. Petition, March 25.

**CLAYTON, THOMAS LUCAS, milkman, Pottsgrove, Bedfordshire, April 9, at two, May 9, at one, Basinghall-st. Off. as Graham. Sol. Cobb, Downham-road, Lower-st. Petition, March 20.**

**COLE, JOHN FREDERICK, victualler, Hampton-court, April 10, at half-past one, and May 15, at twelve, Basinghall-st. Off. as Johnson. Sols. Wild and Co. College-hill. Petition, March 26.**

**KNEE, DAVIDS, draper, Tredegar, Monmouthshire, April 15 and May 13, at eleven, Bristol-court. Off. as Hutton. Sol. Bevan, Bristol. Petition, March 22.**

**DREWSTER, ISAAC, and JOHN SAWLEY, cotton-spinners, Embay, Yorkshire, April 15, at eleven, and May 6, at twelve, Leeds. Off. as Hope. Sols. Brown, Skipton, and Bond and Barwick, Leeds. Petition, March 22.**

**BARRATT, EDWARD, and BLAND, JOHN, builders, Huntingdon, builders, April 15 and May 23, at eleven, Basinghall-st. Off. as Johnson. Sols. Sewell and Co. Old Broad-st. and Hunnybun, Huntingdon. Petition, March 23.**

**MAT, CHARLES, and METCALFE, WILLIAM LEOPOLD and CHARLES JAMES, carpenters, Roston, Bedfordshire, April 11, at two, May 13, at twelve, Basinghall-st. Off. as Groom. Sols. Norris and Co. Bedford-row, and Worship, Great Yarmouth. Petition, March 18.**

**MINOR, GEORGE THOMAS, mercer, Mount-st. Westminster-**

road, April 10, at twelve, and May 15, at eleven, Basinghall-st. Off. as Bell. Sols. Surr and Gribble, Lombard-st. Petition, March 27.

**THORNTON, BENNETT, ironmonger, Huddersfield, April 11 and May 23, at eleven, Leeds. Off. as Freeman. Sols. Fenton and Jones, Huddersfield; and Bond and Barwick, Leeds. Petition, March 20.**

Gazette, April 4.

**ANDREWS, WILLIAM, commission merchant, Liverpool, April 14 and May 12, at eleven, Liverpool. Com. Perry. Off. as Morgan. Sol. Williams, Liverpool. Petition, March 26.**

**BRADBERRY, GEORGE HENRY, and LOWE, GEORGE RICH, flour factors and merchants, 18, Great Tower-st. City, April 16, at half-past one, May 16, at one, Basinghall-st. Com. Fonblanque. Off. as Stansfeld. Sols. Strutt and Cunningham, 18, Buckingham-st. Strand. Petition, March 28.**

**BROWN, JOHN BENSON, wine merchant, Newcastle-under-Lyme, Stafford, April 17 and May 8, at twelve, Birmingham. Com. Daniell. Off. as Whitmore. Sols. Kough, Shrewsbury; and Motteram, Knight, and Emmet, Birmingham. Petition, March 15.**

**GENTRY, JOHN, smith and ironmonger, Bocking, Essex, April 16, at two, May 13, at twelve, Basinghall-st. Com. Fonblanque. Off. as Graham. Sols. Stevens and Satchell, Queen-st. Cheapside. Petition, March 27.**

**LOYD, LEONARD WILD, builder and brickmaker, 15, Goldhawk-terrace, New-road, Shepherd's-bush, April 16, at one, May 16, at twelve, Basinghall-st. Com. Fonblanque. Off. as Stansfeld. Sol. Abraham, 4, Lincoln's-inn-fields. Petition, March 28.**

**MOATE, ROBERT, innkeeper, West Stockwith, Misterton, Nottingham, April 19 and May 10, at ten, Leeds. Com. West. Off. as Freeman. Sol. Marratt, Doncaster. Petition, April 1.**

**MYRONS, HOWELL, innkeeper, coal contractor, and coal proprietor, Aberaman, Aberdare, Glamorganhire, April 23 and May 16, at eleven, Bristol. Com. Stephen. Off. as Aoraman. Sols. C. H. and F. James, Merthyr; and Short and Strickland, Bristol. Petition, April 3.**

**ROOPE, CHARLES, wine merchant, Liverpool, April 11 and May 15, at eleven, Liverpool. Com. Stevenson. Off. as Turner. Sols. Fletcher and Hull, Liverpool. Petition, March 26.**

**TAYLOR, ROBERT ANDREWS, specim salts and colour manufacturer, Dunston, Durham, April 11, at twelve, May 9, at one, Newcastle-upon-Tyne. Com. Ellison. Off. as Baker. Sols. G. Forster, 24, Grey-st. Newcastle-upon-Tyne, and Bolding and Pope, 35, Fenchurch-st. Petition, March 28.**

#### BANKRUPTCY ANNULLED.

Gazette, April 1.

Angle, B. Keenest victualler, Moorfields, March 23.

Gazette, April 4.

Johnson, R. J. plumber, painter, glazier, gas fitter, and house decorator, Wellington-st. Woolwich, April 1.

#### Dividends.

##### BANKRUPT DEBTS.

Official Assignees are given, to whom apply for the Dividends.

Broughton and Garnett, bankers, 55th, 56, 57d. Turner-Liverpool.—*Obituary*, G. G. 44d. Pennell, London.—*Ormond*, J. first, 3s. Pennell, London.—*Donovan*, J. fish, monger, first, 3d. Pennell, London.—*Elliott*, W. first, 3s. 1½d. Pennell, London.—*Green*, R. ironmonger, second, 1d. Pennell, London.—*Griffith and Pearson*, fourth, 1½d. Pennell, London.—*Haskam*, W. chemist, first, 5s. Pennell, London.—*Holloway*, H. R. bookseller, first, 5s. Pennell, London.—*Johnson*, J. first joint, 3d.; sep. on new proofs 20s. Pennell, London.—*Joyce*, J. third, 3½d. Pennell, London.—*Knights*, B. butcher and farmer, second, 5d. Pennell, London.—*Lowe*, R. third, 4s. 1½d. Pennell, London.—*Prior*, H. third, 5½d. Pennell, London.—*Samuel*, L. silver-smith, first, 1s. 1½d. Pennell, London.—*Thompson*, J. gunpowder dealer, first, 2s. 2d. Fraser, Manchester.—*Thorold*, B. H. second, 1s. 7½d. Pennell, London.—*West*, J. R. block and mast maker, first, 1s. 8d. Pennell, London.

##### INSOLVENT ESTATES.

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#### Assignments for the Benefit of Creditors.

Gazette, March 26.

Brown, R. auctioneer and surveyor, Old Broad-st. City, March 24. Trust. J. Davidson, *esq.* Brixton-hill. Sol. W. Savage, Lancaster-place, Strand.—*Cowley*, J. grocer, Manchester, March 21. Trusts. G. Robinson and J. Hunter, tea dealers, Manchester. Sols. Vickers and Diggle, Manchester.—*Pope*, W. D. stationer and printer, Mildenhall, Suffolk, March 19. Trusts. E. Chapman, farmer, and O. Webb, bricklayer, Mildenhall. Sols. Isaacson and Bone, Mildenhall.—*Slip*, 8. and H. painters and glaziers, Westgate-st. Bath, March 18. Trusts. J. Hare, oil merchant, and R. Dix, glass merchant, Bristol. Sols. Gillard and Flook, Bristol.—*Williams*, T. grocer, Manchester, March 7. Trusts. J. Moss, corn merchant, and J. Hunter, tea merchant, Manchester. Sol. J. Janion, Manchester.

Gazette, March 28.

Adams, J. tobacconist, London-road, Liverpool, March 6. Trust. J. Fletcher, tobacco manufacturer, Liverpool. Sol. M. J. Hore, Liverpool.—*Backhouse*, D. farmer, Tadcaster, Yorkshire, March 24. Trusts. R. Williamson and S. P. Wilks, gentlemen, Yorkshire, and R. Smith, seedsman, Tadcaster. Sols. Richardson and Gutch, York.—*Flower*, J. A. linen-draper, Gloucester, March 14. Trust. A. Caldecott, warehouseman, Cheapside, and D. Smith, gent. Wood-st. Cheapside. Sol. Surr and Gribble, Lombard-st.—*George*, J. D. hosier, Old Bond-st. Bath, March 18. Trust. C. J. Leaf, warehouseman, Old Change. Sol. A. Jones, Sise-lane.—*Goodwin*, C. maltster, Canterbury, March 17. Trusts. R. Sankey and G. Furley, gentlemen, Canterbury. Sol. R. M. Mount, Canterbury.—*Watson*, J. H. fellmonger, Southill, Dewsbury, Yorkshire, March 6. Trusts. J. Watson, hide and skin broker, Sheepshead, Leeds, and J. Smithson, butcher, Dawgreen, Dewsbury. Sols. W. Ambrose, Glasgow, and J. Dunning, Leeds.

**Partnerships Dissolved.***Gazette, March 25.*

*Arbuthnot, Beart, and Company*, merchants and commission agents, Liverpool and Bombay, as regards E. Lyon, Dec. 31.—*Cattermole and Son*, builders, Norwich, Dec. 25.—*Coward, Davis, and Co.* salt manufacturers, Anderton, Dec. 31.—*Orlinton and Watt*, millwrights and engineers, Manchester, March 20. Debts paid by Crighton.—*Davis, J.B. and Co.* merchants, Liverpool, March 31.—*Drabble and Sanderson*, saw and steel manufacturers, Sheffield, March 19.—*Hardwick and Fuscett*, cloth finishers, Leeds, March 21.—*Hassell, R. and Tarrant*, E. clothiers and slopellers, Bedford-place, Commercial-road, March 21. Debts paid by Hassell.—*Haycock, E. S. and Co.* mathematical instrument manufacturers, Birmingham, Jan. 6.—*Hastings and Pagan*, cotton spinners, Rochdale, March 4.—*Henry and Dodds*, builders, Newcastle, March 20.—*Hicks and Feather*, tailors and outfitters, Plymouth, Feb. 28.—*Hitchcock and Flower*, saw-mill proprietors, Barron's-place, Waterloo-road, March 22.—*Jackson, W. and Sampson*, C. decorators and house agents, Orchard-st. Portman-square, March 8.—*Leach, J. C. and F. and Oswald*, P. drapers, hosiers, and hatters, Warrington and Runcorn, March 21.—*M'Donnell, W. and Totham*, G. printers, Little Queen-st. Lincoln's-inn-fields, March 19.—*Pagan, Stewart, and Co.* woollen manufacturers, Rochdale, Feb. 28.—*Seavell, W. S. and T. Millers*, Buckfastleigh, March 19. Debts paid by W. S. Seavell.

*Gazette, March 28.*

*Bell, Massey, and Co.* ironmongers, Baker-st. Portman-sq. March 14.—*Brockbank, J. and G. H.* pianoforte makers, Crawley-st. Somers-town, March 21.—*Bromilow and Schofield*, coal proprietors, Ekeleston, March 21. Debts paid by Bromilow.—*Brown and Trotter*, wine merchants, Philpot-lane, March 1.—*Busher, E. and Son*, tailors and woollen drapers, Kendall, March 24.—*Clopham, J. and G.* grocers and oilmen, Lower Clapton, March 27.—*Croeland, W. and Co.* woollen-cloth manufacturers, Huddersfield, and *Hosson, J. and Co.* spinners, Oct. 31.—*Dawson, J. and J.* cloth finishers, Huddersfield, March 22. Debts paid by James Dawson.—*Dennis, Day, and Co.* ironmongers and cutlers, Bristol, March 25. Debts paid by Dennis.—*Edwards, G. and Coleman*, E. H. surgeons, Wolverhampton, March 25.—*Evans, T. F. and A. F.* merchants, Philpot-lane, March 25. Debts paid by Evans and Emson.—*Franklin, C. and J.* tanners, Bickenhall, March 20. Debts paid by J. Franklin.—*Green, R. and Cobb*, R. plumbers, Devonshire-st. Queen-square, March 20.—*Hick, B. and Son*, engineers, Bolton-le-Moors, Jan. 1, 1847.—*Hick, B. and Son*, engineers, &c. Bolton-le-Moors, as regards J. Hargreaves, jun. April 1.—*Holme and Roberts*, cotton spinners, Manchester, March 24. Debts paid by Holme.—*Horsfall, A. and Wild*, B. dyers, Huddersfield, March 26.—*Johnson, E. and L.* drapers, Birmingham, March 25. Debts paid by E. Johnson.—*Joyce and Blake*, mercers, Hinckley, March 25.—*Kay, Birch, and Warburton*, manufacturing chemists, Droydsden, Manchester, March 21. Debts paid by either party.—*Lane, W. and E.* grocers, Christchurch, Southampton, March 26. Debts paid by E. Lane.—*Lewis and Daines*, coal merchants, Watling and Wallisend Pevensey, March 10.—*Mason, H. and G.* worsted spinners, Bradford, March 26.—*Merrett, Edridge, and Merrett*, pin manufacturers, Birmingham, March 23. Debts paid by J. Edridge and J. Merrett.—*Pearson and Irving*, grocers, Salford, April last, and *Irving, G. and Co.* paper dealers, Manchester, March 20.—*Rhodes and Warburton*, stone dealers, Rochdale, March 26.—*Tanner, E. and Elliott*, L. M. milliners, &c. Brighton, March 25. Debts paid by Tanner.—*Thomas, C. J. and Dinsdale*, H. medical and general agents, Wellington-st. Strand, Feb. 15. Debts paid by Dinsdale.—*Winnill, R. and B.* butchers, Broadway, Stratford, Feb. 6. Debts paid by R. J. Winnill.

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- "G. B. N."—*When the statement was written, all was proceeding smoothly without a show of opposition. The objections of the Lord Chancellor were made at the last moment, after the Bill had been once committed, and only on its recommitment. It is so unusual to permit a measure to pass through committee unopposed, and then to oppose it on a recommitment, that we were entitled to share Lord Brougham's belief that it was to pass without opposition. That opposition at the last moment surprised him as much as it surprised ourselves, and we were not made acquainted with it until after our remarks upon the smooth passage of the Bill were written and printed.*
- "A SUBSCRIBER" (Liverpool).—*The letter to Lord Brougham will appear in the County Courts Chronicle, for the reasons above stated. But does he not see that the same argument would equally apply to all other Courts? So long as any distinctions are to be observed in the Profession, a time must be drawn somewhere. Whether it be desirable to abolish all distinctions, and place barrister, attorney, and clerk on precisely the same footing, is another question, which may be fairly argued upon its own merits. But while distinctions are deemed desirable, they must be observed.*
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- We have received a multitude of letters on the question of Clerks being admitted to practise as advocates in the County Courts. As the clause has been unanimously rejected by the House of Lords, it is unnecessary to occupy further space with the subject here. The most interesting of them will have a place in the County Courts Chronicle.*

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## THE LAW TIMES.

SATURDAY, APRIL 12, 1851.

## THE COUNTY COURTS EXTENSION BILL.

UNDER the guidance of the LORD CHANCELLOR, the House of Lords has, in committee, terribly mangled Lord BROUGHAM'S Bill. Of the forty-two clauses of which it consisted scarce half-a-dozen remain.

But our readers will learn, with great pleasure, that among the few which have received the approval of the House of Lords, and which will probably become law, are those which it was our good fortune to suggest and frame for securing to the Attorney fairer professional remuneration. If these alone be saved from the wreck, an improvement will be effected of incalculable value and importance to the Profession.

So far as we are enabled to collect from the reports in the newspapers, for we have not yet seen the curtailed Bill, the following alterations have been made in it:—

The clauses giving to the County Courts an Equity Jurisdiction were agreed to.

The clause permitting Barristers to appear, uninstructed by an Attorney, was, we are happy to say, *withdrawn*.

The clauses permitting parties by consent to try in the County Courts any causes of any amount were struck out, as was clause 36, which required the summons to state the conditions on fulfilment of which proceedings shall be stayed.

Clause 36, which required special courts to be holden for the trial of causes above 20l. was *postponed*.

The clauses abolishing existing local courts, and permitting clerks of Attorneys to act as Advocates in the County Courts, were *struck out*, as also were all the clauses that related to Arbitration and to Courts of Reconciliation.

The LORD CHANCELLOR intimated that, in a contemplated measure for Equity Reform, he should propose to give to the County Courts a limited jurisdiction in Equity.

*Friday night.*—Just as we are going to press, we learn that the Bill, as amended, was this evening read a third time and passed by the House of Lords. It is not probable that the Commons will refuse their assent to any portion of it.

## REGISTRATION OF DEEDS.

THIS measure is already the subject of eager controversy,—but as yet chiefly among the lawyers; the public have treated it with singular indifference. Only one of the daily newspapers has taken part in the discussion, and that is in condemnation, not of the particular plan of the Commissioners, but of the principle of registration, to which it asserts two objections: first, that it will give publicity to dealings with property to which it ought not to be subjected; and, second, that it will increase the cost of transfers.

Undoubtedly, if the *Morning Post* be right in this, there is an end of the question. The very purpose of a registry is to diminish the cost of transferring property, by facilitating that which is the main source of expense, the proof of title. If it does not this, it is worthless. But what proof does the *Post* produce in support of its assertion? None. It assumes what is not the fact, that in small transfers purchasers or mortgagees are content to take the title without investigation or with only partial proofs. It is not so. However trifling the value of the property, the solicitor is bound to see that his client takes as clear a title as if it were half a county, and for this reason, if for no other, that, although the price paid may be small, it may be built upon, or otherwise improved, and then, if the title should fail, the improvements would be lost as well as the land. It is possible, nay, probable, that the expense of transfer, so far as the conveyance is concerned, might, on very small transactions, be somewhat increased by registration; but against this must be set the saving of cost in the proof of title whenever it comes to be mortgaged or sold. On a balance of account the benefit to the owner would be found to be largely in favour of registry. Besides, we have the experience of all other civilized countries who have established registers of titles, and who are unanimously of opinion that they are beneficial by the security they give to titles, and the facilities which they afford for

transfers. If further evidence of this were wanting, it may be found at home. Whatever favour copyhold tenure preserves in popular esteem, in spite of its many absurdities and inconveniences, is due to its being practically a Register of Title, which copyholders are unwilling to exchange, even for the advantages of enfranchisement. The argument of expense has no foundation in fact.

Nor is the objection of publicity more tenable. Wills are registered, and they are much more calculated to provoke curiosity than title-deeds: they reveal much more of a man's affairs, because they extend to all, and not to a portion only, of his property. Not a single argument upon this head can be adduced against a Registry of Deeds which is not equally applicable to a Registry of Wills. Yet does no person so much as suggest the abolition of the latter, and, doubtless, if it were now proposed for the first time, it would be still more vehemently objected to than is the registry of deeds, so ready are men to see faults in novelty, while they are blind as beetles to evils which custom has sanctioned.

Within the Profession this discussion has taken a different direction. More rationally it is argued among the Lawyers as a question of practicability. The principle is conceded; the utility of registration is admitted; the difference is reduced to this,—should the registry be local or general? Lord CAMPBELL'S Bill proposes a general one; but the opinion of the Profession inclines strongly to local registries. It is urged that, in small transactions, the cost of sending an agent to search the register before the purchase and then to register after it, would impose a considerable charge even on the most straightforward case; but in the great majority of cases a single search will not suffice. The abstract sent down by the agent will be pretty sure to give occasion for further inquiries, and thus may the cost be swollen immensely. It is a further and very serious objection, that it would seldom be safe to trust the investigation of a title to a stranger; it could only be conducted safely and satisfactorily by the Solicitor who is personally acquainted with the property and understands the transactions recorded. But if the Solicitor is to go to London to make the search in person, the additional costs would be a worse evil than that which the scheme is intended to remedy.

The more the subject is considered, the more we believe, will this view of it impress itself upon the mind, and it needs only to be temperately pointed out to Parliament to receive reconsideration.

Firmly believing that a well-planned registration of deeds will be a great boon to the landowner, we are equally convinced that its advantages cannot be secured to him by any other than a local registry. A general index might be kept at a London office for convenience of a general search; but the poor-law union districts should be the limits of the registries, and the clerk to the guardians the registrar, with an office for the purpose, fire-proof, attached to the union office. This would be at once inexpensive and efficient, and would remove the only rational objections that have been urged against a registration of deeds.

## SHAM LAWYERS.

THE following is as impudent a specimen of the doings of the rapidly-increasing tribe of Sham Lawyers, who, under the names of *Agents and Accountants*, are invading the Profession, as any we have ever read.

We hope that by thus bringing them prominently under the notice of our readers, the Attorneys in their neighbourhoods may be induced, by a sense of duty to the Profession, if not for self-protection, to keep watch upon the doings of the Sham Lawyers, and to invoke either the Stamp Office or the Criminal Court, according to the circumstances of the case.

encouraged thereto by the successful examples of similar proceedings which we have lately recorded for their instruction:—

J. SIMMONS,

ACCOUNTANT AND ARBITRATOR,  
1, Cambridge-terrace, South-street, Greenwich,  
and 49, Gracechurch-street, London.

Estates and every description of House Property managed, and the Rents, &c. collected.

Partnerships negotiated; Dissolutions arranged; the Partnership Accounts prepared, delivered, and collected, and the final Winding-up and Disposal of the Partnership Property effected.

The Accounts of Executors, Trustees, Charities, Societies, &c. investigated, made out, and audited, and Executors' Accounts passed at the Legacy Duty Office.

#### DEBTS

Collected from any part of the United Kingdom, and, where necessary, legal proceedings taken for their recovery, at a limited expense.

BANKRUPTCY AND GENERAL BALANCE-SHEETS PREPARED.

Trades and Professions negotiated for sale or purchase.

Tradesmen's Books brought up and balanced, and the most complicated accounts arranged. Arbitration references taken, and Agreements of every description accurately prepared.

#### TO THE EMBARRASSED.

To parties desirous of effecting honourable and speedy arrangements with their Creditors by composition, or otherwise to avoid an application to the Bankruptcy or Insolvent Courts, J. S. may be consulted for the purpose of carrying such arrangements into effect. To those where such an application is unavoidable, or where it may be necessary to resort to the privileges of the New Act, to obtain protection from arrest, without imprisonment, every facility will be given to effect that object, and the business conducted through the court with promptitude and despatch.

J. S. begs further to observe, that from a professional experience of twenty years and upwards in the management of extensive legal matters, he offers, at a very moderate expense, to afford much valuable assistance to parties consulting him in the arrangement of their pecuniary affairs; and in soliciting their favours and confidence, they may depend upon every attention and regularity being observed in the business which they may please to entrust to his guidance, and the strictest secrecy may be relied on. Parties waited upon at their own residences, by appointment.

### THE LEGISLATOR.

#### Summary.

THE Prosecutions Bill has been reported; the County Courts Extension Bill has been cut to pieces, leaving but a fragment of its original form, but that fragment fortunately the most important of the whole to our readers—the clauses securing to them better professional remuneration. This is the sum of the legal doings of the week. Neither the Registration of Deeds Bill, nor Lord CAMPBELL's Criminal Law Bill, nor the Law of Evidence Bill has made any progress. And Easter is close at hand! and then the Exhibition! So the prospects of this session may be anticipated.

#### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

Friday, April 4.

Farm Buildings

Oath of Abjuration (Jews).

Monday, April 7.

Sale of Arsenic Regulation.

Tuesday, April 8.

Lodging Houses

Stamp Duties' Assimilation

Property Tax.

Wednesday, April 9.

Exchange Bills (17,766,600.)

Indemnity.

##### BILLS READ A SECOND TIME.

Tuesday, April 8.

Small Tenements' Rating Act Amendment.

Thursday, April 10.

Stamp Duties' Assimilation.

##### BILL READ A THIRD TIME AND PASSED.

Monday, April 7.

Designs Act Extension.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

Friday, April 4.

Halesworth, Beccles, &c. Railway.

Monday, April 7.  
Bangor and Caernarvon Railway  
Shrewsbury and Bridgnorth Turnpike.

Tuesday, April 8.  
Leicester Waterworks.

Thursday, April 10.  
Shrewsbury and Bridgnorth Turnpike.

#### SESSIONAL PRINTED PAPERS.

Par. Numb.

8. Lights, Pilotage, &c.—Abstract of Return

188. Ecclesiastical Commission—Copies of Correspondence

188. Shipping—Returns

189. Roman Catholic Bishop of Newfoundland—Copies of Correspondence

Public General Acts—Cap. 1, 2, 3, and 4

63. Local Acts—Reports of the Admiralty

141. Highland Roads and Bridges—37th Report

153. Loan Societies—Abstract of Accounts

170. Children in Workhouses—Abstract of Return

175. Benjamin Eaton and William Hart—Return

177. Bills—Designs Act Extension, amended

178. — Charitable Institutions Notices

179. — Landlord and Tenant

178. — Expenses of Prosecutions, amended

189. — Sale of Arsenic Regulation

191. — Stamp Duties' Assimilation

193. — Property Tax

180. — Audit of Railway Accounts, No. 2

188. — Oath of Abjuration, Jews

186. — Crown Estate Paving

183. — Farm Buildings

Public Records—Twelfth Report of the Deputy Keeper

163. Lighthouses, Colonies—Return

165. Duchy of Cornwall—Account of Income and Expenditure

Turnpike Trusts, Scotland—Abstract of the General Statements of Income and Expenditure

123. County Treasurers, &c.—Abstract of Return

161. Pilotage—Account

166. Duchy of Lancaster—Account

174. Brewers, Victuallers, &c.—Account

189. Expiring Laws—Report

163. St. Helena—Return

167. Church Preferments—Further Return

171. Customs Duties, &c. Ireland—Accounts

173. Malt—Hops—Accounts

181. Committee of Selection—Fifth Report

183. Ecclesiastical Commission, Ireland—Report

193. St. Alban's Election—Minutes of Evidence

Canada, Civil List and Military Expenditure, &c.—Correspondence.

### HOUSE OF LORDS.

#### CRIMINAL RETURNS.

FRIDAY, April 4.—On the motion of Lord BERNERS, returns were ordered of the number of prisoners committed for larceny in England and Wales at October sessions in 1849 and 1850; at January sessions in 1850 and 1851, and at any adjournment thereof; and at any intermediate sessions; and at the spring assizes in 1849, 1850, and 1851. Also, return of the number of prisoners committed for larceny in Yorkshire and Lancashire at the winter assizes in 1849 and 1850; and also a return of the number of prisoners committed for larceny, burglary, embezzlement, false pretences, and night poaching in England and Wales, at the several assizes in 1849, 1850, and 1851.

#### COUNTY COURTS FURTHER EXTENSION BILL.

LORD REDESDALE moved the adoption of the report on the County Courts Further Extension Bill.—LORD ABINGER suggested that a provision should be added to the Bill, by which the County Court judges should have power to call in an assessor to sit with them in hearing cases of arbitration and cases of legacies and executors' accounts.—LORD BROUGHAM was exceedingly indebted for the suggestion, because it was quite true there were a great number of persons complaining that the County Court jurisdiction was not extended to certain cases of equity, in which the amount of property was so small that no man would dream of going to the Court of Chancery. He had, however, thought it best not to incur the present Bill with that subject at all, but on Monday or Tuesday next he should be prepared to present a second and separate measure, having a sanguine hope that the difficulties in the establishment of such equity jurisdictions might be overcome, and a grievous denial of justice in many cases be prevented. The report was then received.

TUESDAY, April 8.—LORD BROUGHAM moved that the House do go into committee on this Bill.—THE LORD CHANCELLOR said that he objected to certain of the clauses, especially to those relating to Arbitration and the proposed Court of Reconciliation.—LORD BROUGHAM explained.—THE LORD CHANCELLOR objected also to the proposed equity jurisdiction. He thought this ought to form the subject of a distinct measure.—LORD BROUGHAM said that it was no novelty. The clauses were copied verbatim from a Bill framed by the noble lord when Attorney-General (a laugh).—LORD CRANWORTH, LORD BEAUMONT, and other peers supported the clauses.—THE LORD CHANCELLOR said that after such an expression of the opinions of their lordships he should yield his own. The clauses were then agreed to.—The clauses relating to professional fees, and some others were also agreed to.—All the clauses relating to Arbitration and Courts of Reconciliation were struck out, as were also the clauses

giving unlimited jurisdiction by consent of the parties.—The House then resumed.

THURSDAY, April 10.—LORD BROUGHAM presented a petition from Huddersfield, praying for the passing of the Act consolidating bankruptcy jurisdiction in the country, with the jurisdiction of the local courts; and also petitions from several places in Carnarvon, in favour of the County Courts Bill.

The report upon this Bill was brought up, and the Bill was ordered to be read a third time to-morrow.—LORD BROUGHAM laid upon the table a Bill framed upon the principles which he had on former occasions stated to their lordships, with respect to the jurisdiction of local courts in equity cases. It confined the jurisdiction of those courts to personal suits, excluding all questions as to right of real property. It gave the power of appeal, and the power of removing from the local courts any such case instituted in those courts, by an application to the Court of Chancery. The Bill was read a first time.

### THE MAGISTRATE,

AND PAROCHIAL AND MUNICIPAL LAWYER.

#### SUMMARY.

AGAIN attendance at the Assizes has made painfully manifest the vastly greater severity of the sentences at the Sessions, where Magistrates administer the law, than at the Assizes, where it is dispensed by the Judges. It will be remembered that some time since we procured an order of the House of Commons for a return of the average amount of transportation and imprisonment inflicted at Quarter Sessions and at the Assizes, and the result proved, as we had anticipated, that although the greater crimes were tried at the latter, and the lesser at the former, the average amount of punishment by the Sessions exceeded that by the Assizes. It has been shewn most glaringly during the circuit just closed. Many a prisoner did we see sentenced to three months' imprisonment on whom the Sessions would have inflicted ten years' transportation. The conclusion we deduce from this is, either that the Sessions should be presided over by professional Judges, or that their power of punishment should be restricted to imprisonment.

A very novel and curious question in criminal practice was mooted in Ireland in *Reg. v. Fogarty*, 17 Law T. 10. The Judge requested counsel to undertake the defence of a prisoner, who was unable to pay for his defence. Thereupon a conference took place among the counsel present, and the senior member of the Bar stated their objection to act, uninstructed by an attorney, and requiring that the Court should formally assign counsel and attorney in such cases, and order the expenses to be paid by the Crown. Up to a very recent period it was the practice to do so. The Judge (PROCTOR, C.B.) considered that the expenses ought to be so paid, but that a Judge might, with propriety, call on a barrister to give his honorary services to a prisoner who was unable to employ one; but he thought the case different with respect to an attorney. We cordially concur in this view of the Chief Baron; and such is the practice in England. We hold that a barrister is bound to act, when called upon by the Court, without a fee, because his fee is purely an honorarium; so much so, indeed, that he cannot recover it by action: there is no contract; etiquette forbids him to take less than a certain sum; but it is a question whether he can refuse to act, if no fee be paid. It would certainly be very proper that Criminal Courts should be empowered, at their discretion, to assign counsel and attorney to prisoners, and order the costs to be paid as are those of prosecutions; but, until that be done, we trust that the members of the Bar will be as ready as ever they have been to give their assistance to those whose cases really need it, whenever the Court shall intimate an opinion that the case is one requiring to be protected.

What are the limits of "a town," and in what manner that term is employed in a local turnpike Act, was considered in *Reg. v. Cotlle*, 17 Law T. 15. A turnpike Act prohibited the erection of a toll-house within the town of Taunton. Subsequently to the erection of a certain toll-house there, the buildings had extended in that direction (towards the railway station), so that they were all connected together by courtyards, forming a continuous street. The jury were held to have rightly found this to be within the town. It was then objected that the word "towns," in the Act, applied only to the towns as they were at the time of the passing of the Act, and not to towns as altered by subsequent changes; in fact, that the Act was not prospective.



But the Q. B. held the provisions to be prospective, and that a toll-house could not be erected within the *present* limits of the town.

In an interesting case reported to us from Ireland (*Little v. Lord Clements*, 17 Law T. 8), it was held that, in an action of libel against a magistrate for taking with his own hand a declaration by a married woman, charging an assault against a clergyman, the judge should have left it to the jury to say whether the defendant *bond fide* believed he was acting in his capacity and within his jurisdiction as a magistrate in the discharge of his duty, and that, if he did the act in question *bond fide* and without malice, he was protected by the statute.

E. W. C.

#### TO THE EDITOR OF THE LAW TIMES.

SIR,—The discussion of Sir George Grey's Expenses of Prosecutions Bill, respecting the prohibition against clerks to committing justices being concerned in prosecutions, and the withdrawal of that clause, has caused me to consider the matter. The 102nd section of the Municipal Act renders clerks to borough justices, who by themselves or their partners engage in prosecutions, where they act as clerks to committing justices, liable to a penalty. Now it seems nearly the same enactment was attempted to be applied to all justices' clerks throughout the kingdom by Sir George Grey's Bill, but from opposition the clause was withdrawn, and I am told an amended clause was introduced when the Bill was reported regulating the circumstances under which clerks to justices may be employed in prosecutions. I hope it is not too late to obtain a repeal of the absurd prohibition in the Municipal Act, for if it be wrong to extend it to county clerks, it is equally so to continue it to borough clerks. The House of Commons having repudiated the principle, it is almost impossible to conceive what reason could be urged why all clerks to magistrates should not be put upon the same footing. It would be only an act of justice to the borough clerks. The 6th section has provisions applicable to boroughs as well as counties, and therefore no objection could be fairly urged on that head. I beg, therefore, to solicit your valuable aid.

I am, Sir, yours, &c.

MATTHEW KENNETT,

April 5, 1851.

A clerk to borough justices.

#### POOR REMOVALS.

##### TO THE EDITOR OF THE LAW TIMES.

SIR,—By the 11 and 12 Vict. c. 31, which is an Act to amend the procedure in the law of removals, power is given by the 8th section for the removing parish to abandon the order of removal by notice, and thereupon the order becomes null and void, upon payment of all costs which the parish to which the pauper was directed to be removed has incurred, power being given for the proper officer to tax such costs without an application to the Court, and whether it be sitting or no.

This was, doubtless, a very salutary regulation, and a saving of much expense to parishes, but unfortunately the framers of that Act have not gone far enough, and provided a similar course in cases which occur much more frequently, where an appellant parish gives notice of appeal, the respondent parish accordingly prepares for trial, issues subpoenas, &c. and the notice of appeal is then abandoned. In such cases the respondent parish is compelled to go before the Court, at a great expense, to ask for costs subsequent on the notice of appeal, otherwise the officer cannot tax them.

I trust this may have the timely attention of the Legislature, when any measure is brought thither in which such a regulation would be included.

I am, Sir, yours, &c.

JUVENIS.

#### JOINT-STOCK COMPANIES' LAW JOURNAL.

In course of constructing a railway, the company obstructed the bed of a navigable river, for which an action was brought against them. They pleaded that it was done by virtue of their special Act and of the Consolidation Acts, which were incorporated therewith; that the part of the river obstructed was among the lands delineated in their plans and sections; that they entered for the purpose of constructing the railway and not otherwise, and that it was necessary to construct the railway in the manner complained of. It was held, that it was not necessary for them either to allege in their plea, or to prove, that they had taken the requisite steps to vest in themselves the soil and bed of the river. It was also held that,

under the 16th sec. of 8 & 9 Vict. c. 20, a railway may be constructed upon the bed of a navigable river, so as to interfere to some extent with the flow of the river and with the navigation, although the company might not wholly alter the course of the river. (*Abraham v. The Great Northern Railway Company*, 17 Law T. 16.)

E. W. C.

#### WINDING UP.

Two questions as to contributories were reported last week. In *Ex parte Robinson*, 17 Law T. 14. A. a director of a banking company, took twenty shares as a qualification for his office, and signed the deed in respect of them. Afterwards, in pursuance of a resolution of the board, he signed a letter agreeing to take 100 shares more, and gave a promissory-note for 1,000*l.* in respect of these shares payable within four years. The 100 shares were not allotted, nor was the deed signed in respect of them, but entries were made in his account at the bank for dividends on account of these shares. The promissory-note for 1,000*l.* was not, however, met when due. He was held to be a contributory in respect of the 100 shares. Vice-Chancellor BAUCH thought it "a very clear case," in which most readers will agree with him. In *Ex parte Holmes*, 17 Law T. 14. A. the holder of shares in a banking company, transferred them to B. in January 1847. Up to this time the balance-sheets showed considerable profits. On March 6, 1847, the bank suspended payment, and the company was afterwards ordered to be wound up. In fact, there had been losses in the years 1845 and 1846. The question raised upon this was whether A. was a contributory in respect of losses up to the day of the transfer. He was held by Vice-Chancellor BAUCH not to be so. But this, we presume, was rather upon the special facts of the case than upon principle. Surely the Vice-Chancellor did not mean to say that a transferor would not, as a general rule, be liable as a contributory for losses incurred while he was a member, but only that, in this case, there was not sufficient proof that there were such losses, and that "the mere possibility that there might have been a loss sustained before he ceased to be a shareholder did not give a right to place his name on the list."

E. W. C.

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]

*Cheltenham, Oxford, and London Junction Railway Company.*—To further settle list of contributories, on the 26th and 26th of April.—Humphry.  
*Bugby, Warwick, and Worcester Railway Company.*—Call of 4*l.* on classes 4 and 6 (being the contributories to whom 15*l.* per share were paid or returned), and all such other contributories in lists or classes of contributories Nos. 1 and 2 as are not included in classes 4 and 6, and who have neither transferred their shares, nor received or been paid 15*l.* per share, to be paid on the 26th April to the official manager.—Richards.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

THE powers of trustees of a charity under a scheme settled by the Court for the management of the trust were considered in *Willes v. Childs*, 17 Law T. 12. It was provided by the scheme "that the trustees should have authority, from time to time, upon such grounds as they should, in their discretion, with the exercise and execution of the powers and trusts reposed in them, deem just, to remove the master, &c. from office." It was held that this did not empower them to dismiss without control of the Court, and that they were not the absolute judges of the sufficiency of the grounds of removal, and they were restrained accordingly from removing the master.

In *Sweeting v. Cowan*, 17 Law T. 20, the ploughing up of land stocked with rabbits was held not to be waste, where it had been neither specifically demised as a rabbit warren, nor is such by charter or prescription.

#### TO THE EDITOR OF THE LAW TIMES.

SIR,—In the advantages of a general registry of deeds, &c. I believe the Profession is agreed. The hostility of country solicitors hitherto to such a measure has arisen from their objection to its establishment in London, by its involving the ex-

penses consequent upon employing an agent there; and when it is considered that the great majority of transactions, and those it is now sought to cheapen, are for purchases of small amount, such charges would form a considerable as well as an objectionable item in a solicitor's bill.

Every objection, as it seems to me, would be met by forming local registries, so as to be within easy reach of every solicitor in the land, who in most transactions would be enabled, at little or trifling expense, to make the necessary searches and register his own deeds, &c. This would be effected by constituting each County Court office throughout England and Wales a registry office.

Placed in the principal towns in each district, where most of the solicitors reside, they would be found most accessible; the machinery would easily be formed upon that at present in existence, and it would prove the least costly to the public; while the tri-monthly visits of the treasurer would be subvenient to the efficiency and general method of the registry, so that all might be conducted on a uniform system.

I refrain from trespassing further on your space on this subject, and beg respectfully to recommend it to your consideration and that of the readers of the LAW TIMES. I remain Sir, yours, &c.

March 31, 1851.

AN OLD SUBSCRIBER.

#### ACKNOWLEDGEMENTS OF MARRIED WOMEN.

##### TO THE EDITOR OF THE LAW TIMES.

SIR,—Will you call attention to the delay that takes place in the office for Registering Acknowledgments of Married Women? The affidavit and certificate must be left for a month at least, generally six weeks, before the official certificate can be obtained; this is a great inconvenience, and in many cases the certificate is forgotten, and as far as I can judge, there is no good derived from having it registered at all.

I remain, Sir, yours, &c.

A SOLICITOR.

#### REGISTRATION OF DEEDS.

##### TO THE EDITOR OF THE LAW TIMES.

SIR,—I observe in your number of the 22nd March, you say, "That the present intention is to use the Tithe Commutation Maps for the above purpose;" and you add, that a correspondent of last week states, "that these are not always to be relied upon." So far as my experience goes, I not only confirm your correspondent's assertion, but I go further, and say that, for this special purpose, they are seldom to be relied upon; for, in practice, I have almost always found that the surveyor, in making his map, looked only to the land-owner, but made no distinction whatever between the different holdings of that land-owner; so that whether freehold, copyhold, or leasehold, or held for life, in tail, or in fee; whether, in fact, all, or some only, of these diversities occur, no line of demarcation whatever exists.

I do not pretend to say such is the state of the tithe-maps universally; but I speak of those I have seen, and I am certain that if this important measure is to be based on the assumption of the accuracy—for purposes of title—of the tithe maps, a more fatal error can scarcely be committed. I apprehend the only safe mode of avoiding the expense of new maps, &c. would be to call meetings of the landowners in each parish, in order that the tithe-map of the parish should be inspected and (if needful) corrected, and, when found correct, should be so certified; and thenceforth the map should be binding.

I am, Sir, yours, &c.

F.

#### STAMPS ON SURRENDERS.

As there has been much doubt in the Profession regarding the proper stamp-duty chargeable upon conditional surrenders of copyholds, mortgaged in conjunction with freeholds, I beg to send for your information a statement, under which I submitted a surrender of this description, with a view of ascertaining the Commissioners' opinion upon the point; it was, as you will perceive, stamped with 7*s.* 6*d.* duty under the new, instead of 20*s.* under the old Stamp Act, and the Commissioners adjudged it to be duly stamped.

J. W. K.

Walsham-le-Willows, near Ixworth,

8th April, 1851.

"The opinion of the Commissioners of Inland Revenue is requested, whether or not the accompanying surrender of copyholds is sufficiently stamped."

"It is a conditional surrender of copyholds, passed in pursuance of a covenant contained in the indenture (now produced), as a collateral security for a sum of 300*l.* secured by such indenture upon certain freehold hereditaments, thereby granted, by way of mortgage, in conjunction with such copyhold hereditaments."

"The surrender (as well as the indenture) is impressed with a 7*s.* 6*d.* *ad valorem* stamp only, on the ground of its being an instrument either of

further assurance, or additional or further security, and as such subject to the duty on such instruments imposed by the schedule to the 13 & 14 Vict. c. 97, and therefore not liable to the general duty of 20s. imposed by the 55 Geo. 3, c. 184, on conditional surrenders not therein otherwise charged.

"Were it possible upon any construction to hold this instrument subject to the general duty of 20s. a similar conditional surrender of copyhold hereditaments mortgaged in conjunction with freeholds for securing a sum not exceeding 50l. (in respect of which the *ad valorem* stamp under the new Act is 1s. 3d.) would be liable to a duty of 20s. the amount charged on a mortgage for 800l."

#### A WIFE'S REVERSIONARY INTEREST.

In the *LAW TIMES* of the 5th inst. under the head "Real Property Lawyer and Conveyancer," (p. 16) in alluding to *Hobby v. Collins*, 17 Law T. 2, you state that his honour the Vice-Chancellor "was clearly of opinion that a wife could not deal with land in which she had a reversionary interest." Now, I read the report of that case in the 'previous week's *LAW TIMES* very carefully, and certainly did not arrive at that conclusion. It is, I believe, pretty generally understood now that a married woman cannot deal with *personality* in which she has a reversionary interest, but my impression was that she could dispose of any estate or interest in lands, whether in possession, reversion, or remainder, under the Act for the Abolition of Fines and Recoveries. As I understood the case of *Hobby v. Collins*, as reported, it appeared to have been argued that the married woman could dispose of money to arise from the sale of lands, in which money she had a reversionary interest, and which was subject to be reinvested in the purchase of other lands. In his judgment, the Vice-Chancellor said, "As he understood it, this was a sum charged on lands in which (i. e. in which sum) the wife had a reversionary interest, and he considered that she was unable to deal with it (the money). He must, therefore, refuse the prayer of the petition." But this, as it appears to me, by no means decides that a married woman cannot dispose of her reversionary interest in lands, as the statute for abolishing fines and recoveries expressly enables her to dispose of any estate in any lands, and the grounds on which it was decided that she could not dispose of her reversionary interest in personal estate, viz. that it was a chose in action which could not be reduced into possession, does not apply to real estate.

Can you or any of your readers throw any light upon this point, which is one of considerable importance, and refer to any cases deciding directly or indirectly that a married woman cannot dispose of her reversionary interest in lands?

#### A SUBSCRIBER AND READER.

[NOTE.—Our correspondent is right. The commentary should have been expressly limited to personality; the writer's language was too general. Hence the misunderstanding on the part of the reader.—Ed. L. T.]

#### Queries on Points of Practice.

##### CHAPELS OF EASE OR DISTRICT CHAPELS.

I WISH one of your correspondents, who so ably answered the enquiry, in the last volume of the *LAW TIMES*, as to a gift or endowment to a chapel of ease, would state if he is aware of any law as to enforcing the payment of a rate or stipulated charge of so much per sitting in such a chapel, fixed by the consecration deed for the minister or incumbent; and also for the recovery of a rate assessed by the seetholders in vestry, of so much per sitting for the repair or for providing the usual requisites for the service of the chapel. The living has been endowed with a grant from Queen Ann's Bounty, and has a separate district allotted to it. Marriages and christenings are performed in it. J. R.

April 8, 1851.

##### SALES IN THE INCUMBERED ESTATES COURT.

(Specially prepared for the *LAW TIMES*.)

Friday, Feb. 7.

Estate of T. A. Walsh.

**Lands in Waterford.**  
Lot 1.—1,008 acres; fee farm grant; profit rent, 750l.: sold for 9,300l.  
Lot 2.—345 acres; lives renewable for ever; profit rent, 124l.: sold for 1,500l..  
Lot 3.—3,335 acres; lease for twenty-one years, renewable for ever; profit rent, 121l.: sold for 2,200l. Solicitor, Mr. Armstrong.

**Estate of Samuel Hopping.**  
Lands in Meath; fee-simple. 304 acres; profit rent, 279l.: sold for 6,400l. Solicitor, Mr. Gibson.

**Estate of John Tuthill.**  
Lands in Limerick; fee-simple; 574 acres; profit rental, 229l.: sold for 900l. as it was understood that the rents were not well paid. Solicitor, Mr. White.

**Estate of M. Wall.**  
Lands in Waterford; 1,596 acres; profit rent, 960l.: sold for 13,500l.

This estate had been sold for 14,800l. on a former occasion. The Court now ordered that the former purchaser should pay the difference, and the costs of the second sale. Solicitors, Mortimer and Taylor.

**Estate of Hewitt Bridgman.**  
Lands in Clare.  
Lot 1.—291 acres: sold for 600l. At present scarcely any profit value.  
Lot 2.—79 acres; profit value, 51l.: sold for 800l.  
Lot 3.—470 acres; profit value, 42l.: sold for 450l.

Tuesday, Feb. 11.

**Estate of George M. Hanley.**  
Lands in Roscommon.  
Lots 1 and 2.—610 acres; value, 1372l.: sold for 2,000l.  
Lot 3.—42 acres; value, 194l.: sold for 350l.

#### COUNTY COURTS.

##### Summary.

Sec. 96 of the County Courts Act protects from seizure in execution the wearing apparel and implements of trade. But, where the landlord gives to the bailiff a written notice, under sec. 107, claiming arrears of rent, the bailiff may distrain such wearing apparel or implements of trade to satisfy the rent. (*Woodcock v. Prichard*, 17 Law T. 16.)

LORD BROUGHAM'S Extension Bill has been terribly hacked by the committee of the Lords. Nothing of importance has escaped, save the clauses which we had succeeded in introducing, by which fairer remuneration is to be secured to the Profession. But probably this will be esteemed by our readers ample compensation for the temporary loss of other promising portions of the Bill, especially as the Lord Chancellor promises an equity jurisdiction to the County Courts as a part of Chancery reform. Some portions of the eliminated clauses it will be impossible to regret, as the Courts of Reconciliation, the permission to barristers to practise unaided by an attorney, and the admission of attorneys' clerks as competitors both with attorneys and barristers. These dangerous novelties, revolutionising the Profession and destroying all the distinctions hitherto observed, were, we are glad to see, universally condemned.

#### COUNTY COURTS EXTENSION.

TO THE EDITOR OF THE *LAW TIMES*.

SIR,—Now appears the time to discuss the details of this measure, and I venture to call your attention to one or two considerations.

The most unmitigated evil tendency of making attorneys' clerks advocates, is, I presume, manifestly apparent; but of all the propositions that have ever appeared in County Court legislation this is certainly the most dangerous? Better—infinite better—for the public, to prohibit any legal assistance whatsoever. Is it not obvious, to the plainest capacity, that the "clerks" would be the "Sham Lawyers" of the present. Does any one seek to know the effect? Ask their lordships who attend judges' chambers. Apply to the police magistrates and Old Bailey authorities. Look to the newspaper reports. Ask the poor mechanic and labourer, the ready prey of these "Sham Lawyers." Inquire of the poor convicted; and the one universal reply will be, "nuisance of nuisances." Surely Lord Brougham has been deceived, and needs but that the truth should be put before him. He professes to value the opinion of the County Court judges. So he ought. Well, then, let him ask them, and legislate accordingly.

I notice the clauses 29 and 30 of the proposed Bill; but does the latter effect the intention? It only repeals the fee section of the LAST County Courts Act, and that only related to causes above 20l. The 91st section of the 9 & 10 Vict. c. 96, must be touched, or the provision will only go half way towards the remedy at which you evidently aim. But while on this question, ought not that gross bungle of words—the 91st section—to be entirely repealed, and a fresh clause, giving professional men *absolute* and not *permissive* right (as now) to be heard?

The power proposed to the County Court judges to frame costs should be extended to the County Court clerks. The judges alone are certainly not competent to do justice between the public and attorney.

I only notice details here—leaving such erratic notions as "courts of reconciliation" to the public at large. But, upon the above questions, on which I consider I am enabled to inform an opinion, I respectfully and earnestly advise you, that ever since you have occupied the post of editor of a now most important journal, subjects of greater importance to the Profession have never been discussed in the *LAW TIMES*, or which deserved more instant and earnest attention, and the exercise of that influence which your position has commanded for you.

I have conversed with almost everybody, professional, of all grades, and nonprofessional, that I have met with since the "Clerk Advocate" proposition appeared, and I have heard but one solitary voice in its favour.

I am, Sir, yours, &c.

C. R. G.

[NOTE.—Our correspondent is mistaken as to the purport of our clauses for professional remuneration. The scale of costs is to be prepared by the judges of the Superior Courts, and bills are to be taxed by the clerks of the County Courts, with an appeal from that taxation to the judge. This was our plan as adopted by Lord Brougham, and accepted by the House of Lords. Now, as we drew it, was the provision restricted to suits above 20l. but extended to all suits in the County Courts. Whether this was in any way altered by the committee we know not, but the newspaper report states that the clause was "agreed to."—Ed. L. T.]

#### THE "STATUS" OF ATTORNEYS' CLERKS.

SIR,—In justice to a class, neither small nor unimportant, I trust you will give insertion to a few remarks in reference to a leader in your journal of the 5th inst. touching the appearance of attorneys' clerks representing their principals in the County Courts,—educated, I suppose, by the letter of "C. R. G." in the same number.

Let me remind you that the "advocacy" of attorneys' clerks is recognised and permitted by the judges of the Superior Courts, at their Chambers; by the Taxing-masters of the Courts of Common Law, Equity, and Bankruptcy; by the Masters and Registrars in Chancery, the Commissioners in Bankruptcy and Insolvency, and the Magistrates at the Police Court, having equal audience with solicitors and barristers; and I have yet to learn that contact with such clerks is generally considered as so unpleasant and degrading as yourself and your correspondent suppose. The highest encomiums upon the ability of the clerks, to whom these duties are intrusted, have been from time to time volunteered by the highest members of the Bench and the Bar; and I cannot but think it savours, not only of exclusiveness, but of superciliousness, thus to sneer at the character of a class whose merits—although "servants"—have been thus recognised. Sir George Stephen, in his "Clerk," pays no less flattering a tribute to the class of men to whom I am now alluding.

For, sir, your supposition that the attorneys would send their "writers" to represent them in the County Courts is as uncomplimentary to the Profession as it is gratuitous and unfounded in fact. I beg to remind you of another fact, which you appear to have forgotten, viz., that there is a body of clerks employed by the Profession of a far higher grade than that of copying clerks—a body to whom the most arduous duties are allotted, the most momentous interests intrusted, and by whom these duties are most efficiently performed, those interests adequately protected. It is upon them that the task of advocacy—if such be the term—along with other no less responsible avocations would devolve. As a body they are skilful, honest, respectable,—worthy of the trust reposed in them. It is an absurdity to suppose that a solicitor would intrust the care of his proceedings to an incompetent hand, the consequences of whose ignorance and blunders would recoil upon himself, not only in the displeasure of his client, and the removal of that client's business, but also in the shape of damages for negligence. As applied to this question, the word "writers," then, has no meaning.

The possibility that a certain class of attorneys could, in collusion with some protean, "clever sham-lawyer," who should enact alternately the part of a clerk to each—"divide the spoil," could be easily guarded against by the vigilance of the judge or the clerk of the court. In addition to this, the announcements in the daily papers set out what I should conceive to be a sufficient precaution, in the necessity for the clerk having been six months in the employ of the solicitor he represents.

I will not further intrude upon your space in urging those grounds which make the arrangement in question convenient, nay more, expedient. In this respect, for the present at least, I will follow the example of your correspondent "C. R. G."—more laconic than logical, in assuming that "reasons and instances are needless." I am, Sir, yours, &c.

New Broad-street, April 7, 1851.

J. B. M.

#### THE LAWYER.

##### Summary.

**EQUITY PRACTICE.**—Where a party opposed in person a motion for a receiver, and so conducted his opposition that the authorities were not cited, and thus, through his own neglect, the case was not fully discussed, his costs in the Court below were not allowed, upon his

succeeding on appeal against the order. (*Hall v. Hall*, 17 Law T. 11.)

A point of practice under Turner's Act was decided in *Stapleton v. Stapleton*, 17 Law T. 15, namely, that the signature of counsel to the draft of a special case, according to sec. 10 of that Act, is sufficient.]

In *Waldron v. Sloper*, 17 Law T. 15, a claim, improperly certified to be a short claim, was ordered to be restored to its place in the general paper, it appearing, when it came on, to be a cause that would take time, and the party who had set it down as a short cause was ordered to pay the costs of the day.

An interesting question as to costs under the *Law of Patents* was decided in *Newhall v. Wilkins*, 17 Law T. 20, which was an action for infringement of a patent. A verdict passed for the plaintiff, who thereupon claimed treble costs under the statute, the patent having been affirmed at a former trial. It was held, that the proper course was to prove this by producing the record of the former trial *after*, and not *before*, the verdict.

### COUNSEL.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Can you inform me, as well as others who are anxious to know whether there is any rule in any court or on any circuit which requires that a plaintiff's case must be conducted by two counsel at least?

My position at the late assizes of the county of A. was this: I was plaintiff's attorney in an action for about 80l. a short case with only two witnesses, and I delivered my brief to Mr. B. On the conference, he alluded to his having no junior; I said I did not intend him to have any assistance, as the case was so simple, nor did I know of any rule requiring two counsel unless the leader was a silk-gownsmen. He admitted that the character of the case did not require that he should have any help, but he feared the rule on that circuit would compel him to ask for a junior; so I borrowed his brief to make a copy. During the day (the first day of the assizes), the plaintiff's and defendant's counsel referred the case to a *barriester* (it is not my purpose to enter into this circumstance now), and on returning me the brief, my counsel said, "Did you give a brief to a junior?" and I replied "No, and I am glad I have saved the fee, as this is the upshot of the case." But, he said, I was bound to deliver another brief even then; so I indorsed a sheet of paper and handed it to Mr. C. whose labour in behalf of my client was to put his name under the fee, and return me the brief, with thanks. I am, Sir, yours, &c.

A MEMBER OF THE LAW SOCIETY AT

April 7, 1851.

P.S.—I may as well mention that the next day the arbitration was entered upon and closed, and the certificate (or award) handed to me on payment of *ten guineas*.

[Note.—There is no obligation to employ two counsel, unless the senior be a Q.C., in which case he must have a junior.—Ed. L. T.]

### THE MERCANTILE LAWYER.

#### Summary.

THE Court of Chancery has refused, in *Hall v. Hall*, 17 Law T. 11, on appointing a receiver and manager, to take into its hands, for the purpose of continuing it, a partnership trade, "The general principle," said the Lord Chancellor, "resulting from all the authorities appears to be that the breaches of the articles of partnership are not necessarily the foundation of a dissolution; but when those breaches are of such a nature as to show that the partnership cannot be carried on for the benefit of the parties, according to the original intention as apparent from the articles, inasmuch as one side has put an end to the partnership according to the original agreement and articles, in that case the other party may be relieved from the partnership, although there is no express provision that the partnership should determine upon the breach of either of those articles or of any others. It is, therefore, upon the ground that virtually the parties have determined the partnership, or, at least, that one has, so far as he is concerned, withdrawn himself from the partnership according to the articles, and that the other, by reason of such conduct, claims to be relieved or prays a dissolution; and, therefore, in every case where complaints are made of breaches of the articles, it must be seen with what view the complaint is urged, whether with the

view of making it the foundation of dissolution, or of a decree enforcing or carrying on the partnership according to the original terms, and preventing those breaches which have before happened by reason of the conduct of one of the parties."

What is sufficient evidence of duly protesting a *foreign bill of exchange*, was considered in the case of *Geralopulo v. Wieler*, 17 Law T. 17. Certain foreign bills were protested for non-payment on December 10. On December 11 plaintiff paid them, *supra* protest, for honour of the second indorsers. The same day (December 11) the protests for nonpayment and acts of honour were drawn up on the notarial registry and sent by post to Moscow. To prove the protest, *duplication* (made after action brought) of the entries in the notarial registry were admitted in evidence as *originals*. A case of *Vandewall v. Tyrrell*, Moo. & M. 87, was cited against it; but the Q. B. considered that case to have been misunderstood by the reporters. "That case decides only," said the Court, "in conformity with the general law, that a subsequent declaration cannot qualify a previous act, but that in order to have such effect the declaration must precede or accompany the act, in conformity with the law of merchants, and in cases of payment for honour the declaration must be formally made before the notary."

*Reimer v. Ringrose*, 17 Law T. 18, was a question on the law of *Marine Insurance*; what is a constructive total loss? A cargo of corn, consigned to persons at Hull, was insured for the voyage. The vessel was stranded on the coast of Norway, and the corn sold there as damaged. A claim was made upon the policy as for a *total loss*. The judge directed the jury that if, with proper and reasonable care, the corn could have been brought to Hull in the state of corn, though damaged, it would not be a total loss, and such direction was held to be *right*. It was also held, that if the expense of conveying the corn to Hull would have been greater than its value when brought, it would amount to a total loss.

In *Silverlock v. Irvin*, 17 Law T. 20, declarations made by the plaintiff at the time of supplying goods and entries in his shop-books were held to be admissible for him to prove that he then knew of the existence of a dormant partner in the business for which the goods were supplied, and that he was relying on his credit.

The circumstances that make a farmer a trader liable to the Bankrupt Laws were decided in *Slawfield v. Layton*, 17 Law T. 20. Where a farmer had a room in his house for selling flour and pork, and there was a continuing buying and selling, otherwise than as a farmer, he was a trader. But not so if he merely traded in the produce of his farm.

### LEGAL INTELLIGENCE.

#### The Circuits.

#### NORFOLK CIRCUIT.

BURY ST. EDMUNDS, April 2.—The Assizes for the county of Suffolk commenced yesterday afternoon, when the commission was opened by both the learned judges, who afterwards attended divine service. This morning both the Courts were opened at ten o'clock. The cause list for this county presents the same features which we noticed in those of its predecessors on this circuit. This county produces only five causes. One was withdrawn, one was a writ of inquiry simply, a third was an undefended action of ejectment, the fourth was a paltry action of trespass, which terminated in a verdict for 15s. only. All of these were disposed of long before twelve o'clock, and the only remaining cause is a *tythe* case, which being appointed to be heard before a special jury, will be tried to-morrow morning. The calendar, however, presents a fearful array of crime. It contains the names of 92 prisoners, and among the crimes imputed to them are to be found no fewer than 5 cases of wilful murder, 8 of arson, 2 of forgery, 4 of robbery, 2 of perjury, 3 of burglary, 3 of wounding, 2 of manslaughter, and a variety of minor offences, including the Barham rioters.

CHURCH BUILDING ACTS AMENDMENT.—Yesterday Lord Carlisle's Bill (new in the House of Lords), to amend the Church Building Acts, was printed. It contains thirty-four clauses, and was not explained when introduced. Among other things, it provides that the commissioners for building new churches may, by order under seal, fix a moderate rental on a certain number of free seats in a church where they have before established pew rents, and on the vacancy of the incumbency may revoke such order. It is proposed that not more

than two-thirds of the accommodation shall be subject to pew rents. The commissioners may order a certain portion of free seats to be appropriated to the deserving poor inhabitants of the parish or district. Few rents are not to be established for the church of an ancient parish or chapelry. It is further proposed to enact that on persons permanently endowing a church the commissioners may transfer the right of nomination to such persons, compensation being made to the original incumbent. There are seventeen Church Building Acts, and it is declared to be expedient that the same should be amended as pointed out by the intended Act, which is to extend to England, Wales, and the Channel Islands.

LEGAL AND PARLIAMENTARY CHANGES IN SCOTLAND.—Mr. Rutherford has accepted the vacant seat on the bench, and the Solicitor-General, Mr. Moncreiff, succeeds him as Lord Advocate. This, of course, creates a vacancy in the parliamentary representation of the Leith district of burghs; and the new Lord Advocate has presented himself to the constituency. In Mr. Rutherford the bench has gained one of the greatest lawyers Scotland ever produced, but the crown and the country have lost a valuable public officer.

FARM BUILDINGS.—A Bill has been brought in by Mr. Cochrane and Mr. Forbes to extend the provisions of "The Drainage of Lands Act, 1849," to the advance of private money for the erection and repair of farm buildings on lands in Great Britain and Ireland. It proposes to give landlords the power to borrow money for this purpose, provided always that the sum borrowed or advanced under the Act does not exceed in amount eighteen months' value of the land in respect of which it is borrowed. Every rent charge to be granted in respect of money thus borrowed may be made payable for any period exceeding twenty-two years, but not exceeding thirty years. All buildings erected or improved under the Act must be insured against fire.

RENUNCIATION OF A LEGACY.—The late Mrs. Butler Cole bequeathed to Mr. Dixon, surgeon, of Preston, her medical attendant, the sum of 3,000l. That gentleman has, it is said, declined to receive the legacy, and has executed a deed of renunciation. This sum will be divided among the nephews and nieces of the deceased lady.—*Blackburn Standard*.

### PROCEEDINGS OF LAW SOCIETIES.

#### LAW STUDENTS' DEBATING SOCIETY.

##### QUESTIONS FOR DISCUSSION.

Tuesday, April 15, 1851.

44. Was the evidence of handwriting tendered in the case of *Dee dem. Mudd v. Suckamore*, 5 Ad. & Ell. 703, properly rejected?

XXXII. Is a similar Act to the Irish Incumbered Estates Act desirable for England?

### CORRESPONDENCE.

#### AGENTS AND ACCOUNTANTS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I have read with satisfaction the letters and correspondence of Mr. F. Charsley in your journal of the 8th ult. upon the subject of unqualified persons acting as conveyancers; and it must be a matter of congratulation to the Profession at large to find that there are amongst its numbers gentlemen who are at last becoming awake to its interests, and are determined to discountenance that class of interlopers under the names of agents, stewards, accountants, &c. who have grown like excrescences upon the legal body, and render the law scarcely worth the pursuit.

One of the great evils to be complained of is the practice which exists among agents and stewards of estates of noblemen and gentlemen preparing all the leases and other instruments, which are strictly the province of their solicitor to do. This, which is the only real remuneration a solicitor generally has for his legal advice in family matters, is taken from him by men who are quite incompetent to prepare the instrument, except from old forms in their possession, and who cannot adapt new circumstances when requisite, and that in violation of an Act of Parliament, which I am certain the owners of those estates would not countenance or allow, if they were aware that such a violation of the law was committed; nor would the bailiffs or land-agents themselves be comfortable under the penalty of 50l. if fairly brought before them.

Professional delicacy prevents the respectable practitioner from explaining this to his client; and as I am concerned for several large estates in the counties of Lancashire and Shropshire, I hope you will excuse my withholding my name.

April 5, 1851.

PROMOTIONS, APPOINTMENTS,  
ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to grant the place of one of the Lords of Session in Scotland to Andrew Rutherford, esq. her Majesty's Advocate for Scotland, in the room of Sir James Wellwood Moncrieff, bart. deceased.

The Queen has also been pleased to grant the office of her Majesty's Advocate for Scotland to James Moncrieff, esq. her Majesty's Solicitor-General for Scotland, in the room of Andrew Rutherford, esq. appointed a Lord of Session.

MEMBERS RETURNED TO SERVE IN THIS  
PRESENT PARLIAMENT.

**BOROUGH OF DEVONPORT.**—Sir John Romilly, knt. Master or Keeper of the Rolls and Records in Her Majesty's High Court of Chancery.

**TOWN OF SOUTHAMPTON.**—Sir Alexander James Edmund Cockburn, of Wakehurst-place, in the county of Sussex, knt. her Majesty's Attorney-General.

**CITY OF OXFORD.**—William Page Wood, esq. her Majesty's Solicitor-General.

**CITY OF COVENTRY.**—Charles Geach, of Birmingham, in the county of Warwick, esq. in the room of George James Turner, esq. who has accepted the office of Vice-Chancellor.

**COUNTY OF SOMERSET, Western Division.**—William Henry Powell Gore Langton, of the parish of Newton Saint Loe, in the said county, esq. in the room of Sir Alexander Hood, bart. deceased.

## COURT PAPERS.

CHANCERY SITTINGS,  
Easter Term, 1851.  
Lord Chancellor's Court.

AT WESTMINSTER.	
Tuesday...April 15	Appeal Motions
Wednesday...16	Petition day. Unopposed Lunatic and Cause Petitions
Thursday...17	Appeals
Friday...23	Appeals
Friday...24	Appeal Motions
Friday...25	Petition day. Unopposed Lunatic and Cause Petitions
Saturday...26	
Monday...28	
Tuesday...29	Appeals
Wednesday...30	
Thursday...May 1	Appeal Motions
Friday...2	Petition day. Lunatic Petitions, unopposed first
Saturday...Mar. 3	
Monday...5	Appeals
Tuesday...6	
Wednesday...7	
Thursday...8	Appeal Motions
Friday...9	Petition day. Lunatic Petitions, unopposed first
Saturday...10	Appeals
Monday...12	
Tuesday...13	Appeal Motions.

N.B. Such days as his Lordship sits in the House of Lords excepted.

## Rolls Court.

AT WESTMINSTER.	
Tuesday...April 15	Motions
Wednesday...16	Petitions in General Paper
Thursday...17	Pleas, Demurrers, Exceptions, Causes, and Further Directions
Friday...23	Motions
Saturday...26	
Monday...28	Pleas, Demurrers, Causes, Further Directions, and Exceptions
Tuesday...29	
Wednesday...30	
Thursday...May 1	Motions
Friday...2	
Saturday...3	Pleas, Demurrers, Causes, Further Directions, and Exceptions
Monday...5	
Tuesday...6	Direction, and Exceptions
Wednesday...7	
Thursday...8	Motions
Friday...9	Pleas, Demurrers, Causes, Further Directions, and Exceptions
Saturday...10	
Monday...12	Petitions in General Paper
Tuesday...13	Motions.

Short causes, consent causes, unopposed petitions, and short claims, every Saturday at the sitting of the Court.

Notice.—Consent petitions must be presented, and copies left with the secretary, on or before the Thursday preceding the Saturday on which it is intended they should be heard.

## Vice-Chancellor Knight Bruce's Court.

AT WESTMINSTER.	
Tuesday...April 15	Motions
Wednesday...16	Short Causes and Motions continued
Thursday...17	Further Directions and Exceptions
Wednesday...23	Short Causes, Short Claims, & Bankrupt Petitions
Thursday...24	Motions

Friday...25	Pleas, Demurrers, Exceptions, and Further Directions
Saturday...26	Petitions
Monday...28	Causes and Claims
Tuesday...29	
Wednesday...30	Short Causes, Short Claims, & Bankrupt Petitions
Thursday...May 1	Motions
Friday...2	Pleas, Demurrers, Exceptions, and Further Directions
Saturday...3	Petitions
Monday...5	Causes and Claims
Tuesday...6	
Wednesday...7	Short Causes, Short Claims, & Bankrupt Petitions
Thursday...8	Motions
Friday...9	Pleas, Demurrers, Exceptions, and Further Directions
Saturday...10	Petitions
Monday...12	Causes and Claims
Tuesday...13	Motions.

Vice-Chancellor Lord Cranworth's  
Court.

AT WESTMINSTER.	
Tuesday...April 15	Motions
Wednesday...16	Petition day. Adjourned Petitions
Thursday...17	
Wednesday...23	Causes and Claims
Thursday...24	Motions
Friday...25	Petition day. Petitions
Saturday...26	Pleas, Demurrers, Exceptions, and Further Directions
Monday...28	Causes and Claims
Tuesday...29	Short Causes, Short Claims, and do.
Wednesday...30	Causes and Claims
Thursday...May 1	Motions
Friday...2	Petition day. Petitions
Saturday...3	Pleas, Demurrers, Exceptions, and Further Directions
Monday...5	Causes and Claims
Tuesday...6	Short Causes, Short Claims, and do.
Wednesday...7	Causes and Claims
Thursday...8	Motions
Friday...9	Petition day. Petitions
Saturday...10	Pleas, Demurrers, Exceptions, and Further Directions
Monday...12	Causes and Claims
Tuesday...13	Motions.

## Vice-Chancellor Turner's Court.

AT WESTMINSTER.	
Tuesday...April 15	Motions, Causes, and Claims
Wednesday...16	Petition day. Petitions, Causes, and Claims
Thursday...17	Causes and Claims
Friday...23	Causes and Claims
Thursday...24	Motions and ditto
Friday...25	Unopposed Petitions, Short Causes, and Short Claims, and Causes & Claims
Saturday...26	
Monday...28	Causes and Claims
Tuesday...29	
Wednesday...30	Pleas, Demurrers, Exceptions, Further Directions, Causes, and Claims
Thursday...May 1	Motions and ditto
Friday...2	Unopposed Petitions, Short Causes, and Short Claims, and Causes & Claims
Saturday...3	
Monday...5	Pleas, Demurrers, Exceptions, Further Directions, Causes, and Claims
Tuesday...6	
Wednesday...7	
Thursday...8	Motions and ditto
Friday...9	Unopposed Petitions, Short Causes, and Short Claims, and Causes & Claims
Saturday...10	Pleas, Demurrers, Exceptions, Further Directions, Causes, and Claims
Monday...12	Petition day. Petitions, Pleas, Demurrers, Exceptions, Further Directions, and ditto
Tuesday...13	Motions and ditto.

## Court of Queen's Bench.

Sittings appointed to be held in Middlesex and London, before the Right Hon. Lord CAMPBELL, in and after Easter Term, 1851.

**MIDDLESEX.—IN TERM.**  
First sitting—Thursday, April 24, and following days, at eleven o'clock, for short defended and undefended causes.  
Second sitting—Monday, April 28, and following days, at eleven o'clock, for short defended and undefended causes.  
Third sitting—Saturday, May 10, at half-past nine o'clock precisely, for undefended causes only.

**AFTER TERM.**

Wednesday, May 14, at half-past nine o'clock.

**LONDON.—IN TERM.**  
Sitting Monday, May 12, at ten o'clock, for short defended and undefended causes.

**AFTER TERM.**

Thursday, May 15, to adjourn only.

N.B. The hours of attendance at the Marshal's office of this court will in future be from eleven till five during Term and sittings, and from eleven to two during the rest of the year.

## CROWN PAPER.

Yorkshire—Reg. v. Edmund Godfrey and Others
Manchester—Reg. v. Manchester and South Lancashire Railway Company
Middlesex—The Attorney-General v. The Great Western Railway Company
Lancashire—Reg. v. The Lancashire and Yorkshire Railway Company

London—Reg. v. John Bennett
Reg. v. Same
Cambridge—Reg. v. Thomas Coward
Rochester—Reg. (on pros. of Whiston) v. Dean and Chapter of Rochester
Yorkshire—Reg. (on pros. of Appleyard and Another) v. The London and North-Western Railway Company
Reg. (on pros. of Overseers of Poor of Wakefield) v. The Overseers of the Poor of Leeds
Reg. v. Inhabitants of Maurice
Romney Marsh—Reg. v. William Tolhurst
Kent—Reg. v. William Biles
Middlesex—Reg. (on pros. of Parish of St. Marylebone) v. Inhabitants of St. Pancras
Pembrokeshire—Reg. v. Inhabitants of St. Mary
W. E. Yorkshire—Reg. (on prosecution of township of Sheffield) v. Inhabitants of Alkington
London—Reg. v. Jos. Jas. Welch and Others
W. E. Yorkshire—Reg. v. Inhabitants of Oussett
Lancashire—Reg. v. Inhabitants of Woodale
Norfolk—Reg. v. Norfolk Railway Company
Breconshire—Reg. v. Inhabitants of Llanelly
Manchester—Reg. v. Inhabitants of Shavington-cum-Gresby
Lancashire—Reg. v. Jas. Booth (conv. 29th June, 1849)
Reg. v. Same (8th Aug. 1849)
Cheshire—Reg. v. John Dale (Bail of Molyneux)

## NEW TRIAL PAPER.

Standing for the Judgment of the Court.  
Stafford—Lord Campbell. Doe dem. Shalkroft and Another v. Palmer and Wife and Another  
FOR ARRANGEMENT.

## Easter Term, 1848.

Kent—Lord Denman. Doe dem. Warren and Another v. Brydges. Brydges, tenant  
Michaelmas Term, 1851.

Lancashire—Cresswell, J. Reg. v. Henry Thompson and Others  
Hilary Term, 1851.

Middlesex.—Lord Campbell. Reg. v. Curtis  
London.—Lord Campbell. Cowles v. Cashman

Lord Campbell. Stevwright v. Archibald  
Lord Campbell. Klam v. North Western Railway Company

Tried during Hilary Term, 1851.  
Middlesex.—Erie, J. Doe dem. Page v. Page

## SPECIAL CASES AND DEMURRERS.

Standing for the Judgment of the Court.  
Wallis.—The Master, Wardens, &c. of the Company of Tobacco-pipe Makers, &c. v. Loder, the younger, dem.

## For Argument.

Sharpe and Co.—Tarlton v. Liddell and Another, special case from Chancery  
Sewell and S.—Ellcott v. Lewis, special case

Lawrence and Co.—The Sunderland Marine Insurance Company v. Kearney and Another, error from Court of Pleas of Durham  
Sutcliffe.—Gabriell and Others, executors, &c. v. Smith and Others, special case

Stanley.—Corbett, esq. v. Macesey, arrest of judgment  
Husey and Co.—Earl of Chichester v. Hall and Another, special case

Gough.—Glover v. The North Stafford Railway Company, special verdict  
Pringle.—Smith and Another v. Losh and Others, ward

Smythe.—Morloe, clerk, executor, &c. v. Clarke, executor, dem.  
Maples and Co.—Gibson and Another v. Vernon and Another, dem.

Briggs and Son.—Weddell v. Robinson, special case  
B. Turner.—Lowndes v. Earl Stamford and Warrington, dem.

Pemberton and Co.—Lord Seymour v. Morrell, special case  
Brackenridge.—Blair, administrator, &c. of Buckley, v. Ormond and Another, executors, &c. special case

Tatham and Co.—Baker v. Shadbolt, dem. to plaintiff's declaration  
Same.—Same v. Same, dem. to defendant's plea

Weeks.—Doe dem. Davies v. Davies, special case  
Abbott and Co.—Watkins v. The Great Northern Railway Company, dem.

Lowndes.—Shrimpton v. Young, sued with others, dem.  
Upward.—Rooper v. Loftus, dem.

Philpot.—Cooke v. Cunliffe, bart. and Another, special case from Chancery  
Cattlin.—Rains v. Woolrych, secretary of the Metropolitan Commissioners of Sewers, dem.

Beckett.—Philips v. Brown, dem.  
Margatta.—Doe dem. Farsey v. Hemming and Others, special case

Wheelock.—Valpy and Another, assignees, &c. v. Oakley, special case  
Young.—The Irish South-Eastern Railway Company v. Clarkson, dem.

Hudson and Co.—Graham and Others v. Young, dem.  
Berkeley.—Acraman and Another v. Herniman, special case

Wright.—Holt v. Daw, dem.  
Lewis.—Cooper (a pauper) v. Gardner, dem.

Scott and Co.—Collett v. London and North Western Railway Company, dem.  
J. and C. Rogers.—Johnson v. Clark, dem.

Tilson and Co.—Stodbert and Another v. Llynor Valley Railway Company, dem.  
Smith and Son.—Murray v. Bohn, dem.

Dyer and Co.—Bernard v. Sheldhan, Administratrix, &c. dem.  
Pitman.—Lloyd v. Blackburn, dem.  
Same.—Lloyd v. France, dem.



**AFTER TERM.**  
Wednesday, May 14.

**IN TERM.—LONDON.**  
Tuesday, April 20.  
Tuesday, May 6.

**AFTER TERM.**  
Thursday, May 15.

N.B.—The Court will sit at ten o'clock in the forenoon on each of the days in Term, and at half-past nine precisely on each of the days after Term.

The causes on the list for each of the above sitting days in Term, if not disposed of on those days, will be tried by adjournment on the days following each of such sitting days.

On Thursday the 15th of May, in London, no causes will be tried, but the Court will adjourn to a future day.

The office of the Marshal and Associate is at the Lord Chief Justice's Chambers, Rolls-garden, Chancery-lane.

Hours of attendance during Term, and sittings after Term, will in future be from eleven to five.

**REMANET PAPER—ENLARGED RULES.**  
To First Day—*Re Charles Stuart*, gent. one, &c.

**NEW TRIALS.**

*Michell v. Term*, 1842.  
*Surrey*—Hamilton v. Cochrane. To stand over: parties in course of arranging

*Hilary Term*, 1851.

*London*—Southall v. Rigg.

**OUR ADV. VULT.**

The Electric Telegraph Company v. Brett and Another.

**DEMURRER PAPER.**

*Friday, April 25.*  
Robinson and Uxor v. Marquis of Bristol and Others. *In quare impedit*

*Barley and Another v. Kent*

*Rooper v. Loftus*

*Tuesday, April 20; Friday, May 2; and Tuesday, May 6.*

### Court of Exchequer.

Sittings at Nisi Prius in Middlesex and London, before the Right Hon. Sir FREDERICK POLLOCK, in and after Easter Term, 1851.

**IN TERM.—MIDDLESEX.**

1st sitting, Wednesday, April 10, for undefended causes only, and for defended causes on Wednesday, April 23.

2nd sitting, Tuesday, April 29.

3rd sitting, Tuesday, May 6.

**AFTER TERM.**

Wednesday, May 14.

**IN TERM.—LONDON.**

1st sitting, Monday, April 28.

2nd sitting, Monday, May 5.

**AFTER TERM.**

Thursday, May 15, to adjourn only.

The Court will not sit at Nisi Prius from Thursday, 17th April, to Tuesday, 22nd April, both days inclusive. The Court will sit during and after Term at ten o'clock.

### SITTINGS PAPER.

	<i>Banc.</i>	<i>Nisi Prius.</i>
Tuesday April 15	Peremptory Paper after Motions	
Wednesday ... 16	Motions and Peremptory Paper	Midd. 1st sitting.
Thursday ... 17	Motions and New Trial Paper.	
Wednesday ... 23		
Thursday ... 24		
Friday ... 25	Special Cases and Demurrers.	
Saturday ... 26	Motions and New Trial Paper.	
Monday ... 28	Demurrers and Special Cases.	London 1st sitting
Tuesday ... 29	Errors, Motions and New Trial Paper.	Midd. 2nd sitting
Wednesday ... 30	Special Cases and Demurrers.	
Thursday May 1	Motions and New Trial Paper.	
Friday ... 2	Demurrers and Special Cases.	
Saturday ... 3	Crown Cases, Motions and N. Trial Paper.	
Monday ... 5	Special Cases and Demurrers.	London 2nd sitting
Tuesday ... 6	Motions and New Trial Paper.	Midd. 3rd sitting
Wednesday ... 7	Demurrers and Special Cases.	
Thursday ... 8	Motions and New Trial Paper.	
Friday ... 9		
Saturday ... 10		
Monday ... 12		
Tuesday ... 13		

### PEREMPTORY PAPER.

To be called on the 1st day of the Term after the motion, and to be proceeded with the next day, if necessary, before the motions:—

Jan. 17.—Jones and Others v. Harrison

24.—Blair v. Jones

29.—Cunningham v. Hudson, assignee, &c.

**SPECIAL CASES FOR ARGUMENT.**

Doe dem. Pottow and Another v. Tucker and Another.

Order of Alderson, B.

Doe dem. Patrick and Others v. Duke of Beaufort. Special verdict.

The Vauxhall Bridge Company v. Sawyer. Order of Alderson, B.

Simpeon v. Earl of Carlisle. Order of Nisi Prius.

Montoyd and Others v. The London Assurance

Order of Chief Baron.

**NEW CASES ENTERED FOR EASTER TERM.**

Michell v. Winter. Order of Alderson, B.

Mahew v. Bone. Order of Nisi Prius.

Clay and Others v. Rufford and Others. Order of V. C.

Wigram.

Cannan and Others, assignees, v. The South Eastern Railway Company. Order of Wightman, J.

The Great Northern Railway Company v. The Manchester, Sheffield, and Lincolnshire Railway Company. Order of V. C. Knight Bruce.

Dickinson and Another v. The Grand Junction Canal Company. Order of the Master of the Rolls.

**DEMURRER FOR ARGUMENT.**

Fairless and Others v. The York, Newcastle, and Berwick Railway Company

Key v. Thimbley

Bank of Australasia v. Fraser

Jolly v. Cook

Stocks and Others v. Mayor, Aldermen, and Burgesses of the borough of Halifax

Woodham v. Earl of Liverpool

Kirk v. Unwin and Another

Deveroux, exor. &c. v. Emery

Blind v. Cowley and Another

Lancaster v. Eastern Union Railway Company

**NEW TRIAL PAPER.**

Lafond and Another v. Ellis, 2nd May, 1850

North Western Railway Company v. M'Michael, 10th and 11th February, 1851

Embrey and Another v. Owen, 11th February, 1851

**SPECIAL CASES.**

O'Brien v. Lord Kenyon and Others, 13th Nov. 1850

Ralli v. Dennistown and Others, 17th Jan. 1851

**DEMURRERS.**

Allhusen v. Priest and Others (sued with another), 20th Nov. 1850

Ellen v. Topp, 26th April, 1850, and 20th Jan. 1851

**NEW TRIAL PAPER.**

For argument, moved Michaelmas Term, 1850.

Middlesex—Lord Chief Baron. Hart v. Baxendale.

Chambers

Lord Chief Baron.—Bressard v. Brotherton

and Others. Leah

London—Lord Chief Baron. Wood v. Rowcliffe. Humfrey

Lord Chief Baron. Baker v. Boddington. Malah

Middlesex—Mr. Baron Platt. Beldon, jun. v. Campbell. Crowder

Mr. Baron Platt. Wilks and Another v. Wyatt. Burnie

Mr. Baron Martin. Longmeid and Wife v. Holliday. Watson

Moved Hilary Term, 1851.

Lord Chief Baron. Billen, Administratrix, &c. v. Biggerstaff and Another. Sir F. Theisger

Lord Chief Baron. Leneghan v. Capone. Crowder

Lord Chief Baron. Laidlaw v. Leach. Knowles

Lord Chief Baron. Spradberg v. Gillain. Leah

London—Lord Chief Baron. Great Western Railway Company v. Budd and Others. Sir F. Theisger

Lord Chief Baron. Grapes v. Bunney. Sir F. Theisger

Lord Chief Baron. Grapes v. Bunney. Keating

Lord Chief Baron. Graham and Others, Assignees, &c. v. Isomonger. Crowder

Lord Chief Baron. Wear and Another v. Barnett. Knowles

Lord Chief Baron. Morgan v. Whitmore and Others. Watson

Mr. Baron Platt. Burmeister, P.O. &c. v. Norris, official manager. Crowder

Mr. Baron Platt. Graham and Others, assignees, &c. v. Mason. Peacock

Moved after the Fourth Day of Hilary Term, 1851.

Middlesex—Mr. Baron Martin. Smith v. Stevens and Another. E. James

Mr. Baron Martin. Smith v. Howell. Bramwell

Mr. Baron Martin. Jeakes and Another, executors, v. White. Bovill

Mr. Baron Martin. Read v. Legard. H. Hill.

London—Mr. Baron Platt. White and Another, assignees, &c. v. Mullett. Serjt. Miller

### NECROLOGY

OF LEGISLATORS, MAGISTRATES, AND LAWYERS.

#### MR. RUSHTON.

It is with feelings of the profoundest regret that we announce the death of Mr. Edward Rushton, the stipendiary magistrate for this borough. This melancholy event, the result of a short but severe illness, took place at his residence, Parkside-house, this morning, at half-past seven o'clock. The death of this gentleman, who was so well known and so highly respected by all persons in the town, must be looked upon as a loss to the whole community. Amid the extended circle of his more intimate and private friends the sad event is one which will excite feelings of the deepest emotion and sorrow. The name of Rushton is historic in the town of Liverpool, and has ever been associated with all that is elevating in its tendencies, noble in its aims, and liberal in its action. The deceased was in the 57th year of his age. He was appointed stipendiary magistrate of Liverpool on the 16th of May, 1839. He discharged his onerous, delicate, and difficult duties with such firmness and impartiality as to secure the approbation and confidence of his brother justices and the general body of the people, as well as to call forth the unqualified commendation of the judges of the land. On Monday week Mr. Rushton had a slight attack of gout in the left foot, but he

continued to attend the police-court daily up to Friday last, when he had a long sitting. The same night he was seized with gout in the stomach. After active treatment, the alarming symptoms were subdued, and he went on favourably till Tuesday morning, when a slight blush of erysipelas was observed on the side of his nose. He continued in that state up to Wednesday afternoon, about three o'clock, when the disease began to spread more formidably, and he sank rapidly under this very painful malady. The flag at the Town-hall is now flying half-mast high, as a token of respect for the deceased.—*Liverpool Mercury*.

### BIRTHS, MARRIAGES, AND DEATHS.

#### BIRTHS.

BAYLIS.—On the 5th inst. at Springfield, Reigate, the wife of Thomas Henry Baylis, esq. of the Inner Temple, of a son.

BRISTOWE.—On the 7th inst. at No. 3, Ecclestone-square, the wife of Henry Fox Bristowe, esq. barrister-at-law, of a son.

DABBS.—On the 6th inst. the wife of John Dabbs, esq. solicitor, Stamford, of a daughter.

HARRISON.—On the 30th ult. at Sutherland-place, Bayswater, the lady of Edward M. Harrison, esq. barrister-at-law, of a son.

SLOPER.—On the 9th inst. at 7, Southwick-place, Hyde-park, Mrs. Lindsay Sloper, of a son.

#### MARRIAGE.

MOORE, Thomas, esq. assistant-surgeon 5th regt. of infantry, Scindia's Contingent, to Louisa Cort, youngest daughter of the late Coningsby Cort, esq. solicitor, London, on 3rd Feb. at Lullupore.

#### DEATHS.

ADAMS, Mary, third surviving daughter of the late John Adams, esq. formerly of Peterwall, Cardiganshire, and many years M.P. for Carmarthen, on the 4th inst. at Frant, near Tunbridge Wells.

EDWARDS, Jane, relict of the late Rev. Vincent Edwards, vicar of Broomfield, Essex, and eldest surviving sister of the late Lord Chief Justice Tindal, on the 1st inst. at Chelmsford.

LANSDOWNE, Marchioness of, on the 3rd inst. at Bowood.

LIDDELL, George, esq. banker, on the 3rd inst. at Sutton, near Hull, aged 79.

LINCOLN, Robert, esq. on the 4th inst. at Upper Tulse-hill, aged 85.

### JOURNAL OF PROPERTY.

#### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	..	..	211½	211½	211½	211½
3½ Cent. Reduced Annuities ..	96½	96½	96½	96½	96½	96½
3½ Cent. Consols Annuities ..	96½	96½	96½	96½	96½	96½
Consols for Account .....	96½	96½	96½	96½	96½	96½
New 3½ Cent. Annuities ..	97½	97½	97½	97½	97½	97½
Long Annu. (exp. Jan. 5, 1860) ..	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1859) ..	..	..	..	..	..	..
Do. 30 yrs. (exp. Jan. 5, 1860) ..	7½	7½	7½	7½	7½	7½
India Stock .....	..	..	262½	264½	262½	262½
India Bonds (1,000l.) .....	64	..	64	64	..	..
Do. do. (under 1,000l.) .....	65	..	62	62	..	65*
South Sea Stock .....	..	..	..	..	107½	..
Do. do. New Annuities ..	..	..	..	..	..	..
Exchequer Bills, 1,000l. ....	57*	58*	58*	54*	57*	54*
Do. do. 500l. ....	55*	55*	55*	54*	..	..
Do. do. Small .....	57*	58*	58*	54*	..	..
Do. do. Advertised ..	..	..	..	..	..	..

\* Premium.

† Ex. div.

### THE GAZETTES.

#### Bankrupts.

*Gazette, April 8.*

COX, WILLIAM, stock and share broker, Blomfield-terrace, Harrow-road, April 18, at eleven, May 20, at twelve, Basinghall-st. Off. as Graham. Sol. Rye, Golden-square. Petition, April 4.

HILL, JAMES, hennedraiser, Holcombe Rogus, Devonshire, April 16 and May 13, at one, Exeter. Off. as Herniman. Sol. Force, Exeter. Petition, April 4.

HOBSON, JAMES THOMAS, corn merchant, Wellington, Northamptonshire, April 19, at eleven, May 20, at twelve, Basinghall-st. Off. as Nicholson. Sols. Lawrence and Co. Old Jewry-chambers. Petition, April 7.

JONES, GEORGE FREDERICK, surgeon, East Halsey, Berkshire, April 16, at eleven, May 20, at twelve, Basinghall-st. Off. as Groom. Sols. Baylis and Drewe, Redcross-st. Petition, March 29.

M'LEAN, JOHN, commission merchant, Liverpool, April 17 and May 23, at eleven, Liverpool. Off. as Bird. Sols. Littledale and Bardwell, Liverpool. Petition, April 3.

PRACH, ROBERT, butcher, Thorney, Cambridgeshire, April 17 and May 18, at one, Basinghall-st. Off. as Bell. Sol. Robinson, South-square, Gray's-inn. Petition, April 7.

ROBINSON, WILLIAM, corn factor, Ovington-square, Brompton, and Trinity-square, Tower-hill, City, April 19, at twelve, and May 20, at eleven, Basinghall-st. Off. as Pennell. Sol. Bennett, Furnival's-inn. Petition, April 2.

SMELLIE, GEORGE, silversmith, High-st. Shadwell, April 17 and May 15, at two, Basinghall-st. Off. as Bell. Sols. Taylor and Collinson, Great James-st. Bedford-row. Petition, March 10.

STOCKBRIDGE, GEORGE, draper, Oxford-st. April 15, at two, May 20, at eleven, Basinghall-st. Off. as Edwards. Sol. Lawrence, Broad-st. Cheap-side. Petition, March 29.

*Gazette, April 11.*

ANDREWS, WILLIAM, commission merchant, Liverpool, April 14 and May 13, at eleven, Liverpool. Com. Perry. Off. as Morgan. Sols. Anderson and Collins (and not

**J. F. GREENHILL, Wholesale Stationer and Wax Merchant, 1, Philpot-lane, Fenchurch-street, London.**

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## To Readers and Correspondents.

"T. G. H."—The articles in question are not separately published. The author hopes to continue them; a series of unavoidable occupations has interrupted them.

"E. A. D."—All are impractical. Warren's perhaps is the best, but the recommendations there are impossible.

We have received so many letters on the subject of Registration of Deeds, that we cannot find room for a twentieth part of them. Those enclosed must, therefore, understand that they arrived after all the space we could allot to the subject was occupied.

"JYRREKA" is transferred to the County Courts Chronicle.

"E."—We think not.

"H. M. A."—The communication has been lost amid a multitude of papers.

"JYRREK AMKOR."—The language of the section is certainly equivocal, but we have no doubt that the construction put upon it would be that which our correspondent concludes, namely, that suing upon a judgment would be held not to be suing again for the debt on which the judgment was had; indeed, the judgment is usually for something more,—for the costs also.

## TO SUBSCRIBERS.

The Subscription to the current volume is due, and should be paid in the course of the ensuing week, in order to obtain the advantages of pre-payment.

## SCALE OF CHARGES FOR ADVERTISEMENTS.

Under Fifty Words..... 20 5 0  
For every additional Ten Words..... 0 0 6

Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.

Advertisements ordered for the first page are charged one-half more. If not so ordered, they will take the chance of position.

We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, APRIL 19, 1851.

## TO READERS.

NOTWITHSTANDING the full explanation given in the first number of this volume, it seems that many readers do not understand the alteration in the arrangement of the contents. It is therefore necessary to repeat that the reports are now separately paged, so that they may be arranged continuously in the bound volume, thus rendering them more convenient for reference and citation. Hence the double paging, which appears to occasion perplexity to some persons.

A portfolio constructed for keeping the divisions separate may be had at the office or through any bookseller.

## THE LORD CHANCELLOR.

AN address to Lord Chancellor TRURO from the Solicitors of the metropolis, and his Lordship's reply, will be found among the Legal Intelligence of the week.

The occasion is equally gratifying and creditable. Lord TRURO was for many years a practitioner.

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tising Solicitor in London, one of the very body which now congratulates him upon the attainment of the highest honours of the profession. His elevation is another proof, if any were wanting, that the separation of the functions of Advocate and Attorney, to break down which we have lately seen so many attempts, is not, as it has been falsely represented, a barrier set up by the jealousy of one branch of the profession for the purpose of unfairly excluding the other, but an arrangement designed with great wisdom, and sanctioned by the experience of all times and countries, for securing the most efficient administration of justice through two classes of functionaries, who are not rivals, as represented, but each necessary to the other, and both working together to their mutual benefit, as well as to the advantage of their common clients. It is by the general exaltation of the whole Profession, resulting from a division of functions, and the recognition of degrees, from the Silk Gownman to the Attorney's clerk, that such men as Lord TRURO or Sir E. SWENEN are enabled to rise from any one of these branches and attain the highest honours of the state. We trust that a system which works so well will not be lightly disturbed; and it is solely because we are profoundly convinced that the Profession of the Law in England is indebted to it for the loftier position which it holds here than in any other country in the world, that we have resisted, and shall continue steadily to resist, all propositions, whencesoever proceeding, for breaking down the barriers that separate the functions of the different classes, whether it be, as in the County Courts Bill was proposed, to permit barristers to act without the attorney, or the attorney to trespass on the province of the barrister, or the clerk to invade the functions of both; and we are assured, that by so doing we shall best consult the true interests of our readers, by most effectually preserving the status of the whole profession. That in this we are not actuated by any class feeling, we trust we have afforded the best proof, in the success that has attended very recent endeavours materially to advance the welfare of our professional brethren in both branches.

Lord TRURO's address indicates that the same spirit actuates him also, and that we may count upon his assistance in any reasonable endeavour to promote an advantage or to repel an invasion. To his lordship are the lawyers indebted for the rejection of the clause which was to put them and their clerks upon the same level, and of that which sought to compensate the Bar for the admission of attorneys as advocates by permitting barristers to act as attorneys. And no less are we indebted to his ready recognition of the claims which we preferred for a better remuneration of the profession in the County Courts.

It is also greatly to the credit of Lord TRURO that he never forgets the fact of his rise from a humbler sphere. In a speech in the House of Lords, a few days since, he openly spoke of the time when "I practised as a solicitor," and brought his experience in that capacity to bear upon the question under discussion. In the like tone he answered the solicitors who presented the address. This is true greatness.

## REGISTRATION OF DEEDS.

WE are flooded with letters on this subject; a whole number would not suffice to contain them. Place is given to two or three of the earliest that came to hand, but all the later arrivals are necessarily omitted.

But although we are unable to print, we have read them, and, we hope, profited by them; and the substance of their arguments will be presented in a more condensed shape.

They consist of two classes of objectors: the first, a small minority, object to any registra-

tion; the others approve a registry, but object to Lord CAMPBELL's scheme for a general registry, and insist upon the greater advantages of a local registry.

These latter, for the most part, approve our proposition for making the office of the registrar of births the registry of deeds; and the more this plan is considered, the more practicable will it appear. It combines the advantages of economy and of accessibility. The objection usually preferred against local registries, the cost of so many offices and officers, is completely avoided by the employment of an establishment already existing in every part of the country purposely divided into districts of convenient size for access by all the inhabitants. In most cases, we believe, there is a registrar's office which could serve the purpose of a registry of deeds for many years to come. Where there is not such a building, it may be erected at a small cost. Search would be made with facility by the solicitor concerned in the conveyance, and to whom alone could that most important duty be safely intrusted. Such a registry would impose no additional cost upon clients, because the charge for searching the register would not be greater than that for comparing the abstract with the deeds.

Plausible as the plan of a general registry may appear at the first view, it will not bear a moment's examination by a practical man who knows what are the requirements of an investigation of title. It would not be safe to employ an agent unacquainted with the property; and what would be the cost of journeys to London! The proposition is another instance of a phenomenon which we have had such frequent occasion to observe,—the extraordinary ignorance which prevails among the inhabitants of London, of the wants, opinions, feelings, and circumstances of the inhabitants of the provinces. Nowhere is this more remarkable than in our Profession; and projects for laws being usually framed by London lawyers, and London interests alone watching their progress, and moulding them to their own wishes, are the true causes of the impracticable character of so many law reforms. If, instead of consulting only the Law Institution, which represents only the interests and views of London, Government and legislators would invite the aid of half a dozen experienced country solicitors, their measures would be vastly more practical. Our readers in the country would be indeed astonished could they peep behind the scenes and behold the influences that are brought to bear against any law reform of a diffusive character, and in which the provincial welfare is preferred to Town interests. Many a speech in the House of Lords is spoken from a brief prepared in Chancery-lane, nor need we go very far back to find a singular instance of it. The debate on the County Courts Extension Bill probably surprised our readers as much as it did the House of Lords; but the explanation is not difficult.

And so it will be with the Registration Bill, unless the country solicitors bestir themselves. A general registry is so manifestly to the interest of the Profession in London, that a strenuous resistance cannot be expected from that quarter. There may be a show of opposition, but it will neither be sincere nor vigorous,—enough to keep up appearances, but helping rather than endangering the scheme. The same influences that got up the opposition to the extension of an equity jurisdiction to the County Courts, and to the giving of the appeals therefrom to the judges of assize, instead of the judges in banco, because thereby a great deal of the work would be done in the country without the necessity for sending it to London, will doubtless be openly arrayed against a local registry of deeds, and secretly enlisted in favour of a general registry. We tell the country solicitors, that in this matter they must rely upon themselves alone. We have been

reproached often for asserting that the interests of town and country are not the same; but our assertion of it cannot alter the fact. Here is an instance. The interests of town are with a general registry, and of the provinces with local registries. On a question of so much moment, it is impossible that interest should not influence both opinion and action. Let, therefore, the solicitors in the country fight their own battle, under leaders of their own choosing, and trust their cause to none whose interests are palpably adverse to theirs. And, as the first step, let them petition both Houses of Parliament *against a general, and in favour of a local, registry*; and they could not employ a better form than that used by the Somerset Attorneys' Club, which they will find in a communication on this subject in another column.

Our readers may rely upon whatever assistance we can render them in watching the progress, promoting the improvement, and apprising them of the duties to be performed by them in relation to, the measure now before the House of Lords for the registration of assurances.

**COUNTY COURTS EXTENSION BILL.**  
THIS Bill has passed the House of Lords with the provisions for securing better professional remuneration intact. A sketch of the Bill as it is will be found in this week's summary, under the department devoted to the County Courts.

Lord BROUGHAM has introduced a distinct Bill, giving to the County Courts a jurisdiction in Equity. It is opposed by the Lord Chancellor, but supported by Lord CRANWORTH, and, we trust, by a majority of the House of Lords. There is no improvement in the law so required as this, for at present there is practically no remedy in Equity when the subject-matter is worth less than 200*l.* Such a jurisdiction will not be a transfer of business, but the creation of a new class of business, which does not now exist. Nevertheless, it will be actively opposed by the interests in London, and will demand the active support of the provinces to secure its success.

#### LAW OF EVIDENCE.

THE immediate urgency and importance of the question as to *Registration of Assurances* has prevented commentary this week upon another measure, only second to that in interest, *The Law of Evidence Bill*, now before the House of Lords, but which we hope to consider fully in our next.

#### SHAM LAWYERS.

HERE are two further specimens, *verbatim et literatim* :—

Blackburn 1st April 1851

Becka Smith Dr  
To Thos Houlden  
To goods as per Bill Delivered..... £0 10 11  
Madam

I beg to inform you that the above sum owing by you must be immediately to me at my Office 13 Clayton Street Blackburn or an Action will be brought against you without any further notice

Madam Yours Respectfully  
Edward Salisbury  
Auctioneer &c

#### NOTICE BEFORE PROCEEDING IN THE NEW COUNTY [Queen's Arms] COURTS

For the more easy Recovery of Small Debts and Demands, as per 13th & 14th Victoria, cap. 61.

I hereby give you notice, that unless the sum of eight pounds eleven shillings and nine pence, due from you to Mr. Webb, be paid on or before Thursday, the 17th day of April, 1851, I shall proceed against you under the above Act. Trusting you will deem it prudent to pay the amount, and thereby avoid the expenses, to which you will otherwise be liable.

I am, yours, &c.

"J. N. Sayers,"

Agent to Mr. Webb,

67, East-street, Manchester-square.

To Capt. Jas. Townsend.

Dated this 10th day of April, 1851.

### THE LEGISLATOR.

#### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILL READ A FIRST TIME.

Tuesday, April 15.

Coroners' Bill.

##### BILLS READ A SECOND TIME.

Friday, April 11.

Exchequer Bills (17,766,000*l.*)  
Indemnity.

Monday, April 14.

Sale of Arsenic Regulation.

##### BILLS READ A THIRD TIME AND PASSED.

Monday, April 14.

Expenses of Prosecutions.

#### PRIVATE BUSINESS TRANSACTED.

##### BILL READ A THIRD TIME AND PASSED.

Friday, April 11.

Angerstein's Branch Railway  
Bristol and Exeter Railway  
Wivelscombe Turnpike Road.

Monday, April 14.

Commercial Docks Improvement  
Great Western Railway (Purchase of Wilts and Somerset)  
Saint Patrick's Cathedral, Dublin  
Sheffield, Rotherham, &c. Railway  
Stockton and Darlington, &c. Railway.

Tuesday, April 15.

Sheffield, Rotherham, &c. Railway  
Malton and Driffield Junction Railway.

#### SESSIONAL PRINTED PAPERS.

Par. Num.

- 103. Education—Return
- 164. Metropolitan Commission of Sewers—Account
- 186. National Debt—Account
- 202. St. Alban's Election Petition—Minutes of the Proceedings of the Select Committee
- 190. Bills—Lodging Houses
- 200. — Expenses of Prosecutions, as amended in Committee, on Re-commitment, and on Consideration of Amendments
- 201. — Compound Householders, amended
- 206. — Coalwhippers, Port of London
- 172. Ejectment, Ireland—Abstract of Return
- 184. Arterial Drainage, &c. Ireland—Return
- 187. Railways—Return
- 195. Poor Rates—Return
- 197. Newspapers—Return
- 199. Lighthouse, Guernsey—Correspondence
- 146. Coroners' Inquests—Abstract of Returns
- 204. Guano—Account
- 202. St. Alban's Election Petition—Minutes of the Proceedings of the Committee, a corrected Copy
- 196. Steam Vessels—Return
- 203. Easistymon Union—Correspondence
- 205. Church of England—Copy of Sir George Grey's Letter to the Archbishop of Canterbury, &c.
- Coals, Steam Navy—Third Report by Sir Henry De La Beche, and Dr. Lyon Playfair.

#### HOUSE OF LORDS.

##### COUNTY COURTS.

FRIDAY, April 11.—The County Courts further Extension Bill was read a third time.

##### LAW OF EVIDENCE.

Lord BROUGHAM then moved the second reading of the Law of Evidence Amendment Bill, and urged its adoption in a speech of some length.—The Lord Chancellor thought the Bill ought to be read a second time, though some parts of it would be improved by alteration.—After some further discussion in which Lords CAMPBELL and CRANWORTH took part, the Bill was read a second time and ordered to be committed.

##### THE COUNTY COURTS.

MONDAY, April 14.—Lord BROUGHAM was then understood to move for a return connected with the County Courts, but the particular object of it was not heard in the gallery. The noble lord remonstrated against the complaints that had been made with respect to any increase of the salaries of the County Court Judges, and said that the working of those Courts proved how highly beneficial they had been to the public. His noble and learned friend on the woolsack had said, that ninety-nine cases out of an hundred decided in those courts were for sums under 20*l.* He had looked at the returns, and he found that about one-third of the cases were for such sums, but it appeared also, that out of 150,000 disposed of by those Courts last year, no less than 32,000 were for sums above 10*l.* while he found that in the Courts of Queen's Bench and Common Pleas, in the year 1827 (we believe)—the last year for which there was any return—the number was only 31,600. There was another subject that appeared to him to require attention, and that was with respect to the state of the criminal law digest. Nine months since he had had a correspondence with his noble and learned friend on the woolsack, in which his noble and learned friend expressed himself fully sensible of the labours of the Criminal Law Commission, and he (Lord Brougham) was in hope that something would be done with respect to it; but the Government had allowed that commission to expire. Every one was aware that the labours of that commission had been very great, and, even

without its being renewed, he thought advantage might be taken of the admitted good the learned members of it had done.—The Lord Chancellor said his attention had not been called to the subject of his learned friend's last observations, but as to the renewal of the commission in question, the Government were of opinion that it was not required. With respect to the cases that had been disposed of in the County Courts, he had merely said that a large proportion of them were of the description he had referred to on a former occasion; and when his noble friend spoke of the increase of the salaries of the judges, he (the Lord Chancellor) had mentioned that a considerable number of the cases disposed of by them required no labour.—Lord BROUGHAM said, that one reason why those cases were disposed of with so little labour was, that the judges had the means of examining the parties themselves.

#### HOUSE OF COMMONS.

##### EXPENSE OF PROSECUTIONS.

TUESDAY, April 15.—Mr. AARLOWST, advertising to a notice he gave in the last session, with a view to lessening the cost of prosecutions, inquired whether the Government would bring in a Bill upon the subject?—Sir G. GREY answered that it was not the intention of the Government to introduce such a Bill as the hon. gentleman contemplated. The subject might be brought under the consideration of the Lords' committee to whom Lord Campbell's Bill had been referred.

##### ORDER OF PUBLIC BUSINESS AFTER EASTER.

Lord J. RUSSELL wished to inform the House that he proposed to take the second reading of the Income-tax Bill the first thing on Monday, the 22nd of April. He intended to give notice that he should take the second reading of the Oaths (Jews') Bill before any other business on the following Thursday. He wished to give notice that the Navy Estimates would be brought on on the same day, after the Oaths (Jews') Bill had been disposed of. On the next day (Friday) he proposed to go into committee on the Income-tax Bill; and he would take the committee on the Ecclesiastical Titles Bill on the following Monday.

##### MORTMAIN LAW.

Mr. HEADLAM rose to move for the appointment of a select committee to consider the policy of extending the law of mortmain, so as to include personal estate, and generally to consider whether any alteration should be made in the law as it affects testamentary or other dispositions in favour of religious, charitable, or permanent objects. The hon. and learned gentleman said, at that late hour he should not address any lengthened observations to the House on the subject of his motion. He wished merely to state that his object was not confined to any particular portion of the community, but would equally extend to all religious bodies without distinction. He considered that there were defects in the existing law, and if he obtained the committee for which he now asked, he believed he would be able to bring forward practical improvements.—Mr. J. O'CONNELL was glad the proposed legislation of the honourable gentleman would not be directed against the Roman Catholics as distinguished from all other bodies.—The motion was then agreed to without further discussion.

##### SALARIES FOR CORONERS.

Lord H. VANE obtained leave to bring in a Bill to abolish fees paid to county and other coroners, and for providing for the payment of such coroners by salaries.

##### SMALL TENEMENT RATING ACT AMENDMENT BILL.

This Bill went through committee, and several clauses were added to the measure.

**STAMP DUTIES ASSIMILATION.**—A Bill now in the House of Commons was on Thursday issued to continue the stamp duties for three years, and to make regulations for collecting and managing the same.

**PUBLIC SALARIES.**—During the year 1850 there has been an increase in the salaries of public offices of 17,124*l.* 8*s.* 7*d.*; in emoluments of 4777*l.* 14*s.* 4*d.*; in retired allowances of 18,048*l.* 6*s.* 4*d.*; and in expenses of 12,881*l.*; making a total of 48,531*l.* 9*s.* 3*d.* At the same time diminutions to the following amounts have been effected:—salaries, 51,097*l.*; emoluments, 16,285*l.* 13*s.*; retired allowances, 13,037*l.* 3*s.* 3*d.*; expenses, 25,368*l.* 7*s.* 6*d.*; total, 105,786*l.* 4*s.* 5*d.* The number of persons added to public establishments was 499; and of those removed, 361.

#### THE MAGISTRATE,

AND PAROCHIAL AND MUNICIPAL LAWYER.

##### SUMMARY.

Mr. WORTLEY, the Recorder of the city of London, has set an example to all criminal



courts, whether at the Assizes or at the Quarter Sessions, by a resolve, so far as he can do so by exposure and punishment, to put down the various agents and porters who frequent those Courts, and extort money from the ignorant friends of prisoners under pretence of professional assistance.

But of this we are assured, that nothing less will suffice for the security of prisoners, who ought to be protected because they cannot protect themselves, than a provision, which should have been introduced into Sir GEORGE GRAY'S Prosecutions Bill, that the costs of prisoners' defences should be taxed by the Court. This would effect a double purpose. It would prevent sham lawyers from imposing upon them; it would prevent briefs being taken from sham lawyers; it would secure prisoners and their friends against the enormous charges to which they are sometimes subjected by persons who do not scruple to tell them that the chance of escape depends on the amount of fee. If Mr. WORTLEY would complete the work he has so well begun, and purify all the courts in the country, as he desires to purify the Old Bailey, he should prevail on Sir GEORGE GRAY to insert provisions to the effect above suggested.

The Prosecutions Bill, as amended by committee, is now before us.

Clause 1 repeals the 23rd section of 7 Geo. 4, c. 64, which provides that in cases of misdemeanour the expenses of attendance before the examining magistrate shall not be allowed. Sec. 2 extends the power of the Court to allow expenses of prosecution to divers other misdemeanours. Sec. 3 empowers the Court to allow expenses to persons bound over to prosecute for a common assault, upon certificate of justices. Sec. 4 repeals 7 Geo. 4, c. 64, s. 26, empowering Quarter Sessions to make regulations as to costs and expenses, and secs. 5 and 6 empower Secretary of State to make regulations, according to which costs of prosecutions are to be allowed on certificate of committing magistrates. By sec. 7 it is provided that the Act shall not interfere with payments in respect of extraordinary courage, diligence, &c. Sec. 8 extends to Quarter Sessions the power already vested in judges of assize to order payments in respect of apprehension of offenders, &c.

By sec. 9 clerks of the peace and clerks to justices may be paid by salary instead of by fees; but by sec. 10, in fixing such salaries certain business may be excepted. Sec. 11 provides that clerks paid by salaries shall account for fees. Sec. 12 empowers justices in such case to remit fees at their discretion. Sec. 13 and 14 relate to Middlesex only; and secs. 15 and 16 to warrants in the Channel Islands.

Sec. 16 permits prisoners in cities and boroughs to be committed for trial at the Assizes in an adjoining county. Sec. 15 empowers justices to declare when gaols or houses of correction are fit prisons for persons committed for trial; and by sec. 14 prisoners so committed may be removed to the county gaol previous to trial, and while under removal are to be deemed to be in proper legal custody.

Sec. 20 extends to this Act the provisions of 38 Geo. 3, c. 52, and 51 Geo. 3, c. 100, as to the execution of sentences and as to costs; and sec. 21 defines what is to be deemed the next adjoining county.

E. W. C.

**SAVINGS BANKS AND FRIENDLY SOCIETIES.**—A parliamentary paper is printed, shewing that from the 6th August, 1817, when they commenced, to the 20th November last, the gross amount of all sums received and credited by the Commissioners for the Reduction of the National Debt, on account of savings banks and friendly societies, including interest, was 61,832,258*l.* 6*s.* 8*d.* of which 58,114,158*l.* 9*s.* 2*d.* belonged to savings banks, and 3,718,099*l.* 17*s.* 6*d.* to friendly societies.

**POOR-RATE RETURNS FOR LAST YEAR.**—The annual return of the Poor-law Commissioners as to the state of pauperism for the year 1850 has just been published. The results are most gratifying. It appears that, comparing the year ending on Lady-day, 1850, with the year ending on Lady-day, 1849—the former date being the latest period to which this particular return has yet been obtained—the entire expenditure for all purposes connected with the relief of the poor in England and Wales has fallen from 5,792,000*l.* to 5,395,000*l.*, being a decrease (after allowing for the growth of population) of 6·9

per cent. It must be remembered, in order to the due appreciation of this result, that the above sums "include all charges incident to the relief of the poor, to which the poor-rate is subject, as well as the cost of relief itself," and that several of the items "are of such a nature as not to be materially affected by the increase or decrease of pauperism in any particular year." In the next table given in the report, these permanent elements of Poor-law expenditure are eliminated, and we have a clear comparison of the costs of relief alone, during the two years to which it relates. The years taken are those respectively ending at Michaelmas, 1849, and Michaelmas, 1850; and it appears that the total expenditure for the in-maintenance and the out-door relief of the poor in the 606 unions from which the returns have been obtained, has diminished in the latter year to the extent of 405,000*l.* or 10·5 per cent. on the outlay of the previous twelve months. It should be stated that the aggregate population of these 606 unions is nearly nine-tenths of the whole population of England and Wales, and that we are consequently quite safe in regarding them as a fair specimen of the country at large. Again, taking the number of paupers of all classes who were in receipt of relief on the 1st day of January, 1849, and on the same day in 1850, and in 1851, we find that from 1849 to 1850 there was a reduction of 6·4 per cent.—and from 1850 to 1851, a further reduction of 7·4 per cent. If we take the case of adult able-bodied pauperism separately, the result is far more striking; the decrease being 15·4 per cent. from January 1849, to January 1850—and again 14·7 per cent. from January 1850, to January 1851. In other words, precisely 30 per cent. of the adult able-bodied pauperism of the country has been extinguished within a period of two years—and that without a murmur having been heard, in any quarter of undue harshness and stringency in the administration of relief.

**COUNTRY OFFICIALS.**—At the Taunton Assizes, which opened on Tuesday last, the Lord Chief Baron, in summing up one of the cases, observed, that, with regard to the concealment of birth, there appeared to be a sad misunderstanding of the law on the part of those who committed persons for trial, and in the case of a girl of the name of Ruxiter, there had been a mistake which he must call a grievous mistake. She had been upwards of six months in prison upon a charge which was incapable of being supported in any way whatever. The girl's story was, that she was not aware that she was so far advanced in pregnancy, and that her delivery was perfectly unexpected; and he did not see any evidence which contradicted this statement. It seemed that she went to bed at night, and that a delivery took place, but she had nothing whatever to do with the disposition of that of which she had been delivered, but those who were about her had thought it right to dispose of that which seemed to have been a premature birth, and to which the girl had been no party. She had in no respect any share or concern in that disposition, and she was in no respect chargeable with any offence under the statute, and he much regretted to find she had been in prison for six months upon a charge which was utterly destitute of any foundation. He was called upon also to state that many of the depositions were so badly written as to be scarcely legible, and did not reflect the highest honour on the state of education of the magistrates' clerks. In the most serious case in the calendar, the depositions were written so badly that, in order to make himself master of the case, he had been compelled to send the depositions to the clerk of the assize to have them copied, that he might read them.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

**In Hare v. The Cork and Bandon Railway Company,** 17 Law T. 21, it appeared that the company had taken possession of land without the formalities prescribed by the Lands Clauses Consolidation Act, alleging the consent of the owner's solicitor. But the Court refused an injunction, on account of the great public injury that would accrue, but required the company at once to obtain the finding of a jury as to the compensation to be paid, and to pay all the costs fairly incurred. In the case of *The Attorney-General v. The Great Northern Railway Company*, 17 Law T. 23, an injunction had been obtained to restrain the company from interfering with a certain road and obstructing the way there. The company afterwards laid their permanent rails over the road on a level, and erected gates for security. This was held to be a breach of the injunction, and a sequestration was ordered, which the Court

would not even suspend until an appeal against it could be heard.

What is a sufficient acceptance of a bill by a joint-stock company was decided in *Halford v. Cameron's &c. Railway Company*, 17 Law T. 25. The bill was drawn upon the company by its corporate name, and accepted by two directors, describing themselves as "directors of the company appointed to accept this bill," and it bore the corporate seal, and was countersigned by the secretary. This was held to be a sufficient acceptance, under sec. 45 of 7 & 8 Vict. c. 110, to bind the company.

It was intimated, although not expressly decided, in *The West London Railway Company v. The London and North-Western Railway Company*, 17 Law T. 31, that a covenant in the lease of a railway, that lessees would "at their own expense, during the continuance of the lease, efficiently work" the railway, and account to the lessors for one-fourth of the gross receipts in respect of "passengers, goods, &c." is a covenant to work the line for passengers as well as goods. E. W. C.

## THE LAW OF CALLS.(a)

We have now, under the third division of this subject, to consider the legal remedies given to companies for the recovery of the calls made by them on their shareholders. These remedies are of two kinds: 1. By forfeiture and sale of shares. 2. By action at law.

1. The before-mentioned statute of 8 Vict. c. 16, enacts, by sec. 29, that "if any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued thereon, the directors at any time after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was made forfeited, and that, whether the company have sued for the amount of call or not." Sec. 30 provides that, "before declaring any share forfeited, the directors shall cause notice of such intention to be left at, or transmitted by the post to, the usual or last place of abode of the person appearing by the registry of shareholders to be the proprietor of such share," and if the holder of any such share be abroad, or his address be unknown to the directors, notice shall be given in the *London or Dublin Gazette*, and in some other newspaper, twenty-one days before such declaration of forfeiture. Sec. 31 provides that the forfeiture must be confirmed by a general meeting two months after the notice has been given. Sec. 32 empowers the sale of the forfeited shares; and sec. 34 provides that no more shares shall be sold than will be sufficient for the payment of the calls, the interest (to which on the amount of the call, the defaulter is rendered liable by the Act), and the expenses incurred. By sec. 35, it is provided, that on payment of the calls before sale, the forfeited shares shall revert to the holder of them.

The explicit manner in which the Act in question points out the course to be pursued in obtaining the remedy by forfeiture, precludes the necessity for dwelling at length on this part of our subject. The evidence required as to the forfeiture of shares is declared by sec. 33, which enacts that a declaration in writing by a disinterested party before a justice of the peace, or Master extraordinary in Chancery, that the call was made, notice thereof given, default in payment committed, and the forfeiture declared and confirmed, shall be sufficient evidence of such facts. The above declaration, and the receipt of the company for the price of such share constitute a good title to it, and a certificate of proprietorship is to be delivered to such purchaser, who thereupon shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and whose title is not to be affected by any irregularity in the proceedings in reference to such sale. No provision is made for the execution by the new shareholder, of the deed of settlement, or for his registration among the list of shareholders, and until these acts are performed, it may be presumed that he stands on the same footing with an original purchaser of shares, already referred to, who is in this position.

2. The remedy given by action at law in the event of non-payment of calls, is provided by ss. 25, 26, 27, and 28 of 8 Vict. c. 16, already referred to. What is here required to enable a company to

(a) By GEORGE HARRIS, Esq. Barrister-at-Law.

recover the money due from a shareholder is the prescribed proof of his being a proprietor of shares, of the call having been made, and due notice of it given, and of his having failed to make the required payment.

In an action for calls upon certain shares in a railway company, under the stat. 8 & 9 Vict. c. 16, s. 26, it appeared that the defendant was not an original subscriber, but had purchased scrip certificates of the shares in question, and, before the call was made, sent them in to the company, with a claim to be entered in their books as the holder thereof. His name was entered in a draft register of shares, and a receipt for the scrip sent to him; but his name was not entered in the sealed register until after the call was made: held, that the plaintiff was not entitled to recover, and, *semble*, that in this respect there is no difference between the case of an original subscriber and that of a transferee. (*The Newry and Enniskillen Railway Company v. Edmunds*, 17 L.J. Ex. 102.)

In the case of the *Derbyshire Railway Company v. Tomlinson*, Joint Stock Companies, L.J. 126, it was held, that in an action by a railway company for calls, the register of shareholders produced by an officer of the company, purporting to bear the seal of the company, is admissible in evidence under 8 & 9 Vict. c. 16, s. 28, without proof that the seal was affixed at an ordinary meeting of the shareholders, as directed in sec. 9. See also in the subject of actions for calls, *The Belfast and County Down Railway Company v. Strange*, 12 Jur. 19, Ex.; 10 Law T. 307.

In an action for calls by a railway company, the declaration alleged that the defendants were and still are holders of certain shares, and, being such holders, were indebted to the company in the amount of calls upon them: held, that the plea of "never indebted" was not an admission that the defendants were shareholders in the company. The only register of shareholders which, by 8 & 9 Vict. c. 16, s. 28, is made *prima facie* evidence of a party being a shareholder in the company, is the register duly prepared and sealed under the provisions of sec. 9. (*Birkenhead Railway Company v. Brownrigg*, 19 L.J. 27, Ex.)

The certificate of the Registrar of Joint Stock Companies incorporates a company, under 7 & 8 Vict. c. 110, s. 25, although the deed registered be a defective deed. A shareholder who has signed the deed which is registered cannot avail himself, as a defence to an action for calls, of any omission from the deed of certain provisions required by the statute 7 & 8 Vict. c. 110, to be inserted therein. (*Banwen Iron Company v. Barnett*, 19 L.J. 17, C.P.)

It has also been lately held that a plea of set-off, in respect of calls on shares in a joint-stock company, must either state the facts specially, or strictly pursue the form given by the 8 Vict. c. 16, s. 26; therefore a plea founded on that statute, but omitting the words "whereby an action hath accrued," &c. is bad on special demurrer. (*Moore v. Metropolitan Sewage Manure Company*, 3 Ex. 333; 6 D. & L. 496; 18 L.J. 164.)

The most important question, however, which can arise under the above Act is whether it is intended that both these remedies by forfeiture and action shall be given to companies, and shall be available in each case; or whether it is meant that only one of them shall be pursued for one particular default. It is laid down by Mr. Wordsworth, in his *Law of Railways*, &c. p. 178, that "whether calls be sued for or not, the shares may be declared forfeited after six months from the day appointed for payment. But the forfeiture does not relieve the shareholder from liability to pay calls made before the forfeiture." The 8 & 9 Vict. c. 16, does indeed enact by s. 29, that in case of default of payment of a call, a forfeiture of a share may be declared, "and that whether the company have sued for the amount of such call or not;" but nothing is here expressed which enables a company to enforce a forfeiture of shares after a judgment has been obtained for the amount of the call against the defaulting proprietor, though a forfeiture would not be prevented in consequence of an action for the same call having been commenced. The law on this point is, therefore, left as it was before. The precise terms of the deed or Act of Parliament by which the affairs of each particular company are regulated will, indeed, generally serve to determine this point. By the *Edinburgh and Leith Railway Act*, 6 & 7 Wm. 4, c. 121, s. 49, the directors were empowered to make calls in manner therein mentioned, and to sue for them, in case of non-payment, by action of debt, or otherwise, in

their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the company; provided that no advantage should be taken of any such forfeiture until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the company within six months after such forfeiture should happen, which declaration should, *ipso jure*, be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded that by reason of having neglected to pay calls on his shares, they were, in pursuance of the Act, declared by the directors to be forfeited, and the defendant exercised and declared their option, according to the Act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture. It was held, on special demurrer, that the plea was bad, for not shewing that the shares were declared to be forfeited at a general or special meeting of the company, according to the provisions of the Act. Lord Abinger, C.B. in declaring his judgment, observed—"It is clear that the directors have no right both to declare the shares forfeited, and also to sue for the calls; the proviso in the 49th section only allows them an alternative. But the question is whether it is sufficiently alleged in the plea that the directors have exercised their option of declaring the shares forfeited." (*Edinburgh and Leith Railway Company v. Hebblewhite*, 6 M. & W. 717.) In *Giles v. Hutt*, 18 L.J. Ex. 53, by the provisions in the deed of a joint-stock company, power was given to the directors to bring actions to recover the amount of any call that might remain unpaid, or to declare the shares forfeited. The directors commenced an action and recovered judgments for the amount of two calls. The judgments were not satisfied, and the directors afterwards declared the shares forfeited. It was held that the directors could not both recover a judgment for the call, and also declare the shares forfeited; and that having recovered judgment, their subsequently declaring the shares forfeited was a nullity and inoperative.

The principle of forfeiture in our law is of two kinds, embracing two distinct objects in separate cases:—1. Where the forfeiture is intended to operate as a punishment on a person for some offence, as in the case of forfeiture under a penal statute, or by a felon of his goods and chattels. 2. Where the forfeiture is intended to operate merely as a remedy to restore to a suffering party that to which he is entitled, and which is, in fact, the most direct mode of effecting it. Forfeiture of the former kind is in no respect applicable to the case of a defaulting shareholder in a public company. Forfeiture of the latter kind is strictly so. The real principle, therefore, applicable to this case appears to us to be as follows:—

A forfeiture of shares, and a sale of them by the company, so as to liquidate the whole amount due from a shareholder for the amount of his call, and all interest and expenses on that account, will discharge the proprietor of the shares from all further liability in respect of that particular call. But where the forfeiture and sale of the shares has proved insufficient to meet this, or where only a judgment has been obtained against the defaulting proprietor, which remains unsatisfied, the other remedy against him may be resorted to, provided there is nothing in the Act of Parliament, or deed of settlement, regulating the affairs of that particular company, to prevent both these remedies being availed of for the recovery of the same call. The object aimed at by the 8 Vict. c. 16, is obviously this: to give a full remedy for the recovery of unpaid calls, and all interests and costs accruing thereon; but such remedy is not intended to extend beyond this, and until this end is effected, one or both these remedies may be resorted to. The Act, indeed, even directs that the surplus-money obtained by the forfeiture and sale of shares shall, after satisfaction of the call, interest, and expenses, be paid over to the defaulters, which clearly evinces the spirit of it, and shews that its object is only to secure the payment of a debt, and not to inflict punishment on the defaulter. In addition to this it may be remarked, that though the Act of Parliament declares that the shares may be forfeited, although an action has been commenced, yet it nowhere empowers a company to bring an action, after a forfeiture of shares has been resorted to, and the holder of them has ceased to be a member of the company.

We shall next consider the mode in which this liability to pay calls may be discharged.

#### WINDING UP.

In *Re The Norwich Yarn Company*, 17 Law T. 23, a question of jurisdiction was determined by the Master of the Rolls, who decided, that after a claim by a creditor had been disallowed by the Master, and, on appeal, the validity of the debt was questioned, it was competent to the Court to direct an issue to try that validity.

Another case of a contributory was *Ex parte Hamer*, 17 Law T. 24. A shareholder, devised his real estate to B., making C. his executor, and died in 1838. C. received the dividends for some years, and his name was put on the list of contributories. C. having shewn that he had duly administered the personal estate of A. the Master put B.'s name on the list as devisee of A. It appeared that all the company's debts due at the time of A.'s decease had been paid. He was very properly held not to be liable as a contributory.

We understand that, in many of the companies now in course of being wound up, no debts have been proved, so that, in fact, the costly process has been taken for the sole purpose of paying self-produced costs. In such cases the Court should throw the costs upon the petitioners. Where there is nothing to wind up it would be monstrous to make contributories for the sole purpose of subscribing the costs of a proceeding proved by the result to be needlessly taken.

At present, all progress is suspended in the incomplete companies, waiting the results of the pending appeals. The entire principle upon which calls are to be made yet remains to be determined.

E. W. C.

**DOVER, HASTINGS, AND BRIGHTON JUNCTION RAILWAY.**—On Monday the list of shareholders in this company, brought in by Mr. Norris, the official manager, was proceeded with, when about nineteen of those who had paid the deposit and had shares allotted them, were placed on the list. Mr. Simpson, of the firm of A. Beckett and Simpson, who were solicitors to the company, were examined at length, in order to fix certain of the provisional committee, and the meeting was adjourned for the attendance of the secretary.—*Chronicle*.

**CHELTENHAM HOTEL.**—On Monday his Honour Master Brougham, after finally settling the list in this matter, declared a call of 30s. per share, payable to Mr. Hutton, the official manager, on the 28th of May, to discharge the liabilities, amounting to about 20,000l.—*Daily News*.

**SLIGO AND SHANNON RAILWAY.**—On Monday, a meeting was held before Master Farrer, to settle the list of contributories brought in by Mr. Coleman, the official manager, and his solicitor, Mr. Devonshire, for whom Mr. Cotton appeared as counsel. This is the only railway company incorporated by Act of Parliament, the royal assent having been given in August, 1846, under the operation of the Winding-up Act. The line was to commence at Lough Gile, and run through the Arigna iron districts and Leitrim to the Shannon, but only 5,000l. of the deposits were paid in, and the liabilities still outstanding amount to between 6,000l. and 7,000l. The list of contributories consists of 142 persons, 82 of whom having signed the deed and paid the deposit, were yesterday placed on the list.—*Daily News*.

**KILBRIKEN SILVER LEAD MINING COMPANY.**—On Thursday, Master Richards sat to receive proof of debts in the matter of the above-named company. The official manager, Mr. Wryght, and his solicitor, Mr. Harris, attended to watch the proceedings on the part of the contributories. The claims tendered were trifling in amount; and, after a brief investigation, the Master refused to allow any of them being entered as debts against the estate, on the evidence adduced. Several claims, amounting on the whole to about 70l. were brought forward on behalf of some poor persons in Ireland who resided near the mine, but were adjourned to await further inquiry; and Mr. Armstrong, the proprietor of the mine and the grounds adjoining, undertook to afford every facility in his power to ascertain the justice of the demands, as the parties claiming were tenants of his own.—*Chronicle*.

**SHROPSHIRE MINERAL RAILWAY.**—On Monday a meeting in this matter was held before his honour Master Kindersley. The further settlement of the list of shareholders was being proceeded with when it was found necessary to adjourn until June, to give an opportunity for the examination of Mr. Sergeant Adams, who was the chairman of the company. Mr. Alderman Copeland and other directors, with the secretary, relative to the purchase by the directors of a large number of shares on which they claim any dividend that may arise under the estate, the object

being to ascertain whether the shares were purchased on their own account, or as trustees for the company.—*Daily News*.

**STAFFORDSHIRE AND SHROPSHIRE RAILWAY COMPANY.**—On Saturday, Mr. Roxburgh (before Master Richards), on behalf of the official manager, Mr. Hutton, brought forward a claim for 2,502*l.* against Mr. Archibald, a director and trustee of the company, and sought for an order to compel the latter gentleman to pay over that sum to Mr. Hutton. This was the balance of a sum of 4,940*l.* drawn out of the Commercial Bank by the trustees of the company, Messrs. Archibald and Collis. Mr. Phipson, who represented Mr. Archibald, said that his client, in his examination, swore that the trustees had verbal authority from the directors to withdraw the money from the bank, in order to prevent the possibility of its being attached. Besides, under the Winding-up Act, he (the counsel) apprehended that the Master had power to make an order for repayment only where the money was actually in the hands of the party, and, as his client had disbursed it, he submitted that the application ought not to be acceded to. After hearing Mr. Roxburgh on the other side, the Master said that he would defer judgment; remarking, however, that if he felt satisfied that he ought to make the order for repayment, the objection arising from the wording of the Act would not induce him to alter his decision.

**NATIONAL DISINFECTED AND DRY MANURE COMPANY.**—On Thursday, at a meeting before Master Farrer, a compromise was effected, by the former solicitor to the company consenting to take 180*l.* in discharge of his bill.—*Chronicle*.

**IMPERIAL BANK OF ENGLAND.**—On Wednesday a meeting took place, before Mr. Farrer, on the case of Mr. Samuel Buckley, of Manchester, whom it was sought to fix as a contributory for at least ten shares. Mr. Prior appeared for the official manager, Mr. Soubly, and Mr. Hare for the alleged contributory. After an investigation of more than an hour's duration, the matter was adjourned.—*Chronicle*.

**MERIONETHSHIRE SLATE AND SLAB COMPANY.**—On Wednesday there was a meeting before Master Sir William Horne, for the further settlements of the list of contributories. The official manager, Mr. Ernest, was represented by Mr. Hetherington. The cases of eleven alleged contributories were investigated, and, with the exceptions of Mr. Geo. Tollitt, who was settled for thirty shares, and Mr. J. T. Rathbone, who was included without opposition for forty shares, stand over for the production of additional evidence. There are altogether eighty-four names on the contributory lists as brought in by the official manager, of which the Master has already ordered seventeen to be definitively included, and a few to be expunged.—*Chronicle*.

## REAL PROPERTY LAWYER AND CONVEYANCER.

In *Potter v. Baker*, 17 Law T. 22, the following question arose. A, by will gave to B. an annuity of 50*l.* a year, "for her and her three children," after her decease, "to be paid to each of them as they attained the age of twenty-one years; but if either of them should die, to be paid to the survivor." What was this gift to the children? It was held to be a gift of so much money as would, if converted, produce an annuity of 50*l.* a year, and not a mere annuity of 50*l.* during the lives of the children.

The case of *The Attorney-General v. Napier*, 17 Law T. 28, is remarkable in several respects. In the first place, it decides the important question, whether legacy-duty is payable upon the personal estate of an officer in the East-India Company's service, who died in India, and whose personal estate was there situate and administered. The Court held that it was a question of domicile, that the duty was payable according to the law of the domicile, and that the domicile of an officer in the Indian army is in England. But this case is also interesting as being in apparent opposition to a decision of the House of Lords, the judges explaining, that in the case referred to, the attention of the Lords had not been directed to the argument then before them, and that they were not bound implicitly to follow the decisions of a higher tribunal when other reasons, leading to a different one, presented themselves. ALDERSON, B. said, very aptly, "Supposing the Judges were to give their opinion on a supposed state of the law, as not altered by a general or specific statute, and had not adverted to that statute at all, and had given their judgment, establishing a given principle, the *ratio decidendi* being clear, if you point out afterwards, that if they had adverted to that statute they would have decided otherwise, does that make their decision, on the 'grounds upon which they put it, wrong in principle? Would it not be quotable in

a case if the statute did not apply, just as well, even though it were a wrong decision? Lord Chief Barons are not infallible on a subject of fact. All the Judges are supposed to know the statute law, which they do not."

A case of very great interest and value, both as an authority in itself, and as containing an elaborate review of the law, is reported from the House of Lords. In *Irvine and Others v. Kirkpatrick*, 17 Law T. 32, it was decided, that deeds dated thirty-seven and thirty-nine years back are not to be set aside on grounds of misrepresentation and concealment, unless the fraud be precisely stated in the pleadings, and clearly proved, notwithstanding the rule that time is not a bar to fraud. Time is an important element for consideration in such a case.

Upon the question, What is a fraudulent concealment in law? it was decided, that it must be a concealment of something which the party was bound to disclose.

A mere conjectural estimate of the value of an estate was held not to be a misrepresentation.

But where the party had taken two opinions on his title, one of which was in his favour and the other against him, and he produced the former only, and concealed the latter, it was deemed to be both a misrepresentation and a concealment.

The judgment in this case is a very long one, and we hesitated whether to devote so much of our space to it; but its great value as an authority and the instruction to be derived from its perusal, determined us in favour of its admission.

We should add here, that in commenting on the case of *Hobby v. Collins*, in the summary at p. 16, we used too large an expression as to a wife's reversionary interest, naming it generally, without adding "in personalty." We thought the phrase would have been sufficiently understood without adding the limitation.

## REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Your suggestion as to making clerks of guardians and poor-law union districts subservient to the purpose of a local registry, is one deserving of attention; but I apprehend that the staff of officers, and extensive, yet vigilantly controlled, machinery, as well as the district register offices already established throughout the kingdom, under the superintendence of the "Registrar-General of Births, Deaths, and Marriages," may be much more conveniently appropriated for the above important purpose. As you are aware, under the Act, 6 & 7 Wm. 4, c. 86, the whole country is divided into districts, co-extensive with the poor-law unions; each district has its superintendent registrar, generally a respectable solicitor, and in most cases the clerk of the union holds the office. Under his care and control the district register office, containing the registers of births and marriages, with their indices, and which office is provided at the expense of the guardians of the union, according to a plan approved of by the registrar-general—see sect. 9 of the Act—is placed. The officers are from time to time, and without the least forewarning, visited by inspectors—gentlemen of intelligence and experience—deputed by the registrar-general to travel throughout England and Wales and ascertain that the important provisions of the Acts for Registering Births, Deaths, and Marriages are in every particular duly observed by all the superintendent registrars and their deputies. These register offices are always situated in the principal town of the division, and quite distinct from the poor-law union office. As you are aware, the census has been taken entirely under this department, and from its constitution, and the admirably systematic method in which the business of the general register office is conducted, I am convinced that whether for the purpose of a general or local registry, none other could be used so conveniently. A perusal of an article in a late number of Dickens's *Household Words* upon the subject of this office will repay the reader.

April 14, 1851.

P.S. Next to this scheme, I should say that the plan of making county clerks registrars, as suggested by "An Old Subscriber," in your last, is the best.

## REGISTRATION OF DEEDS BILL.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I am obliged to you for the insertion of my note as to establishing local registries. It must be obvious that no other kind will be satisfactory; but I disagree with you in making the clerk of a board of guardians the registrar. This personage, you will find, is frequently a person who has not had a legal education; and in cases where the practical duty is performed by an Attorney, you will find (I speak not in disparagement) he has not succeeded in practice to any great extent. The registrar should be a

person of recognised and competent ability, in whom the public can place confidence. The duties attending a registry would be quite sufficient to employ the time of one person, if competent. Searches would be frequently made by him, and his certificates received. This has been the practice in the West Riding for years. Again, you state that titles are not taken without investigation. As a general rule I agree with you; but nevertheless the reverse, I believe, very frequently occurs in small purchases, the attorney taking a memorandum of discharge. A local solicitor is more or less acquainted with the titles in his neighbourhood, more especially in country districts, and the same titles will be before him repeatedly. In these cases he will often dispense with the examination, at the request of a purchaser.

There is another point to which I would wish to call your attention, and this I think very important. I know it has caused considerable discussion in opposition to a registry of deeds. At present any person has access to registered judgments, on payment of a trifling fee. Almost throughout the country societies are formed—said to be for protection of trade—consisting of members who are not allowed to divulge. These societies, through an agent in town, possess themselves of an account of all registered judgments, and which is privately circulated amongst the members. This system may, in some cases do good; but it has its evils. Many responsible persons give warrants of attorney, &c. little dreaming of the exposure of a judgment thereon, and the consequent doubt to which they are subjecting their credit. It is feared the same publicity given to titles, charges, &c. thereon, would be serious, and I am one who think it should be obviated. I believe it is now the practice in bankruptcy not to permit a person to examine the file of proceedings without the previous consent of the solicitor to the fiat. It occurs to me that some check of this sort to idle or worse curiosity might be very conveniently introduced in the registration of deeds, that before a search were permitted, some of the parties interested on the registry should give an authority to the person making the search, such authority to be written on a stamp of small duty, say 2*s.* 6*d.* to be paid quite irrespective of the fees for search. It has been said that nothing serious has been felt in practice from examination of wills. The cases are not analogous. In the case of charges created by deeds, they can be removed—the owner is a living person. The will is final, and only shews the disposition of property.

A. B.

## REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I was pleased on reading the valuable remarks in your last paper on the registration of deeds. The proposers of the Bill now before Parliament may say what they please; but there is scarcely a solicitor in the kingdom who will not, on reading the cumbersome and lengthy measure, give his decided opinion that it will greatly add to the cost of transfers, especially in small concerns. In all cases duplicates will be thought requisite, for few will part with their muniments of title to an office which may be burnt up any day; and although unstamped, the cost of duplicates will be considerable. The expense of new surveys and plans for the whole nation will be enormous. I say new, because who, in his senses, will rely upon the proverbially inaccurate Tithe Commutation plans; and when the new surveys are completed, they will not long be useful, for boundaries are continually being altered, and it is quite absurd to suppose that in nine cases out of ten, parcels cannot be accurately given by a verbal description. Where parcels are complicated, a plan must be indorsed upon the deed, for the occasion for it generally arises from intricacies in recent subdivisions of property, which the general plan will not meet.

And why this perverse adherence to a costly centralising Act of Parliament like that proposed? In every Poor-law union there is a register office for births, deaths, and marriages, under the care of a superintendent registrar, who is generally an intelligent man, either in, or connected with, the Profession. These local offices cost the country about 10,000*l.* per year, and every one of them is, or could readily be, made adequate to contain all the land and property registration of the district for centuries to come. Let every transfer be registered either by copy original or memorial in the Poor-law union in which any part of it is situate; and in order to provide for a national land index, let the superintendent registrar send a tabular statement of dates, parties' names, and other particulars, to the Registrar-General of Births, Deaths, and Marriages in London, who would keep a national index for the purpose of searches in London. In the great majority of cases it will be known where the registry has been effected, and search will be made at once in the local office; but it is well to have a national as well as a local index. Thus the offices (the General and Local Register offices for Births, &c.), already maintained at great cost, will be made generally useful, and I am satisfied, if well managed, the cost of registra-

tion may be put at a low figure. Besides, why, when the registry of deeds, and that of births, deaths, &c. are both established for one object, and that a matter of title, should you multiply offices, and not use the same establishment and officers for both?

I hope my professional brethren in the country will bestir themselves to prevent this mammoth central establishment, and to promote the establishment of local offices at easy distances from the residence of each country solicitor.

I am, Sir, yours, &c.  
April 15, 1851. A COUNTRY SOLICITOR.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—It is quite time that the Profession were up and doing respecting the Registry Bill; objectionable as it is, it has powerful advocates, and therefore requires strenuous opponents. Fully agreeing in the observations you have made on this subject, I would suggest that petitions to both Houses of Parliament should be transmitted from every district throughout England against the metropolitan plan, as alike injurious to our clients and ourselves. They should be signed not only by professional men, but by the public generally, and especially landowners; and every due influence should be used with members of the Legislature to support the prayer of them. If there is to be a registry at all, it must be a local one; nothing else will be acceptable, and therefore nothing else should be accepted.

As it will be desirable that the petitions should pretty much agree in the sentiments they contain, I beg to send you the form of one which has emanated from the Somersetshire Senior Attorneys' Club. It admits, you will observe, the principle of registration, and therefore if any parties object to all registration, it will require alteration.

The Bill, as most of your readers probably know, is now before a select committee of the House of Lords.

I am, Sir, yours,  
April 16, 1851. ONE, &c.

"That a Bill is now pending in your right honourable House, intitled 'An Act for the Registration of Assurances in England and Wales'; that it is proposed by the Bill to establish in London one central office for registering therein, by the deposit of the original instrument or a duplicate thereof, all the future title-deeds affecting real property throughout England.

That, although your petitioners are not insensible of the advantages that would result from a simple and effective system of registration, they are firmly convinced that these would be more than counterbalanced by the great inconvenience, risk, and expense attendant upon a registry exclusively metropolitan, and they earnestly deprecate the adoption of any such plan.

And your petitioners trust that your right honourable House will reject any measure for registration which does not provide for the establishment of local registries, and humbly pray that your lordships will not allow the said Bill, in its present shape, to pass into a law.

"And your petitioners," &c.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I have read your leading article in the LAW TIMES of the 12th inst. and I deeply regret your advocacy of this most injurious measure. My object in now addressing you is, however, simply to correct two errors into which you appear to have fallen.

1. You say the lawyers,—meaning as it appears, all lawyers—admit the utility of registration. I hope a great majority of the lawyers do not admit this,—certainly all do not,—for I believe I am correct in stating that there is not one solicitor for many miles around me who is not a decided opponent of the measure.

2. You say that copyholders cling to copyhold tenure with its absurdities, because, practically, it gives them a register of title. Of course I know not from what part of the country your experience is derived, but it is most completely opposed to mine. I never in my life knew a copyholder to speak even with patience of his tenure, and never did I know one single advantage gained, or one item of expense saved, by the enrolment of documents connected with copyholds, though of disadvantages my memory recalls too many.—I am, Sir, yours, &c.

A SOLICITOR.

[We are far from approving the measure,—we approve a registry of deeds, provided it be simple and accessible. Except upon such conditions, it would be a positive nuisance.—ED. L. T.]

#### Queries on Points of Practice.

#### STAMPS ON CONDITIONAL SURRENDERS OF COPYHOLD.

IN PURSUANCE OF A COVENANT IN A FREEHOLD MORTGAGE-DEED.

THE question as to the proper duty payable upon a

conditional surrender accompanying and executed simultaneously with a freehold mortgage, the *ad valorem* duty whereon is above 2*l.* does not appear to us to have been decided by the case of "T. W. K." mentioned in his letter at p. 23, No. 419 of the LAW TIMES, inasmuch as it seems that the commissioners might perhaps have founded their decision upon the case coming within the fresh title (under the head Mortgage) of "a further assurance only of an estate already pledged or charged," or more probably upon the ground of the freehold deed and conditional surrender forming together but one mortgage, like a conditional surrender with a deed of covenants accompanying it, as in the case of *Sellick v. Trevor and Davies*, 12 L. J. 401, Ex.; and therefore the *ad valorem* duty not exceeding 2*l.* both instruments were, under the title Mortgage, liable to the same amount of *ad valorem* duty, as not coming within the proviso in the old Act, under the same head, still unrepealed, which in case of several distinct instruments falling within the description of any of the instruments thereby charged with *ad valorem* duty on mortgages made at the same time for securing one and the same sum, renders only one of them liable to *ad valorem* duty if exceeding 2*l.* and the rest to the duty to which the same would be liable under any more general description. The Legislature thus shewing that, but for this proviso, all such instruments would have been liable to the same *ad valorem* duty, and therefore all under the limit fixed in the proviso so remained liable.

The case above referred to decided that a surrender with a deed of covenant for payment, and giving a power of sale, did not fall within the exemption under the old Act, of "an instrument made for further assurance;" and we apprehend the decision has the same effect, now that the further assurance, originally forming the exemption, has in the late Act become a new principal title under the head Mortgage, with new duties.

In the absence of information on which ground the commissioners decided the above case, it still seems to us that a conditional surrender and a freehold mortgage-deed executed at the same time for securing the same sum, are both liable to the same amount of *ad valorem* duty whilst not exceeding 2*l.*; and when the *ad valorem* on the freehold deed does exceed 2*l.* that then, as the above proviso restricts the *ad valorem* duty to one only of the several simultaneously executed instruments, the conditional surrender becomes liable to a 1*l.* stamp only under the general title "Surrender," that being the more general description applicable to such instrument.

We should be glad if any of your readers would favour us with their views upon the conclusion we have arrived at, as the proviso in regard to this question has not been noticed by any of your correspondents, and the question is one of much interest, especially to the stewards of manors, who, being under a penalty for accepting surrenders imperfectly stamped, might perhaps be justified in the present uncertainty in requiring the commissioners' denoting-stamp for their protection before taking them.

We are, Sir, yours, &c.  
Diss, April 17, 1851. W. & L.

#### THE MERCANTILE LAWYER.

##### SUMMARY.

*Stoppage in transitu* is the seizure, by the seller, of goods sold on credit, during the course of their passage to the buyer, and the *transitus* is the passage of the goods to the place agreed upon by the buyer and seller, or the place at which they are to come into the possession of the buyer. The rule appears to be sufficiently simple, but disputes are constantly arising upon its application to special facts. Thus, in *Orr v. Murdock*, 17 Law T. 21, M. and others, distillers, residing in Scotland, sold puncheons of whiskey to P. who lived at Newry, in Ireland. The whiskey was bonded in their own names at the Queen's stores in Newry, and a delivery-order was given to P. with an invoice. P. from time to time took out some of the puncheons, but, becoming insolvent, the vendors stopped the rest of them. It was held that the right to stop was gone, for the goods were no longer *in transitu*; the delivery was complete.

A point of considerable interest, as well in the *Practice of Bankruptcy* as to medical men, was decided in *Elliott v. Clayton*, 17 Law T. 26, in which it was held that a medical practitioner, who was an uncertificated bankrupt, but enabled by help of friends to procure medicines on credit, and so to continue his business, cannot recover for medicine and attendance, if his assignees interfere and require payment to be made to them.

The law of principal and agent has of late been discussed with considerable minuteness in these pages, in the course of the railway litigation. It is

at all times a difficult question whether the principal, or the agent, or both of them, may sue, and the cases upon it are very numerous. In *Schmalz v. Avery*, 17 Law T. 27, the question was, under what circumstances a person contracting as agent for an unknown and unnamed principal might sue as principal. It was held that he might do so, unless it be shewn distinctly that the other party dealt with him relying only, on his character as agent; and would not have dealt with him as principal had he known him to be such. It was contended that a man could not fill the two characters of principal and agent. But the Court said, "a man cannot, in strict propriety of speech, be said to be an agent to himself; but in a contract of this description we see no absurdity in saying he might fill both characters; that he might contract as agent for the freighter, whoever the freighter might turn out to be, and might still adopt the character of freighter himself, if he chose."

It may be as well for traders and their solicitors to bear in mind the case of *Ex parte Bygus*, 17 Law T. 30, in which the certificate was suspended for two years, because the bankrupt, immediately before the fiat, disposed of goods for bills which appeared to be fraudulent, although the bankrupt was not shewn to be personally a party to the fraud. In *Re Higginson*, 17 Law T. 30, the Liverpool Commissioner felt some doubt whether the jurisdiction over cases partly heard by his predecessors in office descended to him.

An important question to manufacturers and workmen was raised in *Reg. v. Hewitt*, 17 Law T. 31, namely, what is an illegal combination of workmen under 6 Geo. 4, c. 120. The Philanthropic Society of Coopers was held to be such, because, although formed as a sick and burial club, it fined one of its members for working in a yard where steam machinery was used, and on nonpayment of the fine, so acted as to prevent him from obtaining work. This case should be noted in *Hertel's Law of Master and Servant*.

#### COUNTY COURTS.

##### SUMMARY.

THERE now lies before us the Bill, "as amended on report from Committee on second recommitment," for Extension of the County Courts. Whether this be the precise form of the Bill, as it passed the House of Lords, we have been unable to ascertain, but we presume it to be so, as, in the newspaper reports of the proceedings on the third reading, no mention is made of any amendment having been then introduced.

The Bill, thus amended, contains the following clauses:—

1. Power is given to the Judges of the Court of Chancery to send Accounts and Inquiries to the Judges of the County Courts. 2. In such Orders of Reference Accounts are to be taken, and Inquiries and Requests thereon to be made as in Equity. 3. Reports and Evidence to be filed. 4. Power is given to the Judges to take Pleas, Answers, and Examinations. 5. Constitutes the Judges examiners of witnesses in the country. 6. Empowers all witnesses to be examined before Judges who might be examined before examiners or commissioners. 7. Directs the mode of examining witnesses. 8. Empowers Judges to call on parties to be present at examinations. 9. Provides that interrogatories may be sent by post and filed. 10 and 11. Give power to the Lord Chancellor to make general orders as to the mode of examining witnesses, &c. and to issue rules of practice. 12. Requires a schedule of fees to be framed which are to be received on account of Equity business done by the Courts.

The 13th and 14th sections of the amended Bill are those which we had framed, giving to the Judges power to allow larger fees to Counsel, and requiring the Judges of the Superior Courts to frame tables of fees to be taken by Attorneys, subject to taxation by the Clerk, with an appeal from such taxation to the Judge.

Sec. 15 permits the venue to be changed on a new trial.

Sec. 16, which is also one of our suggested sections, is retained, and requires defendants to give notice that they dispute the demand, otherwise judgment is to go by default.

Sec. 17 requires that no cause shall be set down for trial unless upon proof of due service of the summons.

Sec. 18 requires that the summons shall contain



"notice of conditions, on fulfilment of which proceedings shall be stayed.

Sec. 19 is new: it provides that on petition to her Majesty the jurisdiction of a city or borough court may be excluded from that of the County Court in concurrent causes. And

Sec. 20 empowers the Lord Chancellor to fix salaries of judges, not to exceed 1,500*l.* a year.

Sec. 21 empowers the Lord Chancellor to appoint additional County Court judges, with consent of the Lords of the Treasury.

The clause requiring suits above 20*l.* to be tried at special sittings was, we regret to say, struck out; but we are not without hope that, by a vigorous effort of the Profession, it might be restored in the Commons. This is the only one of the clauses which we had suggested which has not been adopted by the House of Lords; and it would not be difficult to show that this would be at least as practically beneficial as either of the others which have been so readily accepted. Indeed, we ventured to offer them, not as of our own opinion merely, but as embodying that which we had, by means of our peculiar opportunities, ascertained to be the requirements of the County Courts and the wish of the Profession. And it would give us pleasure to be of equal service, by the same means, in other matters of professional interest.

## THE LAWYER.

### Summary.

**EQUITY PRACTICE.**—Where a solicitor in a cause gave the papers to a third party to prepare the bill of costs, and died, and the solicitor who succeeded him in the cause obtained the papers from the person to whom they had been so intrusted, without paying the costs, it was held that a cause petition or bill was the proper proceeding to compel their production, for the purpose of allowing the costs of the first solicitors to be taxed, and that he was bound to produce them. (*Worrall v. White*, 17 Law T. 21.)

In proceeding to set aside a deed made for the benefit of creditors, it was held in *Gore v. Herries*, 17 Law T. 23, that it was necessary to make one or more of the creditors parties to the suit.

A point which is of interest as relating to the Trustee Act, 11 & 12 Vict. c. 96, was decided by Lord CROMWELL, in *Mitchell v. Cobb*, 17 Law T. 25. Under this Act a surviving trustee had paid into court a sum of 166*l.* the produce of one-eighth part of a sum of stock, which, on the death of A., was divisible among certain parties, of whom plaintiff's wife was one. It was held that this would have been a breach of trust if the parties had not given him an authority express or implied to sell. The trustee had omitted to pay in a sum of 21*l.* part of the trust estate, but this was considered not to be such an omission as would deprive him of the benefits of the statute.

**GENERAL LAW.**—A question to be noted in *Roscoe or Taylor on Evidence*, was raised in *The West London Railway Company v. The London and North-Western Railway Company*, 17 Law T. 31, whether a copy of an agreement admitted to be a correct copy is admissible, without accounting for the non-production of the original, or without a notice to produce. JERVIS, C.J., said the point was very doubtful.

## LEGAL INTELLIGENCE.

### THE SOLICITORS OF LONDON AND THE LORD CHANCELLOR.

The following address has been presented to the Lord Chancellor, at his residence in Eaton-square, by Mr. Clarke, the Solicitor of the Ordnance, late president of the Incorporated Law Society, and Mr. Lavie, of the firm of Messrs. Olivers, Lavie, and Co.; and the deputation at the same time requested his Lordship to sit for his portrait, to be placed in the hall of the Incorporated Law Society:—

"TO THE RIGHT HON. THOMAS, LORD TRURO, LORD HIGH CHANCELLOR OF GREAT BRITAIN, &c.

"We, the undersigned, attorneys and solicitors of the Superior Courts, practising in the cities of London and Westminster, beg leave to offer to your Lordship our respectful congratulations on your Lordship's elevation to the office of Lord High Chancellor of Great Britain.

"We remember with feelings of no ordinary pride and gratification that the distinguished career which has thus been crowned by the highest dignity in the power of the Sovereign to bestow was commenced

by your Lordship in the same branch of the profession to which we ourselves belong.

"Having, by the exercise of great talent and industry, established an extensive practice as an attorney and solicitor, your Lordship passed from our grade of the profession to the Bar, in the ranks of which your Lordship rapidly attained the foremost position.

"As an advocate a course of most unexampled distinction and success, during which your Lordship successively filled the great offices of Solicitor and Attorney-General, was terminated by your Lordship's advancement to the distinguished post of Lord Chief Justice of the Common Pleas.

"Your Lordship has now reached a still loftier elevation, and for the second time only, as we believe, in the history of the profession, its very highest dignity has been attained by one who was, for many years, a practising attorney and solicitor.

"Some of us can personally remember the earlier stages of this brilliant and remarkable career; many of us have been enabled by personal experience to appreciate the value to our clients of your Lordship's zealous and indefatigable services as an advocate; and all have witnessed the powerful ability, the unwearied industry, and the energy, rarely equalled and never surpassed, which were devoted by your Lordship to every cause intrusted to your Lordship's advocacy—to the cause of the poorest and humblest equally with that of the most wealthy and powerful.

"Nor can we forget the unvarying courtesy and consideration in every stage of your progress which the members of our branch of the Profession have experienced at your Lordship's hands, while engaged in the discharge of our anxious and responsible duties.

"We cannot but feel that honours thus earned reflect a portion of their lustre on every member of our body, and we see in your Lordship a conspicuous example of greatness achieved by persevering energy and unremitting diligence, directed by a vigorous understanding to the pursuit of a noble object, and at the same time a signal proof that under our happy constitution the exercise of such qualifications, united with an undeviating adherence to the principles of honour and integrity, may bring the highest dignities of the State within the reach of the humblest member of our Profession.

"With these sentiments we beg leave again respectfully to tender to your Lordship our cordial and hearty congratulations, and to express our earnest hope that Providence will be pleased long to continue to your Lordship the possession of the health and strength requisite for the discharge of the duties of your Lordship's exalted station."

The address was signed by upwards of 400 solicitors, members of the most respectable firms in the metropolis.

Lord TRURO returned the following answer to the deputation:—

"The presentation of this address I shall ever regard as one of the most gratifying incidents of my life.

"Such an address from several hundred gentlemen who constitute a large portion of the most respectable and estimable members of that branch of the profession in which I commenced my career, and to which I devoted several of the earlier years of my life, under whose personal observation that life has been passed, and that success attained which has called forth this expression of their congratulation and esteem, is a testimony in my behalf the value of which I cannot estimate too highly.

"Your request that I will sit for my portrait to be placed in the lecture-room of your incorporated society is also very gratifying to me, and I accede to it with great pleasure. It is indeed a pleasing reflection, which you have kindly suggested, that the retrospect of my life, as recorded in this address, may be followed by advantages beyond the gratification which it affords to myself individually.

"Our Profession in all its departments is laborious and arduous; but in our happy country promotion is denied to no class; and, in my example, your students may see what can be accomplished by personal industry and exertion, though unaided by patronage, and from it may learn that the humblest subscriber upon the roll of attorneys is not excluded from the highest honours of the State.

"Respectable solicitors are among the most valuable members of society, and I am very sensible how deeply the public is interested in the station in which they are maintained, and the estimation in which they are held; and, in returning my cordial thanks to the gentlemen who have concurred in this address, I beg to assure them of my sincere wishes for their prosperity, and that nothing will be more congenial to my feelings than to have it in my power to contribute to it.

"To you, Mr. Clarke and Mr. Lavie, I also return my warm thanks for the trouble which you have taken in presenting this address, and for the very kind manner in which you have expressed yourselves towards me, which has confirmed the gratifying impression upon my mind that the frequent professional intercourse I have had with you has not failed to produce mutual feelings of esteem and regard."

## PROCEEDINGS OF LAW SOCIETIES.

### LAW STUDENTS' DEBATING SOCIETY.

QUESTIONS FOR DISCUSSION.

Tuesday, April 22, 1851.

45. A. being in possession of a term of 100 years, has the immediate remainder, which is a term of ten years, assigned to him Does the first term merge in the term in remainder? *Hughes v. Robotham*, Cro. Eliz. 302.

XXVI. Is it expedient to abolish pauper settlements?

## COURT PAPERS.

### Ecclesiastical Courts.

SITTINGS AT DOCTORS' COMMONS IN EASTER TERM.

#### ARCHES COURT.

First Session: April 15. Second Session: April 23. Third Session: May 6. Fourth Session: May 15.

#### ADMIRALTY COURT.

First Session: April 17. Second Session: April 30. Third Session: May 7. Fourth Session: May 16.

#### PREROGATIVE COURT.

First Session: April 23. Second Session: May 1. Third Session: May 10. Fourth Session: May 20.

#### APPEALS COURT.

First Session: April 24. Second Session: May 2. Third Session: May 13. Fourth Session: May 21.

#### CONSISTORY COURT.

First Session: April 26. Second Session: May 8. Third Session: May 14. Fourth Session: May 22.

## BIRTHS, MARRIAGES, AND DEATHS.

### MARRIAGES.

BURTON, Rev. Edgar B. chaplain and naval instructor, R.N. to Georgina, daughter of the late Henry Burton, esq. barrister-at-law, at Brussels, on the 10th inst.

SWANHAM, Edmund, esq. barrister-at-law, second son of Clement Swanham, esq. of Somerford Booths, in the county of Chester, to Elizabeth Jane, daughter of Wilson Jones, esq. of Hartleath, Flintshire, at Pont Blydden Church, Flintshire, on the 12th inst.

### DEATHS.

BARLOW, Thomas, esq. of the Queen's Bench-office, Temple, at his house, No. 12, Paddington-green, on the 10th inst. aged 78.

JACOB, John Symson, esq. barrister-at-law, magistrate of the counties of Middlesex, Essex, and Hertfordshire, and Deputy-Lieutenant of the county of Essex, at Camberwell, on the 17th inst. aged 71.

DUNCAN, James, esq. much regretted by a numerous circle of friends, and much respected, being for many years a member of the Common Council of the city of London, at his residence, 22, Broad-street, on the 12th inst.

SAVILL, the Hon. Frederick, fifth son of the Earl and Countess of Mexborough, leaving a widow and infant family to mourn his fate, at Coblenz, after a short illness, on the 2nd inst.

PAZMAN, the Hon. Dudley Anderson, Captain, R.N., M.P. for Boston, only brother of the Earl of Yarborough, on the 13th inst. aged 38.

SHARLAND, George Augustine Temple, only son of George E. Sharland, esq. Town Clerk of Gravesend, on the 9th inst. of bronchitis, aged 4.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

RESERVE FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	211	211	211	211	212	
3 $\frac{1}{2}$ Cent. Reduced Annuities	961	963	963	963	963	
3 $\frac{1}{2}$ Cent. Consols Annuities	974	974	974	974	974	
Consols for Account	974	974	974	974	974	
New 3 $\frac{1}{2}$ Cent. Annuities	974	983	983	983	974	
Long Annu. (exp. Jan. 5, 1860)		71	71	71	71	
Do. 30 yrs. (exp. Oct. 10, 1859)		71	71	71	71	
Do. 30 yrs. (exp. Jan. 5, 1860)				71		
India Stock	2641	263	264		263	
India Bonds (1,000 <i>l.</i> )	63	63	63	61	63	
Do. do. (under 1,000 <i>l.</i> )			63	59	60	
South Sea Stock						Good Friday.
Do. do. New Annuities	96					
Exchequer Bills, 1,000 <i>l.</i>	53	54	57	57	57	
Do. do. 500 <i>l.</i>			57	57	57	
Do. do. Small	56		57	54	57	
Do. do. Advertised						

\* Premium.

## THE GAZETTES.

### Bankrupts.

Gazette, April 15.

FABROW, WILLIAM, coal merchant, Kingston-upon-Hull, April 30 and May 21, at half-past twelve, Kingston-upon-Hull. Off. as Carrier. Sols. Levett and Champsey, Hull. Petition, April 11.

GRACE, JOHN, woollendrapers, Bristol, and Dudley, Worcesterhire, April 29 and May 27, Bristol. Off. as Miller. Sols. Whittington and Gribble, Bristol. Petition, April 8.

JOWETT, JOHN, shoe merchant, Bull-bridge, Derbyshire, April 25 and May 23, at twelve, Nottingham. Off. as Biddleston. Sol. Campbell, Nottingham. Petition, March 27.

MARSON, WILLIAM ROUS, auctioneer, Southampton, April 29 and May 27, at two, Basinghall-st. Off. as Edwards. Sols. Lee and Pemberton, Lincoln's-inn-fields, and Harfield, Southampton. Petition, April 9.

MOORE, THOMAS, jun. merchant, South Hylton, Durham,

April 25 and June 5, at one, Newcastle-upon-Tyne. Off. as. Baker. Sols. Maples and Co. Frederick's-place, Old Jewry, and Wright and Burn, Sunderland. Petition, April 10.

WATTS, LORENZ THOMPSON, merchant, Sunderland, April 25, at eleven, June 5, at twelve, Newcastle-upon-Tyne. Off. as. Wakley. Sols. Bell and Co. Bow Church-yard, Cheap-side, and Jobling and Fleming, Newcastle-upon-Tyne. Petition, March 27.

#### BANKRUPTCY ANNULLED.

Gazette, April 18.

Smith, E. hop merchant, Worcester, April 10.

#### Dividends.

BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

Abbott, W. and W. jun. patent hair-felt manufacturers, second, 6d. Cannon, London.—*Appleby*, J. miller, first, 1s. 10d. Baker, Newcastle.—*Baugh*, S. cabinet-maker, second, 1s. Pennell, London.—*Bentall*, T. stock-broker, first, 5d. Cannon, London.—*Bowerman*, R. and G. carriers, &c. third sep. of R. Bowerman, 8d. Stansfeld, London.—*Collingwood*, T. innkeeper, first, 3s. 2d. Pennell, London.—*Colls*, C. Thompson, C. and Harris, R. P. jun. bill-brokers, with, Old. Cannon, London.—*Cousens*, T. B. ship-builder, first, 7s. 5d. Groom, London.—*Cranston*, A. cabinet-maker, first, 3s. 3d. Cannon, London.—*Crosthwaite*, J. merchant, first, 2s. Turner, Liverpool.—*Dart and Brown*, coach-lace manufacturers, second joint, 2s.; first sep. of Dart, 7d.; first sep. of Brown, 10d. Pennell, London.—*Forster*, J. G. tailor, final, 6d. Pennell, London.—*Gilbert*, J. ironfounder, first, 2s. 6d. Graham, London.—*Good*, W. jun. hennedraiser, first, 7s. 10d. Stansfeld, London.—*Guillame*, W. E. H. timber and coal merchant, second, 1d. Graham, London.—*Makepeace*, C. D. and *Strong*, B. screw manufacturers, first, 2s. 0d. Christie, Birmingham.—*Montefiore*, J. B. and J. merchants, second, 2s. 3d. Pennell, London.—*Piggott*, W. general shopkeeper, first, 3s. 2d. Graham, London.—*Pooley*, H. first, 2s. 2d. Graham, London.—*Reynolds*, E. jun. miller, second, 1s. 1d. Graham, London.—*Roscoe*, T. draper and tea dealer, first, 5s. 1d. Graham, London.—*Rowlands*, M. and L. drapers, &c. first, 10s. Pennell, London.—*Smith*, A. wire rope manufacturer, first, 9d. Graham, London.

INVOLVENT ESTATES.

Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.

Banks, J. T. plumber, 4s. 5d.—*Brodie*, P. 20s.—*Cowell*, J. 9d.—*Darling*, D. A. poultryer, 9d.—*Herdman*, R. linen-draper, 1s. 6d.—*Hogg*, W. shipwright, 2s. 4d.—*Huskisson*, J. baker, 8d.—*Lloyd*, J. clerk, 4s. 8d.—*Marriott*, J. T. clerk, 6s. 6d.—*Mossman*, R. H. schoolmaster, 10s. 3d.—*Raby*, C. clerk, 2s. 4d.—*Sherwin*, T. C. commander R. N. third, 6s.—*Wakefield*, A. brewer, 1s. 8d.

Arnold, G. globe manufacturer, 8s. 7d. Apply to Mr. R. Moss, painter, Margaret-st. Cavendish-square.—*Eust*, J. corn merchant, 1s. 1d. Apply to Mr. T. Huxwick, Soham, solicitor.

#### Assignments for the Benefit of Creditors.

Gazette, April 8.

Boorah, T. grocer and tea dealer, Great Surrey-st. Christchurch, Surrey, March 21. Trusts: W. Reid, wholesale grocer, Little Tower-st. and J. Potts, wholesale tea dealer, Martin's-lane, Cannon-st. Sols. Wright and Bonner, London-st. Fenchurch-st.—*Farnell*, J. K. linen-draper and silk mercer, Shrewsbury, March 12. Trusts: J. Hadland, Cheap-side, J. F. Pawson, St. Paul's-churchyard, and J. P. Foster, Wood-st. warehousemen. Sol. H. Lloyd, Milk-st.—*Gilliland*, W. linen factor, Friday-st. Cheap-side, March 19. Trusts: R. Henderson, Mincing-lane, E. Hemaley, Laurence-lane, merchants, and J. T. Studdart, warehouseman, Wood-st. Cheap-side. Sols. Reed, Langford, and Marsden, Friday-st. Cheap-side.—*Gladston*, E. innkeeper, Berwick-upon-Tweed, March 24. Trusts: J. Kay, spirit merchant, and J. P. McKenzie, grocer, both of Berwick-upon-Tweed. Sol. J. Rowland, Berwick-upon-Tweed.—*Hornby*, T. N. joiner and builder, North Shields, March 17. Trusts: G. S. Tysack, merchant, North Shields, and W. Harle, timber merchant, Newcastle. Sols. J. Radford and W. Harle, Newcastle.—*Maddocks*, J. farmer, Caldecott, Shrooklatch, Chester, March 31. Trust: T. H. Urry, gentleman, Whitechurch. Sol. J. G. Etches, Whitchurch.—*Nuttall*, S. ribbon manufacturer, Coventry, Feb. 22. Trusts: J. Wyley, esquire, Coventry, and W. Stone, silk merchant, London. Sols. Dewes and Son, Coventry.—*Robinson*, Rev. I. B. clerk, Melford, Suffolk, March 28. Trusts: D. R. Syer, esquire, Kedington, and R. A. Allen, merchant, Ballingdon. Sol. G. W. Andrews, Sudbury.—*Stolter*, T. and Bryan, G. joiners and builders, Manchester, March 18. Trusts: J. Elton, brickmaker, Broughton, W. Jelly, plasterer and painter, Pendleton, and H. Worrall, plumber and glazier, Strangeways. Sol. W. M. Atherton, Manchester.—*Waldron*, T. P. draper, Fareham, Hampshire, March 17. Trust: E. Ansted, warehouseman, Gutter-lane. Sol. N. Overbury, Frederick's-place, Old Jewry.

Gazette, April 15.

Hornby, W. blacksmith, St. Oyst, Essex, March 28. Trusts: T. Catchpool, jun. ironmonger, Colchester, and J. Newcombe, grocer, St. Oyst. Sol. W. A. Neek, Colchester.—*Hobbs*, T. carpenter and builder, Bath, April 7. Trusts: J. Lester and J. Calder, timber merchants, both of Bath. Sols. T. and E. Crutwell, Bath.

#### Partnerships Dissolved.

Gazette, April 1.

Apate, J. and J. mercers, drapers, and tailors, Horsham, Mar. 31.—*Barber*, J. and J. surgeons, Colehill, Mar. 30.—*Blunden* and Co. cabriolet proprietors, &c. Putney, Mar. 7.—*Burnup*, Spencer and Ackroyd, worsted spinners, Bradford, Mar. 18. Debts by Burnup and Ackroyd.—*Curling*, Pielcy and Co. rope manufacturers, George-yard, Lombard-st. and Mill Wall, Poplar, as regards Pielcy, Mar. 25.—*Eady*, C. and Son, silversmiths, Little Dean-st. Soho, as regards C. Eady, Mar. 31.—*Enery*, J. jun. and Anery, G. rigging masters, Hastings, Mar. 3.—*Hall* and Boyd, sugar refiners, Breezer's-hill, as regards Mac Vicar, Mar. 31.—*Hordy* and Padmore, ironfounders, Worcester, Mar. 26.—*Heron* and Andrews, share brokers, Manchester,

Mar. 12. Debts by Antrobus.—*Hudson*, M. and Bottom, J. F. lace dressers, Sneinton, Mar. 28.—*Ludgate* and Birt, linendrapers, Aldersgate-st. Mar. 25.—*Maclean* and Roberts, coach builders, Kildermister, Nov. 13.—*Morrison*, A. and J. and *Moat*, C. W. hygeists and medicine manufacturers, Hamilton-place, New-road, Mar. 25.—*Mourilgan*, J. N. and *Rossell*, N. H. attorneys, Verulam-buildings, Gray's-inn, Mar. 31.—*Osborn* and Son, linendrapers, Reading, Mar. 28.—*Petter*, Duff, and *Petter*, printers, Crane-court, Fleet-st. Mar. 25. Debts by G. W. Petter and C. Duff.—*Savory* and *Moore*, chemists and druggists, Cheltenham, Mar. 27.—*Shaw*, J. and Son, woollen manufacturers, Holywell-green, Halifax, as regards J. Shaw, Mar. 28. Debts by remaining partners.—*Sichel*, Pierce, and Co. American commission agents, Manchester, Mar. 20. Debts by Sichel.—*Smith* and *Cooper*, leather merchants, Canon-mile-st. Mar. 28.—*Stokes*, J. and I. and W. ironfounders, Sedgley, Mar. 20.—*Sureham*, J. and Co. corn chandlers, Norwich, Dec. 24. Debts by Sureham.—*Sykes* and *Gregory*, bricklayers and builders, Castleford and Hambleton, April 6, 1847. Debts by Sykes.—*Warren*, J. L. and *Burd*, attorneys, Market Drayton, Mar. 25. Debts by Warren.—*Williamson*, W. sen. and jun. cotton dealers, Stockport, Mar. 27. Debts by Williamson, jun.

Gazette, April 4.

Arthur, Collins, and Perkins, dealers in iron, coal, timber, and slate, Loctwithiel, March 28. Debts paid by Arthur.—*Barnes*, M. and T. grocers and drapers, Matfield, March 25. Debts paid by M. Barnes.—*Bennett*, S. and *Rykys*, E. H. surgeons, Hiffall, March 25. Debts paid by Bennett.—*Brooks* and *Green*, estate and house agents, Old Bond-st. April 4. Debts paid by Green.—*Clarke* and *Bond*, stock brokers, Bank-chambers, Lombury, March 31. Debts paid by Clarke.—*Davis* and *Reith*, linendrapers and undertakers, New Barum, March 12. Debts paid by Reith.—*Duke* and *Jaffrey*, wire workers, Allen's-court, and Newman-st. Oxford-st. March 29. Debts paid by H. S. Cafe, Great Marlborough-st.—*Emmet*, T. and Co. chemists and druggists, Preston, Jan. 1. Debts paid by Emmet.—*Falk*, D. and Co. jewellers, Manchester, April 2. Debts paid by D. Falk.—*Feller*, T. G. and *Booke*, J. J. K. manufacturing chemists, Brunton's-wharf, Commercial-road East, April 1. Debts paid by Boote.—*Gilpin*, Guy, and Co. iron manufacturers, Worthington, April 2. Debts paid by Guy.—*Howard*, J. and Co. hatters, Leicester, March 28.—*Langham*, J. and Son, lace manufacturers, Leicester, March 26. Debts paid by Langham, sen. and jun.—*Mills* and *Rothwell*, beer-sellers, Chorlton-upon-Medlock, March 30. Debts paid by Rothwell.—*Mills* and *Burgis*, auctioneers and appraisers, Sandhurst, Feb. 7.—*Ogden*, J. and *Summer*, E. brewers, Liverpool, March 31. Debts paid by Ogden.—*Ogilvie* and *Clarke*, West India agents, Lime-st.-square, March 31. Debts paid by Ogilvie.—*Paschett* and Co. quarrymen, Eccleshill, April 1. Debts paid by Paschett.—*Pinches* and *Billiter*, dye sinkers and fancy stationers, Oxendon-st. Haymarket, Dec. 31. Debts paid by Pinches.—*Pooley* and *Jones*, dressmakers, Holles-st. Cavendish-square, March 25.—*Powell* and *Salter*, tailors and drapers, Cornhill, Feb. 27.—*Prescott*, J. and *Taylor*, J. auctioneers, Manchester, March 31. Debts paid by Taylor.—*Supperbery* and Co. furriers, Staining-lane, April 2.—*Sudman*, W. and *Weddell*, T. paper stainers, Leeds, Oct. 1, 1844.—*Sherlock* and *Ackerley*, smallware dealers and hosiers, Manchester, March 25.—*Shannon*, T. and Son, painters and paperhangers, Leeds, March 28. Debts paid by J. Simpson.—*The Adelphi Fire Company*, March 24.—*Wass*, J. and *Wholey*, J. grocers, Dewsbury, March 13. Debts paid by Wass.—*Welch*, B. and J. G. W. cigar and wine merchants, Upper Wellington-st. Strand, April 1. Debts paid by B. Welch.—*White*, B. and W. H. butchers, High-st. Shadwell, Feb. 6.—*Winstanley*, T. and Son, auctioneers and appraisers, Liverpool, March 31.

Gazette, April 8.

Atkinson and Schlenker, oilmen and coal merchants, Red Lion-st. Holborn, March 28.—*Bainbridge* and *Muschamp*, drapers, Newcastle, Feb. 18. Debts paid by Bainbridge.—*Bibby*, T. and *Hawkins*, W. H. coal salesmen, Oswestry, April 7. Debts paid by Bibby.—*Boughton*, G. and *Turner*, J. Ribbon warehousemen, Cheap-side, March 31.—*Bowers* and *Warneley*, silk manufacturers, Leek, April 3. Debts paid by Warneley.—*Bookland*, G. and Co. soap makers and tallow chandlers, East-st. and James-st. Walworth, April 5.—*Callen*, Taylor, Courts, and Co. ribbon manufacturers, Coventry, April 4, as regards Callen. Debts by remaining partners.—*Cousens* and *Thackrey*, stone merchants, Bradford, March 13.—*Furness*, W. and Co. contractors, Walton, near Liverpool, and Liverpool, April 5.—*Gallen* and *Parker*, paper merchants, Newcastle, March 13.—*Ivey* and *Pearce*, printers and stationers, Swansea, April 8.—*Kemp*, T. and E. grocers and druggists, Birmingham, April 6.—*Langridge*, T. and *Huggitt*, S. coachmakers, &c. Tunbridge Wells, March 15.—*McGuire* and *Dawson*, manufacturing chemists, Salford, Jan. 30. Debts paid by McGuire.—*Pashley* and *Chadwick*, stone merchants, Dalton Brook, near Rotherton, April 2. Debts paid by Chadwick.—*Price* and *Scarlett*, butchers, Kingsgate-st. Bloomsbury, April 5.—*Proctor*, Rowell, and Co. worsted spinners, Bradford, March 31.—*Sandford*, J. O. and *Hosell*, S. B. book-sellers and printers, Shrewsbury, Feb. 28.—*Scott*, W. and J. farmers and coal merchants, Aynho, March 25.—*Sterner*, J. and Co. musical instrument dealers, Derby, April 5.—*Turton*, J. and W. flour and provender dealers, Liverpool, April 2.—*Turton*, T. and W. flour and provender dealers, Liverpool, April 2.—*Watts*, W. E. B. and *Shuttleworth*, S. Bankside, Southwark, April 1.—*Williams* and Son, silk merchants and linen drapers, New Brentford, April 5.

Gazette, April 11.

Baron and Akroyd, cotton manufacturers, Backup, April 16, 1846. Debts paid by Baron.—*Bell*, G. and *Ward*, C. P. E. cheese-mongers and provision dealers, Portland-row, High-st. Camberwell, April 7. Debts paid by Bell.—*Bell*, T. and *Challis*, W. H. brickmakers, Shepherd's-bush, April 10.—*Berry*, Slater, and Co. wine and spirit merchants, Sheffield, April 2, as regards Slater. Debts paid by J. T. Berry.—*Bond* and *Shuttleworth*, tanners, saddlers and ironmongers, Ipswich and Wood-bridge, April 9.—*Bowers* and *Wesley*, silk manufacturers, Leek, April 3.—*Bull* and *Whitmore*, fancy stationery manufacturers, Regent-st. City-road, April 3.—*Chandler*, W. L. and *Badham*, G. attorneys, Tewkesbury, April 4.—*Cooper*, Field, and *Hood*, iron manufacturers, Hunstret, near Leeds, Feb. 25. Debts paid by Cooper and Hood.—*Dale*, J. and Co. papermakers and regulators, Whitebrook, Penalt, April 5.—*Dinwiddie*, H. and Cook, G. opera-

tive chemists, Strand, April 9.—*Douglas*, J. T. and *Walker*, T. carpenters and builders, George-st. Greenwich, April 8. Debts paid by Douglas.—*Gaocigne*, T. and Co. hosiers, Nottingham, Feb. 19. Debts paid by T. Gaocigne.—*Greenhalgh*, E. and J. grease manufacturers, Bursley, April 4.—*Jones*, J. and *Lewis*, W. R. wine and spirit dealers, Bristol, April 4. Debts paid by Jones.—*James*, P. and *Roberts*, J. glaziers, colour merchants, &c. St. Asaph, March 19.—*Key* and *Mitchell*, agents for new inventions, Newgate-st. April 10. Debts paid by Key.—*Mitchell*, T. and *Sinden*, H. carpenters and undertakers, Hastings, April 5. Debts paid by G. B. Poole, Hastings.—*Newton* and *Jones*, drapers and grocers, Leigh, March 24. Debts paid by Newton.—*Park* and *Konig*, musical instrument makers, West Strand, and Lowther Arcade, April 10. Debts paid by Park.—*Storey*, W. and *Simpson*, J. painters and table-cover manuf. Lancaster, April 8. Debts paid by Storey.—*The Morrey Tanning Company*, tanners and curriers, Warrington, Feb. 28.—*Tichen*, J. and *Allen*, E. millers, Hythe, March 24. Debts paid by Allen.—*Woodbridge*, Brothers, rivet manufacturers, Old Gravel-lane, April 8.—*Woodward* and *Brown*, confectioners, Liverpool, April 8.—*Wyatt*, T. H. and *Brandon*, D. architects, London, March 17.

**HATCHETT'S HOTEL**, Piccadilly and Dover-street, established 100 years, near the Parks and Palace. No advance in prices during the Exhibition. Good beds, good living, and first-rate wines, cleanliness, and comfort. Warm baths always ready. Porters up all night.

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Thomas Spalding, esq. Drury-lane.  
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LAW TIMES Office, 20, Essex-street, Strand.

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## To Readers and Correspondents.

"R. H. S."—*If the type were larger we could not comprise all the reports within our limits. The heading of the columns, with the name of the Court, at once indicates to the eye where the pages of report begin and end.*

"A CONSTANT READER."—*Every office has its own practice in this respect. Some adopt the plan mentioned by our correspondent.*

"M. W."—"Macrae's Insolvency in the County Courts,"—"Cox and Lloyd's Practice of the County Courts,"—"Hughes's Concise Precedents in Modern Conveyancing,"—"Chitty's Practice of the Common Law Courts,"—*and "Wise's Bankruptcy."*

"F. B."—*We believe it is; but we have not seen the case.*

"LEX."—*The queries relate to Law, and not to Practice, and therefore do not come within our province.*

*Another large pile of letters on the Registration of Deeds lies upon our table, but it being impossible to insert a tenth of them, we shall endeavour to select such portions of them as present new suggestions or new arguments. For the most part they are repetitions of views already propounded. For the same reason we are unable to acknowledge each one separately.*

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## THE LAW TIMES.

SATURDAY, APRIL 26, 1851.

## REGISTRATION OF ASSURANCES.

THE expression of opinion from the Profession out of London is unanimous, that if there is to be a registration of deeds, it should be local, not central.

Three modes of effecting this are suggested:  
1st. By the clerks to unions.  
2nd. By the registrars of births.  
3rd. By the clerks of the County Courts.

We are indebted to our many correspondents on this subject for numerous details respecting the particular competency of each of these classes of officers for the duties of registrars, and from a review of them we shall be enabled to arrive at a satisfactory judgment upon their relative merits. It is very important that, in submitting to Parliament our objections to the present scheme, we should accompany those objections with a practical substitute. Merely dogmatical opposition to a measure is rarely successful; while rational, well-considered, and practical amendment as rarely fails.

VOL. XVII. No. 421.

Let us consider the fitness of each of the above classes in its turn.

It will be obvious that some peculiar qualifications will be required in a registrar of deeds. He ought to be a lawyer,—he must be a man of intelligence and of education, and a gentleman.

At first, our inclination was strongly in favour of the clerks to the unions or the registrars of births, for in those parts of the country with which we have a personal acquaintance all the clerks are attorneys, and all the superintendent registrars are either the clerks to the unions or persons of great respectability and intelligence; and we are so strongly impressed with the importance of a strictly local registry, that we were inclined to prefer the union districts as the limits of the registry, because they are the *smallest*.

But we are assured by many correspondents, in various parts of the country, that the clerks to the unions are not always lawyers; and that the registrars of births are frequently persons of inferior education and position. It has also occurred to us, that while it is most desirable that the registrar of assurances should have the knowledge of a lawyer, it would be most undesirable that he should practise as a lawyer. Now clearly it would be impossible, in any such small districts as a local registry demands, that a sufficient salary could be given to the registrar to induce a respectable attorney to give up practice and devote himself to the office; nor would even the addition of the niggardly salary of clerk to the union suffice to this end.

Now it appears that all the desired qualifications are combined in the clerks to the County Courts. They are lawyers. They are men of intelligence. They are gentlemen. Their districts are not inconveniently large for the purposes of a registry. Their duties are about to be so much increased, that it will be at least very desirable to remove them from the necessity of practising their profession, by giving them salaries and requiring all their services for the public. The addition to their duties as clerks of the County Courts of the duties of Registrars of assurances would permit of liberal salaries being given to them at less cost than would be that of insufficient payment of two officers and two establishments.

Our plan, therefore, would be, to make the County Court districts the limits of the local registries, and the clerks of the County Courts the registrars. The same building would suffice for the clerk's office, for the courts, and for the registry, by constructing fire-proof rooms for the latter. The same establishment of writers would serve for both purposes; and if the clerks were paid by liberal salaries, and forbidden to practise as attorneys, all jealousies and suspicions would be avoided. The cost would be comparatively trifling; access would be easy and inexpensive; the knowledge of the locality would render it more easy to prevent merely impertinent searches, and every good purpose of registration would be effected as completely as by the proposed centralised system, without entailing upon property the costs and inconveniences that unavoidably result from Lord CAMPBELL's scheme.

The manner of registration is altogether another question. Before time and labour are wasted upon that, it would be prudent to settle the two grand preliminary points: should there be a registration at all? And, if there be, should it be general or local, metropolitan or provincial? For the present, these questions only should engage the attention of our readers; there will be ample time for the consideration of the details when the outline is determined.

## THE LICENSE OF COUNSEL.

THE newspapers have reported a case in the Central Criminal Court, in which both jury and judge rebuked a counsel for adopting a

particular line of cross-examination in the defence of a prisoner.

The excuse of the learned counsel was, that he was following the instructions in his brief. Baron MARTIN is reported to have said thereupon, that—

He had intimated during the trial that the course which was taken was an improper one, and he still entertained the same opinion. Counsel are not bound to act upon instructions where it is evident that they are of an improper description; but it is their duty to exercise a discretion in such matters; and if they fail to do so, a great deal of that confidence which subsists between the judges and counsel will be destroyed. If he had been concerned in such a case, whether for a friend or on his own account, he should certainly have felt it his duty to refrain from acting upon such instructions, or from making use of such materials as had been furnished for the defence of the prisoner in this case.

Now, as many of our readers, in the performance of their duties as advocates, and most of them when, as attorneys, they have been instructing their advocates, have probably experienced the same doubt as was felt by the counsel in this case, a few thoughts on the subject may be acceptable to them.

Is an advocate, who is, be it remembered, avowedly speaking according to the instructions he has received from another, bound to follow those instructions, or is he to exercise his own discretion, even to entire disregard of, or, as it may be, in positive opposition to, them? The question is not so easily disposed of as Baron MARTIN supposes.

Presuming that the Advocate has no other knowledge of the case than the brief reveals, and its instructions are, that a certain state of facts there described is the prisoner's answer to the charge; but that defence involves unpleasant and apparently impertinent investigations into the private books and affairs of the witness. What is he to do? Until he has tried it by cross-examination, he has no means of ascertaining whether the defence is false or true. Is he not to suggest it? He may suspect it to be unfounded; but would he be justified in refusing to put the questions to the witness because he had doubts? Would not this be, in fact, to take upon himself the office of judge and jury, and try the prisoner by his brief?

Obviously, then, an Advocate cannot refuse to suggest a defence because it is a disagreeable one, or because he has doubts of its *bona fides*. But it is no less his duty to exercise a discretion in the manner of that suggestion, and in the extent to which he will carry it. He is bound, in the first instance, to assure himself that, if established, it is a real defence, and not a mere "*tu quoque*," or "*abuse the prosecutor*." Then, if he feels a doubt as to its *bona fides*, it is his bounden duty to conduct it with caution, and with as little offence as possible, and instantly to cease and retract, when satisfied that he has been put upon a false scent. In the manner of dealing with the suggested defence he has an absolute discretion, although we cannot admit that he has a right altogether to disregard it, unless it be insufficient or manifestly absurd or imprudent. It is a too common fault, especially with young Advocates, to be fettered by their instructions; and such a declaration, by a Judge who has enjoyed so large an experience as an Advocate, will not be without its influence in giving them courage to act more upon their own independent judgments, and it will be useful also in teaching the Attorneys who instruct them that *their* duty is to supply the facts, and *only* facts, and to submit these, with unrestricted power to deal with them as he may deem best, to an Advocate selected because they have confidence that he is the most competent to protect their client's interest, and from no other motive, neither from favour nor affection, hope nor fear.

## LAW OF EVIDENCE BILL.

LORD BROUGHAM has introduced a Bill for the amendment of the Law of Evidence, the principal feature of which is the abolition of all the remaining disabilities, and thus to permit the parties to a suit to be witnesses.

To a mind approaching the question for the first time, unbiassed by any prejudice of habit, and without any experience in courts of justice, it would appear to be extremely easy of solution. "You would, of course, hear," it would say, "the statement of every person who knows any thing about the matter, and form your judgment of the truth upon the balance of testimony. Least of all would you exclude those who are most likely to be better acquainted with the facts than any other persons."

That seemingly obvious principle, dictated by common sense and natural justice, has nevertheless been systematically violated, *entirely* in one branch of our jurisprudence, and partially in another. In the Common Law courts, the parties to a suit are wholly excluded from being witnesses; in Criminal and Magistrates' courts, one party is heard, but not the other. In the Equity, Ecclesiastical, and County Courts there is no such restriction, and the examination of the parties is not only permitted, but is the main source upon which those tribunals rely for ascertaining the truth.

It was not very long ago that the restrictions of witnesses in the Common Law courts were ten times more numerous than now they are. Every person who had any interest in a suit, however trivial or remote, was inadmissible. When Lord DENMAN proposed to abolish these disabilities, he was met with precisely the same objections from precisely the same quarters as now assail Lord BROUGHAM's Bill. But, happily for society, the Legislature took a more enlightened view of the question than did the lawyers, and the measure became law. It has been found in practice not to produce one of the evils predicted of it, while it has vastly facilitated that which is, or ought to be, the object of all evidence, the ascertainment of the truth.

The LORD CHANCELLOR, whom we are astonished to find the opponent instead of the promoter of almost all improvements, has entered the lists against Lord BROUGHAM's Bill, and his objections embody all the fallacies and prejudices that are usually arrayed on behalf of restricted testimony. Let us give to these a candid consideration.

The natural method of learning the facts of any occurrence which every person would adopt in his own household would be, of course, to examine the principals as well as the spectators. No man would ever dream of settling a dispute among his children or servants, without making inquiry of the facts from the disputants themselves.

It is for the advocates of restriction to shew why that course, which their own common sense would teach them to pursue in their own case, should not be pursued by legal tribunals for the attainment of the same object—that of learning the *very truth*.

Yet the fact is, that many lawyers, if not a majority of them, are hostile to the abolition of disabilities. The reason of this is twofold. In the first place, the influence of mere habit over the opinions is enormous. Bred to a system, never having questioned it, we assume it to be right, and that which is really only *assent* is mistaken for *conviction*. Secondly, from the very nature of our training it is extremely difficult for us to divest our minds of the notion that a suit is a conflict of skill, in which the victory is due to something besides right. We cannot readily realise to ourselves that while *our* business is to do the best we can, and make the best case, for one side only, the duty and object of the tribunal is to learn the *very truth*. The only question, therefore, properly to be considered is, what is the best method of ascertaining that truth? Let us see what reason teaches as to this? What does experience say? What are the objections to it and their worth?

Reason and common sense instantly dictate that the truth can be best learned by inquiry from *all* sources of information. To exclude *any* is to endanger the result. Degrees of *reliableness* (to coin a phrase) only go to credit and not to competency; the very purpose of a judge and jury is to weigh these degrees of credit. A hearing should be refused *only* to those who know *nothing* at all about the matter. Obviously all who know *anything* about it ought to be required to state what they know, and then it is the business of the Court to determine the *degree* of credit to be given to the

statement. Inasmuch as no testimony is *infallible*, the duty of weighing and testing its worth is required to be performed upon *every* item of evidence adduced, and we defy the most ingenious philosopher to lay his finger upon any one point of the scale of credibility, and say, with any reason, that *there* credibility ends and total exclusion is necessary. For instance, a son has usually as great an interest in the result of his father's suit as the father himself, yet, such is the absurdity of the present practice, the jury are deemed to be competent to determine the credit that a son, so influenced, is entitled to, but not the weight due to the evidence of the father. Again, to take a still more striking instance of absurdity. In an action for seduction, the daughter, who is the real plaintiff, and the party having the deepest interest in the verdict, is admitted as a witness, while the father, who has but a secondary interest in it, is excluded. The defendant is also excluded, so that the tribunal, which professes to be governed in its admissions and rejections of evidence by an extreme sense for the truth and the right, actually hears the interested party on *one side only*, and refuses to hear the statement of the other party. And this is the system of impartial justice which some unreflecting persons are so desirous of maintaining!

The law as it *was*, which excluded *all* pecuniary interests from the witness-box, was much more rational than the present one, for at least an intelligible line was drawn, and there was a reason, although a narrow one, to support it. The error consisting in the assumption that no other interest but a pecuniary one could bias a witness. But the law as it *is* draws no rational and intelligible line. It permits the jury to form a judgment upon the degrees of value to be attached to testimony likely to be influenced by interest, but pronounces the jury incompetent to the same task where the interest is that of being a party to the suit, even although it may, and *often* does, happen that the interest of the witnesses admitted is vastly greater than that of the parties excluded. Why a jury should be competent to form a judgment of the worth of testimony up to that point, and then be suddenly pronounced incompetent, we must leave to be shewn by the supporters of exclusion.

Here we must pause. The rest of the argument must be deferred for another week.

## THE LEGISLATOR.

## NEW STATUTES.

14 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

## CAP. I.

An Act to amend the Passengers Act, 1849.

(April 1, 1851.)

This Act makes several amendments in the Passengers Act, empowering the commissioners to fix different lengths of voyage for steam and sailing vessels; and to substitute a different dietary. 4. Passenger ships putting into port damaged are not to proceed without a certificate of fitness. 5. Powers of governors of colonies and Governor-General of India in Council, as to length of voyage and dietary, are extended. 6. A bond to be given by masters of British and foreign passenger ships. 7. A counterpart of which is to be certified and sent to the colony to which the ship is bound, and received in evidence.

## CAP. II.

An Act to authorise the Inclosure of certain Lands in pursuance of the Sixth Annual Report of the Inclosure Commissioners. (April 1, 1851.)

## CAP. III.

An Act to apply the sum of Eight Millions out of the Consolidated Fund to the service of the year 1851. (April 1, 1851.)

## CAP. IV.

An Act to enable her Majesty to appoint a Vice-Chancellor in the room of Sir James Wigram, resigned. (April 1, 1851.)

We give this statute entire.

Whereas by an Act passed in the fifth year of the reign of her present Majesty, session one, chapter the fifth, her Majesty was by section nineteen empowered to appoint by letters patent under the great seal two fit persons to be additional judges assistant to the Lord Chancellor in the discharge of the judicial functions of his office, each of such additional judges to be called Vice-Chancellor; and by section twenty-one it was provided that nothing therein contained should authorise the appointment

of a successor to the Vice-Chancellor secondly appointed under the authority of the said Act: And whereas the Right Honourable Sir James Wigram, knight, was the Vice-Chancellor secondly appointed under the said Act: And whereas the said Sir James Wigram has, by reason of ill-health, resigned the office of Vice-Chancellor, to which he had been so appointed: And whereas the state of business in the Court of Chancery renders it expedient that a Vice-Chancellor should be appointed in the place of the said Sir James Wigram: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Appointment of additional Vice-Chancellor.*—It shall be lawful for her Majesty to appoint, by letters patent under the Great Seal of the United Kingdom, a fit person, being or having been a barrister-at-law of fifteen years' standing at the least, to be an additional judge assistant to the Lord Chancellor in the discharge of the judicial functions of his office, in the place of the said Sir James Wigram, and to be called Vice-Chancellor.

2. *Rank, &c. of additional Vice-Chancellor.*—The Vice-Chancellor to be appointed under this Act shall have all the same powers and privileges, and the same rank, and shall be subject to the same provisions, duties, and observances, as the said Sir James Wigram had or was subject to under the said Act of the fifth year of her present Majesty, Session One, Chapter the Fifth, excepting that he shall have rank and precedence next after the Vice-Chancellors that now are.

3. *To have a secretary, usher, and trainbearer.*—He shall have a secretary, usher, and trainbearer, to be from time to time appointed and removed by him at his pleasure; and the secretaries, registrars, and other officers appointed to attend the Lord Chancellor shall attend such Vice-Chancellor when sitting for the Lord Chancellor, and also when sitting in his separate court, as circumstances shall require, and as the Lord Chancellor shall order or direct.

4. *Salaries.*—The salary of such Vice-Chancellor, and the salaries of his secretary, usher, and trainbearer, shall be of the same amounts, and paid out of the same funds, and in like manner as the salaries of the said Sir James Wigram, his secretary, usher, and trainbearer, were and were directed to be paid under the said Act of the fifth year of her present Majesty, chapter the fifth.

5. *Retiring pension.*—It shall be lawful for her Majesty, by letters patent under the Great Seal of the United Kingdom, to grant to such Vice-Chancellor, on his resignation of or ceasing to execute his office, an annuity of the same amount, after the same period of service, under the same circumstances, subject to the same conditions, and payable out of the same fund as the annuity authorised to be granted to each of the Vice-Chancellors appointed under the said Act of the fifth year of her present Majesty, chapter the fifth.

6. *Lord Chancellor may appoint persons to keep order in court.*—It shall be lawful for the Lord Chancellor to appoint one or more person or persons, removable at pleasure, for the purpose of keeping order in the court of the Vice-Chancellor to be appointed under the authority of this Act; and the salaries of the persons appointed or to be appointed under this Act, or under any Act or Acts now in force, to keep order in the court of the Vice-Chancellor to be appointed under the authority of this Act, shall be of such amount, not exceeding the yearly sum of 80*l.* as the Lord Chancellor may think reasonable, and such salaries shall be paid to each such person so to be appointed out of the same funds, and at the same time, and in like manner as the salaries of such persons have heretofore been paid.

7. *Nothing to authorise the appointment of a successor.*—Nothing herein contained shall authorise the appointment of a successor to the Vice-Chancellor appointed under the authority of this Act.

## CAP. V.

An Act for the Regulation of her Majesty's Royal Marine Forces while on Shore. (April 11, 1851.)

This is the annual Act.

## CAP. VI.

An Act for punishing Mutiny and Desertion, and for the better payment of the Army and their Quarters. (April 11, 1851.)

## CAP. VII.

An Act to amend an Act of the Parliament of Ireland of the 25th year of King George the 3rd, for explaining and amending several laws for the encouragement of Agriculture, so far as relates to leases for the erection of Mills. (April 11, 1851.)

## CAP. VIII.

An Act to extend the Provisions of the Designs Act, 1850, and to give Protection from Piracy to Persons exhibiting new Inventions in the Exhibi-



tion of the Works of Industry of all Nations in One thousand eight hundred and fifty-one.

(April 11, 1851.)

We give this statute entire.

Whereas it is expedient that such protection as hereinafter mentioned should be afforded to persons desirous of exhibiting new inventions in the Exhibition of the works of industry of all nations in one thousand eight hundred and fifty-one: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—(a)

1. *Proprietors of new inventions to be allowed to exhibit them without prejudice to letters patent to be thereafter granted. Invention to be provisionally registered, and not to be used before granting of the letters patent.*—Any new invention for which letters patent might lawfully be granted may at any time during the year one thousand eight hundred and fifty-one, but not afterwards, be publicly exhibited in any place previously certified by the lords of the committee of Privy Council for trade and foreign plantations to be a place of exhibition within the meaning of the Designs Act, 1850, without prejudice to the validity of any letters patent, to be thereafter during the term of the provisional registration hereinafter mentioned, granted for such invention to the true and first inventor thereof: provided always, that such invention have previously to such public exhibition thereof been provisionally registered in manner hereinafter mentioned; and provided also, that the same be not otherwise publicly exhibited or used by or with the consent of the inventor prior to the granting of any such letters patent as aforesaid, except as hereinafter mentioned: provided also, that no sale or transfer, or contract for sale or transfer, of the right to or benefit of any invention so provisionally registered, or of the rights acquired under this Act, or to be acquired under any letters patent to be granted for such invention, shall be deemed a use of such invention; and the publication of any account or description of such invention in any catalogue, paper, newspaper, periodical, or otherwise shall not affect the validity of any letters patent to be during such term granted as aforesaid.

2. *Public trial of agricultural or horticultural implements, under the direction of the Commissioners, not to prejudice letters patent.*—The public trial or exhibition of any such invention as aforesaid (being an invention for purposes of agriculture or horticulture), which shall be certified by the Lords of the said committee to have taken place under the direction of the Commissioners for the Exhibition of 1851 for purposes connected with the exhibition thereof, in such place of public exhibition as aforesaid, whether such trial or exhibition take place before or after the passing of this Act, shall not prevent the provisional registration of such invention under this Act, nor prejudice or affect the validity of any letters patent to be granted for such invention during such term as aforesaid.

3. *Certificate of invention to be granted for provisional registration.*—Her Majesty's Attorney-General, or such person or persons as he may from time to time appoint to issue certificates under this Act, on being furnished with a description in writing, signed by or on behalf of the person claiming to be the true and first inventor within this realm of any new invention intended to be exhibited in such place of public exhibition as aforesaid, and on being satisfied that such invention is proper to be so exhibited, and that the description in writing so furnished describes the nature of the said invention so intended to be exhibited, and in what manner the same is to be performed, shall give a certificate in writing, under the hand or hands of such Attorney-General or the person or persons appointed as aforesaid, for the provisional registration of such invention.

4. *Certificate of invention to be registered.*—The registrar of designs acting under the Designs Act, 1850, upon receiving such certificate, and being furnished with the name and place of address of the person by or on whose behalf the registration is desired, shall register such certificate, name, and place of address, and the invention to which any certificate so registered relates shall be deemed to be provisionally registered, and the registration thereof shall continue in force for the term of one year from the time of the same being so registered, and the registrar shall certify, under his hand and seal, that such invention has been provisionally registered, and the date of such registration, and the name and place of address of the person by or on whose behalf the registration was effected: Provided always, that if any invention so provisionally registered be not actually exhibited in such place of public exhibition as aforesaid, or if the same invention be in use by others at the time of the said registration, or if the person by or on whose behalf the said registration has been effected be not the first and true inventor thereof, such registration shall be absolutely void.

(a) This Act is entirely for the protection of exhibitors of new inventions at the Great Exhibition.

5. *Description to be preserved, and invention to be marked with the words "provisionally registered."*—The description in writing of any invention so provisionally registered shall be preserved in such manner and subject to such regulations as the Attorney-General shall direct, and any invention so provisionally registered, and exhibited at such place of public exhibition as aforesaid, shall have the words "provisionally registered" marked thereon or attached thereto, with the date of the said registration.

6. *Provisional registration to confer same benefits as under the Designs Act, 1850.*—Such provisional registration as aforesaid shall during the term thereof confer on the inventor of such invention, with respect thereto, all the protection against piracy and other benefits which by the Designs Act, 1850, are conferred upon the proprietors of designs provisionally registered thereunder with respect to such designs; and so long as such provisional registration continues in force, the penalties and provisions of the Designs Act, 1842, for preventing the piracy of designs, shall extend to the acts, matters, and things next hereinafter mentioned, as fully and effectually as if those penalties and provisions had been re-enacted in this Act, and expressly extended to such acts, matters, and things; that is to say, to the making, using, exercising, or vending the invention so provisionally registered, to the practising the same or any part thereof, to the counterfeiting, imitating, or resembling the same, to the making additions thereto or subtraction from the same, without the consent in writing of the person by or on whose behalf the said invention was so provisionally registered.

7. *Letters patent thereafter granted to be as valid as if inventions were not registered or exhibited.*—All letters patent to be during the term of any such provisional registration granted in respect of any invention so provisionally registered shall, notwithstanding the registration thereof, and notwithstanding the exhibition thereof in such place of public exhibition or otherwise as aforesaid, be of the same validity as if such invention had not been so registered or exhibited; and it shall be lawful for the Lord High Chancellor, if he think fit, on the grant of any letters patent to any inventor in respect of any invention provisionally registered under this Act, to cause such letters patent to be sealed as of the day of such provisional registration, and to bear date the day of such provisional registration, the Act of the eighteenth year of King Henry the Sixth or any other Act notwithstanding.

8. *Proprietors of new and original designs exhibited to be entitled to benefits of Designs Acts, although designs have been previously published elsewhere than in the United Kingdom, if not previously publicly sold or used.*—Notwithstanding anything contained in the Designs Act, 1850, and the two Acts therein referred to, and called the Designs Act, 1842, and the Designs Act, 1843, the protection intended to be by those Acts extended to the proprietors of new and original designs shall be extended to the proprietors of all new and original designs which shall be provisionally registered and exhibited in such place of public exhibition as aforesaid, notwithstanding that such designs may have been previously published or applied elsewhere than in the United Kingdom of Great Britain and Ireland; provided that such design or any article to which the same has been applied have not been publicly sold or exposed for sale previously to such exhibition thereof as aforesaid.

9. *The Designs Act, 1850, and this Act to be construed as one Act.*—All the provisions of the Designs Act, 1850, and the provisions incorporated therewith, relating or applicable to the designs to be provisionally registered thereunder, or to the proprietors of such designs, except the provision for extending the term of any such provisional registration, shall, so far as the same are not repugnant to or inconsistent with the provisions of this Act, apply to the inventions to be provisionally registered under this Act, and to the inventors thereof; and the said Designs Act and this Act shall be construed together as one Act.

10. *Short title.*—This Act may be cited as The Protection of Inventions Act, 1851.

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

### Summary.

THE powers of the Poor Law Commissioners were brought under the consideration of the Court in *Reg. v. The Poor Law Board*, 17 Law T. 38. The extent of their authority was questioned: how far their orders were to supersede those of governors of the poor under a local Act. The Court thus laid it down:—"The commissioners have a jurisdiction which attaches everywhere, and is not ousted by the operation of any local statute. The autho-

rities constituted by such statute must act in future in subordination to the commissioners, and the rules made from time to time by the latter would overrule any conflicting rules previously made by the former, nor can the former make any binding rules for the future but under the sanction of the latter. The commissioners, however, cannot put an end to, set aside, or alter the relations *inter se* of the local authorities, which may be guided and controlled, but the management cannot be taken from them. . . . Whatever merely regulates or controls the relief or management of the poor, or the government of the workhouse, or merely guides or controls the vestry and parish officers will be within the power of the commissioners; but any particulars which substantially alter the machinery provided by the local Act for its administration will be beyond it." Therefore an order directing a transfer of power to appoint certain officers from the vestry to another body, called the directors under the local Act, was held to be bad *pro tanto*.

An indictment for a nuisance by burning arsenic whereby noisome smells arose, was held to be sustained by evidence that cattle and trees in the neighbourhood were poisoned thereby, although, in fact, there was no positive smell. (*Reg. v. Garland*, 17 Law T. 39.)

I SHALL be greatly obliged if any of your numerous readers, who are concerned in turnpike trusts, will give me his view of the following facts.

A butcher, living at the village of S., has once or twice a-week to make a circuit of several villages to convey meat to his customers. Somewhere after leaving home he passes through a toll-bar, and travels on the turnpike not 100 yards, when he has to take a branch-road to two or three villages. Having passed through those villages he enters again upon the turnpike at some distance downwards, travels a short way upon it, and then turns off the turnpike to another village, and so onwards to his home. In this last instance he passes through no toll-bar. It is admitted that he is travelling upon the turnpike in a legitimate manner, and in the due exercise of his business, and that there is no attempt to evade toll.

A summons was issued against him for refusing to pay toll under sec. 139 of 3 Geo. 4, c. 126. Passing through the toll-bar no toll was demanded, the defendant being well known to the toll-gate keeper. Upon these facts can the subsequent distance travelled upon the turnpike (but when no toll-bar was passed) be added to the first-named distance of less than 100 yards (*vide* sec. 32 of the above Act) when a toll-bar was passed in order to make the aggregate distance travelled 100 yards? Or ought not the distance under these facts to be 100 consecutive yards, and near to a toll-bar? And if it was merely a crossing of the turnpike in the first instance, would that alter the case? Should not the toll, to be payable, have been demanded? And as it was not demanded, and even if it had been so, at the crossing, or after 100 yards travelled on the road, is not the remedy, if any, by action? I have already had the opinion of a barrister, that the 100 yards ought to be consecutive, but to make assurance doubly sure I am desirous of having the opinion of some of your readers, as the question seems to resolve itself very much into a point of practice. Supposing my client had been a stranger, on passing through the toll-bar, where he merely crossed the turnpike, and no toll was demanded, because not then payable, and during the after-part of the day, in driving for pleasure, he had happened to get upon the turnpike again—surely he would not, by travelling 100 yards upon it (miles from the place where he crossed), be thus held liable to toll?

A CONSTANT READER.

Bradford, 29th January, 1851.

A HIGH SHERIFF IN DIFFICULTIES.—Some days since Calcraft, the hangman, received an intimation from the gaol authorities that his services would be required on Wednesday morning next, at Ipswich, for the purpose of carrying into execution the last sentence of the law upon Maria Clarke, but on Tuesday morning last a note was received from that functionary, stating that his professional engagements elsewhere would prevent his presence at Ipswich on Wednesday, as required. Immediately after the receipt of Calcraft's note, a messenger was despatched from Ipswich to London, for the purpose of having a personal interview with Calcraft, who was informed by the messenger that his presence was necessary at Ipswich on Wednesday next, for the purpose already stated, when he replied that he was already engaged to proceed to Taunton for a

like purpose on Wednesday, the day appointed for the execution at Ipswich. Finding that it was impossible for Calcraft to come down to Ipswich, he was asked if he could find a substitute. He replied he could not. This announcement has caused no pleasurable feelings to those who are bound to see that the execution takes place at the hour appointed. Unless the day named for the execution be altered, or a substitute found in the place of Calcraft, the High Sheriff, whose present position no one, we think, can envy, will have, in accordance with the present state of the law, to perform a duty repugnant to the feelings of thousands of her Majesty's subjects. We believe that an application was made on Tuesday last at the Home-office for the day named for the execution of Maria Clarke to be altered; but we understand that the application was not entertained.—*Standard*.

**SALARIES TO CORONERS.**—By a Bill in the House of Commons, which is to be read a second time after the recess, it is proposed to pay coroners by salaries to be fixed by quarter sessions or town-councils, instead of the present mode of 1l. 6s. 8d. for every inquest; such salaries to commence from Michaelmas next.

**COUNTY CORONERSHIP.**—A smart contest has just taken place for the coronership of one of the divisions of Warwickshire. At the outset there were three candidates; but some time prior to the election one of them, Mr. Field, of Leamington, retired; thereafter the struggle was between Mr. G. S. Poole, of Kenilworth, and Mr. Smith, of Warwick, partner of the late coroner. At the close of the poll, Mr. Poole was the victor; the numbers being for Poole, 1,108; for Smith, 817.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

In the case of *Lawrence v. The Great Northern Railway Company*, 17 Law T. 39, the important point was decided, that although their Act of Parliament may give permission to a company to construct their works in a particular manner, still, if unforeseen damage arises to any person by reason of such construction, they are liable in damages, and their Act will not protect them. In the case of *R. v. Pease*, 4 B. & Ad. 30, a company was held not to be liable for injury sustained by reason of horses taking fright at some works authorised by their Act to be constructed near a highway. But the Court draws a distinction between that case and the present one, that, there, the very proximity itself was expressly sanctioned by the Act; here, the company might, by proper caution in constructing their works, have avoided the injury complained of. E. W. C.

## PROCEEDINGS IN WINDING UP DURING THE WEEK.

(From our own Reporter.)

AFTER a holiday, the proceedings in winding up were resumed on Wednesday.

A new point of law in connection with the liability of contributors appears likely to arise out of a state of things developed in the progress of the Eastern Counties and Southend Junction Railway. On Thursday Mr. Causton, who acted as secretary to the company, admitted, in reply to Mr. Williams, who appeared as counsel for one of the provisional committee, that although he neither applied for shares nor had them allotted, he nevertheless, in conjunction with others, signed the "subscription contract," for 1,250l.; and the question arising is, whether the witness, and those who so signed with him, even though they took no shares, are legally liable for the amount of subscription signed for, towards paying off the liabilities. It was stated that these subscription contracts were commonly "got up" at the period, to delude Parliament and the public, and any legal consequences likely to arise from this misconduct were attempted to be argued away by the assertion that the deed, under the operation of winding up, was waste paper and a perfectly dead letter. Sir William Horne intimated his opinion that, irrespective of the influence the document might have had in deluding Parliament and the public originally, it was now a liability both in law and equity. A complaint was made against the official manager, to the effect that there had been a refusal to produce this document, and the reply was, that it had been withheld in consequence of its having been considered as a "valueless" document, as he, the official manager, did not seek to charge the individuals as

provisional committee-men for any signatures for subscriptions contained in it.

It is understood that an early day is to be fixed for the delivery of Master Blunt's decision, now upwards of two months maturing, in the matter of the Madrid and Valencia Railway. The London and South-Western Railway have made a return to the interrogatories of the official manager relative to Mr. Chadwick's property in their company, and it is stated that, as the information furnished in the replies are not satisfactory, a suit in equity will be commenced against the South-Western on the subject.

On Thursday, the first appeal upon the question of calls, as yet an undetermined one, was to have come on before Vice-Chancellor Bruce, in the case of the Rugby, Warwick, and Worcester Railway, where one of 4s. has been made; but in spite of the desire that exists to obtain some standard decision on the subject, the hearing of the matter was postponed until the first day of the next seal.

It is understood that Mr. Dobie, the legal representative of the North British Insurance Company, intends to bring an action against the official manager of the Royal Bank of Australia, with the view of establishing their claim of some 40,000l. which was lately disallowed by his Honour Master Richards.

**THE GENERAL COMMISSION SHIP LOAN AND INSURANCE COMPANY.**—On Wednesday there was a meeting before Master Sir William Horne, to consider claims brought in against the company. Messrs. Maples and Co. attended on behalf of the official manager, Mr. Hutton, and exhibited a list of the claimants whose demands—amounting to between 1,000l. and 2,000l.—were uncontested. These the Master at once admitted as debts against the estate. Some few items were contested, but they were trifling in amount, and in one case a compromise was effected by a claimant consenting to take 50l. in lieu of 76l. the original demand.—*Morning Chronicle*.

**EASTERN COUNTIES AND SOUTHEAST JUNCTION.**—On Thursday a meeting was held before his Honour Sir William Horne, for the further settlement of the list of contributories. The case of Mr. J. Mainwaring occupied the sitting, and he was sought to be placed on the list as having been one of the members of the provisional committee who agreed to take 100 shares. Mr. Causton, the secretary of the company, was examined at considerable length by Mr. Williams, and the case was adjourned for further proof. The witness, in the course of his examination, admitted that he was one of the original promoters; that though his signature appeared in the subscription contract deed for 1,250l. he did not know in what character or under what circumstances he signed it. Mr. H. Harris, who appeared for one of the provisional committee, said that these subscription contracts were usually "got up" at the period to delude the public and the House of Commons.—*Times*.

**DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY.**—On Thursday, at a meeting of this company, further proceedings were adjourned, after some discussion, until the result of the appeal now before the Lord Chancellor is known. It is understood that an application is likely to be made to the Court to rescind the order for winding up this company.—*Daily News*.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]

*This day.*—Wheal Concord, at one. Horne.  
Cheltenham, Oxford, and Brighton Railway, list, at eleven. Humphry.  
Banwen Iron Company, at three. Kindersley.  
*Monday.*—Bridgewater and Murehead Railway, examination of witnesses, eleven to four. Kindersley.  
General Commission, &c. at one. Horne.  
Sligo and Shannon Railway, list, at eleven. Farrer.  
Dover and Deal Railway, at one. Brougham.  
Vale of Neath, at two. Brougham.  
*Tuesday.*—Staffordshire and Shropshire, at three (Archibald's case). Richards.  
*Wednesday.*—Hemp and Flax, at twelve. Horne.  
*Thursday.*—Universal Gas, list, at twelve. Rose.  
Northern and Southern Railway, at twelve. Humphry.  
*Friday.*—Great North of England Railway, at twelve. Blunt.  
Port of London, at half-past twelve. Tinney.  
Hull Glass, at twelve. Farrer.  
Galway and Ennis, at eleven. Blunt.  
Barbadoes Railway; charge against directors, at twelve. Blunt.  
*Saturday.*—Independent Insurance, at one. Blunt.

## REAL PROPERTY LAWYER AND CONVEYANCER.

A CURIOUS and interesting point under the Wills Act (1 Vict. c. 26) was raised in *Malcolmon v. Malcolmon*, 17 Law T. 44. A devised freehold premises to B. "to be kept in trust for C. that is, B. is to let the premises and give the rent to my son C. for his support." Did this pass the fee? Sec. 30 of the Wills Act gives the same estate to the *cestui que trust* as the trustee takes. What estate, then, did B. take—the fee or only a life estate? The Court held, that the fee passed under these general words, and that the Wills Act had put real and personal estate on a parity in this respect. We are obliged to two or three correspondents for directing our attention to an error into which we had fallen in commenting upon the case of *The Attorney-General v. Napier*, 17 Law T. 28. Mised by the heading of the report, we stated the point decided to be, that the property of an officer in the East-India Company's service dying in India was liable to legacy duty, because he was domiciled in England. It should have been, that such was the case with an officer in her Majesty's service dying in India. We ask our readers to make this alteration with their pens.

## REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—As we have not had an opportunity of expressing our sentiments upon this subject in the shape of a memorial, permit me to do so by letter, as "One, &c." opposed to the registration of deeds, and who has not yet heard any one speak in favor of it. We have seemed hitherto to do very well without it, nor have I heard of any circumstances having occurred to call it into requisition; we have considered that the possession of well-drawn deeds in the hands of a mortgagee was a good feature on the security, and the absence of such deeds warned a second mortgagee, and kept their own registry undivulged, until due inquiry made. If registration becomes law (which I hope it will not), this little planet, so far as our laws extend, may be said to be hanging by a registration thread, subject to public gaze, conflagration, and too weak to hold long: title defeated by imperfect registration; deeds of no value without it, and which might possibly be omitted, either from negligence, ignorance, or by stratagem, with the view of fraudulently defeating a mortgage or purchase, whereby a second mortgagee would be let in, and get priority without the title deeds; and so anxious are mortgagors in general for secrecy, that a local registry would prevent many mortgages being effected, and would certainly add to the cost. I have, therefore, been unable, in my humble comprehension, to discover the wisdom of this Bill. Yours, &c.

R. BROWNLOW.

Bolton-le-Moors, April 22, 1851.

## REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I quite agree with you as to the propriety of local registration, but I quite disagree with you as to registrars of births being made registrars of deeds. Probably you are not aware that out of twenty registrars of births in the provinces, about nineteen are illiterate men. A short time since, I called at the registrar's to register the birth of my child, and in order to put half-a-crown in the registrar's pocket, I asked for a certificate. After a variety of nervous movements, the old gentleman produced a blank form of certificate, and said to me, "I am a very poor hand at writing, sir, would you mind filling it up, and I will sign my name?" I filled it up, and the registrar, after numerous extraneous twistings, managed to scratch his name: he would not make a good registrar of deeds.

Beside, most of the registrars of births keep shops, and it would not be particularly pleasant for a professional man to have to find his way through cheeses, candles, and treacle, to the Registry Office at the back of the shop, saying nothing of the registrar's importunities to purchase scented soap, pickles, &c.

County Court offices are almost as numerous as Registry of Births offices, and I have no hesitation in saying, that County Court offices would be the most suitable offices for the Registration of Deeds.

I am, Sir, yours, &c.

April 22, 1851. A COUNTRY SOLICITOR.

### Queries on Points of Practice.

#### STAMPS ON CONDITIONAL SURRENDERS IN PURSUANCE OF A COVENANT IN A FREEHOLD MORTGAGE DEED.

HAVE not your correspondents, "J. W. K." and "W. and L.," overlooked the still unrepealed provision in the old Stamp Act, that where any copyhold lands shall be mortgaged or charged together with some other property for the same sum of money, the *ad valorem* duty shall be charged on the deed or instrument relating to the other property? Negatively, as this so decidedly does, the payment of any *ad valorem* duty upon the surrender, can there be any doubt that the 20s. stamp is correct as upon a surrender not otherwise charged? If the uniform use of the 20s. stamp is incorrect now, does it not follow that it has ever been so?

Bye, April 22, 1851.

J. B. COLMAN.

#### TITHE COMMUTATION.

CAN any charge be legally made for the ten days' notice required to be given by the Tithe Commutation Act to the parties liable to pay the rent-charge, and for the service of such notice, and if so, what charge?

Cardigan, April 22, 1851.

A. B.

### THE MERCANTILE LAWYER.

THE law will not sanction fraudulent preferences among creditors; especially do the Courts set their faces against the practice of procuring the assent of an obstinate creditor to a composition by a private arrangement for payment to him of a larger sum than was to be paid to the rest of the creditors. Such was the attempt in *Malalies v. Hodgson*, 17 Law T. 37. The composition was pleaded in answer to an action for the debt, and it was replied that the release was obtained by the fraud above described. But it appeared that the plaintiff had been himself a party to the same fraud, and the question was, whether the defendant could set up a counter-fraud between himself and the plaintiff, by which they deceived other persons, as an answer to the charge of fraud practised by the defendants on the plaintiff, or rather as an estoppel on him from setting up that fraudulent representation, which would have the effect of depriving him of part of his original right. The Court differed in opinion upon the question, but the majority held that the defendant might do so, and was entitled to the verdict.

In *Lucas v. Beale*, 17 Law T. 40, an agreement made by B. with the manager of a theatre, "in the name of the gentlemen of the orchestra," was held to be a joint contract, upon which B. could not sue alone.

The liability of a husband was again questioned in *Ambrose v. Kerrison*, 17 Law T. 41. The husband and wife had been separated for some years previously to the death of the latter; a third person paid for her funeral, and sought to recover from the husband. He was held to be entitled to recover, even although it appeared that he might have communicated with the husband before incurring the charge, but did not.

*Bottomry* is a pledge of the ship as a security for the repayment of money advanced to an owner for the purpose of enabling him to carry on the voyage. This contract is usually expressed in the form of a bond, called the Bottomry Bond, that if the ship be lost on the voyage the lender loses the whole of his money; but if the ship and tackle reach the destined port, they are to become liable for the money lent and the stipulated premium or interest. The case of *The Catharina*, 17 Law T. 43, was a question as to the extent of this liability off the ship. She put into a foreign port, and was there sold by authority of the master. The purchaser had no notice of the bond. It was held that the bond attached to the ship, and her value being insufficient to meet it, a sale was decreed.

A point of considerable importance to the Mercantile Community is reported from the Court of Bankruptcy, in Dublin. In *Re James Hurley*, 17 Law T. 44, it was decided that a bankrupt about to abscond, or to remove, or conceal his property, may be arrested under section 94 of the Bankruptcy Consolidation Act (English), even although there has been an adjudication. Hitherto, it has been the practice to summon such bankrupt in the first instance, and thus to give him an opportunity for absconding, or making away with the property.

In *Re Allen*, 17 Law T. 44, accepting an accommodation bill at a time when an acceptor is unable

to pay his debts was held to be a contracting of a debt without probable expectation of paying the same, and the insolvent was remanded for sixteen months.

WE understand that Mr. Robert Stephenson, Dr. L. Playfair, Mr. Webster, and Mr. P. Le Neave Foster have been appointed by the Attorney-General, under the provisions of the Protection of Inventions Act, the commissioners for deciding upon according certificates of registration to exhibitors desirous of availing themselves of the benefit which this act confers. The selection of such a body of gentlemen is calculated to afford the most complete satisfaction to exhibitors of unpatented inventions.

### COUNTY COURTS.

#### Summary.

THE Court of Ex. has reversed the decision of WILLIAMS, J. in Chambers, as to the meaning of the word "may" in the 13th section of the County Courts Extension Act, which provides that if an action be brought in the Superior Court for a sum within the jurisdiction of the County Court, and the plaintiff make it appear to the Court, or to a Judge in chambers, that the action was brought for a case in which there is concurrent jurisdiction with the Superior Court, or for which no plaint could have been entered in the County Court, or that the cause was removed by *certiorari*, then the Court or Judge may order plaintiff to have his costs. The Ex. has decided that the word *may* is not to be read as *must*, but implies a discretion in the judge, "so that his judgment might be exercised upon it, as to whether the party should recover costs or not according to the circumstances of the case, as he thinks right;" and PARKE, B. said, "of late years the Court acts according to the rule generally adopted in the construction of a statute, to adhere to the usual and ordinary meaning of the words used, unless that is at variance with the intention of the Legislature to be collected from the statute itself. The word 'may,' as used in the 13th section of the Act which has been referred to, is clearly permissive. It is to be read in its ordinary sense."

IMPORTANT TO VALUERS AND RAILWAY COMPANIES.—PARKINSON v. LORD GALWAY.—At the Redford County Court a cause was tried before Rd. Wildman, esq. judge, in which Mr. John Parkinson, valuer, Lev-fields, was plaintiff, and Lord Viscount Galway, M.P. was defendant. It appeared that his lordship, being the owner of some land taken by the Great Northern Railway Company, had employed Mr. Parkinson as his valuer; Mr. G. D. Simpson, of Loversall, was valuer for the company; and Mr. Christopher Paver, of Peckfield, was called in as umpire. After the amount of purchase-money had been agreed upon, Mr. Parkinson sent his account to Lord Galway, charging a commission of 2½ per cent. upon the compensation awarded. His lordship forwarded the account to the railway company, who refused to pay it, on the ground that the charge was exorbitant; and Lord Galway being also of the same opinion refused to pay; upon which Mr. Parkinson brought an action against him, and the sum considered reasonable was paid into court. Mr. Burnaby, of the firm of Tallents, Burnaby, and Griffin, solicitors, Newark, appeared for the plaintiff, and Mr. W. E. Smith, of Doncaster, for the defendant. Most of the leading valuers in Yorkshire and Nottinghamshire attended the inquiry, and, after a long discussion on both sides, judgment was given in favour of the defendant—thus establishing the principle that a valuer is not entitled to charge a per centage.—*Doncaster Gazette*.

COUNTY COURTS EQUITABLE JURISDICTION.—There are several forms in the County Courts Equitable Jurisdiction Bill in the House of Lords, which Bill was noticed in the *Times* of Monday, by which it is proposed to effect some Chancery reforms in small estates, and rescue that Court from the expense and delay of its proceedings. The only question seems to be whether the County Courts, with the accumulated business, can attend to such matters. It is proposed to give a like jurisdiction to the Court of Bankruptcy in London, and there is no reason why the Insolvent Debtors Court should not be similarly used in assisting the Court of Chancery. In the schedules annexed to the Bill there are various forms in respect of claims, which it is proposed may be entered, of an equitable character, and

which in the Court of Chancery are now attended with no inconsiderable expense, such as a claim by a creditor upon the estate of the deceased's personal assets, by a pecuniary or residuary legatee, by an administrator seeking to have the estate administered, or for the administration of a partnership estate, or for the appointment of a trustee. There can be no doubt but if such matters were allowed to be heard in a short time, and at a small expense, by competent judges, that great assistance would be rendered to the Court of Chancery, and that suitors in equity proceedings would be benefited.—*Times*.

### THE LAWYER.

#### Summary.

It will be observed that in *Anderton v. Yates*, 17 Law T. 37, the Court gave the preference to the indorsement on the counsel's briefs, both sides agreeing, over the minute in the registrar's book, and in the same case it did not hold itself to be bound to reject an affidavit filed after the time appointed, although, as a general rule, it would do so.

In *Lucas v. Beale*, 17 Law T. 40, the Court refused a new trial asked on the ground that the judge had expressed a strong opinion that the plaintiff ought to be nonsuited, because he had declined to amend.

In *Reg. v. Isaacs*, 17 Law T. 43, it was ruled that a motion for a *habeas corpus* should be made to a judge at chambers, and not to the Court.

And in *Grove v. Young*, 17 Law T. 37, which was a question as to the validity of a will, the heir-at-law was permitted to elect whether it should be tried by an action of ejectment or by an issue *devisavit vel non*.

### LEGAL INTELLIGENCE.

#### THE LATE MR. SERJEANT LUDLOW.

IN his charge on 31st March, at the Spring Assizes for the county of Gloucester, Mr. Justice TALFORD thus alluded to his deceased friend:—

"I should only venture to add one word expressive of the gratitude and pleasure I feel in meeting for the first time in my judicial office, the magistrates of this great county, in which a considerable portion of my professional life was spent, and in which I received through its course that encouraging attention and kindness which have essentially aided me in obtaining, by the blessing of God, the honour of addressing you from this place; if that pleasure were not mingled with sadness by the recollection of the recent death of an old comrade, a frequent opponent, a constant friend—one well known to many of you—one whose memory will long be cherished in this county—the late Mr. Serjeant Ludlow."

"Everything around us,—the Courts which have been often hushed to stillness by his lucid eloquence, and 'set in a roar' by the flashes of his wit—the rustic population, whose manners he understood so well; whose feelings he so vividly interpreted, and in whose welfare he took so strong an interest—and the gentry among whom he was proud to point out the possessors of wealth and influence, wisely and kindly used, as examples to other countries—all suggest the thought that rare accomplishments and generous affections have lately been veiled from this world. When, thirty years ago, I joined this circuit, I found him rising to that position which made him for many years the favourite representative of the feelings, the interests, and the hopes which were involved in the legal controversies of these Courts—and remember, as if it were yesterday, how at once I was struck by his great and unaffected knowledge—by his homely but idiomatic and pure Saxon style—by his original humour, often most happily exerted—by his graphic skill in depicting country scenes, incidents, and manners, and the spirit of enjoyment with which he used it—and by his remarkable power of investing common things with grace, by the lightest touches, and of shading by nice gradation the adverse circumstances of a case until they harmonized with the picture he felt at the moment to be just, and desired to present to the minds he was addressing; but it was not till I was brought into conflict with him that I fully appreciated powers, which, if they had been earlier transferred from the locality to which he was strongly attached, to the great arena of forensic ambition, must have raised him to the highest eminence in the Profession which he adorned."

"I may be forgiven for speaking thus of him in this place; because the love of this county was one of his ruling affections; he gladly expatiated on its vestiges of old times and grew proud in its present

greatness; in this county he endured his severest labours and achieved his happiest successes; and when he exchanged the excitements of advocacy for the comparative repose of important office he rejoiced to renew and prolong his association with it, by assisting with you in the administration of its justice, in the Chair of one of its Courts of Quarter Sessions in this city. To the duties of that position he brought his fine intelligence, his varied knowledge, and his large experience; and as the desire of obtaining the esteem of the county of Gloucester was the strongest motive of his active life, so the consciousness of rendering it good service when the conflict of life was past, was one of the comforts which, mingling with yet higher consolations, cheered the evening of his days.

**FATAL ACCIDENT TO MR. TOMLIN, THE BARRISTER, OF PAPER-BUILDINGS.**—About eleven o'clock last night, this gentleman, after having returned to his chambers from his club, where he had been dining, unfortunately fell from a window on the second landing of the staircase, and was so much injured, that it was thought necessary to remove him immediately to the King's College Hospital, where he expired at quarter-past five o'clock in the morning. What renders this accident extraordinary is, that the deceased gentleman, at the time he fell from the window, was not in the least intoxicated, as people might infer.—*Sun of Friday.*

**THE LATE LORD LANGDALE.**—Thursday morning at half-past 10, the mortal remains of this noble and learned lord were interred in the vault of the Temple church. The funeral arrangements were conducted in as private a manner as possible, at the desire of the deceased. The body was brought from his Lordship's country-seat at Roehampton, and was followed by two mourning coaches, without any private carriages. The noble lord was deeply respected in the vicinity of his residence, and most of the tradesmen closed their shops, and the church bells of Roehampton, Barnes, and Putney, were tolled as the mournful procession passed. The principal mourners were the Rev. Henry Beckwith, Sir Stephen Lushington, Sir George Rose, and Sir David Dundas; but a great number of the members of the bar, of which his Lordship so recently took a painful farewell, testified their esteem and regret by being present on the solemn occasion. The coffin (which was covered with maroon-coloured silk velvet), bore the following inscription:—"The Right Hon. Henry Lord Langdale, late Master of the Rolls. Died 18th April, 1851. Aged 67 years."—*Globe.*

**TESTIMONIAL TO THE LATE MR. RUSHTON.**—From the amount already collected towards a fund for a testimonial to the late lamented Liverpool magistrate, whose family are left in rather straitened circumstances, it is fully expected that the sum will shortly reach 10,000*l.* It is intended, as already mentioned, to have two stipendiary magistrates instead of one, at Liverpool in future.

## PROCEEDINGS OF LAW SOCIETIES.

### LAW STUDENTS' DEBATING SOCIETY.

#### QUESTIONS FOR DISCUSSION.

*Tuesday, April 29, 1851.*

President—Mr. CHURCH.

46. Is the memorandum of a sale signed by a broker in his book admissible as evidence of the contract, to satisfy the Statute of Frauds, in cases where there is no other written contract, or where the bought and sold notes disagree, it not being shewn that the memorandum was known to the parties? *Thornton v. Charles, 9 Mees. & Wels. 802.*

*Affirmative*—Mr. Cross and Mr. Boorman.

*Negative*—Mr. Colquhoun and Mr. Jones.

XXXVIII. Is a general registration of the title-deeds to real property desirable?

Mr. Colborne is appointed to open the debate, and Messrs. Bunting, Farrar, and T. Parker, to speak upon the question.

## CORRESPONDENCE.

### SERVICE OF WRITS IN THE COUNTRY.

SIR,—In your number of Saturday, the 8th ult. (p. 423) is a letter from a country solicitor, complaining of a London attorney having sent a writ for service to W. O. a person not in the Profession, instead of to a country attorney; and inquiring whether the country attorney would not have been fully justified in refusing to administer to W. O. the oath to an affidavit of service.

With reference to the point of law involved in this question, your correspondent loses sight of the character in which he was called upon to administer the oath. It was not as a country attorney, but as one of the commissioners of the court in which the

action was brought; and country attorneys, I conceive, hold these commissions for the convenience of the public, and not as a source of emolument to themselves, still less indirectly to acquire business by the arbitrary exercise of, or refusal to exercise, the functions committed to them; and I really do not see how such commissioners can refuse to administer on oath, than a judge or a magistrate—of course the affidavit being in all respects regular. With regard to the practice of which your correspondent complains, I do not for a moment attempt to justify any departure from proper professional conduct; but in the case of serving a writ, I can imagine many instances in which it may be quite proper to send it to a person not in the Profession,—for example, a knowledge of the defendant's person, or other peculiar circumstances. Moreover, it does not appear that your correspondent could be in any sense considered the agent of the attorney in London, or that the writ should, in the ordinary course, have been sent to him. But is your correspondent aware of the practice very prevalent among country attorneys, who have agents in town, of sending business to be transacted by persons not in the Profession, and other similar irregularities? Has he never heard of law-stationers being employed to pass residence and other accounts at the legacy-duty office, and to do many other matters which ought fairly to be intrusted to the town agent?

As I said, I do not justify any irregularity, still less would I attempt to do so by the *tu quoque* reply; but merely wish to intimate to your correspondent, and the class of gentlemen to which he belongs, before making complaints, to remember the maxim,

FIAT JUSTITIA.

## THE CERTIFICATE DUTY.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Allow me to make a suggestion in regard to the certificate duty, which may meet the objection of some who oppose its abolition through fear of the Profession being opened too promiscuously.

I would have every attorney continue to pay the certificate duty; but let the sum so paid be a discharge *pro tanto* from the income-tax.

Thus the small vermin whom it is desirable to keep out of the Profession would be excluded as effectually as they are now, whilst the honourable practitioner, striving to maintain an increasing family on between 200*l.* and 300*l.* a year, would be taxed *once* only, instead of *twice*, as at present.

Perhaps some other of your readers will give their views on this proposition. THEODORIUS.

[We give this suggestion a place; but how would it be with those whose income-tax is not 8*l.* a year?—ED. L. T.]

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

At the Court at Buckingham Palace, the 14th day of April, 1151; present, the Queen's Most Excellent Majesty in Council:—This day the Right Hon. Sir John Romilly, knt. Master of the Rolls, and the Right Hon. Sir George James Turner, knt. a Vice-Chancellor, were, by her Majesty's command, sworn of her Majesty's Most Honourable Privy Council, and took their respective places at the Board accordingly.

The Queen has been pleased to grant the place of one of the Lords of Session in Scotland to Andrew Rutherford, esq. her Majesty's Advocate for Scotland, in the room of Sir James Wellwood Moncrieff, bart. deceased.

The Queen has been pleased to grant the office of her Majesty's Advocate for Scotland to James Moncrieff, esq. her Majesty's Solicitor-General for Scotland, in the room of Andrew Rutherford, esq. appointed a Lord of Session.

The Queen has been pleased to confer the honour of Knighthood upon George James Turner, esq. a Vice-Chancellor.

The Queen has been also pleased to confer the honour of Knighthood upon William Page Wood, esq. M.P. her Majesty's Solicitor-General.

Her Majesty in Council was this day pleased, upon a representation of the Right Hon. the Lords of the Committee of Council on Education, to appoint Matthew Arnold, esq. to be one of her Majesty's Inspectors of Schools.

The Lord Chancellor has appointed Henry Dyne, of Bruton, in the county of Somerset, gent. to be a Master Extraordinary in the High Court of Chancery.

The office of Vice-Chancellor of the county Palatine of Lancaster, vacant by the promotion of Mr. Page Wood, will, we have reason to believe, be conferred on Mr. Headlam of the Chancery bar.—*Globe.*

WHITEHALL, April 10.—The Right Honourable Sir John Jervis, Knt. Lord Chief Justice of her Ma-

jesty's Court of Common Pleas at Westminster, has appointed Thomas Nicks, of the borough of Warwick, gent. to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women, under the Act passed for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, in and for the county of Warwick.

The Right Hon. Sir John Jervis has appointed James Bretherton, of the city of Gloucester, gent. to be one of the perpetual commissioners for taking the acknowledgments of deeds by married women, in and for the city and county of Gloucester.

The Right Hon. Sir John Jervis has appointed Henry Dyne, of Bruton, in the county of Somerset, gent. to be one of the perpetual commissioners for taking the acknowledgments of deeds by married women.

April 23.—The Right Honourable Sir John Jervis, has appointed Henry Wilcocks Hooper, of the city of Exeter, gent. to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the city and county of the city of Exeter, also in and for the county of Devon.

MEMBERS RETURNED TO SERVE IN THIS PRESENT PARLIAMENT.—Borough of Aylesbury.—Richard Bethell, esq. in the room of Frederic Calvert, esq. whose election has been declared void.

Borough of Enniskillen.—James Whiteside, esq. one of her Majesty's counsel at law, in the room of the Hon. Henry Arthur Cole, who has accepted the office of steward of her Majesty's Chiltern Hundreds.

Burghs of Leith, Portobello, and Musselburgh.—James Moncreiff, her Majesty's Advocate for Scotland, in the room of Andrew Rutherford, esq. who has accepted the office of one of the judges of her Majesty's Court of Session in Scotland.

Borough of Boston.—James William Freshfield, esq. in the room of the Hon. Dudley Worsley Anderson Pelham, esq. deceased.

GRAY'S INN, April 23.—At a pension of the Hon. Society of Gray's Inn, holden this day, Mr. William Simons, and Mr. Henry Collingwood Selby, were called to the degree of Barrister-at-Law.

LINCOLN'S INN, APRIL 24.—The undernamed gentlemen were this day called to the degree of barrister-at-law by the Honourable Society of Lincoln's Inn, viz.: William David Cathcart Monypenny, esq.; Clarke Watkins Burton, esq.; John Heyward Jenkins, esq.; John Caldecott, esq.; and Charles Barrett Russell, esq.

MIDDLE TEMPLE, APRIL 24.—Alexander Dauney, esq. was this evening called to the degree of barrister-at-law by the Honourable Society of the Middle Temple.

Mr. John Cowan has been appointed her Majesty's Solicitor-General for Scotland, in the room of Mr. Moncrieff, promoted to the office of Lord Advocate.—*Globe.*

We believe that during the Easter recess arrangements are intended which will procure the resignation of Mr. Curran, one of the Insolvent Commissioners in Ireland, and that the Attorney-General, Mr. Hatchell, will succeed him. Mr. Hughes will thus be made Attorney-General, and either Mr. Sergeant Howley or Mr. Keogh will have the office of Solicitor-General.—*Standard.*

NEW MAGISTRATES FOR THE CITY OF WELLS.—The following gentlemen have just been placed in the commission of the peace for the ancient city and borough of Wells, by the Lord Chancellor:—The Mayor of Wells, E. N. Wells, esq.; John Belfour Plowman, esq. Alderman; Joseph Parsons, esq.; John Fry, esq. Alderman.

## COURT PAPERS.

### EQUITY REGISTRARS' OFFICE IN CHANCERY.

PAPERS AND DOCUMENTS TO BE LEFT ON DESKING MINUTES, DECREES, OR ORDERS.

*Minutes of Decrees.*—Counsel's brief of the pleadings and the correct title of the cause, the names of the several defendants being corrected from their answers, and the names of the guardians of any infants inserted.

If a memorandum of service of copy bill on any of the defendants has been entered, the order to enter the memorandum, with the record and Writ Clerk's certificate of the entry thereof, and of no appearance by the same defendants.

If a traversing note has been filed, and the defendant does not appear at the hearing, the record and Writ Clerk's certificate that the note has been filed, an affidavit of service of a copy of the note and of subpoena to hear judgment.

If the bill has been taken *pro confesso*, the order for the Record and Writ Clerk to attend at the hearing with the record of the bill, and all previous orders as to the contempt.

If any exhibits proved in the cause are to be ex-



tered as read, a list and correct description of each in the following form:—

"An exhibit marked A., being the indenture dated — in the pleadings mentioned.

"An exhibit marked B., being a letter dated —, and addressed by the plaintiff to the defendant.

"An exhibit marked C., being an extract from the register of baptisms for the parish of —, so far as relates to the parish of A. B." &c.

If any admissions are to be entered as read, the original paper of admissions, signed by the parties or their solicitors, must be produced to be endorsed by the registrar, and must be filed in the Report Office before the order is left to be passed.

If any documents have been proved at the hearing *visâ voce* or by affidavit, the order authorising them to be so proved, with the office copies of the affidavits (if any), and the documents proved.

**Minutes of Orders on Further Directions.**—Counsel's brief, the original decree, and supplemental decrees (if any), or the order on further directions, reserving the further directions on which the cause is heard, and any subsequent orders to revive; the office copy of the Master's report, and the order confirming the same absolutely.

If a memorandum of service of copy bill has been entered,—a certificate of no appearance having been entered.

If the order on further directions deals with any purchase-money,—consent briefs for the purchaser, or affidavits of notice of the intended application of the purchase-money, and that the conveyance to the purchaser has been duly executed.

**Minutes and Orders on Motion.**—Counsel's brief, with his endorsement of the order made; the notice of motion (if any) annexed, and office copies of the affidavits and the other evidence used on the hearing of the motion.

**Minutes and Orders on Petition.**—The original petition, and counsel's brief, with his endorsement of the order made, any evidence used on the hearing, and any decree, order, or office copy report on which the petition is founded.

**Minutes and Orders for Payment of Purchase-money into Court.**—The office copy report of purchase, the orders confirming the same absolute, and the conditions of sale.

If any deposit shall have been paid,—the order authorising the deposit to be taken, the affidavit shewing the amount thereof on each lot, and the Accountant-general's certificate of the payment of the deposit into Court.

**Minutes and Orders under Acts authorising Public Works.**—Where the order deals with any money paid into Court by the promoters of any public undertaking, to the credit of such undertaking not standing to any separate account:—

The Accountant-general's certificate of the payment into Court of the sum sought to be dealt with, and also the Accountant-general's certificate of the fund in Court to the credit of the undertaking; and when the order directs the carrying over the money to a separate account, or payment of the same out of Court to any person absolutely entitled thereto; also, an affidavit of the petitioner, verifying the petition, and of no adverse interest or claim.

**Minutes and Orders vacating Receiver's Recognizances.**—An office copy of the receiver's recognizances from the office of the Clerk of Enrolments.

**Order absolute under Winding-up Acts.**—The affidavit of the service of the petition, and the London Gazette and newspapers containing the advertisement thereof.

**Order on Appeal from Master's decision under Winding-up Acts.**—The Master's certificate of his decision.

**Minutes of Decrees and Orders dealing with any fund in Court.**—Whenever any fund in court is to be dealt with, the Accountant-General's certificate, and if the funds are restrained by any order, the restraining order, or an office copy thereof.

Where payment out of court is ordered to executor or administrator,—the probate or letters of administration.

**In all cases of non-appearance of any party or person served at the hearing of any cause, matter, petition or motion:**—An affidavit of service on the party or person not appearing.

**Generally** any documents or evidence required to be produced to the Court, should be left with the registrar on bespeaking the minutes of the decree, or order.

N.B.—Solicitors and their clerks, on applying respecting minutes or orders, are requested to state by which judge, and on what day, the order was pronounced, and, where the order is made on any *ex parte* matter, the title thereof as the same appeared in the Court paper.

## NECROLOGY

OF LEGISLATORS, MAGISTRATES, AND LAWYERS.

### LORD MONCRIEFF,

ONE of the Scottish Lords of Session, died in Edinburgh lately. He was almost the last of the distinguished

contemporaries of Jeffrey, Cranston, and Clerk, in the Parliament house. For extensive and sound legal knowledge, for acuteness, combined with an ever healthy and reliable judgment, and for indefatigable industry, he was perhaps superior to them all. Lord Moncrieff was the seventh baronet of his house, and is succeeded in the latter title by his son, the Rev. H. Moncrieff, born in 1809, and married in 1838 to the daughter of G. Bell, esq. of Edinburgh.

His lordship was in his seventy-fifth year.

## BIRTHS, MARRIAGES, AND DEATHS.

### BIRTHS.

COCHRANE.—On the 10th inst. at Monaltrie-house, Aberdeenshire, the Lady Cochrane, of a son and heir.

MANNERS.—On the 18th inst. at 56, Upper Brook-street, the Lady Manners, of a daughter.

PYKE.—On the 18th inst. at 11, Kent-terrace, Regent's-park, Mrs. George Pyke, of a son.

### MARRIAGES.

ELPHINSTONE, Captain John Hamilton Dalrymple, Scots Fusilier Guards, son of the late Sir Robert Dalrymple Horn Elphinstone, bart. to Georgina Anne, eldest daughter of the late W. P. Brigstock, esq. M.P. and widow of Francis Garsden Campbell, esq. of Troun and Glenlyon, at St. George's, Hanover-square, on the 23rd inst.

DARE, Henry Hall, esq. of the Royal Welch Fusiliers, second son of the late R. W. Hall Dare, esq. M.P. for the county of Essex, to Agatha, second daughter of Samuel Treahawke Kekewich, esq. of Peamore, Devon, at Exminster, on the 22d inst.

FOOTE, William, esq. son of the late Capt. W. W. Foote, R.N. of Greenwich Hospital, to Anne Ellen, only child of the late Capt. George Willoughby Dore, H.E.I. O. at St. Giles's Church, Reading, on the 23rd inst.

NEVILL, R. D., esq. of Wellington, Salop, solicitor, to Jane, only daughter of James Jackson, esq. of Highfield-road, Edgbaston, Birmingham, on the 22nd inst.

### DEATHS.

ERSKINE, the Right Hon. Lady, on the 18th inst. at Brighton.

LANGDALE, Henry Lord, late Master of the Rolls, on the 18th inst. at Tunbridge-wells, aged 67.

MEEG, Charlotte Mary, younger daughter of Robert Meggy, esq. solicitor, Trinity-square, Newington, Surrey, on the 31st inst. aged 5.

PALMER, Major-General, many years M.P. for Bath, on the 17th inst. aged 74.

TUCKER, Mary, the wife of Alexander Tucker, esq. M.A. barrister-at-law, of the Inner Temple, at Toronto, Canada West, on the 10th ult.

Twine, Frank, Esq. upwards of forty-two years in the Bank of England, at Kennington, on the 7th inst. aged 65.

LUDLOW, Mr. Serjeant, at his residence, Almondsbury. The deceased was one of the Commissioners in the Court of Bankruptcy for the Bristol district, was formerly town-clerk of that city, and for many years discharged the duties of chairman of the first criminal court of the Gloucester Quarter Sessions.

## NOTICES OF NEW LAW BOOKS.

*A Practical Treatise on the Law, Privileges, Proceedings, and Usages of Parliament.* By THOMAS ERSKINE MAY, Esq. Barrister-at-Law. Second Edition. London: Butterworth.

MR. MAY enjoys peculiar facilities for the production of a practical treatise on the Law of Parliament, for he is one of the Examiners of Petitions for Private Bills, and Taxing Officer of the House of Commons; it is therefore his business to acquaint himself with the Law, Privileges, and Usages of the Legislature. The first edition of his work was highly approved; but the present one is much more complete and comprehensive. Great additions have been made to it, and all the recent standing orders have been introduced, with full instructions for the promoters of private Bills. The treatise is divided into three books, the first of which describes the Constitution, Powers, and Privileges of Parliament; the second, the Practice and Proceedings there; the third, the Manner of passing Private Bills. This latter alone will have a professional interest for our readers, but the other portions are of great public and political interest, for acquaintance with the general order of business in Parliament is essential to a proper understanding of the proceedings there. The recent affair of the St. Alban's Election Committee proves the extreme difficulty that often attends questions of practice, and upon all such Mr. MAY is extremely full and accurate: he has collected the decisions, and, where there are none, he has stated his own views very clearly.

*New Magistrates and Parish Officers' Law, being a Supplement to Burn and Archbold, for the years 1849 and 1850.* By THOMAS W. SAUNDERS, Esq. Barrister-at-Law. London: Crockford.

BURN is a costly book: its contents require constant change; every year produces a heap of new laws and new decisions upon the subjects there treated of, and sweeps away much more. Yet neither pub-

lisher could undertake, nor practitioner purchase, a new edition every year.

It was to meet the wants of the Profession in this respect that Mr. SAUNDERS undertook the task of a Supplement, which should comprise all the new law, without the cost of repurchasing the whole work. The last edition of BURN was in 1845. Mr. SAUNDERS first published a Supplement, extending from the date of that edition to the close of 1847: then another for the year 1848, which was remarkably fruitful of Magistrates' Law. These were much approved by the Profession, and were found to be extremely useful alike to magistrates, their clerks, and practitioners, and now he has included the new law of the last two years in a third Supplement.

And in order to make the whole still more useful, he has given a general index to all the three Supplements, which may be bound together in one volume, or bought together, and which volume contains the whole of the law that has been decided by the Courts, and enacted by the Legislature during the last six years that have elapsed from the latest edition of BURN, rendered readily accessible by means of this very copious general index. To those who already possess the former Supplements, this new one will be procured of course, and magistrates, clerks, and attorneys practising in their courts, will find it a necessary portion of their libraries. BURN is the *vade mecum* of the country attorney, and this Supplement is essential to the right and safe use of it.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	212			211	211	
3 $\frac{1}{2}$ Cent. Reduced Annuities .....	96	96	96	96	96	96
3 $\frac{1}{2}$ Cent. Consols Annuities .....	97	97	97	97	97	97
Consols for Account .....	97	97	97	97	97	97
New 3 $\frac{1}{2}$ Cent. Annuities .....	98	98	98	98	97	97
Long Annu. (exp. Jan. 5, 1860) .....	7	7	7	7	7	7
Do. 30 yrs. (exp. Oct. 10, 1859) .....					7	7
Do. 30 yrs. (exp. Jan. 5, 1860) .....						
India Stock .....	264		261	262		260
India Bonds (1,000l.) .....	59	62	62	62	59	60
Do. do. (under 1,000l.) .....	63		59	59		
South Sea Stock .....						
Do. do. New Annuities .....				96		
Exchequer Bills, 1,000l. .....	57	56	57	57	54	53
Do. do. 500l. .....	57	54		57		
Do. do. Small .....	57	54	57	57		53

\* Premium.

## THE GAZETTES.

### Bankrupts.

Gazette, April 18.

BRIGHT, HENRY, corn merchant, Maldon, Essex, April 26, at twelve, May 29, at half-past eleven, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Duffield, Devonshire-st. Bishopsgate-st. and Chelmsford.

DREW, JOHN, and ESTILL, JAMES, pawnbrokers, Bath, April 29 and May 27, at twelve, Bristol. Com. Hill. Off. as Acraman. Sols. Cooke, London; and Hellings, Bath. Petition, April 10.

HATFIELD, THOMAS and ROBERT, plumbers and glassiers, Clapham, Surrey, May 7, at one, May 29, at twelve, Basinghall-st. Com. Holroyd. Off. as Groom. Sol. Blake, Sergeant's-inn, Fleet-st. Petition, April 14.

MANNING, SAMUEL, statutory and mason, Union-place, New-road, April 29, at eleven, May 29, at twelve, Basinghall-st. Com. Evans. Off. as Bell. Sol. Turnley, Cornhill. Petition, April 15.

PENNYCUD, JOHN, grocer and cheesemonger, Woolwich, April 29, at one, May 29, at eleven, Basinghall-st. Com. Holroyd. Off. as Edwards. Sols. Wright and Bonner, London-st. Fenchurch-st. Petition, April 16.

ROCHAT, JULES SAMUEL, watch maker, St. Martin's-lane, April 29, at eleven, May 27, at twelve, Basinghall-st. Com. Holroyd. Off. as Groom. Sol. Cooper, Verulam-buildings, Gray's-inn. Petition, April 16.

WAUGH, GEORGE, banker and farmer, Scough, Edenhall, Cumberland, April 26, at eleven, June 4, at twelve, Newcastle. Com. Ellison. Off. as Wakley. Sols. Shield and Harwood, Queen-st. Chesapeake; and Watson, Newcastle. Petition, April 16.

Gazette, April 23.

BREKE, ALFRED SMITH, and GEORGE SMITH, ironmongers, Aylsham, Norfolk, May 8, at eleven, June 3, at twelve, Basinghall-st. Off. as Nicholson. Sols. Cardale and Co. London; Ling, Norwich. Petition, April 7.

NEWMAN, WILLIAM, colour manufacturer, Great Chart-st. Hoxton, May 8, at half-past eleven, June 3, at twelve, Basinghall-st. Off. as Pennell. Sols. Hodgson and Burton, Strand. Petition, April 3.

RICHES, JOSEPH ALFRED, maltster, Halesworth, Suffolk, May 3, at eleven, June 2, at half-past eleven, Basinghall-st. Off. as Pennell. Sols. Nettleship, Clifford's-inn; Read, Halesworth. Petition, April 15.

Tuesday, April 25.

ALEXANDER, ROBERT, grocer and shopkeeper, Maesteg, Glamorganshire, May 7 and June 4, at eleven, Bristol. Com. Stephen. Off. as Miller. Sols. Franklin, Queens-square, and Bryan, Small-st. both of Bristol. Petition, April 11.

**ATYAL, ADOLPHUS**, wine merchant, John-st. attached-frills, May 5, at one, June 8, at eleven, Basinghall-st. Com. Fane. Off. as. Cannan. Sol. Valance, 12, Tokenhouse-yard, Petition, April 15.

**BROWN, RICHARD**, auctioneer, 72, Old Broad-st. May 7, at half-past twelve, June 6, at twelve, Basinghall-st. Com. Fane. Off. as. Graham. Sols. Vincent and Randall, Castle-st. Holborn. Petition, April 12.

**METKLE, MARGARET**, pawnbroker, Liverpool, May 14 and June 3, at eleven, Liverpool. Com. Perry. Off. as. Morgan. Sol. Roby, Castle-street, Liverpool. Petition, April 23.

**PEARSON, JOHN**, maltster and innkeeper, of the Hollies, Kingswinford, Staffordshire, April 30 and May 28, at twelve, Birmingham. Com. Daniell. Off. as. Whitmore. Sol. Boddington, Dudley. Petition, April 17.

**SAYCE, GEORGE**, grocer, Heywood, Lancashire, May 7 and 28, at twelve, Manchester. Off. as. Fraser. Sol. Dearson, Pall-mall, Manchester. Petition, April 10.

**SMITH, RICHARD SILVER**, ironmonger, Wish-st. Southsea, Portsmouth, May 6, at eleven, June 5, at twelve, Basinghall-st. Com. Evans. Off. as. Johnson. Sols. Messrs. Linklater, Charlotte-row, Mansion-house, and Hodgson, Birmingham. Petition, April 14.

**STELLING, CHARLES**, hairdresser, perfumer, and hosier, 20, Gracechurch-st. May 19 and June 2, at one, Basinghall-st. Com. Goulburn. Off. as. Nicholson. Sol. Innis, Basinghall-st. Petition, April 23.

**BANKRUPTCY ANNULLED.**  
Gazette, April 18.

**Ford, W.** haberdasher, High Holborn, Oct. 14, 1850.

### Dividends.

#### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

**Burton, G.** linendraper, first, 5s. 6d. Nicholson, London.—**Buttfield, J.** grocer, first, 6s. 4d. Nicholson, London.—**Collins, T. P.** tailor and draper, second, 5d. Miller, Bristol.—**Cor, T.** wine merchant, final, 1s. 0d. Pott, Manchester.—**Crosby, H.** linendraper, first, 1s. Mackenzie, Manchester.—**Dixon, J.** dyer, first, 2s. 6d. Young, Leeds.—**Dyson, T.** linendraper, first, 3s. 4d. Mackenzie, Manchester.—**Fawcett, J.** timber merchant, first and final, 1s. 3d. Carrick, Hull.—**Hedge, N.** silversmith, first, 1s. 1d. Miller, Bristol.—**Leister, R.** draper and grocer, final, 5d. and 1-8th of a d. Mackenzie, Manchester.—**Mauzy, W.** merchant, first, 10d. Turner, Liverpool.—**Miles, R.** grocer and draper, first, 2s. Miller, Bristol.—**Shaw, W.** jun. printer, final, 1s. 7d. Pott, Manchester.—**Simons, D.** general dealer, first, 4d. Miller, Bristol.—**Smith, B.** copper smelter, second, 1s. 6d. Whitmore, London.—**Thompson, W.** grocer, first, 3s. 4d. Baker, Newcastle.—**Vick, S.** victualler, first, 5d. Miller, Bristol.—**Wyatt, J.** jun. grocer, first, 2s. 7d. Herniman, Exeter.

#### INSOLVENT ESTATES.

**Clayton, W.** printer, 6d. Apply at the County Court, Reading.—**Earles, M.** baker, 1d. and 1-6th of a d. Apply at the County Court, Reading.—**Smith, C.** tailor, 10d. Apply at the County Court, Reading.—**Southern, N. C.** Wigtoft, final, 5s. 9d. Apply to M. Staniland, official assignee, Boston.

**Arnold, G.** glove manufacturer, 6s. 7d. Apply to Mr. E. Moss, painter, Margaret-st. Cavendish-sq.—**Lewis, H.** shoemaker, 13s. 2d. Apply to T. Dalton, esq. Cardiff, Glamorganshire.

### Assignments for the Benefit of Creditors.

Gazette, April 15.

**Askey, I.** gunsmith, Bedale, Yorkshire, March 12. Trusts. A. Burnell, schoolmaster, York, and J. Wood, harness manufacturer, Walsall. Sol. H. T. Robinson, Leyburn.

Gazette, April 18.

**Brind, H.** merchant, Brompton, March 20. Trust. H. Gregory, warehouseman, Aldermanbury. Sols. J. and C. Robinson, Queen-st. pl. City.—**Bywater, J.** tailor and woollen draper, Nottingham, April 10. Trusts. J. Dodds, salesman, Derby, and D. Crisp, shoemaker, Nottingham. Sol. G. M. Cowley, Nottingham.—**Dummer, S.** tea dealer and grocer, High Holborn, March 24. Trusts. E. Hilhouse, jun. wholesale tea dealer, Finsbury-place, North, and G. Harker, spice merchant, upper Thames-st. Sols. J. and J. H. Linklater, Charlotte-row, Mansion-house.—**Edwards, R.** miller, Oak Mill, Selattyn, Shropshire, March 26. Trusts. W. Gough, Kenwick-park, Elkesmere, and W. Croft, Freshenille, Whittington, farmers. Sol. E. Oswald, Oswestry.—**Honour, J.** builder, Tring, Hertfordshire, April 8. Trusts. H. Stevens, timber merchant, Uxbridge, and T. Little, farmer, Tring. Sols. G. and H. Faithfull, Tring.—**Marshall, J. H.** farmer, Mollwood Grange, Orston, Lincolnshire, April 5. Trusts. W. Brown, jun. and C. Brown, farmers, West Butterwick. Sol. J. Collinson, Doncaster.—**Stelling, G.** fellmonger, Norton, Yorkshire, April 8. Trusts. W. Smith, banker's clerk, New Malton, and R. Hind, book keeper, Norton. Sol. C. Jagger, New Malton.—**Teace, J.** and **Peate, T.** drapers and grocers, Oswestry, Shropshire, March 25. Trusts. H. Winch, wholesale grocer, and J. Woodhall, wholesale tea dealer, both of Liverpool. Sol. J. J. Thomas, Oswestry.

### Partnerships Dissolved.

Gazette, April 15.

**Collins and Williams**, tailors, Stockbridge-terrace, Pimlico, April 7.—**Constable, J.** and **Finden, G. F.** wholesale druggists and tea and coffee dealers, High-st. Southwark, April 1.—**Craddock, J.** and **G. W. attorneys**, 20, Newnston, April 1. Debts paid by J. Craddock.—**Dawes and Wood**, watchmakers, 20, Southampton, April 11. Debts paid by Wood.—**Day, R.** and **M. linendrapers** and hosiers, Bethnal-green-road, March 1. Debts paid by R. Day.—**Dew, W. B.** and **J. B. hosiers**, 2s. and cotton manufacturers, Chesapeake, April 14.—**Franklin, T.** and **S. coal and potato merchants**, Blandford-st. Manchester-sq. April 14.—**Garmory, Irving**, and **Maclean**, drapers and tea dealers, Hereford, and Brynmawr, Brecon, April 7.—**Harvis, P. T.** and **Ward, B. D. attorneys**, Clement's-inn, March 11.—**Harris and Saunders**, Bristol, April 12. Debts paid by Saunders.—**Hayman, H.** and **Price, E.** stonecutter-st. Jan. 1.—**Huntly, S.** and **Ames, E.** milliners and dressmakers, Welbeck-st. Cavendish-sq. April 14. Debts paid by Huntly.—**Kilbourn, T.** and **Chew, E. W.** grocers and bakers, Lei-

cester, Feb. 10.—**Lister and Lees**, ironmongers, Manchester, March 25. Debts paid by Lees.—**Moo Sweeny T. J.** Gould-sq. and **Suphrue, C. M.** patentees of an invention for improvements in steering ships, 20, Stepney-green, April 12.—**Marsland, R.** and **Co.** cotton spinners and doublers, Manchester, Feb. 5. Debts paid by R. Marsland.—**Parsons, S. S., Patterill, P. N.** and **Parsons, J. W.** curriers, 20, Tottenham-court-road, March 31. Debts paid by S. S. Parsons.—**Reaway, W.** and **I. common carriers and farmers**, Rothbury, April 7.—**Richardson and Co.** coach builders, Whitehaven, March 25. Debts paid by Richardson.—**Ryan, M.** and **Roberts, T.** surgeons, 20, Ashley, April 8. Debts paid by Roberts.—**Smith and Turton**, ironfounders, Manchester and Salford, April 10.—**Strongithorn, G.** and **E. lime and coal masters**, Dawend, Rushall, March 25. Debts paid by G. Strongithorn.—**Tyars, A. M.** and **Banfield, R.** and **S. juvenile clothing warehousemen**, Charles-st. Soho-sq. April 15.—**Wilkinson and Corner**, mercers and drapers, Whitby, April 1. Debts paid by Wilkinson.

Tuesday, April 18.

**Baddeley and Tyson**, haberdashers, Newcastle-under-Lyme, April 15. Debts paid by J. J. Tyson.—**Beardsall and Hazledine**, grocers and tallow chandlers, Sneyton, April 16. Debts paid by Beardsall.—**Binated and Co.** japanners, Railway Arches, Rotherhithe New-road, April 10.—**Bonnett, Newby**, and **Co.** worsted spinners, Bradford, as regards Isherwood, April 2.—**Brier, J.** and **Dykesworth, L.** Ingersley Vale, and Manchester, March 29.—**Cooks and Hill**, corn millers, Hanglelow-mills, Audlem, April 16.—**Collicke, W.** and **E. saddlers**, Wolverhampton, April 9.—**Franklin, W. H.** and **Hatch, G. E. F.** surgeons, Cambridge-terrace, Greenwich, April 4.—**Gill, J.** and **J. joiners and builders**, Hunslet, Leeds, April 15. Debts paid by J. Gill.—**Guest, W. S.** and **Small, J.** coal and lime dealers, Chester, April 14. Debts paid by Small.—**Hamilton and Co.** wire workers, Halifax, March 17. Debts paid by Hamilton.—**Kelsall, A.** and **Todd, J.** gold thread manufacturers, Bolton-le-Moors, April 7. Debts paid by Kelsall.—**Kenyon, T.** and **J. manufacturing chemists**, Newton Heath, near Manchester, Jan. 25. Debts paid by J. Kenyon.—**McCarthy, M.** and **Bell, R.** equestrians, Bath, April 16.—**Myers, C.** and **J.** and **Co.** wholesale chemists and druggists, Newcastle, as regards J. Myers, April 14.—**Rothson, J.** and **Whitlock, J.** Davies-st. Berkeley-square, April 14.—**Simonds, J.** and **Co.** galvanizers of iron, Circus, Minorities, and Glass-house-yard, Tower-hill, April 10. Debts paid by Symonds.—**Watson, J.** and **J. manufacturing chemists**, Leeds, April 15.—**Wilkinson, J.** and **I. clock and watch makers**, Leicester, March 28.

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Bricks	Appeal and Grounds of Appeal
Brigades	Caption (of Examinations)
Certiorari	Complaint
Children, Infants, and Juvenile Offenders	Costs
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Churchwardens and Overseers	Order of Removal
Coal-mines	Officers (Auditors, Guardians, Overseers, &c.)
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## To Readers and Correspondents.

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 "A SUBSCRIBER."—*Lord Brougham has a Bill for that purpose now before the Lords: he hopes it will pass this session.*

## TO READERS.

Through some oversight of the printer, the four pages of matter which were included in the Index to the 16th volume just issued, were paged 469, instead of 569. Will our readers alter with their pens the 4 into a 5, lest the binder should make a mistake?

The 16th vol. of the LAW TIMES is now complete, and the numbers may be sent to the office for binding, as usual, through the post, provided they are left upon at the ends, and nothing but the address written upon them. For the purpose of identification some particular seal, or mark, should be made upon them, of which the publisher must be apprised by letter.

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## THE LAW TIMES.

SATURDAY, MAY 3, 1851.

## TO READERS.

THE Opening of the Exhibition has occasioned a holiday and its consequences, and by compelling the postponement to next week of a double number, which was required for the arrears, has also compelled the exclusion to-day of leading articles, correspondence, and many reports which are due.

## REGISTRATION OF DEEDS.

OUR previous remarks upon this question have proceeded upon the assumption that Registration of Deeds was, in itself, desirable, provided the Registry be local, so as to be readily and cheaply accessible, and at the same time simple and secure. Accessibility, simplicity, and security, are the three conditions of Registration, wanting either of which it would be a mischief instead of a benefit.

We have sought to shew that by a Local Registry only could accessibility be attained.

But we find, from numerous communications, that many solicitors altogether deny the ad-

vantages of Registration, and, therefore, we propose now to consider this preliminary question; for if it be decided against Registration altogether and under any form, it is a waste of time and thought to debate the manner of effecting it.

The argument is very brief. Our correspondents assert, as a matter of opinion, not as a proved fact, that Registration is not desirable, because it would probably produce certain supposed evils.

Now, their opinions would be of great value if the question were wholly one of opinion. If Registration did not exist, were proposed for the first time, and its results were wholly conjectural, then, of course, it would be a question to be tried by the balance of opinion. In the absence of facts, we may call conjecture to our aid, and reason upon probabilities; but none know better than our readers, from their studies and experience as lawyers, that a single fact will outweigh any number of conjectures, suppositions, and arguments of what might be.

This question of Registration, fortunately, does not depend upon opinion or conjecture. It is not an unknown or untried experiment. Registration of Assurances already actually exists, not only in every other civilized country in Europe, but also in our own. When there is thus actual experience by which to try the question, our readers will admit that we have no right to give any weight to mere opinion and conjecture. We are, therefore, bound in honesty to set aside the testimony of every witness who does not speak from his own experience of the effects of Registration, and to rest the case wholly upon the testimony of positive experience.

Now, what says experience? Abroad, there is no dissentient. There is not an instance known of a country which has once adopted Registration abandoning it; and seeing the results of their neighbours' experiments, other countries have adopted it, one after another, until it has become universal upon the Continent.

But, perhaps, some of our readers may demur to the evidence of the experience of foreign countries, and contend that the difference of circumstances renders it of little worth to us. Still it is something.

But there remains testimony which it is impossible to answer. Registration has been established among ourselves, and is now in operation. It actually exists in Middlesex and Yorkshire! What is their experience of it? Undoubtedly it is approved, although the system is far from perfect.

True, we have heard some persons say that it does not answer, and express disapproval of it. But is such the general opinion? If Registration in fact produces a tithe of the evils predicted of it by the objectors, wherefore is it that the counties in which it exists do not pray for its abolition? If Yorkshire or Middlesex were to petition against their Registries, it would be very strong evidence that Registration was found to be practically injurious. But while these powerful counties submit to a Registry without a murmur, it is very difficult to believe that it can be productive of the mischiefs suggested in the pile of letters before us.

Indeed, there is something more than negative evidence. Our columns to-day contain the most positive testimony to the advantages of Registration, proceeding from witnesses who will be admitted to be most competent.

The solicitors of Yorkshire have met and agreed to an address, in which they fully admit the benefits of registration, provided it be local. This address will be found in another column. It appears to us to be decisive upon the question, because it is the unanimous testimony of those who have had positive experience.

And if the objectors desire something more than the evidence of experience: if they ask

what other members of the Profession think of it, there is testimony of that kind also.

Before us is a petition to the House of Lords from the Manchester Law Society, the most numerous and intelligent of the law societies of England, the second sentence of which begins thus:—

That your petitioners do not dispute that advantages to the community may be anticipated from a system of local registration of assurances, which, whilst affording on the one hand a basis for the simplification and amendment of the law of real property, and giving on the other the necessary information to persons legitimately requiring it on the state of titles to lands, shall be so framed as to afford the most certain and simple means of reference, and the utmost possible facility of access to the contents of the registry, with such provisions as may most effectually guard against fraud and abuse, and against the disclosure of titles to parties not entitled to inspect them.

And subsequently it states—

That a great practical convenience may be expected to be derived from the facility which registration on a proper system will afford of verifying abstracts of title by comparison with the registered documents, instead of with documents held in private custody, often scattered in various and remote parts of the kingdom, and not unfrequently inaccessible from want of knowledge of their place of custody, or sufficient means for compelling their production.

The purpose of this petition, which is too long for insertion, at least this week, is to pray for a Local Registry, and to submit objections to the present Bill.

The petition of the Somersetshire Senior Attorneys' Club, also approving Registration, provided it be local, was given a fortnight since.

With such testimony, we are entitled to assume that Registration would be desirable in itself, provided it be local in its range, and practical in its details; and we may now confine attention to these questions, without again wasting words upon the general one.

## THE LEGISLATOR.

## Imperial Parliament.

## PUBLIC BUSINESS TRANSACTED.

BILLS READ A FIRST TIME.  
 Monday, April 28.

Customs  
 Inhabited House Duty.

Wednesday, April 30.

Petty Sessions, Ireland  
 Emancipation of Copyholds, No. 2  
 Collection of Fines, &c. Ireland.

BILLS READ A SECOND TIME.  
 Monday, April 28.

Property Tax.  
 Wednesday, April 30.

Lodging Houses  
 Farm Buildings.  
 Thursday, May 1.

Oath of Abjuration, Jews  
 Civil Bills, &c. Ireland.

BILLS READ A THIRD TIME AND PASSED.  
 Monday, April 28.

Stamp Duties' Assimilation  
 Exchequer Bills, 17,750,000.  
 Indemnity.

## PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.  
 Monday, April 28.

Harwich, Improvement, Quays, &c.  
 Heathcote's Divorce  
 Richmond and Lancaster Turnpikes.

Tuesday, April 29.

Great Northern Railway Amendment, No. 1  
 Hereford, Ross, &c. Railway  
 Kilmaree and Valencia Railway  
 Leeds and Thirsk Railway  
 London and Blackwall Railway  
 North British Railway  
 North and South-Western Junction Railway  
 South Wales Railway, No. 1  
 Do. do. No. 2  
 Scottish Central Railway.

Wednesday, April 30.

Derby and Ashburn Road  
 Driffield and Sheffield Turnpikes  
 Regent's Canal Company.

Thursday, May 1.

Charing Cross Bridge  
 Royal Naval School.

## PETITION PRESENTED.

Attorneys' Certificate—For repeal of the Duty upon  
 —From W. B. Gordon.

## SESSIONAL PRINTED PAPERS.

- Par. Numb.  
 62. Local Acts—Reports of the Admiralty  
 113 (3). Dispensaries, &c. Ireland—Summary of Returns  
 137. Increase and Diminution of Salaries, &c. Public Offices—Accounts  
 139. Public Debt—Account  
 210. Committee of Selection—Sixth Report  
 212. Maynooth College—Detailed Account  
 215. Lunatics, Scotland—Return  
 216. Museum of Irish Industry in Dublin—Return  
 217. Gort Workhouse—Correspondence  
 199. Emigrant Ship "Washington"—Copy of Letter  
 230. St. Alban's Election—Minutes of Evidence  
 232. Pirates' Head Money, Borneo—Return  
 231. Sunday Trading Prevention Bill;—Proceedings of the Select Committee  
 239. Bills—Sunday Trading Prevention, amended by the Select Committee  
 109. — Inumbered Estates Leases, Ireland  
 233. — Small Tenements Rating Act Amendment, amended  
 235. — Coroners  
 236. — Inverness Bridge  
 207. — Improvement of Towns, Ireland, amended by Select Committee  
 234. — Sale of Arsenic Regulation, amended  
 233. — Inhabited House Duty  
 232. — Customs  
 Natal—Correspondence  
 Prisons—Sixteenth Report of Inspectors, Southern and Western District, Part 3  
 Extramural Sepulture for County Towns—Report of the General Board of Health  
 Turkey—Despatches communicating the Tariff  
 Sardinia—Treaty of Commerce, &c.  
 Public General Acts—Cap. 5, 6, 7, and 8  
 138. Superannuations—Account  
 202. Customs—First Report from the Committee  
 237. Kaffir War, Cape of Good Hope—Estimate  
 Netherlands—Convention of Navigation  
 78(1). Liverpool and Wallasey Gunpowder Magazines—Further correspondence  
 218. Poor Law, Ireland—Correspondence  
 Borneo—Additional Papers

## HOUSE OF COMMONS.

## HIGHWAYS.

*Wednesday, April 30.*—Sir G. TYLER inquired whether it was the intention of Government to bring in a Bill to include the highways generally of England and Wales, or, if not, whether they approved of the exceptional legislation which was provided for by the Highways (South Wales) Bill, which stood as an order of the day?—Mr. C. LEWIS said, that a Bill upon the subject of highways generally, which would include South Wales as well as the rest of England, had been prepared by the Government, but in the present state of public business he saw no prospect of introducing it this session with any success. It was not, therefore, his intention to ask leave at present to introduce such a Bill.

**INHABITED HOUSE DUTY.**—The Bill to repeal the duties payable on dwelling-houses according to the number of windows or lights, and to grant in lieu thereof other duties on inhabited houses, according to their annual value, has been printed. The house duty is to commence from the 5th of April last, from which time the window duty is to be repealed. The new duties are to be deemed assessed taxes, and to be under the management of the Commissioners of Inland Revenue. Market-gardens and nursery-grounds are not to be included in the valuation of houses. The duties for armorial bearings to be still chargeable under the former Act. According to the schedule annexed to the Bill, the duty on inhabited dwelling-houses worth the rent of 20l. or upwards by the year, for every 20s. of such annual value shall be 6d. and for other houses not used or stated in the schedule, a duty of 9d. in the pound shall be charged.

**SALE OF ARSENIC.**—The main provisions of the Sale of Arsenic Bill, as amended by the committee, are as follows:—On every sale of arsenic the particulars of the sale are to be entered by the seller. No person shall sell less than 10 lb. weight of arsenic at any one time to any person who is unknown to the person selling, unless the sale be made in the presence of a witness who is known to the person selling, and to whom the purchaser is known, and who signs his name, together with his place of abode, to such entries, before the delivery of the arsenic to the purchaser; and no person shall sell less than 10 lb. weight of arsenic at any one time to any person other than a male of full age. No person shall sell any arsenic unless the same be, before the sale thereof, mixed with soot or indigo, in the proportion of one ounce of soot or half an ounce of indigo, at the least, to one pound of the arsenic, and so in proportion for any greater or less quantity. The penalty for offending against the Act is 20l. The Act is not to prevent the sale of arsenic in medicine under a medical prescription.

**EPISCOPAL AND CAPITULAR ESTATES.**—Lord Carlisle has brought a bill into the House of Lords, which has just been printed, for the management of episcopal and caputular estates and revenues in England and Wales. There are as many as 112 clauses in the Bill, the object of which is to give effect to the recommendations, in a modified form,

contained in two reports to her Majesty, by the commissioners appointed some time back to inquire into the revenues arising from the real property of the church, and also into the incomes of the archbishops and bishops, so as best to secure to them fixed instead of fluctuating annual incomes. It is proposed that the Church Estates Commissioners shall be commissioners for the purpose of executing the intended act. They may summon and examine witnesses; and their reports on the property of the church, as to leases and other matters, may be confirmed or varied by her Majesty in council. All episcopal estates are to be under the management of the commissioners, and salaries and incidental expenses are to be defrayed out of the revenues of the sees in respect of which they are incurred. It is also proposed that after existing incumbencies the commissioners may pay fixed incomes to every bishop. The measure has reference to the property vested in the Ecclesiastical Commissioners, and has been framed in accordance with the suggestions set forth in the report to the Queen on church matters.

THE MAGISTRATE,  
AND PAROCHIAL AND MUNICIPAL LAWYER.

## Queries on Points of Practice.

By the 21st Jac. 1, c. 7, ss. 1, 3, any person convicted of being drunk before one justice shall "forfeit 5s." and on refusal or neglect to pay within one week after conviction, to be levied by distress, &c.

A. B. was fined by justices in petty sessions 5s. for being drunk, with 6s. costs (viz. 1s. 6d. for the summons, 1s. for service, 1s. for the oath of the witness, and 2s. 6d. for the conviction). Will any of your correspondents be good enough to inform me whether under the above statute any costs are legally payable, where the party mulcted pays the fine at the time, thus rendering it unnecessary to draw up a formal conviction, as in the case of non-payment it would be, in order to justify the distress. Brecon, April 26. H. P.

## Answers to Queries.

Turnpike Act, 3 Geo. 4, c. 126.—Having observed the case in the last LAW TIMES (No. 421), under the signature of a "Constant Reader," and feeling some interest in the question put, I shall be glad to give my opinion thereon.

The latter part of section 32 of the above Act, after setting forth the exemptions of horses and carriages from the payment of toll, goes on—

"Or for any horses or carriages which shall only cross any turnpike-road, or shall not pass above 100 yards thereon."

Now, I take it, that if A. B. with a horse or carriage, after reaching a turnpike-road, passes through a toll-bar and afterwards crosses that road, the distance gone over not being above 100 yards he is clearly exempt from toll; but suppose he (either on business or pleasure, but not to avoid the toll) shall, after taking a circuitous route, again get upon the same turnpike-road where there is no toll or chain-bar, and shall pass over 100 yards more, how can he be held liable to pay toll?

I am of opinion, that the yards mentioned in the 32nd section must be construed to mean consecutive yards, and that to fix the payment of toll upon A. B. he must pass on a turnpike-road, with his horse or carriage, above 100 yards at the same time, and in that distance must pass through a toll or chain-bar as well. H.

Bradford, April 30, 1851.

**THE SITUATION OF STIPENDIARY MAGISTRATE AT LIVERPOOL** is vacant by the death of Mr. Edward Rushton, who has filled that office since 1839, and who, previous to that time, was known as a very active politician during the liberal struggles of previous years. Mr. Rushton's salary was 1,600l. a year; but it is understood that the Borough Council of Liverpool, which possesses by the Act the power of settling the number of justices as well as the salaries paid to those officers, will recommend the appointment of two justices instead of one, whose united salaries will be 2,000l. a year. This would certainly be an improvement. The borough property is large, and the council possesses ample funds, which could not be better employed than in applying an additional 400l. per annum to the more effective administration of justice. The business of the police court is too much for any one man, and it was with great difficulty that Mr. Rushton was able to keep it down, with all his indomitable energy and his great local knowledge of the place of which he was a native. We would be glad to see the system of stipendiary magistrates—men learned in the law, and free from local prejudice and influences—extended throughout the other great towns, and in time even throughout the country. Amongst other advantages, they are known to exercise a most useful

and salutary control over the police, which is seldom obtained by the local magistracy.—*Observer.*

The Cheshire magistrates have voted a sum of 10,000l., for the purpose of extending and altering the House of Correction at Knutsford, and building a new prison for females.

**EXPENSES OF PROSECUTIONS.**—On Monday the Government Bill, as amended in committee and on re-commitment, to amend the law relating to the expenses of prosecutions, and to make further provision for the apprehension and trial of offenders in certain cases, was printed. There are now twenty-one clauses in the intended Act, which is only to extend to England and Wales. Several new clauses have been added, one of which is to give parties costs in cases of common assault as in cases of felony. It is provided that clerks of the peace may be paid by salaries instead of fees.

**LOAN SOCIETIES.**—According to the annual accounts prepared by Mr. Tidd Pratt relating to loan societies just published, it appears that there are 200 loan societies in England and Wales, of which number 35 are in operation in the county of Middlesex, and several in Surrey.

**THE MARQUIS OF SALISBURY AND THE MIDDLESEX MAGISTRATES.**—The Lord- Lieutenant of the county of Middlesex (the Marquis of Salisbury) gave a sumptuous entertainment on Saturday evening to the officers of the East and West Middlesex Militia, and the Justices in the commission of the peace for the county, at his residence in Arlington-street. The entertainment was on a grand scale, and passed off to the appreciation of all present. A circumstance arose, we regret to say, that cast a gloom over the gathering. Mr. Ballantine, while seated, was suddenly seized with a fit, when medical aid was called in immediately, and, after a short delay, the respected magistrate was conveyed to his residence in Cadogan-place.

**POLICE BUSINESS AT LIVERPOOL.**—The magistrates of this borough, and the special committee of the council, have decided to recommend the appointment of only one stipendiary magistrate in the place of the late Edward Rushton, esq. This recommendation is made, however, with the understanding that a second Court will be established, to be called "the Mayor's Court." In this Court his worship the Mayor and the honorary justices will sit in rotation, and, in order to relieve the stipendiary, will dispose of informations and other minor cases, which occupy a great portion of time, much to the delay of the ordinary business, and to the inconvenience of the persons called upon to attend the Court. We believe it is also intended to fix the salary of the new stipendiary magistrate at 1,800l. a year.—*Liverpool Mercury.*

A charter of incorporation is about to be granted to the borough of Blackburn.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

## Summary.

The precise limits of the powers of a company, under their Act of Incorporation, are continually the subject of dispute, not so much between the company and third parties as between the directors and individual shareholders. When it is inconvenient to pay calls, shareholders often endeavour to avert the claim by contesting the power of the directors or of the company to do some one or more acts, to which the shareholder finds it convenient to pretend an objection; and then a bill is filed, and the question is raised, what are the powers vested in the company.

In *Stevens v. The South Devon Railway Company*, 17 Law T. 46, it appeared that the company had obtained two Acts of Parliament, the second of which empowered them to raise, by the creation of new stock or shares, a certain additional capital, such new shares to be of the nominal amount and entitled to such privileges as the company may determine. In 1847, it was resolved to raise a certain sum by the creation of shares of half the amount of the original shares, and that 6 per cent. should be guaranteed for a limited period on all calls paid, such guarantee not to exclude the holders from participating in any higher rate of dividend for the time being payable on the original shares. The plaintiff was an original shareholder. The directors were largely interested in the half-shares, and in 1850 applied for an Act to authorise the issue of new shares at 6 per cent. in perpetuity, but it was refused. At a general meeting, in November last, the directors recommended a plan for commutation of the half-shares upon the terms previously proposed, which report was adopted, and they were authorised by resolution to apply to Parliament to sanction the plan. The plaintiff, on behalf of himself and the holders of original shares,



who considered the arrangement injurious to them, now applied for an injunction, and it was held by the Master of the Rolls, that it was not a breach of trust or duty to solicit such a bill; that the directors might use the name and seal of the company for that purpose, but nevertheless, that they might not apply the funds of the company in payment of the costs of so much of the Bill as proposed to effect the scheme for the commutation of the privileges of the holders of the half-shares. The judgment is a very clear and sensible one, and should be read with attention by all who take an interest in the Law of Joint-Stock Companies. Certainly, in this case the holders of the original shares were fully justified in interfering to prevent, if possible, an arrangement which would probably indefinitely defer all prospect of interest for them.

In *Hudson v. The Leeds and Bradford Railway Company*, 17 Law T. 50, a company, having compulsory powers to take land, entered by consent of the owners, and they agreed to refer the question of compensation to an arbitrator. After the award, but before payment or tender, the owner, being discontented with the award, brought ejectment against the company. It was properly held, that he could not maintain it, for they were in with his consent. As PATTERSON, J. truly observed, "it would be monstrous if any landowner, dissatisfied with the amount of compensation awarded him, might revoke his consent and make the company transgressors."

#### WINDING UP.

AGAIN the liabilities of contributories are engaging the attention of the Courts. In *Croftfield's case*, 17 Law T. 47, the facts were, that A. and B. were executors of C. who held thirty shares in a banking company. C. died in 1838, and in 1840 notice of the probate of her will was entered in the company's books. A's name appeared as executor in the dividend list of 1845 and 1846, but the warrants were made out in his name only, and notices were addressed to him alone, although in some of his letters to the manager, he referred to his being executor. In 1845, A. alone, as executor, transferred fifteen of the shares to a purchaser. The Master placed his name alone on the list of contributories, excluding that of B. but subsequently reviewed his decision, and put in B.'s name also. Against this B. now appealed, but he was held to be liable—of course as executor, and only so far as he had assets.

The case of *Meus's executors*, 17 Law T. 48, was also a question as to an executor's liability, and also in that most formidable of liabilities, a banking company. There, one A. was a director and holder of twenty shares. In 1840, in pursuance of a resolution of the directors, he signed a letter, agreeing to take 500 shares in addition, and in 1841 gave a promissory-note for 5,000*l.*, payable five years after date, on account of those shares. He died, and in 1842 his executors applied to the directors to know how many shares he held, and they replied, twenty, upon which the executors sold the twenty. In 1843, the directors resolved to cancel the 500 "credit shares," as they termed it, held by A., and the promissory-note also was cancelled. The executors were held not to be contributories in respect of the 500 shares. Vice-Chancellor BRUCE thought the company bound by the act of the directors, even if they had exceeded their authority.

It will be seen by the report of last week of the proceedings before the Masters (p. 40), that it was contested whether a person who had signed the subscription contract for a certain sum, even though he took no shares, was liable as a contributory. How can there be a doubt about it? Both at law and in equity the contract is binding, and it is no defence to say that it was a fraudulent act, done either to deceive the Parliament or to entrap others into signing also. It was contended that the deed was waste paper. Let them take it into any court, and try it.

E. W. C.

IMPERIAL SALT AND ALKALI COMPANY.—On Friday, the first meeting to settle the list of contributories brought in by Mr. Turquand, the official manager, for whom Mr. C. L. Webb appeared as counsel, was held before Master Tinney. The liabilities are alleged to amount to little short of 100,000*l.*, but a very large portion of them are disputed, and it is stated that the Company's property and plant at Stokewitch, near Worcester, will realise considerable assets. A few cases were settled.—*Daily News*.

BANWEN IRON COMPANY.—On Saturday an ap-

plication was made to Master Kindersley for the issue of attachments under the Act of Parliament against certain parties who had failed to pay up their calls, and after some discussion, the meeting was adjourned.—*Daily News*.

SEA, FIRE, LIFE ASSURANCE.—On Saturday, after hearing evidence on the claim of Mr. T. Pratt, in respect of a bill of exchange for 300*l.* brought in against this estate, his Honour Master Tinney decided on sending the case to be tried at common law. Pratt, the claimant, in his examination admitted that he combined with his ordinary calling of a dressing-case maker that of a bill discounter on a large scale, and that he had given 280*l.* valuable consideration for the bill in question, which, it appears, was drawn by the secretary of the company, countersigned by the accountant, but not for the business purposes of the company. Witness had sent no fewer than 27 discounted bills to his bankers the day before, and considered that in this particular line of business he was a useful member of society.—*Daily News*.

DIRECT EAST AND WEST COAST RAILWAY.—On a former day Mr. W. Galsworth, for Mr. Jay, the interim manager, and Mr. Selwyn, for certain claimants, attended before his Honour Master Farrer calling upon him to review a decision declaring that he would not proceed with the winding up of this company without further directions from the Court. On Wednesday, after reconsideration, and after having heard the arguments on both sides, his Honour intimated they had so fully satisfied him, that he would proceed with the order for winding up as prayed. It is proposed to summon the secretary and the managing directors, and ascertain from them how the 19,000*l.* received in the shape of deposit has been applied, and to investigate the claims of creditors.—*Daily News*.

SLIGO AND SHANNON RAILWAY.—On Monday, before Master Farrer, a claim for 3,320*l.* for engineering was brought in by Mr. M'Kenzie, in whose favour an award had been made against the company prior to the order for winding up. The meeting was adjourned to 6th May. Other claims to the extent of about 3,000*l.* have been brought in.—*Daily News*.

DOVER, HASTINGS, AND BRIGHTON RAILWAY.—On Monday, before Master Brougham, the names of certain allottees who had paid the deposit on their shares, but had not signed the deed, were struck off the list, Mr. Norris, the official manager, being directed to take the case upon appeal to the Court, the Master, in view of the decision in *Maudsley's case*, deeming a decision in favour of their exclusion doubtful. The name of Mr. Dayrell was placed upon the list in respect of 100 shares, on its being proved that he had acted and signed a cheque for 500*l.* in opposition to evidence tendered at a previous meeting, when it was sworn that he did not interfere in the affairs of the company.—*Daily News*.

BANWEN IRON COMPANY.—On Monday, on the application of counsel, Master Kindersley consented, on cause shewn to the contrary, to suspension of the issue of attachment for payment of calls, a power conferred upon the official manager, Mr. Adron, under the Act. The Master also intimated that he left it to the discretion of the official manager. Mr. Wilkinson opposed for three-fourths of the shareholders, on the ground of insufficiency, to accept an offer that had been made of 750*l.* for the purchase of the company's property and plant, which, if done, will go in discharge of liabilities.—*Daily News*.

GENERAL COMMISSION, SHIP, LOAN, AND INSURANCE COMPANY.—On Monday, before Sir W. Horne, after settling several adjourned cases on the list of contributories, Mr. Hutton, the official manager, intimated that he proposed to make a call of 5*l.* per share at the next meeting as the amount estimated to pay off the liabilities.—*Daily News*.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

THE numerous communications relating to the proposed Registration of Assurances, which are subjoined, occupy so much space, that little room is left for commentary. Some remarks on the subject will be found among the leading articles. The decisions of last week in this branch of the law are but few. In the *Law of Landlord and Tenant* we have *Davis v. Burrell*, 17 Law T. 51, which was a case of a covenant by a tenant to pay rates, and a proviso for re-entry in case of breach. It was held not to be necessary that before taking possession under the proviso the rates should have been demanded of the tenant, or even that the tenant should have received notice of such rates being assessed. "It was his duty," said the Court, "to seek out the collector and pay the rates. He makes a covenant and it

is in him to fulfil it." *Tancred v. Leyland*, 17 Law T. 53, is another case in the same branch of the law, important, not only as being a decision of a Court of Error, but as overruling a former decision of the Q. B. The point now decided is, that on a distress for rent, it is not incumbent upon the landlord to state the amount for which he distrains, and even if he makes a false statement of the amount, that does not give the tenant a cause of action, unless it be attended with special damage. The case overruled was that of *Taylor v. Henniker*, 12 A. & E. 488.

The Nisi Prius report of the above-noted case of *Davis v. Burrell*, 17 Law T. 56, contains some other points, which are valuable. Among them is this, whether a covenant to paint at the end of every five years is a continuing covenant. JARVIS, C.J. expressed his opinion that it is not so, that it was waived by the distress.

#### THE GENERAL REGISTER BILL.

A numerously-attended meeting of the solicitors of the West Riding, convened by circular, was held in the Music-saloon, Wakefield, "for the purpose of taking into consideration the Bill now before Parliament to establish a general registry for England and Wales in London, and determining whether any and what statement of their opinion on the Bill should be published by them."

Mr. T. W. TOTTIE, of Leeds, was called to the chair, and he very briefly commenced the proceedings by detailing the origin of the meeting:—"At a meeting of the Leeds Law Society, held on the 29th of March, seven gentlemen were requested to revise this Bill, which was entitled 'A Bill for the Registration of Assurances through England and Wales.' Perhaps it would have been as proper if the title of it had been 'A Bill for the Deposit of Assurances for Real Property in England and Wales in the City of London.' That seemed to be the object of the Bill. Those gentlemen met, and they took that view of it, or something like it; and they determined that it was necessary to communicate with the other solicitors of the riding, in order that the mortgagees of land and the owners of real property in the riding at least might be aware of the manner in which this Bill would affect their interest."

Mr. J. H. SHAW, of Leeds, addressed the meeting at very great length. He observed that he stood in the same position with regard to the meeting of Solicitors of the West Riding as he stood in about eighteen years ago, when a Bill similar to the present was under discussion. He did not think it their duty, as a profession, after having once stated their opinion, further to engage, as a distinct body, in any active opposition to the measure. "If the landowners, upon consideration, think it right to oppose it, we, as their professional friends and agents, shall be bound by the same ties of duty which impel us now to declare our opinions to afford them our cheerful assistance in their attempts to avert from themselves what we believe to be a great calamity. But if, on the other hand, they are disposed either to urge on or acquiesce in it, it will be equally our duty, and I am sure we shall perform it cheerfully, to endeavour to realize for them hereafter whatever portion of good may be extracted from the measure, and to mitigate, if we cannot avert, those evils which we believe it contains." He then proposed a resolution, to the effect that an address (of which the following is a copy), embodying the sentiments of the meeting on the subject of the General Register Bill now before Parliament, be signed by the members of the profession, and be printed and circulated:—

#### "BILL FOR REGISTRATION OF ASSURANCES.

"Address from the Solicitors practising in the West Riding of Yorkshire to owners and Mortgagees and all other persons interested in Real Property in the Riding, agreed to at a general meeting held at Wakefield, on Friday, April 25.

"An attempt to establish a general register for England and Wales by the deposit of original deeds in a Metropolitan Register-office (which, after a discussion in and out of Parliament, extending over several years, was rejected in the House of Commons on the 7th of May, 1834, by a majority of 161 to 45) has been renewed under circumstances which require that public attention should again be directed to it; and we therefore deem it incumbent upon us to submit our opinion of the measure to your consideration.

"Fully concurring, as we do, in the objections made by the solicitors of the West Riding to the Registration Bills of 1833 and 1834 (with which the measure now proposed is identical in principle, and nearly so in many of its details), our observations must, to a considerable extent, be a repetition of those objections. We do not think that the changes made in

the measure have improved it as a whole. Some of these changes, indeed, appear to us to introduce new elements of expense and danger.

"By the 6th clause in the Bill, districts are to be formed throughout all England; for each of which districts a map and index are to be provided. (Clause 7.) And the new system of registration required by the Bill may then commence in the district after a notice of three calendar months in the *Gazette*. The formation of districts, the provision of maps and indexes, and the appointment of the time for the commencement of the new system in each district, are left solely to the discretion of the Commissioners of the Treasury.

"The introduction of the new system into any district within the West Riding of Yorkshire will be attended, so far as regards that district, with the consequences which we now proceed to state.

"1. The right to register deeds in the West Riding Office, which, under proper regulations, would afford all the advantages of registration with convenience, economy, and despatch, will cease; and the registration for the district will be carried on in the London Register Office, the distance of which must, under any regulations, be the cause of inconvenience, delay, and unnecessary expense.

"Clause 74 repeals the West Riding Registration Acts as to any district in which the new system shall have commenced, and clause 78 authorises the Commissioners of the Treasury to make provision for the custody of the documents and indexes of the West Riding Office, and for searches and copies of them.

"2. All original deeds executed after the introduction of the new system, or a duplicate of them, must be given up by their owners and deposited in the London Register Office; exposed to the risk of fire or riot, and under the charge of persons appointed by the Crown, and accountable for their conduct to the Crown only.

"The mode of registration prescribed by the 9th clause is 'by the deposit of the original documents, or (where there are duplicate original documents) of one of the duplicate original documents, in the Register Office,' and by certain entries in the indexes; and a document once deposited can never be removed from the office, except in obedience to legal process for its production. (Clause 59.) The office in which the deposited documents are to be kept is to be under the control of a registrar and assistants appointed (clause 2) and paid (clause 69) by the Crown, under securities (clause 5) to the Crown, and indemnified out of the consolidated fund, even against their own omissions, mistakes, and misfeasances. (Clause 93.) The clerks and subordinate officers are to be appointed and removable at pleasure by the Commissioners of the Treasury. (Clause 3.)

"3. The deeds, when deposited, will be liable to exposure, sometimes dangerous to titles, and often needlessly injurious or painful to the owners.

"Every person may inspect and take copies of any document deposited (clause 61), subject to such regulations as the Lord Chancellor, with the advice and consent of the Master of the Rolls, may from time to time make. (Clause 67.) Such regulations, if made, will be general; and general regulations on such a subject may be easily evaded. The owner's power of self-protection, by keeping his deeds in his own hands, is the best, if not the only effectual safeguard.

"The principal advantage of registration, viz. to prevent the suppression of deeds, is effectually attained under the Yorkshire system by registering a memorial, which warns the public of the existence of deeds, without an unnecessary disclosure of their contents.

"4. The present practice of loans on deposits, by which a respectable man in possession of his title-deeds may obtain relief from sudden difficulties confidentially, and at a few hours' notice, would be destroyed; and a new practice substituted which would be attended with painful exposure, and sometimes ruinous delay.

"The ground upon which loans on deposit are now made is, that the borrower, by producing the original deeds, satisfies the lender that there are no prior incumbrances; and, by depositing them with the lender, secures him, to a great extent, against subsequent ones. Both these safeguards will be destroyed by the fact of either the original or a duplicate being deposited in the register-office; because, by means of the deposited original or duplicate, the borrower may have already incumbered the property, or may afterwards incur it at pleasure. It would therefore become necessary, in all cases of loan or deposit, either to enter a caveat (clause 49), or register a memorandum of the transaction (clause 17) in the register office, where it would remain a perpetual record of the necessities of the borrowers. In times of commercial panic, the lender could not generally rely on a caveat, as it would have no effect in case of bankruptcy or insolvency. (Clause 52.) In such cases he must register a memorandum specifying the names of the lender and borrower, and the sum lent (clause 17); and in many other cases very little useful protection from disclosures would be obtained by registering a caveat, for a caveat

must disclose the names of the parties by whom and in whose favour it is given (clauses 49 and 50), which, to those acquainted with them, would be nearly equivalent to a disclosure of the nature of the transaction.

"In every case of loan on deposit under the new system the lender must either rely implicitly on the good faith of the borrower or search the London register before he makes the advance, to ascertain that there is no previously registered incumbrance or caveat; which search must be either by the officers or an agent in London, and, notwithstanding all the facilities for rapid communication, must occasion expense and delay.

"5. Titles will be seriously endangered 'by a system of indexing in which frequent errors will be unavoidable, and such errors fatal.

"The plan of indexing proposed is to be provided on a series of district maps, ultimately including the whole kingdom with books of reference, to be called 'Land Indexes.' (Clause 7.) The maps (the estimated cost of which is 2,000,000*l.*), and the land indexes, are to be provided by the Commissioners of the Treasury. (Clause 7.) As property is subdivided supplemental maps are to be prepared at the expense of the parties interested (clause 58). The first deposited title deed to any property is to be entered in an 'Index of Titles' for all England, as the commencement of a distinct head, and to be designated by a particular number (clause 10), to which heads a reference entry is to be made from the land index. (Clause 11.) All subsequent deeds affecting the property are to be entered under that head, and to be carried from one head to another, with reference to and from each on every subsequent division or union of property. (Clause 10.) There are to be separate indexes for some particular classes of documents, as mills, &c. (Clauses 22, 29.) A slight mistake in any of these complicated and multifarious entries will vitiate the registration of the instrument (clause 32), and enable a subsequent purchaser or mortgagee, though with notice of the prior instruments, to obtain a preference by registering his own deed, without actual fraud can be proved against him. (Clauses 30 and 35.)

"The power given by clause 66 to correct errors in entries will not materially lessen the danger, as such corrections will not affect rights acquired by registration previously to the correction; and an error will not, in general, be discovered till after the mischief has been done.

"6. The expense of the mortgages, conveyances, and searches, will be much heavier than under a good system of local registration.

"For many years to come a search in the local offices will be as necessary as at present; and in addition to that expense, after the new system has commenced in any district, the following precautions will be necessary:—1. A search in the London Register-office to ascertain that no previous incumbrance is registered there. 2. The entry of a caveat in the London Register-office to prevent others from obtaining priority by registration over the party protected by the caveat. 3. The deposit of the original deed in the London Register-office. 4. A duplicate or copy for the party.

"A London agent must be employed in every case; the clauses in the Bills of 1833 and 1844 allowing direct correspondence between the Register-office and the country not being introduced into the present Bill.

"There are other serious objections to the measure which we leave unnoticed rather than increase the length of this address. We wish, however, to add a few general observations.

"We are by no means insensible to the present defects of the system of registry in the West Riding. Much has been done (sometimes at the suggestion, and always with the approval, of our Profession) to remedy as many of them as in the present state of the Registry Acts are capable of remedy. But those Acts (the last of which, 5th Anne, c. 18, passed 145 years ago) require considerable alteration before all the improvements of which the system is capable can be made. We are, as we have always been, desirous to render whatever assistance our experience may enable us to afford in the preparation of an amended Act, whenever it shall be thought proper to apply to Parliament for the purpose.

"Still less are we insensible to the advantages of registration itself. Those advantages are felt in the West Riding, notwithstanding the defects of the present system, and the inroads made upon its usefulness by doctrines established in Courts of Equity which many distinguished lawyers have lamented; and they would be materially increased if the system were judiciously improved and such inroads prevented.

"Our objections apply only to the particular mode of registration proposed by the Bill now before Parliament—the compulsory deposit of original title deeds in a central office, under the control of officers appointed by and responsible to the Crown; the necessity of perpetual reference to that office in all future dealings with landed property; and the absolute dependence of titles upon the chance of minute

accuracy in a complicated index: these elements, combined in one system, and that system applied to a country where landed property is the subject of a great variety and long succession of distinct and independent interests, and is constantly in a course of change between great aggregation and small subdivisions, form sources of danger, expense, and inconvenience to which we cannot be insensible. We believe that no other system of registry, either in the United Kingdom or any foreign country, combines such elements: and that in systems where some of those elements, or an approximation towards any of them, exist, it is for purposes, under circumstances, or with qualifications, essentially different from those of the proposed measure.

"The risk and expense of that experiment will fall with peculiar severity on the owners of small properties, which under the present system are transferred or mortgaged on very moderate terms. The purchaser or mortgagee, relying on the security he derives from the exclusive possession of the title deeds, frequently dispenses with searches or other expensive precautions. But when that security is destroyed (as it will be by the deposit of the original, or a duplicate, in a London register office) the heavy expenses, which are now seldom incurred, except in large purchases, with those additions which the new system will require, will become necessary in the smallest.

"We have no class interest to serve in opposing the measure. If we would separate our interest as a class from the general welfare of the community (a separation, however, which we entirely disclaim) those interests would lead us to support it.

"Its effect, at least for a longer time than most of us can hope to remain in practice (and, as we believe, permanently), must be to increase, not diminish, the profits of our profession. Our motive for this address is a sense of duty. As a body of professional men, confidently intrusted with the charge of our client's interest and safety, we have felt ourselves called upon to point out the dangers we apprehend. That duty is performed by the present statement of our opinions; and we now respectfully leave the consideration of the measure to the landowners of the West Riding, with whom it rests to decide between support, opposition, and neutrality."

The adoption of this address was seconded by Mr. Rogers, of Sheffield, and carried with one dissentient.

After the appointment of a committee to carry the resolution into effect, and the passing of votes of thanks to Mr. Shaw and the Chairman, the meeting broke up.

#### REGISTRATION OF ASSURANCES.

TO THE EDITOR OF THE LAW TIMES.

Sir,—Your suggestion that the County Courts should be the registration offices, and that the clerks should be placed on salaries and retire from practice, is the best I have yet seen, and would remove the profession much of that feeling of dislike to disclose the affairs of their clients which now causes the main obstacle to a registration of deeds.

There is no doubt that the fees arising from this and an equitable jurisdiction to the amount of 200*l.* or 250*l.* would provide a sufficient sum to pay the clerks liberally.

The fees received by the clerks for the first nine months the courts were established amounted to

Judges' fees	£73,777 11 3
Judges' fees	82,652 14 9
General fund	52,117 19 11
	£208,547 16 2

The judges, sixty in number, are now paid 1,000*l.* each, say 60,000

To this add, say 200*l.* a year for additional work 12,000

£ 72,000 0 0

Leaves a surplus of £136,517 16 2

There are 490 clerks to be paid, and it is quite clear that some of them must be paid more than others on account of the work to be done, but the surplus shews that, divided, there is a fund already equal to 220*l.* per annum each. (a)

The charges for registration of deeds, though very small, in amount would make up any deficiency. I should propose a charge of 1*s.* for every deed, and 4*d.* a folio for the number of folios written which would probably cost about 2*s.* 6*d.* for each deed. The form might be very simple, thus:—

"Beston, 24th March, 1851. By indenture between A. B. of, &c. [full description], of the one part, and C. D. of, &c. of the other part, it is witnessed, that in consideration of 100*l.* paid by the said C. D. to the said A. B. he, the said A. B. did get, bargain, sell, &c. unto said C. D. his heirs and assigns, all [premises at full length], to hold, unto said C. D. his heirs and assigns for ever.

(a) I assume with the extended jurisdiction to 50*l.* the courts now proge as much in twelve months as we realised in the first nine months of their establishment.

"Executed by said A. B. and C. D. Receipt indorsed and witnessed."

The first object of registration is to give notice that some other deed than those set out in the abstract is in existence, and it seems to me that the object would be attained in the manner pointed out. A double index of the parish and parties to the deed, to facilitate reference should be kept.

If you can give space for the insertion of this, I shall be obliged. I am, Sir, yours, &c.

ONE, &c. WHO HAS PURCHASED EXPERIENCE OF THE NECESSITY OF A REGISTRATION.

April 29, 1851.

#### REGISTRATION OF ASSURANCES.

SIR.—The objection of your correspondent, "A Country Solicitor," to the register offices for births and deaths being also the registry for deeds is untenable. He says the registrars of births and deaths are often illiterate men. Without replying to the caricature he has drawn, it is merely necessary to say that the register office of births and deaths is under the care, not of a registrar, but of the superintendent registrar of births and deaths, who is generally a solicitor, and always a person of intelligence and respectability, without which, in fact, he could not hold the appointment. The objection of your correspondent, which seems also to have misled you, therefore falls to the ground. The superintendent registrar would be the officer. You have already local registry offices,—then why have two offices in each district, both relating to matters of title?

The surest way to destroy the efficiency of County Courts is to overload them with business, and especially with other departments of practice. Besides, the County Courts' clerks are in general appointed for several districts, which they manage by assistants, who are not necessarily solicitors; and if a solicitor were appointed to each office with a salary sufficient to induce him to give up practice, it must greatly increase the cost of registration. I see no better plan than that of using the present register offices of births and deaths for deeds also.

A SOLICITOR AND SUBSCRIBER.

April 29, 1851.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR.—As it seems to be the general opinion that the Registration of Deeds, would much tend to the safety of titles, the question arises how that can best be accomplished.

I think it will be admitted that it would be far more acceptable to the public that deeds should be registered or enrolled (whether in a metropolitan or district office), in the same way as is now done under the Fines and Recoveries Acts, and the originals returned, than that they should be permanently deposited with the Registrar. This would obviate the objection of parties who do not wish to be deprived of the possession of their Deeds, and avoid the expense of duplicates. It would afford the same safety to a purchaser, as he would not be bound by documents not appearing on the Register.

I am, Sir, yours, &c.

March 30, 1851.

A COUNTRY SOLICITOR.

#### STAMPS ON CONDITIONAL SURRENDERS ACCOMPANYING A FREEHOLD MORTGAGE DEED.

TO THE EDITOR OF THE LAW TIMES.

SIR.—The part of the proviso in the Stamp Act still unrepealed, referred to by your correspondent J. B. Colman, in his letter in your last number, was not overlooked by us.

The first paragraph of that proviso allows parties using several of the distinct instruments therein referred to, the option of placing the *ad valorem* duty on which of those instruments they like; but the subsequent portion of that proviso (referred to by your correspondent) in the case of copyholds being mortgaged with other property, restricts that option, and then requires the duty to be charged on the deed relating to the other property. We certainly consider (as may be deduced from our former letter) the uniform use of a 1*l.* stamp to have been and to be still correct, in all cases where the *ad valorem* duty did or does now exceed 2*l.* but to have been and to be still incorrect in all other cases. See the case referred to in our former letter.

In fact, we deem the late Act to have made no alteration upon stamping conditional surrenders accompanying freehold mortgages.

We are, Sir, yours, &c.

Dis., April 29, 1851.

W. and L.

#### Queries on Points of Practice.

In vol. xiv. of the Law Times, p. 190, it is stated in reply to a correspondent, that it is free from doubt that "the mortgagee's solicitor is invariably entitled

not only to draw the mortgage deed and any other securities, but also the reconveyance." Can any cases be given in support of this view, as it does not appear to be the universal practice? And in Mr. Hughes's Practice of Mortgages, vol. ii. p. 327, it is stated that, "before the expiration of the notice, the mortgagee's solicitor should prepare a draft of the reconveyance, and deliver this to the mortgagee or his solicitor for perusal in sufficient time before the period of payment," &c. in support of which, *Willshire v. Smith*, 3 Atk. 89, is cited. T. D.

I noticed, some few months since, a correspondent's letter on the subject of counting the folios in the schedule of a deed with reference to the words "acres, roods, and perches." Would the same, or any other learned and obliging reader, inform me, through the medium of your valuable paper, what is the correct way of reckoning the number of the piece of land on the title commutation or other map?

Is it sufficient that each figure be counted as one word, or is it necessary to repeat "thousand, hundred," &c. after every figure? Thus, should 4561 be reckoned as four words, or as "four thousand five hundred and sixty-one," which would make it seven words? A CONSTANT READER.

THE WILLS ACT.—A case occurred in the Pre-rogative Court of Canterbury, on the 23rd inst. which affords a remarkable illustration of the unjust operation of the Wills Act upon the classes of society who cannot afford to pay solicitors to draw their wills. The testator, a labouring man, died on the 17th of March last, leaving a will, disposing of the little property he had saved. It occupied the first and nearly half the second side of a sheet of letter paper. The attestation clause was on the third side, immediately opposite to the concluding paragraph of the will, and the testator signed his name just below the attestation clause, in the simultaneous presence of two witnesses, who then duly attested and subscribed the will. The next day the will was shewn to the medical attendant, who very properly observed that the testator must sign immediately at the foot or end of the will. Accordingly, in the presence of the same two witnesses and the medical attendant, the testator again signed his name in the proper place; and the two witnesses proposed to sign theirs again, but the medical gentleman (unfortunately not being acquainted with all the nice distinctions of this law) said that it was unnecessary, as they had already attested and subscribed the will. This will was declared invalid because the signature at the foot or end of the will was not attested, and the signature (which was duly attested, though at the foot or end of the attestation clause, and nearly opposite to the last line of the will) was not at the foot or end of the will. The same day, several other wills were declared invalid because the signatures of the testators appeared, not at the foot or end of the will, but at the end of the attestation clause on the next page, which the Judicial Committee of the Privy Council have decided is not a sufficient compliance with the requirements of the statute.—Times.

#### THE MERCANTILE LAWYER.

An extremely interesting and important question of Copyright was decided in *Richardson v. Gilbert*, 17 Law T. 48. The plaintiffs were proprietors of a review, and paid an author for writing an article, which article other publishers reprinted and circulated at a small price. It was held that the proprietor of a periodical buying contributions from an author purchased the copyright in them; but then it must be actually paid for in order to give a legal title to the exclusive copyright. But where the articles have been supplied on the terms that they should be paid for, it will suffice to protect them against piracy by a stranger.

A novel and curious point in the law of Master and Servant was decided in the case of *Ellen v. Topp*, 17 Law T. 52. An apprentice was bound to a master carrying on three trades. Afterwards the master relinquished one of them. Thereupon the apprentice absented himself from the service. The master brought an action on the covenant for service, and the abandonment of one of the three trades was pleaded in defence. The Court held it to be an answer, but after some doubt. "The immediate cause of action," it said, "is the breach of the contract to serve, and it seems that the obligation to serve depends on the corresponding obligation to teach 'as an apprentice,' and if the master is not ready to teach in the very trade in which he stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relation duty to teach seems to us to be directly in the nature of a condition precedent, and we are not able to distinguish between the three trades of an

auctioneer, appraiser, and cornfactor, so as to say that one is a more substantial part of the contract than the other." This should be noted in *Hertlet's Law of Master and Servant*.

Some cases in Bankruptcy require attention. In *Re Walsh*, 17 Law T. 55, it was held that a trader, discharged under the Insolvent Court, may be declared a bankrupt upon a debt returned in his schedule. In the same case (17 Law T. 56), it was further held, that the Bankrupt Court cannot administer the estate until the petition in the Insolvent Court is dismissed. In *Re Doyle*, 17 Law T. 56, a creditor who had held a bond as a security for his debt without assignment, or without entering up judgment against the obligor, by whom the debt was lost, was not permitted, on the insolvency of the obligee, to prove his debt against the estate for the amount.

#### COUNTY COURTS.

##### SUMMARY.

Two cases of considerable interest in the practice of the County Courts were reported in our last. *Hunt v. The Great Northern Railway Company*, 17 Law T. 54, was a question of jurisdiction: was title in dispute? The Company was by its Act of Parliament required to convey the coals, &c. of other persons in the carriages of such persons at a certain rate, and to convey back its empty carriages, at a fixed sum per mile. A number of loaded carriages being presented to the company for conveyance, they demanded payment then not only for the loaded, but for the return carriages. It was refused, and the company refused to carry, for which an action was brought against them in the County Court. It being objected that this was a question as to toll, and therefore excluded from the jurisdiction of the County Courts Act, by sec. 58, the judge held that it was not so, and proceeded to hear the case. A prohibition being moved, it was decided by COLERIDGE, J., in the Bail Court, that inasmuch as the title to the toll was not disputed, but only the time at which it was demandable and payable, and which depended on the construction of the company's Act, the County Court had jurisdiction, and the writ was refused. *Reg. v. The Judge of the County Court of Ouseway*, 17 Law T. 55, was a point of practice, in *interpleader*. Goods were seized in execution. A. & B. claimed them, stating their ground of claim thus: "That the said two horses, two collars, and two bridles, were assigned to us by an indenture, dated 28th May, 1850, and under" &c.; it was objected at the trial that this statement was not in accordance with rule 39, as omitting to state the consideration of the agreement. The Judge held the objection good, but on an application to the Q. B. for a *mandamus* to compel him to hear, COLERIDGE, J. held that the claim was sufficiently stated in the notice. "It really seems to me," he said, "that the notice was quite sufficient. The notice need not set out a good ground of claim; it will still be a good claim if it describes in what way the party claims. The Judge will decide upon the validity of the claim when he has heard the case."

COUNTY COURT CLERK.—Mr. George Frederick Crowdy, of Faringdon, has recently been promoted by J. B. Parry, esq. Q.C. Judge of the County Court of Berkshire, to the chief clerkship of the Court at Faringdon, vacant by the resignation of Mr. James Nash, of Henley. Mr. Crowdy had previously performed the duties of assistant clerk.

#### THE LAWYER.

##### SUMMARY.

THE practice under the Trustee Act of 1850 is important from its novelty. From *Re Nicholson*, 17 Law T. 49, it appears that the affidavit and certificate for the appointment of a new trustee, on the ground of the unwillingness of the old trustee to act, should not merely state the fact, but should disclose the circumstances from which it might be gathered whether such unwillingness was or was not justifiable.

In an account between an attorney and his client stating a gross sum for professional charges, no bill of costs having been delivered, and it appearing afterwards that such sum exceeded the costs due, the Lord Chancellor held that it cannot be treated as an open account, and could not be corrected by a decree to overcharge and falsify. (*Coleman v. Mellersh*, 17 Law T. 45.)

Where an irregular judgment in ejectment had been obtained, a writ of restitution was held to be the proper remedy in *Wittington v. Harde*, 17 Law T. 49.

In *Drummond v. Tillinghurst*, 17 Law T. 50, the Court refused to require a foreigner actually resident here, and having no domicile abroad, to give security for costs, even although it was sworn that he was only resident here for a time.

An excellent illustration of the absurdities of pleading is afforded by *Hall v. Flockton*, 17 Law T. 54. The plea averred that it was agreed between plaintiff and defendant that certain things should be done, and "that the action and causes of action should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned." This was held to be an insufficient averment that the mere agreement was accepted in satisfaction! Would common sense so read it? The plea went on to aver that defendants had performed some of the things specified in the agreement, and were ready and willing to perform the rest, and this was held *not* to be a good plea of accord and satisfaction.

In *Davis v. Burrell*, 17 Law T. 56, JERVIS, C.J. refused to amend an omission by inserting the words "by statute" in the plea of "not guilty." In the same case he also ruled that a verdict for a sum not exceeding 5*l.* requires a certificate for costs under the 13th section of the County Courts Extension Act.

## LEGAL INTELLIGENCE.

The Lord Mayor and the Lady Mayoress have issued cards of invitation to a banquet at the Mansion-house, on the 8th of May, to her Majesty's judges and their ladies, the commissioners in bankruptcy, and many of the leading members of the Bar, as well as to the high-sheriffs of the four metropolitan counties, and the sitting magistrates of the several police courts of the metropolis.

**CRIMINAL PROCEDURE IN ROMÉ.**—By article 556 of the Gregorian code of criminal procedure, state criminals are judged by the tribunal of prelates of the sacred college, not by any established rules, but in accordance with the powers awarded to it in each case; by article 560, witnesses are not confronted with the accused; by article 561, the accused, having been subjected to examination by the whole tribunal, are not allowed to be present during the consideration and argument of their case; by article 564, there is no appeal against the sentence, although it be decided by a simple majority of votes, except (art. 565) in the cases of condemnation to death, not pronounced unanimously, and even then part of the judges in appeal are the same who have already decided upon the very facts of the case; by article 558, the choice of counsel is not free, but is subject to the approval of the president. Everything takes place with closed doors, and no publicity is allowed to be given to the proceedings of any trial. Practice has added even further iniquities: there are no regularly and permanently appointed judges; in each case the man most approved of for the purposes of the powers that be is appointed to act as judge; the accused are not confronted one with another, and the order of calling them before the council is arbitrary, so that whoever chooses to purchase impunity with a lie may do so without the possibility of refutation. But even these laws appeared too benign to the government of Pius IX. and Cardinal Antonelli; and, amongst other changes in procedure, they have now taken away from the accused even the right of proposing his own counsel.

**COUNTY COURTS.**—A return to the House of Lords has just been printed, giving an account of all sums paid over to the Treasury during the four years ending the 1st of March last by the County Courts. In the last two years 30,500*l.* were paid over—none in the previous two years—out of which 29,075*l.* had been paid by the Treasury to the treasurers of County Courts for payment of the debts abolished by the Act, and for advances to certain courts, the revenue from the general fund of which has been insufficient to meet the expenditure. The balances of County Court moneys in hand subject to the payment of further claims was 1,425*l.*

An application was made on the 25th April to the Court of Q. B. by Mr. Peacock, Q.C. on behalf of Mr. John William Smith, of Sheffield, for a rule to enter his name upon the roll as John William Pym-Smith. This gentleman, it appeared, is one of the sons of the late Rev. Dr. John Pym Smith, formerly of Homerton, and highly distinguished for his talents and profound Biblical learning. The Court at once granted the rule.

## CORRESPONDENCE.

### LICENCE OF COUNSEL.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I observe in the LAW TIMES of April 26, an article upon the "Licence of Counsel," in which reference is made to a case that was tried at the Central Criminal Court during the last session. As the counsel concerned, perhaps I may be allowed a few words upon the subject. I am not, however, desirous of making your publication the medium of any advertisement, and therefore do not sign these observations with my name. It is perfectly familiar to yourself, and may be referred to if necessary.

In the first place, I must say that the report of the proceedings supplied to the various papers is not accurate, particularly as it attributes to me an expression which has led you, and most probably others also, to think that I had some doubt as to the propriety of the course pursued. I had not, nor have I, any doubt whatever upon the matter. The course pursued, I am satisfied, was the proper one, and one which could not have been abandoned without relinquishing that which I believe was a *bona fide* defence on the part of the prisoner.

The facts are shortly these:—The prisoner entered the service of the prosecutor with a six years' character; he had been valet to the prosecutor for about four years, and was, to use the prosecutor's expression, "a confidential servant." He was charged with stealing various articles, which he alleged were given to him by his master, and stated circumstances from which, if true, such a fact might be fairly inferred. These circumstances were of such a character, that any man having been concerned in them would desire to keep them private. Now, the question really is, whether counsel must abstain from going into such facts; that is, whether, under such circumstances he must throw up his brief; whether he ought to have received it at all; or whether it was his duty merely to watch that the case was proved. In my opinion, the prisoner was entitled to have elicited, by cross-examination, every circumstance which could raise a presumption in favour of his innocence, however distasteful the disclosure might have been to the prosecutor, and it was the imperative duty of counsel to prosecute the inquiry. I know of no right of secrecy to which the liberty of a fellow-subject ought to be sacrificed. The constant practice declares there is no such right in the poor prosecutor. There is equally no such right in the rich.

It is clear that a barrister has no right, and that a gentleman has as little inclination, wantonly to wound the feelings of a witness by eliciting a disclosure of painful or discreditable circumstances irrelevant to the issue. It is no part of the duty of an Advocate to make himself the vehicle of a prisoner's malignity. But, on the other hand, if a prisoner insists on facts which are probable, or possible, and which constitute a defence, I doubt very much whether a counsel is ever justified in declining to go into them.

Again, a counsel has no right to make his professional practice the means of prying into a prosecutor's private affairs—supposing any one to be capable of such an act; but when a prosecutor insists that he cannot tell you how often he has drawn cheques, except that he has drawn them when he wanted them, it is a proper course for a counsel to look at the counterfoils, to see if they are dated, and then draw the attention of the witness to those dates—the fact being material.

I would only further observe, that it is most impolitic that immediately a course of cross-examination which reflects on a wealthy prosecutor is begun, a jurymen should be allowed to take upon himself to interrupt counsel by any expression of his opinion. It is the duty of a jurymen to decide upon the fact of the guilt or innocence of the prisoner; and if he, with the others, decides upon the guilt, to submit any recommendation in mitigation of punishment to which the body may agree. All else is *ultra crepidam*.

I am, Sir, yours, &c.

Temple, May 1.

A BARRISTER.

## PROMOTIONS, APPOINTMENTS, ETC.

The Right Hon. Sir John Jervis has been pleased to appoint John Harward, of Stourbridge, in the county of Worcester, gent. one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women in and for the counties of Worcester, Stafford, and Salop.

John Lovell Sealey, of Bridgwater, gent. has been appointed a magistrate in and for the county of Somerset.

Mr. James, of the northern circuit, has been appointed stipendiary magistrate of Liverpool, in the room of the late Mr. Rushton. The salary is 1,000*l.* a year.

**MEMBERS RETURNED TO SERVE IN THIS PRESENT PARLIAMENT.**—County of Longford.—The Right Hon. Richard More O'Ferrall, in the room of Samuel Wensley Blackall, esq. who has accepted the office of governor of the Island of Dominica. City of Cork.—Francis Stack Murphy, sergeant-at-law, in the room of William Fagan, esq. who has accepted the office of steward of her Majesty's Chiltern Hundreds.

Captain J. Rainier is appointed resident magistrate at Riversdale, Cape of Good Hope.

## COURT PAPERS.

### EXCHEQUER CHAMBER.

#### COURT OF ERROR.

The Chief Justice of the Common Pleas, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Talfourd, and Mr. Baron Martin, assembled for the purpose of appointing days for sitting in Error, and they named the 14th of May for hearing Errors from the Court of Q. B., the 15th of May for Errors from the Court of C. P., and the 16th, 17th, 19th, and 20th of May for those from the Court of Ex.

**ADMISSION OF SOLICITORS.**—The Master of the Rolls has appointed Tuesday, May 6, at the Rolls Court, Chancery-lane, at four o'clock in the afternoon precisely, for swearing solicitors. Every person desirous of being sworn on the above day must leave his common law admission, or his certificate of practice for the current year, at the Secretary's Office, Rolls-yard, Chancery-lane, on or before Monday, May 5.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Est.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	211½	211½	210½	211	211	211
3½ Cent. Reduced Annuities ..	96	96½	96½	96½	96½	96½
3½ Cent. Consols Annuities ..	96½	96½	96½	96½	96½	96½
Consols for Account .....	96½	96½	96½	96½	96½	96½
New 3½ Cent. Annuities ..	97½	97½	97½	97½	97½	97½
Long Annu. (exp. Jan. 5, 1890) ..	71	71	71	71	71	71
Do. 30 yrs. (exp. Oct. 10, 1890) ..	71	71	71	71	71	71
Do. 30 yrs. (exp. Jan. 5, 1890) ..	71	71	71	71	71	71
India Stock .....	261	260	260	260	261	261
India Bonds (1,000 <i>l.</i> ) .....	53	53	53	53	53	53
Do. do. (under 1,000 <i>l.</i> ) .....	53	53	53	53	53	53
South Sea Stock .....	107½	107½	107½	107½	107½	107½
Do. do. New Annuities ..	54	54	54	54	54	54
Exchequer Bills, 1,000 <i>l.</i> ..	54	54	54	54	54	54
Do. do. 500 <i>l.</i> ..	54	54	54	54	54	54
Do. do. Small ..	54	54	54	54	54	54

\* Premiums.

## BIRTHS, MARRIAGES, AND DEATHS.

### BIRTHS.

ADDISON.—On the 29th ult. at Gloucester, the wife of Thomas Penn Addison, esq. solicitor, of a son.  
ALLISON.—On the 30th ult. at South Kilvington, the wife of J. P. Allison, esq. solicitor, Thirsk, of a son.  
BANKS.—On the 25th ult. at Brecon, the lady of W. L. Banks, esq. solicitor, of a daughter.  
COWDEN.—On the 28th inst. at 103, Westbourne-terrace, the wife of R. Cowden, esq. M.P. of a daughter.

### MARRIAGES.

ALLEN, Peter, M.D. of Bridport, youngest son of Gabriel Allen, esq. of Smarden, Kent, to Flora, eldest daughter of Edwin Nichollette, esq. treasurer of County Courts and town-clerk of the borough, at the parish church, Bridport, Dorset, on the 26th ult.  
BURNET, John, esq. B.A. Oxon. barrister-at-law, to Catherine Ann, relict of the late Dowell Knorr O'Reilly, esq. Captain in H.M. 86th Light Infantry, and only daughter of the late James Gordon Cawmash, Cambridge, Wexford, at the Church of Charles-the-Martyr, Falmouth.

JONES, John, esq. of Devereux-court, Temple, and Old Brompton, to Margaret, second daughter of the late Charles Rose, esq. formerly of New Broad-street, City, at St. Luke's, Chelsea, on the 30th ult.

SIMPSON, Thomas Burn, esq. of Lincoln College, Oxford, youngest son of J. Simpson, esq. of Whitburn West-house, magistrate of the county of Durham, to Jane, only daughter of the late Thomas Longstaff, esq. ship-owner, Sunderland, at Bishop Wearmouth Church, on the 22nd ult.

STANLEY, Charles, esq. of the Middle Temple, Barrister-at-law, to Annie, second daughter of the late John Stanforth, esq. of Westbourne, near Sheffield, at St. George's Church, near Sheffield, on the 30th ult.

STANLEY, Henry Fern, esq. of Fenshedge, county of Carlisle, Ireland, J.P. and one of her Majesty's deputy lieutenants of and for the county of Dorset, and only surviving brother of the late Lieutenant-Colonel Sir Robert Steele, Knight and K.C.B., deputy-lieutenant of the same county, to Ellen, fourth daughter of the late George King, esq. of Burton Manor-house, Hants, and Burgate, Surrey, on the 23rd ult. at St. James's Church, Westminster.

### DEATHS.

CARTWRIGHT, Thomas, esq. one of her Majesty's Justices of the Peace, and late High Sheriff of Staffordshire, at Hill-hall, in the said county, on the 29th ult. aged 73.  
COWPER, Harry, esq. banker, and a magistrate for the city of Chichester, on the 22nd ult.



**FLINTOFF, Anne**, widow of the late Owen Flintoff, esq., barrister-at-law, and Chief Justice of Sierra Leone, at 1, Upper Belmont-place, Wandsworth-road, on the 16th ult.

**NALDER, Charlotte Rose**, the wife of F. J. Nalder, of Shepton Mallet, solicitor, and youngest daughter of the late Richard Henry Budd, esq. of Stoke-next-Guildford, Surrey, at Shepton Mallet, Somerset, on the 23rd ult. aged 55.

**THORNTON, George Benjamin**, esq., magistrate for the counties of Staffordshire and Shropshire, on the 28th ult. at his residence, Chapel-house, near Wolverhampton, aged 69.

**WOLLEY, Eliza Earle**, the wife of William Bertie Wolley, esq., Acting Government Secretary of British Guiana, on the 21st March, at Demerara, aged 61.

## THE GAZETTES.

## Bankrupts.

*Gazette, April 29.*

**BUTLOCK, JOHN**, innholder, Bristol, May 14 and June 11, at eleven, Bristol. Off. as. Huston. Sol. Barker, Bristol. Petition, April 9.

**KENNY, JAMES**, innkeeper, Preston, Lancashire, May 9 and 29, at eleven, Manchester. Off. as. Mackenzie. Sol. Blackhurst, Preston. Petition, April 24.

**FRANCE, FREDERICK SPENCER ADOLPHUS**, clothier, Lambeth-walk, Lambeth, May 8 and June 6, at one, Basinghall-st. Off. as. Bell. Sol. Stodart, Raquet-court, Fleet-st. Petition, April 26.

**HILL, JAMES**, miller, Saltash, Cornwall, May 23 and June 19, at eleven, Plymouth. Off. as. Herniman. Sols. Edmonds and Sons, Plymouth, and Stogden, Exeter. Petition, April 17.

**HOLTHOUSE, CASSIAN**, sugar broker, Great Tower-st. May 9, at half-past twelve, June 13, at eleven, Basinghall-st. Off. as. Cannan. Sols. Hill and Matthews, Bury-court, St. Mary-axe. Petition, April 26.

**RIDGE, JOSEPH CHARLES**, wine merchant, Great St. Helen's, Bishopgate, City, May 9 and June 13, at twelve, Basinghall-st. Off. as. Whitmore. Sol. Jarwood, Ky-place, Holborn. Petition, April 23.

**SMITH, JAMES**, carpenter, Lincoln, May 21 and June 11, Kingston-upon-Hull. Off. as. Carrick. Sols. Scott and Tahourdin, Lincoln's-inn-fields; Toyabe, Lincoln; and Stamp, Hull. Petition, April 16.

**TAYLOR, JAMES**, worsted spinner, Bradford, Yorkshire, May 20 and June 17, Leeds. Off. as. Hope. Sols. Northwood, Bradford; and Courtenay and Compton, Leeds. Petition, April 28.

*Gazette, May 2.*

**ARTLEY, WILLIAM**, miller, North Burton, Yorkshire, May 14 and June 11, at half-past twelve, Kingston-upon-Hull. Off. as. Carrick. Sols. Tweed, Hull, Bell, Hull, and Hodgson, Driffield.

**BURROWS, WILLIAM**, surgeon, Park-street, Islington, May 14, at two, June 13, at twelve, Basinghall-st. Off. as. Graham. Sol. Cooper, Old Cavendish-st.

**OLIFONT, THOMAS**, and **BAXLE, RICHARD RASKEY**, spirit merchants, Bristol, April 29, Bristol. Off. as. Acraman. Sols. Abbott and Lucas, Bristol.

**HARRISON, WILLIAM BOWEN**, bleacher, Lancashire, May 13 and June 4, at twelve, Manchester. Off. as. Pott. Sol. Cobbett, Manchester.

**JACKSON, WILLIAM**, painter, Orchard-st. Portman-sq. May 13, at one, June 10, at eleven, Basinghall-st. Off. as. Edwards. Sol. Letts, Bartlett's-buildings.

**M'CURRY, JOSEPH**, merchant, Liverpool, May 9 and June 6, at eleven, Liverpool. Off. as. Turner. Sol. Bretherton, Liverpool.

**SHEPARD, ROBERT**, commission agent, Norwich, May 10, June 16, at eleven, Basinghall-st. Off. as. Pennell. Sols. Jay, Bucklersbury; Jay and Pilgrim, Norwich.

**WOODIN, JOHN**, upholsterer, Matilda-st. Islington, May 9, at half-past one, June 13, at twelve, Basinghall-st. Off. as. Cannan. Sols. Tucker and Jones, Sun-chambers, Threadneedle-st.

## Dividends.

*Official Assignees are given, to whom apply for the Dividends.*

**Brett, J. F.** tailor and draper, first, 4s. Wakley, New-castle. Broughton and Garnett, bankers, fifth, Old, and not 9s. Old, as before advertised. Turner, Liverpool.—**Chitty, P. M.** scrivener, final, 10d. Stanfield, London.—**Hendley, A. C.** linen-draper, second, 10d. Stanfield, London.—**Rose, W.** draper, first, 1s. 10d. Fraser, Manchester.—**Love, W. L.** victualler, first, 3s. 4d. Fraser, Manchester.—**Page, G.** coal dealer, first, 10d. Valpy, Birmingham.—**Parker, E.** shoe manufacturer, first, 1s. 9d. Stanfield, London.—**Perkins, W.** timber merchant, first, 7s. 6d. Valpy, Birmingham.—**Swilford and Harris**, cotton spinners, first sep. of Swilford, 10d.; first sep. of Harris, 3s. 0d.; and first joint, 3s. 4d. Lee, Manchester.—**Williams, W. G.** draper, second, 10d. Fraser, Manchester.

*INSOLVENT DEBTS.*

**Pearce, T. jun.** 3s. 8d. Apply at the County Court, Trowcester.

## Assignments for the Benefit of Creditors.

*Gazette, April 23.*

**Bell, A.** grocer, Luton, Bedford, March 20. Trusts: J. Lucas, banker, Hitchin, and C. Teede, grocer, Warner's-yard, Mincing-lane. Sol. C. A. Austin, Luton.—**Bowcher, H. E.** draper and haberdasher, Birmingham, April 12. Trusts: J. Heath, draper, and J. Boucher, gentleman, Birmingham. Sol. W. P. Alcock, Birmingham.—**Brown, J.** gentleman, Leicester, April 13 & 14. Trusts: T. C. Harris, draper, and T. Harrold, builder, Hincley. Sol. W. P. Alcock, Birmingham.—**Carter, J.** agent and broker, Huddersfield, April 17. Trust: W. Richardson, silversmith, Huddersfield. Sols. Fenton and Jones, Huddersfield.—**Macklin, H. C.** draper, Highworth, April 4. Trusts: W. F. Jennings, bank agent, Highworth, H. Sturt, Wood-st. and R. Russell, Friday-st. warehouseman. Sols. Sol. and Turner, Aldermanbury.—**Maddocks, R.** Brington, April 9. Trusts: T. Maddocks and J. France, farmers, Whitechurch. Sols. Lee and Brooks, Whitechurch.—**Pearce, J.** draper, Basingstoke, April 16. Trusts: J. Bag-

gally, Love-lane, and T. Shepperson, Cheapside, warehousemen. Sols. Sole and Turner, Aldermanbury.—**Pettitt, J. W.** cabinet-maker, Sudbury, March 17. Trusts: C. H. Hawkins, timber-merchant, Colechester, J. Wright, printer, Sudbury. Sols. E. and R. F. Stedman, Sudbury.—**Smirk, sen.** and jun. sailmakers and shipowners, Sunderland, April 10. Trusts: W. Thackray, timber-merchant, and J. Hay, rope manufacturer and shipowner, Sunderland. Sol. R. T. Wilkinson, Sunderland.—**Squire, S. F.** stationer, Ventnor, Isle of Wight, April 8. Trust: G. Kershaw, stationer, Wilderness-row, Clerkenwell. Sols. Sewell and Estcourt, Newport.

*Gazette, April 25.*

**Assiter, W.** builder and stonemason, Maidstone, Kent, April 19. Trusts: J. Laker, Maidstone, and T. Tompson, Loose, builders, and J. Hayles, painter, Maidstone. Sol. C. Morgan, Maidstone.—**Jones, R.** and J. R. blacksmiths, Newbridge, Monmouth, April 2. Trusts: J. Brown, steel manufacturer, Sheffield, and C. Davies, ironmonger, Pontypool. Sol. T. M. Llewellyn, Newport.—**Ramsden, G.** and **Bruntton, T.** dyers, Leeds, April 12. Trusts: F. Carr and R. Webster, drysalers, Leeds. Sol. W. Middleton, Leeds.—**Shelton, J. P.** shoemaker, Peterborough, Northampton, April 6. Trusts: G. Caster, currier, and W. Verzetze, grocer, both of Peterborough. Sols. Atkinson and Smith, Peterborough.—**White, P.** ironmonger, oil and colourman, Norwich, April 15. Trusts: J. Keep, factor, Birmingham, and R. Thompson, jun. ironmonger, Norwich. Sol. H. Ling, Norwich.

## Partnerships Dissolved.

*Gazette, April 22.*

**Blakesley and Company**, wine merchants, Bread-st. Cheapside, April 21.—**Cheetham, J.** and **Novelli, P.** cotton spinners, Chadderton, near Oldham, and Manchester, April 2. Debts paid by Cheetham.—**Dobson, J.** and **W. spindle and fly makers**, Bradford, April 17.—**Gaskell and Thomason**, tobacco and snuff manufacturers, Liverpool, June 30, 1847.—**Hill, T. A.** and **Martin, B.** chemists and druggists, Park-street, Camden-town, April 17.—**Leigh, J.** and **W.** commission agents, Burlington and Manchester, April 16. Debts paid by W. Leigh.—**McCulloch, J. S.** and **Co.** outfitters, Liverpool, Feb. 15.—**Redfern and Bourne**, gunmakers, Birmingham, April 17. Debts paid by Bourne.—**Sharpe and Co.** manufacturers of fire-brick, Swadineote and Ashby Wolds, April 5. Debts paid by Cartwright.—**Stearns and Pittman**, stockbrokers, Hercules-passage, Threadneedle-st. April 19. Debts paid by Pittman.—**Wheeler, T. H.** and **D.** butchers, Frome, April 12. Debts paid by T. H. Wheeler.

*Gazette, April 25.*

**Brailey and Son**, brushmakers, Skinner-st. Bishopsgate, April 21.—**Caseley, A.** and **Anderson, W.** carpenters and builders, Wells-row, Highbury, April 23.—**Cock, W.** and **M. farmers**, Pilton, March 25.—**Cutts and Hurry**, paper-makers, Melford, April 9.—**Frost, W.** and **Priestley, F.** pianoforte makers, Cleveland-st. Fitzroy-square, April 23.—**Kennedy, Macgregor**, and **Co.** Canton, June 29.—**King and Bolton**, corn chandlers, Fulham, April 19. Debts paid by King.—**Kober, G.** and **Horrocks, J. L.** general merchants, Eastcheap, March 8.—**Lane, J.** and **Son**, millers and corn dealers, Ford, North Wrexall, March 25. Debts paid by J. Lane.—**Maudsley, H.** and **J.** cotton-sheet manufacturers, Musbury, April 21.—**Mercier, F.** **Prinsep, W.** **Seymour, G. E.** stockbrokers, Royal Exchange-buildings, April 30, 1848. Debts paid by Seymour.—**Murch, J.** and **Andrews, J.** grocers and tallow chandlers, Kingsbridge, April 23. Debts paid by Murch.—**Perry and Bowen**, ironmongers, Hanley, April 19. Debts paid by Bowen.—**Prinsep, W.** and **Seymour, G. E.** stockbrokers, Royal Exchange-buildings, Dec. 31, 1842. Debts paid by Seymour.—**Proctor, Bidwell**, and **Co.** commission agents, April 19.—**Raphael, Calvoecorresi**, and **Co.** and **Merzang, J.** and **Co.** general merchants, London, Manchester, and elsewhere, Feb. 1.—**Scotland and Kirkaldy**, wholesale tea dealers, Cullum-st. April 11. Debts paid by Kirkaldy.—**Singleton and Co.** tarpauling manufacturers, Manchester, April 22.—**Swindells and Murgatroyd**, manufacturing chemists, Bewick, Manchester, April 12. Debts paid by Swindells.—**Tubb and Brooks**, linen drapers, Albany-st. April 22. Debts paid by Tubb.—**Vibert and Collinson**, printers, booksellers, &c. Penzance, March 25.

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35. Appointment by testatrix (a widow), under a power contained in her marriage settlement, of freehold property to her eldest son in fee, and of copyhold and leasehold estates, upon trust for her four younger children absolutely, as tenants in common, with cross limitations in case either of them should die in testator's lifetime, or under the age of twenty-one years, without leaving issue.
36. Will, devising real property to devisees for life, with remainder to trustees to preserve contingent remainders, and with power for devisee to appoint the property amongst his children or more remote issue; in default of appointment, amongst all his children equally, with cross limitations to the survivors, in case of the death of any of the children under twenty-one. Provisions for maintenance. Directions that unapplied surplus shall be invested to accumulate, and to be applied either for the benefit of children during their minority, or paid over to them on their coming of age. In case devisees for life shall leave no children who shall survive testator and attain twenty-one, then ultimate limitation to the testator's right heirs. Also, power to grant leases at rack-rent.
37. Bequest of one-third of residuary estate to which testator is entitled under the will of a deceased uncle, upon trust for the separate use of a sister of testator for life, with power of appointment in favour of her children; and in default of appointment, upon trust for her children absolutely, and in case of no children, to go to testator's brother absolutely. Proviso for determining sister's interest in case she shall marry a particular person. Devise of premises which testator holds as mortgagee in possession in fee, and also of the mortgage-money to his brother, subject to the subsisting equity of redemption. Bequest of a bond debt for 750*l*. due from testator's brother-in-law to the wife. Power for trustees to defer calling in debts owing to testator from his brother-in-law. Bequest of residue between testator's brother and sister in equal shares.
38. Will of a brewer, by which he bequeaths his share (one moiety) in the business and stock in trade to his son, and appoints him as his successor in the partnership firm, and his special executor as to the business.
39. Will of an attorney, in which he bequeaths his share (one moiety) of the business to his son, and appoints him as his successor in the partnership firm, with power to adjust all partnership matters without the interference of the executors.
40. Concise forms of various kinds of conditions, adapted to bequests of real and personal estate.
41. Concise forms of various kinds of powers, adapted to settlements of real estate.
42. Will, limiting legal estates to each of testator's sons successively for life, with legal remainders to their first and other sons in tail general, with remainder to trustees during the life of each of testator's daughters successively, upon trust for her separate use, with legal remainders to the first and other sons of daughters in tail general, with the ultimate remainder to testator's own right heirs.
43. Will, creating a rent-charge for testator's widow for life, and limiting a term of 1,000 years for raising portions for younger children. Also devises to uses in strict settlement, embracing the whole line of testator's descendants. Appointment of three persons as protectors of the settlement. Power to raise portions for younger children, and also yearly sums for their maintenance and education, with provisions for survivorship and accretion. Power of advancement of younger children, and proviso for ceasing of term.
44. Short form, containing limitations to the same effect as those in the foregoing precedent.
45. Will, limiting equitable estates to all testator's sons successively for life, with legal remainders to their first and other sons in tail male, with equitable remainders to each of testator's daughters successively for life, with legal remainders to their first and other sons in tail male, with ultimate remainder to testator's right heirs.
46. Will, devising real estate to trustees for ninety-nine years, if testator's daughter shall so long live, upon trust for her separate use for life, to trustees to preserve contingent remainders; with limitations to the first and other sons of daughter in tail, with remainder to all her daughters as tenants in common in tail, with cross remainders between them, with an absolute power of appointment in the daughter in default of her leaving issue, with ultimate limitation to her in fee.
47. Devise of real estates to trustees during the lives of testator's niece and her husband, and of the survivor, upon trust to pay them the rents and profits. Power for wife, after the decease of survivor, to appoint real estates amongst her children; and which, in default of appointment, are limited to her first and other sons successively in tail general, with similar limitations in favour of her first and other daughters, with remainder to testator's nephew for life, with limitations to all his sons as tenants in

common in tail, with cross remainders between them, with similar limitations in favour of his daughters; with remainder to trustees during the life of testator's niece, upon trust for her separate use, with similar limitations in favour of her sons and daughters as before limited to those of testator's nephew.

48. Will, by which real and personal estate is limited to trustees for a term of twenty-one years, upon trusts for accumulation, the proceeds of which are directed to be invested in lands, which, with certain real estates previously devised, are limited in trust for testator's nephew for life, with equitable life estates to his first and other sons successively born in testator's lifetime, with legal remainders to their first and other sons successively in tail male; with legal remainders in tail male to first and other sons of nephew not born in testator's lifetime; and with similar limitations in favour of first and other daughters of testator's nephew, as are before contained with respect to his sons, whether born in testator's lifetime or after his decease.
49. Will, by which a testator directs his personal estate, and the rents and profits of his real estate, to accumulate, and to be invested in lands until his daughter (an only child) attains twenty-five. Then upon trust, as to all his real estate, including those previously devised, for her separate use for life, with limitations to her first and other sons successively in tail, and to all her daughters as tenants in common in tail; and in case of daughter dying without issue, to testator's three sisters for life, as tenants in common, with benefit of survivorship and accretion; with remainder to testator's brother for life, with similar limitations to his sons and daughters in tail as before mentioned. Directions that daughter shall be brought up under the superintendence of testator's three sisters, with whom she is directed to reside until she attains twenty-five, trustees making a yearly allowance during such residence. Daughter, on attaining fourteen, to receive a yearly allowance for pocket-money, which is to increase annually until she attains twenty-one. Proviso for avoiding limitations to daughter in case of her marrying without consent, or any person bearing a certain name, or of a particular country, or a foreigner, although naturalised, on either of which events she is to receive a small life annuity, payable monthly, for her separate use, and the surplus rents to be paid to the persons who would have been entitled thereto upon her decease without issue. Appointment of testator's sisters to the guardianship. Devise of trust and mortgage estates, and reference to the other usual and proper clauses for completing the will.
50. Devise of real estate to trustees for 1,000 years, for the purpose of raising money to pay debts and legacies in aid of the personal estate.
51. Devise of freehold, copyhold, and leasehold property, and personal estate, upon trust to get in personal estate and invest in lands. Freehold estates devised are settled to testator's eldest son for life, with remainder to his first and other sons born in his lifetime, successively, for life, with remainder to first and other sons successively in tail male, with remainder to first and other sons of eldest son not born in testator's lifetime, successively in tail male, with remainder to first and other daughters of eldest son born in testator's lifetime, with remainder to her first and other sons in tail male with remainder to first and other daughters of eldest son not born in testator's lifetime, in tail male, with similar limitations in remainder to testator's second son, and to his daughter and their respective sons and daughters and their issue. Copyholds are limited to second son and his sons and daughters and their issue, upon trusts corresponding with those previously limited of the freehold property, and with similar trusts in remainder in favour of testator's daughter and her issue, excepting that her life estate is limited to her separate use. As to leasehold estates, trustees are directed to pay the reserved rents and effect renewals, and to stand possessed upon trusts corresponding with those before declared of copyholds. Personal estate to be invested in the purchase of lands to be settled to the separate use of testator's daughter for her life, with similar limitations in favour of her sons and daughters and their issue as before limited respecting the issue of testator's eldest son, with proviso for shifting copyhold and leasehold estates to daughter and her issue in case of testator's second son or his issue succeeding to the devised freehold estates.
52. Clauses containing provisions for testator's wife. Directions that chattels shall go as her loans, and other clauses connected with settlement of real and personal estate.

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## To Readers and Correspondents.

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## THE LAW TIMES.

SATURDAY, MAY 10, 1851.

## TO READERS.

MANY practitioners having expressed a wish that we would supply them with an Index to the subjects of cases reported, to assist them in researches during the progress of a volume, before they can obtain the general index, we have determined to accede to their request, and we purpose, as the most convenient interval to present such an index in every seventh number to the reports contained in the previous six numbers. The first of these intermediate indexes appears to-day, and we trust that it will be found to afford the assistance desired.

## THE ATTORNEY'S TAX.

LORD ROBERT GROSVENOR has renewed his motion for the repeal of this tax, but with no hope of present success. It seems to have been arranged on Monday that the financial measures of the session are to be accepted without further modification. But the Income Tax being voted for one year only, an extensive revision of taxation cannot be evaded next year, whatever party may be in power. Then will be our opportunity and the time to use it. To put forward our strength now, would be to waste our energies without a chance of success. It is right, nevertheless, that the motion should be made, in order that the House of Commons may bear our grievance in mind, and that we may not appear to have abandoned our own most just demand. The time cannot be far distant now when we shall be able to help ourselves and fight our own battle. A general election is in prospect. Let the Attorneys be but true to themselves, and they may command success. Let them make the pledge to vote for the abolition of their impost a condition of their assistance to any candidate

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of any party, and their success is assured. Candidates cannot do without them at an election, and the promise of a vote for a measure of such manifest justice cannot be deemed by the candidate an unfair or unreasonable request in return for services rendered by those who are seeking redress of a grievous wrong.

## REGISTRATION OF DEEDS.

We are informed that there is no chance of this Bill becoming law during the present session. The Committee of the Lords have rejected so much of the plan as adopted the tithe commutation maps; and that being the foundation of the scheme, the superstructure must fall to the ground, and another edifice be erected in its stead—a task of no small difficulty, and which the Lords are not likely to accomplish during the remainder of a session which is to be hurried to a premature close.

The plan of the Commissioners being thus swept away, the question is opened anew, and suggestions may be serviceable. We have given place to many, but all proceeding upon the assumption that only a local registry can be successful. In addition to the registrars already proposed, other correspondents have suggested, as fit persons, the magistrates' clerks, who have also the advantage of small districts and of being lawyers, while it would facilitate another very desirable object, that of freeing them altogether from private practice, and enabling them to be sufficiently well paid for the combined offices, to admit of their becoming wholly public servants. Another correspondent proposes the remaining Commissioners of Bankrupts, but they are few and scattered. Beyond all measure, the choice manifestly lies between the magistrates' clerks and the county court clerks.

## LAW OF EVIDENCE.

SINCE the former article on this subject, a very important accession has been made to the ranks of those who, with us, are advocates for the unlimited admission as witnesses of all who know any thing about the subject-matter in dispute, whatever may be their interest in the issue, leaving it to the jury to determine the amount of value that is to be given to such testimony, forming their judgments, as now they are obliged to do, by the various tests of examination and cross-examination, the manner of the witness, and the probabilities or otherwise of the story he tells. Having, from the very commencement of our editorial labours, maintained this opinion, in opposition, as we are bound to admit, to that of the majority of our readers, it is not a little gratifying now to welcome the conversion to it of so high an authority as Lord DENMAN, himself the parent of the Bill that swept away all other disabilities of interest but left that of parties to the suit still existing, because at that time he did not see his way clearly in the question, and had not given to it the consideration which has since induced an entire change of opinion, and satisfied him, not only that the admission of the testimony of the parties is unobjectionable, but that without it justice is unattainable.

The letter of the retired Chief Justice is subjoined, and every word of it will be eagerly perused and pondered upon by our readers. It is a clear and explicit statement of the arguments that have convinced him, and still more valuable as containing the testimony of his long experience. Leaving, at least for the present, this most interesting document to the calm judgment of the Profession, let us now continue the argument we had commenced.

We have shewn that *reason*, apart from any experience of the matter, decidedly approves the reception of all testimony from witnesses *able* to throw light upon the question, without regard to their willingness or their veracity, leaving its worth to be determined by the tribunal, which alone is competent to form a judgment from the aspect, the manner, the cross-examination, and the probabilities of the story. Let us now see what *experience* teaches us.

It must be steadily borne in mind that the practice is *not* a new one; it is not one of which no trial has been made, and on which, therefore, we have nothing but conjecture to guide us. Already

it exists among us, and has existed for centuries. In England there are six classes of tribunals; to wit, the Equity Courts, the Common Law Courts, the Ecclesiastical Courts, the Criminal Courts, the County Courts, and the Magistrates' Courts. To read the illogical speech of the Lord Chancellor, and the petition of the Incorporated Law Society, it might be supposed that some great innovation was contemplated, which was to reverse all previous experience and substitute a new and questionable practice, entirely strange to the laws and customs of English courts of justice. Now, would not a stranger perusing these protests be amazed to be told, as the truth is, that in five out of these six classes of tribunals the practice already exists, and has existed for centuries, at least with so much content to judges and suitors that not one of them has ever so much as proposed to change it? Nay more, that in the very court over which the Lord Chancellor presides, it is the main reliance for procuring the facts, and that every judgment which the noble lord delivers is actually founded upon the self-same species of testimony which he, in his speech, declares to be so worthless and unworthy that it ought not to be admitted at all! The practice and the preaching of the noble lord are altogether at variance. His conduct contradicts his arguments. If that testimony is but one-half as dangerous as he represents it, he has no right to place any reliance upon it for the formation of his own judgments; nay, he is failing in his duty to the tribunal of which he is the chief, if he permits a single day to elapse without introducing, and then with all the might of the Government urging onward, a measure to put an end to so monstrous a mischief, by excluding the evidence of parties in the Equity courts as it is excluded in the Common Law courts.

But, except as shewing how little worth is an argument when the practice of the speaker is in opposition to it, the inconsistency of the LORD CHANCELLOR does not affect the actual question at issue. The important fact for the reader is, that there are six classes of tribunals in England; that five out of these six admit the testimony of the parties; that they have never raised an objection to it, nor has any judge or practitioner in those courts ever proposed to abandon the practice and adopt that of the Common Law Courts. To all reasonable and unprejudiced minds this fact will at least carry this conclusion, that the evils predicted of it by its opponents are not found to occur in practice, where the testimony of the parties is already taken; for, if they did so, that practice would long since have been denounced and abandoned. That it has continued without objection from any, if not proof of positive good in it, is decisive evidence of the absence of positive evil.

"Ah!" it will perhaps be said, "but there is a difference between the Equity and other courts in which the testimony of the parties is received, and the Common Law courts."

We admit it, most fully; but that difference is entirely in favour of its reception in the Common Law Courts and its rejection in the Equity Courts. In the former, the witness is subjected to personal and public examination and cross-examination, and his manner as well as his story is subjected to observation, and forms an element in weighing and estimating his veracity. All the tests of truth are applied to him. In the latter, he is subjected only to an examination in private, by questions previously prepared, and, therefore, impossible to be adapted to circumstances as they may arise in the course of the inquiry, and with ample time and opportunity to frame answers which, if not positively false, may be a suppression of the truth. If it be unsafe to receive the testimony of parties to a suit, it would be impossible to conceive a method of taking it more likely to render it worthless and to encourage perjury. And yet would our consistent defenders of the existing practice exclude the testimony taken with all the safeguards of truth, while they receive and act upon it when taken without those safeguards, and with every temptation offered to dishonesty. Is not this to strain at the gnat and swallow the camel?

But this is only the first of the practical contradictions into which the objectors fall. Let the reader who has yet a doubt remaining ponder upon these arguments and the following letter, before they resume with us the further consideration of the question next week. Its vast importance to the administration of justice and the very existence of the Common Law Courts, will excuse the length at which we are treating it.

This is Lord DENMAN's interesting and conclusive letter, copied from the *Law Review*—



## LORD DENMAN ON THE EVIDENCE OF PARTIES.

TO THE EDITOR OF THE LAW REVIEW.

DEAR SIR,—Being still disabled from attending in my place in Parliament, I request permission to make known in your valuable journal my sentiments on the important Bill now pending before the House of Lords, on the reception of the evidence of parties.

In the outset, however, I must admit that I have no judicial experience to report, as, indeed, none can exist with respect to a system which has not actually been tried: my only title to be heard arises from a general acquaintance with, and much consideration of, the subject, combined with an ardent desire to contribute to the safe improvement of our judicial system. I have frequently discussed it in a correspondence with Lord Brougham—have urged and sifted all the doubts which have occurred to me, as to the expediency of the change proposed—and have ultimately come to a clear and decided opinion that that change will be beneficial, or rather, that it is necessary for the discovery of truth, and the promotion of justice, and will greatly tend to prevent the crime of perjury, and ultimately to extinguish unjust litigation.

To enter particularly into the argument would be superfluous and almost impertinent, as Lord Brougham's speech is before the public, and will, of course, command attention. Whoever wishes to enter into more details will find them admirably discussed in the tract of my friend, Mr. Amos, illustrated as it is by actual experience of a state of things perfectly analogous to that which the Bill contemplates. The same evidence of the same experience has proceeded from nearly all the County Court judges who have enjoyed the same opportunity. I would further mention the able letter addressed by Sir Erskine Perry to Lord Campbell, which seems to establish the same conclusion both in our eastern possessions and in foreign countries, where the practice has been introduced, particularly in the courts of France.

The hope, therefore, may be confidently indulged that the formidable opposition with which the Bill is menaced in the House of Lords, will be removed, as my own objections have been, by a fuller consideration of the proofs in its favour; and that the candid mind of the Lord Chancellor, when relieved from the immediate pressure of overwhelming duties, and free to make full inquiry, may acquiesce in the same result, at which so many of his friends have already arrived.

The evils of the ancient system, which excluded all information from interested witnesses, were glaring and intolerable in Westminster Hall; and I am able to set forth some monstrous consequences arising from the defects which it is now proposed to remove. Take one example. The plaintiff is the holder of a bill or note, which the defendant, if he signed it, is liable to pay. The plaintiff, though he, and he alone, saw him sign it, cannot prove the fact, because excluded by the rule of law. The defendant is protected by the same law from confessing the fact. On the trial, recourse must therefore be had to those who know the handwriting; but no witness is at hand who can speak to it with certainty. The defendant may sit in court, and be a spectator of the plaintiff's nonsuit, for want of that proof; and, instead of assisting him to recover the sum which both parties know to be due, the law becomes his accomplice in converting his creditor into a debtor for the amount of costs incurred in the prosecution of a just claim. This, which would hardly be believed if it were not conformable to constant practice, is, perhaps, the extreme case; but the degrees in which injustice may be effected by this operation of law are innumerable. (a)

I shall abstain from entering on the utility of permitting a defendant to be personally examined in the case where he is sought to be defrauded by a forged instrument, or where his signature may have been obtained under circumstances, known only to himself and the plaintiff, which shew that he is not liable, &c.

When at the bar, my experience as an arbitrator was considerable. I have no impression of having ever declined to examine a party where he was thought capable of giving useful information. I know, as the result of inquiry, that this is now frequently the case; and I may mention that, when sitting on the Bench, I have heard the witnesses at fault in making out by inference some decisive fact known to the parties. I have frequently recommended that the cause should be referred to arbitra-

(a) I ventured, when at the Bar, to denounce the possible triumph of this dishonest suppression, in a short pamphlet, published, I think, in 1828, which the Commissioners for the Amendment of the Law printed in their minutes as my evidence. Every suggestion it contained has, in the interval, become law, except the correction of this defect, which is really a disgrace to a civilised country. I meditated an Act for empowering Courts to call on parties whose signature appears to instruments, to admit or deny it. But I trust the necessity for such partial measure will be superseded by the comprehensive enactment under consideration.

tion, for the single purpose of subjecting those parties to examination. The recommendation was, in no instance that I remember, declined, and I have never heard any complaint of the consequences.

In the late debate, a hint was thrown out that it might be more proper to call for the opinion of the superior judges on the Bill than for that of the gentlemen presiding in our County Courts. But it is obvious that the County Court judges speak of an experiment which is actually and every day passing before their eyes, while the superior judges could only report a speculation of their own on a state of things which has not yet presented itself to their observation. If, however, it should be deemed advisable to consult the judges upon the Bill, I hope that those learned and excellent men will be found to have turned their minds to the question, and are prepared to pronounce a judgment upon it. I am sure that their suggestions will be received with the utmost respect and deference, as the product of conscientious candour, of cultivated and practised intellect. Their opinions, to whichever side they may incline, will assuredly be supported with that fulness of reasoning and explanation which will enable Parliament clearly to discern their import, accurately to weigh their value, and ultimately, on its own untransferrable responsibility, decide upon them.

The delay itself may, however, produce both inconvenience and injustice; and there is this further difficulty of a more general nature. To form schemes for altering the law is no part of the judge's vocation. They have sometimes, to my knowledge, felt rather aggrieved by being expected to have done so, or required to perform that task. While they are bound to certify their practice, and would receive entire credit in reporting it, they may well decline to expound their opinions, or even to form any, on the prudence of reforming it, and they may hesitate to submit their speculations to contradiction and criticism.

The lines of Horace, hackneyed by frequent quotation, on account of their true and felicitous description of a certain phase of human nature, are much more applicable to judges than to literary or theatrical censors:—

—Clament perire pudorem  
Conati pone petros, ex cum reprehendere coner,  
Quæ gravis ædopus, quæ doctus Roccus egit;  
Vel quis nil rectum nisi quod placuit sibi ducunt,  
Vel quis turpe putant parere minoribus, et quæ  
Imberbes didicere senes perenda fateri.

Besides the constant occupation of their minds in their important functions, and the necessity for the undisturbed enjoyment of their hard-earned leisure, there are feelings in the judges which must ever strengthen the reluctance to assent to alteration. They have administered the law as they found it, with implicit confidence, and even veneration, which unite in them with all the obvious and instinctive motives for abhorring change. It is painful to condemn the past and present. Even if they concur in the projected improvement, they had rather that others should be the persons to counsel it. What has satisfied mankind so long may be suffered to remain during their time, alas! too short at the best.

Some of the chiefs in our Superior Courts are advanced to the peerage in the expectation, possibly, that in Parliament they will propose a remedy for the defects made apparent to them while presiding over the administration of the law. My own activity in such legislation has not been excessive; I rather blush for the little I have attempted, and the less I have been able to do. But I confess I have felt discouragement, regret, and even humiliation, at receiving the answer of some of my contemporaries to points which I have thought it my duty to lay before them:—"The principle is perfectly right. I cannot answer your reasoning, and I see the objection to the present state of the law, and none to the change, except that it is a change; yet I cannot bring myself to concur in it." It is a fact on record, which will startle existing judges, most of whom probably never heard of it (as I am now travelling forty years back), that Lord Ellenborough announced in the House of Lords the unanimous opinion of his eleven brother judges, that it would be wrong to repeal the law which punished with death a larceny to the amount of five shillings in a shop. The oracle had not been consulted; it solemnly volunteered this fearful edict. Perhaps also every member of the present House of Peers will be astonished to hear that the Bill was for that time rejected.

I cannot forget one particular fallacy which I have frequently observed, which tends to increase the aversion of some judges to change. The system which they find they believe to have been established on full deliberation by wisdom of former ages, and hence impute to all innovators the arrogance of reversing a decision; whereas, in truth, the existing system is, for the most part, the neglected growth of time and accident; circumstances have prevented the revision that is now taking place; and the existing defect has only been left uncured because no deliberation has ever been had upon it.

The reasons, however, on which the present law

must have been founded, probably stated with all possible force in judicial Acts, and by text writers on the law, admit and require free and careful examination. Mr. Amos then most properly lays before us Chief Baron Gilbert's deduction of the rule excluding interested witnesses, because their testimony "can never induce any rational belief." Lord Brougham, from the great authority of Lord Chief Justice Tindal and others, proves that there have been on the bench many exceptions to the adoption of this dogma; and, indeed, it is worth while to consider whether it is not entirely without foundation.

On what ground is the assertion warranted, that no man, speaking with the bias of interest on his mind, can speak the truth? Made with respect to ourselves, or any individual of our acquaintance, it is an imputation as false as insulting, and would be rejected with just indignation. Why must we pronounce ourselves so much more virtuous than the rest of mankind? The earlier part of Mr. Amos's treatise furnishes a simple and lucid narrative of the various causes which, under his own observation, have insured the triumph of candour and veracity over the principle of self-interest; and I have seldom read a defence for mankind from one of the charges most commonly brought against it more ingenious or more just than that contained in those pages. I must also bear witness, as far as opinion goes, that, notwithstanding the frequent contrarieties of testimony observable in courts of justice, the amount of wilful falsehood, undoubtedly great, is far less than is generally supposed. (b)

"Ask no questions, and you will hear no lies," is a vernacular caution often administered to incontinent inquisitiveness. It seems to me to comprise the whole argument in opposition to this Bill. But no one will advise us to prefer darkness to light, because the latter must sometimes reveal unightly objects; still less will prudence suggest an entire abstinence from food, though that is the only perfect security against swallowing poison.

With these views, which I merely state, leaving the argument in able hands, I give in my adhesion to the principle of Lord Brougham's Bill, and respectfully thus tender my vote for its further progress.

I remain, dear Sir, very truly yours,  
PARALOE, April 21. DENMAN.

## THE LEGISLATOR.

## Imperial Parliament.

## PUBLIC BUSINESS TRANSACTED.

## BILLS READ A FIRST TIME.

Friday, May 2.

Fees on Proceedings before Justices, Ireland

Appointments to Offices, &amp;c.

Monday, May 5.

County Courts further Extension.

Tuesday, May 6.

Apprentices to Sea Service, Ireland, No. 2

Bridges, Ireland.

Wednesday, May 7.

Common Lodging Houses.

## BILL READ A SECOND TIME.

Monday, May 5.

Appointments to Offices, &amp;c.

## PRIVATE BUSINESS TRANSACTED.

## BILLS READ A THIRD TIME AND PASSED.

Friday, May 2.

London and Blackwall, &c. Railway  
Mayfield Railway, No. 2  
Monklands Railway.

Monday, May 5.

Edinburgh, Perth, &c. Railway  
Manchester and Ashton New Road  
South Devon Railway  
York, Newcastle, and Berwick Railway, abandonment of part.

Tuesday, May 6.

Briton Ferry Docks and Railway  
Ministers' Widows' and Orphans' Fund of Free Church of Scotland  
Reading Waterworks.

## SESSIONAL PRINTED PAPERS.

Par. Num.

247. Bills—Enfranchisement of Copyholds, No. 2

254. — Appointments to Offices, &amp;c.

246. — Montpelier Water

257. — County Courts further Extension

213. Commissioners—Estimate

240. Navy—Supplementary Estimate

63. Local Acts—Reports of the Admiralty

228. Lights, &amp;c. Hull—Return

239. Friendly Societies—Return

236. Roman Catholic Hierarchy—Copy of an Address

237. Sewers—Copies of Fees and Charges

239. Head Money—Account

234. Kilrush Union—Report by Mr. Lucas

(b) I am tempted to wish that Mr. Amos's tract had ended with his interesting and truly philosophical disquisition on this theme. The particular constitution of County Courts, with the amount of remuneration to their various officers, and some other matters of which he treats, may be very fit subjects for animadversion, but they are not *hæc sunt verba*, and hardly deserve to hold a place in such superior company.



292. *Spirits—Accounts*  
 241. *Church Extension—Copy of an Address*  
 245. *Quit and Crown Rents, Ireland—Return*  
 136. *Finance Accounts, Classes 1 to 8*  
 294. *Jury Panel, Mayo—Return*  
 280. *Crime and Outrage Act, Ireland—Copy of Report*  
 252. *Trade and Navigation—Accounts*  
 255. *Public Income and Expenditure, Balance Sheet—Account*  
 Cape of Good Hope, Kafir Tribes, &c.—Correspondence.

## HOUSE OF LORDS.

## REGISTRATION BILL.

TUESDAY, May 6.—Lord FEVERSHAM presented a petition from the solicitors residing at Witham, in the county of Essex, against the Registration of Assurances Bill.—Lord STANLEY presented a similar petition from the attorneys of Lancashire, in which, though the petitioners objected to a central and metropolitan legislation, they admitted the propriety of establishing a local registration, either in counties or in union districts.—Lord CAMPBELL admitted that this latter petition came from a very useful and influential body of men, but, nevertheless, implored their lordships not to listen to their prayer. On the contrary, he hoped that they would enter with vigour into the consideration of the Bill which he had submitted to their lordships. They must either have one system of registration for England and Wales, or have no registration at all. He had hoped that his Bill would have passed without further opposition. It had been read a second time without opposition in that House, and a Bill for a similar object had also undergone a second reading in the House of Commons last session. The petitioners undoubtedly were respectable—indeed, he might say almost all powerful—men; but on this subject they ought not to be listened to for a moment.

## HOUSE OF COMMONS.

## COUNTY COURTS BILL.

MONDAY, May 5.—On the motion of Mr. J. WILLIAMS, the County Courts Further Extension Bill, brought from the House of Lords, was read a first time, and ordered to be read a second time on the 14th of May.

## LAW OF MORTMAIN.

FRIDAY, May 2.—Mr. HEADLAM moved, "To nominate the Select Committee on the Laws of Mortmain:—Mr. Headlam, Mr. Attorney-General, Lord John Manners, Mr. Hutt, the Earl of Arundel and Surrey, Mr. Fitzpatrick, Mr. Roundell Palmer, Mr. Heald, Sir Robert Harry Inglis, Lord Harry Vane, Mr. William Marshall, Mr. Anstey, Mr. Shafto Adair, Mr. Hardcastle, and Mr. Drummond."—Mr. HAMILTON suggested that some Irish members should be placed on the committee.—Mr. HEADLAM regretted the suggestion had not been made before, and said if any vacancy occurred he would bear it in mind.

THE MAGISTRATE,  
AND PAROCHIAL AND MUNICIPAL LAWYER.

## Summary.

THE 3rd section of the Removals Act renders irremovable children under 16, residing in the parish with stepfather, stepmother, &c. In *Reg. v. Overseers of Leeds*, 17 Law T. 61, two children who had been resident with their stepmother were, with her consent, taken into the workhouse, which was situate in the parish. Thence they were removed by order to the parish of their settlement. It was held that this residence in the workhouse was not a residence with the stepmother so as to render them irremovable under the provisions of sec. 3. "I cannot doubt," said Lord CAMPBELL, "that those children were removable." And, we may add, nor can any other person. An absurd objection raised in *Reg. v. Inhabitants of St. Maurice*, 17 Law T. 26, was properly disposed of. An order of maintenance of a lunatic pauper purported to be made by two justices in and for the city of York. It was objected that the order called it the city of York only, and not "the county of the city." The Court held that it would take judicial notice that York was a county of a city, and so disposed of the sapient objection. It is by such quibbles as these that the law is brought into contempt, and the lawyers are visited with odium.

## Answers to Queries.

In reply to your correspondent "H. P." in your last number, I beg to observe that the costs of the

conviction for drunkenness therein mentioned, amounting to 6s. appear to have been correctly imposed. The fee for conviction is payable the moment the judgment of the Court is pronounced, and it makes no difference whatever in this respect whether the penalty and costs be paid at once or at a subsequent period.

The power of giving costs in all cases of summary conviction is conferred by 11 & 12 Vict. c. 43, s. 18.

A MAGISTRATE'S CLERK OF MANY YEARS' STANDING.

## DRUNKENNESS (21 Jac. 1, c. 7).

"H. P." appears to have lost sight of the stat. 18 Geo. 3, c. 19, the first section of which provides for those cases where the statutes have omitted to authorise the award of costs. Previously to the passing of that Act it is clear that a justice had no power to award costs unless expressly authorised by statute. It is equally clear that the statute of James contains no such authority. If the present case has been brought within the statute of 18 Geo. 3 by the defendant having been summoned to answer the charge, the convicting justice may by his order (of which see the form in "Chitty's Barn's Justice," tit. "Costs") award costs, to be paid by the defendant, which order may be enforced by distress, or in default by imprisonment.

The valuable Act 11 & 12 Vict. c. 43, by sec. 18 of which justices are empowered to award costs in all cases, is hardly applicable to the present case, inasmuch as it is thereby enacted that such costs "shall be recoverable in the same manner and under the same warrants as any penalty" adjudged to be paid by the conviction, whereas the mode of recovering the penalty for drunkenness is by distress, and in default by placing in the stocks (which are in many districts now numbered among the things that have been), and according to the case of *Reg. v. Barton*, 18 L. J. 56 (M.C.), a conviction adjudging the defendant in default of distress to be placed in the stocks until payment of penalty and costs would be bad.

C. H.

The report of the General Board of Health on the legislative enactments appearing necessary for extending to country towns powers and provisions analogous to the Metropolitan Interment Act has been published. It quotes a great mass of evidence accumulated by the Inspectors of the General Board of Health, showing that the grave-yards of country towns are in general in no better condition than those of the metropolis, and that the practices of interment in use among some of them are even worse; and shewing that there is a general and earnest desire for some legislative enactment of general application, "which shall be cheap, efficacious, and capable of granting to local boards the power necessary to close all objectionable burial-grounds, and purchase ground for cemeteries." The Board give their recommendations in the shape of seventeen general conclusions. They consider that where a Local Board of Health exists, any scheme of interment approved by a majority, under the requirements of the Diseases Prevention Act, should be at once enforced by Order in Council, authorising the Local Board to apply so much of the Metropolitan Act as is suitable. The site, plan, charges, and conditions of the cemetery, should be subject to the approval of the General Board of Health. When the cemetery is in operation, the Local Board of Health, or a local body to be appointed, should be the sole administrative authority for the interment of the dead; and it should be unlawful for any person to perform any funerals within the district without the sanction of the proper authority.

During the year 1850 there was a decrease of 1,000l. in the expenditure of the Blandford Union as compared with 1849.

FRIENDLY SOCIETIES.—From a return printed by order of the House of Commons, it appears that, in 1850, 1,000l. was allowed as a salary to the Registrar of Friendly Societies, and 200l. as salaries of clerks. The amount of fees received by the registrar, and accounted for by him, was 672l. 3s. 6d. and the amount paid out of the Consolidated Fund was 528l. 8s. 6d.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

A RAILWAY company had entered on lands pursuant to the 85th section of the Consolidation Act, and made the required deposit and bond. The three years limited by the 123rd section were, however, permitted to expire without the amount of compensation being ascertained, and the owner brought ejectment. It was held that the owner, having neglected to use the powers given to him, could not avail himself of the consequences of that neglect; and

that the original possession by the company having been lawful, the present possession was likewise so, and therefore ejectment could not be maintained. (*Armistead v. The North Staffordshire Railway Company*, 17 Law T. 59.) In the same case the Court held the term "deviation," in sec. 15 of the Consolidation Act, to mean a departure from the line of railway actually laid down, and the meaning of the section to be, that the actual line shall not deviate more than 100 yards from the line delineated in the parliamentary plan. It was also further decided, in the same important case, that when the owner of land had by notices required the company to take the whole parcel, although only a part of it was necessary to it, and the company accepted it, but the owner afterwards wished to retract, whereupon the company took possession of the whole, it was justified in doing so, the owner being bound by his own notice.

Very nearly the same point was decided also in *Worsley v. The South Devon Railway Company*, 17 Law T. 60.

It will be observed that, in the case of *Hunt v. The Great Northern Railway Company*, 17 Law T. 63, the C. P. has also ruled that, under the circumstances there detailed, and which were described last week in the County Courts Summary, the title to "tolls" was not in question.

## WINDING UP.

*Ex parte Hennessey*, 17 Law T. 57, was decided long since, but why delayed by the reporter we know not. It was the point, since so often litigated, as to the continued liability of a vendor of shares after sale of them. In this case the deed of settlement required that the transfer should be signed by both parties. A father purchased shares in his son's name, which was inserted in the list of shareholders; neither father nor son executed the transfer, and the son repudiated. This was held, on appeal, to be an invalid transfer, and that the vendor was rightly included in the list of contributories.

*Ex parte Preece and Evans*, 17 Law T. 58, was the first case that has come on for decision as to calls. It was one of those cases which were so improperly brought under the Winding-up Act, and exhibits in a remarkable manner the monstrous consequences of using that costly machinery for a purpose to which it was never intended to be applied. In this case, as in many others, there were no debts, but the costs of winding up were of considerable amount. The Master made several lists of contributories, one of which consisted of those who had received back a portion of their deposits from the directors on the cancellation of their shares; another, of transferees of shares for which the original allottees had signed the deed; a third, of shareholders who had paid deposits and signed the deed; and a fourth, of those who had paid deposit and not signed. On these the Master made a call. It was now objected that such call was improper, because it was made to provide for unascertained costs, and not for debts, and because it was partial, not being made on all the contributories. But Vice-Chancellor Bruce held otherwise. He was of opinion that the Master had a discretion as to the manner and amount of call, and that in this case he had exercised that discretion properly. It will be observed that this case involves none of the various important questions that are depending with respect to liability to calls. Indeed, it would appear from the report that the real objection was not taken, namely, that inasmuch as each contributory is liable only for his proportion of so much of the debts of the company as he has rendered himself liable to at law, it is necessary, before a call can be made, that the debts should be ascertained and an estimate made of the amount of each contributory's individual liability, and that the call should be made for that only. This case seems, however, to determine that, even if the contributory is not liable for a single debt, he is yet liable for his share of the costs, a consequence so palpably unjust that it ought to undergo further discussion.

In *Holt's case*, 17 Law T. 59, shares had been allotted to A. as agent of the managing director and trustee, who could not hold them personally. The directors were aware of this, and had rescinded the allotment, but A. executed the deed in respect of those shares, and he was held to be a contributory.

tory. It may, therefore, be taken as a rule, about which, indeed, there could have been no rational doubt, that a shareholder cannot, under any circumstances, escape the responsibilities to which he has bound himself by executing the deed, except by a formal transfer.

In *Ex parte the Barnet, &c. Railway Company*, 17 Law T. 59, an attempt was made to draw a distinction from *Upfill's* case, that in the latter P. C. was placed after the name in the application for shares, but in this there was no such acknowledgment that he accepted them as a committeeman. But Lord CRANWORTH properly held it to be a distinction without a difference. E. W. C.

## PROCEEDINGS IN WINDING UP DURING THE WEEK.

(From our own Reporter.)

ALL practical proceedings in matters of winding up are at a stand-still, the Masters having determined to await the determination of the various vexed questions under the Act.

The question of the jurisdiction of the Masters has been raised in two cases during the week, and in both cases overruled, with notice of appeal to the Court. In the first it was contended that the Master, under the 66th section of the Act, had no right to call on a trustee or contributory to pay into court any moneys that were not in hand at the date of the order to wind up; and in the second case it was contended, in opposition to an application of Mr. Selwyn, *Re The Royal Bank of Australia*, to have access to the books, in order that creditors might better prepare a pedigree of their claims, that creditors for whose benefit the Act was not intended, had no right or title to this privilege, and that if granted, it was only arming them with weapons against the contributories, who ought to be protected.

Calls in some instances, where the contributories do not consist of what, in winding-up parlance, are called "good men," are very inadequately responded to. The call of 2l. per share in the Independent Assurance Company, which was to have produced upwards of 2,000l. only brought in 500l. The consequence is, that another call is necessary, which will have to be levied again on those who could and were willing to pay, the insolvents escaping scot-free. It is found very necessary in these matters of call, to resort to compromise, but at present in only two companies has it occurred that the harsh processes of attachment have been resorted to, or incarceration ordered.

**DIRECT CHICHESTER AND PORTSMOUTH RAILWAY.**—On Saturday, before his Honour Master Richards, the cases of the managing committee, Messrs. Clarkson, Chapman, Mountague, and Stevenson, were gone into. Mr. Mogenie appeared for the latter, and Mr. H. Harris for the estate. The evidence of these gentlemen went to shew that the payment of 10s. per share on their shares was not in the nature of a deposit, but a contribution to pay off expenses. It was agreed that at the next meeting, on Thursday, the case of the other members of the managing committee similarly situated should be taken. *Daily News.*

**DIRECT WEST-END AND CROYDON RAILWAY.**—On Saturday a claim for 779l. on the part of Messrs. Lloyd, the advertising agents, was brought in by Mr. Roxburghe and Mr. H. Harris, to be considered before his Honour Master Tinney, who has appointed a day to go into the matter; the claimant alleging on affidavit that two of the managing committee have by their acts rendered themselves liable to pay it. *Daily News.*

**INDEPENDENT ASSURANCE COMPANY.**—On Saturday, before Master Tinney, Mr. Hutton, for whom Mr. Roxburghe appeared as counsel, intimated that, in consequence of the call of 2l. already made having been very inadequately responded to, it would be necessary to make another of like amount to defray the outstanding liabilities. *Daily News.*

**STAFFORDSHIRE AND SHROPSHIRE RAILWAY.**—On Tuesday Mr. Stanway, formerly secretary of this company, was examined at length before Master Richards, by Mr. Daniel, counsel for Mr. Archibald, and by Mr. Roxburghe, counsel for Mr. Hutton, the official manager. The witness declared that Mr. Archibald was authorised by the finance committee at the period to remove the funds from the Commercial Bank, to avoid an anticipated attachment. Mr. Daniel, under the 66th section of the Act, objected the Master's jurisdiction in the matter of making any order on Mr. Archibald to pay the money into Court; but the point was overruled. *Daily News.*

**METROPOLITAN RAILWAY JUNCTION.**—On Tuesday Master Kindersley proceeded with the further

consideration of the list of provisional committee, expunging the names of Dr. Marsden, Mr. Addis, and others, for want of conclusive evidence. *Daily News.*

**BARBADOES RAILWAY.**—On Friday a meeting was held in this matter before Master Blunt, to take steps to call on the directors, for whom Mr. Glaspe appeared as counsel, to account for the deposits received by them, amounting to between 9,000l. and 10,000l. Mr. Roxburghe appeared as counsel for Mr. Ainger, the official manager, and said the directors had received 1l. per share deposit when they were only entitled to receive 2s. 6d. per share. The proceedings, after some evidence, were adjourned for want of the necessary documents. *Times.*

**LONDON AND BIRMINGHAM EXTENSION RAILWAY.**—On Tuesday further undisputed claims to the extent of between 500l. and 600l. were brought in by Mr. Croysdill, the official manager. *Daily News.*

**ROYAL BANK OF AUSTRALIA.**—On Thursday Mr. Selwyn, with Mr. Dobie, for a large number of creditors, applied to his Honour Master Richards to be entitled to inspect certain books and papers in the possession of the official manager, to enable them to classify the claims of creditors. Mr. Leach, of the firm of Farquhar, Johnstone, and Leach, strenuously opposed the application on behalf of a large body of the shareholders, contending that under the Act, which was not for the benefit of creditors, the Master had no jurisdiction to do so, and that it would be arming the creditors with weapons against the shareholders to grant the application. After considerable discussion, Mr. H. Harris, for the official manager, offering no objection, his Honour granted the application, and Mr. Leach gave notice of appeal.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]  
*General Commission Ship, Loan, and Assurance Company.*—Call of 5l. per share on all contributories in Class 1, on May 14.—Horne.

*Patent Elastic Pavement and Kamptulicon Company.*—To make call of 3l. per share on all contributories, on May 30.—Tinney.

*Sea, Fire, Life Assurance Society.*—To settle list of contributories, on May 31.—Tinney.

*Lancashire, Cheshire, and Staffordshire Junction Railway.*—To settle list of contributories, on May 30. Blunt.

## REAL PROPERTY LAWYER AND CONVEYANCER.

It was provided by one of the conditions of sale that the vendors should not be required to produce any deeds, &c. not in their possession, and that all deeds of covenant for production, &c. which the purchaser should require, and all searches, &c. and all costs incidental thereto, should be at the expense of the purchaser. It was held that this condition threw on the purchaser the risk of obtaining covenants to produce from parties who had possession of some of the deeds necessary to establish the title, and that their refusal to enter into such covenants did not entitle the purchaser to rescind the contract and recover back his deposit. (*Gabriel v. Smith*, 17 Law T. 61.) This case should be noted in the margin in the new edition of *Hughes's Practice of Sales*. Where the chirograph of a fine had been accidentally destroyed, the Court, in *Re Nicholas*, 17 Law T. 64, refused to order the Master to amend the record, so as to place parties in the same position as before.

The case of *Ellard v. Cooper*, 17 Law T. 67, is an extremely interesting and important one on the marshalling of assets, where a *devastavit* had been committed by the executor. It was first a decision of the Ex. in equity (in Ireland), afterwards confirmed on appeal to the Lord Chancellor, and in the report the judgments of the Court below are given, because they review with great learning and acumen the entire law on the subject, and therefore will be instructive to the reader. The case itself may be briefly stated. At the time of testator's death there were ample funds to satisfy all the creditors; but the executors wasted one portion of the personality, and afterwards applied the residue of it to payment of the specialty debts. It was held that this did not deprive the simple contract creditors of their right to marshal. "The principle," said PENNEFATHER, B. "is this, that if the specialty creditor exhausts the fund to the prejudice of the simple-contract creditor, this latter shall stand in his place; that is, if he exhausts the assets to the prejudice of the simple-contract creditor at the time he is paid, or in other words, if at that moment he leaves enough to satisfy the simple-contract creditor's demand, then the latter has no right to complain, for it is by his own negligence

that he fails to realise his claims, and that is the principle of all the cases."

It was also held, in the same case, that simple-contract creditors who had acquired a right to marshal will be affected by the Statute of Limitations as if they were the specialty creditors in whose places they stand.

## REGISTRATION OF ASSURANCES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—It would be well if all your correspondents were to follow the wise and sensible principles laid down in your leading article of Saturday last, because then, in advocating any system or plan they would discharge their task in a manner calculated to secure respectful consideration even from parties who hold different views. I very much regret to see a letter signed "A Country Solicitor," at p. 40 of your journal (who seems to confound registrars of births with the superintendent registrars, the former class of officers never having been mentioned or contemplated by any one in connection with the registration of deeds). This letter contains the following startling sentence: "Probably you are not aware that out of twenty registrars of births in the provinces, about nineteen are illiterate." It is quite evident that this country solicitor, if a county clerk, is not a superintendent registrar, and has no knowledge of, or acquaintance with, the general character of these registrars, and I beg to refer him to the official list of superintendent registrars and registrars of births, deaths, and marriages: he will find that even the latter officers are all either public officers connected with the union, or respectable tradesmen, and some solicitors, surgeons, solicitors' clerks, &c. hold the office of registrars. Amongst our own Profession your correspondent would now and then find some nervous old gentlemen of the kind he points out. I know some among attorneys in town and country. But it is hardly possible for a thoroughly inefficient person to escape the vigilance of the registrar-general's notice, and the visits of his inspectors.

As it was never proposed that the registry should be kept at a treacle shop, or by these registrars, but by the superintendent registrars, at the district register office, I will pass by his observation on this point, and remark, that although a considerable majority of the last-named officers are solicitors, it is by no means invariably the case. Some are respectable tradesmen of the first class; but all are competent or they would soon be sent to the right-about. The county clerks are all professional men, and certainly upon this ground—and after reading your article—on the whole they strike me as being the fittest for the duties of registration of legal instruments. If, however, the duties of registration should be devolved on these officers, accompanied by the condition that they cease to practise, very few of them could take it, unless such a salary were given as we could hardly expect in some districts, where, perhaps, the county clerk only realises from 20l. to 30l. per annum by his fees, and the registration would be in proportion.

I am, Sir, yours, &c.

A COUNTRY SOLICITOR, ALSO A COUNTY CLERK AND SUPERINTENDENT REGISTRAR.

April 28.

## PRACTICE AS TO TITLE-DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Will any of your correspondents inform me whether it is the practice for a vendor to retain deeds that have been enrolled pursuant to Act of Parliament, such as bargains and sales, deeds for barring entails, &c. where they relate only to the land sold? Even if such deeds can be considered of record (which is more than doubtful), and the purchaser, therefore, on account of the decision in *Campbell v. Campbell*, not entitled to attested copies of them, when retained as relating to unsold property of the vendor, it does not seem reasonable that the vendor should refuse to give them up, simply because they are of record, when they do not relate to unsold property. Sir E. Sugden (*Vend. and Purch.* 11th edit. p. 476) says, "In some cases a purchaser can obtain attested copies of instruments on record," as when the vendor procures an attested copy of an instrument on record for the purpose of examination with the abstract, "the purchaser is, of course, entitled to it on the completion of the purchase." On the same principle, in my view, is a purchaser entitled to have the possession of such deeds as I refer to.

I am, Sir, yours, &c.

H. I.

## REGISTRARS OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I have observed, in a recent number of the LAW TIMES, a recommendation from you of the parties most eligible for the office of registrars, should it be decided upon to adopt provincial instead of a central registration. I think there is one class of men that you have overlooked,—I allude to the

magistrates' clerks. Their districts are co-extensive with the County Court districts; they are, for the most part, selected from those members of the Profession that the country gentlemen employ; and, as a rule, I think you will find in most districts that the clerk to the magistrates has the principal share of the conveyancing business. On the other hand, it is notorious that the appointments of the clerks to the County Courts have been jobs. I know, myself, several instances where the judge has appointed some friend as his clerk for the whole district. The clerk has provided a substitute in each town, by whom the labour is performed, and the clerk's situation is little more than a sinecure. The deputy is, of course, one who, from the remuneration, must be selected from the lower ranks of the Profession. And I submit, therefore, that they are not the men to be selected as the depositaries of the real property transactions of the country.

I am, Sir, yours, &c.

AN OLD SUBSCRIBER.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Will you allow me a short space in your columns, to suggest, as a substitute for the proposed scheme of registration, a plan which will effect every useful object of the new Bill? What I propose is, a plan of registration neither at a central nor a local office, but, if I may so call it, *registration upon the title-deed itself*, to be simply effected by a memorandum or memorial signed and attested, stating shortly the contents and purport of every new deed or instrument, which memorial should be indorsed upon the last existing deed, or the deed upon or out of which the purchase, mortgage, or other transaction arises, such indorsement to be notice to, and taken adversely against, the holder of, and all persons claiming under, the deed upon which the memorial is indorsed.

I am Sir, yours, &c.

58, Cheapside, May 5, 1851. S. T.

#### Answers to Queries.

#### COUNTING FOLIOS.

I beg to refer your correspondent "Constant Reader," who in No. 422 of the LAW TIMES asks for information as to the mode of counting figures in deeds in ascertaining the amount of progressive duty payable, to the case of *Lord Dudley and Ward v. Robins*, 3 C. & P. 26, where it was held, that each figure is to be counted as one word. C. H.

#### THE MERCANTILE LAWYER.

It is to be regretted that any exception, save a formal security given for the debt, should have been permitted to the operation of the Statute of Limitations. An exception once allowed, especially so vague an one as an acknowledgment in writing, difficult questions were sure to arise. The reports are full of them, and each depends on its particular facts, and it is impossible to extract a principle by which to guide the judgment. In *Liddell v. Robinson*, 17 Law T. 61, the following letter, in answer to an application by the creditor for a security by mortgage, was held to be *insufficient*:—"I will endeavour, before any great length of time, to give your account my serious consideration, and see what can be done with it." Lord CAMPBELL observed, "It is difficult to say that the one relied upon contains any distinct acknowledgment of the amount; but even if it did, and then goes on to add anything which repels the presumption of a promise to pay on request, the statute is not barred."

In *Taplin v. Florence*, 17 Law T. 63, it was held that an auctioneer has no right to remain on the premises for the purpose of delivering the goods sold by him to the purchasers, after his employer has countermanded his authority.

#### ASSURANCE CHRONICLE.

[The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

ACCIDENTAL DEATH INSURANCE COMPANY.—The first annual meeting of this company took place on Tuesday, at the offices, 7, Bank-buildings, Lothbury, Mr. Mayne in the chair. The report stated

that the premiums received during the first twelve-months amounted to 1,228l. This amount would have been larger, but the company had extended their operations, and were now giving compensation to non-fatal cases; whereas they set out upon the principle of confining themselves solely to fatal injuries. Since they had enlarged the scope in the manner above alluded to, their operations and business had been materially increased. There were now several hundred agencies established, and preliminary arrangements had been entered into with several railway and other large companies, some of which had been brought to a very satisfactory conclusion. Arrangements had also been entered into in the various colliery districts. Several parties who had met with accidents were now receiving weekly compensation, and not one instance of dispute or disagreement had occurred between the company and the insured. The report was adopted, officers for the ensuing year elected, and, after a vote of thanks to the chairman, the meeting separated.

#### COUNTY COURTS.

##### Summary.

THE County Courts Extension and Amendment Bill has been read a first time in the House of Commons, and is ordered for second reading on Wednesday next.

It will be seen that the question as to a dispute with a railway about back carriage being a question involving a right to tolls under the exception in the County Courts Act, has been again mooted before another Court, and has received a similar decision. (*Hunt v. The Great Northern Railway Company*, 17 Law T. 63.) Another case has occupied the same Court. In *Booth v. Clive*, 17 Law T. 62, the judge of the County Court had proceeded, after prohibition, to commit the plaintiff for nonpayment of instalments. The plaintiff brought an action against him for false imprisonment. The judge who tried the cause was held *rightly* to have told the jury that, if the defendant acted under a *bona fide* belief that, notwithstanding the prohibition, it was his duty to commit the plaintiff, he must be deemed to have done so in the course of his duty under the County Courts Act, and therefore was entitled to notice of action.

#### APPEALS UNDER THE COUNTY COURTS EXTENSION ACT, 13 & 14 VICT. c. 61.

Statement of the case—Appeals upon cases of "mixed law and fact."

THE doubt expressed by Maule, J. in *The East Anglian Railway Company v. Lythgoe*, 16 Law T. 487, as to the right of appeal against the decision of a County Court judge in a case where the law and fact are mixed up together (to use the legal phrase) will give rise to much discussion. It is the offspring of a subtle and legal mind, and was very forcibly expounded by the learned judge in giving judgment. It may be questioned, however, whether, upon further reflection, the considerations urged by the learned judge affect the right of appeal in such cases. That the difficulty imposed on the Courts of Appeal in unravelling those cases and severing the law from the fact will be great when the County Court judge alone decides without the intervention of a jury, may readily be granted; but not that there is no appeal against a decision upon a case of what is termed "mixed law and fact."

It is proposed to enter more at large upon this subject; and the above case naturally suggests two inquiries—as to the statement of the case for the Court of Appeal, and the proper subjects of appeal.

The appeal is to be in the form of a case agreed on by both parties or their attorneys, or if they cannot agree the judge of the County Court, upon being applied to by them or their attorneys, is to settle the case and sign it, and such case is to be transmitted by the appellant to the rule office of the court in which the appeal is to be brought. (Sec. 15.) Where the parties do not agree upon the case, or do not agree to have it settled by the judge of the County Court, the appellant should take out a summons in the County Court to shew cause why the respondent should not consent to the case as stated by him, or why it should not be settled by the judge; such a step would bring both parties before the judge, who could then settle the

case from his notes and sign it. It is obvious that where the parties have any contemplation of an appeal, they should, at the hearing in the County Court, see that the judge takes notes of all the material parts of the case. From want of such caution, and not proceeding with regularity at the hearing, many appeals are likely to fail when the cases come to be scrutinised in the Courts of Appeal. In *The East Anglian Railway Company v. Lythgoe*, exceptions were taken to the statement of the case. It was said by the Court that no facts were found in it, but that evidence only was set forth; and that it was unnecessary to set forth the observations of the judge of the County Court with such particularity as was done there. It is essential that the facts should be found, and stated in the case to have been found; but a mere statement of the evidence given by the witnesses is not equivalent to a finding of facts. The finding of the facts is the province of the judge of the County Court or of the jury as the case may be; and, therefore, where there is no jury, it should be left to the judge of the County Court to settle the case for the Court of Appeal, as he may alone know what facts he has found to be proved, and what not. The Court of Appeal has no power to draw any inferences of fact from what is stated; an appeal cannot, therefore, be entertained where evidence only, and not facts, is set forth. An appeal case under the Registration of Voters Act (6 Vict. c. 18, s. 42), will illustrate this (*Pitts, App. Smedley, Resp. 8 Scott's N. R. 937*); there the case sent by the revising barrister found "that S. P. states that he rents the second and third floors, &c.; that he has exclusive control, &c.; that he has," &c. &c.; and so on, merely recapitulating the evidence. When the case came on for argument, Tindal, C.J. observed that the barrister had not transmitted a statement of facts, but merely of evidence, and upon its being urged by the appellant that the concluding part of the case, which stated the point raised before the barrister, and his decision thereon, amounted to such a finding as to enable the Court to deal with the case, Tindal, C.J. said, "The case must go back for amendment. We have but a limited jurisdiction under this Act; and we must see that we do not exceed it." So, if a jury were to find that after goods were missed the prisoner was taken with the goods in his possession, and that he confessed that he was guilty, this might be abundant evidence to prove him guilty, but would be mere evidence, and the Court could pronounce no judgment. There is no provision in the County Courts Extension Act, as there is in the Registration of Voters Act, enabling the Courts of Appeal to amend the case, or to remit the case in order that it may be re-stated. When the case is settled for the Court of Appeal by the judge of the County Court, he is required to sign it. If he omits to do so, and the respondent objects thereto at the hearing, the appeal must be dismissed; as the case transmitted to the Court of Appeal would not be in accordance with the provision (sec. 15) for want of the signature.

The right of appeal is granted "in any cause of the amount to which jurisdiction is given by the Extension Act" (sec. 14), "if either party shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence." The judge of the County Court is the sole judge in all actions brought in the County Court, and "shall determine all questions, as well of fact as of law, unless a jury shall be summoned" (9 & 10 Vict. c. 95, s. 69); and in all actions where the amount claimed exceeds 5l. either party may require a jury to be summoned; or if the claim do not exceed 5l. the judge may, on the application of either party, order the action to be tried by a jury (9 & 10 Vict. c. 95, s. 70). Where an appeal is intended, in case the judge of the County Court directs contrary to what the parties think to be the law, it is as well to take the precaution of having a jury summoned, for much difficulty will then be removed,—the law and the facts will then be separated,—the jury will have to decide on the facts, and the judge to direct the jury as to the law; and then if any error is made by the judge of the County Court, it will be in the direction in point of law, or in the admission or rejection of evidence. But if no jury is summoned, and the judge alone has to decide all questions of law and fact, there may be many cases in which great difficulty will be imposed on the Courts of Appeal, and in which parties will be disappointed by the statement of the case. A judge may, with the utmost blandness and patience, listen to every statement of fact and law, and to every

objection made by the parties, and only now and then interpose an observation, and that not for the purpose of deciding any interlocutory point, but of rather inducing the parties to proceed with the case (in the meanwhile the points raised being suspended and not abandoned, though ultimately forgotten), and when the case is closed give his decision for the one party or the other, as "I find for the plaintiff" or "the defendant," without saying anything further; and in such case, though it would be clear to the parties that in coming to his decision he must have found some facts proved or not proved, or taken a particular view of the law applicable to the facts; yet, from the uncertainty of the view which the judge took of the facts, or of the law which he applied to them, it would be impossible for them to state a case for the Court of Appeal. Where there is no dispute about the facts, of course the difficulty of stating a case will be less; but this seldom occurs in comparison with the number of cases which are brought into court. In general, the judge's statement of the case, by which the parties will be bound, will shew whether his decision was correct or not; it will shew the facts found and the law applied to the facts. And therefore, if upon such statement the decision appears to be correct, the appellant may abandon the appeal.

The statute gives an appeal upon the determination of the judge in point of law. Upon this Maule, J. remarked, "An appeal lies, properly speaking, upon the determination of some point of law,—as, supposing an action of *assumpsit* brought in a case for which no such action will lie, or that a breach of contract is alleged, and, in fact, there has been no breach of contract at all. In such cases a judge might say that there was no cause of action, or no evidence in support of the action. That would be a determination in point of law, and is a direction in point of law the same as when, in a Superior Court, a judge, in directing a jury, says the law is so and so, or the construction of an instrument is so and so."

In the course of his judgment, however, Maule, J. expressed a doubt whether, in a case where the law and the facts of the case are "mixed together," an appeal was intended to lie against the decision of the judge of the County Court. The term "mixed law and fact" is rather a vague and inappropriate one, but it has become one generally understood by usage. Thus, for instance, in works on pleading it is generally laid down that an allegation "mixed of law and fact" may be traversed. (Stephen on Plead. c. 2. s. 1, rule 1; 1 Wms. Saun. 23 a, note m.) A well-known example of this rule is, that a *virtute cujus*, where it is mixed with matter of fact, and does not put in issue a mere inference of law, is traversable. (*Lucas v. Nockells*, 10 Bing. 158.) This, however, only means that the statement of the law and fact are inseparable in the pleading. When issue is joined, and the case comes on for trial, the presiding judge has then the duty to perform of directing the jury to find the facts, and himself to apply the law involved in the issue. It is almost obvious that the term "mixed law and fact" imports a contradiction. Law and fact cannot amalgamate; there is always a distinction between them. The judge or the Court has the duty to perform of expounding the law in every conceivable state of facts. So changing and complex are human affairs that no code of law can provide for all the combinations of circumstances that may arise; all that can be done is to lay down certain general rules of law for the ordinary and probable occurrences. When any given state of facts has been found by a jury, it is for the Court to say whether or not that comes within any general rule of law. The distinction between the functions of the Court and the jury has never been doubted; but in practice contests frequently take place, whether a particular question is one for the Court or the jury to decide, that is, whether it is one of law or fact. "Thus far is clear that whenever upon particular facts found the Court, by the application of any rules of law, can pronounce on their legal effect, such inference is matter of law. It is also clear that whenever the Court cannot pronounce on the legal effect of particular facts, and where it is requisite to enable them to do so, the jury should find some other inference or conclusion; such further inference or conclusion is a question of fact." (1 Stark. Evid. 513.) In one sense, every issue involves matter of law as well as matter of fact; thus, if the issue be whether A. assaulted B. what A. did is a question of fact; whether that amounted to an assault is a question of law. So, if the question is, whether A. is indebted to B. that may depend on the facts whether goods were sold to C. as A.'s agent, and whether

A. authorised C. to buy them; and if the jury find these facts in the affirmative, the Court, as a matter of law, says that A. is indebted to B. In ordinary cases, the distinction between law and fact is clear, but a class of questions has acquired the name of being mixed questions of law and fact. It has been said that what is reasonable notice of the dishonour of a bill of exchange is a mixed question of law and fact; the situation and places of the parties, the post hours, and other matters of that sort, are facts to be ascertained by the jury; but whether under such and such circumstances notice was given in reasonable time, is a question of law on which the jury ought to receive the direction of the judge. (Per Grose, J. in *Darbishire v. Parker*, 6 East, 9.) Lord Mansfield said, that reasonable notice is partly a question of fact and partly a question of law; and Buller, J. that when the facts are established, it then becomes a question of law on those facts what notice is reasonable. (*Tindal v. Brown*, 1 T. R. 168.) The Court is not supposed to make a law applicable to those facts, but to decide whether they bring the case within the general rule of law as to reasonable notice. If the jury were by their verdict to find all the special facts, and were also to find that the time was reasonable in point of fact, the judgment of the Court upon this finding would still, in all cases, be matter of law. Difficulties of this nature, viz.—whether a question is one of law or fact, occasionally happen, where some general inference is to be drawn from a number of particular facts and circumstances. The most common examples are probable cause, due diligence, reasonable time, &c. All these may depend upon a number of facts incident to each case; and it may be that in some cases the inference in law will follow the inference in fact; but still the mind, the judgment of the Court, performs its due and appointed part, and directs the jury to find for the plaintiff or the defendant, according to the view they may take of the facts, i.e. to find for the plaintiff in case they think such and such things proved, or for the defendant if otherwise. The existence of probable cause for a prosecution is one of the best examples that can be taken to illustrate the rule; and that has at length been settled to be in all cases a question of law to be decided by the Court. *Panton v. Williams*, 2 Q.B. 182, is a decision to that effect; and the law upon the subject is there very ably reviewed. "In the more simple cases where the question of reasonable and probable cause depends entirely on the proofs of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities but that such question is purely a question of law, to be decided by the judge." "There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but upon further examination it will be found, that although there has been an apparent, there has been no real departure from the rule. Thus, in some cases the reasonableness and probability for prosecution has depended, not merely on the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not; in other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested it is obvious that the belief, the knowledge, and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both of which investigations fall within the legitimate province of the jury, whilst, at the same time, they have received the law from the judge that according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse. And such being the rule of law when the facts are few and the case simple, we cannot hold it to be otherwise when the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter cases to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct

point of view the application of the rule of law according as all or some only of the facts and inferences from the facts are made out to their satisfaction. But it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view without having recourse to the less important circumstances that have been brought before them."

The above remarks, when applied to the decisions of a judge of a County Court, will lose none of their effect. Although he may have to decide all questions of law and fact, and although in some cases the application of the law may depend on a more intricate combination of facts than in others, the separation of the law from the facts is not impossible, or it would be more proper to say that his determination of the law applicable to those facts may be discovered. No doubt the difficulty may be much greater in some cases than in others, but the object to be attained, the knowledge of his determination in point of law, is not impossible, and if such determination in point of law is erroneous, an appeal is given by sec. 14.

The other grounds of appeal given by the statute are for the admission of improper, or the rejection of proper, evidence. It is not necessary to enlarge upon these, as no difficulty will arise in the County Courts, that does not occur at trials in the Superior Courts. J. T.

## THE LAWYER.

**EQUITY PRACTICE.**—A question having arisen in *Cockburn v. Green*, 17 Law T. 58, as to the mode in which the affidavits of plaintiff and defendant should be treated in their order, Vice-Chancellor Bruce said they should be entered as read, with a direction to the Master that plaintiff's affidavit was not to be considered as evidence of the matter there stated, except by the consent of the defendant, and that defendant's affidavit should be treated in all respects as if it were his answer to a bill filed against him. As to setting down claims as short claims, it was explained, in *Bower v. Cusningham*, 17 Law T. 59, that it was to be done on the production of the certificates of either counsel alone, at the risk of costs, if it should turn out not to be a proper case to be so heard.

**COMMON LAW.**—In *Doe dem. Nicholls v. Bower*, 16 Law T. 61, it was held to be no ground for granting a new trial that the judge erroneously allowed the plaintiff, after his case had been closed, and the defendant's counsel had addressed the jury, to give evidence which might have been produced as part of his original case.

In *Muirhead v. Evans*, 17 Law T. 65, a very curious question was raised. Thirteen jurymen were sworn by a mistake, which was not discovered until a witness had been called. The defendant would not consent that one of them should retire, so the judge discharged the jury, postponed the case to the following morning, and then tried it as undefended, the defendant having protested against the trial and withdrawn. And the proceedings were held to be regular.

Nor less curious is that of *Cos v. Prichard*, 17 Law T. 67. A defendant was taken in execution. Plaintiff died leaving no personal representative, whereupon defendant applied to be discharged. On this plaintiff's attorney appeared and claimed a lien on the judgment for his costs, and also for a sum advanced to the plaintiff on security of the judgment, and that he intended to administer. The Court refused to order his discharge.

The point as to whether a payment is voluntary, so as to bar an action for money had and received, and recover it back, is often a very nice one. In *Oates v. Hudson*, 17 Law T. 65, the facts were that deeds had been placed in the hands of an attorney, and he refused to give them up unless paid 63*l.* claimed by his aunt. That sum was paid, and at the time he was told he would hear further of the matter. PARKE, B. said, "If this money had been paid voluntarily it could not have been recovered back; but it was not so: it was a payment made in order to get the deeds. The duress of the person invalidates an agreement; the duress of goods does not, but at the same time it negatives the voluntary payment."

A question on Evidence was raised in *Hughes v. Clark*, 17 Law T. 64, which was an action of debt for rent. The declaration made protest of the counterpart lease; the plaintiff produced it, stamped as such. It was objected that the other counterpart should have been produced to show



that it had the lease stamp. But the C. P. held this not to be necessary, as it would be presumed to be in defendant's possession, and it was upon him to prove, if the fact were so, that it was not properly stamped.

In an action of *slander* (*Tixer v. Mashford*, 17 Law T. 65), it was distinctly laid down that words which imply only a suspicion of felony on the part of the person who speaks them are not actionable, although a direct charge is so.

## LEGAL INTELLIGENCE.

We have been favoured with a communication from the secretary of the Oxford University Commission, containing the opinion of the law officers of the Crown as to the legality of the commission. These learned gentlemen give it as their opinion that the commission "is not in any respect illegal or unconstitutional."—*Globe*.

**NEW ORDER BY THE LORD CHANCELLOR.**—"It is ordered that, before any letters patent for inventions shall be passed under the Great Seal, there shall be deposited with the Privy Seal Bill, at the Great Seal Patent-office, a certificate by the Attorney or Solicitor-General that an outline description in writing or drawing of the invention has been filed with them or one of them. Dated the 2nd May, 1851. (Signed) TAUNO, C. Great Seal Patent-office."

A deputation from Jersey—Mr. Edward Nicolle Law and Mr. W. Grant Dumaresq—had an interview, on Saturday, with Sir George Grey, at the Home-office, to present a petition from the inhabitants of Jersey, praying for the establishment of a paid police, a sitting magistrate, and a Court of Requests for the recovery of small debts.

Since 1830 there have been ninety-eight writs of error returned into the Appeal Court of the Ex. Ch.: in seventy-two of these cases the original judgment was affirmed, and in thirteen it was reversed; in ten cases the parties were ordered to begin again, and in three cases the writs were quashed.

**THE NEW MASTER OF THE ROLLS.**—The following congratulatory address was presented to Sir John Romilly, M.P. on his elevation to fulfil the judicial functions of Master of the Rolls. The earned knight's brethren of the Society of Benchers gave an entertainment on a scale of unbounded hospitality yesterday, invitations to which comprised all he learned judges in London or its neighbourhood:—

**TO THE RIGHT HON. SIR J. ROMILLY, M.P. MASTER OF THE ROLLS, ONE OF THE BENCHERS OF GRAY'S INN.**

"Sir,—We, the Barristers of Gray's Inn, beg to offer you our most sincere congratulations upon your recent promotion to high office of Master of the Rolls. We hail with a double pleasure this auspicious opportunity of paying you this tribute of respect when we reflect upon the great name which you so worthily bear—a name which is known, not only in England, but throughout the world, as identified with the loftiest patriotism and the purest philanthropy. We esteem it a peculiar satisfaction that we are members of the same Inn of court of which you are, and your illustrious father was so great an ornament, and to which fresh lustre has been added by the distinguished judicial rank you have attained after having enjoyed the proud distinction of filling successively the high offices of Solicitor and Attorney General to her Majesty. We also beg to express to you our great gratification that your appointment will not deprive us of the happiness of frequently meeting you in this our ancient hall, where on all occasions you have observed that urbanity towards its members which has won for you their deep admiration and regard. In conclusion, we hope that you may long be spared to administer your responsible duties, and we entreat you to accept our warmest wishes for your health and happiness."

## IRISH LEGAL INTELLIGENCE.

(From our Correspondent.)

**DUBLIN, May 7.**—During the present Term only four gentlemen have presented themselves as candidates for admission to the Bar, which number exhibits a great falling off as compared with former years.

**IMPORTANT TO COMMISSIONERS OF AFFIDAVITS AND SPECIAL BAIL.**—As it is not improbable that any of those gentlemen who hold commissions from the Irish Courts of Common Law for taking affidavits or special bail in England or Scotland may not be aware of the existence of the 209th General Order (of 23rd December, 1850), which materially concerns them, I think I shall be doing them a service by calling their attention, through your columns, to its provisions. By the above order, which is one of a numerous code framed by the judges here under the provisions of the Act of 13 Vict. "for the Regulation of Process and Practice in the Superior Courts of Common Law in Ireland," it is di-

rected that "all persons holding commissions for taking affidavits or special bail, whether in Ireland or elsewhere, which have not been enrolled, shall bring in such commissions on or before the 1st day of May, 1851, to be entered and enrolled in the proper office of each court; and such entry and enrolment shall be without any expense to such commissioners: and no commission already issued shall be considered in force after said day, except such commissions as shall be brought in and enrolled on or before the said day; and in future all persons appointed commissioners for taking affidavits or special bail in Ireland or elsewhere shall enter and enrol their respective commissions in the proper office of each court previously to their acting in any manner under the same." The period specified in the order has been by an order published in the *Dublin Gazette* of Friday last, enlarged to the 1st June, 1851. Therefore those commissioners who have neglected to have their commissions enrolled should lose no time in repairing the omission, as otherwise their commissions may be lost, and they may be put to the expense of a fresh commission, and the costs of an application to the Court to be re-appointed, which also might possibly be opposed by some rival claimant for the office; and further, a question might well arise whether acts done by a commissioner who had lost his authority by not having his commission enrolled would not be invalid, and thus great inconvenience might arise.

## PROCEEDINGS OF LAW SOCIETIES.

### LAW STUDENTS' DEBATING SOCIETY.

QUESTIONS FOR DISCUSSION.

Tuesday, May 13, 1851.

45. A. being in possession of a term of 100 years, has the immediate remainder, which is a term of ten years, assigned to him. Does the first term merge in the term in remainder? *Hughes v. Rowbotham*, Cro. Eliz. 302.

XXXIX. Is any material extension of the suffrage desirable?

## MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	210	210	210	210	210	210
3 1/2 Cent. Reduced Annuities	95 1/2	95 1/2	96	96 1/2	96 1/2	96 1/2
3 1/2 Cent. Consols Annuities	96 1/2	96 1/2	96 1/2	96 1/2	97	97
Consols for Account .....	96 1/2	96 1/2	96 1/2	97	97 1/2	97 1/2
New 3 1/2 Cent. Annuities ..	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	98
Long Annu. (exp. Jan. 5, 1860)	..	7 1/2	7 1/2	..	..	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1859)	..	..	..	7 1/2	7 1/2	..
Do. 30 yrs. (exp. Jan. 5, 1860)	..	..	..	7 1/2	7 1/2	..
India Stock .....	260 1/2	260	..	261	..	..
India Bonds (1,000l.) .....	53	50	..	53	50	51
Do. (under 1,000l.) .....	..	..	54	54	..	51
South Sea Stock .....	..	..	..	..	..	107 1/2
Do. do. New Annuities ..	..	..	..	..	..	..
Exchequer Bills, 1,000l. ....	50	50	50	49	52	53
Do. do. 500l. ....	..	50	50	53	52	53
Do. do. Small .....	53	53	50	..	52	53

\* Premium.

## NECROLOGY

### OF LEGISLATORS, MAGISTRATES, AND LAWYERS.

#### THE EARL OF COTTENHAM.

ALTHOUGH but a short time has elapsed since the state of the ex-Chancellor's health made it necessary for him to resign the custody of the Great Seal, yet until very lately no strong apprehensions were entertained of his immediate dissolution; that mournful event has, however, occurred, to the great regret not only of his family and friends, but to that also of those who could appreciate the merits of an eminent judge and an able lawyer.

Lord Cottenham was the second son of Sir William Weller Pepps, Bart. by the daughter of the Right Hon. William Dowdeswell. His lordship was born in Wimpole-street, Cavendish-square, on the 29th of April, 1781, and had, therefore, at the time of his decease, just completed the seventieth year of his age. Being intended for the Bar, he received in his early years all the advantages of a sound education, and in due time went to Trinity College, Cambridge, where he graduated LL.B. in the year 1803, without honours. This was the same year in which Sir James Parke and Mr. Justice Colman took wranglers' degrees. They were all of Trinity College. It was thought expedient by himself and his friends, before he quitted the university, that he should enter his name as a law student at one of the inns of court, and accordingly we find him admitted of Lincoln's Inn on the 26th of January, 1801, and called to the bar by that society on the 23rd of November, 1804. From the day that he quitted Cambridge almost to the very close of his life he devoted himself with unremitting assiduity and signal success to the study of his profession. Under the late William Tidd, so celebrated for his pupils and his pleadings, he was

initiated in the most scientific part of the law—almost the only portion for which its professors claim the distinction of being called scientific. Mr. Pepps was also for a time under the advice and guidance, as regarded the pursuit of his studies, of no less a person than Sir Samuel Romilly. The progress of Mr. Pepps at the Chancery bar was not rapid, and his position did not enable him to assume the cares and responsibilities of married life till he had attained the mature age of 40 years. On the 30th of June, 1821, at St. George's, Bloomsbury, he espoused Caroline Elisabeth, second daughter of Mr. William Wingfield, and niece of the Earl of Digby, by whom he has had a large family. Lady Cottenham survives her husband, and she must have been almost young enough to be his daughter, for her father was not married till the year 1796. Mr. Pepps was 22 years in the practice of his profession before he reached the rank of King's counsel, a silk gown not having been conferred upon him till Michaelmas Term, 1826. On the 6th of November in the same year he became a bencher of Lincoln's Inn, and was appointed Solicitor-General to Queen Adelaide in 1830, which office he resigned when he became Solicitor-General to the King, in the month of February, 1834. During the time that he held this important situation he sat in the House of Commons as member for Malton, and previously for Higham Ferrers. Upon that assembly, however, his unadorned oratory made but little impression. He, like many others before him of the same profession, was made to feel the prodigious difficulty with which a successful advocate, after a series of exhausting conflicts in a court of law, comes late at night to engage in a struggle hand to hand with officials trained to statesmanship from their youth; to debate currency questions with country gentlemen and merchants, or foreign policy with members of the Corps Diplomatique; and whatever may be the case now, it is pretty certain that in those days, notwithstanding a few brilliant exceptions, the lawyers of the House of Commons were not the favourite members. On the retirement of Sir John Leach, Mr. Pepps became Master of the Rolls, and received the honour of knighthood. This appointment took place in the month of September, 1834. To his duties in this court were soon afterwards added the functions which belong to a Commissioner of the Great Seal, to which he was appointed, jointly with others, in the month of April, 1835, the Whigs not being then prepared with a Chancellor in whom they could confide, or whose character and position would add weight to their Government. The admirable manner in which Sir Charles Pepps presided in the Court of Chancery, however, soon led the Minister of that day to place unbounded reliance in his learning, abilities, and discretion. On the 16th of January, 1836, he became Lord Chancellor, which office he held with great advantage to his party and to the country from that date till September, 1841, when, the Conservatives coming into power, he made way for Lord Lyndhurst. It was, of course, on his elevation to the highest place in the Court of Chancery that Sir Charles Pepps received his peerage. In the House of Lords he was by no means so remarkable a man as many members of his profession who never attained to his eminence at the bar have been; there is, therefore, little recorded of his speeches in debate or his measures as a legislator, and least of all respecting his labours as a law reformer,—a character to which he never made any pretension, at all events in the sense in which that appellation is now received. When the present Ministers returned to power, in the month of August, 1846, Lord Cottenham again became Chancellor, but his health had in the interval evidently declined, and his frequent absence from Court rendered it obvious that the office of Chancellor must be intrusted to stronger hands. In the month of June of last year Lord Cottenham was raised to the rank of an Earl, and the Great Seal was put in commission. His lordship then went abroad in the vain hope of repairing a constitution broken down by severe intellectual labour, the toils of office, the anxieties of public life, and "all the ills which wait on ambition." He died at Pietra Santa, in the Duchy of Lucca, on the 29th of last month.—*Times*.

#### LORD LANGDALE.

SCARCELY a month has elapsed since the late Master of the Rolls took his final leave of the Court and the Bar over which he had so long presided, and already we are called upon to record the melancholy close of a life which had been exhausted in the severest labours of the judicial service. Lord Langdale expired on Good Friday at Tunbridge-wells, whither he had repaired about a fortnight ago for the benefit of his health. The over-exertion of his prolonged attendance in the Court of Chancery had produced a degree of exhaustion from which he was unable to rally. His faculties, which had remained unimpaired to the last moment of his judicial duty, collapsed under that repose which came too late. A

paralytic stroke followed, and though hopes had at one time been entertained that change of scene and complete rest would revive his lordship's vital powers, "the silver cord was already loosened and the bowl was broken at the fountain."

Henry Bickersteth, Lord Langdale, was born on the 18th of June, 1783, in the county of Westmoreland, where his father belonged to the class of the small landed gentry of the north of England. He had, consequently not yet completed his 68th year. Originally destined for the medical profession, in which he had already completed his studies with success, he visited the Continent with the family of the late Earl of Oxford; and it was by the advice of those discerning friends that he was induced to embark on the more ambitious career in which his remarkable talents already promised him no ordinary success. He entered Caius College, Cambridge, where he took his degree as Senior Wrangler in 1808. Three years afterwards he was called to the Bar by the Society of the Inner Temple, and he engaged at once in the arduous duties of his profession.

Throughout the whole course of his life Lord Langdale was ardently devoted to the cause of liberal opinions, and although he figured but little at any time in the arena of party politics, no man pursued with greater enthusiasm the work of reform, or brought a more subtle intellect to bear upon the great problems of social and legal improvement. His speculative opinions upon these topics brought him into close and habitual contact with that remarkable set of men who, about a quarter of a century ago, looked up to Mr. Bentham as their sage and law-giver; and although the philosopher of Queen-square, Westminster, was hardly destined to witness the practical application of his Sybilline labours, no small portion of the reforms we have since accomplished in our laws, our administration, and the Constitution itself, may be traced to that class of thinkers who claimed to be his disciples, and amongst whom Lord Langdale occupied a distinguished place.

Assiduous in his devotion to his professional duties, Mr. Bickersteth rose to great eminence in the Equity Courts, to which he confined his practice; and perhaps at the period of his career to which we are now adverting a higher estimate was formed of his powers than his judicial performances subsequently warranted. Indeed, it may be said that his personal reputation stood even higher than his forensic weight and celebrity amongst the party which had at that time recently been summoned to the councils of the empire. Probably it was with a view to the services Mr. Bickersteth was expected to render in the cause of law reform, and possibly in part to supply the loss which had recently been sustained by the rupture of the Whig cabinet with Lord Brougham, that the equity counsel was suddenly appointed on the 19th of January, 1836, to succeed Lord Cottenham as Master of the Rolls, and was at the same time called to the House of Peers. By an unusual exception to the course of high legal preferment in this country, his lordship had thus risen to one of the most honourable and important posts in his profession without having mingled in active political life, and without having either sat in the House of Commons or held the office of a legal adviser to the Crown.

But a few months had elapsed after his accession to the Mastership of the Rolls when Lord Langdale delivered in the House of Lords his remarkable speech on the administration of justice in the Court of Chancery, and on the appellate jurisdiction of their Lordships' House. To the opinions expressed in that speech, and in favour of the division of the duties of the Great Seal, Lord Langdale constantly adhered; but when the occasion arrived at which it might have been possible for him with more robust health and greater energy to carry these plans into execution, his time of action was already verging to its close. Upon the resignation of Lord Cottenham last year, the Great Seal was more than once tendered to Lord Langdale by the head of the present Administration; but though he consented to act as First Commissioner, and actually sat for a short time in the Lord Chancellor's Court and in the House of Lords in that capacity, the intense application to which the state of the Court of Chancery had condemned him forbade any further stretch of his powers, and he longed only for that repose which the expiration of fifteen years' uninterrupted judicial service entitled him to claim, though not to enjoy.

His labours as a reformer of the Court of Chancery fell infinitely short of his intentions and his desires, though even these he powerfully and systematically contributed to the new rules for the removal of delays, the reduction of costs, and the abolition of needless formalities. But the philosophical lawyer was baffled by the duties and obligations of the active judge. No man ever sat in that court who was more anxious to reform its abuses, and the last disappointment of his life was the production by Lord John Russell of the miserable Chancery Bill of the present session.

Lord Langdale brought to his office a personal dignity not inferior to that which it conferred upon himself, for he was a man earnestly devoted to truth and justice—his whole life was unsullied by the sus-

picion of a job or of subservience to any but the loftiest motives of action. He preserved the simplicity of his manners and his love of literature in the residence on the confines of Richmond-park, where of late years he exclusively resided, and in the gardens or library he had himself formed. Younger and more active men have already succeeded to the functions he so recently discharged, but amongst the lawyers who have filled the chief offices of their Profession, and who might have filled the highest of all, none leaves purer fame than the late Master of the Rolls.

His lordship married late in life the Lady Jane Harley, eldest daughter of the late Earl of Oxford, by whom he leaves one daughter; his peerage, therefore, becomes extinct.—*Times*.

## THE GAZETTES.

### Bankrupts.

*Gazette, May 6.*

COCKERILL, SAMUEL, draper, Northampton, May 30, at one, June 17, at eleven, Basinghall-st. Off. as Edwards. Sols. Reed and Co. Friday-st. Chesapeake. Petition, April 28.

EDWARDS, RICHARD, linendraper, Sudbury, Suffolk, May 15, at eleven, June 13, at twelve, Basinghall-st. Off. as Johnson. Sols. Hardwick and Co. Weavers'-hall, Basinghall-st. Petition, April 25.

EVETT, JAMES, apothecary, Shifnal, Shropshire, May 24, at one, and June 9, at ten, at Birmingham. Off. as Valpy. Sols. Mottram & Co. Birmingham. Petition, April 23.

FARNARD, FRANCIS, fancy cloth manufacturer, Almondsbury, Yorkshire, May 30 and June 19, at eleven, at Leeds. Off. as Young. Sols. Messrs. Sykes, Milnbridge, near Huddersfield, and Bond and Barwick, Leeds. Petition, May 1.

MARTIN, WILLIAM LANE, ironmonger, Gravesend, May 15, at eleven, and June 20, at half-past one, at Basinghall-st. Off. as Whitmore. Sols. Wilkinson and Co. Nicholas-lane, Lombard-street, and Sharland, Gravesend. Petition, May 5.

PEARSON, THOMAS, merchant, Plympton St. Mary, Devonshire, May 23 and June 19, at eleven, Exeter. Off. as Hernaman. Sols. Gibson and Moore, Plymouth. Petition, May 3.

WHEELER, GEORGE, grocer, Richmond, Surrey, May 14, at half-past one, June 13, at half-past eleven, Basinghall-st. Off. as Stansfeld. Sol. Digby, Circus-place, Finsbury-square. Petition, May 2.

*Gazette, May 9.*

BAGG, THOMAS, victualler, Birmingham, May 24, at one, June 9, at ten, Birmingham. Com. Balguy. Off. as Whitmore. Sols. Gem, Moor-st. Birmingham; and Mottram, Knight, and Emmett, Bennett's-hill, Birmingham. Petition, May 3.

CREED, JOHN WILLIAM, innkeeper, Chadwell St. Mary, Tilbury Port, Essex, May 29 and June 19, at one, Basinghall-st. Com. Holroyd. Off. as Edwards. Sol. Matthews, 2, Arthur-st. West, London-bridge. Petition, May 8.

DEVET, CHARLES THOMAS SPENCER, auctioneer, upholsterer, and cabinet maker, Woburn, Bedfordshire, May 29 and June 17, at two, Basinghall-st. Com. Holroyd. Off. as Groom. Sol. Cobb, 11, Downham-road, Lower Islington. Petition, May 8.

DITTRICH, FREDERICK AUGUST, hat manufacturer, No. 2, Bennett-st. Stamford-st. Blackfriars-road, May 16, at half-past eleven, June 12, at one, Basinghall-st. Com. Evans. Off. as Bell. Sol. Turnley, No. 16, Cornhill. Petition, April 30.

FROGGETT, FREDERICK WATER, and VAN PUTTEN, JAMES, corn merchants, No. 36, Mark-lane, May 20 and June 10, at eleven, Basinghall-st. Com. Evans. Off. as Bell. Sols. May and Sweetland, Queen-square, Bloomsbury. Petition, May 8.

GOLDER, WILLIAM ROLFE, miller and ship owner, Folkestone, Kent, May 19 and June 16, at half-past eleven, Basinghall-st. Com. Goulburn. Off. as Pennell. Sols. Bower and Son, 46, Chancery-lane; or Watson, Folkestone. Petition, May 7.

GRAY, WILLIAM, draper, Sunderland, Durham, May 23 and June 24, at eleven, Newcastle-upon-Tyne. Com. Ellison. Off. as Baker. Sols. Sale, Worthington, and Shipman, Manchester; and Griffith and Crighton, Newcastle-upon-Tyne. Petition, April 26.

GUDGIR, RICHARD, licensed victualler and dealer in cattle, Cople, Bedfordshire, May 16 and June 20, at two, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Wright, 11, Farnival's-inn, Holborn, and Green, Woburn, Beds. Petition, May 8.

HARPER, ISAIAH, builder and upholsterer, Dudley, Worcestershire, May 23 and June 17, at twelve, Birmingham. Com. Daniell. Off. as Valpy. Sols. E. and H. Wright, Waterloo-st. Birmingham. Petition, May 5.

KIRBY, DAVID, linen and woollendraper, Brackley, Northamptonshire, May 23, at half-past twelve, and June 20, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sol. Shatlock, No. 63, Coleman-st. Petition, May 7.

MERRILL, JAMES, cattle dealer, Walcot, Holy Cross, Pershore, Worcestershire, May 22 and June 17, at twelve, Birmingham. Com. Daniell. Off. as Christie. Sols. E. and H. Wright, Waterloo-street, Birmingham. Petition, April 25.

MOORES, JOHN, jun. draper, Aylesbury, Buckinghamshire, May 24 and June 23, at eleven, Basinghall-st. Com. Goulburn. Off. as Nicholson. Sols. Wilkinson, Gurney, and Stevens, No. 2, Nicholas-lane, City. Petition, May 8.

SALTER, CHARLES, and EVANS, RICHARD MORRIS, tailors, Upper King-st. Bloomsbury, May 20, at two, June 24, at twelve, Basinghall-st. Com. Holroyd. Off. as Groom. Sols. J. and J. H. Linklater, Charlotte-row, Mansion-house; and Lindsay and Mason, No. 26, Gresham-st. City. Petition, May 8.

### BANKRUPTCIES SUPERSEDED.

*Gazette, May 6.*

Thompson, W. spirit merchant, Morpeth Northumberland, April 17.

*Gazette, May 6.*

Bosser, T. meat salesman and farmer, Newgate-market, and Merton, Surrey, May 7.

### Dividends.

*BANKRUPT ESTATE.*

*Official Assignees are given, to whom apply for the Dividends.*

Bolt, H. S. wine merchant, further, 4d. Hernaman, Exeter.—Broadbent, T. draper, second and final, 2s. 1d. Freeman, Leeds.—Briggs, J. G. innkeeper, first, 6s. 4d. Bittleston, Nottingham.—Cradington and Southall, iron masters, first sep. of Cradington, 6s. Whitmore, Birmingham.—Daniell, T. copper smelter, final, 3d. Hernaman, Exeter.—Evans, W. D. butter merchant, final, 6d. Hernaman, Exeter.—Gibson, B. ironmonger, first, 1s. Freeman, Leeds.—Godfrey, V. S. miller, second, 9d. Groom, London.—Inger, G. E. druggist, first, 4s.; second, 2s. 7d. Bittleston, Nottingham.—Moore, J. cabinet maker, first, 1s. 6d. Bittleston, Nottingham.—Stake, F. and S. woollen manufacturers, first, 5s. 1d. Hernaman, Exeter.—Taylor, W. cotton spinner, first, 5s. 11d. Pott, Manchester.—Walker, W. innkeeper, first, 2s. 7d. Bittleston, Nottingham.—Wilkin, G. tailor, second and final, 1d. Groom, London.

*INSOLVENT ESTATE.*

Taylor, T. B. silk mercer, 4s. 11d. Apply to Samuel Schofield, merchant, Manchester.

### Assignments for the Benefit of Creditors.

*Gazette, April 29.*

Boatell, J. R. linendraper, Lower Mitcham, Surrey, April 15. Trusts: T. Millgate and J. James, warehousemen, Gresham-st. Sols. Sole and Turner, Aldermanbury.—Dobb, G. seed crusher, Kingston-upon-Hull, April 1. Trusts: W. Wright and J. Blundell, merchants, Kingston-upon-Hull. Sols. Lightfoot, Earnshaw, and Frankish, Kingston-upon-Hull.—Fryer, A. saddler, Northwick, Chester, April 23. Trusts: W. Grange, farmer, Great Bodworth, and J. Oakleton, tanner, Euncorn and Wincham. Sol. G. Saxon, Northwick.—Jones, J. farmer, Wimbington, Isle of Ely, Cambridgeshire. Trust: E. Jones, farmer, Flood's Ferry, March. Sols. T. L. and W. Reed, Downham Market.—Manley, B. draper and slop-seller, Devizes, Wiltshire, April 1. Trusts: G. Mabyn, draper, Bath, and H. Gardiner, slop-seller, Bristol. Sol. H. K. Norris, Devizes.—Pringle, J. grocer and tea dealer, Berwick-upon-Tweed (under the firm of Fringle and Co.), April 11. Trusts: R. Dadds, grocer and tea dealer, and W. Gibson, postmaster, both of Berwick-upon-Tweed. Sol. J. Rowland; Berwick-upon-Tweed.—Shipman, W. and E. grocers and merchants, Chichester, Sussex, April 17. Trusts: W. W. Dendy, Chichester, and T. McCheane, Portsmouth, merchants. Sols. Freeland, Raper, and Johnson, Chichester; Bircham, Dalrymple, and Drake, Parliament-st. Westminster.

*Gazette, May 2.*

Appleby, W. bookseller, Broad-st. Bath, April 25. Trusts: W. Tegg, wholesale bookseller and publisher, Queen-st. Chesapeake, and James Jeffery, bookbinder, Bath. Sols. Fry and Loxley, Chesapeake.—Dixon, T. iron merchant, Bradford, Yorkshire, April 26. Trusts: H. Rangeley, ironfounder, Unstone Iron Works, Drondfeld, S. Dixon, carrier, Shipley, H. Pearson, carrier, Balby, and R. Croasland, ironfounder, Bradford. Sols. Bentley and Wood, Bradford.—Neal, T. wine merchant, Northridge Wells, Kent, April 9. Trusts: G. Taylor, gentleman, Hammet-st. Minorities, and J. K. Hooper, jun. importer of foreign wines and spirits, Queenhithe. Sols. Fry and Loxley, Chesapeake.—Warry, H. E. draper, West-st. Bristol, April 4. Trust: T. Furlong, accountant, Bristol. Sols. Brittan and Sons, Bristol.

### Partnerships Dissolved.

*Gazette, April 29.*

Addy, Stevenson, and Co. merchants and manufacturers of fillo, and other hardware, Sheffield, April 10. Debts paid by Stevenson.—Baker, A. C. and Moor, J. ironfounders, East Stonehouse, April 25.—Bokkberry, and Dixon, gas fitters and contractors, King-st. and Rose-st. Covent-garden, April 25.—Bourne and Ebbly, iron masters, Marston, as regards J. T. Bourne, April 15.—Bower, T. and Sons, naphtha manufacturers, near Morriston, April 23. Debts paid by T. Bower, sen. and jun.—Bower, G. and Co. wine, spirit, ale, and porter merchants, Liverpool, April 24. Debts paid by Bryce.—Bris and Co. shirt makers and hosiers, Regent-st. April 23. Debts paid by Browne.—Burton, J. D. and Gaseby, G. pen manufacturers, Birmingham, April 25.—Carter, G. and T. pork butchers, Bath, April 25.—Cresswell and Co. stone merchants, Thornton, near Bradford, Feb. 23. Debts paid by Harker.—Edmonds and Co. clothiers, Bradford, April 24.—Faulkner, J. and J. tile makers and potters, Lomphill, Lewisham, April 23. Debts paid by J. Faulkner.—Gill, F. and Silley, A. plumbers, South Molton-st. Dec. 25.—Grey, M. and J. farmers, Newmoor, Botheral, April 23.—Harris, T. and Son, chair manufacturers, West Wycombe, April 24. Debts paid by T. Harris.—Hassam, J. and G. linen drapers and undertakers, Burnley, April 23. Debts paid by G. Hassam.—Hocky and Stradling, drapers and outfitters, Tynemouth and elsewhere, April 19. Debts paid by Stradling.—Kierstead and Wyatt, wholesale oilmen, Upper Thames-st. April 26.—Leonard and Harris, mercers and linendrapers, Chippenham, April 19. Debts paid by Leonard.—Lewis, J. W. and J. linendrapers, Stroud, April 10.—Liddell, J. and Larkins, F. crystal merchants, Horsehoe-court, Ludgate-hill, April 26.—Montepasi, A. and P. jewellers and silversmiths, Winchec Saint Peter, April 26.—Mullen, J. and George, G. farmers and breeders, Boxley, April 23.—Oxford, J. and Dix, F. grocers, drapers, and general shopkeepers, Yorkford.—Robinson, Crabtree, and Co. worsted manufacturers, Bradford, April 14. Debts paid by Crabtree.—Rossell and Co. drapers, Preston, Jan. 1.—Thompson, J. and Boone, R. coal merchants, Little Lion, April 23. Debts paid by Boone.—Webbey, W. W. jun. and O. general traders, Princess-st. Hanover-square, April 26, as regards Webbey, jun.—Whitty and Buckton, commission agents and general merchants, Liverpool, April 26. Debts paid by Whitty.—Wilson, Dore, and Co. merchants, brokers, and vinegar manufacturers, Liverpool, and Kirkdale, near Liverpool, April 26. Debts paid by Dore.

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## THE LAW TIMES.

SATURDAY, MAY 17, 1851.

## A HINT.

THE reader who desires to preserve the former arrangement of the contents of the number may do so with the greatest ease. When he cuts the leaves, he has but to take from the middle of the sheet the pages of reports, and place them at the beginning, within the outside leaf, and he will have the entire contents in their ancient order—the reports in succession first, and then all the miscellaneous contents in their order. We cannot so send them, because the stamp is imposed on the sheet: a severed sheet would be liable to as many duties as it has parts, and there is no other possible method of arranging the reports, so that they may be severed from the rest of this sheet and bound up continuously, but by placing them in the centre leaves. Any seeming dislocation thence arising is effectually cured by the simple plan of at once removing the pages of reports from the centre and placing them at the beginning.

## TRANSPORTATION.

THE House of Lords has been considering the question of transportation, but more soberly and rationally than it has been treated by Mr. ADDERLEY, in his pamphlet, and by the *Spectator* and two or three others of the newspapers, which look exclusively to the interests of the colonies, and ignore the interests and necessities of the mother country.

We are not about to inflict upon our readers a review of all the arguments that are adduced for and against the system of punishment by transportation; but we are desirous of bringing under the notice of the Lawyers who are in Parliament one consideration, which appears to be overlooked by all the speakers and writers upon this much-contested question.

THE BISHOP OF OXFORD dwelt with great force and eloquence upon the propriety of substituting improved reformatory punishment at home. This is the answer given by all the opponents of transportation.

Unfortunately there is an obstacle to the

success of any scheme of this kind, of which they appear not to be aware; for they never attempt to grapple with it and shew how it is to be removed.

Grant that a perfect system of reformatory punishment could be devised and carried out at home; that every criminal could be so improved as to leave the prison a changed man; still we fear the object would be as far as ever from being attained, and transportation as unsafely dispensed with.

For this reason. The temptations to relapse are not and cannot be removed, so long as the criminal remains in England. His character is blasted by his public trial—his respectable friends shrink from associating with a convict—and nobody will take into his service a thief just released from the gaol. Conscious degradation and the scorn of his fellow-men lower his self-respect, and drive him out of good society into bad, and the impossibility of living by honest labour compels him to be again a thief. Nothing can remedy this—and this is the greatest of all causes of crime, not to be reached by any improvements in punishment. So long as the liberated criminal is sent back to his old haunts and his old associates, he will continue a criminal. It is almost impossible that he should be otherwise: whatever his inclinations, the world will not let him be honest, because it will not treat him as honest.

Now for this evil—which the opponents of transportation entirely overlook—no cure has been suggested, and, as we believe, none is practicable, but transportation. The only chance of a criminal retrieving his position and becoming an honest man, is to remove him from his old haunts and associates—to give him hope of a happier and more prosperous future, secured by his own exertions. Transportation does this. We should like to see a comparative table of the proportion of transported convicts who relapse into crime after punishment, compared with that of convicts kept at home.

Even if home punishment be practicable, it should be accompanied by deportation afterwards, as a freeman. If not thus, how would the opponents meet the difficulty we have suggested?

Nor is there much force in the objection, that we have no right to inundate a colony with criminals. The objectors forget that the criminals were made the colony. A place is colonized purposely for them, and colonists have gone thither of their own accord, knowing the character of the place. There is some reason in an old colony, that has never been a penal one, objecting to be made such; and it would be a breach of faith, and an act of tyranny, to compel them to take our convicts against their will. But this objection does not extend to the colonies which were founded as penal colonies, who have no right to complain that they are what they were designed to be, and what those who settled there knew them to be when they went thither.

Until some means can be suggested by the colonial philosophers whereby criminals may have the means of becoming honest, industrious and respected, after their term of punishment is over, it seems to us a waste of time, breath and paper, to speak and write against transportation.

## FORMA PAUPERIS.

IT was with great pleasure that we read the following remarks by Lord CAMPBELL, upon a trial last week of a very disgraceful pauper suit, in which the defendant had a verdict:—

The learned Judge said, he perfectly agreed with the verdict returned by the jury. He should, for the protection of his fellow-subjects, take care that in similar cases, the jury should be properly directed. There was a case which he had tried at the other end of the town, in which a thief had been taken with the stolen property on his person; but, owing to some technicality, he escaped, and immediately brought an action for damages for false imprison-

ment. Happily, however, as in the present case, a verdict was returned for the defendant. It was an extremely vexatious course, and more especially so when the plaintiff sued in *forma pauperis*, in which case the plaintiff and his attorney would be benefited by the damages and costs, and the defendant, if he gained a verdict, would be put to the expense of 50*l.* or 60*l.* He would advise legal gentlemen, for the honour of the profession to which he belonged, to be most particular and cautious in the granting of certificates to sue in *forma pauperis*. He expressed his intention, when those certificates came before him, to subject the affair to the strictest scrutiny and inquiry.

More than once we have directed the attention of our readers to the abuses of this privilege of the poor. In practice it has been perverted into a privilege for the benefit of unprincipled and speculating Lawyers, and a means of injustice and oppression to the public, where the game is all on one side,—“heads I win, tails you lose,”—where the Attorney picks up a pauper and manufactures a grievance against a wealthy man, with a certainty that he can lose nothing and may gain much, and stimulated not a little by the possibility of payment by the unfortunate defendant, as a more prudent course than the certainty of loss by going to trial, even with certainty of success.

A privilege thus capable of abuse, and thus actually abused, should at least be surrounded with checks to prevent an ill use being made of it. At present, the only check is the certificate of Counsel that there is good cause of action. But this is found to be ineffectual, because any Counsel may certify; and some Counsel are always to be found who are either very inexperienced, very ignorant of law, or very inconsiderate. Lord CAMPBELL announces that he will scrutinise such certificates, and, we trust, publicly censure those who give them improperly. But we fear that even this will not suffice to check the abuse while so great a temptation is offered to a disreputable class of Attorneys. We would, therefore, suggest the following remedy, which would reach the root of the evil.

Let Attorney as well as Counsel be assigned by the Court. If the pauper succeeds, let the Attorney have no more costs than money actually paid out of pocket, and the Counsel no fees at all. If the action fails, let the defendant be empowered to come upon both Attorney and certifying Counsel, or either, for such expenses out of pocket as he has been put to.

If this were done, we should never again witness the application of the greatest instruments of extortion in existence—the action in *forma pauperis* brought by a speculative Attorney.

## THE LEGISLATOR.

## Summary.

ALL the Law Bills before Parliament have been in suspense during the last week. It is not probable that many of them will pass during the present session, and next year will be occupied with the Suffrage question.

## Imperial Parliament.

## PUBLIC BUSINESS TRANSACTED.

## BILLS READ A FIRST TIME.

Thursday, May 8.

St. Alban's Bellary Commission.

Friday, May 9.

Universities, Scotland.

Wednesday, May 14.

Sequestration of Benefices.

## BILLS READ A SECOND TIME.

Monday, May 12.

Colonial Property Qualification

Apprentices to Sea Service, Ireland.

Wednesday, May 14.

Charitable Institutions Notices

Landlord and Tenant.

Thursday, May 15.

Bridges, Ireland

Common Lodging Houses

St. Alban's Bribery Commission  
Enfranchisement of Copyholders, No. 2.

BILLS READ A THIRD TIME AND PASSED.

Thursday, May 8.  
Compound Householders.

Monday, May 13.  
Property Tax.

Thursday, May 15.  
Small Tenements Rating Act Amendment.

PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Thursday, May 8.  
London and Blackwall Railway.

Friday, May 9.  
Aberdeen Public Record

Dundee and Arbroath Railway

Huddersfield, &c. Turnpike.

Thursday, May 15.  
Stroud and Gloucester Road

Uttoxeter to Stoke, &c. Road.

#### SESSIONAL PRINTED PAPERS.

Par. Numb.

- 160. Civil Contingencies—Account and Estimate
- 211. Civil Services—Estimates; Classes 1, 2, and 3
- 251. Agricultural Produce (Ireland)—Returns
- 263. Holyhead and Kingstown Packets; Returns
- 268. Valuation (Ireland)—Returns
- 274. Constabulary (Ireland)—Abstract of Statement
- 281. Aylesbury Election—Minutes of Evidence
- 288. Incumbered Estates Commission (Ireland)—Report
- 290. Ecclesiastical Courts—Returns
- Prisons—Sixteenth Report of Inspectors (Scotland)—Part 4
- 248. Emigration—Correspondence
- 263. Spirits—Returns
- 273. Barrel Organs, &c. (Metropolis)—Copy of Instructions
- 274. Railway Accidents—Returns
- 277. Committee of Selection—Seventh Report
- 282. Convict Discipline and Transportation—Memorials
- 290. Poor Relief (Ireland)—Returns
- 246. Bills—Petty Sessions (Ireland)
- 254. — Fees on Proceedings before Justices (Ireland)
- 249. — Collection of Fines, &c. (Ireland)
- 271. — Lodging Houses (amended)
- 272. — Common Lodging Houses
- 269. — Apprentices to Sea Service (Ireland)—No. 3
- 270. — Bridges (Ireland)
- 278. — Inverness Bridge (No. 2)
- 285. — St. Alban's Bribery Commission
- 284. — Universities of Scotland
- 261. Ports of Newcastle-upon-Tyne and Shields—Returns
- 266. Wheat and Wheat Meal; Linen Yarn—Returns
- British Chapel at Florence—Correspondence
- 265. Fire Insurance—Account
- 290. Convict Discipline and Transportation—Copies of Petitions
- Education—Minutes of the Committee of Council, Vols. 1 and 2
- 63. Local Acts—Reports of the Admiralty
- 275. Excisequer—Account
- Prisons—16th Report of the Inspectors (Northern and Eastern District)—Part 2
- Metropolis Improvements—7th Report of Commissioners.

#### HOUSE OF LORDS.

##### CRIMINAL JUSTICE BILL.

FRIDAY, May 9.—Lord CAMPBELL brought up from the select committee his Administration of Justice Bill and his Prevention of Offences Bill, and moved that they be reprinted as amended. The noble and learned lord said these Bills had been drawn by very eminent members of the bar, Mr. Greaves and Mr. Pitt Taylor, the latter of whom was a grandson of the celebrated Lord Chatham, and inherited a great portion of his talents, and had also an ardent desire to improve the laws and institutions of his country. He (Lord Campbell) had received a letter from Lord Chief Justice Blackburn, of the Q. B. in Ireland—one of the greatest judges that had ever lived in either Ireland or England—who stated that he and his learned brethren in Ireland highly approved of these Bills, and anxiously wished to see them extended to that part of the United Kingdom. The noble and learned lord concluded by moving that the Bills be reprinted.—Agreed to.

#### HOUSE OF COMMONS.

##### CHANCERY REFORM.

FRIDAY, May 9.—In reply to a question from Mr. Muntz, Lord J. Russell said that, since he made his statement on this subject, the Lord Chancellor had consulted those whose opinions were entitled to the most weight. Those opinions had not yet been drawn up in a proper shape, but when they had been, he (Lord J. Russell) would consider them, and introduce a measure on this subject.

##### JUDICIAL SALARIES.

TUESDAY, May 10.—In the debate on the report on salaries, Lord JOHN RUSSELL defended at length the principle of choosing for the judges of the law courts those gentlemen who have attained the first rank in the race for legal distinction at the bar: this system gave to the bench such men as Hardwicke, Camden, Eldon, and Mansfield. But such men are not easily tempted to yield their large private revenues. The Government proposes that the salaries of the Lord Chancellor shall be 10,000*l.* a year instead of 14,000*l.* (from two sources), as at present; that of the Chief Justice of the Queen's Bench 8,000*l.* instead of 7,000*l.* as proposed by the committee; and those of the Chief Justice of the Common Pleas and the Chief Baron, 7,000*l.* instead of 6,000*l.*

as proposed. Persons appointed after last year will be subject to the new arrangement. The scale of salaries for the Scottish and Irish bench, which the committee proposes, involving a diminution of salaries to a large amount, by which a small saving only would accrue to the public, the Government does not accept. Both in Edinburgh and in Dublin, and particularly in the former, ever since the Union, the persons chiefly at the head of society have been the judges: it is not desirable to lower them from their present dignified and conspicuous position. Lord John took the opportunity to state that there never has been the least intention to change the position of the administration of law in Ireland, either by reduction or transfer of the courts of justice; on the contrary, the Government thinks it is of the greatest importance to maintain the local administration of justice in Ireland.

##### ADMINISTRATION OF CRIMINAL JUSTICE IMPROVEMENT BILL.

THURSDAY, May 15.—Lord LYNDEHURST asked his noble and learned friend the Lord Chief Justice of the Queen's Bench to postpone the committee upon this Bill, which he had fixed for Friday next, to some day next week, as he was anxious to say a few words on the subject.—Lord CAMPBELL said that he should have great satisfaction in postponing the committee on this Bill from Friday to any day in the next week which would be most convenient to his noble and learned friend. He would fix the committee for any day which his noble and learned friend would name.—Lord LYNDEHURST. Under such circumstances, I will say Tuesday next.—The committee was then postponed accordingly.

##### BILL FOR THE REFORM OF THE COURT OF CHANCERY.

Lord LYNDEHURST hoped that their lordships would not consider him importunate if he now called the attention of his noble and learned friend on the woolsack to the Bill which had been promised for the reform of the Court of Chancery. It would perhaps be recollected as matter of history that at the close of last session the noble lord at the head of the Government in the other House of Parliament gave notice in that House that he would bring in a Bill for the reform of the Court of Chancery early in the present session. It was, therefore, natural to suppose that during the recess he had employed himself, in conjunction with the law officers of the Crown, in preparing such a Bill. In the speech from the Throne, at the commencement of the present session, the promise was reiterated in distinct terms. A few days after the meeting of Parliament, in consequence of a question put to him by his hon. and learned friend the member for Newark (Mr. J. Stuart), the noble lord stated that he would bring in the Bill in question very shortly. Very shortly! It was perfectly clear that the noble lord had not used those words in their ordinary sense, but (if he might be permitted to say so without offence) in a *quasi* Chancery sense. For, after the expiration of three months, or of half the session, the Bill in question had not yet made its appearance. The noble lord, as soon as he meddled with the Court of Chancery, seemed to have contracted the habit of delay for which that court was notorious, with a view, he supposed, of shewing the inconvenience of the delay which he wished to remedy. He (Lord Lyndhurst) did not know whether he ought to put his question to his noble and learned friend on the woolsack, or to the noble marquis who was at the head of the Government in that house; but he would ask one or both of them whether their lordships were to expect that Bill this session? He hoped that he should receive a distinct answer from one quarter or the other.—The LORD CHANCELLOR observed, that his noble and learned friend had informed him in private of his intention to put this question to him in the house. As his noble and learned friend had himself presided for many years in the Court of Chancery, with great credit to himself and benefit to the country, he must be well aware of the ease with which remedies for the inconveniences and delays of the Court of Chancery were accomplished. Still, there was one circumstance which induced him to think that this could hardly be the case, for all the time that his noble and learned friend held the Seals he had done nothing, but had left the task of reform to his successors. He could assure his noble and learned friend, that ever since he had had official communication with the Government on this subject, their attention had been closely devoted to it. His noble and learned friend had said that all the session had passed away without a single word having been said about it; but here his noble and learned friend's memory was clearly at fault, for he (the Lord Chancellor) recollected that his noble friend (Lord J. Russell) had stated in the other house the outline of the Bill which he intended to introduce. His noble friend stated that he would "very shortly" bring in that Bill. The draught of the Bill was then prepared, for he had seen it himself. His noble and learned friend (Lord Lyndhurst) had made some observations of great importance on that Bill, and many learned members of the pro-

session had made communications to him, and had offered suggestions for its improvement too important to be overlooked. He had been in communication with the noble lord in the other house (Lord J. Russell) on those communications and suggestions, and had requested him not to bring in his Bill until he had looked over those suggestions, and especially those of his noble and learned friend (Lord Lyndhurst). He (the Lord Chancellor) now had a Bill prepared, containing such of the suggestions as he approved of; but he had not yet given it a final perusal. Her Majesty's Government had never lost sight of the subject; nor had he individually. He appealed to his noble and learned friend whether he was not aware of the difficulty of preparing a Bill of such vast importance as the present, and of the care which ought to be taken lest, in attempting to introduce new improvements, they introduced impediments into other parts of the system.—Lord LYNDEHURST was glad that he had put this question to his noble and learned friend on the woolsack, as it had elicited from him a distinct answer, which was a complete justification of every observation which he had made on a former occasion. As his noble and learned friend had stated that he had the Bill now prepared, might he be permitted to ask whether it was intended to introduce it in this or in the other House of Parliament?—The LORD CHANCELLOR was not aware that there was any alteration in the intention of bringing it first under the consideration of the other House of Parliament. Here the conversation on this subject dropped.

COMMON LODGING HOUSES.—On Saturday a Bill in the House of Commons was printed for the well ordering of common lodging houses. It is to be read a second time on Wednesday. The object of the Bill is to place under the police common lodging-houses, with regard to the cleanliness, ventilation, &c., as also to remedy contagious diseases. The Bill was brought forward by Lord Ashley.

#### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

THE last number was extremely fertile in reports of cases relating to this department of the LAW TIMES, the Courts having been unusually diligent during the Term just concluded, inasmuch that the *Crown Paper* was cleared for the first time within our editorial memory, and in most cases judgment was given *instanter*. Indeed, so numerous were the decisions, that, although a double number was resorted to, several that were in type were obliged to be deferred to this week, and appear to-day.

The first we shall notice are two decisions on the *Law of Rating*. In *Reg. v. The Manchester South Junction Railway Company*, 17 Law T. 71, a line of railway had been carried through a town. Of course, it was required to be rated at its value. But its previous value as land for building was considerably greater than its value as a railway; in fact, the value had been much diminished by its conversion to railway purposes. Was it to be rated at its former or its present value, or was the test of value what it was worth as building ground, or as railway? The Court held rightly that its rateable value was what it would let for as a railway, and not its possible value for building, as determined by the value of adjoining building ground. The other case relates to the liability of a literary institution under the exemptions provided by 6 & 7 Vict. c. 36. It was a case stated by consent of the parties, under Baines's Act, which, by the bye, is capable of a much more extensive application than it has yet received. In *The Earl of Clarendon v. The Rector, &c. of St. James's, Westminster*, 17 Law T. 75, the facts were shortly these. The London Library is a society formed by entrance fees and annual collections, to purchase a library, to be used on the premises and lent to members at their own houses. Its rules provide that no dividend nor profit should be divided among the members. It was held to come *within the exemption*. But, unfortunately, it sub-let a portion of its premises to other societies, receiving rent for them. These societies were exclusively devoted to literary purposes, and would have come within the exemption. But it was also held, that by reason of such sub-letting it was taken out of the exemption, and on this there could be no reasonable doubt. In order to secure the exemption under the statute, "the society," said JENKINS, C.J. "must be for all purposes devoted to literature, and it must occupy the premises for the transaction of the business of the society; not for the purposes of literature, science, or the fine arts, but it must be for the purposes of the society which is liable to the rate."

In *Municipal Law* there is another decision, on



a point very similar to those which have been raised in election law. The 142nd section of the Municipal Act provides that in voting-papers, &c. no misnomer, inaccurate description, &c. shall vitiate. A voting-paper rightly described a wrong place. Could this be cured by the above section? The Q. B. has held that it cannot be so, the section applying only to cure an inaccurate description of the right place.

The *Lunatic Paupers Act* has produced another decision. In *Reg. v. St. Pancras*, 17 Law T. 74, it was held to be no objection to an order for the costs of maintenance of a lunatic in a licensed house, that such house is, in truth, a part of the workhouse of the parish obtaining the order. "If it be an objectionable thing," said Lord CAMPBELL, C.J. "to license part of a workhouse for the reception of lunatics, it is a matter to be referred to the lunacy commissioners."

Questions of *Settlement* are very rare now, but we read them with interest, from recollections of their past importance; and probably many of our readers will feel something of the sort of revival of past ardour in the discussion of *settlement points* which the old hunter displays when he hears the familiar cry of the hounds. Among the mass of interesting reports in the last *LAW TIMES*, there is one of these "old familiar faces." In *Reg. v. Oseiti*, 17 Law T. 74, the question was as to a settlement by office. Does the clerk of a district church, erected under the Church Building Acts, thereby obtain a settlement? It was held that he did so. But there was a question as to his appointment; he was appointed by the district curate, in whom the right was not vested; but he actually filled the office for several years, and with the knowledge of the vicar of the parish, in whom the appointment properly lay. He was held to have gained a settlement by the office.

The *Practice of Sessions* as to the costs of a *mandamus* was considered in *Reg. v. the Justices of Middlesex* (17 Law T. 83). At the Sessions, the Bench objected to the right of the appellants to be heard, and refused to hear the appeal. A *mandamus* was moved, and at the motion, the respondents shewed cause; but the rule was made absolute, and the appeal was heard, and the appellants succeeded. The appellants were held to be entitled to the costs of the *mandamus*: "The right to costs in these cases," said Coleridge, J. "does not in any manner depend upon the fact of whether or not the opposition was vexatious; it may have been a very proper thing to shew cause, but it would be right that the successful party should have his costs." Another case on the *Law of Quarter Sessions*, is that of *Reg. v. St. James's, Colchester* 17 Law T. 84, which was a rule to set aside a *veriorari* which had been obtained on an affidavit, tating that deponent was present at the Sessions, &c. and did then and there see the said A. and B. (the justices served) acting as justices of the peace for the said city of S. at the said Sessions, &c. It was contended that this affidavit was insufficient, for not stating that the two justices were present at the hearing of the appeal, and it was held.

A *Criminal Law* case will conclude this long ummary. *Reg. v. Thompson* (17 Law T. 72), was an indictment for conspiring to procure the removal of certain foreign goods from bonded warehouses without payment of the duties. The Customs Acts in force at the time of the conspiracy charged were repealed, except as to the duties payable, by a later statute, passed before the indictment was preferred. This was held to be no answer to the indictment. The indictment charged A., B. and C. with conspiracy with divers other persons unknown. No evidence was offered affecting any other persons than A., B. and C. The jury found A. guilty, but acquitted B. and C. stating that they believed one of them to be guilty, but not knowing which, they acquitted both. It was held by three of the four judges of the Q. B. to be an inconsistent verdict, and that A. was entitled to an acquittal also. The dissentient was ERLE, J. whose reasoning is certainly very strong. E. W. C.

THE LIVERPOOL STIPENDIARY BENCH. — The office of stipendiary magistrate of Liverpool has actually gone a-begging. We stated last week that Mr. James had positively declined the appointment. Some of our contemporaries have been making free with the names of Mr. Henry and Mr. Yardley, the police magistrates of London, without the least authority. The truth, we believe, is, that every police magistrate of any standing in the metropolis has been applied to, and has refused the offer! The

London magistrates get nearly the same salary, for the performance of less than half the labour. Their refusal is consequently intelligible enough. Mr. Brandt, of Manchester, a gentleman well known on the Northern Circuit, as possessing every requisite for the office, is the judge of the County Court there, with a salary of 1,000*l.* a year. It was expected that an additional 200*l.* a year might possibly tempt him to come to Liverpool. He has declined. The Hon. Mr. Denman, a rising man at the northern bar, was believed to have a liking for the vacant post, and was written to; but he also declined. The committee would be glad to appoint a local man, but the want of what they deem the requisite qualifications deters them. No recommendation, and necessarily no appointment, has yet been made. Mr. Rushton's salary was considered handsome, and some even deemed it exorbitant; but it is now found that in proportion to the work he got through, he was really underpaid. It is needless to add that Sir George Grey will be happy to appoint any suitable member of the bar that the council may nominate. Strange that a difficulty should exist where to find him. — *Liverpool Chronicle*.

LIVERPOOL POLICE RETURNS. — From the returns annually made by the Liverpool police, we find that notwithstanding the advance of population, the increase in the whole number of offences is only 366. The total number of disorderly cases for the year is 5,514, being an excess over the last year of 3,438. The value of property stolen in the borough was 10,757*l.* and the amount actually recovered, 5,075*l.* The number of apprehensions by the police was 15,869; the number apprehended for felony, 5,252; and the number of offences, 6,581; which, compared with the last year, shews a decrease of 67 persons, and 121 felonies. The committals exceed those of last year by 84. The number of juvenile offenders shews a decrease of nearly 2 per cent. as compared with 1849, and 8 per cent. as compared with 1848. The adults shew a decrease of 1 per cent. compared with 1849, and 19 per cent. compared with 1848. There has been a decrease in the drunken cases, as compared with 1849, of 1,480, and, in cases of assault, of 41. In disorderly cases an increase had taken place of 3,438, attributable, probably, to the great number of excavators employed at the north dock works and the neighbouring railways. The number of fires had exceeded those of 1849 by 45; 39,640*l.* worth of property had been destroyed, and 157,364*l.* worth saved by the exertions of the fire brigade. The number of public-houses and beer-houses within the borough shewed a decrease, as compared with 1849, of 59 public-houses and 103 beer-houses. There was a decrease of 21 in the brothels, and an increase of 169 prostitutes. In the number of professional thieves, and those who worked occasionally, there was a decrease of 144. The amount of property accidentally lost was 2,495*l.* of which 998*l.* was recovered by the aid of the police. — *Liverpool Mercury*.

BARREL ORGANS AND ADVERTISING VANS. — The following is a return to an order of the Hon. the House of Commons, dated April 14, 1851, for copy "of the instructions given by the Commissioners of the Police to the police officers relative to the preventing obstructions and other nuisances, caused by the large travelling barrel organs and advertising vans in and about the metropolis: —

(MEMORANDUM.)

"March 21, 1851.

"The police would be justified in stopping music playing in the streets, and, if necessary, removing the parties in cases where, from the loud noise or other circumstances, danger is caused to passengers in the streets, horses frightened, or the thoroughfares obstructed. Let instructions be given accordingly for the guidance of the police."

"Whitehall-place, April 19, 1851.

"To the Superintendents."

"No instructions have been given to the police respecting the advertising vans, there not being any law specially applicable to them. In case of actual obstruction of a thoroughfare by these vans, the police would interfere as in other cases of obstructions, and enforce the law—3 & 3 Vict. c. 47, s. 54 (8)."

"Whitehall-place, April 19, 1851."

## JOINT-STOCK COMPANIES' LAW JOURNAL.

YET another case on the construction of the Consolidation Act, or rather upon the application of it. In *Glover v. The North Staffordshire Railway Company*, 17 Law T. 73, the question was as to the meaning to be given to the words, "injuriously affected," in the sec. 6, which directs compensation to landowners whose lands are "injuriously affected" by the construction of the railway. The test was thus defined by the Court:—"It is quite clear," said Lord CAMPBELL, C.J. "that the plaintiff's property is depreciated in value by the company having done that which would have

been an actionable injury but for the powers given them by their special Act. That is a fair criterion by which to decide this question. There may be such a thing as a loss in consequence of the construction of a railway, without there being claim for compensation, e. g. if that which is done by the railway might have been lawfully done by some persons without the aid of any Act of Parliament." This is by far the most clear and satisfactory definition we have yet seen of the grounds on which the right to compensation may be based, and the most simple and satisfactory test if such a claim can be sustained. We recommend all our readers who are interested in railways to note it in the margin of *Cox's Consolidation Acts*, if they possess it; if not, in their note-books.

Another case affecting the powers of railway companies for the construction of their works, and the remedy against them, is that of *Watkins v. The Great Northern Railway Company*, 17 Law T. 74, in which a company had obstructed a way without first making a new one; and it was held that an action in this case could not be maintained against them for its unless the plaintiff had sustained some special damage by reason of the manner of the obstruction.

## THE LAW OF CALLS.(a)

THE last point for consideration in our division of this subject is the manner in which any one who has incurred the liability to pay calls may be discharged from this obligation. And this may happen in two ways: 1. By his own acts; 2. By the acts of the company.

1. Of the acts which may be performed by a party himself to free him from the liability to pay calls,—the first and most direct mode is by a sale of his shares, and a registration of the new proprietor as the purchaser, according to the terms of 7 & 8 Vict. c. 110. But if at the time of the transfer the seller has not paid all calls on every share held by him, he cannot transfer any share, unless a provision to the contrary be contained in the company's deed of settlement. And though the vendor may have paid calls after having entered into the contract for sale, yet he cannot call upon his vendee to pay them, for in such a case the law does not imply an undertaking by the vendee to indemnify the vendor against subsequent calls. (*Humble v. Langston*, 7 M. and W. 517; Wordsworth's *Law of Railways*, 366.) Before making the contract of sale, therefore, the parties should stipulate expressly upon this point. The liability of a shareholder for calls will cease only on his transferee being registered at the registrar's office, and this registration will not be granted until the transferee has executed the deed of settlement.

While treating on this part of our subject, we may remark that a transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors, pursuant to, but after the passing of, the Act of Parliament, is good, although the transferor be never registered as a proprietor (*Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock*, 7 M. and W. 574). Subject to the stipulations contained in the Act of Parliament or deed of settlement regulating the affairs of the company, the transfer of shares should be made by deed duly stamped. The Brighton Railway Act, 1 Vict. c. 119, s. 155, requires the conveyance of shares to be by writing duly stamped, and to be under the hands and seals of both parties. The clause afterwards calls the instrument a "deed of sale or transfer." It was held, that this conveyance must, in order to satisfy the statute, be by deed; and, therefore, that an instrument of transfer of shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant the defendant's name was inserted as the purchaser, was void. (*Hedderley v. M'Morine*, 6 M. & W. 200; 2 Rail. Cas. 51.) Where the statute directed that a deed of transfer should be kept by the company, and a memorial of it entered in a book, and such entry was made, dated 7th April, it was held, in an action for calls, that this was sufficient evidence to shew when the entry was, in fact, made. (*The Birmingham and Aylesbury Railway Company v. Thompson*, L.J.

(a) By GEORGE HARRIS, Esq. Barrister-at-Law.

1841, Q.B. 124.) Where the Act required a transfer of shares to be by deed, and a transfer of shares was executed by the seller, with a blank for the purchaser's name, and the consideration untrue; but the purchaser afterwards signed and transmitted to the company, in pursuance of the Act, a proxy paper, describing him as the proprietor of the shares: it was held, in an action by the company against him for calls on such shares, that he was precluded from disputing the validity of the transfer. (*Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock*, 7 M. & W. 574.) A railway Act declared, that "all shares in the undertaking should, to all intents and purposes, be deemed personal property, and be transmissible as such, and should not be deemed to be of the nature of real property:" it was held, that such shares might be sold by verbal contract. (*Bradley v. Holdsworth*, 1 Horn. & H. 156.)

The discharge of a proprietor of shares from his liability to pay calls, by a forfeiture of his shares, has already been discussed under a previous division of this subject.

On the marriage of a shareholder who is a *feme sole*, her liability to the payment of calls on her shares devolves upon her husband, who becomes entitled to them, and who is liable to be sued with her in the event of nonpayment of the calls. Where, however, previous to the marriage of a *feme covert*, her estate has been assigned by her to trustees for the purposes of settlement, independent of her intended husband, this assignment, preventing him from obtaining possession of the shares, and being, moreover, necessarily subject to her liability to pay the calls on her shares, the property will remain subject to this charge after her marriage, although the husband as well becomes liable for this debt. (*See Owens v. Dickenson*, 1 Cr. & Ph. 48; *Murray v. Barbe*, 3 Mylne & K. 209; *Lockwood v. Slater*, 5 B. & Ad. 303.) The estate is, indeed, still that of a *feme sole*, and is not affected by the marriage, having been disposed of prior to that event; and it would be manifestly unjust that her husband should become exclusively liable to the incumbrances on an estate which never comes into his possession, and which, perhaps, do not arise until after the marriage. (*Vide Heard v. Stamford*, 3 P. Wms. 409; *S. C.* ca. Temp. Talbot, 173.) The debt, moreover, like that secured by a mortgage, attaches to the estate as much as to the person. But, if neither the wife nor the husband were liable, the company would be left entirely without remedy, while, on the other hand, the husband and wife would be entitled to all the benefits of their proprietorship. Where the shares are transferred into the names of the trustees, and duly registered as their property by the officer of the company, the trustees thereupon become liable in the same way as purchasers of shares to all calls upon them, and should be authorised to discharge these out of the estate vested in them; and in this case the person assigning to them, as also her husband, is effectually relieved from liability to pay the calls.

Whether the infancy of a shareholder be a sufficient plea to an action for the recovery of calls made upon him has been considered until lately a question of some doubt. This point has, however, been set at rest by the case of *The Newry and Enniskillen Railway v. Coombe the Younger*, 18 L. J. 325, Ex. In this case an action having been brought against the defendant for calls according to the form prescribed by the 8 Vict. c. 16, he pleaded that he became possessed of the shares by contract, and not otherwise, and that at the time he purchased the shares of the company, and became an original subscriber to the undertaking, he was an infant; and that afterwards, and during his infancy, he repudiated and disaffirmed the contract, of which he gave the company due notice, and that he then held the shares at their disposal, and thence hitherto had always held the shares at the plaintiff's disposal. Upon demurrer to this plea the Court held the plea to be good, and that it was a sufficient answer to the action.

There can, however, be no doubt that in a case of this nature the company may avail themselves of the remedy by forfeiture of the sale of the shares of the infant defaulter to defray the amount of his call, and the interest and expenses, provided that the infant has done all the requisites to constitute him a shareholder in the undertaking, so as to become registered in the list of shareholders (though his execution of the deed of settlement would be a nullity), as the debt attaches to the estate as well as to the person of the shareholder.

Thus, an infant who rents premises for residence,

or land for the purposes of cultivation, and which are not for his necessary occupation, is liable to be distrained on for the rent; and in some cases an action for debt may be sustained against him for it. (*See Cro. Jas. 320; Kirtan v. Elliott*, 2 Blustr. 69.) In certain cases infants are also liable to incur forfeiture of lands, as by doing anything to the disinherison of the lord, as wilful waste. (*Co. Cop. s. 59, tr. 136; Proc. Ch. 568; 1 Stra. 447.*)

In the case *Ex parte Thomas, re North of England Joint Stock Banking Company*, Joint Stock Coms. Law J. 143, it was decided that the executrix of a deceased shareholder in a banking company, who, since her testator's death, had not received dividends nor complied with the requisitions of the company's deed for obtaining possession of the shares, was held to be a contributory as executrix of her testator in respect of the shares held by him.

We have, lastly, to consider what acts done by a company will discharge its shareholders from the liability to pay calls. These are of two kinds: first, a change in the constitution or objects of the company; second, the dissolution of the company.

1. The change effected must be a material one, and not a mere discretionary deviation from the original plan in an immaterial point. Thus, by the terms of the Brighton Railway Act, the directors were entitled to recover for calls in arrear, upon proving that the defendant was a proprietor, and that notice of the call had been given according to the Act, unless the defendant should prove that he had paid the full amount of his subscription. Defendant pleaded, amongst other things, that the calls were made for purposes other than those warranted by the Act. This plea, however, was refused on the ground that the Act limited the answer to be given to the company's action for a call. (*The London and Brighton Railway Company v. Wilson & Same v. Fairclough*, 6 Bing. N. C. 135; *Ib.* 270; 8 Dowl. 40.) In the same case the defence pleaded was, amongst other things, that there had been a deviation from the original line, and that the money called for was in respect of such deviation. The Court said, the effect of allowing such an answer as this would be, that if there is any deviation to the extent of three yards, with the consent of the person whose land immediately adjoins, and at the risk of the directors and of the company generally, every individual subscriber, from the moment that deviation is made, may stay his hand, and refuse his call, and the whole concern be broken up altogether: and accordingly the plea was disallowed. So also, in the same case, as to the plea that fewer shares had been allotted than were required by the statute, which enacted that "notwithstanding anything in the several subscription deeds or contracts relating to the said several lines, the capital of the company hereby incorporated shall be 1,800,000*l.* divided into 36,000 shares;" it was said that this was not an available plea, for there were, if not in fact, yet in contemplation of law, 36,000 shares. See also *The South Eastern Railway Company v. Hebblewhite*, 12 Ad. & E. 497; and *Davis v. Hawkins*, 3 M. & S. 488. But see also *The Midland Great Western Railway Company v. Gordon*, 16 M. & W. 804; where it was held that the undertaking sanctioned by Act of Parliament, was so different from that pointed out in the subscribers' agreement, as to save the subscribers from being bound by it.

2. The dissolution of a company may happen either by the joint consent of the shareholders, or by the operation of law, as the bankruptcy of the company. A dissolution to be binding upon all the shareholders, must be come to and decided upon, in conformity with the stipulations in that behalf contained in the deed of settlement. The company then becomes *ipso facto* dissolved. By 7 & 8 Vict. c. 111, amended by the Act of 1848, to which we are about to refer, fiat in Bankruptcy may issue against public companies; but, until the affairs of the company in each case are wound up, the respective shareholders continue liable for any call made upon them for the purpose of carrying into effect such winding-up.

By the Joint Stock Companies Winding-up Act of 1848, which has been amended, and still further carried out by 12 & 13 Vict. c. 108, it is enacted, "that it shall be lawful for the Master, from time to time, to make calls on the contributories, or such individual contributories or classes of contributories as he may think proper (but so far only as such contributories respectively shall be liable at law or in equity to pay the same), for raising such amount as may be necessary to pay the debts or liabilities of such company," or the costs of winding it up.

And by sect. 84 the Master is directed to apportion the amount of calls to be made. But, as we have already intimated, this subject is beyond our province to treat of under the present head.

#### WINDING UP.

ONLY one case was reported last week in this new and unsettled branch of the law. In *Walsworth v. Holt*, 17 Law T. 71, it appeared that, prior to the enactment of the Winding-up Acts, a suit had been instituted for the purpose of winding up the affairs of the company, and the bill had been dismissed, as against some of the defendants, with costs. A sum had been paid into court to the credit of the suit. The company was afterwards placed under the Winding-up Acts, and the official manager applied to have this sum paid over to him. But the defendants, against whom the bill had been dismissed, were held to be entitled first to have their costs paid out of it.

The appeals on Winding-up in the House of Lords wait the return of Lord Brougham, who is detained at Cannes by ill health. E. W. C.

**UNIVERSAL GAS-LIGHT COMPANY.**—On Monday, the first meeting was held before his Honour Sir George Rose, to settle the list of contributories brought in by Mr. Harding, the official manager, and his solicitors, Messrs. Prichard and Collett, when all those members of the provisional committee who had signed consents to act, but had not signed the deed or had shares, were struck off. The lists of other classes of contributories were partially settled.

**GREAT NORTH OF ENGLAND AND GLASGOW UNION RAILWAY.**—On Friday the first meeting before his Honour Master Blunt was held for the settlement of the list of contributories brought in by Mr. Harding, the official manager, and Messrs. Sedlow and Torr, his solicitors. Mr. Roxburgh appearing as counsel, and Mr. Baggallay and Mr. Westmacott for several of the executive committee, who were sought to be made liable on the ground that they signed consents to act as members of the provisional committee, agreed to take 100 shares, and paid thereon. Mr. Middleton, of Leeds, formerly solicitor to the company, was examined at considerable length on the case of Mr. W. B. Carrick, whose position was analogous to others, and the Master decided upon placing him on the list, on the ground that the case was identical with that of Bealey, decided by the Court above.

**GENERAL COMMISSION SHIP LOAN INSURANCE COMPANY.**—On Wednesday, after further settling the list of contributories, his Honour Sir William Horne declared a call of 5*l.* per share, to equate the outstanding liabilities of this company.

**DIRECT BIRMINGHAM, OXFORD, AND READING RAILWAY.**—On Tuesday, after some discussion, and on the requisition of Mr. Hutton, the official manager, his Honour Master Brougham made a call of 12*s.* 6*d.* to meet the costs incurred in connection with the proceedings in winding up. The other call of 2*l.* per share, to discharge the outstanding liabilities, is under appeal.

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made during the past week.]  
*Banwen Iron Company.*—Call of 2*l.* per share on all the contributories, on May 20, at 11.—*Kindersley.*  
*Independent Assurance Company.*—Call of 2*l.* per share, on June 7 next, on all the contributories in Classes 1 and 2.—*Tinney.*  
*London and Birmingham Extension, and Northampton, Decontry, Leamington, and Warwick Railway Company.*—Call, on May 30, of 2*l.* 4*s.* per share on all the contributories, who have not paid up that sum.—*Blunt.*  
*Wolverhampton, Bridgnorth, and Ludlow Railway Company.*—Petition to wind up presented by John Baker, on May 14.  
*Worcester Corn Exchange Company.*—Ordered to be wound up, on May 10.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

It seems that, to create an equitable mortgage by deposit of title deeds, something more is necessary than a mere deposit; or rather, the mere possession of the title-deeds of a debtor by his creditor, is not a sufficient presumption of such a mortgage. (*Chapman v. Chapman*, 17 Law T. 70.)

An interesting case to conveyancers, on the effect of *interlineations* in a deed, is that of *Doe dem. Tatham v. Cattamore*, 17 Law T. 74. It was there decided that an erasure or interlineation appearing on the face of a deed is to be presumed, unless the contrary is shown, to have been made at the time of the execution; but that the judge might leave it to the jury to say whether it was made before execu-

tion, even in the absence of all other evidence than the deed itself. Equally interesting is *James v. Whitbread*, 17 Law T. 78, where, in an assignment, the grantee was called James James, his right name being James James; but the place of abode and occupation were rightly stated. He executed the deed by his right name. It was held not to be void for uncertainty, his identity being established.

The limits of the right of property in *Running Streams* were very minutely and learnedly examined by the Court of Ex. in *Embrey v. Owen*, 17 Law T. 79, every word of which judgment we commend to the attentive perusal of all who are studying real property law. The sum of the decision is well stated in the judgment, "The proprietor of the adjacent land has the right to the usufruct of the stream which flows through it. This right is not an absolute and exclusive right to the flow of all the water in its natural state, but is the right only to the flow of the water and the enjoyment of it, subject to the similar right of all the proprietors of the banks on each side, with a reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie. . . . It is entirely a question of degree, and it is very difficult, and, indeed, impossible, to define the precise limits, and separate the permitted and reasonable use of the stream from all wrongful application of it. . . . In this case, we think that as this irrigation took place not continuously, but only at intermediate periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. . . . The same law will be found to be applicable to the corresponding rights of air and light. So long as the reasonable use by one man of this common property does not do actual perceptible damage to the right of another to the similar use of it, no action would lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without in some degree impairing the natural purity of the air. He cannot erect a building, or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys. But such small interruptions give no right of action, for they are necessarily incident to the common enjoyment of it."

It would scarcely seem to be now as debatable a point as the import of the word "estate" in a will. It was it again disputed and decided in *Pottow v. Tricker*, 17 Law T. 81, where the phrase "I give hereafter my estate that I now live in, to my son," was held to pass the fee. "The expression 'estate,'" said PELLICK, C.B. "would carry the state of the testator as he possessed it, unless something further appeared to alter the ordinary meaning." "The modern decisions," said PARKER, B. establish the rule that the word 'estate' means a whole of the interest, unless the context of the instrument shows a contrary intention."

Another point in the *Law of Distress* was raised in *Ridgway v. Lord Stafford*, 17 Law T. 80, and was decided that, where produce is distrained on the farm of a person bound by his lease to vend the produce upon the farm, it ought not to be sold with reference to that covenant, that is to say, with such a condition attached to it, but for the best price, irrespective of any such covenant. A covenant to vend the produce upon the land a covenant that cannot run with a chattel, and it quite plain that the tenant himself would have the power to sell, and selling without such a condition, he would be merely liable to his landlord for breach of covenant; and if he might clearly so sell, the person who seizes the property might sell in the same way, for the best price."

#### BENEFIT BUILDING AND MUTUAL INVESTMENT SOCIETIES.

OTHER doubt has been suggested as to the effect of the 13 & 14 Vict. c. 115, upon the Building Societies Act. (See the letters of "G. H. R." Law T. 112, 230.) The 13 & 14 Vict. c. 115, an Act to Consolidate and Amend the Laws relating to Friendly Societies," repeals, among others, the 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40, "except so far as the same may be applicable any benefit building society established under the 7 Wm. 4, c. 32." The doubt suggested was, that by the 13 & 14 Vict. c. 115, s. 1, building societies established after the passing of that Act, should be deprived of the benefits given by the 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40. The

answers given to these letters by "G. R." and Mr. TOWNLEY, 16 Law T. 159, 248, are quite satisfactory and correct. It will be seen at once that the test given in *Walker v. Giles* decides the question, because if the 13 & 14 Vict. c. 115, s. 1, repeals the 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40, as far as they relate to Building Societies, they could not be incorporated in the 6 & 7 Wm. 4, c. 32, as if they had been therein expressly re-enacted. This shows that the introduction of the saving clause in the 13 & 14 Vict. c. 115, s. 1, was superfluous and unnecessary, and there is no rule of construction or authority for construing such a clause into a partial repeal of the 6 & 7 Wm. 4, c. 32, as to Building Societies established since the passing of the 13 & 14 Vict. c. 115.

*Reg v. Cotton*, 15 Law T. 276; 19 L. J. 238, M.C. is an important case as to the alteration of the rules. It was the case of a friendly society, established under the 33 Geo. 3, c. 54, whose rules were enrolled in 1818, and subsequently additional rules were made altering the original rules, and acted upon for a long time, but they were not formally made by three-fourths of the members present at a general meeting convened by notice under the 33 Geo. 3, c. 54, s. 3. Two points were made; first, that the new rules not being made in the mode prescribed by the statute, the application before the Court under the Friendly Societies' Act could not be entertained; and, secondly, that the original rules having ceased to be acted upon, no longer existed, and that the society therefore ceased to exist as an enrolled friendly society. For the purpose of applying the decision in this case to building societies, there is no substantial difference between the 33 Geo. 3, c. 54, s. 3, and the 10 Geo. 4, c. 56, s. 9, which regulates the mode of altering the rules of building societies. The Court decided that the new rules were not properly made and confirmed, and therefore that the original ones had not been repealed.

The case of *Lomas v. Bradshaw*, 15 Law T. 113, 19 L. J. 273, C.P. may be very usefully noted up. Some building societies are in the habit of taking bills of exchange and promissory notes as collateral securities, and it then becomes material to consider how far the facts of the payee and the makers being members of the society or copartnership, and the proceeds of the bills and notes being for the benefit of the common fund, operate to prevent the payees from suing the makers. In *Lomas v. Bradshaw*, it was decided that these facts were no defence: there the plaintiff and defendant were both members of a mutual loan society, and the defendant gave a promissory note to the plaintiff, as the treasurer and trustee of the society, for securing the repayment of an advance out of the funds, and the plea contained an averment that the plaintiff "now sues the defendant upon the said note, on behalf of and for the use and benefit of himself the plaintiff, and of him the defendant, and the other members and copartners." The analogy between a building society and a mutual loan society will hold good, so far as the decision in *Lomas v. Bradshaw* is concerned.

The case of *Doe dem. Morrison v. Glover*, 15 Law T. 111, was an ejectment in the Court of Q. B. upon the same deed as the action of covenant was brought upon in the Court of Ex. (*Morrison v. Glover*, 14 Law T. 404; 19 L.J. 20, Ex.) The Court of Q. B. affirmed the decision of the Court of Ex. that the arbitration clause (10 Geo. 4, c. 56, s. 27) does not apply to disputes between the society and a member, arising out of his character as mortgagor. It was also resolved that the transaction could not be impeached on the ground of its being usurious; and, further, that the member, having neglected to pay rent to the ground landlord, was liable to an action of ejectment by the trustees, notwithstanding a rule of the society providing that disputes between the society and any member of it should be referred to arbitration; and that the consent of the directors need not be proved, although one of the rules provided "that in the event of the committee of directors deeming it requisite to bring any action or suit, or commence any legal proceedings on behalf of the association, respecting the property or claims, or any other matter concerning the interests of the association, the same should be brought by and in the names of the trustees or trustees; and that he or they should be borne harmless and indemnified by the association from any loss or damage which he or they might sustain in reference thereto; but that no such action, suit, or proceeding should be commenced by him or them, without the sanction and consent of a majority of the directors present at a

meeting to be duly summoned to consider and determine as to the propriety of commencing and prosecuting such action, suit, or proceeding."

Some observations were introduced in my Treatise, p. 113, *et seq.* upon the decision of the Court of Ex. in *Morrison v. Glover*, as to the arbitration clause, which will, of course, apply to the case in the Q. B. so far as that is a confirmation of the decision. The report of *Doe dem. Morrison v. Glover* does not show that any additional argument was used, or any other ground alleged for upholding the decision than what was given by the Court of Ex. With regard to the proof of the consent of the directors to the action being brought, it may be, that it is not incumbent on the plaintiff to prove such consent to have been given, and that such consent ought to be presumed until the contrary is proved; but the Court of Q. B. seem to have decided on a different ground, viz.—that the particular rule did not apply to an ejectment. Lord CAMPBELL, C.J. said—"It seems to me that the rule of the society does not apply to cases like this, in which the plaintiffs are proceeding upon a legal right, conferred upon them by a deed; and that the same answer is to be given to this objection as was given by the Court of Ex. in *Morrison v. Glover*, to the objection founded upon the arbitration clause in these rules." PARKER, J. said—"As to the consent of the directors, I am clearly of opinion that no defendant can take advantage of that objection in a case of this sort, the stipulation being found in a clause relating to the indemnity of the trustees." These reasons are not very cogent or satisfactory ones. The above rule is framed for the protection of the society, in order that before the society, or any member thereof, is involved in litigation, the merits of the dispute and the consequences, may be fairly considered. The defendant, Glover, in the above actions is a good illustration of the advantages of the rule; he is first sued for damages for the breach of the covenant, and he is afterwards ejected for a breach of the same covenant. It is obvious he might have been ejected at once without the first suit for damages. If a member is a troublesome and constant defaulter, the best mode is to eject him at once; but if the default is merely the result of temporary causes, the society ought not to proceed to enforce the legal rights, conferred by the mortgage-deed; besides, there may be other circumstances which would influence the society as to its mode of dealing with the member. The reasons given by Lord CAMPBELL and PARKER, J. do not, therefore, seem satisfactory for saying that the rule in question is not applicable to the case of *Doe dem. Morrison v. Glover*. Whether the burden of proving that such consent to bring the action has been given, is or is not incumbent upon the trustees, is another question. Subsequently to this case, the same society has brought another ejectment against another mortgagor (*Doe dem. Morrison v. Wadsworth*, MSS.), which was tried in the Court of C.P. Jan. 24, 1851, when the same objections were raised as in *Doe dem. Morrison v. Glover*, and overruled, whereupon the defendant tendered a bill of exceptions. The only difference in the facts proved was, that it was shown that the defendant Wadsworth obtained the advance in the usual way: in fact, it was treated throughout the trial as an ordinary advance of the society. This, it is presumed, shows that it was not an advance of surplus funds under the 10 Geo. 4, c. 56, s. 21. And it was further proved that the advance was not made to enable Wadsworth to erect or purchase a dwelling-house or other property, but upon the mortgage of property already leased to him by the Brewers' Company.

The case of *Trott v. Hughes*, 16 Law T. 260, is an important case upon the subject of arbitration. Some members of a society who had given notices of withdrawal, anticipating that the directors were going to advance the funds upon a sale of shares, instead of paying them off, filed a bill for an injunction. It appeared that there was some difference of opinion between the plaintiffs and the directors as to the funds out of which the plaintiffs were to be repaid according to the rules. Lord CRANWORTH, V.C. refused the injunction on the ground that the matter ought to have been referred to arbitration according to the statute.

The case of *Seagrave v. Pope*, 14 Law T. 524; 14 Jur. 342, was as to the terms upon which a member might redeem his mortgage security. It has been considered difficult to reconcile this decision with that of Wigram, V.C. in *Mosley v. Baker*, 6 Hare, 94, afterwards confirmed on appeal by

the Lord Chancellor, 1 Hall & Twells, 305. Both were cases of bills filed to redeem (the mortgage-deeds being similar in all respects material to the decisions in the two cases), and the contention was as to the mode in which the account was to be taken. It appears that in *Mosley v. Baker* the mortgagor had made default in his payments, and the trustees had exercised the power of sale as to part of the property mortgaged, and then the plaintiff had made a tender of 690*l.* to redeem; that being the sum he calculated to remain due upon the mortgage; but in *Seagrave v. Pope* the mortgagor had not made any such default, but had given notice under the rules of the society that he intended to redeem. The mortgage-deeds in both cases were silent as to the terms of redemption; but the rules of the societies upon that point were very similar. The following was substantially the rule in both societies:—

"That if any member shall be desirous of paying off and redeeming any security or securities which he or she shall have given to this association, and shall give notice of such his or her desire to the manager, the directors shall allow such member the profits of his share or shares, made up to such time, (a) and shall make a deduction of such profits, and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorised and empowered to receive the balance, either in one payment, or by such instalments as the directors and the member shall agree upon; and on payment of the balance, together with all fines due in respect of such share or shares, the directors shall authorise the trustees to deliver the deeds and other documents in their custody relating to the mortgage so redeemed, to the member, and at his or her cost indorse a receipt or acknowledgment of payment on such mortgage, according to the 6 & 7 Wm. 4, c. 32."

In *Mosley v. Baker*, it was said that the plaintiff was not entitled to redeem on terms less beneficial to the association than those stipulated for in the powers reserved to themselves for selling, and those being in case of a sale, that all moneys which should at any time afterwards become due in respect of the shares, should be considered as due at the time of such sale, it was held that the mortgagor was only entitled to redeem upon payment of all future monthly subscriptions and redemption moneys. But in *Seagrave v. Pope*, Knight Bruce, V. C. held, that the plaintiff was entitled to redeem on payment of the balance of the 544*l.* with interest at the rate of 4 per cent. he having credit given him for the monthly payments of 8*s.* 6*d.* so far as they had been paid by him to the time of notice to redeem, but not for the monthly payments of 3*s.* 6*d.* redemption-money, and being debited with the 3*s.* 6*d.* monthly for redemption, so far as it had not been paid by him to the time of notice. In *Mosley v. Baker* the decision proceeded on the ground of the deed being the contract between the parties, and that the terms of redemption were to be collected from it; in *Seagrave v. Pope*, on the ground that the terms of redemption were to be collected both from the rules and the deed. In *Mosley v. Baker* it was said, that if the deed was inconsistent with the rules, the deed alone, in a suit to redeem, was to be looked at, as the plaintiff rested his case upon the deed, not seeking to have it altered but confirmed; in *Seagrave v. Pope* it was said that the deed was not intended to prohibit or preclude, and did not prohibit or preclude the right to give notice to redeem under the rules, and that the deed did not control the rules, so as to require the account to be taken in a less advantageous way than the rules provided. In *Mosley v. Baker* it was further said, that there was no departure in the deed from the rules; in *Seagrave v. Pope*, that the language of the deed, at least in the actual circumstances of the case, did not render it necessary to consider whether the account should be taken in a manner more prejudicial or less advantageous to the plaintiff than provided for by the rules. In *Mosley v. Baker* it was said that the rule to redeem was conclusive, for that it provided, that upon redemption the shareholder should have the amount of his share of the profits, and the subscriptions paid deducted from the full amount expressed to be secured in and by such mortgage; and that the rules directed security for the future payments in respect of the shares, not the money advanced; and that this mode of accounting was not inconsistent with that to be collected from the

(a) In *Seagrave v. Pope* the words of the rule were—"The directors shall, within one month thereafter, award to such member the same proportion of profit per share as is allowed on the withdrawal of unpurchased shares," &c.

deed. In *Seagrave v. Pope*, although the mode of accounting in the deed was similar to that in the deed in *Mosley v. Baker* in all material respects, it was also expressly declared in the deed that the deed should not be a security for a greater sum than 544*l.* while there was no such declaration in the deed in *Mosley v. Baker*, as far as can be collected from the statement of it in the different reports. Therefore, although the deed in *Seagrave v. Pope* was a security for the future payments in respect of the shares, yet the deed itself expressly limited the security to the extent of 544*l.* and Knight Bruce, V. C. decreed that the plaintiff was entitled to redeem on payment of the balance of the 544*l.* in the manner already stated. Therefore in the result it seems that there is not that difference in the two decisions that was supposed to exist. In both, the trustees were held entitled to have the full amount secured by the deed paid to them; but in *Mosley v. Baker*, the security was for the full unlimited amount of the future payments on the shares, whereas in *Seagrave v. Pope*, the security was only for the sum of 544*l.* and in ascertaining how much of that sum remained due, the plaintiff was properly allowed credit for his past monthly subscription payments.

It has been said (*vide* Stone, 152, 153) "that these two cases appear to decide two different principles; first, that after default the redemption of the property must be on the express provisions of the mortgage-deed, which will be construed as between mortgagor and mortgagee, unless the rules are inconsistent with the deed. Secondly, that if notice to redeem be given before default, in pursuance of the rule giving power to redeem, the account will be directed to be taken in the mode prescribed by the rule, unless the deed should contain a prohibitory clause. It is apprehended that this is not so. In *Mosley v. Baker*, which was the case of a default, nothing whatever was said about the default; it was decided as if there had not been any default. Besides, the deed gave a power of sale, and nothing more upon default, and there was no provision in the deed stipulating for any mode of accounting on redemption after default. In *Seagrave v. Pope*, where notice to redeem was given before default, there is nothing to show that the decision turned upon that fact. Besides, the marginal note in the reports shews that the decree was made both on the terms of the deed and the rules of the society, and not on the rules alone; and, indeed, the particular rules in question, by the words "and on the payment of the balance, together with all fines, and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds," &c. shew that the redemption rule was applicable to a notice after default in the payments, else no fines would be incurred.

*Lee, App. Hutchinson, Resp.* 20 L. J. 4, C. P.; 16 L. J. 276, is an important case, as regards freehold land societies, and the qualification of county voters. It was there held, that a mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered, unless he receives therefrom 40*s.* per annum, after deducting the interest really paid on the sum secured by the mortgage although no interest was reserved by the mortgage-deed. J. T.

#### TO THE EDITOR OF THE LAW TIMES.

May 8, 1851.

SIR,—I see that in many counties the attorneys are so far on the alert respecting the measure of registration of assurances, as to have petitioned against it themselves. But would it not be a more effectual method of opposition to follow the Yorkshire example, and invite the attention of the landowners in general to the damage they are likely to sustain if the Bill should pass? Petitions from them would command more attention in Parliament than those of the Profession, it being easy for the advocates of the measure to represent professional opposition as interested and dishonest.

Perhaps you will kindly keep us informed from week to week as to the proceedings of the Lords' Committee to which the Bill stands referred, the witnesses examined, and the opinions expressed.

I am, Sir, yours truly,  
W. F. P.

It may be well to state, for the information of parties interested in the renewal of the commission for the sale of Irish incumbered estates, and in the proposed legislation with respect to the advance of loans on the security of landed property in Ireland, that the Master of the Rolls only waits a favourable opportunity for applying for leave to introduce two distinct Bills on those subjects. It was originally intended to embody both objects in one Bill, but upon

a more mature consideration of the distinctions which exist between the two cases, separate legislation for each has been decided upon as more advisable.—*Globe*.

## THE MERCANTILE LAWYER.

### Summary.

*Boden v. French*, 17 Law T. 77, was a question as to the authority given by a principal to his agent. It ran thus: "Please sell for me 250 tons of coal, at such a price as will realise me not less than 15*s.* per ton, net cash, less your commission for sale. Was this a condition not to sell otherwise than for ready money? It was held not to be so.

*Lock v. Baker*, 17 Law T. 81, is important to the masters of apprentices. It was there held, that the treating of bad women with oysters in the master's shop; leaving the shop and remaining out all night; saying he had slept at home, when in fact he had been out, were not sufficient acts of misconduct to dissolve the contract of apprenticeship.

In *Montoya v. The London Assurance Company*, 17 Law T. 82, was considered one of those very nice questions which must be continually arising, as to the remoteness of damage by the peril insured against. In this case a cargo of hides and tobacco was insured against perils by sea, in the usual form. During the voyage, the hides were damaged by the seawater, and the effluvium from them damaged the tobacco. Was this latter damage the result of the perils of sea insured against? It was contended to have been only a remote consequence. But the Court held otherwise, and that the underwriters were clearly liable for the loss of the tobacco as well as of the hides.

## COUNTY COURTS.

### Summary.

THE case of *Cross v. Seamen*, 17 Law T. 77, although coming from the City of London Small Debts Court, is equally applicable to the County Courts, the provisions of the two statutes being alike in this respect. The plaintiff, in an action, claimed more than 20*l.* The defendant pleaded a tender as to part, with payment into court, and never indebted as to the residue, which was less than 20*l.* The plaintiff took the sum so paid out of court, and went to trial for the residue, and recovered part of it, and this, with the sum taken out, exceeded 20*l.* The question now was whether, under such circumstances, the plaintiff did or did not recover more than 20*l.* within the meaning of the Small Debts Act, so as to enable the defendant to enter a suggestion to deprive him of costs. It was held that, inasmuch as the action was well brought originally for a sum exceeding 20*l.* the defendant was not entitled to enter a suggestion. The principle is equally applicable to debts above 50*l.*

## SOLICITORS' FEES IN THE COUNTY COURTS.

### TO THE EDITOR OF THE LAW TIMES.

SIR,—I obtained a verdict in the Westminster County Court this morning for a plaintiff, and on my applying for the fee allowed me by the Act (only 15*s.*), I was informed that it could not be allowed, as I had given no notice to the clerk of the Court previously that I intended to appear for the plaintiff. I stated that I had taken out the plaint, that I had mentioned the fact of my being the plaintiff's attorney when I did so, that I had conducted the whole case, and that my name was in the Law List; but all this had no effect, as the rule, I was also informed, had been made for the benefit and protection of the Profession, but in what way I am really at a loss to understand.

This absurd and arbitrary rule does not exist in any other court in which I have been engaged, as I have always been able to obtain my fee at the hearing, on application to the Judge for it.

In conclusion, I would add that this "rule" is only affixed in the room where the plaintiff and defendants are called previously to entering the



court, and where, from the peculiar construction of the Westminster County Court, parties do not think of going until the day upon which their summonses are appointed to be heard.

I enclose my card.  
Ironmonger-lane, City, I am, Sir, yours, &c.  
14th May, 1851. C. I. W.

### AGENCY BUSINESS IN THE COUNTY COURTS.

TO THE EDITOR OF THE LAW TIMES.

Sir,—I shall feel obliged if you or any of your readers will inform me what the practice is in the profession respecting the employment by one solicitor of another, as his agent in the County Court; whether the agent ought to charge full fees for all business done in relation to an action in the County Court, both in and out of Court, or whether it is usual to make the same allowances as in actions at common law, &c. between principal and agent, particularly in a case where the principal himself (an attorney), is the plaintiff in the cause. I think it is important to the Profession generally to be well informed as to the usual practice of County Court attorneys in such cases, as there appears to be no rule governing the charges of these gentlemen for business done "out of court," or what may be termed "extra costs," and they may be made out according to the views or convenience of the County Court agent, if the bill is not a taxable one, which I very much doubt.

I am Sir, yours, &c.  
May 14, 1851. A LONDON SOLICITOR.

### THE LAWYER.

**EQUITY PRACTICE.**—It appears from *Reeves v. Baker*, 17 Law T. 70, that an executor cannot compel a plaintiff to revive a suit, but the plaintiff may lie by and do so at his option. The Master of the Rolls well observed that this was "a great hardship," but he was bound to adhere to the practice. Wherefore, if it be a bad practice? The law he must bow to, however bad, but the practice is the creature of the Court, and the power that made can alter it.

Another decision on the *Trustee Act* is to be noted. In *Re Smyth* it was held, that an order under the 35th section of that Act amounts only to a declaration by the Court that the new trustees were the proper persons to have the stock transferred to them, and therefore, that the new trustees cannot, under sec. 26, require the Bank of England to transfer to them stock standing in the names of the old trustees.

**COMMON LAW.**—In *Pulley v. Richardson*, 17 Law T. 74, a plea in abatement entitled of a different date from that in which it was pleaded was set aside as irregular. In *Dunkley v. Paris*, 17 Law T. 75, a forged writ of summons had been served, and the Court granted a rule calling on the attorney from whose office it issued to shew cause why it should not be set aside, and the costs paid by him.

Where A. and B. had entered the premises of C. and A. seized moneys of D. and paid the same into the bank to their joint account, it was held that D. must waive the tort, and bring an action against A. & B. jointly for money had and received. (*Nest v. Harding*, 17 Law T. 80.)

**THE CONFIDENTIAL ADVISER.**—The position of those leading solicitors who have the affairs of great personages in their management is really very curious. They stand in the place which is, or rather which was, occupied by Father Confessors in Roman Catholic countries, and scarcely any important family step can be taken without their advice and assistance. With respect to property—it is in most, if not in all great families, the subject of formal arrangement by legal deeds or settlements expressed in language which no one thoroughly comprehends, and which men of the legal profession alone affect to understand. The persons chiefly interested in those arrangements know the general results of them, or what were intended to be the general results; but the instruments on which these results depend are not intelligible to them; and if they wish to make any new dispositions of their properties, they cannot stir a single step without the solicitor to guide them. Now, when people have property, almost every important act on their own part, or that of any of their family, is concerned either with getting or giving money, or money's worth, and the solicitor necessarily becomes a confidential agent in family arrangements. If a son has been extravagant, or a daughter is going to be married, the worthy head of the house knows not what to do till he has stated the case to his solicitor. And these are among the simplest matters in which his advice is re-

quired. Perhaps in no walk of life in England are there to be found men of such exquisite discretion as these professional advisers of great families. Their legal knowledge constitutes the least part of their value. They have the nicest appreciation of the prudent, the becoming, and the practicable; and their legal lore is in many cases only made use of in giving due form and validity to arrangements which are based on circumstances and considerations that at first sight seem to be wholly out of the province of the lawyer. Having become confidential advisers in questions where property is concerned, they are often called upon in respect to disagreements, doubts, suspicions, and other domestic troubles, where a calm, impartial judgment is required, and perfect secrecy may be depended upon. Some of them might tell very strange histories of confidences no less strange, for your solicitor is the only man who is enabled by his professional conscience so to identify himself with his "principal," that he will make nothing known that is confided to him professionally, no matter what interests beyond those of his client may be concerned. If some man or woman—it may be of rank or wealth—having committed some great offence, goes to confess to the parson of the parish, the reverend gentleman may probably deem it his bounden duty to call in the police, or to inform the injured party, as the case may be. Not so the solicitor. He advises, soothes, and lays down the doctrine of discretion, which he considers applicable to the circumstances. Solicitors are the priests of the *Nemus Prudentia*, and thereby many of them become very important and very rich. As regards morality, the same inconvenience or evil belongs to the system in which they are the prime movers, as does to the system of acting by trustees, or any other representation of the interests of an individual by persons who are not representatives of his conscience. I am far from saying that respectable solicitors take no account of what a man is in honour and conscience bound to do, as well as in law and in prudence. They generally consider what is becoming to a man in the station which he occupies and in the circumstances with which he has to deal. Following that rule, they cannot set aside the obligations of honour and conscience. But passions, and affections, and generous emotions are the natural auxiliaries of conscientiousness, especially when it is to be exercised among persons connected by blood or affinity, and these the solicitor keeps at a distance. He may give a cold opinion as to what might be considered generous, but his business is to advise what is prudent, and to keep his clients on their guard against emotion. And this is another reason why so much is committed to confidential solicitors, for great or rich personages are glad of an escape from the disturbance of what they call "a scene," meaning thereby any occurrence in which the passions and feelings are strongly moved; and they take refuge from such agitation under the cold shade of professional advice. It is, moreover, but too true that while the eminent professional adviser will generally, if left to himself, either do, or recommend to be done, that which is reasonable and becoming under the circumstances, yet he is not so independent but that he will yield himself in some degree to be the instrument of his employer's anger, or enmity, or prejudice, if the employer be rich, and insist upon that course being taken. Whatever he does will, of course, be done in a respectable manner, and with due regard to professional rules; but many things which are harsh and domineering, and even unjust, may be done in this way; and the proud and unfeeling man of wealth will not find much difficulty in obtaining even the most eminent aid to carry out his views, if he be willing—as he generally is—that a decorous and formal manner shall pervade the proceedings, however severe in their substance and cruel in their intention. Whether in such cases the professional adviser charges anything more in his bill for the pain his mind may have undergone in giving vigour to insensibility, or activity to malevolence, my researches have not been able to discover.—*Johnston's England as it is.*

### LEGAL INTELLIGENCE.

#### THE MASTER OF THE ROLLS AND GRAY'S INN.

FRIDAY last being Grand day of Easter Term, the barristers of Gray's Inn took the opportunity of presenting a congratulatory address to Sir John Romilly, the recently appointed Master of the Rolls. At a few minutes before 6 o'clock Sir John Romilly entered the hall, accompanied by the other benchers, and having taken his position on the dais, was addressed as follows by Mr. W. Rogers, of the Chancery bar:—

"Sir,—I am deputed by my brother barristers of this society to present you an address, which, I trust, we all must feel has been ably penned by a gentleman who on every occasion in which he can do it asserts the interest or consults the pleasure of this society, and is never wanting in zeal or activity. Sir, it would not become me to forestall the ob-

servations of others; but I cannot deny myself the pleasure and honour of saying that I look proudly forward to this auspicious occasion as a presage for the good of our ancient and honourable society, standing pre-eminent as it does for friendly intercourse, which is carried, I believe, to a greater extent in this society than in any other. Sir, I beg, in the name of my brother barristers here assembled, to hope that long, long may you be spared to enjoy a career of the highest honour and usefulness, and on the bench and in the Senate long, long, may you be spared to us, *et præsidium et dulce decus.*"

Mr. Henry Griffith, who had penned the address, was then called upon to read it. It was in the following terms:—

TO THE RIGHT HON. SIR J. ROMILLY, M.P. MASTER OF THE ROLLS, ONE OF THE BENCHERS OF GRAY'S INN.

Sir,—We, the barristers of Gray's Inn, beg to offer you our most sincere congratulations upon your recent promotion to the high office of Master of the Rolls.

We hail with a double pleasure this auspicious opportunity of paying to you this tribute of respect when we reflect upon the great name which you so worthily bear—a name which is known, not only in England, but throughout the world, as identified with the loftiest patriotism and the purest philanthropy.

We esteem it a peculiar satisfaction that we are members of the same inn of court of which you are, and your illustrious father was, so great an ornament, and to which fresh lustre has been added by the distinguished judicial rank you have attained, after having enjoyed the proud distinction of filling successively the high offices of Solicitor and Attorney General to her Majesty.

We also beg to express to you our great gratification that your appointment will not deprive us of the happiness of frequently meeting you in this our ancient hall, where on all occasions you have observed that urbanity towards its members which has won for you their deep admiration and regard.

In conclusion, we hope that you may long be spared to administer your responsible duties, and we intreat you to accept our warmest wishes for your health and happiness.

After which the Master of the Rolls replied as follows:—Gentlemen,—At any time and upon any occasion such an address as this would give me very high gratification, but that value is augmented to the greatest possible extent when I consider that it is presented to me by such a body of gentlemen as those whom I see around me on the present occasion, when I recollect that we are all bound together by one common tie by being members of this society, and that it is presented to me in its ancient and venerable hall. Gentlemen, when I first entered this hall as a student, out of the twelve judges who then presided in Westminster-hall, five had been elevated to the bench, selected from among our members; and they were wont to attend on such occasions as the present to testify their respect and esteem for the society in which they had received their education. Although since that time we have somewhat declined in these honours, yet this society has always maintained a high reputation for the deep and accurate legal knowledge of its members, owing, probably, in no slight degree, to the peculiar attention paid here to the study of the law of real property. Gentlemen, it is to me a matter of the very deepest and warmest satisfaction that I have, in your opinion, striven not unsuccessfully to walk in the steps of my father, and that, by doing so, I have added some lustre to this our ancient society. I anticipate many future occasions on which we may renew these opportunities of social intercourse; but while I do so I look forward, also, with confidence, with joy, and with pride, upon the prospects of many gentlemen who surround me, who are pursuing here the various walks and paths of our noble profession, and who will doubtless achieve distinction for themselves, and add fresh lustre to the society. And I may say, gentlemen, that so far as depends on myself—and I hope that I may not too fondly look forward to such an event—whether I am living to see it or not, I may not be the last of my name to be enrolled among the members, and possess the esteem and approbation of this society. Once more, gentlemen, I beg to thank you most sincerely, and in the most heartfelt manner, for the kind and touching proof you have given me of your approbation.

**THE LATE LORD COTTENHAM.**—It is expected that the mortal remains of the late lamented Earl of Cottenham will arrive in London on Tuesday or Wednesday next, when they will be taken to his late residence, in Park-lane, thence to be removed to Tottenham for interment, according to the directions of his will.

**LORD MAYOR'S DINNER TO THE JUDGES.**—The annual dinner by the Lord Mayor to the judges of the Superior Courts, at the Mansion-house on Thursday, was fully attended. Lord Campbell, the Chief Justice of England, was spokesman in reply to the toast of the evening. From ancient times there had been a high court of criminal jurisdiction in the city over which the Lord Mayor presided, and when that court met, the judges had much pleasure in mixing with the magistrates of the City. They went together, on solemn occasions, to the cathedral of St. Paul's, to offer up their prayers to the Almighty. Again, at the festive board they had the pleasure of being invited to the Mansion-house and

the Guildhall, to partake of the elegant hospitality of the City. In former times that hospitality used to be reciprocated by the serjeants, but he was sorry that of late years that custom had fallen into disuse. He rejoiced in the prospect which existed that the ancient festivities were to be revived; for he had read in the newspapers—and therefore it must be true—that the Society of the Middle Temple were about to give a grand dinner and ball to the illustrious foreigners assembled on our shores, to the Lord Mayor and Aldermen of the City of London, and to the magistrates. Barristers would once more dance round the bonfire, and the grave Lord Keeper would again open the ball. The seals and the mace of office dancing along with him. Thus would the festivities of Queen Bess be revived in the reign of Queen Victoria. The toast of "Lord Cranworth and the House of Peers," gave Lord Cranworth the opportunity of twitting the Lord Chief Justice with his own concern in the disuse of festivities by the serjeants, of whom the Chief Justice himself is the head.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Right Hon. Sir John Jervis, has appointed George Lewis Phipps Eyre, of John-street, Bedford-row, gent. in the county of Middlesex, to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the city of London; also in and for the city and liberties of Westminster; and also in and for the counties of Middlesex, Essex, Kent, and Surrey.

It is understood that Mr. Duncan M'Neill is to be the new Scotch judge, in the room of Lord Mackenzie.

MIDDLE TEMPLE.—A further call to the bar of students of the Honourable Society of the Middle Temple was made on Saturday evening last, and comprises the after-mentioned gentlemen:—John Raymond, Esq., Thomas Geary, Esq., Joseph Ship-ton, Esq., and Joseph Kerr, Esq.

## COURT PAPERS.

### Judicial Committee of the Privy Council.

Will sit for the despatch of business on the following days:—Wednesday, May 14; Thursday, May 15 (Claridge's Patent); Friday, May 16 (Admiralty cases); Monday, May 19.—At ten.

#### LIST OF CAUSES.

Haxner, appellant; Bell and Others, respondents.  
Rawat Urjun Sing, appellant; Rawat Ghuniam Sing, respondent.  
Wallace, appellant; Fielding, respondent.  
Attorney-General of New Zealand, appellant; Clarke, respondent.  
Musadee Mahomed Casim, appellant; Meerza Ally Mahomed Shoosty, respondent.  
Kaspeche, appellant; Smith, respondent.  
Lynn, appellant; Brencley, respondent.  
Lomi, appellant; Ashwell, respondent.  
Bennett, appellant; Tree, respondent.  
Pollok, appellant; M'Alpine, respondent.  
The Colonial Bank, appellant; Cazabon, respondent.  
Caffero, appellant; Frosdick, respondent.  
Wilkinson, appellant; Wilson, respondent.  
Nawab Aminood Dowlah, appellant; Synd Roahun Ali Khan, respondent.

### Court of Queen's Bench.

#### COUNTY COURT APPEALS.

To be taken on Wednesday, May 14:—George Hall v. Woodhouse and Others, from the County Court of Warwick; J. and J. H. Linklater v. Bowers, from the County Court of Norfolk; Gray v. Watson, from the County Court of Lincoln.

#### Common Bench.

Sittings appointed to be held in Middlesex and London, before the Right Hon. Sir JOHN JERVIS, in and after Trinity Term, 1851.

#### IN TERM.—MIDDLESEX.

Friday, May 9

Friday, June 6.

#### AFTER TERM.

Wednesday, June 18.

#### IN TERM.—LONDON.

Tuesday, June 3.

Tuesday, June 10.

#### AFTER TERM.

Thursday, June 19.

N.B.—The Court will sit at ten o'clock in the forenoon on each of the days in Term, and at half-past nine precisely on each of the days after Term.

The causes on the list for each of the above sitting days in Term, if not disposed of on those days, will be tried by adjournment on the days following each of such sitting days.

On Thursday the 19th of June, in London, no causes will be tried, but the Court will adjourn to a future day.  
The office of the Marshal and Associate is at the Lord Chief Justice's Chambers, Rolls-garden, Chancery-lane.  
Hours of attendance during Term, and sittings after Term, will in future be from eleven to five.

### Court of Queen's Bench.

#### List of Middlesex Causes for the Sitting after Easter Term.

REMANETS.  
Clark v. Hughes, S.J. (inj.)  
King v. Cannon, stayed  
Collinson v. Westoby, S.J.  
Paul v. Cochrane and Anor. (inj.)  
Walton v. Froese, S.J.  
Westmacott v. Flint, S.J.  
Krause v. Reichenberg, S.J.  
Buckham v. Wright, S.J.  
Reg. v. Walker  
Reg. v. Martin and Others  
Reg. v. Lloyd and Others, S.J.  
Murray v. Routledge, S.J. (1st action)  
Same v. Same, S.J. (2nd action)  
Cuttings (pauper) v. Le Blanc  
Macintosh v. Mackenzie  
Cook (pauper) v. Gardner  
Goswer v. Beaumont  
Copeland v. Pocock  
Ingilis v. East India Company, S.J.  
Morton v. Hyland  
Doe dem. Yarnold v. Yarnold

NEW CAUSES.  
Reg. v. Newton  
Lenton v. Booth, S.J.  
Doe dem. Ford and Another v. Chandler  
Jacobs v. Bignell and Anor.  
Milner, exor. v. Harrison, S.J.  
Edwards v. Anor. v. Flounee, S.J.  
Doe dem. Strickland and Ora. v. Whalley

### Court of Common Bench.

#### Middlesex Causes for the Sitting after Easter Term.

REMANETS.  
Stead v. Williams, S.J.  
Black v. Boys, S.J.  
Burke v. Parkgate, &c. Railway Company  
Freeman v. Remmett  
Hiser v. Knethoven, commis-sioner  
Marshall v. The York, New-castle, &c. Railway Com-pany  
Gadsden v. Cartwright  
Hancock v. Somerville, after Trinity Term  
Bathurst v. Murray, S.J.  
Collman and Another, v. R. C. Foster, S.J.  
Wells jun. v. Eisenberg and Wife

NEW CAUSES.  
Brogden v. Smith and Another, S.J.  
Foster v. Jordan  
Vineven v. Emanuel  
Doe dem. Webb v. Strebling  
Duan v. Green  
J. T. Wheatley v. Rutherford  
Brewster v. Brown  
J. Johnson v. Wilton  
Graves v. Brittain  
Sleigh v. Warren, S.J.

### Court of Exchequer.

#### List of Middlesex Causes for the Sitting after Easter Term.

REVENUE CAUSES.  
The Attorney-General v. The London Dock Company, 10 causes  
The Same v. The St. Katherine Dock Company, 10 causes  
The Attorney-General v. James Morgan.

REMANETS.  
Watts v. Penny, S.J.  
Penny v. Watts, S.J.  
Kings v. Reid  
Liddbird v. Cook, S.J.  
Jones v. Dutton  
Wilson and Others v. Tyson  
Atkinson v. Haddingham  
Frost v. Parker

NEW CAUSES.  
Clement v. Littledale  
Vardy v. Haines, S.J.  
Randall and Another v. Han-son  
Hoare v. Baldwin, S.J.  
Swayne and Another v. Wa-terford and Kilkenny Rail-way, S.J.  
Binsted v. Rolfe and Another  
Burt v. Kelly and Another  
Allan v. Spring  
Playne and Another v. Burn-leet v. Gresham Life As-surance Society  
Coates v. East, S.J.

The Same v. T. Carter the younger  
Birch v. Smith  
Rainford v. Gardner  
Blackie v. Marshall  
Barwick v. Walters

Duigan v. Machin  
Leader v. London, Brighton, and South Coast Railway  
Gash and Another v. Broome  
Westons v. Percival  
Doe dem. Walker v. Bells

PROLONGATION OF EASTER TERM.—The whole of the four Easter holidays falling in Term time, the Term will be prolonged for an equal number of "days of business." In the present year one of the last four days of Term being a Sunday, Trinity Term will commence on Tuesday, the 27th May, and end Tuesday, 17th June.

## PROCEEDINGS OF LAW SOCIETIES.

### MANCHESTER LAW SOCIETY.

#### REGISTRATION OF ASSURANCES.

THE following is the petition of the members of the Manchester Law Association to the House of Lords:—

"The petitioners do not dispute that advantages to the community may be anticipated from a system of local registration of assurances, which, affording on the one hand a basis for the simplification and amendment of the Law of Real Property, and giving on the other the necessary information to persons legitimately requiring it on the state of titles to lands, shall be so framed as to afford the most certain and simple means of reference, and the utmost possible facility of access to the contents of the registry, with such provisions as may most effectually guard against fraud and abuse, and against the disclosure of titles to parties not entitled to in-spect them.

"The present Bill does not fulfil these objects, and is in particular objectionable in seeking to establish a system of central or metropolitan registration, instead of a system of local registration, providing separate Registry Offices for districts of convenient extent, into which, for this purpose, the kingdom should be divided.

"The adoption of the metropolitan system would, as regards all parts of the kingdom, except the metropolis and its immediate neighbourhood, be attended with disadvantages which would more than counter-balance the benefits which, in other respects, registration may be calculated to confer.

"In any but the most simple cases the requisite searches in the registry could be effectually made only by a person previously acquainted with the state of the title under consideration, and such search must therefore be made by the country solicitors, or if a metropolitan registry be adopted, by his London agent, who must have acquired such acquaintance by perusal of the abstract or evidence of title in possession of the client.

"A great practical convenience may be expected to be derived from the facility which registration on a proper system will afford of verifying abstracts of title by comparison with the registered documents, instead of with documents held in private custody, often scattered in various and remote parts of the kingdom, and not unfrequently inaccessible from want of knowledge of their place of custody, or sufficient means for compelling their production. But it is well known to every solicitor of experience that such comparison of abstracts requires for its efficient performance familiarity with the principles and practice of conveyancing, and a knowledge of the title as shown by the abstract, and in such cases also either the country solicitor must himself make the comparison, or employ a properly qualified London agent.

"The resort to London of the country solicitor, or the employment of a London agent to discharge the duties referred to, would occasion, especially in small transactions, most onerous expense to the client, which local registration would obviate; and it would be impossible for any agent to form a safe judgment on questions of identity of parcels and persons which would frequently arise on such searches and examinations, and which local knowledge alone can duly enable any one to determine upon.

"To commit such searches or examinations to the registrar or his assistant would involve the necessity of his perusal of the abstract or evidence of every title requiring investigation through the means of the registry, which would evidently be impracticable; nor could such perusal supply the unavoidable want of local and personal knowledge on the part of the registrar, nor could these objections be removed by any written instructions to be forwarded to the registrar, for it would be extremely difficult, and in many cases impossible, for the solicitor to frame written instructions sufficient to enable the officer, previously unacquainted with the title, to make such searches and examinations satisfactorily; and the preparation of such instructions would increase at once the responsibility of the solicitor and the cost to the client; whilst any imperfection therein would deprive the latter of the remedy proposed by the Bill

to be given to him by an action for damages payable out of the Consolidated Fund, a remedy which, under the most favourable circumstances, it would be difficult to enforce.

"The Bill provides no means of guarding against the introduction on the registry of forged deeds and unauthorised entries, which, if once placed thereon, might occasion very great difficulty and expense to the landowner concerned in their removal or correction; and registration may thus, instead of affording protection to titles, create a new means of embarrassing them.

"This possible evil would be facilitated, and other injuries occasioned to landowners by the liberty of examining the registry which is proposed to be given to all persons, a liberty which the petitioners submit ought to be restricted by well considered provisions in the Bill, so framed as to prevent access to the registry by parties not fairly entitled thereto, without inconveniently impeding such access by parties having just reason to require it.

"Although the system of indices proposed by the present Bill appears, so far as it is disclosed, to be unobjectionable, yet in this, as in other respects, the Bill is, on the face of it, imperfect, inasmuch as it contemplates extensive rules and regulations for the working of the details of registration, to be framed by the judges of the Court of Chancery, or by the registrar, whilst the petitioners submit that in a measure, the good or evil of which must depend so much on the perfection or imperfection of its details, those details should be embodied in the Bill itself, that they may be judged of in connection with other provisions; and being established, after due consideration by the Legislature, may be hereafter subjected to no variation but what the same high authority may deem to be demanded by future experience.

"The petitioners submit that the present Bill should be altered and extended, with reference to the several matters referred to; and that when so altered and extended, its future progress should be suspended until the fullest publicity shall have been given to it, and the consideration of both branches of the Legal Profession invited to its provisions, to the end that the Bill, when ultimately passed into a law, may appear in a form suitable to the great importance of its object; and which may avoid, as far as possible, the injurious necessity of alteration and amendment by subsequent Acts.

"Whatever advantage in point of safety may arise from a properly constructed system of local registration, the petitioners would not be discharging their duty to their Lordships' House and the public if they did not express their opinion that an erroneous impression is entertained as to the tendency or effect of registration to reduce the expense of conveyancing; their feeling being that for some years after the establishment of even a perfect system of registration, the direct expense will be increased rather than diminished; and that the expenses of carrying into effect such a system of registration, as is proposed by the present Bill, would more than counterbalance all the advantages which even in the metropolis would be derived from the measure."

#### METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

THE general annual meeting of this important law association, which comprises upwards of 1,000 of the principal solicitors in the kingdom, was held on Wednesday, the 16th April instant, at the offices of the society, No. 10, Lincoln's-Inn-fields, London. Mr. James Crosley, of Manchester, was in the chair.

A long and very able report of the proceedings of the committee of management was read by Mr. Wm. Shaen, the secretary, a considerable portion of it referring to measures introduced in Parliament relating to the Profession, and the administration of the law during the last session, as well as those now pending, and the views and proceedings of the committee with respect to them.

Mr. THOS. HODGSON, of York, said he did not intend to oppose the adoption of the report, but with respect to one most important measure now before Parliament, the Bill for the General Registration of Assurances, the committee had not distinctly intimated what course they intended to take. He had no hesitation, however, in stating, that he believed the Profession in the country were almost entirely opposed to it, not only on account of the objectionable nature of many of the details of the Bill, but especially on account of the proposal to establish one General Register Office in London. He knew such was the feeling in Yorkshire. It had been stated by the promoters of the Bill, that it would diminish the expense of conveyances; this he entirely denied. In addition to the preparation of the conveyance, there would be a duplicate to make, and both would have to be transmitted to London for the registrar's certificate, and the official seal to be indorsed and affixed upon the duplicate, which would most probably have to be done through agents, in whatever part of the country it might be required. Searches would also

have to be made by them, whilst, in his opinion, no searches for incumbrances by either agents or the registrars, could be so effectively made as by the solicitor acquainted with the title to the property with respect to which the search was made. Whenever a deed was required in a court of law, the registrar's clerks would have to take it. The cost of small transactions would be greatly increased; and it was no answer to say, as some of the supporters of the Bill did, that the facility of communication with London was greatly improved by railways and the electric telegraph. The cost of such communications with the registrar in London ought not to be added to the present cost of conveyances, especially in small transactions. It had been computed by the committee, as appeared by their report, that 1,000 deeds for every working-day would be deposited in the office. This would be upwards of 300,000 a year, so that in a few years there would be required a building to contain them ten times larger than the largest building then in the metropolis. These deeds would have to be divided according to districts, as well as the indexes to them, for the purpose of reference. Why, therefore, should not the deeds be kept in district registries in the country, near the properties to which they related. He thought that registration should be local, although there might be a registrar-general in London to superintend and keep uniformity. Besides, in times of great political excitement commotions in London had occurred, and in all probability would occur again, and the accumulated deeds of all the landowners of the country would not unlikely be an object of attack on such occasions. He therefore recommended that the association should unite to oppose the Bill before Parliament. By the 59th section of the Bill, the original deeds were to be deposited in the office and not allowed to be removed therefrom, except under judicial process. The effect of this would be that where a wrong stamp had been used, either through inadvertence or a doubt as to the proper stamp, there would be no means of obtaining possession of the deed for the purpose of having a proper stamp impressed, whilst the opportunity is now afforded for the party interested in upsetting a deed to inspect it at the registrar office.

Mr. J. H. SHAW, of Leeds, said that a meeting of the solicitors in the West Riding of Yorkshire would be held next week, to consider the Metropolitan Register Bill; and until that meeting, their opinion upon it as a body could not be authentically ascertained; but that he had had opportunities of hearing the individual opinions of many amongst them, and those opinions (with which his own fully coincided) were strongly against the Bill. If the collective opinions of the body, when assembled, were to the same effect, of which he had no doubt, they would most probably lay that opinion before the public; but whether in the form of a petition to Parliament, or of a simple declaration, he could not anticipate. He need not then go into a discussion of the many strong objections to the Bill. Mr. Hodgson had stated several of the principal ones, in which statement he (Mr. Shaw) entirely concurred. But he thought the report now before the meeting, with regard to the question, was properly and judiciously framed; it indicated clearly that the opinion of the committee was unfavourable to the present measure; but without positively pledging them to any particular course respecting it, and rather inviting suggestions and expressions of opinion from the general body of the Profession, by which the future proceedings of the association in relation to it would certainly be materially influenced, and might probably be guided. This course was the more proper, because while the Profession, in and out of the metropolis, were to a considerable extent agreed in disapprobation of the present Bill, there were differences of opinion amongst them on the general question of registration. In the West Riding of Yorkshire, for instance, where a system of registration had long prevailed, he believed the Profession would be generally in favour of local registration, on the amended plan, though dissatisfied with the defects of their present registry. In districts which never had any registration, the opinion of the Profession, so far as he had seen indications of it, appeared to be decidedly against the introduction of it, on the ground that it was unnecessary, and that any advantage from it would be overbalanced by its inconvenience and expense. The general experience of the Profession in those districts appeared to have led them to the conclusion that the suppression of a deed had occurred only in very rare instances, and that in those instances no party had, or could have, suffered loss from it without gross negligence. The common ground on which the Profession generally can unite appears to be that of opposition to a metropolitan registry, and to the deposit of original deeds in any office, central or local; the opponents of registration agreeing with the supporters of local registration to this extent—that if there be any registration, it should be local. He (Mr. Shaw) also thought that the registration should be by memorial—or rather, that nothing more than a memorial should be compulsory. There were, no doubt, cases where registration at length

would be convenient; but they were exceptional cases, and would be fully provided for by leaving an option to register by memorial or at length. He mentioned that during a struggle against a Metropolitan Register Bill in 1833 or 1834, a Bill for local registration had been brought into the House of Commons by Mr. Cayley, but had been given up on the defeat of the Metropolitan Register Bill of Mr. Wm. Brougham. It was, most probable, the best course, at that time, to abandon it, because the metropolitan scheme had excited a degree of indignation and alarm throughout the kingdom which made the mere name of registry odious. But as the measure, if re-introduced, could now be calmly considered on its merits, he thought it might be desirable to re-introduce it, and suggested an application to Mr. Cayley for that purpose. He was not sure, from recollection, whether his Bill made the establishment of local registries compulsory, or left it optional; but he thought it ought to be optional with each district, so that those who preferred a registry might have one, and those who objected to any might not have one forced upon them. The only object of the measure—or at least its only professed object—being to benefit landowners, it might with great safety and propriety be left to the option of the parties meant to be benefited whether to avail themselves of it or not. If it proved beneficial by a short trial in the districts which should first adopt it, the remaining districts throughout the kingdom would be sure to follow the example; and in that way the measure would soon become a general one.

Mr. THORLEY, of Manchester, said that in his neighbourhood they objected to registration altogether. It was of little use, and certainly there was no advantage in it to counterbalance the increased cost. He never heard of an instance where any loss had been sustained for the want of registration, except through professional neglect; and he did not think the country would submit to the extraordinary proposition contained in the Bill, that any loss to parties caused by the neglect of the registrar or his assistants should be paid out of the consolidated fund.

Mr. G. H. SEYMOUR, of York, said, that in his opinion in a few years the office in London would become so unwieldy that searches would become quite impracticable. It was difficult now to make a satisfactory search in the West Riding of Yorkshire, the indexes had become so voluminous; although the deputy registrar was a man of great ability, and had formed dictionary indexes himself, which he was not required to do. He had heard that some places in London, in which public documents were deposited, were not very suitable for the purpose.

The report was received and adopted; and the officers and committee appointed for the ensuing year.

Mr. G. H. Seymour, of York, was appointed one of the vice-presidents; and Messrs. Hodgson and Leeman, members of the committee of management.

**THE LAW ASSOCIATION.**—The thirty-fourth annual general meeting of this association, established for the benefit of widows and families of professional men in the metropolis and vicinity, was held yesterday, in the Hall of the Incorporated Law Society, Chancery-lane; Augustus Warren, Esq., one of the treasurers, in the chair. The report, which was read by Mr. Murray, the secretary, stated, *inter alia*, that the income, as in the preceding year, amounted to 1,635*l.* 5*s.* 7*d.*, and the directors had the gratification to announce that 10*l.* 10*s.* had been given to the association by Mr. John Jacques; 5*l.* 5*s.* by the Principal of Staples Inn; 5*l.* 5*s.* by Mr. J. G. Hough; 1*l.* 1*s.* by Mr. H. P. Bird; and 2*l.* 2*s.* annually by the widow of Mr. Michael Clayton. The Master of the Rolls, Lord Cranford, and his Honour Vice-Chancellor Turner had both consented to become vice-presidents of the association. No new case of the primary class had come before the board during the past year; whilst, on the other hand, one of the claimants, on her marriage, voluntarily resigned all claim on the funds. The outlay in this branch of relief has been this year 825*l.*, being less than in the preceding year. The sum voted at the last annual meeting for the benefit of the widows and families of persons who had not been, or who had ceased to be, subscribers to the society, was 200*l.* being 50*l.* more than the grant for the previous years. Relief had also been afforded to six other cases, and there is now a balance of only 18*l.*, which consequently falls into the general fund of the association.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTH.

KENT.—The lady of F. W. Knight, esq. M.P. of a son and heir, on the 11th inst. at Wolvsey-house, Worcester-shire.

##### DEATHS.

DAWKINS, John Nursery, esq. for thirty years one of the Examiners of the High Court of Chancery, on the 7th inst. at Croydon, aged 84.



**NETTLESHIP, Augusta Mary**, daughter of Mary, widow of the late George Nettleship, esq. solicitor, of Watford, Hertfordshire, on the 7th inst. at No. 1, Westbourne-park-place, Paddington, aged 13.

**STRELLING, John**, esq. one of her Majesty's Deputy Lieutenants and Justices of the Peace for the county of Essex, at Dymes-hall, in the said county, on the 27th ult. aged 67.

**TASSELL, Caroline**, the wife of Robert Tassell, esq. Barrister-at-Law, and fifth daughter of John Golding, esq. of Ditton-place, Kent, at North-end, Fulham, on the 7th inst. aged 30.

**TRACERAT, John**, esq. one of her Majesty's Justices of the Peace for the county of Kent, at the Priory, Lewisham, on the 13th inst. aged 74.

**WAD, Robert Siggoe**, for twenty-seven years clerk to Richard Bethall, esq. Q.C. at 14, Thornhill-place, Islington, on the 11th inst. aged 41.

**WESTWORTH, Mrs. Martha**, the last lineal descendant of Thomas Wentworth Earl of Strafford, and relict of the late John Wentworth, esq. Barrister-at-Law, at Trinity-square, Southwark, on the 1st inst. aged 77.

## JOURNAL OF PROPERTY.

## MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	210½	210	211	210½	211	211
3% Cent. Reduced Annuities	96½	96½	96½	96½	96½	96½
3% Cent. Consols Annuities	97½	97½	97½	97½	97½	97½
Consols for Account	97½	97½	97½	97½	97½	97½
New 3½% Cent. Annuities	98	97½	97½	97½	97½	97½
Long Annu. (exp. Jan. 5, 1880)	..	..	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1889)	..	..	..	7½	7½	7½
Do. 30 yrs. (exp. Jan. 5, 1880)	7½	..	..	7½	7½	7½
India Stock	..	..	..	259	259	259
India Bonds (1,000l.)	54½	53	54	50	50	50
Do. do. (under 1,000l.)	..	..	..	50	54	53½
South Sea Stock	..	..	..	..	..	..
Do. do. New Annuities	..	..	..	..	..	..
Exchequer Bills, 1,000l.	52½	52½	50½	46½	49½	46½
Do. do. 500l.	..	52½	..	46½	49½	46½
Do. do. Small	..	52½	52½	46½	49½	46½

\* Premium.

## THE GAZETTES.

## Bankrupts.

Gazette, May 13.

**BANISTER, JOHN**, general hardware dealer, Birmingham, at May 26 and June 23, at Ten, Birmingham. Off. as Whitmore. Sol. Smith, Birmingham. Petition, May 8.

**BUTLER, THOMAS HUMPHREY**, ironmonger, Lichfield, May 23 and June 19, at Twelve, Birmingham. Off. as Christie. Sols. Reginald, Lichfield; and Smith, Birmingham. Petition, May 7.

**HARRIS, JOHN**, boot and shoe maker, Buckingham, May 21 and June 24, at Twelve, Basinghall-st. Off. as Stanfield. Sol. Rialley, Mecklenburgh-square. Petition, May 10.

**HATHERINGTON, JOHN**, grocer, High Holborn, May 23, at one, June 27, at eleven, Basinghall-st. Off. as Cannon. Sols. Howard and Dolman, New Bridge-st. Blackfriars. Petition, May 9.

**LAW, CATHERINE**, grocer, Chippenham, Wiltshire, May 26 and June 23, at eleven, Basinghall-st. Off. as Cannon. Sols. Castle and Henderson, and Hippisley, Bristol. Petition, May 2.

**MAGRATH, DAVID**, colour manufacturer, George's-row, City-road, May 24, at twelve, and June 23, at one, Basinghall-st. Off. as Pennell. Sol. Condy, Gray's-inn-square. Petition, May 9.

**RADLEY, JAMES**, cotton-spinner, Oldham, Lancashire, May 24 and June 21, at eleven, Manchester. Off. as Lee. Sol. Cobbett, Manchester. Petition, May 8.

**WOODS, ALEXANDER**, money scrivener, Great Yarmouth, Norfolk, May 22, at half-past one, and June 26, at eleven, Basinghall-st. Off. as Johnson. Sols. Lawrence and Co. Old Jewry, City; and Reynolds and Palmer, Yarmouth. Petition, May 5.

Gazette, May 16.

**AYLES, WILLIAM HENRY**, builder, Rickmansworth, Hertford, May 30, at eleven, and June 26, at twelve, Basinghall-st. Com. Evans. Off. as Bell. Sols. Abbott, Jenkins, and Abbott, New Inn. Petition, May 13.

**BARRETT, ARTHUR YOUNG**, ironfounder, Horncastle, Lincolnshire, May 26 and June 26, at half-past twelve, Kingston-upon-Hull. Com. Ayrton. Off. as Carriak. Sol. Dunning, Leeds. Petition, May 7.

**BOYD, CHARLES**, tanner and currier, Tiverton, May 27, at half-past twelve, June 24, at eleven, Bristol. Com. Hill. Off. as Acraman. Sol. Bevan, Bristol. Petition, May 14.

**CLARK, JOHN**, auctioneer, Camberwell, May 23, at half-past eleven, and June 27, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Guy and Reed, 8, Cannon-row, Westminster. Petition, May 12.

**DONOH, GEORGE**, painter, Neath, Glamorganshire, June 3 and July 1, at eleven, Bristol. Com. Hill. Off. as Miller. Sols. Sewell, Fox, and Sewell, Old Broad-st.; and Whittington and Gribble, Bristol. Petition, April 29.

**GREENWED, SAMUEL**, victualler, Brighton, May 27, at eleven, June 27, at one, Basinghall-st. Com. Holroyd. Off. as Groom. Sols. Rickards and Walker, 29, Lincoln's-inn-fields; and Bennett and Houseman, Brighton. Petition, May 13.

**HOLDER, JAMES**, licensed victualler, Salford, June 2 and 23, at twelve, Manchester. Off. as Fraser. Sol. Taylor, Norfolk-st. Manchester. Petition, May 9.

**TARRANT, ALFRED**, bookbinder, 1904, High Holborn, May 28 and June 27, at Twelve, Basinghall-st. Com. Fonblanque. Off. as Graham. Sols. Kingston and Shepherd, 16, Clifford's-inn. Petition, May 15.

## BANKRUPTS.

**BANKRUPT DEBTS.**  
Official Assignees are given, to whom apply for the Dividends.

**Andrews, E. T.** ironmonger, second, 2a. Pennell, London.—**Angle, B.** victualler, third, 8d. Pennell, London.—**Blein, J.** stationer, first, 2a. 9d. Morgan, Liverpool.—**Brown and Todd**, provision merchants, first, 8d. Morgan, Liverpool.—**Charnock, G.** provision dealer, first, 2a. 9d. Morgan, Liverpool.—**Cheshire, J.** salt manufacturer, second, 8d. Morgan, Liverpool.—**Edwards, T. J.** dressing-case maker, second, 6a. Cannon, London.—**Golborne and Debbis**, wine merchants, sixth, 1d. Morgan, Liverpool.—**Harrison, W. B.** draper, first, 3a. 9d. Wakley, Newcastle.—**Hoggate, W.** brickmaker, first, 3a. 4d. Pennell, London.—**Holland, J. T.** builder, 8c. first, 3a. Christie, Birmingham.—**Loycock, W.** iron merchant, first, 1a. 8d. Morgan, Liverpool.—**Mitchell, A.** draper, 8c. 11d. Hutton, Bristol.—**Nash and Neale**, bankers, third, 3a. Pennell, London.—**Reid, J.** ship broker, first on new profits, 1a. 8d. Baker, Newcastle.—**Robinson, J.** cattle dealer, first and final, 1a. 11d. Wakley, Newcastle.—**Sampson, W.** spirit merchant, 8c. second, 5d. Freeman, Sheffield.—**Scarfe, C.** timber merchant, first, 3a. 10d. Pennell, London.—**Swanborough, R. & H.** Oake, linen merchants and flaxdressers, first, 10s. second, 0d.; second sep. of R. Swanborough, 8d. Stansfield, London.—**Taylor, S.** grocer, first, 3a. 4d. Pennell, London.

## INSOLVENT ESTATE.

**Leddell, H. R.** ironmonger, 1a. 5d. Apply to R. G. Barton, assistant clerk, Park-street, Windsor.

## Assignments for the Benefit of Creditors.

Gazette, May 6.

**Bray, G.** grocer, Landport, Portsea, Hants, April 25. Trusts: J. Consens, jun. tea and coffee merchant, Sherborne-lane, City, and G. Baker, provision merchant, Portsea. Sol. E. Hodgkinson, Little Tower-st.—**Cliff, C.** farmer, Dunt Lane Farm, Hurst, Berkshire, April 15. Trusts: J. Cliff, yeoman, Strathfieldsay, and O. Goddard, timber dealer, Finchampstead. Sols. Prickett and King, Basingstoke.—**Franklin, J. H.** farmer, late of Radford Semele, Warwickshire, now of Leamington Priors, April 24. Trusts: O. Walter, butcher, Radford Semele, and J. Downing, publican, Upton. Sol. A. S. Field, Leamington Priors.—**Harley, W. H.** broker, Kingston-upon-Hull, April 15. Trusts: J. L. Baxter, broker, and J. S. Walker, merchant, both of Kingston-upon-Hull. Sols. Holden and Son, Kingston-upon-Hull.—**Wardley, G. R.** shopkeeper, Brundish, Suffolk, April 26. Trusts: T. Gray, draper, and S. Wainwright, grocer and tea dealer, both of Ipswich. Sol. S. B. Jackman, Ipswich.—**Wyatt, D. I.** and **Underwood, E.** hat and cloth cap manufacturers, Bristol, April 10. Trust: W. Butterfield, merchant, Manchester. Sol. T. P. Bunting, Manchester.

Gazette, May 9.

**Andrews, E.** and **W. C.** drapers, Tormoham, Devonshire, April 21. Trusts: J. D. Wilcocks, linen draper, Exeter, and J. Brown, warehouseman, Manchester. Sols. C. Kitson, Torquay, and W. Sale, Manchester.—**Goodridge, C. J.** linen draper, High-st. Exeter, May 5. Trusts: J. Hooke, hosier, and J. Spark, linen draper, Exeter. Sol. E. W. Hooper, Exeter.—**Hind, J.** sep. farmer, Marsh Chapel, Lincolnshire, April 9. Trusts: G. totter, farmer, Marsh Chapel, and T. Barkworth, maltster, North Thoresby. Sols. Goe and Wilson, Louth.—**Oyle, G.** and **Douglas, J.** ironfounders, Bishopwearmouth, Durham, May 3. Trusts: J. Clay, merchant, and T. W. Pantton, gent. Bishopwearmouth. Sol. J. Kidson, Bishopwearmouth.—**Pearce, J.** wine and spirit merchant, North Shields, May 2. Trusts: A. Crighton, wine and spirit merchant, and G. Hall, grocer, North Shields. Sols. Leitch and Kewney, North Shields.—**Ramsay, M.** grocer, Stevenston, Berkshire, April 28. Trust: T. Richardson, grocer, Abingdon. Sol. A. D. Bartlett, Abingdon.—**Reeves, W.** lime burner, Mansfield, Nottinghamshire, April 30. Trusts: J. Edwards, timber merchant, Nottingham. Sol. G. M. Cowley, Nottingham.—**Wadams, S.** corn and flour dealer, baker, and livery-stable keeper, Bedford-st. Leamington Priors, Warwickshire, April 12. Trust: W. Snape, accountant, Warwick.—**Wilkes, J.** brazier, High-st. Leominster, Herefordshire, March 25. Trust: W. Lee, brushmaker, Bowdley. Sol. H. Herbert, Leominster.

## Partnerships Dissolved.

Gazette, May 2.

**Birley, S.** and **J. G.** watchmakers, Birmingham, April 29. Debts paid by S. Birley.—**Broadhead and Co.** boot and shoe makers, Longlight, Manchester, April 28. **Bury, Bradley, and Bury**, oil of vitriol manufac. Church, as regards A. Bury, April 28. Debts paid by B. Bury and B. Bradley.—**Casley and Gargery**, leather-dressers, Wright's-buildings, Bermondsey, May 1.—**Cook, E.** and **Lord, J.** reedmakers, Manchester, April 30. Debts paid by Lord.—**Cookes and Long**, ship and insurance brokers, Mark-lane, April 30. Debts paid by Long.—**Davis, H.** and **Swett, J. L.** surgeons, Tenbury, April 30.—**Greener and Barrett**, ale and porter merchants, Sunderland, April 30. Debts paid by Greener.—**Holding, T.** and **J.** grocers and drapers, Blackburn, April 14. Debts paid by T. Holding.—**Holroyd and Gledhill**, blacksmiths, Raistrick, near Halifax, April 21. Debts paid by Holroyd.—**Hooper, W.** and **Punchard, J. C.** printers, St. Thomas-the-Apostle, April 30. Debts paid by Punchard.—**Hudson, E.** and **Hipkins, G. F.** manufacturers of door springs, Birmingham, April 29. Debts paid by Hipkins.—**Lock, J.** sen. and jun. yeomen, Court Farm, Eastmeon, April 28.—**Malden and Wiseman**, merchants, Soham, April 19. Debts paid by Wiseman.—**Mayo, C.** and **Nicholas, W. I.** surgeons, Winchester, April 30. Debts paid by T. Sherlock, accountant, Winchester.—**Mort, H.** and **Kearseley, E. S.** master coal miners, Bedford, April 28.—**Ogilby and Doran**, cotton dealers, Manchester, April 29. Debts paid by Ogilby.—**Peel, Holmes, and Co.** merchants, Manchester, April 3. Debts paid by Holmes.—**Pooley, T.** and **Rayner, C. S.** coal and iron masters, Langley Field Iron Works, Dawley, March 29.—**Price, J.** and **Lavender, J.** wholesale stationers, Birmingham, March 27.—**Radcliffe, T.** and **Son**, engravers, Birmingham, April 29.—**Rhodes, Brothers**, tea dealers, Otley, March 14. Debts paid R. Rhodes.—**Slip, S.** and **H. O.** oil and colourmen, Bath, March 18.—**Storey, W. T.** and **Tatham, H.**

**C.** cotton waste dealers, Manchester, April 29. Debts paid by Storey.—**Tweedale and Beethorne**, slate and stone merchants, Dewsbury, Jan. 1. Debts paid by Beethorne and J. S. Tweedale.—**Walker, B.** and **Hart, J.** ribbon manufacturers, Coventry, April 30. Debts paid by Hart.—**Wesley, W.** sen. and jun. and **Wesley, O.** general tailors and outfitters, Princess-street, Hanover-square, as regards W. Wesley, jun. April 28.—**Westhead, W.** and **Black, S.** soda water manufacturers, Liverpool, April 1. Debts paid by Westhead.—**Wills, Brothers**, cigar manufacturers, Church-street, Spitalfields, April 30.—**Woodhouse, J. T.** and **Pearson, J.** silk purse and brace manufacturers, Nottingham, April 14. Debts paid by Pearson.

Gazette, May 6.

**Baines and Newsome**, stationers, Leeds, April 30. Debts paid by Newsome.—**Bradshaw, J.** and **Knox, T.** plumbers, Birmingham, May 2.—**Campbell, P.** and **Weight, J.** cheesemongers, Freeschool-st. Horsleydown, May 1. Debts paid by Campbell.—**Christy and Company**, ironfounders, Old Accrington, April 1. Debts paid by Christy.—**Dennis and Eansford**, surgeons, Alnwick and elsewhere, April 26.—**Emmet, C. B.** and **Sammam, R. W.** surgeons, Cheyne-walk, Chelsea, and Onslow-square, Brompton, March 31.—**Gova and Koppel**, merchants, Mark-lane, April 30. Debts paid by Gova.—**Hayman and Myers**, cigar manufacturers, Birmingham, May 1. Debts paid by Myers.—**Hicks and Son**, attorneys, Shrewsbury, April 28. Debts paid by O. Hicks.—**Holmes, T.** and **Mellor**, felling and scribbling millers, Jackson-bridge-mill, near Holmfirth, April 30. Debts paid by F. H. J. and T. Holmes.—**Hunsley and Hawksworth**, painters, Sheffield, May 2. Debts paid by Hawksworth.—**Hust and Hartell**, clothiers, Addle-st. Wood-st. May 8. Debts paid by Hartell.—**Keen and Pritchard**, grocers and ironmongers, Rochdale, April 26. Debts paid by Pritchard.—**Kelly, C.** and **Lyon, F. G.** pianoforte makers, High-st. Kensington, April 26. Debts paid by Kelly.—**Kincaid and Wyley**, wholesale and export oilmen, Upper Thames-st. April 26.—**McLinton, J.** and **C. St.** and corset makers, Barnaley, as regards Brooks, May 8. Debts paid by remaining partners.—**Nicholson, J. I.** Besley, and Co. wharfingers and warehouse keepers, Lyon's-quay and Somerset-quay, Lower Thames-street, Sept. 29.—**O'Hara, C.** and Co. dealers in sacks and general dealers, Liverpool, May 2. Debts by O'Hara.—**Roberts, W.** and Co. grocers and corn dealers, Ashton-under-Lyne, March 26.—**Swan, Brothers**, stationers and printers, Birmingham, May 3. Debts paid by T. O. Swan.—**Whitham, S.** and **J. millwrights**, Leeds, Jan. 1. Debts paid by J. Whitham.—**Young, J.** and Co. edge-tool manufacturers, Wolverhampton, May 1. Debts paid by Cooper and Wildsmith.

Gazette, May 9.

**Bilton and Newsome**, plumbers and glaziers, Somerset, May 5. Debts paid by Newsome.—**Black, Booth, and Co.** starch and gum manufacturers, Salford, March 31. Debts paid by Black and Booth.—**Bright and Woodmansey**, silversmiths, 8c. Doncaster, May 6.—**Goddard, R.** and **Hartshorn, J.** designers and draughtsmen, Nottingham, May 1. Debts paid by Hartshorn.—**Gumbrell, J.** sen. and jun. farmers and graziers, Dunsford, April 13.—**Hollingsworth, W.** and **Hollingsworth, J. T.** butchers, Watford, March 26. Debts paid by W. Hollingsworth.—**Jules, J.** and **Pennell, W.** silk manufacturers, Macclesfield, May 6.—**Levick, G. A.** and **Dolby, J. M.** chemists and druggists, Market street, May 2. Debts paid by Dolby.—**Myers, G.** and **Wolff, A.** cigar manufacturers, Birmingham, April 30. Debts paid by Myers.—**Ogden and Hadfield**, cotton spinners and doublers, Lees, July 1, 1847.—**Park and Dewell**, grocers and drapers, Filigully, near Newport, May 1. Debts paid by Park.—**Peppatt, J.** and **G. New** of North-shoreditch, April 16.—**Ferry, J.** and **Blossom, G. F.** surgeons, Eaton-sq. and Eccleston-st. Fimbo, May 7.—**Rees, J.** sen. and jun. and **Rees, W. H.** rule manufacturers, Birmingham, June 24, 1846. Debts paid by remaining partners.—**Rodney and Moore**, medicated vapour practitioners, Mount-st. Grosvenor-sq. May 6. Debts paid by Moore.—**Smith and Connolly**, cotton manufacturer, Manchester, May 6. Debts paid by Smith.—**Trippett, Garrett, and New York**, and Co. provision merchants, Liverpool and New York, as regards Garrettson, Dec. 31. Debts paid by John and Joseph Trippett.—**Welch, Mayeside**, and Co. stock and brace manufacturers, 8c. Chesapeake, as regards Mitchell, Dec. 21. Debts paid by remaining partners.—**Whitaker and Porter**, wine and spirit merchants, Coopers-row, Tower-hill, May 6. Debts paid by Whitaker.

## PULLING'S LAW OF ATTORNEYS AND

SOLICITORS, describing their legitimate provinces, the Regulations as to their Duties and Functions in the general Practice of the Law; their Rights, Privileges, and Liabilities, and the Mode and Form of Proceeding by and against them; including all the Cases decided to this time, and the Statutes. By ALEXANDER PULLING, Esq. Barrister-at-Law, Author of "The Laws and Customs of London," &c. Price 13s. boards; 15s. half-bound; 16s. calf.

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Policies do not become void by the Life assured going beyond the prescribed limits,—so far as regards the interest of third parties—provided they pay the additional premium, so soon as the fact comes to their knowledge.

Parties assuring within six months of their last birthday are allowed a diminution of half a year in the premium charged.

The Tables are especially favourable to young and middle-aged Lives, and the Limits allowed to the Assured, without extra charge, are unusually extensive.

Twenty per cent. of the Profits are divided at the end of every five years among the assured.—At the first Division to the end of 1849, the addition to the amount Assured averaged above fifty per cent. on the Premiums paid.

The usual Commission allowed.

Loans in connection with Life Assurance.

## PELICAN LIFE INSURANCE COMPANY.—Established 1797.

NOTICE.—The Directors are prepared to receive Proposals for Loans on approved Security, in sums of not less than 500*l.* coupled with one or more policies of insurance to be effected in the Pelican Office.—Applications to be made to the Secretary, at the Chief Office of the Company, No. 70, Lombard-street.

Loans in connection with Life Assurance.

## LAW PROPERTY ASSURANCE and TRUST SOCIETY, 30, Essex-street, Strand, London.

18th May, 1851.—Notice is hereby given, that the FIRST ANNUAL GENERAL MEETING of the Shareholders of this Society will be held at the Society's Office, on FRIDAY, the 30th May instant, at twelve o'clock precisely, for the purpose of transacting the ordinary business of the Society.

By order of the Board of Directors,  
 WILLIAM NEBSON, Secretary.

## INSOLVENCY FORMS IN PRISON, AND PROTECTION CASES IN TOWN AND COUNTRY.

## THE Officers of the County Courts and

Practitioners are invited to provide themselves with the FORMS above named, which are printed by J. S. HODSON, Printer to the Court for Relief of Insolvent Debtors; as they have been prepared for him by the Commissioners of that Court, and may be confidently relied on for their correctness. To save practitioners from the chance of falling into error from the use of incorrect Forms, the Court has deemed it necessary to issue an order to prevent any Schedules, Petitions, &c. being received by the clerks that are not printed by J. S. Hodson, 23, Portugal-street, Lincoln's-lan-fields.

## THE PRACTICAL STATUTES OF THE SESSION OF 1850, edited by E. W. COX and W. PATERSON, Esqrs. Barristers-at-Law, in one small volume for the pocket or bag, with introductory Notes and Index. Price only 7s. 6d. cloth; 5s. half-cloth; 3s. 6d. paper.

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New Edition Office, 28, Essex-street, Strand.

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## To Readers and Correspondents.

- "A READER."—*This is a question of law, and not of practice, and should be put to an Attorney or Counsel in regular form.*
- "MANAGING CLERK."—*We know of no such precedent; but we have sent his suggestion to Mr. Hughes, who will doubtless adopt it and introduce one into his valuable series of "Concise Precedents in Modern Conveyancing."*
- "J. D. N."—*suggestions shall be considered; but there are difficulties of arrangement, although the advantages are obvious. As to the citations of cases, it would be almost impossible, with our plan of speedy reporting. It would cause a long delay in each report. At present, the reporters name only the reports from which the cases are actually cited in the courts. The labour of reference to search for them in our volumes also would be enormous.*
- "A FORTHRIGHT SOLICITOR."—*Thanks for his hints. Both of the topics named have been already suggested here; and as he only repeats the same name, it is not necessary to publish his letter.*
- "AN ARTICLED CLERK."—*Williams's book is a tolerable one, but there is not a good word on the subject.*
- In Harnsworth v. Harnsworth the judgment was reversed; but no reportable point was decided; and its omission from the business of the week was accidental.*

## SCALE OF CHARGES FOR ADVERTISEMENTS.

- Under Fifty Words..... 50 5 0  
For every additional Ten Words..... 0 0 6
- Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.
- Advertisements ordered for the first page are charged one-half more. If not so ordered, they will take the chance of position.

We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, MAY 24, 1851.

## REFORM OF THE COMMON LAW COURTS.

WHAT has become of the Common Law Commission?

This question is whispered in Westminster Hall, and loudly put wherever Lawyers most do congregate. Already the greater portion of the session of Parliament has passed away, and the measure of reform which the Commissioners were appointed to suggest has not seen the light, nor is there any symptom of progress in the work. It was the duty of the Commissioners to have matured their report in time for legislation during this session. That duty they have utterly neglected. The consequence is, that another year must pass away before anything can be done to improve the administration of justice in the Superior Courts, and thus to arrest the decline of business, which has been proceeding with an accelerated pace, and the end of which it is not difficult to prophesy. Look at the Court Papers for the next Term, as they appear to-day in another column, and compare them with the papers for the Trinity Term of six years ago, and the decline will be startling. It is impossible to mistake the cause of it. Suits are preferred for the rough justice of the County Courts to the more perfect justice of the Superior Courts, which can only be attained by a hazardous journey through the pitfalls of

VOL. XVII. No. 425.

pleading, with the risk of indefinite delay, through difficulties that dismay the hardiest, and at a cost which they deem to be more than the article is worth after they have obtained it.

The Commission was appointed to arrest this process of decay, by adapting the practice of the Superior Courts to the new needs of society, to the advanced intelligence of the times, and to the rivalry to which they have been subjected. It was understood that, as soon as Parliament assembled, the suggestions of the Commission would be submitted to it, and at once passed into a law, with the aid of the whole power of the Government. Parliament has been sitting nearly three months, and the Commission has done nothing.

Wherefore is it so? Is it idleness, or want of unanimity, or are interests at their dirty work again? Or is the Commission another sham set up to deceive with a pretence of reform, without any purpose of effecting it? To whom does the blame attach—for there is grave cause for blame somewhere—to the members of the Commission, or to the Government? These questions the public and the Profession have a right to put; and, on behalf of the latter, whose interests are dependant upon the adoption of a speedy and entire reform of the Superior Courts, so as to bring back the business that is fleeing from them, we shall not cease week by week to repeat them, until an answer is given that shall be satisfactory, both as to what is to be done and the time for doing it.

## TO THE RESCUE.

It is as we had feared. From some ominous observations in our contemporary, the *Legal Observer*, which speaks on this matter the views of the Law Institution, the County Courts Bill is in danger in the Commons. We have no doubt that efforts will be made to strangle it there, unless the Profession in the provinces come to the rescue, by an immediate request by each one to his own members to give it his support.

At first it may appear strange that a measure, which has for its object the securing to the Profession a just remuneration in the County Courts, instead of the insulting fees now given to them, should have the hostility of any portion of the Profession. But when the reason for it is seen, wonder will cease. If the Attorneys receive liberal costs for actions in the County Courts, of course they will bring them there instead of in the Superior Courts, where they must share their fees with an agent. Hence this provision, so advantageous to one half of the Profession in London and to every Attorney in the country, will be injurious to a few great agency houses in London; hence the hostility to the Bill now before the Commons; hence the ominous article of our contemporary; hence the impending danger, which it behoves the thousands whom the Bill will benefit to avert by immediate and energetic efforts. They must remember that in this, as in so many other matters of vital moment, the interests of the Profession in the country are directly opposed to the interests of those who rule the Law Institution; and therefore not only can they expect no help from that quarter, but they must count upon positive opposition, open or covert. The Profession must rely upon itself alone, and we repeat to all who desire to secure fair professional fees for business in the County Courts, that they should forthwith personally request their representatives to support the Bill.

## DELIVERING BRIEFS.

In the Court of Common Pleas at Guildhall, on Monday last, before Mr. Justice TALFOURD, the following occurrence is reported:—

At the sitting of the Court this morning, when the first case in the list was called on, the counsel en-

gaged for the plaintiff stated that their briefs had only been delivered late on Saturday night, and they were not therefore prepared to proceed with the trial. The other cases in the list were then called on successively, but though counsel appeared, neither the attorneys nor witnesses were present, and the result was that they were all struck out, and the Court rose at ten o'clock.

Mr. Justice TALFOURD observed that the modern practice of withholding the delivery of briefs to counsel until the eve of the trial was a great evil, and there could now be no excuse for it on the ground of the pressure of business. The remedy would be for some public-spirited client to bring an action for negligence against the attorney who had neglected to instruct counsel, and had thereby occasioned him the expense of having his cause struck out.

## Again:—

On Saturday two or three causes were in like manner struck out (as we stated in our report) in consequence of the absence at Westminster Hall of the counsel engaged in them. On that occasion,

The Lord Chief Justice observed that clients had only themselves to blame for the evil. There were counsel of the highest rank and reputation in the profession in continual attendance on that court, and whose personal attention to their cases could always be relied upon, yet parties and their attorneys would insist upon retaining other counsel, and run the risk of their being able to attend, and the result was very great loss of public time and very great expense to suitors.

It is not the first time that we have had occasion to direct the attention of our readers to this subject. It is undoubtedly a great neglect of duty on the part of an attorney to delay the delivery of his brief until the day of the trial, for it is impossible that Counsel can give it due preparation, and we have little doubt that, for any damage thence resulting, the client would have a remedy against his attorney in an action for negligence.

There is another evil of scarcely inferior magnitude—the employment of Counsel who have so much to do, and so many courts to attend, that their presence at the trial cannot be calculated upon. As was truly observed by the LORD CHIEF JUSTICE, there are abundance of very able and competent Counsel who regularly attend each court, and who would conduct the case as ably as either of two or three great men whom it is the fashion to prefer merely because every body employs them. The attorneys may rely upon it that they will best consult the true interest of their clients by breaking through this tyranny of custom, and giving their briefs to the men who are regular attendants at the court in which the cause is to be tried, instead of lavishing them upon those who are already so overburdened that neither their presence nor their mastery of the case can be relied upon.

## A WARNING.

We are requested to direct the particular attention of our readers to a case entitled *Ridsdale v. Lautour*, reported from the C. P. at p. 77. It was an application for the discharge of a prisoner for debt, under certain circumstances stated in an affidavit made by the prisoner and one GEORGE HETHERINGTON, who was styled "his agent." Fortunately, the Court directed an inquiry into the facts so alleged, and it turned out that they were untrue. Upon receiving the report of the Master to this effect, the Court purposely applied to the counsel who had moved upon the affidavits, for the name of the attorney who had instructed him. It was stated that the name indorsed upon the brief was "H. J. HEMBERTY." We do not here repeat the particular facts of the case, referring the curious reader to the report for them; but the application now made was, that HEMBERTY should be ordered to pay all the costs, upon which Sir J. JERVIS said, "That will be ordered; of course. But had you not better move, as a substantive motion, that HEMBERTY be struck off the rolls? Meanwhile I will consider with my brothers how HETHERINGTON may be indicted for perjury, for, as far as I can do it, it shall be done."



Now it would appear that the real attorney, **HEMBERY**, whose name is on the brief, had no concern, in fact, with the matter. **HEATHERINGTON**, who styles himself the prisoner's "agent," probably concocted the affidavit, being a sham lawyer to whom the real lawyer had lent his name. By so doing, **HEMBERY** has made himself responsible for the acts of the sham lawyer, and will probably be struck off the rolls. His punishment, although severe, will not be undeserved. It would, indeed, be desirable if a similar penalty were always to follow a similar practice, and if the attorney who lends his name to a sham lawyer, for any purpose, or under any pretence of being his clerk, were deprived of the privilege he is abusing. We have thus prominently noticed this case, in the hope that it will operate as a warning to those who have done, or who may be tempted to do, as **HEMBERY** did, reminding them that they are responsible for the acts of the sham lawyer, and that the Courts are resolved to try what severity will do to put a stop to a system which is bringing disgrace upon the Profession.

If at the Central Criminal Court, in the Insolvent and Bankrupt Courts, and in the Criminal Courts at the Assizes and Quarter Sessions, there were no real Lawyers degraded enough to lend or sell their names to Sham Lawyers for use upon their briefs, the latter must cease to exist in these their most profitable fields of enterprise; and now that it is known that the Courts will shew no mercy to an Attorney proved to be guilty of the practice, and that he will be responsible for the misconduct of his representative, we trust that no false delicacy on the part of the respectable members of the Profession will prevent them from sifting and exposing every case of the kind that may come under their notice.

### INDUSTRIOUS LORD CAMPBELL.

**LORD CAMPBELL's** industry is amazing. He manifestly loves work for its own sake. He is thoroughly a man of business: patient, pains-taking,—never wearied; bending all his powers to his task, and when a thing is to be done, doing it. As it is always, the spirit of the Chief Justice has inspired those about him, unconsciously perhaps to themselves, but obvious in the results. A greatly increased activity is perceptible at Westminster. **LORD CAMPBELL** will not permit of postponements in deference to the convenience of two or three leaders. If Counsel are not ready when the case is called, it is struck out of the list, unless very good reasons for delay are shewn. Then he will not reserve a judgment for consideration, unless there is really some doubtful point to consider; but immediate judgment is pronounced more frequently than it used to be. Lastly, when the Court has taken time to consider, judgment is not delayed Term after Term, but usually given during the same Term or the sittings after; and even in the most difficult cases it is not delayed beyond the following Term. When it is remembered that these judgments are always written—that many of them are long and learned reviews of the course of decision upon the subject to which they relate, as the reader of the reports here will doubtless have noticed, some estimate will be formed of the amount of labour which **LORD CAMPBELL** must expend in the performance of his office, and of the industrious nights that must succeed his laborious days.

And the results are visible in the greater activity of all the courts, which have caught his spirit and reduced the arrears enormously. During the last Term, the Crown Paper was cleared off, for the first time within legal memory; and all the other papers were reduced to the smallest dimensions ever known. It is not improbable that the close of the next Term may witness the phenomenon of "no arrears" in the Q.B. and C.P. The Ex., following

the example, has been labouring zealously and successfully, although it has not accomplished so much as the others. Once let the arrears be swept away, and every Term made to do its own work, not only will there be less labour for the judges, the counsel, and the attorneys, but the increased speed of justice, and the diminished costs and vexation of which delay was the most painful source, will certainly increase the amount of law, and thus bring a much greater value of legitimate business to the lawyers than was that of the illegitimate profits arising from justice delayed and suits protracted. **LORD CAMPBELL** will doubtless induce many a suitor, who would have submitted to wrong rather than incur the lingering vexation of an appeal to the law for redress, to demand justice where he is sure of finding it, could he but secure a hearing, from the judges of Westminster Hall.

## THE LEGISLATOR.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

*Monday, May 19.*  
Woods, Forests, &c.—New Forest Deer Removal, &c.  
*Thursday, May 22.*  
British White Herring Fishery.

##### BILLS READ A SECOND TIME.

*Friday, May 18.*  
Coalwhippers (Port of London).  
*Thursday, May 22.*  
Stamp Duties, Ireland (continuance).

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

*Monday, May 19.*  
Midland Railway, extension of time  
York, Newcastle, &c. Railway (West Durham Branch)  
Taw Vale Railway and Dock.  
*Tuesday, May 20.*  
East Lancashire Railway.  
*Thursday, May 22.*  
Chorley Waterworks  
Eastern Union Railway  
Edinburgh Royal Asylum for the Insane  
Liverpool Docks, &c.

#### SESSIONAL PRINTED PAPERS.

Par. Numb.  
151. Customs and Post Office Duties (India)—Papers  
63. Local Acts—Reports of the Admiralty  
244. County of Huntingdon—Report of R. Weale, Esq.  
298. Customs Duties—Account  
299. Navy—Returns  
299. Committee of Selection—Eighth Report  
276. Idolatry (India)—Copies of Communications  
298. Bills—Hainault Forest (as amended by the Select Committee)  
297. — Sequestration of Benefices  
297. — Prisons (Scotland) (amended)  
307. — Woods, Forests, &c.  
311. — New Forest Deer Removal, &c.  
312. — Stamp Duties (Ireland) Continuance  
298. — Colonial Property Qualification  
300. — Gunpowder Stores (Liverpool) Exemption  
Repeal  
308. — Ecclesiastical Titles Assumption (amended)  
Court of Rome—Further Correspondence  
291. Customs Duties, &c. (Scotland)—Accounts  
292. Northern Lighthouses—Abstract of Accounts  
299. Metropolitan Roads—Twenty-fifth Report of Commissioners  
Convict Discipline and Transportation—Further Correspondence  
294. Sugar, &c.—Tabular Return  
297. Sugar, &c.—Account  
296. Cuffe-street Savings Bank, Dublin—Return  
303. Captain Graham Moore—Copy of Letter  
304. Acts of Parliament—Return  
301. Poor Relief—Return  
313. Railways—Return  
Cape of Good Hope (Vaal and Orange Rivers)—Correspondence

## HOUSE OF LORDS.

### ROYAL COMMISSION.

**THURSDAY, May 22.**—This afternoon the Royal Assent was given by commission (the royal commissioners being the Lord Chancellor, the Earl of Carlisle, and the Earl of Minto) to the Exchequer Bills Bill, the Indemnity Bill, Heathcote's Divorce Bill, and twenty-four other private Bills.

**ADMINISTRATION OF CRIMINAL JUSTICE.**  
Their lordships then went into committee upon the Administration of Criminal Justice Improvement Bill and the Prevention of Offences Bill.

**LORD CAMPBELL** stated that these Bills extended to Ireland; and he had received a letter from Lord Chief Justice Clerk, of Scotland, requesting that a part of their provisions might be extended to Scotland. He (**LORD CAMPBELL**) should be most willing to follow his advice; but, as only a part of the pro-

visions were applicable to Scotland, he recommended that a separate Bill should be introduced for that purpose. He would either introduce it himself, or if the Lord Advocate introduced it, he would lend his best assistance to carry it through Parliament.

The Bills passed through committee without opposition.

## HOUSE OF COMMONS.

### DUTY ON ATTORNEYS AND SOLICITORS' CERTIFICATES.

**THURSDAY, May 22.**—**LORD R. GROSVENOR**.—I beg to state that it is not my intention this evening to bring on the motion of which I have given notice for the repeal of the attorneys' and solicitors' annual certificate duty, but I shall bring it forward as soon as possible after Whitsuntide.

## NEW STATUTES.

14 VICTORIA. A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract of the titles only are presented.]

### CAP. IX.

An Act for raising the sum of seventeen millions seven hundred and fifty-six thousand six hundred pounds of Exchequer Bills, for the service of the year 1851. **May 20, 1851.**

### CAP. X.

An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively. **May 20, 1851.**

### The annual Indemnity Act.

### CAP. XI.

An Act for the better Protection of Persons under the Care and Control of others as Apprentices or Servants; and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain Cases. **May 20, 1851.**

Whereas it is expedient to make provision for the better protection of persons who are under the care and control of others as apprentices or servants: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

1. *Persons refusing or neglecting to supply necessary food to apprentices or servants, or unlawfully assaulting them, guilty of a misdemeanor.*—That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or House of Correction, for any term not exceeding three years.

2. *Costs of prosecution.*—That the costs and expenses of the prosecution of any such misdemeanor as aforesaid may be allowed and ordered by the court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the Act of the seventh year of the reign of King George the Fourth, chapter sixty-four, or may be allowed and ordered by the Court of Queen's Bench, in case the indictment shall have been removed into that court, to be paid by the treasurer of the county or other officer who would have been liable to pay under the order of the Court in which, but for such removal, the indictment would have been tried.

3. *A register to be kept of young persons hired or taken as servants from any workhouse.*—Not to supersede obligation to keep register as required by 42 Geo. 3, c. 46, and 7 & 8 Vict. c. 101.—That the guardians of every union, and of every separate parish under the management of a board of guardians, and the overseers of every parish not in union or under the management of a board of guardians, shall provide and keep a book or books, and shall cause to be registered therein the name of every young person under the age of sixteen who shall hereafter be hired or taken as a servant from the workhouse of such union or parish, together with the several other particulars specified in the schedule hereunto annexed; and every such entry shall be signed by the presiding chairman of such board of guardians at an ordinary meeting thereof, or by some one of such overseers; provided that nothing herein contained shall be taken to supersede or affect the obligation to keep such register of poor children apprenticed by overseers or guardians as is



required by the statute of the forty-second year of King George the Third, chapter forty-six, and the statute of the eighth year of Queen Victoria, chapter one hundred and one.

4. *Young persons hired from workhouses, or bound out as pauper apprentices, to be visited periodically by officer of guardians or overseers.*—That where any young person under the age of sixteen shall have been or shall be hired or taken as a servant from the workhouse of any union or parish, or shall have been or shall be bound out as an apprentice by the guardians of any union, or the guardians or overseers of any parish, it shall be lawful for such guardians or overseers respectively, and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have gone as a servant from such workhouse or as such apprentice within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorized for the purpose, to visit such young person at least twice in every year, and to report to them in writing whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect.

5. *As to young persons hired or bound to masters residing at a distance from unions or parishes.*—That where any young person under the age of sixteen shall hereafter be hired or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking, or binding, specifying the name and age of the apprentice or servant, and the name, description, and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside; and thereupon it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books, to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been received; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently and in the same manner in all respects as if such young person had been hired or taken from their own workhouse, or had been bound out as an apprentice by themselves.

6. *Guardians and overseers authorized and required to prosecute in certain cases—Costs of prosecution.*—That where any complaint shall be made of an offence against this Act, or of any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom the examination is taken shall certify under their hands that they deem it necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or of the parish, or where there are no guardians by the overseers of the parish, in which the offence shall have been committed, such guardians or overseers, as the case may be, shall, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of the court trying the indictment, or of the Court of Queen's Bench), out of the common fund of the union, or out of the funds in the hands of the guardians or overseers (as the case may be) of such parish.

7. *Justice empowered to bind over officer of guardians or an overseer to prosecute.*—That in the case of a union or parish under a board of guardians the clerk or some other officer of such union or parish, and in the case of a parish not under a board of guardians one of the overseers thereof, may, if such two justices of the peace before whom the examination is taken shall deem it necessary for the purposes of public justice and shall certify as hereinbefore mentioned, be bound over to prosecute.

8. *Interpretation of terms.*—That the words "guardians," "union," "overseers," "justice of the peace," "officer," "poor," "parish," and "workhouse," used in this Act, shall be construed in like manner as in the Act of the fifth year of the reign of King William the Fourth, chapter seventy-six.

9. *Extent of Act.*—That this Act shall extend only to England and Wales.

SCHEDULE.  
Form of Register.

Name of Child.	Age.	Date of hiring or taking as Servant.	Name of Master or Mistress.	Trade or other Description of Master or Mistress.	Residence of Master or Mistress.

WOODS AND FORESTS.—The Bill brought in by Lord Seymour and Mr. Cornewall Lewis to make better provision for the management of the Woods, Forests, and Land Revenues of the Crown, and for the direction of Public Works and Buildings, after reciting various Acts referring to the commission, says that it is expedient that the direction of her Majesty's works and buildings, and such of the duties imposed on the commissioners as do not concern the possessions and land revenues of the Crown should be separated from the management of such possessions and land revenues. The person who may be First Commissioner of her Majesty's Woods and Forests, &c. from the passing of the Act will be First Commissioner of her Majesty's Works and Public Buildings under this Act, and the other commissioners will be commissioners by the style of "The Commissioners of her Majesty's Woods, Forests, and Land Revenues." The Commissioners of Woods, &c. under this Act will perform the duties of the present Commissioners of Woods, &c. except as otherwise provided by the Act. The powers of mortgaging under 4 & 5 Vict. c. 40, and 7 & 8 Vict. c. 1, will be exercised only for discharging existing charges. So much of the 10 Geo. 4, c. 40, and 2 & 3 Wm. 4, c. 1, as relates to the salary of the First Commissioner will be repealed. The Treasury will be enabled to assign separate duties to each commissioner. Her Majesty's principal Secretaries of State, and the President and Vice-President of the Committee of Council, will be *ex officio* Commissioners of Works and Public Buildings. The management of the royal parks, gardens, &c. will devolve upon the new commission unchanged. The salaries and expenses of the department of Works are proposed to be provided for by Parliament.

## THE MAGISTRATE,

### AND PAROCHIAL AND MUNICIPAL LAWYER.

AGAIN the reports of cases relating to parochial, municipal, and magistrates' courts law have been very numerous and interesting.

The question as to the *five years' residence* under the *Removal Act* has been mooted in three cases. In *Reg. v. Llanelly*, 17 Law T. 90, the facts were, that a wife and children had resided in the parish for ten years; but during the last two years the husband had been absent from her, having gone to America. She had received a letter from him since his arrival in America, and was expecting assistance from him to enable her to join him there. Was this absence of the husband a breach of residence? It was argued that, according to the maxim, *ubi usor ibi domus*, there was no such breach, the residence of the husband being by construction of law with the wife. But the Court held otherwise. The facts showed no *animus revertendi*, but the contrary. He had transferred his domicile to America. In *Reg. v. Shavington-cum-Gresley*, 17 Law T. 90, the question was whether relief received by parents on account of their children is relief received by the children within the proviso in sec. 1 of the *Removals Act*, which exempts from the calculation of time the period during which the pauper shall be receiving relief from any parish. The Court held that the children were in receipt of this relief, and, consequently that, inasmuch as they had not resided five years, after deducting the time during which the relief was given, they were removable. In *Reg. v. The Inhabitants of Caldecott*, 17 Law T. 93, the point decided was, that a removal under a valid order was a breach of residence, even though the absence from the parish was for a few hours only. The pauper in this case had been removed under an order, but allowed to return on the same day, and to continue to reside under an agreement between the officers of both parishes that he should be maintained at the expense of the parish on whom the order had been made. But, nevertheless, he was deemed to have been thus put legally out of the parish. "There was," said Lord Campbell, "a period of time, during which he had ceased to reside in the removing parish, and during which he had no power to return, and the duration of this period cannot be taken into consideration."

The *Lunatic Paupers Act* has produced another case. In *Reg. v. Inhabitants of Priest Sutton*, 17

Law T. 91, it was decided, that sec. 5 of 12 & 13 Vict. c. 103, which provides that the costs of lunatic poor, irremovable, shall be borne by the common fund of the union, is applicable to unions under Gilbert's Act.

In a case (*Reg. v. St. George's, Bloomsbury*, 17 Law T. 92) relating to a settlement by apprenticeship, it was decided that a single police magistrate in the metropolis had authority to make a valid allowance of a parish indenture of apprenticeship, under sec. 3 of 3 & 4 Wm. 4, c. 63.

*Reg. v. Dale*, 17 Law T. 91, was a point of practice. A writ *sci. fa.* upon a recognizance of the peace was adjudged to be good, although it described the justices only by the initial letters of their Christian names.

The law of *Highways* occupied the Court in *Reg. v. Charlesworth*, 17 Law T. 91. A public turnpike-road was crossed by tram-roads leading to coal pits. For many years it had been the practice, as fresh pits were opened, to make fresh tram-ways across the road, letting them into a groove in the road, so that the highest part of the tram was on a level with the road. The Turnpike Act gave the trustees power to grant licences for these tram-roads. Under these circumstances, were they an obstruction? The Q.B. held them to be so. But then it was contended that the road had been dedicated to the public by the owner of the pits, with a reservation of a right to make tram-ways over it. But the Q.B. also held that this could not be; so large a reservation as a general right to make as many tram-ways as he pleased was inconsistent with a dedication to the public. It was intimated that the indictment could not have been maintained if the trustees had licensed under their power.

It will be observed that in *Re James Edmondson* (17 Law T. 93), it was decided, that justices are limited in their power to assess compensation to land owners under the *Lands Clauses Act*, to *six months* from the time when the matter of the complaint arose, the 11th sec. of 11 & 12 Vict. c. 43, being held to extend to their jurisdiction under that Act.

There is also a point in *Criminal Law* to be noted. In *Reg. v. Pocock* (17 Law T. 91), a coroner's inquisition charged defendants with being trustees of a turnpike-road, and that it was their duty to contract for its reparation, but they neglected to do so, whereby a cart went into a hole and the deceased was killed. It was held that the indictment did not disclose a sufficient duty to make the neglect of it criminal. "The cases cited," said Lord CAMPBELL, "show a *personal duty*, the neglect of which has directly caused death. But how do those cases apply to trustees of a highway? How can it be said, at their omission to raise a rate, or contract for the reparation of the road, directly causes death? If so, the surveyors or inhabitants of the parish would be equally guilty of manslaughter, for the law casts upon them the duty of keeping the roads in repair." And ERLE, J. thus defined the nature of the duties that made the liability. "In all the cases of indictments for manslaughter, where the death has been occasioned by the omission to discharge a duty, it will be found that the *duty was one connected with life, so that the ordinary consequences of neglecting it would be death.*" This is a very useful definition to be borne in the memory.

Lastly, in the case of *Ratt v. Parkinson* (17 Law T. 94), an order had been made by two justices for payment of a church-rate on the 6th May. On the following day a minute of the order was served, and he still refused to pay. A formal order and warrant of distress were then drawn up, and dated 6th May. The former order was filed at the Midsummer Sessions, and the distress warrant executed in October following. On this an action of trespass was brought, but the justices were held to be protected by the *Justices' Protection Act*, 11 & 12 Vict. c. 44, s. 1, they being then acting within their jurisdiction, although they had not followed the very words of the Act.

E. W. C.

LIBERAL COMPENSATION.—On the passing of the Municipal Reform Bill, the then town-clerk of this borough (Mr. T. Burbidge) was dismissed from his office, and Mr. S. Stone elected in his stead. Mr. Burbidge sent in a claim of 28,000*l.* for loss of office, but the new corporation refused to allow him anything, alleging against him serious charges of misconduct whilst in office. He then appealed to the Lords of the Treasury, and on Monday last the inhabitants were astounded at learning that their lordships had awarded him compensation amounting to 889*l.* a year for life, together with the arrears,

amounting to many thousands of pounds.—*Lincoln Mercury.*

**NEW MAGISTRATES.**—On Wednesday last, Admiral Mends, Josiah Glencross, and Alderson Hodson, esq. took the oath as magistrates for the borough of Devonport.

**PRISONS OF GREAT BRITAIN.**—The sixteenth report of the inspectors appointed to visit the different prisons of Great Britain, has just been presented to both Houses of Parliament, by command of her Majesty. The report refers to the northern and eastern districts. Mr. F. Hill, the inspector, states that efforts had been made to introduce useful labour into the prisons, and enlarged provisions had been made for instruction in reading and writing at several prisons. If the principle of using each prison solely for the confinement of male or of female prisoners was adopted, he supposes that, with a slight modification of the law, upwards of fourteen prisons might be at once wholly given up. The difficulty of guarding against escapes of prisoners employed in agriculture is reported to have been greatly over-estimated. The number of prisoners in the district in 1850 was less by 235 than in 1849, but the number of prisoners in confinement at the end of 1850 was considerably greater than at the end of 1849.

**THE STIPENDIARY MAGISTRATE FOR LIVERPOOL.**—We understand that Mr. Mansfield, who formerly was attached to this circuit, has accepted the office rendered vacant by the death of Mr. Rush-ton, at a salary of 1,000*l.* per annum. The learned gentleman has been warmly recommended by Barons Parke and Alderson, and several of the other judges. It is the intention to have two courts, one of which will be presided over by the honorary magistracy.—*Liverpool Standard.*

**DIMINUTION OF PAUPERISM.**—A return made by the Poor-Law Board to Parliament of the cost of the in-door and out-door relief of the poor in 607 unions and parishes in England and Wales, for the half-year ended at Lady-day last, has just been printed. This return shows that the total cost of the relief of the poor for the last half-year amounted to 1,679*l.* 42*s.* 9*d.* being a decrease of 140,433*l.* or 7.7 per cent. as compared with the cost of relief for the corresponding half-year in 1849-50.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

THE Consolidation Acts, if they have immensely abbreviated private Acts, and diminished the cost of procuring them, have certainly occasioned more litigation than any other statutes passed within our remembrance. Scarcely a number of the LAW TIMES issues without one or more reports of cases decided upon their construction, especially of the Lands Clauses and Railways Clauses Acts. In the second edition of *Cox's Consolidation Acts*, the decided cases are collected, and occupy some thirty or forty closely-printed pages, the produce of four years only! And yet they appear to be as far as ever from being settled by judicial interpretation. Again, we have to note two reports upon these statutes. In *The East and West-India Dock and Birmingham, &c. Company v. Gatliffe*, 17 Law T. 88, the 68th section of the Lands Clauses Act was questioned, whether the compensation there given to owners and occupiers of land extends to consequential injury, as where a shop was so affected by the proximity of the railway that the customers were driven in another direction. The Court below had granted an injunction to restrain proceedings by the injured party against the company, to compel them to summon a jury to assess compensation; but the Lord Chancellor, on appeal, dissolved the injunction, holding it to be properly a question for the jury, as "I can see no reason to doubt, if the defendant has in fact sustained damage by the cause he has alleged, he is a person entitled to compensation, and under the statute he is entitled to have that question submitted to a jury." In *Re James Edmondstone*, 17 Law T. 93, a new and important point was raised. An order was made by justices to assess compensation for "lands taken by a railway company under ss. 22 and 24 of the Lands Clauses Act. By that Act no limit of time is imposed within which such an order may be made. But the 11th section of the 11 & 12 Vict. c. 43, enacts, that in all cases where no time is limited in the Act relating to each particular case for making any complaint, &c. to justices, such complaint, &c. shall be made within six calendar months "from the time when the matter of such complaint, &c. arose." The question now was, whether this provision applied to the powers given to justices under the above section of the Lands Clauses Act, and the Q. B. held that it did so, and

that an order made after the lapse of six months was bad.

In *Reg. v. The London and North-Western Railway Company*, 17 Law T. 92, the Q. B. refused to issue a peremptory writ of *mandamus*, commanding the company to purchase lands, and complete their line, where they had neglected to do so in time to avail themselves of their compulsory power; the Court holding that a *mandamus* will not go to command an impossibility, even although that impossibility had been produced by the laches of the defendant.

### WINDING UP.

THE liabilities of a company were disputed in *Ex parte James*, 17 Law T. 88. The provisional committee, on behalf and for the purposes of the company, took a lease of offices for twenty-one years, determinable at seven or fourteen years, and the trustees executed it by the direction of the committee. There was a subscribers' agreement. One of the trustees had paid moneys on account of rent since the dissolution of the company; and for these he claimed to prove against it. But Vice-Chancellor BRUCE held that the company was not liable, as it was not within the *provisional* powers and duties of the committee to contract for a continuing lease. In *Re The Royal Bank of Australia*, 17 Law T. 88, the Court sanctioned a permission which the Master had given to certain persons claiming to be creditors of the company to inspect certain documents of the company in the possession of the official manager.

The first case in which the Court has formally confirmed an arrangement made by the Master with a contributory, to release him from all further liability, on payment of a certain sum, is that of *Re the Independent Assurance Company*, 17 Law T. 89. This arrangement was made under the powers given to the official manager by sec. 88. E. W. C.

### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]  
*Danvers Iron Company.*—Call on all the contributories of 2*l.* per share, on May 28. *Kinderley.*  
*London and Birmingham Railway, and Northampton, Daventry, Leamington, and Warwick Railway Company.*—Call of 2*l.* 4*s.* on all contributories who have not paid up that sum, on May 30. Blunt.

### REAL PROPERTY LAWYER AND CONVEYANCER.

SEVERAL decisions of interest are to be noted by our readers engaged in this branch of the law.

Probably they will remember the remarkable case of *Cutts v. Salmon*, 16 Law T. 502, relating to the purchase by a solicitor of his client's interest in some property. This case has come again before the Court in *Cutts v. Salmon*, 17 Law T. 87, and Vice-Chancellor BRUCE distinctly laid it down, that where the question was whether a subsequent confirmation or acquiescence by the client was requisite to secure the solicitor's title, that acquiescence must be "plain and strong" in order to entitle him to claim specific performance. This case confirms the general opinion as to the danger of any purchase by a solicitor of property from his client.

Another case on the construction of a will, is that of *Philps v. Evans*, 17 Law T. 87. A. bequeathed her personal estate in trust for B. for life, with remainder to her niece C. for life, with limitations to C.'s children, and, in default of children, to another niece D. for life, and with limitations to her children, and in the event of C. and D. dying without having had a child, in trust for the personal representatives or next of kin of testatrix's late father. C. and D. did die without children. Who were the next of kin of the father, intended by the will: those who were such at the death of the testatrix, or those who were such at the death of the tenant for life? It was held to pass to the former. Another will case is *Doe dem. Parsey v. Hemming*, 17 Law T. 89. A. devised to B. his heirs and assigns for ever, "all those three several freehold messuages in N. street, together with the piece of freehold ground in the rear of the said messuages

whereon I have erected certain cottages, part of Parsey's gardens, and which said last-mentioned hereditaments were conveyed to me by indentures," &c. In the rear of the three messuages was a piece of freehold land, which was included in the conveyance alluded to; but the only cottage to which the words were applicable was built upon some leasehold land adjoining, which came to the testator at a different time and by a different conveyance. ERLE, J. well expressed the opinion of the Court:—"There is a perfectly clear intention to pass freehold land behind the three messuages in North-street, which was included in the conveyance of September, 1804. That is a true demonstration of the land behind the three houses, which was acquired by the testator at the same time as those three houses. Then there is a false demonstration, 'whereon I have erected certain cottages;' but that false demonstration would neither hinder the strip of freehold land from passing under that devise, nor will it operate to pass the leasehold land, to which all the other words of the devise are wholly inapplicable."

### Queries.

#### PRACTICE.

WILL any of your correspondents inform me whether it is the practice for a vendor to retain deeds that have been enrolled pursuant to Act of Parliament, such as bargains and sales, deeds for barring entails, &c. where they relate only to the land sold? Even if such deeds be considered of record (which at least seems doubtful), and the purchaser, therefore, on account of the decision in *Campbell v. Campbell*, not entitled to attested copies of them, when retained as relating to other property of the vendor, it does not seem reasonable that the vendor should refuse to give them up simply because they are of record, when they do not relate to other property. Sir E. Sugden (Vendor and Purch. 11 edit. p. 476) says, "In some cases a purchaser can obtain attested copies of instruments on record," as where the vendor procures an attested copy of an instrument on record for the purpose of examination with the abstract, "the purchaser is of course entitled to it on the completion of the purchase." H. J.

#### COUNTING FOLIOS.

WILL your correspondent, C. H., in last week's LAW TIMES, or any other of your subscribers, have the goodness to inform the Profession, whether the registrar's certificate on deeds relating to lands in Middlesex and Yorkshire, of the registration of memorials thereof, should or should not be included in the number of folios contained in the deed; and whether (as in the case of figures) there be any decision, dictum, or published opinion on the subject? I have made repeated inquiries of different members of the Profession, as to their practice on the point, but I could never obtain any more satisfactory answer than that, for caution's sake, they included the certificate in the counting.

A SUBSCRIBER.

#### CONDITIONS OF SALE.

A CLIENT called upon me this morning, to ask my opinion of certain conditions of sale. One of them was to the effect that the conveyance was to be prepared by the vendor's solicitor, at the expense to the purchaser of 7*l.* 7*s.*, exclusive of stamps. Might I be allowed, through the medium of your journal, to ask whether such a stipulation does not amount of the unprofessional? I need scarcely add, that I advised my client to have nothing to do with the sale. London, 22nd May, 1861. S. H.

Nearly 20,000*l.* worth of land has just been secured for the Birmingham Freehold Land Society. This will make nearly 800 freeholds, in addition to the 945 previously made by this society, or a total of more than 1,700! These purchases furnish another proof of the immense power of association.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I observe you say in your paper of the 3rd inst. that the principle of registration is approved by experience, and you refer to the address of the Yorkshire Solicitors as proof of your assertion. But I see in that address (page 48 of the 3rd of May), under the fourth head thereof, those gentlemen particularly refer to the difficulties and objections attendant on registration of deposit of deeds. Now, I consider that an objection to the principle of the

measure; and, as in my practice I find instances of deposit quite as numerous as all the other instances of dealings put together, I hold it to be a most essential part of that principle; and those objections and difficulties ought to be removed or cleared up before the promoters of the measure can justly appeal to experience in that important part of the question.

For myself, I am no wholesale opponent of registration. I believe, in some instances, it would be beneficial; but, I fear, in the majority, it would be prejudicial; and especially, as to the beneficial practice of occasional deposit, it would, by checking that, cramp the commercial dealings of the country to an extent, as I believe, most serious to contemplate. I see Lord Campbell seems for the present disposed to dispense with PLANS altogether! The measure does not assume a very practical shape.

I am, Sir, yours, &c. F.  
Littlehampton, May 21, 1851.

**INCUMBERED ESTATES.**—We may state that it is not likely that any Bill for extending the duration of the Incumbered Estates Commission will be introduced in the present session of Parliament. Should such a measure be deemed hereafter expedient, there will be ample time for introducing it in the next session, as the right to present petitions for sales may be exercised up to July, 1852. We may avail ourselves of the present opportunity to contradict a report circulated, we understand, very generally amongst the legal profession in Ireland, that it is intended to transfer the commissioners' jurisdiction to the Irish Court of Chancery.—*Globe*.

## THE MERCANTILE LAWYER.

### Summary.

A DECISION of considerable importance to manufacturers was given by the Court of Ex. in the case of *Halliswell v. Eastwood*, 17 Law T. 96. The question was, whether mules used in a cotton factory are fixtures? It appears that they are fixed, some by means of screws to wooden fastenings, others into stones with molten lead. The judgment will reward attentive perusal, as it is a learned and interesting review of the law of distress as it relates to fixtures. The Court decided that the machinery was not distrainable, one reason being, that "the object and purpose of annexation was not to improve the inheritance, but to render the machinery steadier, and for the more convenient use of the inheritance." This test is worth committing to memory, as the principle will apply to many other cases.

In *Re Dawson*, 17 Law T. 100, the Court of Bankruptcy held, that where an insured ship was lost, and the insurance recovered by the owner, the seamen were entitled to be paid in full out of the insurance money.

A deputation to urge the repeal of the present receipt stamp tax, or for its reduction to an uniform rate of one penny, had an interview on Thursday with the Chancellor of the Exchequer, at his official residence. The deputation consisted of Mr. Brotherton, M.P., Mr. Moffatt, M.P., Messrs. Bradbury, Schofield, Hackblock, Sim, and Christy.

## COUNTY COURTS.

THE question has at length been raised and decided, whether sections 11, 12, and 13 of the County Courts Extension Act (13 & 14 Vict. c. 61) extend to the case of a judgment on demurrer. It turned on the meaning of the word "recover," in the 11th section; and that is, said Jervis, C.J. "what the plaintiff gets in the action. Here he has got a farthing, which is less than 20s.; this, therefore, is an action of covenant in a Superior Court, in which the plaintiff has recovered less than 20s. and which is not within the exceptions in the Act: I think, therefore, he is not entitled to costs." The Court would not decide the meaning of the word "verdict," in the 12th section, but intimated a doubt whether in *Read v. Skrubsole*, 1 Cox, Mac. & Herts. it was rightly decided to mean a verdict on issue joined. (*Prew v. Squire*, 17 Law T. 95.)

Another new and interesting point was raised in *Breese v. Owens*, 17 Law T. 97, namely, whether a writ of trial for any debt or demand not exceeding 20s. might, under s. 17. of 3 & 4 Wm. 4, c. 42, be directed to a judge of the County Court. The statute says that such issue may be tried "before

the sheriff of the county where the action is brought, or any judge of any Court of Record for the recovery of debts in such county;" and the County Courts are by the Act made Courts of Record. The judges differed in opinion upon the question, POLLOCK, C.B. and ALDERSON, B. holding that the writ might be sent to the County Court judges; PARKE and PLATT, BB. holding that it could not. A writ of error will probably be brought, in order to procure the settlement of a point which is one of great practical importance.

But here we may direct the attention of the reader to a remark which fell from ALDERSON, B. and with which PARKE, B. expressed his full concurrence,—that if a writ might be so directed to a County Court judge, he would be bound to conduct the trial according to the rules and practice of the Superior Courts, and not according to those of the County Courts. Thus, he must have a full jury, and may not examine the parties, &c.

Another case upon the form of *affidavit*, in a motion for a *suggestion*, illustrates the extreme care required in the preparation of that document. The rule is, that it must allege, *with certainty and precision*, that plaintiff did not, at the time of action brought, dwell more than twenty miles from the defendant. Therefore, where it stated that plaintiff at the time, &c. dwelt at Birmingham, which is within twenty miles from Wolverhampton, the place where defendant dwelt, and carried on his business at the time this action was commenced, it was held to be insufficient, because, as ALDERSON, B. remarked, "How can you say that from Wolverhampton includes Wolverhampton." Such are the verbal quibblings to which sensible judges are compelled, by the practice of our Courts, to condescend. (*Anonymous*, 17 Law T. 98.)

The sixth part of *Coa, Macrae, and Hertlet's County Court Cases and Appeals*, including *Insolvency*, is now ready, bringing down the decisions to Hilary Term last. This is the regular authorised series of Reports of County Courts Cases.

THE following orders in Council, dated Buckingham Palace, 14th April, 1851, appeared in the *Gazette* of Tuesday, 25th April last:—

"That from and after the 31st day of May, 1851, the parishes and places of Rye, Winchelsea, Broomhill, Icklesham, Udimore, Peasmarch, Iden, Playden, East Guldeford, Beckley, Northiam, and Brede, now in the district of the County Court of Sussex, holden at Hastings, shall cease to be within the district of the said Court holden at Hastings, and shall form the district of a County Court to be holden at Rye aforesaid; and a County Court for the purposes of the above-mentioned Acts shall accordingly, from and after such day, be held at Rye aforesaid, by the name of the 'County Court of Sussex, holden at Rye,' for the said parishes of Rye, Winchelsea, Broomhill, Icklesham, Udimore, Peasmarch, Iden, Playden, East Guldeford, Beckley, Northiam, and Brede."

"And that from and after the said 31st day of May, the parishes of Brampton, Castlecarrock, Cumrew, Cumwhiton, Denton Upper, Denton Nether, Farlam, Hayton, Irthington, Lanercost, Walton, Bewcastle, Stapleton, and Scaleby, and the townships of Hethersgill and Kirklington Middle, now in the district of the County Court of Cumberland, holden at Carlisle, shall cease to be within the district of the said Court holden at Carlisle, and shall form the district of a County Court, to be holden at Brampton aforesaid, and a County Court for the purposes of the above-mentioned Acts shall accordingly, from and after such day, be held at Brampton aforesaid, by the name of the 'County Court of Cumberland, holden at Brampton,' for the parishes of Brampton, Castlecarrock, Cumrew, Cumwhiton, Denton Upper, Denton Nether, Farlam, Hayton, Irthington, Lanercost, Walton, Bewcastle, Stapleton, Scaleby, and the townships of Hethersgill and Kirklington Middle."

WM. L. BATHURST.

## ECCLESIASTICAL LAWYER.

**SEQUESTRATION OF BENEFICES.**—The Bill brought in by Mr. Frowen and Mr. Child to amend the law relating to the sequestration of benefices for debt, states in the preamble, that whereas in many cases where the powers of the Act 1 & 2 Vict. c. 106, are put in force, and also in other cases and in cases of sequestration of benefices by creditors, no due provision is made for the maintenance and support of the curate or other spiritual person licensed or authorised for the cure of souls, it is desirable to provide a remedy. The Bill proposes that in cases of sequestration of benefices the bishop of the diocese shall be required to set aside a portion of the income of such benefice sufficient to provide for the needful support of the cure of souls. The bishop must give a certificate of what he considers a suffi-

cient sum for the purpose, which certificate will have complete authority against creditors.

## THE LAWYER.

### Summary.

**EQUITY PRACTICE.**—It appears that the Court will, in certain circumstances, interfere, although reluctantly, with the discretion of the Master. Thus, in *Digby v. Boycott*, 17 Law T. 88, an agreement for the purchase of an estate was declared to be beneficial, although the Master had certified that it would not be so.

In *Baxter v. Losh*, 17 Law T. 89, leave was given to set down a special case for argument, under Turner's Act, a married woman being a party.

**COMMON LAW.**—In *Acraman v. Hernaman*, 17 Law T. 90, a warrant of attorney filed without an affidavit of the time of its execution was held to be null and void against creditors, and any judgment signed upon it is a nullity also. The petitioner will make a careful note of this.

A very strange matter has come before the Court in the case of *Dunahley v. Parie*, 17 Law T. 96. It seems that there has been some irregularity in the issuing of writs in the Writ-office; at least, so it is alleged by the clerks to the attorney, who had been charged with issuing forged ones; but the clerks in the Writ-office stoutly deny it. As the matter is undergoing investigation, we refrain from remark at present.

*Bruford v. Griffin*, 17 Law T. 99, was a question of costs. There were several defendants, who appeared by separate attorneys, and obtained a verdict generally. It was held not to be necessary that all should attend the taxation of costs, or that the several bills of costs should be taxed at the same time.

We trust that, ere another year has passed, questions as to the competency of witnesses will cease to arise, by the abolition of all disabilities. The case of *Harding v. Hodgkinson*, 17 Law T. 97, admirably illustrates the absurdity of the existing practice. The plaintiff was a trustee under a will directing him to sell land and divide the proceeds among the testator's family. The title was by user. In an action of trespass the testator's son was called to prove acts of ownership. It was objected that he was interested, inasmuch as the proceeds of this very land belonged to him in part; but the Court held him to be competent under Lord Denman's Act. Here we see the part-owner of the property admitted to the witness-box, while the trustee, who has no beneficial interest, was inadmissible; yet there are persons who would preserve this absurdity.

## LEGAL INTELLIGENCE.

**ADMISSION OF ATTORNEYS IN TRINITY TERM, 1851.**—The periodical list published by the Incorporated Law Society, in reference to this subject, has appeared, and shews the undermentioned results:—Applications to be admitted to practice in Trinity Term, 1851, 162; notices of admission in Easter Term, 1851, to be added to the list pursuant to judge's order and rule of court, 9; notices of admission in Trinity Term, to be added to the list pursuant to judge's order, 6; applications to the Court for the taking out and renewal of certificates on the last day of Easter Term, 10; applications to a judge at chambers to take out and renew certificates on the 14th of May, 1851, 21; making the total number of names set down in the present list, 208; whilst in that published for Easter Term these amounted to 236.

The testimonial fund for the benefit of the family of Mr. Rushton, the late stipendiary magistrate, has been closed. The total amount contributed is £5,600.

**ARREST OF ABSCONDING DEBTORS.**—The Liverpool Guardian Society have been vigorously following up the needful measures for putting a stop to the depredations of fraudulent persons, who almost daily leave this country (especially through facilities at Liverpool) with property belonging to creditors, whom they are thus most seriously injuring. The president, secretary, and solicitor of the society have been in London for some days, holding conferences with many noblemen (law lords and others), and with members of the House of Commons. Some difficulty occurred as to the depository of the required power of arrest in the country and the out-ports, and some modifications on the subject have been therefore submitted to the Lord Chief Justice, whose opinion on the question had been sought by Government. Should his lordship find the difficulty removed, the Bill proposed by the Guardian

Society, as prepared by their solicitors and approved by the principal law authorities of Liverpool, may be expected to receive the immediate sanction of the Legislature. It will be introduced in the House of Lords by the Earl of Harrowby, who, with Lord Wharncliffe, Lord Beaumont, Mr. Beckett, M.P. for Leeds, and our local representatives, have taken the most cordial interest in its success.—*Liverpool Mercury*.

**MELANCHOLY DEATH OF A SOLICITOR.**—At ten o'clock on Tuesday night, the police-constable on duty found, in the garden of Mr. Heal's house, 62, Euston-square, a gentleman lying in a helpless state, having on his person a gold watch and a large amount of property. The police without delay conveyed the unfortunate gentleman to the St. Pancras Workhouse, where the master had him placed in a comfortable bed in the infirmary, and attended him until the senior and junior house-surgeons arrived, who exerted all their skill to save his life; but he died in a state of insensibility at four o'clock the following morning. Upon examining his papers, it appeared that the deceased was Mr. Charles Foulkes, solicitor, of Leicester, aged 36, and that he had come to town to consult, on some law business, Mr. W. Sanger, of Essex-court, Temple, with whom he lunched, and after that took leave of him in apparently the best health and spirits. On his way to the Euston-square station, he visited another friend near the square; and after parting with him, was not heard of until he was found by the police.

**PROTECTION TO APPRENTICES AND SERVANTS.**—THE NEW ACT.—Yesterday the important Act of Parliament which received the royal assent on Tuesday, for the better protection of persons under the care and control of others as apprentices or servants, and to enable the guardians and overseers of the poor to institute and conduct prosecution, in certain cases, was printed. This act, which resulted from a late case, contains nine clauses, and is now in force. It is provided that persons, masters or mistresses, refusing or neglecting to supply necessary food to apprentices or servants, or unlawfully assaulting them, to be guilty of a misdemeanor, and liable to three years' imprisonment, with or without hard labour. The costs of such prosecution are to be allowed. A register is to be kept of young persons under sixteen, hired or taken as servants from any workhouse, with particulars as prescribed in a schedule annexed to the Act. Young persons who are hired from workhouses, or bound out as pauper apprentices, are to be visited twice at least in every year, and the officer is to report to the guardians, "in writing, whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect." Where the residence is more than five miles, the parties are to be visited by the officers of the union or parish in which they reside. The act authorizes and requires parish officers to prosecute in cases where injury has been inflicted on a poor person under sixteen years old. The justices are to bind over parish officers to prosecute, and the costs of prosecutions are to be allowed. The act only extends to England and Wales.

**MEMBERS OF THE SELECT COMMITTEE ON THE INCOME TAX,** to be nominated by Mr. Hume this evening:—Mr. Hume, Sir C. Wood, Mr. Horsman, Mr. Harries, Mr. Labouchere, Lord Harry Vane, Mr. Dimsell, Mr. T. Baring, Mr. Henley, Mr. Cobden, Mr. F. Peel, Mr. Roebuck, Mr. Ricardo, Mr. Henry, and Mr. Scholefield.

**ACTS OF PARLIAMENT.**—Among the Parliamentary papers issued, is a statement of the number of copies of Acts of Parliament and volumes of Acts sold, and the amount of money received therefrom, out of the stock of Acts of Parliament purchased from Messrs. G. and J. Grierson, on the expiration of their patent for printing Acts of Parliament in Ireland to the 31st of March, 1851. The total number of Acts disposed of is 14,240, of which 3,014 were supplied gratis to public departments; and the total number of volumes 162, of which 151 were supplied to public departments. The total value of the whole was 573*l.* 4*s.* 7*d.*, of those given away gratis 216*l.* 4*s.* 8*d.*

**COLONIAL PROPERTY QUALIFICATION.**—Among the printed Bills issued on Monday is one brought in by Mr. Hutt, the object of which is to make property situate in any colony or possession of Her Majesty a qualification for a seat in Parliament.

## CORRESPONDENCE.

TO THE EDITOR OF THE LAW TIMES.

SIR,—My attention has been directed to the report in your last publication, of the proceedings of the annual meeting of the Metropolitan and Provincial Law Association in Lincoln's-inn-fields, on the 16th ult. in which I am represented to have stated, in reference to the Registration Bill, that "in the neighbourhood of Manchester they objected to registration altogether." This, however, is in-

accurate. My statement was, that "in Manchester the Profession generally objected to the scheme for registration as proposed by the present Bill, and that some objected to registration altogether." I am the more disposed to trouble you with this correction, from the circumstance that a copy of the petition to the House of Lords against the scheme of registration as set forth in the present Bill, from the Manchester Law Association—of which I am a member, and of a large proportion of whose members I was at the meeting of the 16th ult. a representative—appears in the same number of the *LAW TIMES*, and in the article immediately preceding the report of the proceedings at the meeting in question, and to obviate the apparent inconsistency between the views of the petitioners (who form the great majority of the Profession in Manchester and the neighbourhood) as set forth in the petition, and those which in the report referred to, I am (under misapprehension) represented to have stated them to be. I shall be obliged by your correcting the error in your next publication in the mode you may deem most efficacious.

I am, Sir, yours, &c.

St. James's-square, GEORGE THORLEY.  
Manchester, May 21, 1851.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to grant the place of one of the Lords of Session in Scotland to Duncan M'Neill, esq. Dean of Faculty, in the room of Joshua Henry Mackenzie, esq. resigned.

The Queen has been pleased to appoint John Dalrymple, jun., esq., to be lieutenant and sheriff principal of the shire of Wigton, in the room of Randolph Earl of Galloway, resigned.

The Lord Chancellor has appointed Henry Whitford, of St. Colomb, in the county Cornwall, gent.; James Tree, of Worcester, gent.; and William Henry Atkinson, of Blandford, in the county of Dorset, gent. to be Masters Extraordinary in the High Court of Chancery.

William Furner, esq. judge of the County Court of Sussex, has, with the approval of the Lord Chancellor, been pleased to appoint George Slade Butler, of Rye, solicitor, to be the clerk of the County Court holden at Rye.

The Right Hon. Sir John Jervis, Lord Chief Justice of her Majesty's Court of Common Pleas, has been pleased to appoint Edmund Butler Edwards, of Pontypool, in the county of Monmouth, gentleman, to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women under the Act passed for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, in and for the county of Monmouth.

We believe that the office of Clerk of the Crown (vacant by the present Lord Cottenham taking his seat in the House of Peers) is to be filled up by the appointment of Charles John Tindal, esq. son of the late Lord Chief Justice.

**COMMISSION SIGNED BY THE LORD LIEUTENANT OF STAFFORDSHIRE.**—The Hon. Henry William George Paget, commonly called Lord Paget, to be deputy-lieutenant.

**THE SCOTCH JUDICIAL AND LEGAL APPOINTMENTS.**—The Summer Session of the Court of Session commenced in Edinburgh on Tuesday. The judges, as usual, breakfasted with the Lord President, and afterwards drove in their private carriages to the Parliament-house. The first division was crowded by a brilliant assemblage of ladies and gentlemen, in order to witness the ceremony preliminary to the inauguration, first of Mr. Rutherford as one of the judges of the Court, in room of Lord Moncreiff, deceased; second, of Mr. Moncreiff as Lord Advocate; and third, of Mr. Cowan as Solicitor-General. All the judges were present except Lord Dundrennan and Lord Wood. The Lord President having pronounced a feeling eulogium upon the personal and professional merits of his late colleagues, Lord Moncreiff, deceased, and Lord Mackenzie, resigned, Mr. Rutherford, Mr. Moncreiff, and Mr. Cowan then entered the Court. The two latter presented the Lord President with their commissions, which his lordship ordered to be duly recorded by the clerk. Mr. Rutherford then tendered his letter of appointment from her Majesty, which was read *in extenso*, all present standing during the time. This was followed by the administration of the oaths of allegiance, abjuration, and fidelity to Mr. Moncreiff and Mr. Cowan, who then put on their silk gowns, and received the congratulations of their friends in and around the bar. Mr. Rutherford then retired to undergo the usual probation of hearing two cases in the Outer House. The first of these cases Mr. Rutherford heard beside Lord Murray. The hearing occupied about three-quarters of an hour; and, at its close, Mr. Rutherford

returned to the first division, accompanied by Lord Murray, and made a statement of the case, with the judgment which he thought should be pronounced in regard to it. Their lordships acquiesced in the judgment, when Mr. Rutherford bowed and left the Court. The remainder of his probation is to be concluded this day (Friday), when he will take his seat in the Outer House. It was intended that Mr. M'Neill, elevated to the judgeship vacant by the resignation of Lord Mackenzie, should also have presented his letter of appointment, but, owing to his absence in the country, he could not forward his formal acceptance of the office till Monday. Her Majesty's letter of appointment had not come to hand. This document was expected to arrive in time, however, to enable him to present it yesterday, and it was intended that he and Mr. Rutherford should take their seats at the same time. Mr. Rutherford is to assume the title of Lord Rutherford, and Mr. M'Neill that of Lord Colonsay, from his family estate. Lord Colonsay (says the *Scotsman*) is to supply the vacancy created in the Court of Justiciary by the death of Lord Moncreiff; that caused by the resignation of Lord Mackenzie having been filled up some time ago by Lord Dundrennan. Lord Ivory is to take the place of Lord Mackenzie in the first division, and Lord Murray that of Lord Moncreiff in the second division of the court. The *Daily Mail* states that the Faculty of Advocates are likely to choose for Dean, in the place of Lord Colonsay, Mr. Adam Anderson. This learned gentleman, who will thus be raised to the head of the Scottish Bar, was admitted advocate in the year 1818, two years after his predecessor, Mr. M'Neill. Mr. Anderson filled the office of her Majesty's Solicitor-General for Scotland from the year 1842 (when he succeeded Mr. M'Neill, who became Lord Advocate on the death of Sir William Rae in October of that year), until the resignation of Sir Robert Peel's cabinet in July 1846.

## COURT PAPERS.

Court of Queen's Bench.

Trinity Term, 1851.

CROWN PAPER.

Reg. on the prosecution of St. Pancras v. the Overseers of the Poor of Leeds, from Middlesex  
Reg. v. Charles Carr, from Yorkshire  
Re an award between the Great Western Railway Company and the Inhabitants of Tilehurst, from Berkshire  
Reg. on the prosecution of the Marquis of Bristol and Ors. v. Tithe Commissioners, from Lincolnshire  
Reg. v. William Haslam and Another, from Lancashire  
Reg. v. William Hellier, from Dorsetshire.

NEW TRIAL PAPER.

For Judgment—Sivewright v. Archibald  
For Arrangement—Doe dem. Warren and Another v. Brydges.

Easter Term, 1851.

Cort and Another v. Ambergate, &c. Railway  
Doe dem. Player and Others v. Dashwood  
Cooper v. Bull  
Doe dem. Newman v. Exham  
Walton v. Midland Railway Company  
Scholefield v. Andrew  
Doe dem. Palmer v. Ayre  
Reg. v. Soafie and Another  
Armistead v. Wilde  
Eaton v. Swansea Water Works Company  
Doe dem. Lord Ashburnham v. Michael  
Evans (clerk) v. George (clerk).

Tried during Easter Term, 1851.

Doe dem. Baddley and Another v. Massey  
ENLARGED RULE PAPER.

Eoe v. Manser  
Jackson and Others v. Charing-cross Bridge Company  
Lane and Others v. Hooper and Another  
Todd and Others v. Hill  
Reg. v. Blackstone  
Reg. v. Commissioners of Inland Revenue  
Reg. v. Schlesinger (for Bail Court)  
Reg. v. Cameron's, &c. Railway Company, ditto  
Reg. v. Guardians of St. Martin's-in-the-fields, 2nd day  
Reg. v. Ingham, ditto (Bail Court)  
Reg. v. North-Western Railway Company, 3rd day  
Reg. v. Inhabitants of Truweston (last day of term for Bail Court).

DEMURRERS.

Tarleton v. Liddell and Another, for judgment  
Blair and Another v. Ormond and Another, ditto  
Gibson and Another v. Vernon and Another, dem. for arrangement  
Lowndes v. Earl Stamford and Warrington, ditto  
Cooke v. Cunliffe, special case for Chancery  
Booth v. Monmouthshire Railway Canal Company, dem.  
Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company, dem.  
Simms and Others v. Maryatt, special case  
Orchard and Others v. Honchin and Another, dem.  
The Derbyshire, Stafford, and Worcestershire Junction Railway Company v. Tebbutt, dem.  
The Governor and Company of Chelsea Water-works v. Bowley, special case

List of London Causes for the sittings after Easter Term.

REMARKS.

Lloyd v. Underwood, S.J.  
Barker v. Nias, stayed  
Walker v. Clements, ditto  
Sigrist v. Drummond  
Harragan (pauper) v. Lawrence and Another  
Corcoran v. Gurney, S.J.  
Amira v. Wackerbarth and Another, S.J.  
Reg. v. Cecil and Another  
Heygate and Others v. Freeman



Richards and Another v. The St. Katherine Dock Company  
 Pullen v. Hassell, S.J.  
 Doe dem. Green v. Shaw  
 Lord G. W. Loftus v. Cornwall, S.J.  
 Dephee v. Hickling

## NEW CAUSES.

Bartlet (clerk) v. Evans  
 Wilson v. Simpson, S.J.  
 Reg. v. Jackson and Others  
 Christmas v. Bernard  
 Doe v. Challis  
 Hooper v. Hollinsworth  
 Tandy v. Fleetwood  
 Scott v. Salmon  
 Leachman v. Thompson and Wife  
 Sewell v. Lawford  
 Sewell and Others v. the Same  
 Davies v. the Same  
 Hiam v. London and North-Western Railway Company  
 Fennell v. Pinder

## Common Bench.

To 2nd day—Re a plaint entered in the County Court of Shropshire, at Wem—Wilson v. Franklin  
 To 10th day—Dunkley v. Farris  
 Generally—Re Sharp (clerk) and Others, on behalf of J. F. Carr (prohibition).

## NEW TRIALS.

Michaelmas Term, 1848.

Hamilton v. Cochrane. Stands for arrangement.

Easter Term, 1861.

Dews v. Ryley  
 James v. Whitbread and Others  
 The West London Railway Company v. The London and North-Western Railway Company  
 Leachman v. Manser.

## CUR. ADV. VULT.

Southall v. Rigg  
 West London Railway Company v. The London and North-Western Railway Company  
 Arden v. Goodacre  
 Abley v. Dale  
 Rosetto and Others v. Gurney  
 Stainbank v. Fenning.

## DEMURRERS.

Robinson and Uxor v. Marquis of Bristol and Others. *In quere impedit*  
 Doe (Hopkinson and Others) v. Ferrand.

List of London Causes for the adjourned Sittings after Easter Term.

## REMANETS.

Dearie and Others v. Henderson, S.J.  
 Electric Telegraph Company v. Brett and Others, S.J.  
 Same v. Same  
 Biggenden v. May, S.J. inj.  
 Munroe and Others v. Bordier and Another, S.J.  
 Francis and Wife v. Bischoff and Another, S.J.  
 Shrewsbury and Birmingham Railway Company v. Smith, S.J.  
 Nicholls and Others v. Ellis, commission  
 Tooth v. Whicker, S.J.  
 Everett v. Hamilton, S.J.  
 Gadbon v. Anderson, S.J.  
 Ferguson v. Elder, S.J.  
 Metcalf v. Thompson and Others  
 Rhodes v. Allfrey, stayed  
 Barber v. Asphthal, S.J.

## NEW CAUSES.

Adams v. Ashlin  
 Dane v. Oakenfold, sec. &c.  
 Yuly v. McGregor  
 Weston v. Briggs  
 Cooper v. Maynard  
 Hinson v. Barclay and Others, S.J.  
 Lee v. Jones  
 Gray v. Blaxland  
 Earl Mountcashel v. Hopkinson, S.J.  
 Same v. Clarke, S.J.  
 Same v. Rose, S.J.  
 McDonald v. Evans  
 Flight v. Follett  
 Taylor and Others v. Thompson and Another (remains after Trinity Term)  
 Conolly v. Lee and Another  
 Ernest v. Gray, S.J.  
 Caledonian Railway Company v. Dickinson, S.J.  
 Same v. Friend, S.J.

## Court of Exchequer.

Sittings in Banco in Trinity Term, 1861.

Tuesday May 27—Motions and Peremptory Paper  
 Wednesday May 28—Peremptory Paper and Motions  
 Thursday May 29—General Business  
 Friday May 30—General Business  
 Saturday May 31—General Business  
 Monday June 2—Special Cases and Demurrers  
 Tuesday June 3—Errors  
 Wednesday June 4—Demurrers and Special Cases  
 Thursday June 5—Circuits chosen  
 Friday June 6—Special Cases and Demurrers  
 Saturday June 7—Crown Cases

Monday June 9—Demurrers and Special Cases  
 Tuesday June 10—General Business  
 Wednesday June 11—Special Cases and Demurrers  
 Thursday June 12—General Business  
 Friday June 13—General Business  
 Saturday June 14—General Business  
 Monday June 16—General Business  
 Tuesday June 17—General Business

## PEREMPTORY PAPER.

To be called on the first day of the Term after the motions, and to be proceeded with the next day, if necessary, before the motions.

Jones v. Davies  
 Re Roberts and Jones  
 Edwards v. Cameron's Company  
 Turner v. the Same.

## SPECIAL CASES, FOR ARGUMENT.

Micklethwaite v. Winter  
 Mehen v. Bone  
 Clay and Others v. Bufford and Others  
 Carman and Others (assignees) v. South-Eastern Railway Company  
 Same v. Same  
 Great Northern Railway Company v. Manchester, Sheffield, and Lincolnshire Railway Company  
 Swansea Dock Company v. Laven  
 Dickenson and Another v. Grand Junction Canal Company.

## DEMURRERS FOR JUDGMENT.

Allhusen v. Preet  
 Key v. Thimbleby.

## FOR ARGUMENT.

Stocks and Others v. Mayor, &c. of Halifax  
 Kirk v. Unwin and Another  
 Callow v. Jenkinson  
 Nichols and Others v. Dixon  
 Drew and Others v. Collins  
 Goddard v. Electric Telegraph Company  
 Addyman v. Woodman and Another  
 Waterford, &c. Railway Company v. Maxwell  
 Deckmann v. Laurent.

## NEW TRIAL PAPER.—FOR JUDGMENT.

Lafone v. Ellis  
 Hart v. Baxendale  
 Longmead and Wife v. Holliday  
 Beldon v. Campbell  
 Leneghan v. Capone  
 Great Western Railway Company v. Budd and Others.

List of London Causes for the Sittings after Easter Term.

## REMANETS.

Dethier v. Denis  
 Whitmore and Others v. Lechmere

## NEW CAUSES.

Maclean v. Maclean  
 Galvanized Iron Company v. Malins, S.J.  
 Phillips and Another v. Goldmid, bart. S.J.  
 Booker v. Royal British Bank  
 Knight, the younger, v. Bartlett  
 Pooley v. Royal British Bank, S.J.  
 Letts v. Pratt  
 Bridger v. Normandy  
 Plummer v. Travers  
 Gardener v. Chisnall

## FOR ARGUMENT.

Graham and Others (assignees) v. Mason  
 Smith v. Stevens and Another  
 Smith v. Howell  
 Jeakes v. White  
 Read v. Legard  
 White and Another (assignees) v. Mallett.

Moved Easter Term, 1861.

Stoccombe v. Lyall  
 Page v. Watkins  
 Hudson v. Roberts  
 Thoms v. Taylor  
 Stockton, &c. Railway Company v. Fox  
 Fean and Another v. Bittell  
 Same v. Others  
 Byrnes v. May  
 Trumpler v. Lockett  
 Graham and Others (assignees) v. Newham  
 Skipper v. Great Western Railway Company  
 Harvey v. Towers  
 Same v. Same  
 Adcock v. Wood  
 Doe dem. Guest v. Bennett  
 Griffiths v. Tegollas  
 Heslop v. Baker and Others  
 Fernandez and Another v. Parkin and Another  
 Arde v. Dixon  
 Stocks and Others v. Mayor, &c. of Halifax  
 Yates v. Eastwood and Another  
 Cunliffe v. Harrison  
 Newton v. Vacher

Moved after the Fourth Day of Easter Term.

Middleman v. Hooker  
 White v. Till

PROCLAMATIONS OF OUTLAWRY.—Mr. Hemp, chief officer to the sheriff of Middlesex, made proclamation of outlawry in the usual form, when the following persons were summoned to surrender at the suit of their respective creditors:—George F. Sydenham, at the suit of Morris Meyers; Watkins William Martin, at the suit of Edward Barnard; Jacob Barrow, at the suit of George Drayson; Wil-

liam Skifney Porter, at the suit of John Henry Taylor; Barnard Brocas, at the suit of Edward Edwards; Hector Harvest, at the suit of Samuel Cathcart and his wife; Stephen Temple, at the suit of John Dirk Vanderpant; Sir Wyndham Carmichael Anstruther, Bart., at the suit of William Whitmore; Everard St. John Mildmay, at the suit of Charles Pratt and another; Sir Wyndham Carmichael Anstruther, Bart., at the suit of William Killingworth Hedges; Howell Jones Phillips, at the suit of Anthony Hodgkins; Sir William Carmichael Anstruther, at the suit of Alexander Silk; Henry James Noyes, at the suit of Lewis Harris; Henry William Marriott, at the suit of Frederick Augustus Davies; Charles Webster Wedderburn, at the suit of George Samuel Ford; and Winfield Attenborough, at the suit of Richard Kirkman Lane.

## NOTICES OF NEW LAW BOOKS.

*The Law as to the Exemption of Scientific and Literary Societies from the Parish and other Local Rates, &c.* By GEORGE TAYLER, Esq. of the Inner Temple. London, 1851. Crookford.

At length this question may be considered as settled. After protracted litigation upon the meaning of some half-dozen words, parish officers and their legal advisers will know what constitutes liability to, and Literary Societies what entitles them to exemption from, parish rates. This timely little treatise by Mr. TAYLER will teach them with clearness and precision what the law is, as determined by a series of decisions. The plan is very complete, treating separately of the various circumstances which have been held to constitute liability or non-liability. All the cases are collected, and a copious index enables the reader reference to be made to any subject on which information is sought.

*Advocacy in the County Courts. A Letter to Sir A. Cockburn, M.P. her Majesty's Attorney-General. By a Barrister of the Inner Temple.* London: Sweet.

In this letter the author shapes his argument thus:—Nobody disputes the propriety of separating the functions of Advocate and Attorney. If it be right to separate them, that must be done by a distinct line drawn somewhere. If the Attorney is to be permitted to practise as an Advocate, the Advocate cannot be prevented from practising as an Attorney. The only way in which the distinction can be preserved, is to prevent each from invading the province of the other. Exclusive audience to the Bar is the only manner in which the invasion of the province of the Advocate by the Attorney can be prevented, and disbarring the offender is the remedy against the Advocate who invades the province of the Attorney. To refuse to the Bar exclusive audience in the County Courts is practically to put an end to the severance of functions.

But the author admits that there are small litigated matters in which it would be oppressive to the suitor to compel him to employ two persons. In such cases he does not object to the Attorney conducting the case; but he does object to the employment of another Attorney for this purpose, as being in fact, the employment of an Advocate, and the payment of two persons.

This distinction is a new one, and there is some reason in it. Certainly it removes the difficulty always felt as to cases of small value, which will not afford two fees.

## BIRTHS, MARRIAGES, AND DEATHS.

## MARRIAGES.

FIFTH, John, esq. solicitor, Upper Temple-street, to Mary Letitia Campbell, only daughter of the late Captain Richard Braddell Heslop, of the 90th Rifles, and granddaughter of Jacob Owen, esq. of Mountjoy-square, on the 15th inst. at St. George's Church, Dublin.

STANTON, the Rev. W. H. eldest son of W. Henry Stanton, esq. M.P. for Stroud, to Mary, second daughter of Mr. Charles Lawrence, of the Querns, near Cirencester, on the 20th inst. at Cirencester.

## DEATHS.

GREENFIELD, Eliza, the beloved wife of Mr. Thomas Greenfield, of the city of Winchester, solicitor, on the 19th instant, aged 80.

HINDS, John, esq. solicitor, one of the coroners for the county of Kent, at Milton-next-Sittingbourne, on the 16th instant.

HUGHES, Mr. of the firm of Ventom and Hughes, Angel-court, Throgmorton-street, on the 17th instant, at Hackney, aged 51.

MORISON, Major-General Sir William, K.C.B., M.P. for Clackmannan and Kinross, in Seville-row, on the 18th instant.

**MURDOCH**, Katherine Edith, infant daughter of Mr. C. B. Murdoch, of Upper King-street, and Adelaide-road, on the 17th inst.

**NOTTON**, Edward, esq. solicitor, Diss, Norfolk, suddenly, at East Farleigh, Kent, on the 18th inst. aged 49.

**SHALLICE**, George, esq. at his residence, Field-place, Compton, near Guildford, on the 21st inst. aged 77.

## JOURNAL OF PROPERTY. MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	210	210	210	210	211	211
3 1/2 Cent. Reduced Annuities	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	97
3 1/2 Cent. Consols Annuities	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
Consols for Account	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
New 3 1/2 Cent. Annuities	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
Long Annu. (exp. Jan. 5, 1880)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1880)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Jan. 5, 1880)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
India Stock	250	250	250	250	250	250
India Bonds (1,000l.)	53	49	51	53	49	49
Do. do. (under 1,000l.)	54	54	54	54	54	54
South Sea Stock	54	54	54	54	54	54
Do. do. New Annuities	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Exchequer Bills, 1,000l.	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Do. do. 500l.	44	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Do. do. Small	43	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2

\* Premium.

## THE GAZETTES.

### Bankrupts.

**BOND**, CHARLES, tanner, Twerton, Somersetshire, May 27, at half-past twelve, and June 24, at eleven, Bristol. Off. as. A. Crampton. Sol. Bevan, Bristol. Petition, May 14.

**BROOKS**, RICHARD, draper, Liverpool, June 3 and 23, at eleven, Liverpool. Off. as. Casanova. Sols. Sale and Co. Manchester. Petition, May 9.

**CASSAIGNE**, JOHN GEORGE, wine merchant, Salisbury-st. Strand, May 30 and June 30, at eleven, Basinghall-st. Off. as. Johnson. Sols. Lawrence and Co. Old Jewry. Petition, May 12.

**DOBINSON**, THOMAS STORKE, banker, Tynemouth, Northumberland, May 29, at eleven, and June 16, at twelve, Newcastle-upon-Tyne. Off. as. Wakley. Sols. Whalton, North Shields; and Griffiths and Crighton, Newcastle-upon-Tyne. Petition, May 12.

**DOWSON**, JOSEPH EMERSON, furnishing ironmonger, Oxford-st. May 31, at one, and July 12, at eleven, Basinghall-st. Off. as. Nicholson. Sol. Cooper, Gray's-inn-square and Old Cavendish-st. Petition, May 17.

**FRANKS**, JOSEPH FRANKS, licensed victualler, Hampstead-st. Fittisway-square, May 30 and July 4, at eleven, Basinghall-st. Off. as. Cannon. Sol. Barlings, John-st. Bedford-row, and Bonford, Essex. Petition, May 15.

**GROVER**, DAVID, clothier, Minorities, city, and Uxbridge, May 29 and July 1, at twelve, Basinghall-st. Off. as. Stanfield. Sols. Reed and Co. Friday-st. Cheap-side; and Sale and Co. Manchester. Petition, May 15.

**HAROLD**, ROBERT, and FREDERICK ROBERT, victuallers, Bristol, June 4, at twelve, July 2, at eleven, Bristol. Off. as. Miller. Sol. Bevan, Bristol. Petition, May 16.

**JONES**, HUGH, ironmonger, Gaswen, Anglesea, June 3 and 23, at eleven, Liverpool. Off. as. Morgan. Sols. Fletcher and Hall, Liverpool; and Jones, Bangor. Petition, May 10.

**MCNEIL**, JAMES EUGENE, lithographic printer, Parliament-st. Westminster, June 3, at one, July 1, at eleven, Basinghall-st. Off. as. Edwards. Sol. Phillips, Gray's-inn-square. Petition, May 8.

**M'NAMES**, JAMES, manufacturing chemist, Manchester, June 2 and July 1, at twelve, Manchester. Off. as. Pott. Sols. Sale and Co. Manchester. Petition, May 15.

**PAGE**, WILLIAM, grocer, Great Yarmouth, May 30 and June 30, at twelve, Basinghall-st. Off. as. Johnson. Sols. Storey, Featherstone-buildings; and Fillett and Co. Norwich. Petition, May 9.

### Gazette, May 23.

**HUGHES**, JAMES, cooper, Mill Pond-bridge, Rotherhithe, June 3, at two, July 1, at one, Basinghall-st. Com. Holroyd. Off. as. Edwards. Sols. Borradaile and Dimsdale, 20, Kings-arms-yard, Moorgate-st. Petition, May 19.

**BAVIN**, JOHN, draper, Wisbeach, Cambridge, May 31, at half-past one, July 12, at twelve, Basinghall-st. Com. Goulburn. Off. as. Pennell. Sols. Sole and Turner, 18, Aldermanbury. Petition, May 17.

**JONES**, SHADRACH EDWARD ROBERT, apothecary, Painslane, Wrookwain, Balop, June 3 and 25, at twelve, Birmingham. Com. Daniell. Off. as. Valpy. Sols. Mottram, Knight, and Rimmer, Birmingham. Petition, May 9.

**MACLIS**, GEORGE, spade and shovel manufacturer, Dixon's-green, Dudley, Worcester, June 5 and July 3, at twelve, Birmingham. Com. Daniell. Off. as. Christie. Sols. Dingman and Hemmatt, Walsall. Petition, May 12.

**REILLY**, EDMUND WILLIAM, heavy stable keeper, postmaster, farmer, and milkman, Bath, and Bathampton, Somerset, June 6 and July 7, at twelve, Bristol. Com. Stephen. Off. as. A. Crampton. Sol. Hellings, Bath. Petition, May 10.

**TAUNTON**, WILLIAM GEORGE HENRY, civil engineer and patent windlass and chain cable manufacturer, Liverpool, June 5 and 23, at eleven, Liverpool. Com. Stevenson. Off. as. Turner. Sols. Holt and Rowe, Liverpool. Petition, May 21.

**WILKINSON**, JOHN, brace and purse manufacturer, Nottingham, June 13, and July 11, at ten, Nottingham. Com. Balguy. Off. as. Biddleston. Sols. Shilton and Son, Nottingham. Petition, May 12.

## BANKRUPTCY ANNULLED.

Gazette, May 23.

Bagg, T. publican, Aston, Warwick. May 10.

## Dividends.

### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

**Cousins**, W. coach builder, first, 6s. Christie, Birmingham.—*Dalton*, T. silk dyer, first, 3s. 10d. Whitmore, Birmingham.—*Farrar*, E. surgeon, second, 7d. Edwards, London.—*Firth*, S. draper, first, on new proofs, 6s.; second and final, 8d. Hope, Leeds.—*Gilston*, J. woollen draper, first and final, 4s. 3d. Hope, Leeds.—*Gummer*, S. H. attorney, first and final, 4d. Hornaman, Exeter.—*Hardwick*, T. and W. auctioneers, final sep. of T. H. 3d. Hope, Leeds.—*Holman*, A. K. cloth manufacturer, second, 1s. 8d. Young, Leeds.—*Horsman*, G. blacksmith, first and final, 1s. 1d. Carrick, Hull.—*Jarvis*, M. wool merchant, first, 1s. 3d. Young, Leeds.—*Langdale*, S. sen. and jun. corn dealers, second, 7d. Wakley, Newcastle.—*Kinton*, T. furniture broker, 3s. 4d. Hornaman, Exeter.—*Parnall*, S. grocer and draper, final, 1s. 11d. Hornaman, Exeter.—*Prattman* and *Poster*, timber merchants, first and final, 0d.; first sep. of Prattman, on new proofs, 3s. 2d. and second, 2d. Baker, Newcastle.—*Richardson*, J. ironmonger, first, 6s. Groom, London.—*Reaumur*, J. shoemaker, first and final, 2s. 4d. Hope, Leeds.—*Smith*, G. M. book-seller, first, 6s. Whitmore, Birmingham.—*Smith*, J. money scrivener, first, 1d. and 15-16th of 1d. Valpy, Birmingham.—*Smith*, W. ship builder, first, 13s. 2d. Young, Leeds.—*Starkie*, W. woollapster, first, 1s. 8d. Young, Leeds.—*Stevens*, J. builder, first, 7d. Edwards, London.—*Worrey*, J. and *Biggs*, J. wire manufacturers, first joint, 6s. Whitmore, Birmingham.

### INSOLVENT ESTATES.

Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.

*Butterworth*, rag dealer, 4s. 2d.—*Finlayson*, W. Commander, R. N. 7d.—*Hoare*, W. lodging-house keeper, 2s. 8d.—*Horne*, F. keeper of lunatics, 4s. 9d.—*Terris*, D. coach smith, 9d.—*White*, M. Capt. R.N. 3s. 6d.

## Assignments for the Benefit of Creditors.

Gazette, May 13.

**Frost**, W. carpet manufacturer, Kidderminster, Worcester-shire, April 21. Trusts. W. B. Best, esq. and A. Tilden, banker, both of Kidderminster. Sol. H. Saunders, Kidderminster.—*Howarth*, H. coach proprietor and lodging-house keeper, Altrincham, Cheshire, May 7. Trusts. J. Mort, draper, and J. Davenport, grocer and corn dealer, both of Altrincham. Sols. Robinson and Southern, Altrincham.—*Laurie*, S. draper, Bushey, Hertfordshire, April 28. Trusts. D. Laurie, Walling-st. and J. Lowe, Minorities, warehousemen. Sol. T. M. Catlin, Ely-pk.—*Rate*, M. bassar keeper, King's-cliff, Northampton, May 6. Trusts. D. Gally, general dealer, Leeds, and W. Lea, Birmingham. Sol. C. Bulmer, Leeds.

Gazette, May 16.

**Butler**, W. B. draper, Newark-upon-Trent, Nottingham-shire, May 9. Trusts. J. Branton, gent. and R. Gamble, miller, Newark-upon-Trent. Sol. P. B. Falkner, Newark-upon-Trent.—*Gibson*, R. farmer, Mount Pleasant, Northumberland, May 8. Trusts. J. Laing, farmer, Cornhill, and J. Wilson, ironmonger, Berwick-upon-Tweed. Sol. J. C. Weddell, Berwick-upon-Tweed.—*Oliver*, H. W. Worthington, E. G. and *Oliver*, W. warehousemen, Alder-mansbury, May 6. Trusts. R. Shillingford, calico-printer, Old Jewry-chambers, Old Jewry, and H. Thomas, warehouseman, Trump-street. Sols. Reed, Langford, & Marsden, Friday-st. Cheap-side.—*Verning*, W. coach-builder, Truro, Cornwall, May 12. Trusts. W. Hunter, jun. J. E. and E. Hunter, timber-merchants, Moorgate-street. Sol. E. W. Gooday, Doughty-street, Bedford-row.—*Wilson*, T. baker and confectioner, Lowgate, Kingston-upon-Hull, May 6. Trusts. J. Fountain, fruit merchant, and C. Wells, coal merchant, both of Kingston-upon-Hull. Sols. Thorney and Son, Kingston-upon-Hull.

## Partnerships Dissolved.

Gazette, May 13.

**Bircham** and **Son**, tailors and drapers, Hackford, next Reepham, Feb. 17, 1846, and W. T. Bircham, March 31, 1846.—*Burley* and *Co.* cotton spinners, Chorlton-upon-Medlock, May 31.—*Bonell* and *Ridal*, manufacturers of Bonell's pills, May 9.—*Clark*, J. and *B.* and *Ingham*, J. wool staplers, Bradford, as regards Ingham, April 14. Debts paid by remaining partners.—*Croxford* and *Lind-say*, linen manufacturers and bleachers, Ballydown, near Banbridge, Ireland, and Laurence-lane, London, as regards Crawford, April 1.—*Denise*, M. A., and *Dewice*, P. proprietors and conductors of an academy near Monmouth, May 9. Debts paid by P. Davies.—*Demison*, *Comber*, and *Co.* manufacturers of a substitute for vegetable black, and of printing inks, &c. Chester, April 21.—*Foster*, *Murray*, and *Co.* cotton manufacturers and commission agents, Manchester, April 5. Debts paid by *Murray*.—*Griffith*, W. and *Brat-ton*, J. surgeons, &c. Shrewsbury, March 31.—*Hind*, W. and *Eyles*, R. millwrights, Preston, May 1.—*Hirst*, H. and *Co.* woollapsters, Huddersfield, May 1. Debts paid by C. Hirst.—*Holmes* and *Co.* brewers, Lower Mitham, May 9. Debts paid by Milnes.—*Macfarlane*, *Campbell*, and *Co.* merchants, Martinique, Jan. 1. Debts paid by Campbell and Cuvillier, Martinique.—*Mansfield* and *Newland*, hat lining manufacturers, Manchester, May 10.—*Mole*, W. and *Wilcox*, M. gold and silver pencil manufacturers, Birmingham, May 9. Debts paid by Wilcox.—*Parkin*, T. S. and *Co.* wine merchants, &c. Worksop, May 9. Debts paid by Parkin.—*Prisick*, *Spies*, and *Co.* colliery workers, Darfield, as regards Prisick, May 3.—*Smith* and *Booth*, worsted spinners, Bradford, May 5.—*Swarbrick*, T. and *Tomlinson*, J. joiners and builders, Preston and Waverley, Feb. 19. Debts paid by Tomlinson.—*Taylor* and *Glew*, brokers and general commission agents, Liverpool, April 24. Debts paid by Taylor.—*Till*, G. and *Jacobson*, J. tailors and habers, York-terrace, Commercial-road East, May 9.—*Walters*, W. and *R.* cheesemongers, Croydon, May 12.

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## To Readers and Correspondents.

"J. R."—Our correspondent will of course recognise the propriety of the rule that forbids us to enter into the private acts of solicitors inter se. We can only notice public mal-practices.

"A STUDENT."—We did not find fault with the decision, because it is in strict accordance with the rules of law, that require such strict verbal accuracy; and the judge could not have done otherwise. We only expressed our regret that the law should condescend to such verbal quibbling, and that a legal document should not be read according to its plain obvious meaning, just as we should read any other document. Of the meaning of the affidavit there could be no doubt.

"G. P. G." (Worcester).—Thanks for the suggestion. We will endeavour to avail ourselves of it.

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We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, MAY 31, 1861.

## TO READERS.

THAT we might be enabled to bring up an immense array of reports which had accumulated, we have devoted the present double number almost entirely to them.

Next week a *gratis* double number will contain the general legal intelligence, leading articles, and other miscellaneous matter necessarily omitted from the present number.

## A SUGGESTION.

ALL the difficulties that have beset the Papal Aggression Bill have arisen from the absence of a distinct definition of the offence intended to be made penal.

As we understand it, the offence intended to be prohibited is the assumption of an authorised title of dignity by an unauthorised person.

This is fairly within the scope of legislation. The state has created certain dignities, and invested the Crown with power to appoint persons to hold them. It is manifestly an invasion of the power so vested in the Crown by the state for any other person to assume such dignities without the appointment of the Crown. It would not be permitted in any country to a person to style himself and be styled by others its king, or to assume any title of nobility already existing, or even any title of office which he does not possess by lawful appointment.

Here is an offence clearly within the province of jurisprudence, the punishment of which could not be justly complained of, provided it had not the appearance of partiality, by being limited to any particular titles.

Let, then, a law be made, simply prohibiting

the holding, without the authority of the Crown, by a British subject, within the realm, of any title or dignity, ecclesiastical or temporal, now existing, or which may hereafter be created, under a penalty, &c. And if it be desired to be still more explicit, the dignities may be named, or it might be termed any dignity having a title derived from any territory or place within the United Kingdom or the Colonies.

This would effectually attain all that is sought by the Aggression Bill, without the appearance of being aimed exclusively at any particular persons or sect. A power might be reserved to the Crown to license the holding of such titles, for the proper exercise of which the Government would always be responsible.

## MR. HEMBERY'S CASE.

WE are bound to do instant justice to Mr. HEMBERY. Last week we directed attention to a report of a motion in the Court of C.P., from which it appeared that Mr. HEMBERY had permitted one HETHERINGTON, a sham lawyer, to make use of his name upon a brief, whereby he had rendered himself responsible for the misdeeds of his representative. When we commented upon this, we were not aware that the statements made in the Court had been answered by Mr. HEMBERY; that, in fact, he was not cognizant of this employment of his name, nor had ever authorised HETHERINGTON to use it. The Court accordingly refused the rule, and stated that Mr. HEMBERY was fully exonerated from the charge. It should be added that HETHERINGTON has himself made an affidavit to the same effect. Under these circumstances, the rebuke which we had based upon the original statements in the Court, is not deserved, and Mr. HEMBERY is entitled to stand completely vindicated in the sight of his Profession from every expression of blame applied to him. The remarks we made are, of course, withdrawn, with an expression of regret that he should have been the victim of such a fellow as HETHERINGTON.

## REGISTRATION OF ASSURANCES.

WE have received the resolutions of the Solicitors of Lincolnshire and the Solicitors of Worcester on this subject.

It is unnecessary to repeat them, for they are substantially the same with those already published, differing only in this, that they object to registration altogether, and not merely to a central registry; their objections being twofold; first, that it will prevent loans by deposit; second, that it will increase the costs of a conveyance.

Thus we have the remarkable fact that, in Yorkshire and Middlesex, where registration has been long tried, it is approved by the Solicitors, while it is objected to by those who have had no experience of it. Let this fact be explained as it may, it is certainly a singular one.

However that may be, whether our judgments should be most swayed by experience or by anticipation, by facts or by possibilities, we put it to our readers whether the two objections which have been preferred by Lincolnshire and Worcester against registration in any shape are such as call upon the Profession for any very active opposition. If such are likely to be the results of registration, it will be highly beneficial to the Lawyers. If it prevents loans by deposit, it will immensely increase loans by mortgages. If it swells the costs of a conveyance by increasing the work to be done, it will, *pro tanto*, increase the Solicitors' profits. Now we see no reason why the Lawyers should reject a benefit, if the Legislature is desirous of thrusting it upon them. We have not been so careful of late by Parliament that there is any claim upon us for fastidious resistance to having money put into our pockets. If we owe a duty to the public, something is also due to ourselves. Certainly we shall not obtain credit for our distastefulness. It is our duty, when we see the public about to do something which we believe will be injurious to itself, although beneficial to ourselves, to give it fair warning of the consequences. But

clearly we are not called upon to do more than this: it is not incumbent upon us to hinder what is not troublesome in opposing a measure which is to bring us a benefit, if they who are alone interested in it are bent upon conferring upon us the boon. If the effect of registration be, as our friends allege, to bring so much added business to the Lawyers, we see no reason why they should take upon themselves the toil of resisting it. Such public virtue is so rare with every class, that we fear we shall not obtain for it the credit we deserve. The heroism of self-sacrifice for the public good is well unknown to the Lawyers; we could point to many instances of it in modern legislation; but what have we obtained in return for our public spirit? Are we better cared for by the Legislature? Are our interests more respected? Is there more desire to do us justice—for we ask not for favour?

Let the Attorneys' Tax reply: let the restricted and increasing fees of the County Courts Act answer. Is there, then, any obligation upon us to go out of our way to oppose a registration of deeds which is to be productive to us of greatly increased business? We think not.

If, therefore, we objected to registration generally, and not alone to the particular plan now before Parliament, we would counsel our readers to let it take its own course, and if the Legislature be resolved to give us such a boon, to allow it to have its own way.

But we are of opinion that a Central Registration would be a very bad thing, and Local Registration a very good one, and our greatest fear is lest, by opposing registration altogether, instead of supporting a feasible useful scheme, we should fail altogether, and so, as in other cases it has been, in seeking to resist all change we bring down upon ourselves destructive changes; whereas by trying to modify, instead of to prevent, we might have moulded the change to our own views. Therefore it is that we consider the course taken by the Solicitors of Yorkshire and the Law Societies of Manchester and of Taunton to be the most prudent and politic, as well as the most proper in itself—namely, to seek to substitute for the present most objectionable scheme of a General Registry, the more reasonable and practicable one of a Local Registry.

THE MAGISTRATE,  
AND PAROCHIAL AND MUNICIPAL LAWYER.

## SUMMARY.

THE Court of Q.B. has confirmed the opinion of Lord CAMERON in *Reg. v. Hewitt*, 17 Law T. 105, which was reported here from the Court below. But a new point was also raised. It was an indictment for a conspiracy to prevent a workman A. from accepting work with B.; and in other counts for preventing him from obtaining work generally. The indictment was prosecuted by C. another master for whom he had worked, and the combination against him was for having worked for C. No count charged an intention to injure C. But he was held to be a party "grieved or injured" within the meaning of the statute, and therefore, on conviction of the defendants, entitled to his costs.

Magistrates and their clerks will note also the cases of *Reg. v. Bessell*, 17 Law T. 104; and *Reg. v. Welch*, 17 Law T. 105, on the Registration of Designs Act.

The 2nd section of 3 & 4 Vict. c. 54, empowers overseers by an order of justices to take possession of the property of a lunatic criminal. In *Re Long-Horne*, 17 Law T. 106, the lunatic had mortgaged property which the mortgagee had sold, and after paying himself his mortgage, a balance remained in his hands; it was also claimed by trustees under a deed of assignment, executed while the lunatic was in prison. The Court refused a *mandamus* to compel the mortgagee to pay it over to the overseers, holding that the statute applied only to property of which the overseers can take manual possession, and that it does not authorise them to recover a debt due from a third person.

A question of some interest in the practice of Sessions was decided in *Reg. v. The Southampton Dock Company*, 17 Law T. 106. Upon appeal against a rate, the Sessions amended it, subject to a case. The case was stated, and by it objections to the decision of the Sessions were raised by the respondents as well as by the appellants. The latter obtained the *certiorari* to bring up the case, and it had been agreed that the respondents should not impeach the judgment of the Sessions, unless the

appellants did so. Upon these facts it was held that the *certiorari* was obtained by both parties, and that respondents were not entitled to their costs under 5 Geo. 2, c. 19, s. 2.

An agreement by a coroner to pay another twenty per cent. out of the clear profits of every fee paid to him for every inquest which he should hold during nine years, was held, in *Pugh v. Carttar*, 17 Law T. 107, not to be a covenant for the sale of an office, and therefore not illegal. E. W. C.

**THE PREVENTION OF OFFENCES.**—Lord Campbell's Bill in the House of Lords for the better prevention of offences, amended by the select committee, has just been printed. It contains fifteen clauses, including several provisions for the better prevention of offences on railways. The clause respecting "Chloroform" is retained, making it felony to administer, or attempt to administer, any chloroform, laudanum, or other stupefying or overpowering drug or thing with intent thereby to enable the party to commit any felony; and the offender is to be liable to be transported for life, or for any term not less than seven years. The Bill now provides that any person who wilfully places on railways any wood, &c. or takes up any rail, &c. or removes any machinery or any signal, &c. or does any other thing with intent to upset, &c. any engine, &c. or to endanger the safety of any person, shall be guilty of felony; or if any person shall cast any wood, &c. upon any railway carriage, with intent to endanger the safety of any person therein, such person to be guilty of felony; and any person wilfully setting fire to any railway station, or to any goods, carriage, &c. shall be guilty of felony, and liable to ten years' transportation, and not less than three years' hard labour. By this Bill, for aggravated assaults, offenders, with hard labour, can be imprisoned for three years.

**THE LIVERPOOL MAGISTRACY.**—Several inaccurate statements have appeared in the Liverpool papers, and elsewhere, in reference to the arrangements consequent upon the lamented death of Mr. Rushton, who had so long filled the office of stipendiary magistrate in that borough. Mr. Rushton had a salary of 1,600*l.* a-year, and discharged duties perhaps the most onerous of any office in the kingdom. At his death his friends and admirers have raised a fund for his family, amounting already to 8,500*l.* The duties devolving upon a single magistrate were so great, that it was generally supposed that the Borough Council of Liverpool would recommend a division of labour, and the appointment of two justices, at salaries of 1,200*l.* and 800*l.* per annum respectively. This would be only an addition of 400*l.* a-year to the cost of the late single magistrate, who was confessedly overworked, and who discharged the duties in a way that few men could attempt to undertake. From the dilatory or parsimonious proceedings of the town-council of Liverpool up to the present moment, we might be disposed to think that they had had experience of the worst magistrate instead of the very best; for they have as yet given no sign of their intentions respecting the division of the duties, or of the salaries which they are disposed to pay for the discharge of functions which are important everywhere, but which may be considered vital in such a place as Liverpool, where the amount of floating property is so great, and where the population is so fluctuating and uncertain. The borough fund of Liverpool is the richest in England; but its managers seem to get parsimonious in the ratio of their accumulated wealth. Parsimony in the administration of justice is the worst economy of all.—*Observer*.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

### WINDING-UP.

THE principle which we have maintained against so many opponents as that which ought to regulate *calls* upon contributories, has at length received the formal sanction of the high authority of Lord CRANWORTH, after time taken for consideration. The reader will remember, that our argument was, that inasmuch as the object of the Winding-up Acts was not to create any new liabilities, but only to facilitate the apportionment and liquidation of such as previously existed, the call upon contributories could not properly be a general one of so much per share; but that it would be the duty of the Master, first to ascertain for what portion of the debts of the Company each contributory was liable at law, and then to call upon each for his proportion of those debts alone for which he would be responsible if the Winding-up Acts had never passed. It appeared to us that this course, however troublesome to the Master, was the only one consistent with natural justice, or with the provisions of the Act.

Hence we contended that Mr. UFFILL, the defendant in the famous *Uffill* case, although held to be a contributory, that is to say, simply a person so connected with the Company as to be liable for any acts done by him in pursuance of the objects of the Company, could only be liable for such debts as he had himself incurred, in accordance with the definition of legal liability established by the cases at common law, and that therefore, before any call could be made upon him, the Master was bound to ascertain the particular debts, if any, to which he had rendered himself liable, so that the amount of the call might be proportioned to his share of such debts; and upon this ground we hinted to Mr. UFFILL the propriety of appealing against the call when made.

The hint was taken. A *pro rata* call was made upon the contributories, without any previous apportionment of the liabilities of each. Against that call there was an appeal to Lord CRANWORTH; the case, the report of which appears in this number, was fully argued, and, after taking the vacation to consider his judgment, the Vice-Chancellor has decided *against the validity of the call*, upon the grounds which we had formerly ventured to take. He states that he has come to this opinion after careful review of the question, and that he feels no doubt about it whatever. Even if the Act had been silent upon the question at issue, the course contended for, of making an equal call for unequal liabilities, or to make some persons contribute to debts for which they were not liable in law, was such an invasion of natural justice, that he should have felt himself justified in straining the law to avoid it; but fortunately the Act itself had rendered this unnecessary, by expressly declaring that nothing in it should alter or affect any liabilities at law or in equity. If, then, the liabilities were only such as existed in law, it was necessary to ascertain what they are before a call can be made, for it may turn out that in fact there is no liability to any debt on the part of the contributory.

It was stated that there would be an appeal from this decision. But with what hope? The argument is unanswerable; the conclusion is unavoidable.

True it is, that its practical result is to make the Winding-up Acts inapplicable to incomplete companies. But that is a very desirable result. The machinery of winding up was not framed for them, and cannot be made to apply to them; because the liabilities are vague and indefinite. As we have before asserted often, the Winding-up Acts are admirable for their purpose, which was, to wind up the complicated affairs of companies actually formed, whose members and their liabilities are readily ascertained; but it is impossible that they, or any law human wisdom could devise, could grapple with a thing so undefined and unsubstantial as a scheme for a companies which never took shape. E. W. C.

**UNIVERSAL GAS LIGHT COMPANY.**—On Thursday a meeting was held before Master Sir George Rose in the matter of this company, when the settlement of the contributory lists was resumed. The cases standing over from the last meeting were quickly disposed of, mainly owing to the fact that the company had been what is termed "completely formed." At the end of a sitting of less than an hour's duration, Mr. Roxburgh, who appeared for the official manager, said that the list was now definitively settled, with the exception of some persons who were believed to be insolvent, so that the next meeting would be for the purpose of considering the question of a call.—*Chronicle*.

**MERIONETHSHIRE SLATE AND SLAB COMPANY.**—On Wednesday a meeting took place before Master Sir William Horne, when the further settlement of the list of contributories was proceeded with. The names of several parties were, during the earlier part of the proceedings, included as contributories, without giving rise to much discussion, but when Mr. Hetherington, on the part of the official manager, proposed to settle in like manner Mr. Hooper for fifty shares, Mr. Hancock, who appeared for that gentleman, observed that his client had not signed the deed; and by a clause in that document it was enacted that no proprietor should be entitled to any right in respect of, or hold shares in the company, until he had executed the deed. He apprehended that this would prove a fatal objection, and likely to affect all those persons who had been put down as contributories, but who did not sign the deed. He (Mr. Hancock) wished, moreover, to call attention to a resolution passed by the board on the 14th of December, 1847, to the effect that all those shares upon which the call of 10*s.* per share was not paid were thereby forfeited; and subsequently, on the 7th of February, 1848, a list of shareholders was laid before

the board, which list contained the names of only sixteen persons, and his client was not of the number. All this had taken place long after the payment of the deposit by Mr. Hancock. Mr. Hetherington commenced his reply to these statements, when it was found that the presence of the secretary was indispensable; and his Honour, after expressing an opinion that the facts stated were extremely important, and deserved the best consideration from all parties, adjourned the case.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]  
*Dinsbury Iron Works Company*.—To settle contributories on 20th June.—*Humphry*.  
*Water Dale Iron Company*.—Call on contributories for 5*s.* per share by 10th June, 1861.—*Farrer*.  
*New Manufacturing Company*.—Petition to discharge the order for winding up, presented on 22nd May; to be heard on 6th June.  
*Essex and Leam Company*.—Petition to wind up, presented on 24th May; expected to be heard on 6th June.  
*Waterford and Kilkenny (Carlow Extension) Railway Company*.—Petition to wind up presented on 27th May; expected to be heard on 7th June.

## REAL PROPERTY LAWYER AND CONVEYANCER.

SEVERAL points upon the construction of a will were decided in *Quennell v. Turner*, 17 Law T. 101. A. was entitled for life to dividends of certain stock standing in the names of trustees, and to a beneficial interest in remainder, as to one moiety of it. There was a charge of 500*l.* upon the whole. He was also entitled to certain copyhold estates; and in his marriage settlement covenanted to provide an annuity for his wife. His will ran thus:—"I confirm the settlement made on my marriage, securing 200*l.* a year to my wife; and I do hereby charge and make liable all and every my freehold hereditaments and estate in the county of, &c., and moneys standing in my name in the public funds, with the payment of the said annuity to my wife;" and subject to the payment thereof, "I give, devise, and bequeath the same freehold hereditaments and estates, and moneys in the funds, to my niece B., her heirs, executors, administrators, and assigns," with remainder to her two sisters in case of her death, leaving them surviving. "All the rest and residue of my real and personal estate, subject, as to my personal, to payment of my debts, funeral expenses, and legacies hereinafter bequeathed, I give, devise, and bequeath to my wife, her heirs, &c. absolutely." It was held, that by "moneys in the public funds," A. meant the stock standing in the names of the trustees; that the personal estate was the primary fund for payment of the annuity, and that the copyholds did not pass by the will.

Where a brick-kiln for burning bricks was erected within 48 yards of a dwelling-house and garden, which was thereby rendered almost uninhabitable, the Court of Chancery granted an injunction, deeming it to be a nuisance. (*Walter v. Selfe*, 17 L. T. 103.)

An interesting case on the construction of conditions of sale is *Mosley v. Hide*, 17 Law T. 106. The conditions stated that the estate was limited to Mrs. C. for life, with remainder to trustees to sell for the benefit of her children; and there being three only of such children, all of whom had attained the age of twenty-one, it was thereby stipulated that such children, or their trustees or assigns, should, if required, join in the conveyance, but that no objection should be taken to the title by the purchaser on account of the sale taking place in the life-time of Mrs. C. Upon these conditions the estate was sold. But afterwards it appeared that two of Mrs. C.'s children were married women with children, and that they had settled their funds in trust for themselves for life, with remainder to their children. It was held, that the conditions of sale could not be fulfilled, because the grandchildren of Mrs. C. being minors, neither they nor their trustees could join in the conveyance. "It seems to me," said PATERSON, J., "to be tantamount to a warranty that those who would be prejudiced by a sale in the life-time of the tenant for life should join, and that they had the capacity to join, and it now appears they cannot." This should be noted in *Hughes's Practice of Sales*.

It will be seen that the Lord Chancellor has at length avowed himself to be opposed to some of the provisions of the Registration of Assurances Bill, although a ministerial measure. The plan of registration by maps is abandoned. It is not at all probable that the Bill will pass this Session.



### Queries.

#### COPYHOLD FEES.

THE conditions of sale of copyhold property do not notice whether vendor or purchaser is to defray the steward's fees of surrender and admission.

Will any of your correspondents inform me, whether the purchaser is to pay the fees of the surrender (which is charged with the *ad valorem* duty) and admission, or only the admission? W. H. C.

#### PRACTICE IN CONVEYANCING.

WILL it be giving you too much trouble to state what is the practice in the following case?

Landed property is sold to A. & B. A. is the largest purchaser. In the contract with B. it is stipulated that the title-deeds shall remain in the possession of A., and no mention is made of a covenant to produce. Supposing A. enters into a covenant to produce, who pays the costs of his attorney for perusing the deed of covenant?—the vendor or B. the purchaser of the smaller lot? LEX.

### Answers to Queries.

#### STAMPS.—COUNTING FOLIOS.

I beg to refer your correspondent at p. 76 of the current vol. of the *LAW TIMES*, to 2 Sugden's Vend. & Purch. 446 (10th edit.), where it is stated that "the common indorsements, such as attestations, receipts, or the like, are counted as part of the deed; but certificates of enrolment or registry, it is apprehended, would not, for they are not within the control of the parties at the time of the execution of the deeds." It is not the practice in the North Riding to count the registrar's certificate in order to ascertain the amount of progressive duty in any case. The deed is complete, *inter partes*, without any registration at all. W. T. J.

Northallerton, May 28, 1851.

#### CONDITIONS OF SALE.

IN answer to the query of "S.H." allow me to say, I consider the insertion of a condition that the conveyance shall be prepared by the vendor's Solicitor for a sum named, to be altogether *unprofessional* on his part. The same opinion I have heard expressed by several other solicitors, when a case of this sort has come under their notice. T. S. W.

#### COUNTY COURTS.

##### Summary.

THE County Courts Bill has been read a second time in the House of Commons, and we are glad to see that the Attorney-General has taken charge of it; thus assuring for it the support of the Government.

#### THE LAWYER.

##### Summary.

COMMON LAW PRACTICE.—In *Doe dem. David v. Jones*, 17 Law T. 106, on taxation of costs, the affidavit by the attorney's clerk of payments to certain witnesses did not satisfy the Master, and the taxation was adjourned. It then appeared that the witnesses had not in fact been paid, upon which the attorney paid them, and made the necessary affidavit. The Court allowed the costs so paid.

The Court refused to permit pleas setting up enjoyment of the land for sixty years and eighty years, without payment of the rent-charge, to be pleaded in replevin where the seizure of the goods was avowed as a distress or tithe rent-charge. Lord CAMPBELL said, "Can these questions be raised in replevin? All claims for exemption from tithes ought to be raised before the Tithe Commissioners." *Shepherd v. The Marquis of Londonderry*, 17 Law T. 106.)

In *Beaulieu v. Fooks*, 17 Law T. 107, on a writ of error *coram nobis*, to reverse an out-awry for error in fact, the Court refused to require the plaintiff to give security for costs. "It seems to be admitted," said the Chief Justice, "that the practice is not to require costs on a writ of error to reverse an out-awry." "Of course," added PATTERSON, J. "if no costs are payable, no security can be

required, and that appears to be so according to the practice."

TRINITY TERM.—On Tuesday, Trinity Term, the last before the long vacation, commenced. The arrears of the Common Law Courts, with the exception of the Court of Exchequer, are inconsiderable. At the time the County Courts Act was passed, one Court had nine arrears: these are now allotted to the three Courts. The Equity Courts are burdened with arrears, and seem likely to be so until some efficient measure is passed on the subject. The whole arrears of the Law Courts for the present Term are only 130, of which twenty-eight are in the Court of Queen's Bench, nineteen in the Court of Common Pleas, and eighty-three in the Court of Exchequer. In the Queen's Bench, in the new trial paper, one rule is standing for judgment, one for arrangement, and thirteen for argument, whilst in the special paper there are two for judgment, two for arrangement, and only nine for argument. In the Common Pleas there are four demurrers entered, four enlarged rules in the remanet paper, and five new trials and six matters for judgment. In the Exchequer there are four rules in the peremptory paper, thirteen demurrers for argument, and nine special cases, besides ten cases for judgment, and as many as fifty-seven rules for argument on new trials. Several causes have brought about the diminution of the arrears, not the least of which is the County Courts Act; and it is to be hoped that some effort will be made to reduce the arrears in the Court of Chancery.—Times.

#### PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to nominate and appoint Duncan McNeill, esq. one of the Ordinary Lords of Sessions, to be one of the Lords of Justiciary in Scotland, in the room of Joshua Henry Mackenzie, esq. resigned.

The Right Hon. Sir John Jervis has appointed William Sale, of Manchester, in the county of Lancaster, gent. to be one of the perpetual commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the county of Lancaster.

The Lord Chancellor has appointed John Rogers Browne, of the town of Nottingham, gent. and James Blenkinsop, of Liverpool, in the county of Lancaster, gent. to be Masters Extraordinary in the High Court of Chancery.

Mr. Charles Young is appointed Attorney-general, Mr. William Swabey Registrar of Deeds, Mr. James Warburton Colonial Secretary, Mr. Robert Hodgson Queen's Counsel, and Mr. Desbrisay, Clerk of the Council, for Prince Edward's Island.—Observer.

GRAY'S INN, MAY 28.—At a pension of the Honourable Society of Gray's Inn, holden this day, Edward Paul Page, esq. was called to the degree of barrister-at-law.

#### COURT PAPERS.

##### CHANCERY SITTINGS,

Trinity Term, 1851.

##### Lord Chancellor's Court.

AT WESTMINSTER.	
Tuesday ... May 27	Appeal Motions
Wednesday ... 28	Petition day, Unopposed Lunatic and Cause Petitions
Thursday ... 29	
Friday ... 30	
Saturday ... 31	
Monday ... June 1	Appeals
Tuesday ... 2	
Wednesday ... 3	
Thursday ... 4	
Friday ... 5	Appeal Motions
Saturday ... 6	Petition day, Unopposed Lunatic and Cause Petitions
Sunday ... 7	
Monday ... 8	
Tuesday ... 9	Appeals
Wednesday ... 10	
Thursday ... 11	
Friday ... 12	Appeal Motions
Saturday ... 13	Petition day, Unopposed Lunatic and Cause Petitions
Sunday ... 14	
Monday ... 15	Appeals
Tuesday ... 16	
Wednesday ... 17	Appeal Motions
N.B. Such days as his Lordship sits in the House of Lords excepted.	

##### Vice-Chancellor Knight Bruce's Court.

Tuesday ... May 27	Motions and Claims
Wednesday ... 28	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 29	
Friday ... 30	Claims
Saturday ... 31	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... June 1	Cause and Claims
Tuesday ... 2	

Wednesday ... 4	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 5	Motions
Friday ... 6	Pleas, Demurrers, Exceptions, and Further Directions
Saturday ... 7	Petitions and Claims
Monday ... 8	Cause and Claims
Tuesday ... 9	
Wednesday ... 11	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 12	Motions
Friday ... 13	Pleas, Demurrers, Exceptions, and Further Directions
Saturday ... 14	Petitions
Monday ... 15	Claims
Tuesday ... 16	Motions
N.B. Fifty Claims will be placed in the paper on May the 20th. Unopposed Petitions, not exceeding ten, to be in the paper every day.	

##### Vice-Chancellor Lord Cranworth's Court.

Tuesday ... May 27	Motions
Wednesday ... 28	Petition day. Cause Petitions
Thursday ... 29	Cause and Claims
Friday ... 30	
Saturday ... 31	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... June 2	Cause and Claims
Tuesday ... 3	Short Causes, Short Claims, and do.
Wednesday ... 4	Cause and Claims
Thursday ... 5	Motions
Friday ... 6	Petition day. Cause Petitions
Saturday ... 7	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... 8	Cause and Claims
Tuesday ... 9	Short Causes, Short Claims, and do.
Wednesday ... 10	Cause and Claims
Thursday ... 11	Motions
Friday ... 12	Petition day
Saturday ... 13	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... 14	Cause and Claims
Tuesday ... 15	Motions
N.B. Unopposed Petitions, not exceeding Ten, at the sitting of the Court daily, except seal days.	

##### Vice-Chancellor Turner's Court.

Tuesday ... May 27	Motions, Pleas, Demurrers, Exceptions, Cause, and Claims
Wednesday ... 28	Petition day. Petitions, Pleas, Demurrers, Cause, and Claims
Thursday ... 29	Pleas, Demurrers, Exceptions, Cause, and Claims
Friday ... 30	Unopposed Petitions, Short Causes and Claims, Pleas, Demurrers, Exceptions, Cause, and Claims
Saturday ... 31	
Monday ... June 2	Pleas, Demurrers, Exceptions, Cause, and Claims
Tuesday ... 3	
Wednesday ... 4	
Thursday ... 5	Motions and ditto
Friday ... 6	Petition day. Unopposed Petitions, Short Causes and Claims, Pleas, &c.
Saturday ... 7	
Monday ... 8	Pleas, Demurrers, Exceptions, Cause, and Claims
Tuesday ... 9	
Wednesday ... 10	
Thursday ... 11	Motions and ditto
Friday ... 12	Petition day. Unopposed Petitions, Short Causes and Claims, Pleas, &c.
Saturday ... 13	
Monday ... 14	Pleas, Demurrers, Exceptions, Cause, and Claims
Tuesday ... 15	General Petitions and ditto
Wednesday ... 16	Motions and ditto

#### HOLYDAY AT THE CHANCERY OFFICES ON HER MAJESTY'S BIRTHDAY.

The subjoined order of the Court, dated May 27, has been issued by the Lord Chancellor.

"Whereas, by the 10th of the general orders of this Court, of the 8th day of May, 1845, it is provided that the Lord Chancellor may from time to time, by special order, direct the offices to be closed on days other than those mentioned in the fifth of the same orders; and whereas Saturday, the 31st day of May inst. has been appointed for the celebration of her Majesty's birthday, and this event has been heretofore observed as a general holyday in the several offices of this Court, I do therefore order that the several offices of this Court be closed on Saturday, the 31st day of May inst. and that this order be entered with the registrar and set up in the several offices of this Court."

#### Queen's Bench.

##### ADDITIONAL SITTINGS IN LONDON.

A short sitting has usually been held in London during the Term for the disposal of undefended causes; but during the last term Mr. Justice Coleridge gave notice that thereafter there would be two Nisi Prius sittings in Term of the entire day. We now understand that these Nisi Prius sittings will not be limited to one day, but will be continued on the subsequent days, if necessary, and that any common jury cause will be taken.

## PROCEEDINGS OF LAW SOCIETIES.

### LAW STUDENTS DEBATING SOCIETY.

QUESTIONS FOR DEBATE.

Tuesday, June 3, 1881.

**XLII.** Is it desirable to establish tribunals of commerce in this country?

**50.** Ought the case *In re Deacon*, 20 L.J. Rep. N.S. to be reversed or upheld?

## BIRTHS, MARRIAGES, AND DEATHS.

### BIRTHS.

**HOWARD.**—On the 26th inst. at Corby Castle, Cumberland, the lady of Philip H. Howard, esq. M.P. of a daughter.

**LORD.**—On the 26th inst. the wife of Henry Lord, esq. barrister-at-law, of Lincoln's Inn, of a son.

**YOUNG.**—On the 26th inst. at Champion Grove, the wife of Edward Young, esq. barrister-at-law, of a son.

### MARRIAGES.

**DANIELL.** Edward T. of Little Northampton, in the county of Bedford, to Anne Emma, second daughter of the Right Hon. Sir James Wigram, on the 27th inst. at All Souls' Church, Marylebone.

**PERKINS.** Frederick, of Devonshire-court, Temple, solicitor, to Mrs. Elizabeth Bagshaw, of Somerset-villas, Fulham-road, Brompton, at St. Luke's, Chelsea, on the 26th inst.

**EVANS.** J. Franks, esq. J.P., A.B., and B.L. son of Kyre Evans, esq. of Ash-hill Towers, and Milborne Castle, Ireland, to Julia Bruce, daughter and co-heiress of the late Rev. D. Stewart Moncrieff, A.M. rector of Loxton, Somerset, and Calverton-place, Clifton, at Clifton, on the 27th inst.

### DEATHS.

**BRANTFORD.** John, esq. formerly clerk for many years to active magistrate and a deputy lieutenant of the county of Essex, on the 19th inst. at Northfleet, aged 80.

**FLOOD.** Christopher, esq. Oldendon-place, Maida Hill, for twenty years vicar of St. Marylebone on the 26th inst. aged 58.

**JACOBS.** Alfred, younger son of Mr. William Jacobs, solicitor, on the 26th inst. aged eight months.

**FIRE INSURANCE.**—A return has been published of the amounts paid for duty by the various fire insurance-offices in England, Scotland, and Ireland during the year 1850. The following English offices paid the largest amounts during the quarter ended the 25th of December, 1850:—In town, the Alliance, 12,632*l.*; Church of England, 14,071*l.*; Imperial, 12,061*l.*; Phoenix, 30,362*l.*; Royal Exchange, 19,522*l.*; Sun, 43,310*l.* In the country: The Norwich Union, 21,880*l.*; and the West of England, 11,383*l.* The total amount of duty collected in Scotland from fire insurance-offices was 66,421*l.*; and the sums insured on farming stock amounted to 4,168,057*l.* In Ireland the largest amount of duty was collected from the following offices: In Dublin, the National, 1,602*l.*; Patriotic, 1,208*l.*; Royal Exchange, 1,129*l.*; Sun, 1,084*l.*; and in the country, the Alliance, 1,076*l.*; Atlas, 1,259*l.*; Sun, 1,392*l.*; West of England, 1,688*l.* The total amount of sums insured on farming stock in England in 1850 was 57,162,216*l.*

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	211	211	210	211	211	211
3 $\frac{1}{2}$ Cent. Reduced Annuities .....	97	97	97	97	97	97
3 $\frac{1}{2}$ Cent. Consols Annuities .....	97	98	97	97	97	97
Consols for Account .....	97	97	97	97	97	97
New 3 $\frac{1}{2}$ Cent. Annuities .....	98	98	98	98	98	98
Long Annu. (exp. Jan. 5, 1860) .....	7	7	7	7	7	7
Do. 30 yrs. (exp. Oct. 10, 1859) .....	..	..	7	7	7	7
Do. 30 yrs. (exp. Jan. 5, 1860) .....	..	..	7	7	7	7
India Stock .....	261	..	..	..	..	..
India Bonds (1,000 <i>l.</i> ) .....	..	48	51	..	..	..
Do. do. (under 1,000 <i>l.</i> ) .....	..	49	50	51	52	46
South Sea Stock .....	..	..	..	..	..	..
Do. do. New Annuities .....	..	..	..	..	97	..
Exchequer Bills, 1,000 <i>l.</i> .....	42	44	42	38	42	44
Do. do. 500 <i>l.</i> .....	..	43	..	43	44	..
Do. do. Small .....	..	..	45	42	41	42
Do. Advertised .....	44	..	41	42	40	42

\* Premium.

## THE GAZETTES.

### Bankrupts.

Gazette, May 27.

**BURBERRY.** DAVID, wood dealer, Newdigate, Surrey, June 10, at half-past eleven, and July 10, at eleven, Basinghall-st. Off. as Bell. Sols. Sharpe and Co. Bedford-row. Petition, May 28.

**CHAYLER.** CHARLES, printer, Sudbury, Suffolk, June 4, at eleven, and July 1, at half-past twelve, Basinghall-st. Off. as Stansfeld. Sols. Thorncliffe and Smith, Staple-in. Petition, May 28.

**GLAZ.** JAMES, hawker, Preston, Lancashire, June 6 and 20, at eleven, at Manchester. Off. as Macdonald. Sols. Blackhurst and Son, Cannon-street, Preston. Petition, May 28.

**CLARK.** ROBERT, draper, Brynmawr, Breconshire, June 11 and July 6, at twelve, Bristol Court. Off. as Hutton. Sols. Berra, Bristol. Petition, May 28.

**GRANTING.** WALTER LONG BOSS, agricultural implement maker, Red Lion-square, June 10 at one, and July 8, at twelve, Basinghall-st. Off. as Groom. Sol. Trapp, Adelaide-place, London-bridge. Petition, May 24.

**MOORE.** RICHARD, commission agent, San Teyan-Fields, St. George's-in-the-East, and Ashchurch-villa, Hammer-smith, June 10, at twelve, and July 8, at eleven, Basinghall-st. Off. as Groom. Sols. Lawlor and Co. Old Jewry-chambers, Old Jewry. Petition, May 24.

**RODRIGUEZ.** FREDERICK, schoolmaster, Croydon, June 5, at twelve, and July 11, at eleven, Basinghall-st. Off. as Cadman. Sols. Lowless and Nelson, Hutton-court, Threadneedle-street. Petition, May 28.

**WATSON.** WILLIAM, licensed victualler, Salisbury-street, City, June 6, at half-past eleven, July 11, at one, Basinghall-st. Off. as Whitmore. Sol. Halk. Chesham-place, Blackfriars. Petition, May 24.

### BANKRUPTCY ANNULLED.

Gazette, May 27.

**JOHN.** E. carpenter, Richmond-st. Soho, May 15.—Jackson, R. Tanner, Balby, Yorkshire, May 24.

Gazette, May 30.

**DEWE.** WILLIAM HENRY, wine and spirit merchant, Brerley-hill, Staffordshire, June 9 and July 7, at half-past ten, Birmingham. Com. Balguy. Off. as Whitmore. Sol. Smith, Waterloo-st. Birmingham. Petition, May 21.

**CLARK.** JAMES, builder, Exeter, June 11 and July 23, at eleven, Exeter. Com. Bere. Off. as Hirtzel. Sols. Gledhill, and Geare, Mountford, and Geare, Exeter. Petition, May 28.

**CLAYTON.** ROBERT, timber dealer, Stratton-on-Dunsmore, Warwickshire, June 9 and July 7, at ten, Birmingham. Com. Balguy. Off. as Valpy. Sol. W. H. Elkington, Coleman-row, Birmingham. Petition, May 23.

**GOVERNOR.** GEORGE, coal merchant, Paradise-row, Rotherhithe, June 19, at half-past eleven, July 11, at half-past one, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Newbon and Evans, 1, Wardrobe-place, Doctors'-commons. Petition, May 29.

**HOBBS.** ROBERT, hawker, Morice Town, Devonshire, June 19 and July 17, at eleven, Plymouth. Com. Bere. Off. as Herdman. Sol. Elworthy, Plymouth. Petition, May 23.

**HUNT.** JOHN HENRY, warehouseman, Silver-st. June 10 and July 10, at twelve, Basinghall-st. Com. Evans. Off. as Johnson. Sols. Sole and Turner, Aldermanbury. Petition, May 27.

**MAYOR.** RICHARD, wholesale and retail grocer, Bolton-le-Moors, Lancashire, June 19 and July 4, at twelve, Manchester. Off. as Lee. Sol. Tyrer, North John-st. Liverpool. Petition, May 23.

**SCOTT.** JOHN, sen. and jun. ship owners, North Shields, June 13, at half-past twelve, July 16, at eleven, Newcastle-upon-Tyne. Com. Ellison. Off. as Baker. Sols. Bell, Brodick, and Bell, Bow-churchyard, London; and T. and W. Chater, Newcastle-upon-Tyne. Petition, May 22.

**WYATT.** DAVID ION, and UNDERWOOD, BRIDAL, hat and cap manufacturers, Bristol, June 10 and July 3, at eleven, Bristol. Com. Hill. Off. as Acraman. Sol. Salmon, St. Nicholas-chambers, Bristol. Petition, May 22.

### Dividends.

#### BANKRUPT DEBTS.

Official Assignees are glad to whom apply for the Dividends.

**BLACK.** A. bookseller, first, 38, Stansfeld, London.—Burnell, J. P. glass dealer, first, 38, 9d. Edwards, London.—Burridge, W. sen. and jun. and J. bankers, fourth, 141, Stansfeld, London.—Clegg, J. H. cotton spinner, first, 18, 2d. Pott, Manchester.—Cooper, W. S. grocer, first, 38, 6d. Stansfeld, London.—Davies, J. mercer and draper, first, 38, 3d. Christie, Birmingham.—Holley, J. miller, first, 38, 6d. Miller, Bristol.—Jones, C. G. victualler, first, 38, 1d. Edwards, London.—Kee, S. and Langford, W. brewers, first on new proceeds, 18, 6d. Edwards, London.—Sharp, G. J. tailor, second, 34d. Edwards, London.—Thompson, F. sen. carpenter and builder, second, 2d. Stansfeld, London.—Tuck, H. E. milliner, second, 6d. Edwards, London.

#### INSOLVENT ESTATES.

**PAGE.** T. J. grocer, 28. Apply at the County Court, Brighton.—**PHIPPS.** F. first, 13s. 4d. Apply at the County Court, Margate.

#### Assignments for the Benefit of Creditors.

Gazette, May 30.

**BROWNING.** T. and E. H. millwrights, engineers, and machine makers, Salford, Lancashire, May 13. Trusts: B. Lewis, machine maker, and P. Fryer, iron merchant, both of Salford, and T. Pritchard, iron merchant, Manchester. Sol. J. Parry, Manchester.—**CLIFTON.** John and Joseph, woollen manufacturers, Carr Cote, near Delph, Saddleworth, Yorkshire, April 23. Trusts: D. Boscovits, wool merchant, Huddersfield, G. Fielder, wool merchant, Dobcross, Saddleworth, and T. Robinson, oil merchant, Huddersfield. Sol. W. Barker, Huddersfield.—**GOLDBURY.** E. draper, Upper-st. Islington, April 17. Trusts: J. Dillon, wholesale warehouseman, Fore-st. Sols. Ashurst and Son, Old Jewry.—**HUGHES.** E. draper, North Shields, Northumberland, May 10. Trust: E. Tweddell, draper, Newcastle. Sol. G. Brewis, Newcastle.—**HOLMES.** J. farmer, Wisbech St. Peter, Isle of Ely, Cambridgeshire, May 13. Trusts: E. Shepperson, farmer, and H. Calver, surgeon, both of March. Sol. E. H. Jackson, Wisbech St. Peter.—**JONES.** H. collector of rates, Southampton, April 28. Trusts: E. Williams, auctioneer, Southampton, and W. Elliott, gentleman, Hill, par. Millbrook. Sols. Page and Moody, Southampton.—**MICHELL.** T. labourer, Blaina, Monmouth, late of the White Lion, Mill-st. Newport, licensed victualler, May 13. Trust: C. B. Palmer, brewer's agent, Newport. Sol. J. Philpotts, Newport.—**MICHELL.** J. woollen draper, Manchester, April 19. Trust: J. Marshall, merchant, Leeds. Sol. E. W. Bennett, Manchester.—**WOODWARD.** D. farmer, Longcott, Berkshire, April 30. Trusts: T. Smith, farmer, Chilton Follet, and C. Hart, Ironstone, Wantage. Sol. H. E. Astley, Hungerford.

Gazette, May 23.

**BLAKELEY.** W. B. and T. wine-merchants, Broad-st. Cheapside, May 14. Trusts: J. T. Howard, gent. Man-

church-st. and W. Bagshaw, accountant, Coleman-st. Sol. Oliver and Wilkins, St. Swithin's-lane.—**BRIDGER.** J. agricultural implement manufacturer, Hitchen, Hertfordshire, April 28. Trusts: S. Prudden, Hitchen, and E. Bloom, Baldock, ironfounders, Sols. J. Luce, Trinity-place, Charing-cross, and G. D. V. Wade, Baldock.—**BROWN.** J. grocer and tea-dealer, Deal, Kent, May 19. Trusts: W. C. Gemmell, banker, and W. B. Munday, builder, both of Deal. Sols. Mercer and Edwards, Deal.—**DAY.** G. tailor, Sixties-borne, Yorkshire, May 7. Trusts: J. Broadbent, cloth manufacturer, Longwood-edge, near Huddersfield, and S. Davison, gent. Great Driffield. Sols. T. Crust, Beverley.—**ELL.** W. jun. wine and ale dealer and flour merchant, Tavistock, Devonshire, May 10. Trusts: J. Gill and J. Randle, bankers, Tavistock, and D. Millward, jun. wholesale grocer, Plymouth. Sol. P. M. Little, Devonport.—**JONES.** I. builder, Wrexham, Denbighshire, May 19. Trusts: W. Overton, ironmonger, Wrexham, and J. Myers, timber-merchant, Chester. Sol. G. C. Parker, Wrexham.—**SCOTT.** T. licensed victualler, Portland, Dorsetshire, May 13. Trusts: G. E. I. Woodhouse, brewer, Anster, near Blandford; G. C. Welsford, merchant, Weymouth and Melcombe Regis; T. J. Hansford, builder, Portland; S. Tite, commission agent, and E. B. Washborne, brewer, both of Weymouth and Melcombe Regis. Sols. Hemming and Andrews, Weymouth.—**TURNER.** W. R. grocer, Oxford-st. Middlesex, May 9. Trusts: T. Hawley, grocer, Blackfriars-road, and W. Burchett, boot and shoe maker, Cheapside. Sol. G. W. Marsden, Queen-st. Cheapside.—**WINGROVE.** E. grocer, Penn, Buckinghamshire, May 21. Trusts: F. Wingrove, gent. Penn, and J. W. Williams, builder, High Wycombe. Sols. G. Smith and Son, Slough.

### Partnerships Dissolved.

Gazette, May 16.

**CRICHTON** and Marshall, printers, booksellers, &c. Birkenhead, April 30.—**DAVIES** and Sons, shopkeepers and general dealers, Brynhafo, par. Llanllwyr, April 30. Debts paid by R. S. and J. S. Davies.—**DOUGLAS.** W. and Owen, W. ship builders, Southwick, May 13. Debts paid by Douglas.—**FRENCH.** D. and Anderson, hoxmen, carriers, and wharfingers, Chatham, April 25. Debts paid by French.—**FRENCH.** J. and Son, coal merchants, coopers, and general merchants, Chatham, May 14. Debts paid by D. French.—**FOSTER.** H. and Stubbsfield, J. farmers and corn dealers, Westfield and Hastings, May 13. Debts paid by Stubbsfield.—**GREEN.** G. and Co. brass and ironfounders, Aberystwyth, May 6. Debts paid by Humphreys.—**GREEN.** W. and Taylor, J. woollen scribbles and spinners, Huddersfield, May 12.—**HAIGH** and Bottomley, scribbles and woollen yarn spinners, Folly Hall, near Huddersfield, May 2.—**HARPER** and Whittle, general Manchester warehousemen, Manchester, May 14. Debts paid by Bowden and Whittle.—**JAGO.** W. and Nicholls, J. stonemasons, Great Dunmow, and Bishops Stortford, May 14.—**JAMES** and Tanton, auctioneers, Coventry, May 8. Debts paid by Tanton.—**MOORE.** L. E. and Durham, H. furnishing undertakers, Rathbone-place, May 8. Debts paid by Durham.—**MURRELL.** W. and Co. drapers, King's-road, Chelsea, Feb. 25.—**PHILLIPS** and Nurse, attorneys, Weymouth, May 14.—**PRESTON.** W. and J. breeches makers and tailors, New Bond-st. May 15.—**REGAN** and Phillips, Manchester warehousemen, May 14. Debts paid by Phillips.—**ROUSE.** J. and G. iron and tin plate workers, Rawdon-stall, May 13.—**RIDGWAY** and Hawley, wool merchants, Huddersfield, May 12. Debts paid by Ridgway.—**STEER** and Webster, manufacturers and merchants, Sheffield, Jan. 1. Debts paid by Webster.—**WHITTINGHAM.** J. and Gill, T. B. booksellers and stationers, Conduit-st. May 15.—**WILLIAMSON** and Barker, manufacturers of oil cans, Manchester, May 10. Debts paid by Barker.—**WILSON** and Son, silversmiths, Peterborough, May 13. Debts paid by J. F. Wilson.—**WOOD.** J. and H. fancy wares manufacturers, Camberworth, par. Silkstone, May 1.—**WOODCOCK** and Blackbarn, corn mill, Spen, par. Birstal, May 13.

Gazette, May 30.

**ANGLATO.** Cox, and Co. general merchants and commission agents, Saint Mary-at-hill, May 10. Debts paid by Cox.—**BATES.** Shaw, and Brother, millwrights and engineers, Halifax, May 14. Debts paid by Bates.—**BECKETT.** G. and W. mercers and drapers, Northwick, May 1. Debts paid by W. Beckett.—**BOLTON** and Cony, eating-house keepers, Liverpool, May 14.—**BRICE.** H. and J. millers and corn dealers, Colford, March 26.—**BROWNING.** T. and E. H. millwrights and engineers, Salford, May 13.—**CASE** and Liddell, warehousemen, Saint Alban's-hall, Little Lonsdale, A.D. 18, and Wood-st. Dec. 31. Debts paid by Liddell.—**CURTIS.** J. jun. and Wright, W. V. chemists and druggists, Old Fish-st. Doctors'-commons, May 19. Debts paid by Wright.—**DIXON.** T. and W. cloth manufacturers, Batley, Dec. 31.—**DONALDSON** and Berrwick, timber merchants, Little Bolton, Dec. 13, 1849. Debts paid by Berrwick.—**EVES.** Brooks, and Spear, surgeons, Cheltenham, May 16.—**GELLEY** and Charlton, iron forgers, Newnham, May 16. Debts paid by Charlton.—**HARRIS.** Mervin, and Harris, wine and spirit merchants, Liverpool, June 30, 1848.—**LONGHEAD** and Liddell, woollen cloth merchants and manufacturers, Huddersfield, May 19. Debts paid by Liddell.—**MASSEY** and Nicholson, general agents, Manchester, May 17.—**MENLOVE** and Watson, bonnet manufacturers, Somerset-place, Hoxton, May 17.—**NICHOLL.** J. and Ford, H. attorneys, Exeter, May 12. Debts paid by Ford.—**NICHOLLS** and Trenbath, cotton-waste dealers, Manchester, Feb. 14. Debts paid by Nicholls.—**OLDHAM.** Amory, and Booth, millwrights and ironfounders, Hull, as regards Amory, May 14.—**OLIVER.** H. W. Worthington, E. G. and Oliver, W. Manchester warehousemen, Aldermanbury, May 6.—**PARKINSON.** J. and Summers, F. fancy stationers, High-st. Peckham, May 6.—**PAYNTER** and Hancock, corn merchants, Liverpool, May 16. Debts paid by Hancock.—**PHIPPS.** J. L. and Co. New York, and Phipps, Brothers, and Co. Rio de Janeiro, merchants, as regards Phipps, Nov. 22.—**RUNDLES** and Sugden, plasterers, Leeds, May 15.—**ROBERTSON** and Co. engine wrights and ship wrights, Newcastle, Nov. 26.—**SHAWROD.** J. A. and Wright, T. M. retail chemists and druggists, Bishopsgate-st. without and Arkwright-lane, May 17. Debts paid by Shawrood.—**STONE.** S. and G. Grocer, F. joiners, &c. Stavely, April 25. Debts paid by Stone.—**WATERER** and Protheroe, coal proprietors, Llanelli, April 20.—**WILKS.** W. J. and Miley, W. silk mercers, Regent-st. St. James's, May 10. Debts paid by Wilks.—**WILLIAMS** and Barth, milliners and dressmakers, Chancery, May 15. Debts paid by Barth.

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## To Readers and Correspondents.

- "G. J."—We are not aware of any such rule. But he must cease to be a clerk.
- "Mr. B.'s" report of the County Courts case contains no decision in any point of law, which alone is of any use in a legal journal.
- "S. D." (Leeds).—There is no book on this subject exclusively. It forms a chapter in Hughes's Practice of Sales.

## SCALE OF CHARGES FOR ADVERTISEMENTS.

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Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.

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We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, JUNE 7, 1851.

## A SUGGESTION.

A FEW weeks ago a correspondent suggested to us the possibility of substituting for the costly machinery of a register of deeds, the form of a memorial by indorsement.

At first we were inclined to reject the proposition as one that scarcely deserved consideration; but we have since given to it some thought, and although we are unable to see our way clearly to the object, it seems so far practicable that no difficulty presents itself which ingenuity may not overcome.

The primary purpose of registration is to simplify the proof of title by preserving a record of all conveyances, incumbrances, and settlements affecting landed property, so that a purchaser or mortgagee may be enabled to ascertain with readiness and certainty what have been the dealings with it.

The uses of this are twofold. First, it secures him against secret conveyances and defects not disclosed; secondly, it diminishes the expense of proving a whole title afresh on every new investigation of it. Each deed or devolution once proved and registered remains for the use of all succeeding dealers, and never again requires to be re-investigated.

The objections to registration are, first, the expenses of the registry itself; secondly, the cost of registering the particular conveyance; thirdly, the cost of going to the registry office to search the title; fourthly, the difficulty of devising a plan which shall at once be simple, and yet distinctly preserve the identity of parcels, when, after awhile, properties become divided, and with them incumbrances are divided also. Undoubtedly registration will increase the cost of the particular conveyance to the extent of the expenses of registration; but, on the other hand, it will diminish the cost

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of proving and investigating the title for the purpose of the conveyance.

The true difficulty of registration lies in the construction of a plan which shall secure the identity of the property, after repeated devolutions and charges. Thus, suppose an estate of 20,000 acres to be registered as held under one title and one description. It is sold in twenty lots: there must be twenty new descriptions as the foundations of so many more titles; again subdivide them into lots of half an acre, and some of these half-acre lots into divers lots of square feet for building, and conceive the difficulty of preserving the identity of the house of twenty square yards, with the estate of 20,000 acres, and this yet further increased by the purchase of a slice from half-a-dozen of the lots at some point of junction to form a new title conglomerated out of the whole.

But other countries have accomplished it successfully. True; but is land subjected elsewhere to so many complicated dealings? We doubt it. From all that we heard, or read, as to the real property laws of other European states, there appears to be nowhere practised, or perhaps permitted, such a variety of charges as are wont to be made on estates in this country. Indeed we are inclined to believe that this is the root of the evil, and that the only effective cure for it will be to limit this power of charging landed property for any other than the purpose of mortgage—so that, without actual possession, there may be no ownership—in short, that none but a mortgagee (who should be deemed a conditional purchaser) should have a charge upon land, the ownership of which is in another. Immense advantages would flow from this, by the gradual release of the land from the thralldom in which it is now held by the burden of charges that have attended the inheritance, while it would promote its sale, raise its value in the market, and legitimately increase the profits by increasing the business of the solicitors.

This, however, is from our present purpose, which is to throw out, for the consideration of our experienced readers, the hint of a plan for preserving all the uses of, and avoiding the many objections to registration by means of indorsement upon the title-deeds. Let it be required that every deed should contain in it, or indorsed upon it, a list of all the documents required for evidence of title from a date within the Statute of Limitations, and let all conveyances, &c. not so indorsed, be declared to be void and of none effect. Such indorsement or schedule to be exempted from stamp duty.

It is not necessary to develop the entire arrangements that would be requisite for the perfecting of the scheme of which this is only the rude design or foundation. It certainly presents itself to our mind as feasible, and, if practicable, its advantages over any system of registration are manifest. We place it before our readers for their better experience to test its value.

## COUNTY COURT JUDGES.

THE newspapers of the week have presented the curious circumstance of two judicial investigations into the conduct of County Court Judges. Neither is yet concluded, nor has the accused in either been heard, and therefore we suspend an opinion upon the particular cases, merely remarking that we have had occasion, in the course of our duty, but with much pain, to comment upon the conduct of the self-same judges long before the present charges were preferred. Mr. RAMSHAYE's sayings and doings at Liverpool have been more than once reported here and in the County Courts Chronicle; and Mr. AMOS, in Marylebone, has been complained of by some practitioners whose complaints we have published, and by more whose complaints we have suppressed, because we are very loathe to do anything which may have even a tendency to

lower the dignity of the judicial office, or disturb public confidence in the wisdom, or discretion, or self-command of those who fill it. But since these have been made the subject of public discussion, we cannot pass them in silence.

Upon Mr. RAMSHAYE's doings we are inclined to place the most charitable construction, and attribute them to physical infirmity; the faults of Mr. AMOS are, we believe, more in manner than in substance; he desires to do his duty, but he wants that essential quality in a judge—patience. His own mind is quick of apprehension, and he is impatient when he is dealing with slower minds. This is the only fault with which he has been charged before, for, with respect to the particular case now under investigation, it would be unfair to form any opinion until his answer has been heard.

But the occurrence of two such complaints is not without significance. It proves the justice of a remark, very commonly made, how little care had been exercised in the appointment of County Court Judges. It seems to have been thought that anybody would do for such an office; patronage was unscrupulously exercised without any regard for fitness. This should not be. This appointment was taken from the Crown and given to the Lord Chancellor, for the purpose of preventing political influences from swaying a choice which should be determined only by competency. But the precaution has not availed. County Court Judges have become vastly more important personages than any had anticipated. Under these altered circumstances, and seeing the manner in which patronage has been exercised, would it not be proper for Parliament to reconsider the subject, with the purpose of placing the appointment upon some more satisfactory basis, which should secure to the public the services of the most competent men, instead of a selection in which competency is never considered, but only connection?

## REGISTRATION OF ASSURANCES.

THIS Bill has been so mangled in Committee, that in the absence of a corrected copy it is impossible to say precisely what it now contains; but we believe that no alteration is made in one part of it, which ought to have the attention of the Attorneys, for it is not fair towards them.

The Deputy-registrars are required to be Barristers of three years' standing, who have practised as Conveyancers. Wherefore? A knowledge of conveyancing is, perhaps, a necessary qualification, but why is it to be presumed that only a Barrister of three years' standing is acquainted with conveyancing? Why is such a person to be preferred to a Solicitor, who has practised conveyancing for twenty years? We intend no slight to our brethren of the Equity Bar, but we are bound to tell the truth, and the truth is, that conveyancing is precisely the branch of the law upon which the Attorneys (at least the country practitioners) are usually best informed. We would back a three years' Solicitor in a country office, with a few stewardships, against any three years' Conveyancer in Lincoln's-inn, and the reason is, that he has had a great deal more experience. There are few country Solicitors who are not compelled to study Real Property Law and Conveyancing, even if they do not dive very deeply into the mysteries of other branches of the law. Why, then, should not Solicitors, who are at least equally competent, be eligible to the office? To take as a test a nominal three years of practice by a man who calls himself a Conveyancer, and to reject the actual practice of thirty years of a body of men who are Conveyancers, and something more, is at least an absurdity. But it is also an injustice, for it excludes a large and influential body of persons whose competency

is unquestionable. We do not believe that in this there was any ill intention. Doubtless it was desired to have as registrars persons acquainted with the law of real property and the practice of conveyancing. The framers of the Bill probably share the general ignorance with respect to the true character and attainments of the country Solicitors. They knew that, in London, the Solicitors generally do not make conveyancing a study, the practice here being to employ conveyancers; and therefore that they were not fitted for the post. But the framers were ignorant that the country Solicitors are very different; that almost every Solicitor in the country is obliged to learn real property law thoroughly; that he is in the daily practice of it; that he is as familiar with conveyancing as is the London Lawyer with the *minutiae* of practice at Judge's Chambers, and that therefore in the country Solicitors there is a body of men quite as competent as the three years' Conveyancers whom the Bill has selected.

We trust that the error and the source of it being now pointed out, the Bill will be amended in this respect, and that any Lawyer, Barrister or Solicitor, shall be eligible, provided he prove himself to be qualified by shewing his proficiency in the knowledge of the law of real property and the practice of conveyancing.

Let the Solicitors look to it, should the Bill proceed further, of which, however, there is no present probability.

#### CIVIL (IRELAND) BILL.

##### I.

THE Bill purports—1. To consolidate the several Acts of Parliament relating to proceedings by Civil Bill in Ireland, and to repeal all previous enactments upon the subject.

2. To extend the jurisdiction of the assistant barristers.

3. To facilitate the service of process, and confer ample powers of amending processes on the assistant barristers.

4. To abolish all fees payable to the assistant barristers, and to substitute a stamp-duty in lieu thereof; and to regulate the salaries of the assistant barristers.

5. To give to the assistant barristers a new jurisdiction, by transferring to them the hearing of petitions of insolvent debtors on circuit.

The jurisdiction of the assistant barristers is not a very ancient one; it was first conferred on them in 1796, when the 36 Geo. 3, c. 25, transferred to them the jurisdiction to hear civil bills, which had previously been exercised by the judges of the Superior Courts on their respective circuits.

From that period to the present their jurisdiction has been from time to time extended, and a large jurisdiction at present exists, which has so been exercised as to bring justice home to the doors of all aggrieved at an expense within the means of most persons. And it may be confidently stated to have answered the objects of the institution, and to have afforded general satisfaction.

The institution of the County Courts in England seems to have been based upon the successful trial of over fifty years of the Assistant Barristers' Court in Ireland; though it will be found upon a comparative view of the duties of the judges of the County Court—the nature and expense to the suitor, of its proceedings, as compared with the duties of the assistant barristers and the expense and proceedings of their court, that whilst the duties of the one fall far short of those of the other, the expense to the suitor in the latter court is trifling when compared with that of the former.

Previous to last year, the jurisdiction of the County Courts was limited to the sum of 20*l.* in personal actions (a certain class of which, however, were excepted from the jurisdiction of that Court); by the 13 & 14 Vict. c. 61, the jurisdiction was extended to 50*l.* in these actions.

That Court also entertains replevins and ejectments for the recovery of the possession of lands, where the tenancy has determined and the rent does not exceed 50*l.* which, with the hearing of petitions for the discharge of insolvent debtors, constituted the entire jurisdiction of these Courts.

The Assistant Barristers' Court now exercises a jurisdiction far more extensive; in many instances actions can be brought by civil bill for the recovery

of sums of money, without any limit to the amount sought to be recovered; for instance, for the recovery of poor-rates, road-contractors' bonds, monitions, penalties under the Stamp Acts, and in various cases to a very large amount, as hereinafter pointed out.

It is proposed by the present Bill to assimilate the jurisdiction of the Assistant Barristers' Court with that of the County Court, by extending the jurisdiction of the former Court in personal actions generally to that which the latter Court now possesses.

Provision is also made for the enforcing the attendance of witnesses resident out of the jurisdiction of the respective Assistant Barristers' Courts in Ireland, and for the payment of the costs of these witnesses, limiting the amount, and which provision did not exist heretofore.

Advantage has been taken of the experience of the last fifty years to meet and correct any defects that may have been in any of the previous Acts regulating the practice and constitution of the Court.

The jurisdiction in hearing cases of ejectment upon the title at present is 20*l.*

A jurisdiction is given to recover by ejectment the possession of lands overheld by caretakers and permissive occupants. And also the possession of lands held by tenants from year to year where a year's rent is due. This latter provision, it is hoped, will put an end to the vicious practice, which so much exists in Ireland, of serving notices to quit every year, as a means of enforcing the payment of rent.

In future, the petitions of insolvent debtors are to be heard before the assistant barristers in their respective jurisdictions, conferring on them the same powers in that behalf as are now exercised by the County Court judges in England. By this arrangement, the circuits of the insolvent judges will be abolished, the expense attendant thereon saved, and these judges enabled to attend to their duties in Dublin.

The fees payable to the assistant barristers have been in all cases abolished; but acting on the principle found to work so well in the County Court Acts, namely, that the suitor should, to some extent, contribute to the support of the Court whose aid he requires, a stamp of sixpence on every original process, and sixpence on every copy, is imposed in lieu of the fee heretofore paid to the assistant barrister in ordinary cases; and in ejectment and other cases, a stamp is imposed *less than half the fee* heretofore paid; so that by this arrangement the suitor is considerably relieved from the payment of costs. And it may be well here to observe, that in the ordinary cases which are heard in the Assistant Barrister's Court, the costs to a suitor, including those of his attorney, are much less than what the suitor in the County Court has to incur in the first step that he takes in that court.

From the result of the return made, it is evident that with this small stamp duty (and which is but falling back to the original intention of the Legislature, as appears by the 36 Geo. 3, cap. 25) an ample fund will be created for the purposes of this Act.

The office of assistant barrister was originally created in the year 1787, by the 27 Geo. 3, cap. 40. His duties were by this Statute confined to the criminal business of the Quarter Sessions, and a salary of 300*l.* a year given. He had no civil jurisdiction whatever.

In 1791, the Legislature, conceiving the salary to be insufficient, and an inadequate remuneration for the duties as assistant to a court merely criminal (and the Act so reciting it), by the 31 Geo. 3, c. 29, increased the salary to 380*l.* a year.

The salary was again, by the 36 Geo. 3, c. 25, increased to 400*l.* a year, and by an Act of the 39 Geo. 3, certain fees were given in addition to the yearly salary of 400*l.* therein granted.

From 1799 to the present time no alteration has been made in the salary of the assistant barrister.

By the 36 Geo. 3, c. 25, the duties of the assistant barrister were prescribed; and at the time of the passing of this Act, and for years afterwards, the class of cases returned to and disposed of at the Quarter Sessions necessarily, and from the nature of the then criminal law, consisted almost wholly of common assaults and petty larcenies.

As the criminal code became relaxed in severity, so did the business of the Quarter Sessions increase; and the result of the abolition of capital punishment for crimes (with a few exceptions) has been that now and for some years past the great proportion of

the criminal business of the country is sent for trial to, and disposed of, at the Quarter Sessions.

The result is, that now all arson, burglaries, house robberies, highway robberies, with and without violence, cattle killing, cattle stealing, all larcenies, violent assaults, assaults with intent to commit felony, certain classes of forgeries and perjuries, offences against coin, and misdemeanours of all sorts, including white-boy offences, are not only now triable, but are in practice sent to, and are actually tried at, Quarter Sessions.

The general instruction given to magistrates is, to send all classes of cases, not capital, to the next tribunal for trial, whether Quarter Sessions or Assizes; and as the Quarter Sessions are held four times a year in each county, and as a Session always immediately precedes the Summer Assize, and invariably two Sessions intervene between each Assize, the great majority of the above class of cases are disposed of at Quarter Sessions, by which a great benefit to the country at large is effected, not only by reason of the less expensive mode of prosecution, but also the great diminution in the expense of keeping prisoners, and at the same time the more speedy discharge of the innocent takes place.

#### ANOTHER SHAM LAWYER.

We have received the following:—

8, Wellington-street, Bedford,  
May 29, 1851.

SIR,—Mr. Craft, grocer, &c. of Bedford, has directed me to apply to you for payment of the sum of 14*s.* 8*d.* being the amount due from you to him, and unless the same is paid to me on or before Saturday next, May 31, by 12 o'clock, proceedings will be taken against you in the next County Court for the recovery of the above amount without further notice.

I am, yours obediently,

THOMAS ROBINSON, Agent, &c.

Charles Denton, Goldington.  
Debt, 14*s.* 8*d.*

#### THE LEGISLATOR.

##### Summary.

SOME progress has been made during the week. The County Courts Bill in the Commons has been read a second time. The County Courts Bill (No. 2) in the Lords, which purposes to give an original equity jurisdiction to the County Courts, has been read a second time, committed, and the report has been brought up with amendments, the particulars of which we have not yet learned. The Law of Evidence Bill has been referred to a committee, after an emphatic expression by Lord CAMPBELL, of approval of its principle. Lord BROUGHAM has introduced a Bill for the improvement of the practice in the Court of Chancery, which he states to have been prepared by the experienced hands of his brother, Master BROUGHAM. The Registration of Assurances Bill has been deferred, to give time for consideration of the amendments that have been made by the committee.

The Commons have made no progress. The Papal Aggression Bill stops the way.

#### Imperial Parliament.

##### PUBLIC BUSINESS TRANSACTED.

###### BILLS READ A FIRST TIME.

Friday, May 30.

Survey of Great Britain, &c.  
Charitable Purchase Deeds.

Monday, June 2.

Irish Fisheries  
Ecclesiastical Property Valuation, Ireland.

Wednesday, June 4.

Administration of Criminal Justice Improvement  
Prevention of Offences.

Thursday, June 5.

Metropolis Police.

###### BILLS READ A SECOND TIME.

Friday, May 25.

Woods, Forests, &c.

Wednesday, May 26.

County Courts' further Extension.

Thursday, May 29.

British White Herring Fishery.

Friday, May 30.

Fee Farm Rents, Ireland  
Court of Chancery, Ireland  
Colonial Property Qualification.



Wednesday, June 4.  
Charitable Purchase Deeds.

BILLS READ A THIRD TIME AND PASSED.

Friday, May 23.  
Sale of Arsenic Regulation  
Appointments to Offices, &c.  
Process and Practice, Ireland  
Highways, South Wales.

Tuesday, May 27.  
Apprentices to Sea Service, Ireland, No. 2

Thursday, May 29.  
Stamp Duties, Ireland (continuance).

Friday, May 30.  
Bridges, Ireland.

Thursday, June 5.  
Furn Buildings  
Prisons, Scotland.

PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Friday, May 23.  
Birmingham Improvement  
Malmesbury Turnpike Roads  
Waveney Valley Railway  
Hainsall Forest.

Monday, May 26.  
Bolton, &c. Railway  
Brackley Roads Consolidation  
Great Western Railway, Birmingham and Oxford Junction  
Branch  
Hayling Bridge and Causeway  
Manchester and Salford Extension Railway  
North Shields Quays and Improvements  
Sunderland Improvement  
Warrington, &c. Junction Railway  
Western-Super-Mare Improvement.

Tuesday, May 27.  
Doe Standard Restoration  
Great Central Gas Consumers' Company.

Wednesday, May 28.  
Great North of Scotland Railway  
Midland Railway, purchase of Leeds, &c. Railway.

Thursday, May 29.  
Price's Patent Candle Company  
Thames Haven Dock and Railway.

Friday, May 30.  
Great Southern and Western Railway, Ireland  
South Staffordshire Railway, Branches  
Stockton, Middlesbrough, &c. Waterworks.

Monday, June 2.  
Cork and Waterford Railway  
Great Northern Railway, No. 2  
Kilmerney Junction Railway  
Manchester Improvement  
Manchester Waterworks  
Maryport and Carlisle Railway  
Ulverston and Lancaster Railway  
Waterford and Kilkenny Railway.

Wednesday, June 4.  
Clackenwall Improvement.

SESSIONAL PRINTED PAPERS.

- Par. Num.  
63. Local Acts—Reports of the Admiralty  
288. Portpatrick Harbour Light—Correspondence  
296. Legacy, &c. Duties—Return  
294. Sweets or Made Wines—Returns  
316. Van Diemen's Land—Copy of Sir W. Denison's Despatch.  
321. Hope—Returns  
322. Workhouses, Ireland—Correspondence  
306. Custom House—Abstract of Accounts  
319. Bills—Apprentices to Sea Service, Ireland (No. 2), amended  
320. — British White Herring Fishery  
323. — Farm Buildings, amended  
350. — Lodging Houses, as amended in Committee and by the Select Committee  
363. — Metropolitan Water Supply, Control of by Representative Body  
357. — Fee-farm Rents, Ireland, amended  
359. — Common Lodging-Houses, amended by the Select Committee  
361. — Survey of Great Britain, &c.  
362. — Charitable Purchase Deeds  
341. — Farm Buildings, as amended by Committee and on re-commitment

Cape of Good Hope, Representative Assembly—Further Papers.

- Public Acts—Cap. 9, 10, and 11  
314. Public Income and Expenditure—Account  
333. Metropolitan Water Bill—Copy of Scale of Rates  
308. Navy—Return  
309. Valuation, Ireland—Return  
319. Trinity College, Dublin, Bill—Return  
322. Civil Bill Processes—Return  
323. Wheat and Oats, Ireland—Returns  
Affairs of Rome—Correspondence  
311. Civil Services—Estimates, Classes 4, 5, and 6  
317. Wheat, &c.—Account  
324. Cheese—Account  
325. Ports of Shields and Newcastle-upon-Tyne—Copy of Official Regulations  
219. Trigonometrical Survey, India—Returns  
303. West India Contract Mail Service—Return  
337. Church Preferments—Further Supplemental Return  
336. Income Tax—Return  
344. Railway Accident, Sutton Tunnel—Return  
345. Metropolitan Water Supply—Mr. Hammett's Report  
351. Statute—Copies of Documents  
310. Steam Vessels—Return  
291. Waterford, Wexford, Wicklow, and Dublin Railway Company—Returns

Charitable Donations and Bequests, Ireland—6th Report of the Commissioners

343. Merchant Seamen—Account  
345. Bibles—Return  
342. Bann Navigation Bill—Copy of Report  
346. Trade and Navigation—Accounts  
Turnpike Trusts—County Reports of the Secretary of State—No. 1, Kent

Loan Fund Board of Ireland—13th Report  
Metropolis Water Supply—Report by the Hon. William Napier  
340. Official Salaries—Copy of Treasury Minute  
Turnpike Trusts—Reports of the Secretary of State  
Prisons of Ireland—29th Report of the Inspectors General.  
SESSION 1850.  
397. Titles, Contents, and Indexes to the Sessional Printed Papers.

## HOUSE OF LORDS.

### REGISTRATION OF ASSURANCES.

FRIDAY, May 23.—The LORD CHANCELLOR presented a petition against the Bill for the registration of assurances of land. In doing so, his lordship, who was very indistinctly heard, stated that, while he approved of the principle of the measure, there were many portions of it which he thought liable to objection, and to which he was not prepared to assent.—Lord CAMPBELL expressed his disappointment at hearing these sentiments from his noble friend, whose support he had expected to receive. The Bill was founded upon the recommendation of a commission which had emanated from his noble friend, it had been carefully considered by a select committee of their lordships, and had been received with approbation on both sides of the House.—Lord BEAUMONT said that the course taken by the noble lord on the woolsack appeared to him to be scarcely a fair one. The Bill was founded upon the report of a commission appointed three years ago, having been referred to a select committee of that house. The noble lord then took an objection to a plan of registration by maps; upon this a discussion took place, and this having terminated in the rejection of the plan, the noble lord quitted the committee without bringing forward any further objections, but leaving the committee under the impression that he approved of the bill. Now, he thought that the committee was the proper place for the noble lord to have brought forward whatever objections he entertained to the bill. It was not intended by this bill to bring the title-deeds of all estates up to London, as his noble friend opposite supposed. If his noble friend sold his estate after the Bill passed, there would still be the same examination into the title as at present; but the purchaser would then gain such a title as would enable him hereafter to deal with the property much more easily and rapidly than the noble lord could at present do, however long his family might have been in possession of the estate. In the North Riding of Yorkshire, where a system of registration existed, it was optional to deposit either the title-deeds or a memorial of them; but it had there been found convenient, in cases where large estates were sold in small portions, to deposit the title-deeds, in order to avoid the expense of covenants to produce the title-deeds. That was a practical instance of what the working of the Bill would be. The LORD CHANCELLOR said, he would mention one clause which struck him as improper. It was proposed to be enacted that if a will be made, and be not registered within two years, and the heir-at-law shall in the meantime have disposed of the estate coming to him by descent, that in that case all the titles derived under the will were to be destroyed. Now by will provision was made for unborn children the issue of marriages, and for absent persons, and yet this Bill would destroy all titles under a will not registered within two years, if some person having a colourable title to the property disposed of it in the meantime. It was true that, if a person was prevented from registration, he might make an affidavit to that effect; but the effect was that those to whom property was bequeathed did not always know of the will, while the heir had that advantage. He was not an opponent of registration; and he would assist to the utmost in carrying a measure for that purpose, seeing, at the same time, that the measure introduced had not an effect exactly the reverse of that intended. He believed that no one was opposed to a general system of registration, if it could be practically carried out in such a manner that its advantages were not counterbalanced by accompanying disadvantages. But the difficulty lay in the details; and it appeared to him that this Bill left that difficulty still to be solved. It provided that certain things should be done by rules, to be framed by the Registrar-General, with the approbation of the Lord Chancellor and the Master of the Rolls. Now, he believed those functionaries were incompetent to the performance of that duty; not from want of ability, but from the nature of the inquiry, and the labour that would be required. He thought that the whole question, as to whether the Bill would be beneficial or mischievous, turned upon the nature of the regulations, and he thought that Parliament should not entrust the framing of these to others. He thought that the commissioners should have pointed out, not minutely but in substance, what those regulations should be.—Lord CRANWORTH said it had appeared to the select committee that to have waited until they had maps in existence to suit the exigencies of the case, would have been tantamount to postponing their legislation on this subject, *vide*

And as to the details of the measure not having been provided, the nature of the machinery of the Bill was already pointed out, and also the *modus operandi*; but if they had delayed the Bill till the details were all drawn up, they might as well have postponed the question for two hundred years.

### COUNTY COURTS.

MONDAY, June 2.—Lord BROUGHAM moved for a return, shewing the number of causes tried in the Superior Courts during the last ten years, with the view of ascertaining the advantages that had been derived from the County Courts. Agreed to.

### REGISTRATION OF ASSURANCES BILL.

Lord CAMPBELL postponed the committee on this Bill until after the Whitsuntide recess, after a short desultory conversation between himself, Lord Fitzwilliam, Lord Cranworth, and the Marquess of Westminster.

### CHANCERY REFORM.

Lord LYNTHURST said that he saw that Lord John Russell was about to bring in a fresh bill for the improvement of the administration of justice in the Court of Chancery. He hoped that the Lord Chancellor would have more hand in this measure than he seemed to have had in the last, and he wished particularly to draw his attention to the satisfactory working of an act passed last session, which had effected a great reform in the Irish Court of Chancery.

The Lord CHANCELLOR thanked his noble friend for calling his attention to the subject. Some of the facts stated as to the progress of Chancery reform in Ireland had taken him by surprise, but he would make inquiry into the matter, and spare no pains to make the bill about to be laid before the House as effective as possible.

### THE CRIMINAL LAW.

Lord LYNTHURST had now to put a question to his noble and learned friend on a very important subject—he meant with reference to the Criminal Law. Their lordships were aware that in 1838 a commission had been appointed to frame a digest, or criminal code. Those commissioners had performed their duty with great zeal, industry, and ability. Many thousand pounds had been expended under that commission. A digest was prepared by them, and a bill was brought in, which was read a second time in their lordships' house, and afterwards referred to a select committee. The question he wished now to ask his noble and learned friend (the Lord Chancellor) was, whether or not it was the intention of her Majesty's government to pass over altogether the labours of that commission, and if not, to what extent it was meant to adopt or to abandon them? He (Lord Lyndhurst) was anxious to know what the intentions of her Majesty's government were on that important subject, because, until their lordships knew whether the report of the commissioners was to be acted on or altogether disregarded, it was impossible to expect any general measure to be introduced, having for its tendency the consolidation into one simple, uniform, and consistent code, the present complicated criminal statutes of this country. That was his object in putting the question, otherwise they might go on, from session to session, in a line of patchwork legislation on this important question. He had mentioned the subject a few days ago to his noble and learned friend, who would, therefore, probably be prepared now to give an answer to this question.—The Lord CHANCELLOR said, a few days ago his noble and learned friend did incidentally mention this subject to him in the way of ordinary conversation, but not in a manner to make any particular impression on his (the Lord Chancellor's) mind, or to induce his noble and learned friend to expect that he (the Lord Chancellor) would make any inquiries of his colleagues on the subject. He thought it was mere gossip at the time. The question had been asked on a former occasion, and it was then stated that it was not the intention of the government to advance any more money with a view to enable the commissioners to prosecute their inquiries. He had not heard anything on the subject; he had no reason to think that it was the intention of the government to renew the commission, though their lordships would not understand him as giving an authorised answer to the question.

### COUNTY COURTS EXTENSION (No. 2) BILL.

TUESDAY, June 3.—Lord BROUGHAM, in moving the second reading of this Bill, said its object was simply to transfer to the County Courts the jurisdiction in bankruptcy. They had already a jurisdiction in insolvency, and the purpose of the Bill was to absorb, as it were, the existing jurisdiction in bankruptcy into the County Courts, so that there should be a great saving of expense to the public ultimately—he would not say immediately—and a vastly amended course of procedure. The London district was exempted entirely from the operation of the Bill. From many valuable communications he had received from different parts of the country, the details of the Bill had been materially improved, but the principle remained precisely the same. He now proposed to have the Bill read *pro forma* a second time, and to have it committed at the next meeting of the House. He should then be able to give the

amendments which he meant to introduce into it; and, the committee being then taken *pro forma*, he should move that the Bill, with the amendments, be reprinted—a course which would not commit their lordships to its details. He might observe that the Bill united the bankruptcy and insolvency jurisdiction as regarded the provinces; but in London there would still be insolvent and bankruptcy courts. An objection had been taken that bills of this nature ought to be originated in the other House of Parliament, and then brought up to their lordship's House; but to that he might reply, that the Bankruptcy Jurisdiction Bill of 1831 originated in this House. He wished the amended Bill they were now to have for improving the administration of justice in the Court of Chancery had also originated in this House; for he could hardly conceive a greater relief to his noble and learned friends and himself than to be spared the labour and trouble of discussing, amending, and altering that Bill, and beating it into shape when it came before their lordships. Not only was the Bankruptcy Bill of 1831 originated in this House, and, he believed, only and entirely discussed there, but the Central Criminal Courts Bill was brought in there also, and sent down to the House of Commons, where it passed, he believed, without a single word of objection. Last of all, the Judicial Committee Bill had also been introduced into their lordship's House, whence it was sent down to the other House, where, he believed, not a single observation was made upon it. It passed, he believed, unanimously, and entirely *sub silentio*. The observation was consequently not borne out, that the Chancery Amendment Bill would only have a chance of success by being introduced in the other House of Parliament. With respect to the Judicial Committee Bill, though defective in one respect, it had worked admirably well; and there was almost only one thing wanting to complete that important jurisdiction—he meant the appointment of a professional president of that Court, not with the view of superseding his noble friend the Lord President of the Council, but to relieve him from the trouble of attending to cases, before the Court, with which he could not be supposed to be conversant. That seemed to him (Lord Brougham) to be the only defect in that jurisdiction. The attention of their lordships had been called yesterday incidentally to the important subject of the criminal law, with a view to its consolidation and amendment, by his noble and learned friend (Lord Lyndhurst); but he (Lord Brougham) might take that opportunity of saying, that so long as the criminal law remained in the barbarous state of having no public prosecutor answerable for its execution, he had no hope of its amendment. Until that great blot was effaced from our criminal system, they might amend and digest the law for ever, but it would remain imperfect in the greatest possible degree. The noble and learned lord concluded by moving the second reading of the Bill.—The Bill was then read a second time, and ordered to be committed on Thursday.

#### ROYAL ASSENT.

THURSDAY, June 5.—The royal assent was given by commission to the under-mentioned Bills:—Property Tax Bill, Sale of Arsenic Regulation Bill, Royal Naval School Bill, London and Blackwall Railway Bill, Driffield and Sheffield Turnpike Road Bill, Mayfield Railway Bill, Leicester Waterworks Bill, Shrewsbury and Bridgenorth Turnpike Roads Bill, Whitby Waterworks Bill, Scottish Central Railway Bill, Regent's Canal Company Bill, Halesworth, Beccles, and Haddiscoe Railway Bill, North British Railway Bill, London and Blackwall Railway Bill (extension of time for widening), Malton and Driffield Junction Railway Bill, Derby and Ashborne Road Bill, Aberdeen Public Records Bill, Richmond and Lancaster Turnpike Road Bill, Hereford, Ross, and Gloucester Railway Bill, Manchester and Ashton-under-Lyne New Road Bill.

#### COUNTY COURTS EXTENSION (NO. 2) BILL.

On the motion of Lord BROUGHAM, this Bill passed through committee, and was ordered to be reprinted.

#### LAW OF EVIDENCE AMENDMENT BILL.

On the order of the day being read for going into committee on this Bill, Lord BROUGHAM said it was his intention to introduce words into the Bill for providing that it should not be compulsory to examine a wife as a witness against her husband. He had intended, in the first instance, to move that their lordships should go into committee on the Bill *pro forma*; but considering the infinite benefits which he expected to attend the passing of this measure, and considering also the risk their lordships ran of diminishing the amount of those benefits if there were any defect in the Bill, he would propose that their lordships should refer it to a select committee. He should object, however, to the judges being called as witnesses before the committee, should their lordships acquiesce in the motion to send it before a committee. He should be happy to hear professional men examined on its merits; but he objected to submitting to the judges the legislative opinions of Parliament.—The LORD CHANCELLOR said he approved of the course

taken by his noble and learned friend (Lord Brougham) with respect to this Bill; but he did not agree with him on the point that the opinions and the experience of the judges on this question were to be disregarded. Considering that when his noble and learned friend introduced this measure he relied very much on certain opinions given by the county court judges, he (the Lord Chancellor) thought the experience of the judges in Westminster-hall ought not to be lightly esteemed, but that, on the contrary, they were very likely to be able to render his noble and learned friend important assistance in the consideration of matters which bore on this question. He (the Lord Chancellor) felt perfectly satisfied that no more important Bill than this ever came under their lordships' notice, and it deserved, on that account, more than any other, the consideration which his noble and learned friend proposed to give it.—Lord CAMPBELL said he likewise rejoiced in the course which his noble and learned friend proposed to take with regard to this Bill. Either for good or evil, it was the most important Bill which had been laid on their lordships' table for a long time. He (Lord Campbell), after great consideration, was a warm defender of the Bill; and his opinion had been greatly confirmed by the circumstance that his noble and illustrious predecessor, Lord DENMAN, had entirely approved of its principle in a letter which had been recently published. With respect to the judges not being consulted on the provisions of this Bill, he (Lord Campbell), was of opinion that they ought undoubtedly to be consulted on the subject, and that the greatest respect ought to be paid to their opinions; but he agreed with his noble and learned friend (Lord Brougham) that their opinions ought not to guide the opinions of the Legislature. He would remind his noble and learned friend, and their lordships, that many of the improvements which had taken place in the law during the last thirty years had actually been introduced by the judges. He (Lord Campbell) had no doubt that in a select committee this Bill would receive all the consideration it so eminently deserved.—Lord BROUGHAM was afraid his noble and learned friend (Lord Campbell) had misunderstood what he had said with respect to the judges not being consulted on the subject of this Bill. He (Lord Brougham) did not hesitate to say that he had no objection to the judges being consulted, and that their opinions ought to be treated with great respect; but his objection was to calling them as witnesses before the committee. If the Bill had been committed *pro forma* he should have proposed to add words providing for its not being compulsory to examine a wife as a witness against her husband; but he thought it would be better to refer the Bill at once to a select committee; therefore, instead of moving the order of the day for the House going into committee *pro forma*, he should move that the Bill be referred to a select committee. The motion was agreed to.

#### HOUSE OF COMMONS.

##### LAND CLAUSES CONSOLIDATION (IRELAND) ACT.

Mr. LABOUCHERE gave notice that on Friday next he would move for leave to bring in a Bill to alter and amend this Act.

##### CORONERS' BILL.

WEDNESDAY, May 28.—The second reading of the Coroners' Bill having been moved by Lord H. VANE, Mr. FITZROY moved as an amendment that the Bill should be referred to a select committee. This amendment was seconded by Mr. R. PALMER, and opposed by Mr. SOTHERON.—Sir G. GREY believed that some previous inquiry and adjustment were necessary before the measure could be fit to pass the second reading. In particular he stated, that while he approved of the proposal to pay the coroners by salaries rather than fees, he saw in the Bill as it now stood no provision that the pay of those functionaries should be apportioned to their duties, or that their duties should be well and efficiently performed. He therefore supported the amendment. After some considerable discussion, Lord H. Vane consented to postpone the second reading, and the Bill was ordered to be referred to a select committee.

#### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

##### Summary.

THE litigation arising out of the compensation clauses of the *Municipal Corporations Act* has not yet concluded. Another point was raised in *Reg. v. The Mayor of Lichfield* (17 Law T. 130). The Lords of the Treasury had awarded to a removed town-clerk an annuity, to commence from a day named. The treasury minute directed an order to be drawn up pursuant thereto. The minute disclosed, but the order did not, that the compensation had been awarded for a period during which the claimant had in fact continued to hold

the office. The Court of Error decided that the order and minute were to be read together, and that the order was bad only for so much as had been awarded in respect of that period.

Several cases are also reported from the Court of Criminal Appeal.

1st. As to what constitutes larceny. In *Reg. v. Poyser*, 17 Law T. 135, the facts were that A. had employed B. to sell clothes for him, and gave L. for that purpose, a parcel of clothes, fixing a separate price on each article. B. was to receive a per-centage on such as he sold, and to bring back the unsold. He pawned some and kept the rest for his own use. Was this larceny? The Court held that there was one bailment only of all, and that when he misappropriated part he determined the bailment, and the conversion of the rest to his own use was larceny.

##### 2nd. Evidence of receiving.

In *Reg. v. Oddy*, 17 Law T. 136, the possession of other stolen goods not forming a part of the immediate charge was held to be inadmissible as evidence of guilty knowledge on a charge for felonious receiving.

##### 3rd. Breaking and entering a counting-house.

A place called the machine-house at chemical works, where a weighing-machine was kept, and an account taken of the weights of goods, and where the workmen's time was entered in books, was held to be a counting-house, in an indictment for breaking and entering, under 7 & 8 Geo. 4, c. 29, s. 15. (*Reg. v. Potter*, 17 Law T. 136.)

##### 4th. Night poaching.

In an indictment for night poaching, it is necessary to describe the *locus in quo* with precision. In *Reg. v. Uzzell*, 17 Law T. 136, it was described as certain land in the occupation of A. or of A. and B. in the parish, &c. This was held to be sufficient; and also that if three of one party were proved to have entered any land answering to such description, whether in the same class or not, it will suffice.

##### 5th. Perjury.

In *Reg. v. Bennett*, 17 Law T. 135, an indictment for perjury charged that defendant, on a trial for rape, falsely swore that she never got into A. (the said A. being then present in court during the trial) to write a letter for her. This averment was prefaced by an allegation that it was a material question. The evidence was that at the trial A. was pointed out to her, and that she swore she did not get him to write for her a letter, which was produced and shewn to her, and that it was false. This was held sufficiently to allege materiality, and also sufficient proof of A.'s identity. In *Reg. v. Hallett*, 17 Law T. 136, the Court decided that an arbitrator appointed under the 77th sec. of the County Courts Act has no authority to administer an oath, and therefore an indictment for perjury so committed would not lie.

##### 6th. Practice and Pleading.

A curious point was raised in *Reg. v. Davis*, 17 Law T. 135, in which the prisoner had been indicted for stealing the goods of *Darius Christopher*. It appeared in evidence that the prosecutor's name was *Tryus C.* The Chairman ruled that in *Darius Christopher* and *Tryus* were *idem sonantia*. The question was not left to the jury. The Court held that the two words were not similar in sound, and that the variance was fatal.

The Court has also decided in the negative that much vexed question, whether counsel may put the depositions into a witness's hand, and, telling him to read it, ask him if, having read it, he still adheres to his statement. This practice will now be abandoned. (*Reg. v. Ford*, 17 Law T. 135.)

In *Reg. v. Clements*, 17 Law T. 136, it has been decided that the deposition of a witness absent through illness, may, under sec. 17 of 11 & 12 Vict. c. 42, be used before the grand jury as well as the petty jury. But doubts were expressed whether the Court of Criminal Appeal has jurisdiction to decide such a question, and also whether the improper reception of a deposition before the grand jury would invalidate a conviction.

Lord CAMPBELL'S Criminal Law Amendment Bill has passed the Lords, and is gone down to the Commons. As this Bill effects important changes in the Criminal Law, an edition of it, together with all other criminal statutes and parts of statutes since January 1, 1848, and a Digest, alphabetically arranged, of all the criminal cases decided during the same period, to serve as a separate work, or as a supplement to *Archbold or Roscoe*, will be published in time for next circuit, by E. W. Cox and St. LEGER BABINGTON, Esqrs. Barristers-at-Law. E. W. C.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

A NOVEL question as to the liability of railway companies was raised in *Collett v. The London and North Western Railway Company*, 17 Law T. 123, whether they are liable for injury done to a servant of the post-office sent by the railway in charge of the letters. It was contended that there was no contract with the plaintiff for safe conveyance. But the Court ruled otherwise. Lord CAMPBELL, C.J. said, "There is no duty whatever in this case. The allegation in the declaration that it was the duty of the defendants to use proper care, &c. is substantially made out in point of law. That duty arises, not from any contract with the plaintiff, but from the obligation imposed by the Legislature of carrying the mail bags and the officers of the post-office. If it be the duty of the defendants to carry the plaintiff at all, it is their duty to carry him safely."

Another case on the *Liability of Railways as Carriers*, was raised in an appeal from a County Court. *Watson v. The Ambergate, &c. Railway Company*, 17 Law T. 125, was an action for not duly delivering goods at C. They were delivered to the office-keeper of the defendants, duly directed, and the plaintiff wished to pay the whole carriage, but the office-keeper said that he had no rates of payment beyond N. where the defendants' line joined another railway, but that the things would go well enough. The goods arrived at N. but were delayed between N. and C. It was held that the office-keeper, as agent of the defendants, not having expressly limited their liability, was responsible for the due delivery of the goods at C.

Every device that the ingenuity of pleaders could suggest, has been resorted to for the purpose of defeating actions for calls. But the law has been found by its simple language competent to defeat them all. The last effort was tried and failed, in a Court of Error. In *Wilson v. The Birkenhead, &c. Railway Company*, 17 Law T. 131, the declaration alleged that defendant was the holder of ten shares in the said company, and was indebted to the said company in the sum of 100l. in respect of calls, &c. It was contended that it should have been "was the holder," inasmuch as it did not follow that, because he is now, he was so when the calls were made. But the Court held it to be sufficient, the 26th section of the Companies Clauses Consolidation Act declaring that the subject matter shall be sufficient. The case should be noted in the practitioner's edition of the Consolidation Acts.

From the Irish Bankruptcy Courts in Dublin, we have the report of a very interesting case in this branch of the law, namely, how shares are to be proved against a bankrupt's estate. After a careful review of the law, the commissioner decided that calls regularly made and due before bankruptcy are provable; but calls made payable by instalments are not so, and that when a creditor proves for calls the shares must be brought in and sold for the benefit of the estate. (*Re C. Jennings*, 17 Law T. 133.)

THE importance of the decision in *Uppill's case*, No. 2, 17 Law T. 117, becomes more apparent the more the consequences are considered. Practically it destroys all the winding-up speculations that were not undertaken upon *bond fide* grounds. The fact cannot be disguised, however it may be lamented, that not a few of the proceedings for winding-up were instituted solely for the sake of costs, when there were no debts outstanding, nothing in fact to be wound-up, unless, perhaps, the bill of costs of the promoter of the scheme, who thus sought to make his victims pay him, first for his trouble in taking them in, and then for the costs of enforcing his own iniquitous demands. Thanks to Lord CRANWORTH's astuteness, this third railway war has been suppressed. Previous decisions had deprived the speculators of their hoped-for contribu-

tories from among the allottees, and scripholders, and innocent members of the provisional committee. *Uppill's case*, in the Lords, revived hope that some would remain to be plucked. But this has been swept away by the decision of Lord CRANWORTH in the same case, which is in effect this, that even although the Lords have decided (irrationally) that an application for shares made a man a contributory who could not otherwise be such, still that a contributory does not, in itself, infer any liability to payment of debts; it must still be proved for what debts such contributory has rendered himself liable in law, and he is to be called upon to contribute his quota of such debts only. If, therefore, he took no part in the management, he did not incur any legal liability whatever, and, although a contributory, is liable to contribute to nothing; such is the practical absurdity to which the greater absurdity of the Lords' decision in *Uppill's case* has conducted.

The case of *Ex parte Bagge*, 17 Law T. 113, is upon the liability of a contributory to a veritable company. The partnership deed had provided for the sale and transfer of shares in a prescribed form, and that the directors should, if they refused to accept a proposed purchaser, themselves purchase the shares so offered for sale out of the capital stock at a price and in manner thereby directed. But this provision was made long after the establishment of the company. The proprietor of 1,000 shares, who had received dividends thereon, sold 260 of them to the directors, without the prescribed forms, there being at the time no means of observing them. Afterwards he sold the rest of his shares, and ceased to be a partner. The company existed for eight years after the sale of the 260 shares, and was then wound up. Was he a contributory in respect of them? He was held not to be so, inasmuch as the company, having dealt with the shareholder, could not treat the transaction as void, on account of its own irregularities.

Since the above was written, Lord CRANWORTH has decided the important question of the liability of contributories for costs of the winding up. As we had anticipated, he has held, that before a contributory can be called upon for costs, it must be ascertained to what debts he is liable, and then that he will be liable for his share only of so much of the costs as were occasioned by the debts so proved. If, therefore, the contributory is not liable for any of the debts, he is not liable for any of the costs of the winding-up. This decision gives the coup de grace to the winding-up speculations.

E. W. C.

It is understood an attempt is about to be made to remove the business connected with the winding-up of railway and joint stock companies from the tribunals of the Masters in Chancery to the Courts of Bankruptcy, on the ground that they occasion interruption and delay to the progress of private suits. One of the results of this would be to take away the appointments at present held by the official managers and confer them on the official assignees. The interruption and delay alluded to arise to the progress of private suits is thought to intervene from the want of method adopted in the Master's courts, where it has long been suggested that one or more of the ten Masters should solely devote their time to these inquiries or that fixed days should be appointed, as in some of the offices is the case, for the purpose of proceeding with these matters, which, if no better system were adopted, would be equally calculated to cause interruption and delay to private cases in the Court of Bankruptcy. One of the principal reasons for the interruption and delay arises from the circumstance of the offices of the Masters in Chancery being only open for business about six months out of the twelve, or, if the various holidays are deducted, about five months in the year.—*Times*.

DIRECT CRICHESTER AND PORTSMOUTH RAILWAY.—Friday, Master Richards delivered judgment on the liability of those members of the managing committee—Messrs. S. Brown, R. Chapman, F. Clarkson, H. Downman, W. B. Hughes, D. Mountague, J. Scales, T. Stevenson, and E. Parratt—who had agreed among themselves to take 200 shares each, upon which they subsequently paid 10s. per share each, alleging that it was not a deposit payment, but a voluntary contribution towards expenses, the general body of shareholders having also paid a deposit of 10s. on their shares. The Master, on the evidence, which was very voluminous, declared that he must place these gentlemen on the list of contributories as liable, it being clear that, besides being members of the managing committee, they acted, took shares, and paid upon them.

SLIGO AND SHANNON RAILWAY.—Tuesday, Master Senior commenced the business of his court with recruited health, and, in further settling the list

of contributories in this concern, struck off the list the name of Mr. Andrew Walker, in respect of fifty shares, on evidence being adduced that he was a minor when he took the shares and signed the deed, and within two months after repudiated the contract.—*Daily News*.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &amp;c.

[Announced, issued, and made, during the past week.]  
*Patent Elastic Pavement and Kamptulicon Company*.—Call of 3l. share on all the contributories, to be paid on June 27 to the official manager.—*Tinney*.  
*Worcester Corn Exchange Company*.—To appoint official manager on June 18.—*Kindersley*.  
*Oxford and Worcester Extension and Chester Junction Railway, with Branches to Shrewsbury and Northwich Company*.—Call of 1l. 1s. per share on all the contributories in the first and sixth classes, excepting such as have already paid the call of 2l. 2s. per share; on June 12.—*Rose*.

## REAL PROPERTY LAWYER AND CONVEYANCER.

THE construction of wills, even of such as were drawn by lawyers, will be found to occupy a considerable portion of the time of all the Courts, from which the solicitor may gather the importance of well instructing himself in this branch of the law, and providing himself with good practical precedents. Therefore it is that we are careful to note in this summary every case that occurs, that it may be impressed upon the memory. In *Morgan v. Morgan*, 17 Law T. 114, A. gave specific legacies to B. and directed her executors to pay to B.'s daughters, C. and D. 5,000l. each on their marriage, with accumulations of interest from the time of A.'s death. The residue of her property was given to the executors in trust for E. for life, and after her death, equally to be divided between F., G. and H. A. died in 1825. The executors set apart stock to meet the legacies and accumulate the dividends. E. died in 1838, and D. in 1839, unmarried: the twenty-one years from C.'s death expired in 1846, and C. was then living and unmarried. How was the property to go? It was held that the legacies of 5,000l. were contingent on the marriage of C. and D.; that the accumulations on D.'s legacy between the death of the testatrix and the death of E. belonged to E. and that, although there was no direction to accumulate, the case was within the operation of the *Thellusson Act*. In *Doe dem. Page v. Page*, 17 Law T. 123, A. devised to his wife "all my land and shop, stock in trade, business, and everything that I have;" and after his wife's death, "I will and bequeath the business to my son for his sole use and benefit," and "all the rest of my property which may remain after my wife's death I give to my executors in trust for my daughter," &c. The question upon this was, whether the word *business* here included the land on which the shop was built where it was carried on. The Court held that it did not.

A case of considerable interest in the *Law of Mortgage*, and which should be read attentively by the student and practitioner, is *Ullmer v. Stevens*, 17 Law T. 115. The facts are too numerous to be repeated here, but the points decided were the following:—A letter written within twenty years, from a party representing himself as deriving title under the mortgagee, admitting the right of the mortgagee to redeem, is an acknowledgment in writing within the meaning of the statute. That an account against a mortgagee in possession will not be ordered to be taken with rests, unless it appears that he took possession when there was no material arrear of interest due, or that the annual rents greatly exceeded the annual interest of the mortgage money. This should be noted in *Hughes's Mortgages*.

The operation of a Judgment under certain circumstances was considered in *Squire v. Ford*, 17 Law T. 119. B. obtained judgment against A. and registered it in August 1848. C. did the same in November following. In December, A. assigned his real and personal estate for the benefit of his creditors, who thereby covenanted that it might be pleaded as a release of all actions, judgments, &c. claimed against his or her estate, with a proviso that it should not operate to destroy any specific security which any creditor then possessed in respect of his debt. In June, 1849, B. assigned his judgment to the trustees of the creditors. On a bill filed by B. praying a declaration that his judgment was a charge in priority of C.'s judgment, and seeking a sale of the real estate and payment of the proceeds, it was held that B.'s judgment was

not released by the deed of 1848; that he was entitled so to sue; and that his judgment was a charge in priority of C.'s judgment.

The effect of the *Statute of Limitations* in barring claims to heriot and quit-rent in the case of a *Copyhold* was considered in *The Earl of Chester v. Hall*, 17 Law T. 121. Down to 1804 the land was held of the lord by heriot, quit-rent, relief, &c. On the death of a tenant, in 1804, a heriot was seized. The next tenant died in 1824, but no heriot was then seized, nor was any reason shewn for the omission. In 1826 the present lord came into possession; in 1847 the tenant died, and heriot was seized, for which trover was brought. No quit-rent had been paid or demanded, or service rendered since 1804. It was held that the statute did not bar the claim to heriot, and there was nothing from which a release of it could be presumed. But it seems that the quit-rent would be barred.

The circumstances under which a secret antenuptial settlement will be deemed void were determined in *Richards v. Lewis*, 17 Law T. 126. A. being about to marry B. secretly conveyed her leasehold property to trustees, for herself for life, remainder to her son C. by a former marriage, and his issue; remainder to her illegitimate son D. At first she retained the deed in her possession, then delivered to a stranger, then it was returned to her, and then lost. Long after this she joined her husband and son C. in settling this property on other trusts. She survived both her husband and son, and then executed a mortgage to D. for a valuable consideration, and the illegitimate son also conveyed to the same party for a valuable consideration. Upon this state of facts several questions arose, and it was held,—1st, that the settlement was not fraudulent and void in law; 2nd, that there was not sufficient evidence of its delivery; 3rd, that there was not sufficient proof of search to let in secondary evidence; 4th, that the conveyance by the illegitimate son gave a good title against those claiming under the settlement made by husband and wife; and 5th, that the mortgage was inoperative.

The first decision under the *New Stamp Act* was given in *The Marquis of Chandos v. The Commissioners of Inland Revenue*, 17 Law T. 128. It was conveyance between A., B., and C. by which A. conveyed his life interest in some estates, and his reversion in fee in others to B. and C. subject to mortgages and incumbrances of nearly a million and a half; no price or purchase-money was stipulated to be paid by B. or C. to A. but they were to pay off B.'s debts out of the rents and profits. The commissioners were of opinion that the deed required an *ad valorem* stamp on the amount of those charges, as if the purchase-money had been to that amount. But the Court, upon appeal, held this to be wrong, for the words "to be paid by the purchaser," mean where it is stipulated that he is to pay it, and that the provision applies only "to those cases where, in consideration of the conveyance of the estate, the vendee agrees to pay a certain sum to the mortgagee or incumbrancer. Where the purchaser does not bind himself to pay it, but is left to pay it or not, as he pleases, it cannot be part of the consideration money." In the same case it was also determined that, on appeals against the decisions of the commissioners, under the 15th section of the *New Stamp Act*, the appellant has the right to begin, and that the Crown is entitled to the general reply.

#### LATE CASES ON THE LAW OF LANDLORD AND TENANT.(a)

As the subject proposed for discussion under the above head is one of universal interest, inasmuch as every individual must come under one or other of the characters here stated, it is also one of very great importance in a professional point, so many questions continually arising on the various matters relating to it. It is one, moreover, as will be shewn by the numerous recent cases which we shall cite bearing on the matter, that has occupied a large share of the attention of the Superior Courts.

In entering upon this subject, it will be proper, first, to consider the nature of the instrument which forms the foundation, as it were, in law, of the connexion between landlord and tenant. A lease is defined by Blackstone, 2 Stew. Black. 350, to be a conveyance of any lands or tenements usually in consideration of rent or other recompense, made for life, for years, or at will, but always for a less time than the lessor hath in the premises; for if it be

for the whole interest, it is more properly an assignment than a lease. The usual words of operation are, demise, grant, and to farm let.

In order to ascertain whether an instrument amounts to a present demise, or operates merely as an agreement for a future letting of the premises, the intention of the parties, to be collected from the whole of the words used by them in such instrument, is to be considered. And if the words of the instrument be ambiguous, the acts of the parties, as the taking possession of the premises, &c. may be called in aid to ascertain their intention. (Per Tindal, C.J. in *Chepman v. Black*, 5 Scott, 530; 4 Bing. N.C. 187.)

No precise or technical form or language need be observed to create an immediate letting or demise; nor is it necessary that the demise should be contained in one single instrument, but it may be constituted by a series of letters. It may be laid down as a rule, that whatever words are sufficient to explain the intent of the parties, that the one should divest himself of the possession, and the other assume it for any determinate time, such words, whether they run in the form of a license or a covenant, or agreement, are of themselves sufficient, and will, in the construction of the law, amount to a demise. (Chitt. Cont. 314.) An instrument containing words of present demise will operate as a lease or letting, if such appear to have been the paramount intention of the parties, although it contain a stipulation for the execution of a formal lease in future, or a clause that such lease shall contain all "usual covenants;" such future formal instrument being alluded to rather for the purpose of affording a further or better assurance, security, or protection, than in contemplation of the demise being thereby created, though such stipulations, in the absence of express words of present demise, tend to shew that the instrument was not meant to operate as such; nor will an instrument the less operate as a demise, though it be dependent on a condition, if such condition is afterwards performed.

If the most proper and authentic form of words whereby to describe and pass a present lease for years be made use of, yet, if upon the whole deed or instrument there appear no such intent, but that they are only preparatory, and related to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties. (Bac. Ab. Leases, K.)

If strong circumstances of inconvenience would arise from an instrument being construed as a present demise, that fact may indicate that the intention of the parties was that it should be an agreement only; such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises; and a stipulation that the tenant "should hold under all usual covenants, &c.;" for it may be disputed what are usual covenants. (*Morgan dem. Dowding v. Bissell*, 3 Taunt. 65; *Colley v. Shelton*, 3 D. & R. 522.) It is, however, observable, that in these cases, the terms of the future lease were not ascertained at the time; where the terms, though not stated, can be collected at once from an instrument referred to by the agreement, as a former lease, &c., the above objection does not apply.

By the *Statute of Frauds*, 29 Car. 2, c. 3, it is provided, by sec. 1, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only; and shall not at law or in equity have any greater effect, notwithstanding any consideration for making such parol leases or estates. The second section excepts all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts, at the least, of the full improved value of the thing demised.

The effect of these sections is, that a tenancy which is to endure beyond three years from the agreement, cannot be created by a parol contract, and therefore a parol lease for three years to commence in future, is inoperative. (*Rawlin v. Turner*, 2 Lord Raym. 736.) But a lease by parol for a year and a half, to commence after the expiration of a lease which wants a year of expiring, is good, for it does not exceed three years from the making.

Although the statute enacts that all leases by

parol for more than three years shall have the effect of estates at will only, and they cannot create a term, yet such a lease endures as a tenancy from year to year. (*Clayton v. Blakey*, 8 T. R. 3.) Estates at will, though they may be created at the present day, are almost unknown in practice. A general letting or holding is impliedly a tenancy from year to year. A parol lease for seven years may be void as to the duration of the term, yet the contract may regulate the terms of the holding from year to year in other respects; and therefore, if the tenant under such a lease entered at Candlemas, the landlord can only eject him at that period of the year. (*Doe dem. Rigg v. Bell*, 5 T. R. 471.)

Although the second section of the Act renders valid a parol lease of less than three years from the making, yet until entry by the lessee there is a mere *interesse termini*, and if he refuse to take possession upon such verbal letting, no action lies to recover damages for not occupying or becoming tenant; nor can an action for use and occupation be maintained. For the fourth section applies to such a parol lease not rendered effectual by entry, it providing that no action shall be brought whereby to charge the defendant upon any contract or sale of lands, or any interest in or concerning them, unless the agreement be in writing, (Chitt. Cont. 320.) It may be said that the second section of the statute has made a lease for years less than three years from the making valid, and yet that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee; but first, the Legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or secondly, this distinction might not have been contemplated, but may be the result of the true construction of the *Statute of Frauds*. The effect, then, of the *Statute of Frauds*, so far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession. (Per Bayley, J. in delivering the judgment of the Court in *Edge v. Stafford*, 1 C. & J. 391.)

The following requisites to the validity of an estate for years are essential at common law. 1. Its commencement and duration must be capable of being ascertained with certainty. 2. The lessee must enter upon his estate. As regards the commencement of the estate, this must be understood of the time from which the term of years is to be computed; and by the end is meant the time when in point of limitation the estate is to determine. Hence, also, it follows that there must be a given time for the continuance of the estate, so that after it has commenced in interest the time of its determination may be precisely ascertained; but when it is said that every lease for years must have a certain beginning, we are not to understand by this expression, that the time of commencement or beginning of the estate must be certain at the time when the lease is made. (Inst. 45 b. 652.) For it is not by any means necessary, either that the time at which the lease is to commence in interest, or that from which the computation is to be taken, shall be ascertained at the time when the lease is made. The certainty of the time of commencement and the time of continuance is required merely to ascertain the period of enjoyment; and so long as the lease is for a certain period, and the period of computation is so precisely marked that when it happens it may be said with accuracy on what day the term will end; and in the meantime it is certain of what continuance the estate will be after that period happens, the rule requiring certainty is fully complied with (Prost. 611); or, in other words, all that seems requisite is that the estate should have a certain or definite time of commencement, and a certain or definite period, beyond which it cannot last. Thus, a lease to a man for twenty years from the death of A. is a good lease; for though at the time of making the lease it is equally uncertain on what day in particular the term will begin, and on what it will end, because it is uncertain at what time A. will die; yet it is certain that it will determine at the end of twenty years from the death of A. and whenever that event shall happen, the day of the determination of the term

(a) By GEORGE HARRIS, Esq. Barrister-at-Law.



may be ascertained, which is all the certainty that is requisite.

But though every estate for years must have a certain beginning and a certain end, yet this certainty need not appear upon the face of the deed, for a reference in the deed to any collateral circumstance by which it may be ascertained is sufficient.

The certainty of the duration of a lease must be ascertained either by the express limitation of the parties at the time of the lease, or by a reference to some collateral act, which may with equal certainty measure its continuance, otherwise the lease will be void. If, therefore, a person makes a lease for so many years as he shall live, or a parson make a lease of his glebe for so many years as he shall be parson, these leases are to be absolutely void for the uncertainty of their continuance, because none can say how long the lessor will live, in the first case, or be parson in the other; and then it cannot be a lease for years, when by no possibility the number of years can be ascertained. But if the lease be for twenty-one years, or any other certain number of years, if the lessor shall so long live, or continue parson, or if a third person shall so long live, these are good, because the lease at first is certain for the determinate number of twenty-one years, though the death of the lessor or third person may determine it sooner; and this is, therefore, the common and usual mode of limiting an estate intended to continue during the life of the lessee, and seems to have been introduced to obviate the objection of uncertainty in the mode of leasing just noticed. (Co. Litt. 45 b; 1 Roll. Abr. 848, pl. 3.)

If a man make a lease for years generally, without saying how many is certain, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words. (2 Bar. Cl. 407.)

Having thus deduced the general leading principles which regulate the law relating to leases, we shall now proceed to examine some of the more recent cases which have been determined on this branch of the subject of the law of landlord and tenant, those especially which bear on the question of the requisites in a lease, and the general nature of deeds of this description.

The following document was held not to be a present lease, but at most a conditional agreement for a future tenancy:—"Proposals for letting the M. farm at H. in the county of S.; quantity 130 acres, term twelve years, determinable at the end of eight years, provided notice be given by either landlord or tenant at the end of the first four years. Rent, 172l." (with stipulation as to the mode of cultivation). And subjoined to them the following:—"June 3, 1835.—Agreed to the above rent, provided the house, cottages, and buildings are put in good and tenable repair, on a plan to be mutually determined upon, and finally settled within a month from the above date." Signed by the parties. (*Doe dem. Wood and Another v. Clark*, 14 L. J. 233, Q.B.) In an instrument bearing date the 2nd of February, it was stated, "W. T. D. hereby agrees for himself, his administrators and executors, to let and grant, or lease, to M. W. and M. the coal-mine, stone, and fire-clay, under" the property there mentioned, "at the following rate per ton, viz. 9d. per ton" for coal; "1s. per ton for mine; and for clay and stone, the same that W. T. D. is paid for, as well as for the coal and mine, for the term of seventy years, from the 2nd of February; and that so much royalties as will amount to the sum of 50l. a year be worked or paid for during the said term, which rent is to commence in a year from the time a pit is sunk through the four-feet coal, with power to work the said minerals; and to deposit rubbish, and make a wharf," as is usually granted in leases of a similar nature, and by W. T. D. power was given to the lessees, "on giving six months' notice, to abandon and quit the same, as if this agreement had never been entered into; and we hereby bind ourselves to commence sinking a pit before the 24th of June next; and the said W. T. D. engages that he has not incumbered the said estate to prevent him entering into a lease on the above terms or agreement, which lease is to contain the usual covenants, &c. as is entered into by W. T. D.; the said W. T. D. to be allowed 1d. per ton for all minerals brought from other properties through the pits on the land; and the said W. T. D. engages to sign a lease, upon the said terms as soon as it can be prepared." It was held that this instrument was only an agreement for a lease, and not an actual lease. (*Doe dem. Morgan and Others v. Morgan and Powell*, 14 L. J. 5, C.P.)

An agreement was entered into on the 28th of

October, 1843, between M. D. and T. and signed by them, that whereas M. held and rented under D. a message situate, &c. at the rent of 25l. per year, payable quarterly, and that whereas M. had agreed with T. to underlet the message from Monday next, at and after the rent of 20l. per year, until the 24th day of June next, at which time the said D. agrees to exonerate the said M. from his tenancy, on his paying all rent up to the said 24th of June, and to accept the said T. as tenant from that period, at, &c. Now, therefore, the said M. agrees to let, and the said T. agrees to take, the said message, &c. (and to do certain repairs), and the said T. agrees to take of the said D. the said message, from the said 24th day of June next, at, &c., and the said D. agrees to release and exonerate the said M. from his tenancy, on and from the said 24th of June next, on his paying up all rent due to that time. It was held, that the instrument amounted to a lease, as regarded both T. and D. After T. had been let into possession by M., and before the expiration of his tenancy to M. he contracted with D. for the purchase of the message. It was held, that such contract did not affect the above lease, and that after the 24th of June, T. became a yearly tenant to D. (*Turle v. Derby and Another*, 15 L. J. Ex. Ch. 326.)

By a written agreement the tenancy was to be "from year to year from Michaelmas next, at the yearly sum of 55l. payable half-yearly at Lady Day and Michaelmas, except the last half year, which portion of the rent shall be paid on or before the 1st of August in that year; the tenant to dress the lands in the due course of husbandry, &c., and to allow the landlord or incoming tenant in the last year, to enter on the 1st of May, to make fallows, &c., the tenant to be allowed the use of the barns, for stacking and threshing the crops, &c., of the last year, until the 1st of May after the tenancy." It was held, that the agreement did not create a tenancy for more than a year, and that notice to quit might be given, expiring at the end of the first year. (*Doe dem. Plummer v. Nainby*, 15 L. J. Q.B. 303.)

A. under a mortgage deed agreed to become tenant to B. of the premises demised, "henceforth at the will and pleasure of B., at the yearly rent of 25l. 4s. payable quarterly. It was held, that this was a tenancy at will; and that occupation for two years, and payment of rent under the agreement did not make B. tenant from year to year. (*Doe dem. Banto and Others v. Cox*, 17 Law J. Q.B. 3.)

(To be continued.)

## WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Having lately had occasion to inspect a will of recent date, in the Prerogative Office, I found that it contained sundry erasures and interlineations, against which there were set in the margin, opposite to the alterations, simply the initials of the testator, and of the two persons who attested the will, thus:

A. B.  
C. D.  
E. F.

Query.—Whether such an attestation is sufficient to satisfy the requisitions of the Wills Act (1 Vict. c. 26)? Or rather I would ask any of your intelligent readers whether there has been any decision on the point? In the absence of such decision, I would observe that the Act says that no alteration made after the execution of the will shall be valid, or have any effect unless such alteration shall be executed in like manner as is required for the execution of the will. The answer to the objection to the sufficiency of the initials in the above case may be that the alterations were not made after the execution of the will, but simultaneously therewith. But in reply to this, it may be argued that by a late decision it has been held that any alterations appearing on the face of the will, and unattested, shall not be presumed to have been made at the time of the execution thereof.

I am, Sir, yours, &c.

O.

## Answers to Queries.

### PRACTICE IN CONVEYANCING.—COSTS.

I THINK your correspondent, "Lex" will find it to be the practice that, where no provision is made in the contract for the costs of the perusal of the covenant for production, by the solicitor of the covenantor, such costs must be borne by the covenantor himself. Under the circumstances stated in the query, there would, I think, be no obligation on the part of A. to enter into the covenant, but if he does he must pay his solicitor's costs.

C. H.

CHARITABLE PURCHASE DEEDS.—A Bill has been brought into the House of Commons, by Mr. Mullings, Mr. Coles, and Mr. Heald, "for further remedying a defect in the titles of lands purchased for charitable purposes, and for obviating difficulties as to copyhold or customary lands conveyed for such purposes." The principal clauses of the Bill are to the effect, that purchase deeds of lands for charitable purposes should be valid, although formalities of the Mortmain Act should not have been complied with; that *bond fide* purchases for charitable uses should not be void merely by reason of reservation, &c. to the grantor; but other formalities and requisitions will not be dispensed with, and the Act will not dispense with formalities in future deeds. In the case of copyholds or customary hereditaments being made over to charitable purposes, it will be sufficient that such charitable uses be declared by some deed forming part of the transaction, and properly attested and enrolled. The Act will not extend to deeds avoided by suits.

## COUNTY COURTS.

### Summary.

AMONG the Criminal Appeal cases of last week will be found one of very great importance in the County Courts. It was decided in *Reg. v. Hallett*, 17 Law T. 136, which was an indictment for perjury committed before an arbitrator appointed by a County Court Judge under sec. 77 of the County Courts Act, that such an arbitrator has no authority to administer an oath. A clause to cure this defect ought to be introduced in the County Courts Bill now before the House of Commons.

A question of jurisdiction was determined in *Wilson v. Franklin*, 17 Law T. 127. The plaintiff's account exceeded 50l. but he sought to bring it within the jurisdiction by proving an agreement that cross accounts were to be set off between him and the defendant's testator (the defendant being sued as executor). The judge proceeded on this assumption, and found for the plaintiff. But no evidence whatever was adduced to shew such an agreement, and the Court granted a prohibition.

In *Re Edwards*, 17 Law T. 134, it was decided in insolvency that all the names in which an insolvent has contracted debts must be set forth in his petition.

THE attention of the judges, clerks, and practitioners in the County Courts is particularly directed to an observation thrown out by PATTERSON, J. in the course of the hearing of the appeal of *Watson v. The Ambergate, &c. Railway Company*, 17 Law T. 125, to the effect that the case for the appeal ought not to be drawn by the judge, unless the parties are unable to agree upon a statement of the facts.

The County Courts Extension Bill (No. 2), which purports to give an original Equity Jurisdiction to the County Courts to the extent of 100l. has already passed through the committees of the Lords. It is not improbable, therefore, that the Bill may become law this Session. It will be of incalculable advantage to the Profession, for it will produce an entirely new and extensive business, at present non-existent.

## THE JUDGE OF THE LIVERPOOL COURT.

ON Tuesday an inquiry, arising out of a memorial emanating from the Liverpool Guardian Society, relative to the alleged misconduct and incapacity of Mr. Ramsay, Judge of the Liverpool County Court, was opened before the Right Hon. the Earl of Carlisle, the Chancellor of the Duchy of Lancaster, at the Duchy Court, Lancaster-place, Waterloo-bidge.

His Lordship was assisted by Mr. Ellis, barrister, the assessor of the Court.

Mr. John Smith, president of the Liverpool Guardian Society, and Mr. Reay, the secretary of the society, were in attendance, instructing Mr. Evans, the solicitor to the society.

The counsel for the promoters of the inquiry were *Whateley, Q.C. and Whitmore*.

*Wilkins*, Serjt. appeared to answer the allegations on behalf of Mr. Ramsay, who was present during the whole of the inquiry. Eleven witnesses were present to support the prayer of the memorial, amongst whom were two reporters from the *Liver-*

pool Journal and one from the *Liverpool Mercury*. The memorial having been read,

Wheateley, Q.C. opened the case. He said it was with the greatest pain that he entered upon the investigation, arising from the fact of a professional acquaintance with the learned gentleman whose conduct was the subject of the inquiry, and whose attainments, had he (Mr. Wheateley) been asked, he would have said, highly qualified him to have discharged the duties of his onerous office most efficiently. Notwithstanding this, however, it was his duty to offer evidence in support of the memorial, which had received the signatures of no fewer than 3,500 persons of the highest respectability, most of them carrying on business in Liverpool, and who, having attached their names to the memorial, its genuineness could not be impeached. It was impossible to deny that a strong and widely extended feeling existed in the town of Liverpool with respect to the conduct of the judge of the County Court, and he (Mr. Wheateley) was afraid that during the inquiry it would turn out that this feeling was justified by the conduct of the judge; and it could not be denied that much evil had arisen and injustice taken place, emanating from the very improper manner in which Mr. Ramshay had conducted himself on the bench. On many occasions, he (the learned counsel) was informed, the judge had used offensive language and opprobrious names to the suitors, inasmuch, that persons who had occasion to bring cases before the Court, declined to do so, rather than subject themselves to the offensive conduct of the judge. Mr. Ramshay was appointed to his office in May, 1850, and shortly afterwards he was affected by a severe ailment, and probably to this a good deal of what had unfortunately taken place was attributable; but whether it arose from infirmity of temper, or bodily indisposition, it was but too clear that the learned gentleman had not conducted himself in a manner to attain, or to deserve the respect and confidence of the suitors who had to appeal to his decisions. There was another class of cases, not so numerous, but more important, to which he (Mr. Wheateley) would allude. Influenced by a want of temper at the time, the judge of the County Court, in cases where he thought parties had not brought forward facts to entitle him to give a verdict for the plaintiff, had ordered, not a nonsuit to be entered, the effect of which, as his lordship might be aware, would enable the plaintiff again to bring his case in a more perfected form—had ordered a verdict to be given for the defendant. In support of this charge he should call, in evidence, reporters who had taken notes. After some further observations, Mr. Wheateley said the question at issue was, whether the general demeanour of Mr. Ramshay, as judge of the County Court, had not been such as to render the Court less efficient, and to prevent persons from suing in that court; and if this could be proved, the allegations contained in the memorial must be looked upon to be established.

At the suggestion of *Wilkins*, Serjt. the different witnesses were ordered out of court.

Henry Joyce was the first witness examined.—Was an accountant and collector of debts at Liverpool. Had been in the habit of attending the County Court at Liverpool since the appointment of Mr. Ramshay as judge of the court. Was present in the court during every sitting. Had had many opportunities of witnessing Mr. Ramshay's general conduct towards suitors attending the court. His general behaviour and demeanour towards suitors was discourteous. Had heard him ask witnesses and other parties in the court what they were mumbling about. Had heard him call witnesses fools and blockheads. Had heard him say to a witness, "What are you talking about, man? you must be drunk." Had frequently called witness an impatient fellow when he was giving evidence. In the course of his examination the witness stated, that in cases in which he (witness) had heard defendants admit a debt the judge had nonsuited plaintiffs.

The witness was subjected to a severe cross-examination by *Wilkins*, Serjt.; but the learned gentleman did not succeed in shaking his testimony.

Mr. Grocott, a solicitor, of Liverpool, who practises in the court, and who had been an eye-witness to the mode in which the judge of the court was in the habit of addressing suitors, deposed to the uncourteous bearing of his Honour.

Several other witnesses corroborated Mr. Grocott's statement.

Mr. Charles Alopod, Mr. Thomas Baker, and Mr. Olive Mone, local reporters at Liverpool, who had been in the habit of reporting cases at the court, gave detailed evidence of the proceedings of his Honour, the effect of which was to prove the offensive nature of the learned judge's conduct towards those frequenting the court.

Wheateley here intimated to his lordship that that was the case on behalf of the memorialists.

After some conversation between his lordship and a learned counsel, the case was adjourned to the inst. when *Wilkins*, Serjt. will reply.

## THE LAWYER.

### Summary.

**EQUITY PRACTICE.**—In *Johns v. Mason*, 17 Law T. 118, it was stated that orders on claims were not designed to alter the ordinary rule of the Court, which required parties to establish their case *secundum allegata et probata*, and that the strict rules of pleading are to be observed; and in *Penny v. Penny*, 17 Law T. 120, the executors of a deceased executor were held to be necessary parties to a suit by claim for a legacy, where the general accounts of the estate are involved; that the Court has a discretion either to give or refuse relief at the hearing, and that where such accounts are involved, the proceeding should be by bill and not by claim.

**COMMON LAW.**—Two decisions on evidence were reported last week, and these are always interesting and important. In *Doe dem. Padwick v. Willcomb*, 17 Law T. 132, an old book was tendered in evidence, which purported to be the book of one B. who, it was attempted to be shewn, was steward of the manor, and which had been found in the muniment room of the Duke of Norfolk, to whom the manor belonged till 1825, when he conveyed it to the lessor of the plaintiff. An ineffectual search had been made for the originals, and notice given to the defendants to produce them. It was contended that the entries in this book were admissible, first, as reputation of the extent of the manor; second, as made by the steward in discharge of his duties; third, as secondary evidence of the lost leases. But the Court held that they were not admissible on either of these grounds. In *Richards v. Lewis*, 17 Law T. 126, it was decided that to let in secondary evidence of the contents of a deed of settlement, where there were two trustees and three parties, it was necessary to prove a search for it among the papers of both the trustees, and of the personal representatives of the parties, who were deceased.

## THE MERCANTILE LAWYER.

### Summary.

It will be observed that in the case of *Waller v. Seffe*, 17 Law T. 103, brick-burning has been held to be a private nuisance, for which an injunction will be granted.

The *Registration of Designs Act* has produced two cases. In *Reg. v. Russell*, 17 Law T. 104, the inventor of a design for an article called a window ventilator, the separate parts of which were not new, but only the combination of the certain parts, was held not to be entitled to register. "If the inventor does not shew that shape or configuration make out the benefit, he is not entitled to be protected by this Act of Parliament." So said *PATTERSON, J.* In *Reg. v. Welch*, 17 Law T. 105, a conviction for exposing to sale an article to which a registered design had been applied, was held bad, for not stating that defendant had a knowledge that the consent of the proprietor had not been given to the use of it.

A Court of Error has decided the much disputed question of copyright in foreigners. In *Boosey v. Jeffereys*, 17 Law T. 110, the decision in *Boosey v. Purday* was reversed, and the Court held, that a foreigner who first publishes in England may thereby secure a copyright here.

*Lloyd v. Blackburn*, 17 Law T. 105, was another question as to the construction of a guarantee. It ran thus: "In consideration of your supplying A. B. with goods as he may order them from time to time to the extent of 300l. I guarantee the payment of the same at two months from the date of the invoices. The plaintiff refused to supply A. B. with goods at a time when less than 300l. was due to him. This was held to be no answer to an action on the guarantee.

A case of very great importance is *Cleave v. Jones*, 17 Law T. 108, in error, in which, after an elaborate discussion, the Court reversed the former practice, as founded upon the case of *Willis v. Newham*, 3 Y. & J. 518, and held that verbal evidence of an acknowledgment of payment of part of principal or interest, is sufficient to take a case out of the Statute of Limitations. This case should be read with attention by practitioners and students, and remembered, for the contrary practice has so long prevailed, that there is danger lest its abandonment may be forgotten.

Keeping a ladies' school has been held, in *Kemp v. Sober*, 17 Law T. 117, to be within the restrictive clause of a lease, "that the lessee should not

carry on any trade, business, or calling," as it was clearly the latter.

In *Valpy v. Oakley*, 17 Law T. 124, it appeared that A. and B. had agreed that B. should deliver goods to A. at a certain price, to be paid for by a bill at three months from delivery. An invoice was delivered, and a bill drawn and accepted by defendant for the amount. But the proper quantity of goods was not sent as contracted and invoiced; the deficiency, however, not being discovered till some time after the delivery. The bill was dishonoured, and he became bankrupt. It was held that the assignees were entitled to recover only as damages for the breach of contract the difference between the contract price and the market price of the goods which ought to have been delivered.

In *Colbourne v. Dawson*, 17 Law T. 125, the following guarantee was held to be good. "200l. I hereby engage to guarantee to Messrs. C., G. and T. ironmasters, the sum of two hundred pounds, for iron received from them for Messrs B. and Co. as annexed." A consideration sufficiently appeared.

Another case to be added to the law of *Bills of Exchange* is that of *Ralli v. Dennistoun*, 17 Law T. 127. The plea to an action upon a bill was that, before the circulation of the bill, it was agreed between the drawer and acceptor that it should be cancelled, and that the then holder, who accepted the part of the bill for the drawer, should return it to the acceptor for the purpose of being cancelled; and the accepted part was thereupon returned, cancelled, and the bill became wholly void. The Court held the jury right in finding a verdict for defendant, being of opinion that the plea was proved.

From the Court of Error we have a point in *Patents Law*. In *Steiner v. Heald*, 17 Law T. 131, a patent had been had for obtaining colouring matter from madder by boiling, and also an article called garancine. But it appeared that the same result had been obtained before the date of the patent. At the trial, the judge directed the jury, as a matter of law, that the invention is not any manner of manufacture for which letters patent could lawfully be granted according to the statute. This was held to be wrong, and that it was matter of fact for the jury, and not a matter of law.

In *Re Ronaldson*, 17 Law T. 133, it was decided that money paid to a bankrupt for a specific purpose, immediately before his bankruptcy, will not vest in his assignees if clothed with a trust.

**THE ARREST OF ABSCONDING DEBTORS.**—Some amendments to the Bill to arrest absconding debtors have been printed by order of the House of Lords. The object of this Bill is to enable creditors to arrest their debtors when there is reason to believe that they are about to abscond. For the want of some such power, property is made away with before the parties can be captured. The Bill is to be further considered in the House of Lords on Friday.

## ASSURANCE CHRONICLE.

[The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

**MITRE LIFE ASSURANCE ASSOCIATION.**—The annual general meeting of this company was held at the offices, 23, Pall-mall, on Thursday last. The report announced that the business transacted during the year just concluded had exceeded 33 per cent. of the total amount of assurances effected during the previous experience of the association. At an extraordinary meeting which followed the ordinary proceedings, a proposition to add a mutual branch to the business of the company was adopted, by which assurers will be entitled to a share of all the profits of this department. The first division of profits to be made in 1858; such profits, at the option of the assured, to be added to his policy, payable at death; paid to him in cash, less the necessary discount; or commuted to an equivalent reduction of premium.

## COURT PAPERS.

### ADMISSION OF SOLICITORS.

**NOTICE.**—The Master of the Rolls has appointed Saturday, the 14th of June, at the Rolls Court, Chancery-lane, at four o'clock in the afternoon, precisely, for swearing solicitors.

Every person desirous of being admitted on the above day must leave his common law admission or certificate of practice for the current year at the Secretary's Office, Rolls-yard, Chancery-lane, on or before Friday, June 13.

# CHANCERY CAUSE LIST, Trinity Term, 1851.

## Lord Chancellor's Court.

### Appeals.

Briggs v. Penny, part heard  
Bodick v. Gandell  
Robinson v. Geldart  
Salmon v. Dean  
Smith v. Pincombe  
Vivian v. Cochran  
Sturge v. Sturge  
Felly v. Watson  
Rhodes v. Mason  
Smith v. Smith  
Kekewich v. Manning  
Attorney-gen. v. Murdock  
Deakes v. Bell  
Toft v. Stephenson, 2  
Smale v. Graves  
Hawkes v. Eastern Counties  
Railway Company  
Keynell v. Sprye  
Vaughan v. Vanderstegen, 2  
Eries v. Griffith  
Cooper v. Carter  
Bayden v. Watson, 2  
Hamilton v. Rankin  
Saunders v. Hamilton  
Swift v. Grazebrook  
Robinson v. Robinson  
Gaston v. Frankum  
Bell v. Bea, 2  
Ward v. Martin  
Weaver v. Grant, 2, and peti-  
tion  
Haigh v. Gray  
Duke of Leeds v. Earl Am-  
herst

Thornes v. Harper  
Watts v. Symes, 2  
Seagrave v. Pope  
Jones v. Lewis, 2  
Mayor and Aldermen of Ber-  
wick v. Murray, 2  
Percival v. Caney  
Newman v. Hutton, appeal  
and motion  
Ogle v. Morgan  
Allen v. Wilson  
Miller v. Fridder  
Sharp v. Taylor  
Lette v. London Corn Ex-  
change Company  
Blenkinsopp v. Blenkinsopp  
Wellcley v. Wellcley  
Powell v. Dodson  
Evans v. Evans  
Barnett v. Sheffield, 2  
Fairthorne v. Davis  
Follett v. Jefferys  
Bryan v. Manson  
Waters v. Myan  
Langdale v. Gill  
Jones v. Parry  
Sponner v. Wayne  
Keynaston v. Lancashire and  
Yorkshire Railway Comp. 2  
Hervey v. Hewitt, rehearing  
Same v. Oliphant, fur. dirs.  
Chappell v. Rees  
McIntosh v. Great Western  
Railway Company.

### Rolls Court.

#### Judgments Reserved.

#### Pleas and Demurrers.

#### Cases, &c.

Bush v. Watkins | Morgan v. Morgan, 3  
Dean and Chapter of Ely v. Gayford, 6  
Minn v. Stant.

Gas Light and Coke Com-  
pany v. Symonds  
Morgan v. Morgan  
Heale v. Bexley, 2  
Attorney-gen. v. Colegrave  
Attorney-gen. v. Mayor of  
Gloucester  
Gooch v. Gooch, 2  
Rice v. Gordon  
Littlewood v. Webster  
Mackason v. Pope  
Massey v. Corvick, 2  
Betts v. Barrow  
Bell v. Jones  
Bligh v. The Great Western  
Railway Company  
Ross v. Ross  
Dunn v. Stokes  
Fry v. The Corporation of  
Gloucester  
Thorpe v. Duke  
Brown v. Cross  
Duvall v. Mount  
Heaton v. Dale  
Leer v. Butterfield, 2  
London Gas Light Company  
v. Spottiswoode  
Bolton v. Powell, 2  
Lord James Stuart v. The  
London and North-West-  
ern Railway Company  
Grundy v. Piningier  
Reece v. Green  
Early v. Middleton  
Withers v. Boys  
Lord Crewe v. Robson  
Jackson v. Jackson  
Bentley v. Mackay  
Ellis v. Maxwell, 6  
Grace v. Carden, 2  
Grace v. Hood  
Lees v. Laforest, 2  
Peters v. Beer  
Younge v. Hudson  
M'Donnell v. Heslridge  
Brown v. Oakshot, 3  
Fuller v. Green  
Pickard v. Mitchell, 2  
Douglas v. Andrews  
Hanbury v. Hussey  
Lake v. Pearce  
Johnson v. Thomas, 2  
Jodrell v. Jodrell  
Wilson v. Eden  
Serdfield v. Thacker  
Blake v. Blake  
Davis v. Barrett  
Rennie v. Nicholl  
Noble v. Meymott  
Wright v. Nixon  
Sayer v. Collard  
Davenport v. Charlesworth, 2  
Charlesworth v. Verity  
Weymouth v. Taylor

Grimwood v. Gable  
Read v. Strangways, 3  
Trilley v. Keefe  
Clayton v. Garnett  
Vickers v. Shaw  
Dudman v. Gordon, 2  
Harris v. Mott  
Lord v. Ryle  
London and South-Western  
Railway Comp. v. Mansfield  
Godson v. Turner  
Cleobury v. Turner  
Peckersgill v. Peckersgill  
Karnshaw v. Earnshaw  
Minn v. Stant  
Bailey v. Ward  
Attorney-gen. v. Chambers  
Same v. Rees  
Hall v. Hall  
Foley v. Smith  
Same v. Same  
Kardley v. Owen  
Dimesdale v. Hutton  
Parks v. Turner  
Bryant v. Blackwell, 2  
Crallan v. Oulton  
Peatfield v. Benn, 2  
Irwin v. Dimes  
Turner v. Turner  
Laurie v. Clutton, 2  
Cooke v. Lamotte  
Fell v. Jones  
Bartlett v. Patten  
Greenwood v. Roberts  
Macdonald v. Walker  
Harris v. Farvell  
Anthony v. Simmons  
Attorney-gen. v. Corporation  
of Chester  
Harvey v. Read  
Dowding v. Bartley  
Bain v. Cameron  
The Caledonian Railway Com-  
pany v. Naylor  
Norris v. Wright  
Mason v. Gallimore  
Keddell v. Keddell  
Davies v. Brown  
Penruddock v. Hammond, 2  
Hayward v. James  
Duke of Devonshire v. Elgin  
Ballenger v. Hawes, 2  
Thrustans v. Smith  
Heath v. Sampson  
Attorney-gen. v. Wright, 2  
Hancock v. Amer  
Davis v. Barrett  
Mathew v. Brise  
Lucens v. Parkes, 2  
Littlewood v. Webster  
Barton v. Terrell  
Jolly v. Gould  
Scott v. Wheeler.

## COURT OF EXCHEQUER.

### TRINITY TERM, 14TH VICTORIA.

Tuesday, the 3rd day of June, 1851.

This Court will hold sittings on Saturday the 21st day of June instant, and on every succeeding day (Sundays excepted) until and including Tuesday, the 1st day of July next, and also on Thursday, the 10th

day of July next, and will, at such sittings, proceed in disposing of the business then pending in the paper of new trials, in the paper of demurrers, and in the paper of special cases; also in disposing of such motions and applications (if any) as shall then have been made and shall be then pending, as the Court shall give leave to be brought on at the said sittings; and likewise in giving judgment in all cases then standing for judgment.

FRED. POLLOCK, E. H. ALDERSON,  
T. J. PLATT, SAMUEL MARTIN.  
Read in open Court,—Edward Bennett.

## COURT OF ERROR.

The Court fixed the following as the error days after the present term:—Q. B. June 18 and 19; C. B. June 20; Ex. June 21.

**SUMMER CIRCUITS.**—The judges met on Thursday, and made the following arrangements for the Summer Circuits:—Western Circuit: Lord Campbell and Mr. Justice Coleridge. Home Circuit: Lord Chief Justice Jervis and Mr. Baron Alderson. Norfolk Circuit: The Lord Chief Baron and Mr. Justice Cresswell. Midland: Mr. Baron Parke and Mr. Justice Maule. Oxford: Mr. Justice Erle and Mr. Baron Martin. Northern: Mr. Baron Platt and Mr. Justice Williams. North Wales: Mr. Justice Wightman. South Wales: Mr. Justice Talford. Mr. Justice Patteson will remain in town.

## PROCEEDINGS OF LAW SOCIETIES.

### LAW PROPERTY ASSURANCE AND TRUST SOCIETY.

THE first annual general meeting of this Society, established for the purpose of facilitating the settlement, sale, mortgage, and redemption of property, and the security of families by the application of the principle of assurance to property as well as to life, was held at the offices, 30, Essex-street, on Friday last. There was a numerous attendance of shareholders.

E. W. Cox, Esq. the chairman of the Society, occupied the chair.

The following report was read:—

#### REPORT.

At this, the first annual general meeting of the Law Property Assurance and Trust Society, the directors have great pleasure in submitting to the shareholders their report of the proceedings of the past year.

The advantages of the novel application of the principles of assurance to leaseholds, copyholds, and lifeholds, as well as the redemption of mortgages and of loans, and the security of building societies, in addition to the contingencies of life, have been more extensively appreciated than was expected, and your directors refer with much gratification to the transactions of this Society during the first year of its existence. 313 proposals have been received, of which 192 have been completed, and are now in force, yielding an annual income of 2,234l. 16s. 3d. In addition to these, 27 more have been accepted, and are in process of completion.

Your directors congratulate the shareholders that not a single life policy has become a claim.

The confidence with which the plans of this Society are viewed by the public is evidenced by the fact that all the shares in the capital stock of the Society are subscribed. And your directors, continuing to receive applications for further allotments, have found it expedient to declare forfeited such shares as had not been taken up; and in order to extend as widely as possible the interests of the Society, they have resolved to issue the few remaining forfeited shares only in small lots.

The management of the office has been carried on with the utmost caution and prudence, regard being had rather to economy than display. The entire fixed annual charge upon the Society's funds, including the salaries of secretary, medical officer, clerks, and porter, with rent and taxes, does not exceed 800l. per annum. Thus already the annual income is much more than double the fixed expenditure. The Society, therefore, offers the almost unprecedented instance of having become self-supporting at the end of only one year.

Your directors have considered the subject of remuneration to themselves and to the auditors, and although they deem it inexpedient to postpone the usual annual vote for this purpose, they have determined that the payment of whatever sum the shareholders may be disposed to grant shall be deferred.

Application has been made to Parliament for powers to enable the society to carry out certain branches of business with greater facility, but as the provisions of the Bill are now under the consideration of the chairmen of the committees of both Houses, your directors feel that it would be premature and imprudent to state them more fully at present.

On reference to the *List of Agents* of this Society, it will be seen that the services of a highly respectable and influential body of gentlemen of the Legal Profession have been secured, and the assistance of the shareholders is particularly requested in increasing their number in localities not yet represented.

Your directors invite special attention to the peculiar and great advantages offered by this Society to those effecting life assurances on the participating scale, inasmuch as they receive 80 per cent. of all the profits from every branch of the Society's business on the participating scale.

The assurance of titles is now beginning to be understood and appreciated. Many proposals have come before the Board, some of which have been accepted, and your directors anticipate a very extensive and advantageous business from the plan they have adopted, in cases where large estates are sold in small lots, for assuring the title to each of the purchasers, and thereby saving the expense of a separate investigation of the whole title, and of an attested copy of the title-deeds.

In conclusion, your directors offer their congratulations to the shareholders on the entire success which has attended the society. Feeling assured that the advantages offered by it are so manifest as to require only to be well understood to be universally adopted, they beg to impress upon the shareholders the necessity for active co-operation in making known its plans to their friends and the public, and thus to assist in placing the Law Property Assurance and Trust Society in that position, which the experience of the past year assures your directors it may shortly occupy,—namely, in the foremost rank of assurance societies in the United Kingdom.

WILLIAM NEISON, Secretary.

Offices, 30, Essex-street, Strand,  
28th June, 1851.

The CHAIRMAN, in moving the adoption of the report, said that he had a very agreeable duty to perform, for it was wholly of congratulation. The Society was flourishing beyond expectation, and in every particular, whether of business done or of future prospects, the assured and the shareholders have cause for satisfaction. The first feature that must have struck them was the almost unprecedented one in an assurance society, that at the end of the first year this was self-supporting; that its income very considerably exceeded its expenditure, and that it had actually invested, so as to yield five per cent. interest, the entire amount of premiums received. (Hear, hear.) In the formation and conduct of the Society, advantage had been taken of experience, and therefore it had been done in the most economical manner; nothing had been spent in buying experience, as was too often the case with young societies. This one had been fortunate in every respect. Its preliminary expenses—that is to say, the entire cost of forming and establishing it, up to the date of complete registration, including all the expenses of registration, the legal expenses of the deed of settlement, services, advertising, and every other cost incidental to the formation of a company did not in this Society exceed 1,200l. a sum less than that which a tradesman will often expend in fitting up his shop, and at which outlay they had formed a Society whose income was already more than 2,200l. a year, and with a little exertion on their parts might be multiplied tenfold in five years. Then they had been fortunate in furnishing. They had succeeded in buying off the entire furniture of an extinct company, which had cost 800l., for 200l. and they saw how very handsomely and conveniently their offices were furnished. All this had cost but 200l. Then they were working it very cheaply. The entire of the house in which they were assembled, comfortable and convenient as it was, was obtained at a rent of 75l. a year, and with the rates and taxes, did not cost them 100l. a year. (Hear, hear.) They had a secretary of great experience and ability, the brother of their consulting actuary, whose name was known through Europe, and their arrangements with their officers made a present charge of only 700l. a year, it being agreed with their Secretary that he should share their fortunes, and that his remuneration should be regulated by the future success of the Society. As to the business done during the year, it must be a source of great satisfaction to all of them. The application of assurance to property as well as to life was a novelty, and it is only by slow degrees that the most useful plans, if new, receive confidence and support. Yet so obvious have been the advantages of the assurance of leaseholds, copyholds, and titles, and the redemption of mortgages and loans, that the Board had already issued a great number of policies of that class; and as these were not speculative, but yielded certain calculable profits, they were highly beneficial to the Society. Indeed, the advantages of assuring leaseholds, so that at the expiration of the lease the purchaser may receive back his purchase money, were so obvious, that the business of this class has been considerable; it has been found to afford extraordinary facilities for the sale and mortgage of property otherwise difficult to deal with. In fact, for all practical purposes, it converted a leasehold

into a freehold. So it is with the redemption of mortgages and loans. It is very desirable that, when a man contracts a loan, he should make an arrangement for its gradual liquidation; formerly this was difficult, because the lender would not take it in parts, and the borrower could not well turn his annual saving to profitable account, besides the temptation there is to spend instead of to save it. But now, by means of a redemption policy with this Society, the borrower has but to pay an annual premium to such an extent as he can conveniently lay by, and his debt will be redeemed by the Society at the time agreed, or earlier if he should die, so that his family may receive his property unincumbered. This branch also had been favourably received by the public. The assurance of titles has brought a great number of proposals; but only a few had proceeded to a conclusion, because the object was misunderstood. The Society did not undertake to assure a title positively bad, but only such as, being good holding titles, were yet unmarketable or unmortgageable by reason of some defects in proof, &c. It was a condition that the title should be good to hold, so that they were proceeding on safe grounds to themselves, while conferring a great boon upon the public by releasing a large amount of property now locked up. (Hear, hear.) There was, however, another application of this form of assurance from which they might contemplate an extensive business; that was, in cases where large estates are sold in small lots, and in which the Society, being satisfied of the title to the whole, will grant policies of assurance for the title of each lot, so as to save the cost of attested copies, and of investigating the whole title by each purchaser. Proposals of this kind are now under the consideration of the Board, and will probably be completed. They were also making progress with the GUARANTEE OF FIDELITY, having issued several policies of this class. Their Life Assurance, too, was extremely flourishing and daily increasing, and if the shareholders would but explain to the clients and friends the peculiar advantages of assuring in this office, that branch of business might be immensely increased. The peculiar advantage is this, that those who assure their lives on the participating scale receive eighty per cent. of the profits, not of the life assurance only, but also of all the other business of the office transacted upon the participating scale. (Hear, hear.) Thus it will be seen that, in respect of amount and nature of business done, the progress of the Society has been very satisfactory; and although under the disadvantage both of youth and novelty, it had already attained the position of an established, flourishing, and self-supporting institution. (Hear, hear.) The public are naturally and properly cautious, and will want to see how a society to whom they are going to trust their property proceeds; and when it is known what this Society has done and is doing, and how it is managed, and what are its expenses, public confidence will be given to it; and if so much has been sent to it already, how much more may not be anticipated from the future? It was another pleasing circumstance that all their shares are subscribed; that only some of the forfeited shares remained—not exceeding 350—and that for these there were applications, only that the Board had resolved to issue them in small lots, so as to extend the connections of the Society. The deed empowered the Society to issue more shares, but the Board deemed it undesirable to do so, inasmuch as a large amount of paid-up capital was found in practice to be a serious impediment to the prosperity of an Assurance Society, by imposing upon the profits the burden of a large amount of interest, and consequently the diminution of the fund from which the assured derived their bonuses. Since the deed of settlement was executed, the Board had been increased by the addition of two members, whose services had been found to be of great value—Mr. Brockman and Mr. Chandler. The Society was indeed much indebted to its country Directors, who have been found in practice to be extremely beneficial. In the country, the people know nothing of Mr. A., B. or C. in London, but they know their neighbour, Mr. Chandler, or Mr. Young, or Mr. Brockman; they know him to be a man of property, and reputation, and family, who would not connect his name with a Society he did not know to be respectable: so they come to us with their assurances, because they know our friends here on either side of me, and, in fact, it will be found that the greater portion of the business has come from the districts within which our country Directors live, and where their names have given to their neighbourhoods a confidence in our respectability. Nor is that confidence undeserved. Never was a Society more fairly and firmly based than this. We court publicity; we invite inquiry; every sixpence we have spent, every resolution we have passed, every plan we have put forth, our condition and prospects, our books and papers, are welcome to be inspected by any person—shareholders, assured, or stranger,—who desires to know how we are going on. (Hear, hear.) It is in the power of our shareholders and agents to increase our prosperity yet further by increased exertions to explain our plans, point out the advantages of assur-

ing here, and satisfy the public of the security of the Society. There is no doubt, and they who are most familiar with the subject admit, that this Society has in itself the elements of unlimited expansion, and that it needs but the active co-operation of all who are connected with it, whether as shareholders, as agents, or as assured—for all are equally interested in its success—to become the most flourishing Assurance Society—not in England only, but in Europe. (Hear, hear.)

The report was then adopted unanimously.

J. G. SHEPHERD, Esq. said that in moving the election of the two country Directors, and the re-election of the two retiring Directors, he could confirm from his experience all that the Chairman had said with respect to the advantage which the Society derived from their presence at the board. Living in the country, he was aware how much the inhabitants liked to see names they knew, and gentlemen of such great respectability and influence in their neighbourhoods as the country Directors of this Society, could not fail to produce the advantages that had been anticipated, and which, as he understood, had been already realised. The Chairman was naturally proud of his progeny, and it might be supposed that he would look more hopefully upon his child than a stranger; but in this instance he did not think that he had exaggerated the uses or the prospects of the Society, nor his description of what it is capable of becoming. It has so many really useful and practical plans that its present success, great as it is, is nothing to what it might and will be, if the members will interest themselves in making it known. He was also of opinion that they should spend more in advertising. Their plans were new, and the public require to be made to understand them by repeatedly directing attention to them.

The CHAIRMAN said that the Board had been unwilling to make a large expenditure at first, fearing that shareholders might not understand the use of present outlay for future profit, and having advantageous means of investing money, so as to bring business at the same time, the Board had applied as much as they could spare from unavoidable expenses to investment. As their income grew they should, of course, enlarge their outlay in this respect.

The motion for the re-election of the retiring Directors was then carried unanimously.

W. B. GEORGE, Esq. briefly moved a vote of 250l. to the Directors for their services during the past year.

E. E. P. KELSEY, Esq. seconded the motion. Their labour had been great, and the result of their exertions was seen by the gratifying report they had just heard.

The CHAIRMAN, in putting the resolution, said that he was desired by the Directors to state that, although they considered an annual vote the most satisfactory, it was not their intention to draw it out of the funds of the Society, but they purposed to take policies for the amount of their several portions of it, thus increasing the business and not diminishing the funds of the Society. (Hear, hear.)

The resolution was carried unanimously.

R. T. BROCKMAN, Esq. moved a vote of 40l. to the Auditors for their services during the past year. They had used great diligence, attended for five or six days, and Mr. Kelsey had come twice from Salisbury.

JAS. MACAULAY, Esq. seconded the motion. He could confirm the statement as to the labour and diligence of the auditors, to whom the shareholders were much indebted.

The resolution was carried unanimously.

N. M'CANN, Esq. proposed a vote of thanks to the directors for their services. As their medical officer he had observed the diligence and industry with which they discharged their duties, and the great prudence and caution they exhibited in the acceptance of lives. He had, indeed, given the best proof of his own confidence in the manner in which the business was conducted and the prospects of the Society by not only taking shares for himself but doing so for all his children, and recommending it to all his friends. (Hear, hear.)

JAMES HUTTON, Esq. seconded the motion. As auditor, he was enabled to bear his testimony to the excellent management of the Society. It was in all respects a sound and substantial institution.

The resolution was put and carried unanimously.

The CHAIRMAN, on behalf of his brother Directors, assured them that no efforts would be wanting on the part of the Board to promote the interests of the Society by prudent caution, but it was for the members and the public to send the business on which the Board must exercise its judgment.

B. CHANDLER, Jun. Esq. moved a vote of thanks to the auditors for their services. They were the officers appointed by the shareholders to see that the accounts were properly kept, and they had performed their duty with diligence.

ROBERT YOUNG, Esq. seconded the motion, which was carried unanimously.

T. CHANDLER, Esq. proposed a vote of thanks to their medical officer, Mr. M'Cann.

HENRY PAULL, Esq. seconded it. They were much indebted to their medical officer for the care with which he investigated the various cases submitted to him, and the proof of his sound judgment was in the fact that they had not lost a single life during the year.

F. G. P. NEISON, Esq. proposed a vote of thanks to the Chairman. The Society was fortunate in having at the head of it a gentleman of so much experience in business, and who had made a study of the principles of assurance. For some years he had been in frequent communication with Mr. Cox, and he could state that his views were sound, and it rarely happened that he (Mr. Neison) had occasion to differ from him in opinion. His other qualities for the office were as well known to them as to him, but of this one he was perhaps a better judge than they, and therefore he was desirous of stating it to them. While on his legs, he would take this opportunity of expressing his approval of Mr. Shepherd's suggestion for more extensive advertising. Experience had satisfied him that it was the most profitable course, ultimately if not immediately, that a society can pursue; and that every 100l. thus expended would produce a thousand. There was a very mistaken notion abroad, that the older and richer offices were better to assure with than the younger offices. It is not so. On the contrary, all experience has proved that, after a certain period, the bonuses in an office decline until they come back to nothing,—the reason being, that when the capital becomes very great it cannot be profitably invested; therefore much more is to be gained by assuring in a flourishing young office than in an old one. This Society was established on a sound basis, and was well conducted, with prudence and economy, combined with a knowledge of the business of assurance, to which its early success is due, and which he had no doubt would make it in no long time one of the most extensive and influential assurance offices in Europe.

H. PAULL, Esq. seconded the motion, and begged to bear his testimony not only to the efficiency and diligence of their Chairman, but to his urbanity and kindness, which had preserved unbroken harmony at the Board, and enabled it to conduct the business of the Society with unanimity, and therefore with efficiency.

E. W. COX, Esq. in returning thanks, said that certainly he did feel for the Society the interest of a parent. The plan of it was altogether his own. It was no mere visionary project, but a practical design to supply what he had found, in his experience of the profession, to be an existing want, and therefore it was that it had succeeded even beyond his most sanguine expectations. But the bantling was as yet a child, though a very promising one, and if they would have it grow to be a giant, as he hoped it would, they must be good nurses, and send up plenty of food. He hoped every succeeding year to be enabled to congratulate them more and more upon his astonishing growth. (Mr. GEORGE.—For the next Exhibition.) If this first year is an omen for the future, he will be all they could desire, but that would mainly depend upon their own exertions. The meeting then separated.

#### THE SOLICITORS' INSURANCE SOCIETY.

THE fifth annual general meeting of this society was held at the Gray's-inn Coffee House, on Saturday, the 31st of May. Mr. Morris was voted into the chair.

The secretary having read the advertisement convening the meeting, and the circular, and also the minutes of the last general meeting, and these having been confirmed, he proceeded to read the following

#### REPORT.

"The directors of the Solicitors' and General Life Assurance Society have much gratification in reporting that the number of policies effected during the past year has exceeded the number effected in any preceding year of the society's existence.

"It will be seen on reference to their last report, that in the year ending the 31st of May, 1850, 202 policies, covering assurances to the extent of 84,896l. producing annual premiums amounting to 2,694l. had been effected, and that three annuities had been purchased of the society of the value of 871l.; but, pleasing as the results of that year's business proved, they are enabled to give a still more satisfactory report of this year's operations.

"In the year ending this day, 227 policies, assuring 110,369l. and producing an addition of 3,569l. to the income of the society have been effected, and four annuities of the value of 1,375l. have been granted.

"It is also satisfactory to be enabled to congratulate the shareholders on the facts that the number of deaths which have happened during the past twelve-months has, as in former years, been considerably less than that resulting from the ratio of mortality on which the tables of the society have been constructed, and that the average amount payable under the policies which have become claims has again been less than the average of the policies in existence.



"The claims during the year have arisen on eight policies, assuring 3,250*l.* giving 406*l.* as the average of each, while the average amount assured by existing policies is 465*l.*

"Since the commencement of the society 1,034 policies have been issued, which covered assurances to the extent of 500,261*l.* the yearly premiums on which would have amounted to 15,743*l.* had all the policies remained in force; of these, however, 17 have become claims, and 149 have lapsed, therefore, as the claims amounted to 5,698*l.* the lapsed policies to 90,214*l.* and the annual premiums to 2,607*l.* it follows that 868 policies, covering assurances to the amount of 404,549*l.* and producing an annual income of 13,136*l.* now remain in force, and that the average amount of these policies is 465*l.* From the same period, the society has granted 12 annuities of the value of 3,805*l.*

"The amount received by the Society on the 166 policies before referred to as not now in force, is 4,107*l.* which, if contrasted with the amount of claims, shews that the premiums paid in respect of those policies is about 72 per cent. of the sum assured under all the policies on which claims have arisen.

"Since the last annual meeting of the proprietors, a vacancy had occurred in the board, by the resignation of Mr. Cox, which the directors have not filled up *pro tempore*, as they are empowered to do under the 46th clause of the society's deed of settlement, but have left the choice of a director entirely to the judgment of the proprietary."

The CHAIRMAN then said, it now became his duty to report to the meeting, that from the date of the last general meeting there had been fifty-two regular boards and two special boards, and the number of attendances of directors had been 436, and having an average attendance at each board of eight directors. He would now move that the report just read be received and adopted; and in doing so he felt it was quite unnecessary for him to occupy the time of the meeting with any observations in support of the motion. The report itself would be found to exhibit the state of the affairs of the society, shewing a gradual progress, which was both satisfactory and encouraging. It must not be overlooked that there had been of late a most extraordinary degree of competition in the business of life assurance; a competition arising not only from the increase of new offices which had of late been called into existence, but from the very large reduction in the rates of premium which had been adopted by many of the old and long-established offices. When these matters were taken into consideration, the fact that this Society had, during the past year, effected more policies than ever had been effected in any preceding year since its establishment was a highly satisfactory feature in its history. An opinion was entertained by some, that, from the nature of the constituency of this Society, consisting as it did of upwards of 370 members of the legal profession—that if every shareholder had exerted himself to the utmost in bringing in policies to the office, it might, perhaps, have been reasonably expected that it would have been able to have done a larger amount of business than even that which they had done; but it must be taken into account also what were the number of its years of existence. It was possible that many of the members of the Profession were less sanguine than the shareholders of this Society had been, from a confident and positive assurance of the success; and perhaps that want of confidence had deterred many from using their influence with their clients to enable them to bring business, considering it so young an office. If that notion had existed in times past, and operated against the society, it was quite impossible that it should continue to do so; for surely, with assets now of between 40,000*l.* and 50,000*l.* and policies in existence to the number of 868, yielding an annual income of 13,000*l.* and upwards, no one could for a moment hesitate about using his utmost influence, whatever it might be, to induce persons to take their business to the office. In conclusion, he said he should be very much surprised indeed, when the period arrived for the distribution of the profit, if they did not find in their pockets the best possible evidence of the success of the Society.

Mr. BROCKMAN (of Folkestone) seconded the motion, which was put and carried unanimously.

The retiring directors, Mr. Samuel Edward Donne, Mr. Joseph Noakes Mourilyan, Mr. James Allyn Meynard, and Mr. John Thomas Church, were then re-elected.

Mr. MOURILYAN, in returning thanks for the honour, on behalf of himself and the other directors, assured the meeting that the best exertions of himself and his colleagues would be at all times used in forwarding the interests of the society. He reminded the shareholders then present, and especially he wished the country members to know, that the labours of the directors might have been very easy if there had been a corresponding amount of exertion on the part of the shareholders. If the directors had anything to complain of, it was want of business; and if the shareholders would give it to

them, they would with great pleasure do it according to the utmost of their ability, and with regard to the best interests of the society. The facts stated in the report were worthy of notice, and he would venture to state that 300 of the 378 shareholders were solicitors. They all know, as professional men, the influence of solicitors amongst their clients, and it must be obvious to every body, that if one policy alone were sent annually to the society by each of its members, the numbers must be very much greater. It could not, therefore, be too often impressed upon the minds of the shareholders, particularly those in the country, that if they would but exert themselves to a very slight degree, this office must very soon be placed in a very enviable position.

Mr. BROCKMAN moved, and Mr. KEIGHLEY seconded, that Mr. Thomas Loughborough be elected a director in the place of Mr. Cox, who had retired from the direction. The motion was carried.

Mr. LOUGHBOROUGH, in returning thanks for the honour conferred upon him, observed that the Society had had great difficulties to contend with in past years, but he thought they might take credit for the position it now assumed, and the favourable condition in which their funds and assets presented themselves to the proprietors. In addition to the difficulty which every young Society must expect, it was well known that beyond a certain point a solicitor could not press his client; he might mention the name of the office, and suggest the effecting a policy in it, but that was all, which, in many cases, he could do. He believed the Society had now attained that position as to which every one might say it was a Society that was really carrying out all the purposes to which it could be applied, and that it afforded a full and substantial assurance that it would yield profits equal to those to be obtained in any other office. He assured the meeting that he should proceed to a performance of the duties of the office in which he had now been placed with a full sense of the importance of those duties, in seeing that the business when brought to the directors was done efficiently, and to their satisfaction, so as to secure the best interests of the Society. It remained but for the members of the Society to exert themselves amongst their clients, because, than solicitors, there was no class of men to whom life assurance presented itself on more frequent occasions, or who had so frequently to consider the risks and chances which attach to the various modes in which life assurance was brought to bear. Having, therefore, this body of men so peculiarly circumstanced, it was only for them to exert themselves to send policies to the office, and he was quite sure that those gentlemen who had so kindly encouraged the Society in its early career would ever be found ready to continue their support, in the full assurance that they would obtain an ample reward, as their pockets would shew.

Messrs. W. Scrope Ayrton, John Jackson Blandy, Montague Gosset, Robert William Hand, and Richard Nation, were then re-elected auditors.

Mr. MAYNARD then moved "that the sum of ten guineas be paid to each auditor for his attendance during the past year, in addition to their travelling expenses; and that the best thanks of the Society be presented to them for their services." He could not move that resolution without bearing on behalf of the directors—and it was extremely gratifying to him to be the medium of such a communication to the meeting—the testimony, on the part of the directors, to the zealous, conscientious, and effective labours of those gentlemen, and the obligation the Society was under to them for their great services. It was the opinion of the directors, and he believed all the members of the Society who had the honour of acquaintance with the auditors would join in that opinion, that the gentlemen who served in that capacity were most entirely worthy of their confidence. Their zeal was most unquestionable; and it would truly appear so, when he stated that on the last occasion they were employed during a period of three days a large number of hours, between ten and six on each day, in investigating with the utmost and most searching scrutiny the accounts of the Society. The directors were most deeply indebted to them for that scrutiny; and when it was considered that they were—if he might use the figure—the telescope through which the Society must look at the affairs as conducted by the directors, they would feel the importance of the service rendered, and how much the Society was indebted to them for the manner of its performance.

Mr. DONNE seconded the motion, and it was then carried unanimously.

Mr. RUDALL then moved "That the sum of 500*l.* be presented to the directors for their services during the past year." He felt this was a very inadequate sum to pay to the directors; but he trusted that, as the affairs of the company became more extended, a more liberal allowance would be made. The Society were much indebted to the directors for the very prosperous and thriving position in which their office was placed.

Mr. JOHN THOMPSON, in seconding the motion, said he was glad to see that the remuneration that

was paid to the directors last year had not been thrown away—if he might use the expression—because he conceived that during the past year the Society had made great and solid progress. He felt that the Society was now, as it were, on a rock; that it had gained ground in public estimation; and now was an existing society whose credit no institution in the metropolis could impeach; and the balance-sheet which went forth to the world was a test not only of good management, but of the responsibility of all those who favoured the Society with their insurances. Upon that feeling he, last year, had doubled the amount of interest he had in the Society, and he believed so had a great number of other members. He felt confidence in the directors of the Society, and particularly from the attention which they paid to certain delicate matters connected with the Society which had come before them last year, and which had been very ably managed without any public reproach, and without bringing private grievances before the public; and the unanimity which pervaded their proceedings convinced him that the direction was in the most able hands. He had frequently been at the offices of the Society and had always found some one at his post superintending the labours of those who had the underworking of the establishment. In every respect the Society had reason to congratulate itself on its position, and he felt confident that no other society connected with the legal profession—though they might assume to put forth more flourishing advertisements than this Society—could be in a better position, taking into consideration the subscribed capital, the small amount they had paid, and the interest which they annually received, and the almost certainty of realising a large addition when the division of profits took place in 1853—something on which they might congratulate themselves. To whom, then, was owing the prosperous condition of the Society at the present moment but the directors? Believing it to be the result of their exertions, he had great pleasure in seconding the resolution.

The motion was then put and carried unanimously.

Mr. ELIOART then moved "that the best thanks be given to the directors for their able and judicious management of the affairs of the society." He was one of those who, though he acknowledged the use of the telescope, liked to look at things with his own eyes: he had looked into the affairs of this society, and was much gratified in finding so steady an increase in the receipts over the expenditure of the society.

Mr. WILLIAMS seconded the resolution, which was put by the chairman and carried unanimously.

Mr. COMMISSIONER FOMBLANQUE said,—"I am deputed by my brother directors to return thanks to you for the honour you have done us, and we are most anxious to assure you that there will be no relaxation in the efforts by which we hope we have deserved, and in future will endeavour to deserve, your confidence. You will have learned from the report that there has been a very steady attendance of the directors: of twelve, the average attendance has been eight; and I can assure you it is not merely a nominal attendance, but that every director present at the board does most diligently apply his mind to the business before him. You will perceive the fruit of that in the result of the very small number of policies that have become claims; and I can assure you that when we look back to the circumstances of those few policies, we find nothing to reproach ourselves with, in having admitted those lives. They were admitted after careful scrutiny, first by the medical officer, and then by the board itself, and we do not find that we have made any slip. I cannot mention the medical officers without also stating that the Society, in my opinion, is much indebted to them for their good care, and their great skill, and the mode in which they have assisted us in the business, the consequences of which are abundantly evident. I say, if there is any fault—for I will not say over-caution is a fault in a young office—I desire most particularly we may acquire the character of being exceedingly careful, and exceedingly cautious, and rather foregoing something of immediate profit than incurring ultimate risk. (Hear, hear.) The next branch of conduct which the directors have been very particularly careful upon, is the mode of investing their funds. I have the satisfaction to say there has never been a single loss upon any loan; that there has only been one single case in which any difficulty has been found, and that the interest of all loans has been most carefully paid. When we, therefore, take the utmost care that we draw to our office as much business as can be safely transacted, and that we lay out our funds as carefully as the Board, in the exercise of their best discretion can (in which, by the bye, I will observe, they are very ably seconded by the solicitor of the Society, who very carefully examines all titles),—when you have done this, I think you will find that the directors have amply performed the duty which you have cast upon them. I thank you for the past vote, and I anticipate that it is not the last which I shall have the honour of receiving from you, for I am con-



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## To Readers and Correspondents.

"J. A. M."—"Bishop" is a title recognised by the law, which has empowered the Queen, i. e., the State, to appoint bishops, and by virtue of that appointment, has invested them with certain privileges, powers, and titles. Surely it is no injustice to forbid persons to assume the titles which the law has chosen to confer.

## SCALE OF CHARGES FOR ADVERTISEMENTS.

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We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, JUNE 14, 1851.

## EQUITY IN THE COUNTY COURTS.

It was as we had anticipated. A formidable opposition is organising against the beneficent measure now before Parliament for giving an Equity jurisdiction to the County Courts.

The reader will probably exclaim with surprise, Whence can such an opposition come? Whatever beside in the County Courts may be objectionable,—however opinions may differ as to the propriety of extending the common law jurisdiction of the County Courts,—surely there can be no question as to the utility of a tribunal for the dispensation of justice in small matters of equity, for which there exists no remedy at present. None but a madman would, unless compelled, go to a Court of Equity, where the subject matter of the suit is of less value than 100*l.*—an old practitioner at our elbow says 200*l.* A jurisdiction over cases of lesser amount would confer incalculable benefits upon the community, and would bring to the Profession a vast accession of business, not taken from another tribunal, but now non-existent. It would be so much gained to the Lawyers, and especially to those in the provinces; for not only will they reap the benefit of this addition to business, but the entire advantage of it will be their own: they will be enabled to conduct their own suits in their own localities without the intervention of others, so that the whole profits will go into their own pockets.

But, although in practice it will be found that the business thus given to the County Courts will not be taken from the Superior Courts, but will be entirely a new creation, hostility has already begun to shew itself, and the first intimation of it, which our readers who have so deep an interest in this measure should not neglect, but make ready for a struggle, is conveyed by our cotemporary, the *Legal Observer*, which has put forth a paper

entitled "Objections to the County Courts Equitable Jurisdiction Bill," the origin of which it is impossible to mistake. We pray our readers to note the skill with which the true source of the objector's hostility is sought to be concealed.

First, we have a profession of deep concern for the poor:—

That it is of great importance that the poor suitors in small debt cases should have their business disposed of speedily, inasmuch as their loss of time, if detained, would frequently, if not generally, exceed the value of the matter in dispute, and render it a less evil to abandon the debt, and consequently it is of great importance that these cases which form the great bulk of the business of the Court, should not be delayed by the investigation of questions of difficulty or importance in which attorneys or counsel attend, and in which considerable discussion may take place.

Amiable spirits of Chancery-lane, seized with so sudden a philanthropy for the poor provincial suitors under 5*l.*, magnanimously regardless of the interests of the provincial attorney!

But other days may be appointed for the hearing of equity cases and disputed demands. This answer was foreseen; so the objectors say, "such course would be impracticable on circuits including numerous small towns." There is a ready remedy for this. If the business should so increase, contract the circuits and increase the number of judges; the increased fees will pay the increased cost.

Then comes another objection. The County Courts judges are from the Common Law Bar. They are not competent to administer Equity Law.

This is not true. So much of Equity Law as they would be required to adjudicate is known to every Common Lawyer who has learned his profession; and as to Equity Practice, it is, and is to be, so changed that those most familiar with it will need to learn it afresh, and simplified as it will be, a County Court judge will acquire it at least as readily as those who in the Equity Courts will have the double task of unlearning as well as learning.

Then it is politely hinted that the practitioners in the country would be incompetent to conduct Equity matters:—

That the proposed equitable jurisdiction will involve causes of great importance, depending on the application of principles of equity, and involving the administration of estates and the investigation of complicated transactions.

That many important questions arise on the proof of debts, by persons claiming to be creditors of testators or intestates—that inquiries become necessary on liens affecting the estate, and various claims to priority of incumbrance must be adjudicated, requiring the examination of witnesses and the discussion of the rules of equity.

That the Masters in Chancery, and the practitioners in London, are familiar with the investigation of such questions, and are enabled to conduct them with greater facility, and at less expense, than in the country.

In other words, the country solicitors are not able to prove debts, or make inquiries into liens on estates, claims of priority of incumbrance, the examination of witnesses, and the discussion of the rules of equity.

Do they admit or deny the aspersion?

This paragraph has betrayed the meaning of the whole; the true cause of the opposition just peeps out here, but it is altogether revealed in that which follows:—

That if such investigation should take place in the large towns, the expense of the suitors in attending by their own solicitors resident in their several localities, or by agents in the town where the Court is held, the expense would be greater than when conducted in London.

That in most suits in equity, the parties, plaintiffs and defendants, are very numerous, and reside in various and often distant places; and consequently the transaction of the business in London can be conducted more advantageously, and at less expense, than elsewhere.

We repeat, that it is impossible to mistake the meaning of this manifesto from Chancery-

lane: it means neither more nor less than this:—"We object to the County Courts Bill, because it permits proceedings in equity to be conducted in the country instead of in London. The provinces can do it so well as we can."

Upon this the provincials will, perhaps, form a different opinion, and to the last four objections we have quoted they will probably be inclined to demur. If they are wise, and respect themselves, they will hasten to vindicate their capacities to transact their own business, by instantly and energetically exerting themselves in aid of the very important measure, in whose success they are so deeply interested, against the opposition with which it is met for reasons apparent in the semi-official document we have quoted. To this end they must petition both Houses of Parliament, for the Bill is not yet safely out of the Lords; and the form of petition may be as follows, and let each Solicitor wait not for his fellows, but write out his own on a piece of paper, and send it immediately with his own signature, or as many more as he can procure, to some one of the Peers for presentation—say to Lords BROUGHAM, CAMPBELL, or CRANWORTH.

To the Lords Spiritual and Temporal in Parliament assembled.

The humble petition of the undersigned Solicitors of the town of —

Sheweth,—

That your petitioners have seen with satisfaction a Bill before your Lordship's house, for giving to the County Courts a jurisdiction in Equity.

That, in the opinion of your petitioners, this Bill will prove to be of great public utility, by affording redress in many cases for which, by reason of the cost, there exists at present no remedy.

We, therefore, pray your Right Honourable House to pass this Bill into a law.

And your petitioners, as in duty bound, will ever pray, &c.

Let this be done instantly with the Lords. We will give due notice when it is necessary to help it in the Commons.

## THE POLICY OF THE PROFESSION.

We continue to receive great piles of letters on this subject. It would be impossible to give place to a twentieth part of them, even if our readers would be content with repetitions of the same arguments. They are of two classes. The most numerous oppose registration in any shape; the others raise specific objections to the proposed measure.

We have already stated why we do not approve of opposition to the principle of registration. Admitting the apparent force of some of the objections urged against it, we cannot get over the fact that it is approved where it has been tried. Ten thousand reasons why it is likely to be injurious do not answer the assertion that it is approved where it exists. If it really produced a hundredth part of the mischiefs which our correspondents anticipate from it, Parliament would long ago have been deluged with petitions for its abolition in Yorkshire and Middlesex. Unless the landowners of the registered counties advocate the discontinuance of their own registration, it will be very difficult to convince any rational mind that they find it in practice to be injurious or even inconvenient, and it will be equally difficult to argue that a system which is good for two counties will be bad for others.

This is really the point to be first met. Before we have a right to reason on probabilities and anticipations, we must first find a satisfactory answer to the question—"Why is registration endured in Yorkshire and Middlesex?" We must remind our readers that in all controversies one fact is of more worth than one hundred conjectures, and that we have no right to argue upon probabilities when we have positive experiment to appeal to.

But we hold it also to be extremely unwise. Rightly or wrongly, the weight of opinion is overwhelmingly in favour of registration as a principle, the difference being mainly as to the manner of effecting it. The House of

Lords has *decided* in favour of it; the Incorporated Law Society and the Metropolitan and Provincial Law Society; the Solicitors of Yorkshire, the Manchester Law Society, and the Somerset Attorneys' Club have proclaimed their approval of registration. Even if we did not agree with these great authorities, we should, nevertheless, earnestly counsel our readers not to attempt the impracticable task of combating such a host, with certainty of defeat, but to take up a more secure position, in which the numbers as well as the argument will be on their side and victory certain. This is not the first, and we fear it will not be the last, occasion on which it will be our duty to counsel tactics very different from those which the Profession has hitherto pursued in dealing with changes in the law. Hitherto, with rare exceptions, the policy of the lawyers has been either altogether to oppose great changes, or to treat them with contempt, standing apart and permitting them to pass unaltered. The consequences we now see and feel. The changes they opposed were effected in spite of them, and those they disregarded have been found to be most noxious. In the face of such sad experiences of failure, we may be excused if we question the prudence of their past generalship, and strive to awaken them to a wiser policy.

There need be no disguise about it; there is nothing in it of which they should be ashamed; it is simply the policy of common sense and prudence. We repeat it in few words, that it may be carved in the memory, for many times it will be necessary to invoke its aid. This it is,—

When change is inevitable, that is to say, as soon as it is seen that public opinion is so tending towards it that there is no reasonable hope of averting it for long, unless it be in itself and in its principle erroneous, let us abandon the impracticable position, let us accept the necessity, and take the *initiative* in its accomplishment, instead of leaving it to be effected by our foes. By thus taking it into our own hands we may mould it, to a great extent, to our own views; at all events, we may prevent its being so constructed as to do serious mischief. It is quite certain that if we, the Lawyers, would take upon ourselves to frame or modify the measures of Law Reform demanded by the public, we might carry them in any shape we please; but if we will fight against them altogether, or stand aloof from them with contempt, they will be carried without any care for us by those who have no love for us.

This is the policy which, in these times of change, when the entire legal system is being broken up, and a new one is to be constructed out of its ruins, we are profoundly convinced that it will be for the true interests of our readers to pursue. If they had adopted it long ago, their position now would have been very different. Had they followed it in the case of the first County Courts Bill, we should not now have been struggling to secure fair professional remuneration in courts which are absorbing three-fourths of the entire legal business of the country. If the advice which we ventured then to offer and implored them to follow had been taken, and the Local Courts Bill which we then suggested had been proposed by the Lawyers as their substitute for the hostile County Courts Bill, we should have seen none of the depression which now is witnessed, but, on the contrary, an immense increase of professional emolument, coincident with a vast improvement in the administration of justice and great public benefit. But the Profession would not stir; they preferred opposition to the *principle*, or affected a contempt of the Bill. The result is known to every body.

Again, we say, let us not repeat this fatal fault; let us not waste our energies upon hopeless fighting against an admitted conclusion; but let us, upon this question of Regis-

tration take up practicable ground, and, closing our ranks, let us insist upon securing a Registration that shall be beneficial instead of noxious, and the first condition of which is, that it shall be *local* and not *general*. Not improbably, by thus combating it in detail, we may defeat it altogether.

#### LAW OF EVIDENCE AMENDMENT BILL.

THIS is by far the most important measure now before Parliament, for upon its success or failure depends the revival or the annihilation of the Superior Courts of Common Law. With a simplified procedure the Common Law Courts might compete successfully with the County Courts, provided they adopt that which gives to the latter their greatest value—the power to examine the parties to the suit. Without this provision, the commissioners may simplify and facilitate suits, but they will not recal the business that has flown. The greatest portion of the costs of the Superior Courts is occasioned by the absurd requirement that facts should be proved, not by those who know most about them, but by some other persons, thus compelling the attendance of half-a-dozen witnesses to prove that which either of the parties to the transaction could have proved in a moment, and which probably the other would not have denied. Who can wonder that suitors persist in going to the County Courts, even at the loss of abandoning an excess of demand beyond the jurisdiction, rather than incur the hazard of the Superior Courts, which will not hear him or his opponent, but insist on a flight of witnesses to sustain or explain a dispute which five words from the parties would determine in five minutes.

We believe that the Superior Courts would be preferred if they would afford the same facilities for proving a case as do the County Courts, and therefore we are most anxious that, before they are quite destroyed, a measure may become law which will go far to restore the business they have lost. All the greatest authorities, Lord DENMAN, Lord CAMPBELL, Lord CRANWORTH, Lord BROUGHAM, and all but one of the County Court judges, (who speak from experience), have declared in its favour; yet, as we are informed, it is threatened with a fatal opposition from a quarter whence it might have been least expected—from the woolsack—backed by a petition, as we record with a blush, from the Incorporated Law Society. Here is a question on which depend the fortunes of the Profession, and yet we find the representative of the Profession throwing its weight of influence on the other side!

#### THE COMMON LAW COMMISSION.

COMPLAINTS have been made in both Houses of Parliament of the non-appearance of the promised report of the Common Law Commissioners. The only answer given is, that it is in a state of forwardness. But so is the session, and there will be no time now for legislation, even were it presented to-morrow.

Thus, another year has been lost, and the Courts at Westminster have continued to decline, and the only cure has been delayed until it is almost too late to be serviceable.

When we inquire why it is not forthcoming, the answer is, that the Commissioners are not paid, and that they cannot be expected to sacrifice their private business for the public. They are right. But this proves the expensiveness of unpaid labour. If the public required the services of the Commissioners, the public purse ought to pay them for those services. Then we might exact the *quid pro quo*. As it is, for the sake of saving a few hundred pounds, the public loses as many thousands by delay of desirable improvements. This is the penny-wise and pound-foolish policy often

seen in Englishmen. They have no right to complain that they reap as they have sown.

#### ANOTHER ADVERTISEMENT.

THE following appeared in the *Times* of March 22. Can any one inform us who is "M. W."?

"LAW.—An established attorney desires to extend his practice by undertaking the business of tradesmen and others having debts outstanding, on liberal terms, and without the liability to bills of costs. Loans and sales of every description promptly effected. All the County, Insolvent, and Criminal Courts attended at very moderate charges.—Address to M. W. 5, Austinfriars, City. Insurances effected free.

#### THE LEGISLATOR.

##### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

Friday, June 6.

Lands Clauses Consolidation, Ireland.

##### BILLS READ A SECOND TIME.

Friday, June 6.

Survey of Great Britain, &c.

Thursday, June 12.

Petty Sessions, Ireland.

Collection of Fines, &c. Ireland.

##### BILLS READ A THIRD TIME AND PASSED.

Thursday, June 12.

British White Herring Fishery.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

Thursday, June 12.

Waterford and Limerick Railway.

##### SESSIONAL PRINTED PAPERS.

##### Par. Num.

366. Bills—Administration of Criminal Justice Improvement

367. — Prevention of Offences

370. — St. Alban's Bribery Commission, amended

373. — Metropolitan Police

358. — Irish Fisheries

371. — Smithfield Market Removal, as amended by the Select Committee

377. — Duchy of Lancaster, High Peak Mining Customs and Mineral Courts

Charity Commission, 1849—Second Report

Borneo—Correspondence with the Kayan, &c.

Borneo—Leases of Antimony, &c. in Bantale—Correspondence

194. Blackwater River—Report by Commander Fraser

361. Mr. Ryland—Copy of a Despatch

365. Aylesbury Election Petitions—Report from Committee

340. Official Salaries—Treasury Minute, a corrected Copy

211. Civil Services—Estimates: Class 7, and General Abstract

315. Army, Commissariat, and Ordnance—Accounts

326. East India—Territorial Accounts

349. Steam Communication, Australia and New Zealand—Despatches

354. Bibles and Prayer Books, Ireland—Copy of Patent for Printing

355. Education, Ireland—Annual Report of Commissioners

356. Dublin Gazette—An Extract

368. Spirits—Account

372. Steam Communications with India, &c.—First Report from Committee

376. Smithfield Market Removal Bill—Report from Select Committee

381. St. Alban's Election—Return.

#### NEW STATUTES.

14 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 8.)

##### CAP. XII.

An Act to continue the Duties on Profits arising from Property, Professions, Trades, and Offices, and to amend the Act imposing the same.

(5th June, 1851.)

This is the Income Tax Continuance Bill. Sec. 1 continues the rates and duties granted by the former Act for one year. Sec. 2 provides that the former statutes shall continue in force. Sec. 3 introduces a new provision, and we give it verbatim.

3. *Abatement to be made from assessments on tenant farmers where profits fall short of such assessments.*—That if at the end of the year of assessment of the said duties under this Act any person occupying lands for the purposes of husbandry only, and obtaining his livelihood principally from husbandry, who shall have been assessed in the said year to the duties chargeable under Schedule B. of the said first-recited Act in respect of such lands, shall find, and shall prove to the satisfaction of the commissioners by whom the assessment was made, that his profits and gains arising from the occupation of such lands during the said year fell short of the sum on which the assessment was made, it shall be



lawful for the said commissioners, upon appeal made to them in that behalf within three calendar months after the expiration of the said year, and of which notice in writing shall be given to the surveyor of taxes for the district, to cause an abatement to be made from the amount of the said duties charged on such appellant proportionate to the deficiency of his said profits and gains; and in case the whole sum assessed shall have been paid, the amount of the sum overpaid shall be certified and repaid in like manner as is provided by section 133 of the said first-recited Act in the case of any overpayment of the duties assessed under Schedule D. of the same Act.

## CAP. XIII.

An Act to regulate the Sale of Arsenic.  
(5th June, 1851.)

We give this entire:—

Whereas the unrestricted sale of arsenic facilitates the commission of crime: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *On every sale of arsenic, particulars of sale to be entered in a book by the seller in form set forth in schedule to this Act.*—Every person who shall sell any arsenic shall forthwith, and before the delivery of such arsenic to the purchaser, enter or cause to be entered in a fair and regular manner, in a book or books to be kept by such person for that purpose, in the form set forth in the schedule to this Act, or to the like effect, a statement of such sale, with the quantity of arsenic so sold, and the purpose for which such arsenic is required or stated to be required, and the day of the month and year of the sale, and the name, place of abode, and condition or occupation of the purchaser, into all which circumstances the person selling such arsenic is hereby required and authorised to inquire of the purchaser before the delivery to such purchaser of the arsenic sold, and such entries shall in every case be signed by the person making the same, and shall also be signed by the purchaser, unless such purchaser profess to be unable to write (in which case the person making the entries hereby required shall add to the particulars to be entered in relation to such sale the words "cannot write"), and, where a witness is hereby required to the sale, shall also be signed by such witness, together with his place of abode.

2. *Restrictions as to sale of arsenic.*—No person shall sell arsenic to any person who is unknown to the person selling such arsenic, unless the sale be made in the presence of a witness who is known to the person selling the arsenic, and to whom the purchaser is known, and who signs his name, together with his place of abode, to such entries, before the delivery of the arsenic to the purchaser, and no person shall sell arsenic to any person other than a person of full age.

3. *Provision for colouring arsenic.*—No person shall sell any arsenic unless the same be before the sale thereof mixed with soot or indigo, in the proportion of one ounce of soot, or half an ounce of indigo, at the least, to one pound of the arsenic, and so in proportion for any greater or less quantity: provided always, that where such arsenic is stated by the purchaser to be required, not for use in agriculture, but for some other purpose for which such admixture would, according to the representation of the purchaser, render it unfit, such arsenic may be sold without such admixture in a quantity of not less than ten pounds at any one time.

4. *Penalty for offending against this Act.*—If any person shall sell such arsenic, save as authorised by this Act, or on any sale of arsenic shall deliver the same without having made and signed the entries hereby required on such sale, or without having obtained such signature or signatures to such entries as required by this Act, or if any person purchasing any arsenic shall give false information to the person selling the same in relation to the particulars which such last-mentioned person is hereby authorised to inquire into of such purchaser, or if any person shall sign his name as aforesaid as a witness to a sale of arsenic to a person unknown to the person so signing as witness, every person so offending shall for every such offence, upon a summary conviction for the same before two justices of the peace in England or Ireland, or before two justices of the peace or the sheriff in Scotland, be liable to a penalty not exceeding twenty pounds.

5. *Act not to prevent sale of arsenic in medicine under a medical prescription.*—That this Act shall not extend to the sale of arsenic when the same forms part of the ingredients of any medicine required to be made up or compounded according to the prescription of a legally qualified medical practitioner, or a member of the medical profession, or to the sale of arsenic by wholesale to retail dealers, upon orders in writing in the ordinary course of wholesale dealing.

6. *"Arsenic" to include arsenious compounds.*—In the construction of this Act, the word "Arsenic" shall include arsenious acid and the arsenites, arsenic

acid and the arseniates, and all other colourless poisonous preparations of arsenic.

## The SCHEDULE.

Day of Sale.	Name and Signature of Purchaser.	Purchaser's Place of Abode.	Condition or Occupation.	Quantity of Arsenic sold.	Purpose for which required.
1 Sep. 1851.	John Thomas	Hendon	Elm Farm Labourer	5 lbs.	To steep Wheat

(Purchaser's Signature.) John Thomas. (Seller's Signature.) James Stone, George Wood. Grove Farm, Hendon.

Or, if Purchaser cannot write, Seller to put here the words "cannot write."

## HOUSE OF LORDS.

## PRACTICE IN THE COURTS OF COMMON LAW.

FRIDAY, JUNE 6.—Lord BROUGHAM wished to put a question to his noble and learned friend (Lord Campbell), respecting the proceedings of the commission which had been sitting for some time revising the rules of practice and pleading in the Courts of Common Law. He wished to ask his noble and learned friend if he happened to be informed of the progress made by that commission, and whether, within a reasonable time, their Lordships would have the benefit of their report?—Lord CAMPBELL said the commission had not yet presented any report, and he regretted he had to return that answer to the question which had been put to him by his noble and learned friend. He (Lord Campbell) entertained the highest expectations from the commission. There could not have been a better selection than was made of the gentlemen who composed it. He had been looking from month to month for their report, and he was informed three weeks ago that the report on practice pleading and fees was ready for their signatures. He deplored this delay, because it prevented the judges from doing what was in their power, and what they would otherwise have done in this matter. He most earnestly hoped that no further delay would arise in the commissioners making their report, otherwise the present session of Parliament would pass away without anything being done. On the whole, he believed justice was better administered in this country than in any country in the world; but he thought our system of practice might be simplified and rendered much more economical. Before, however, any attempt at improvement could be made, their Lordships ought to have the report of those learned commissioners.—Lord BROUGHAM said, the good greatly preponderated in our system of practice in the Courts of Common Law, but, in order to save that which was good, they must eradicate that which was bad; otherwise, both the bad and the good would be swept away together.

## COURTS OF RECONCILEMENT AND ARBITRATION.

Lord BROUGHAM said he had to move to lay on their lordships' table a resolution respecting the benefits to be derived from proceedings in reconciliation and arbitration. That resolution was to the effect that advantages resulting from proceedings in reconciliation and arbitration appeared from the experience of such proceedings in the kingdom of Denmark during a period of twenty years ending in 1846.—Lord REDDESDALE thought it was irregular to move to lay a resolution on the table.—Lord BROUGHAM (with some warmth) said he did not call on their lordships to adopt the resolution, but he called on them to receive it. He surely had a right to move to lay that resolution on the table.—Lord REDDESDALE was understood to dissent.—The Marquis of LANSDOWNE thought the noble and learned lord (Lord Brougham) had a right to lay the resolution on the table, but not to divide the House upon it.—Lord CAMPBELL said it was the privilege of any peer to lay on the table any information which he deemed of importance to his brother peers. It was known that on one occasion Lord Mansfield laid on the table his notes of a trial at which he had presided for the information of the House.—The resolution was then laid on the table.

THE statement in a morning paper, that Lord John Russell's announced Bill to improve the administration of justice in the Court of Chancery and the Judicial Committee of the Privy Council proposes to associate the Vice-Chancellors Sir J. L. Knight Bruce and Lord Cranworth as appellate judges with the Lord Chancellor, is not correct. The Bill will provide for the appointment of two additional vice-chancellors, who are to take precedence immediately after the Lord Chief Baron. It will be proposed that the new vice-chancellors shall assist the Lord Chancellor in the hearing of appeals, and exercise in his absence a co-ordinate equitable jurisdiction. It will also be proposed to confer on them a primary jurisdiction in bankruptcy. In addition to these

duties a proposal will be made to empower the House of Lords to avail themselves of their assistance in the same manner as that of the Common Law judges is now afforded, but without interfering with the existing power to require the aid of the latter. The new vice-chancellors will also form a portion of the Court of the Judicial Committee of the Privy Council. In addition to these leading provisions of the forthcoming measure, there will be others introduced with a view generally to improve the administration of justice in equity.—*Globe*.

CHARITABLE TRUSTS.—The Bill just brought into the House of Lords by the Lord Chancellor for facilitating and better securing the due administration of charities in England and Wales is printed. It contains eighty provisions, framed with the view, according to the preamble, of providing means for better securing the due administration and supervision of charities, and for diminishing the delay and expense of legal proceedings for the revision and control of charities, and otherwise to amend the law concerning the administration of charitable trusts. The plan proposed by the Bill is to appoint five "Charity Commissioners," two of whom are to be paid, with other officers. Three of the commissioners, one at least being a paid commissioner, to form a *quorum*. They are to have an office in London or Westminster, and may make rules and regulations. They are to inquire into the conduct and management of all charities in England and Wales; they may call for documents and examine witnesses; they may give their advice and opinions to trustees of charities. Proceedings may be instituted on a certificate of the Attorney-General, and summarily heard in County Courts and before Masters in Chancery. For providing a fund for carrying out the measure a charge may be made of 2d. in the pound on charities amounting to or exceeding 10l. The proceedings of the commissioners are to be laid before Parliament. There are clauses in the Bill which were in other charitable trusts Bills, and as the present is under the care of the Lord Chancellor it will probably fare better than the other measures on the same subject.

LEGACY DUTY.—A return has been published relative to the sums upon which legacy duty has been paid. The amount of capital on which legacy duty was paid in Great Britain in 1850 was 45,815,694l. 10s. 11d. and in the year preceding it was 45,283,070l. 9s. 4d. The total amount of capital on which legacy duty has been paid since the year 1797 is 1,561,109,328l. 8s. 3d. The amount of legacy duty paid in Ireland in 1850 was 55,633l. 7s. 6d. being on capital amounting to 2,404,491l. 7s. 3d. In the preceding year the legacy duty amounted 71,846l. 8s. the capital being 2,478,948l. 19s. 9d. The amount of duty paid on probates and letters of administration in Ireland in 1849 and 1850 amounted respectively to 73,392l. 10s. and 68,948l. 10s. In Great Britain the legacy duties produced in 1850 1,190,760l. 2s. 3d. and the probates, administrations, &c. 957,260l. 15s. 6d.; in 1849 these two sources of revenue had been respectively 1,144,665l. 0s. 9d. and 887,181l. 14s. 6d. The total amount received for legacy duty in Great Britain and Ireland since 1797 is 46,187,161l. 17s. 4d. and for probates, &c. 37,197,156l. 14s. 2d.

ARREST OF ABSCONDING DEBTORS.—A bill has been printed by order of the House of Lords, brought forward by the Earl of Harrowby, to facilitate the more speedy arrest of absconding debtors. It is proposed to give authority to the commissioners of bankruptcy and judges of County Courts, to issue warrants for the arrest of absconding debtors. The writs of *capias* from the superior courts are to issue thereupon. The warrant is to be auxiliary to such writ of *capias*, and persons so arrested may apply to a judge of one of the superior courts to be discharged. On the payment of the debt and costs the party arrested to be discharged. In case it should appear to the satisfaction of a jury in any action brought for false imprisonment under a warrant authorized to be issued, that such imprisonment was malicious, or that there was no probable cause of action, then the warrant and the writ of *capias* issued thereon shall, in either of such cases, be no ground of justification to the person at whose suit the same shall have been issued. Certain fees are to be payable, but none in the Court of Bankruptcy. Some forms to be used are given in a schedule to the bill.

FARM BUILDINGS.—Among the Parliamentary papers issued on Monday is a copy of a bill as amended by the committee, the object of which is to extend the provisions of the Drainage of Lands Act (1849) to the advance of private money for the erection and repair of farm buildings on lands in Great Britain and Ireland. Section 1 provides that landlords may borrow or advance money for the improvement of land by the erection thereon of farm-houses, labourers' cottages, or farm-buildings, or repairing the same, and to have the money so expended charged upon the inheritance in the same manner as is provided by the Drainage of Lands Act. The advances are not to exceed eighteen months' value of the land for which they are required. The report made on application to the Commissioners to

authorise any loan is to contain all the particulars as regards the land and proposed improvements deemed requisite, to enable the Commissioners to judge of the expediency of allowing the application, but need not include any estimate of the annual value of the improvement to the land. All buildings erected under the proposed Act are to be insured.

### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

#### Summary.

It seems that where there has been an alleged illegal election of a clerk to a board of guardians, the proper course of proceeding to set it aside is by *quo warranto*, and not by *mandamus*. In *Re The Guardians of St. Martin's-in-the-Fields*, 17 Law T. 140, Lord CAMPBELL said, "An election has taken place, and the office is full. Now, that being so, if the office is one for which *quo warranto* would lie, it is settled by a long course of practice, which I consider very convenient, that the proceeding ought to be by information in the nature of *quo warranto*, and not by *mandamus*." The question whether it is such an office depends on this, if it is of a public nature. "It does appear to me that the office is just as public in its nature as that of treasurer of a county."

The provision of 12 & 13 Vict. c. 103, s. 5, charging the expenses of a *pauper lunatic*, who, if sane, would be removable, upon the common fund of the union, has been held, in *Reg. v. The Overseers of Leeds*, 17 Law T. 142, not to extend to the case of a single parish which has a board of guardians by Act of Parliament exercising the powers of a union.

In *The Vauxhall Bridge Company v. Sawyer*, 17 Law T. 144, the tolls of a bridge were held liable to land tax, as being tenements and hereditaments within the meaning of 38 Geo. 3. c. 40.

Where a conviction was quashed on appeal to the Sessions, and then, on a case reserved, affirmed by the Q. B. a *procedendo* was directed to carry back the case to the Sessions, in order that the conviction might be enforced, pursuant to sec. 27 of 11 & 12 Vict. c. 43.

Lord CAMPBELL'S Bill for the improvement of the administration of criminal justice, as sent down from the Lords, is now before us. Various alterations have been made in it since last we noticed it. Now it consists of thirty-three sections: it empowers the Court to amend variances; provides that, in indictments for murder and manslaughter, the manner and means by which the crime was committed need not be stated; gives a short form of indictment in embezzlement, forgery, and uttering, stealing, or obtaining by false pretences, engraving plates, &c.; empowers the jury, on indictment whereon the defendant might be convicted of larceny, to find him not guilty of stealing, but guilty of receiving; enacts that, in trials for felony, if the offence be not completed, the parties may be found guilty of an attempt to commit the same; repeals the famous 11th sec. of 1 Vict. c. 85 (*The Bird's case*); enables juries on an indictment for robbery to convict of an assault with intent to rob; provides that a person tried for a misdemeanour shall not be acquitted because the offence proves to have been felony; nor a person indicted for embezzlement if it prove to be larceny, or *vice versa*; that persons guilty of separately stealing or receiving may be convicted on an indictment for jointly stealing or receiving; that in the absence of the principal felon separate accessories and receivers may be included in the same indictment; that three larcenies by the same person within three months may be included in the same indictment; that where a single taking is charged the prosecutor is not to be put to elect, unless it appear that there were more than three takings, or at more than the distance of three calendar months from each other; that even a bank-note may be described simply as money. It empowers any Court, judge, or justice to direct a person guilty of perjury in any evidence to be prosecuted, and for that purpose to commit or bind over witnesses to give evidence, and give a certificate of prosecution being directed, upon production of which the costs are to be allowed by the Court before which the trial is had. Further provisions are made for simplifying indictments for perjury, and the proof thereof. In indictments it is not to be necessary to state the venue, except in the margin, nor is an indictment to be held insufficient by reason of divers specified objections; and all objections to indictments are to be taken before the jury are sworn, except in error. The Court is empowered to amend any formal defect, and ver-

dicts and judgments are to be valid after such amendments, and records are to be drawn up in the amended forms.

The law as to the traverse of indictments in misdemeanour is repealed, and no traverse is to be allowed without the permission of the Court on a motion to postpone the trial. The mode of pleading also is altered. Upon arraignment, prisoner is to be asked "whether he wishes to plead guilty or any other plea, or to be tried;" and if he says he wishes to be tried, or refuses to answer, a plea of not guilty is to be recorded.

This measure, which effects great improvements in the Criminal Law, is to come into operation on the 1st of November next.

### JOINT-STOCK COMPANIES' LAW JOURNAL.

THE much-vexed question as to the validity of a call payable by instalments, has been at length determined by the decision of the Court of Error holding a call so made to be good, provided the entire sum so called for does not exceed the sum for which the company is authorised to make a single call. But it would seem that neither could an action lie for the call, nor the shares be forfeited for nonpayment, until the last instalment had become due and was unpaid.

#### WINDING UP.

AFTER the decision of the House of Lords in *Cottle's case* there could be no doubt what would be the decision of the Lord Chancellor in *Besley's case*, 17 Law T. 137. Mr. Besley had done nothing more than subscribe to payment of the expenses and attend a meeting for this purpose after the concern was broken up. He was not liable to any creditors—that was clear. "The payments made by Mr. Besley were made as matters of favour and in good faith to the committeemen, and did not make him liable to them for further contribution." The curious part of this case was the inclination, so strongly shewn by the Court, to make the official manager pay the costs of the appeal.

It will be seen that in *Onion's case*, 17 Law T. 138, Lord Cranworth has directed an issue to try whether the answer to the usual letter of allotment "that shares should be reserved for him" was an acceptance of shares by a committeeman, who had never acted, so as to make him a contributory.

LANCASHIRE, CHESHIRE, AND STAFFORDSHIRE RAILWAY.—Friday, the first meeting of the shareholders liable to pay off the claims on this company was held before Master Blunt. The first list taken was that of the provisional committee, for whom Mr. Roxburgh, Mr. Little, and other counsel appeared. The only person fixed was Mr. Ward, of Sheffield, on its being proved that he accepted shares and paid deposit, and attended meetings of the managing committee. The other cases were adjourned to the 11th of June.

GREAT WESTERN RAILWAY OF BENGAL.—Tuesday, Master Humphry disallowed a claim of 140*l.* brought in under this estate by Mr. W. P. Andrews in respect of a third edition of a pamphlet, published by Messrs. Newby, on the subject of Indian railways, and advocating the advantages to be derived from the route of the proposed line from Calcutta to Rajmahal. Evidence was produced in support of the claim, to the effect that Major M'Leod, Mr. Alderman Hooper, and others of the directors, had approved of the publication, as calculated to promote the interests of the company; but as no direct proof of any order could be adduced, the claim was disallowed.—*Daily News*.

COMPRESSED AIR ENGINE RAILWAY COMPANY.—On Tuesday, on the recommendation of Mr. Duncan, the official manager of this company's affairs, Sir Wm. Horne, declared a return of 4*s.* 9*d.* per share, to be divided amongst the shareholders in this company out of the assets realised.

OXFORD AND WORCESTER EXTENSION RAILWAY.—On Thursday a meeting was held in this matter before Sir George Rose, to make a call of 1*l.* 1*s.* per share on those shareholders settled on the list as liable. Mr. Cairns, for the official manager, stated that it was proposed to levy the above contribution on those who were included in the first class of contributories, who had not paid the original deposit of two guineas per share, and in respect of which they had subscribed the deed. It was likewise proposed to make the call on the sixth class of contributories, but only upon those in that class who

were members of the managing committee. Mr. Turquand stated that the call was required to meet debts amounting to 1,143*l.* and that on applying the produce of the call the payments originally made by the shareholders would be equalised. The proposed call would produce about 3,000*l.* and any surplus, after paying the expenses of winding up the company, would be returned to the contributories. Mr. Piers, Mr. W. B. James, and others, on behalf of Sir J. Key, Major Sharpe, and several shareholders, opposed the declaration of a call, contending that, according to the decision of Lord Cranworth, the official manager must first shew in respect of what particular debts their clients were individually liable. Mr. Cairns replied that the decision of Lord Cranworth could not avail in this case, and quoted a clause from the subscribers' agreement entered into by the shareholders, and by which they expressly "undertook, in the event of the rejection of the scheme in parliament, or in the event of the company's failure, to pay and discharge all the debts of the company." His Honour said, that in view of this direct declaration of covenant on the part of the subscribers, he did not at present see how he could decline to make a call unless the various parties opposing could succeed in upsetting the assumption in respect of which they were clearly liable, to give them an opportunity of doing which he would postpone any formal decision until the 10th of July next.

HULL PUBLIC BATH COMPANY.—Tuesday a meeting was held in this matter, before Sir William Horne, to consider the propriety of declaring a call of 2*2l.* per share on the contributories. Mr. Hetherington, who appeared for the official manager, Mr. Goodchap, said that if his Honour should approve of a call for the above amount, it would probably be the last that would have to be declared on the contributories. There were 185 shares, and the amount proposed to be raised would therefore be 4,070*l.* supposing the call to be properly responded to. All the contributories had already paid 10*l.* per share, and those who had advanced more would have credit for it. The costs of winding up would probably amount to 600*l.* The Master remarked that, until the bill of costs was taxed, he would make no order for payment in respect to it. Mr. Hetherington only desired that a sum of 600*l.* should be reserved to meet the bill. His Honour thought this suggestion perfectly reasonable. The official manager would take care to have the meeting to declare the call properly advertised. As to the amount of the proposed call, he could at present see no objection to it.

MERCHANT TRADERS' SHIP LOAN AND INSURANCE COMPANY.—Tuesday, a point of considerable importance was raised in this matter before Sir William Horne, on the application of Mr. Roxburgh, counsel for Mr. Harding, the official manager of this company, to expunge the proof of debts, amounting to 80,000*l.* allowed by the Commissioners of Bankruptcy. The application in question was founded on the allegation that these debts were contracted between the provisional and complete registration of the company, and that, consequently, the directors or promoters, and not the shareholders, were liable in respect of them. Messrs. Maples and Pearce, who were solicitors to the assignees under the bankruptcy, opposed the application under the 7th section of the Joint Stock Companies Winding-up Act. His Honour declined to accede to the application, being of opinion that he had no jurisdiction to do so under the Act, the debts having already been admitted by the Commissioner in Bankruptcy. Mr. Roxburgh said, that as the point was of very great importance, and as the Bankruptcy Law Consolidation Act expressly saved the jurisdiction of the Joint Stock Companies Winding-up Act, the question could not be allowed to rest there.

INDEPENDENT ASSURANCE COMPANY.—On Saturday, before his Honour Master Timney, a further call of 30*s.* per share, in addition to one of 2*l.* already made, but insufficiently paid, was declared, on a report from Mr. Hutton, the official manager, that it was necessary to discharge debts.

BANWEEN IRON COMPANY.—A call of 2*l.* per share has been made to pay off liabilities, payable on the 23rd inst.

### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]  
Worcester Corn Exchange Company.—To appoint official manager on 18th June.—Kindersley.  
Hersford and Merthyr Tydfil Junction Railway Company.—To settle list of contributories on 17th June.—Farver, for Richards.

### REAL PROPERTY LAWYER AND CONVEYANCER.

SCDOME a week passes without producing a case of disputed construction of a will. Again, there are two to be noted by the Solicitor in his *Alliott or Jarman*,

or whatever is his practical guide in this branch of the law. In *Crafton v. Brith*, 17 Law T. 137, the residue of property was given to trustees to be purchased into the funds for opening new schools, subscribing to those already opened, and in purchasing land, to be let out to the poor at a low rent, which rent was to be applied to any benevolent purpose the trustees might think proper. It was held that the residue should be divided into two equal parts, one to be applied to education, the other to go to the next of kin, the devise being void under the Mortmain Acts.

In *Easterby v. Fenwick*, 17 Law T. 138, lands in A. and B. were settled upon various trusts, and subject thereto to such children as C. should by deed or will appoint; and, in default, among such children as tenants in common. Two of the trustees never acted; the third sold the lands in A. and B. and bought lands in D. with part of the money, and in a suit invested the rest in Consols. In the same suit the lands in B. and D. and the Consols were declared to be the trust estate. C. by will, reciting the settlement, appointed "all the real and personal estate mentioned and comprised in the said recited settlement," to four of the children. It was held that the lands in D. and the Consols passed by this appointment.

In the law of *Landlord and Tenant* there is another decision of interest—viz. that a landlord has a right to distrain upon his tenant at will. (*Doe dem. Benson v. Frost*, 17 Law T. 145.) In the same case it was held, that where an agreement for a lease had been made with a tenant at will, but no lease was ever prepared, but in the draft there was an indorsement made and signed between the parties, and rent had been paid and a receipt given for it, this was not sufficient to alter the tenancy at will into a tenancy from year to year.

#### REGISTRATION OF ASSURANCES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—As I am one of many who much regretted that you seemed to have made up your mind that registration itself was desirable, and that its mode only was now open to discussion, I was pleased to see the "suggestion" in the leading article of your last number. The possibility of attaining most of the useful ends of registration, without its drawbacks, by means of indorsements on title deeds, is by no means a new idea. It was suggested by several of the witnesses who were examined before the Real Property Commissioners of 1830; but it is, indeed, so obvious that it had occurred to me before I knew of this circumstance; and I had given it, at intervals, some thought. The most feasible plan seems to me to be something as follows:—Conveyances on sales form now the principal deeds, or, so to speak, the vertebrae of almost every title. Possession changes with them, so that they are usually notorious: mortgages, settlements, and charges are capable of concealment. It might then be enacted, that every document (except wills) subsequent to the last sale conveyance should be void as against any person acquiring an interest in the estate for valuable consideration, and not having express notice of the document, unless a memorandum of it were indorsed on the last sale conveyance. In the few cases where there had been no sale of the estate, the indorsement should be on the last deed passing an estate in fee simple to the present owner or his ancestor or testator. As to derivative estates, such as leaseholds for years or lives, the deed creating the estate should be considered as a sale conveyance for the purpose of indorsements being made upon it.

With a view of testing this plan, I have gone through almost all the cases either suggested by the commissioners of 1830 in their report, as affording facility of fraud, or stated in the evidence in the appendix as actual instances of it under the present system; and I find that in no single case could the fraud have been committed if the law had contained these simple provisions. Surely, if there be even the least prospect of anything of this kind furnishing an adequate remedy, Parliament ought to hesitate before venturing on so dubious an experiment and so enormous an innovation as a general register; for these frauds are urged by its advocates as affording the strongest argument for its adoption.

I cannot see the advantage of indorsing a list of all documents of title on every deed, as you seem to recommend; but possibly I am under some mistake as to your meaning, which a fuller development of your views may remove.

I am, Sir, yours, &c.  
Cambridge, Jan. 11, 1861. H. GORNBURN.

#### COSTS OF SURRENDER.

IN answer to the query of your correspondent "W. H. C." the rule is that, in the absence of an express declaration in the conditions of, or agreement for, sale as to costs, the vendor shall be at the ex-

pense of making a good title to the property, and the purchaser at the expense of the preparation of the instrument necessary for vesting the property in himself. I conceive a surrender and admittance to be necessary instruments for so vesting a copyhold estate in the purchaser, and I, therefore, think that the purchaser should be at this expense, and this I know to be the rule in Lancashire, and I suppose it is so everywhere else.

W. S.

#### Answers to Queries.

##### WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Your correspondent, who signs himself "O," in your last number, asks whether the initials of a testator, together with those of the attesting witnesses, placed in the margin of a will against alterations therein, are of themselves sufficient to satisfy the provisions of 1 Vict. c. 26 (the Wills Act); and also whether there has been any decision on the point. There has not been any decision as to the mere placing of initials. Should that question arise, I have little doubt they would not be deemed sufficient, unless it appeared either from the attestation clause, or from a memorandum, or from an affidavit of the attesting witnesses, that the alterations which these initials identify, were made before the will was executed. The words of the 21st section of the Wills Act are, "No alteration made after the execution of a will shall be valid, unless such alteration shall be executed in like manner as is required for the execution of the will." It is obvious that if the alterations were so executed, whether they were there before or after the will was executed would be immaterial. The concluding words of the above section are these, "but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will (a) opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." Accordingly, the Prerogative Court lately, "in the goods of G. P. Wingrove," reported in the LAW TIMES, vol. 16, p. 347, granted probate of a will, together with the alterations it contained, the names of the attesting witnesses and the testator appearing opposite thereto, and that, although there was no mention of the alteration in the attestation clause, nor any memorandum referring to them; but I apprehend that Court would not have done so had the initials alone been there. I might here remark, that the words of the Act last cited would tend to nullify (if they do not in effect do so) the provisions of the 9th section, which, as interpreted by the decisions, require the signature of the testator and the two subscribing witnesses to be made in the joint presence of all three. For example, a will may have been so executed, and the testator may subsequently make very extensive and important alterations, and may then sign his name against them, and subsequently ask the attesting witnesses to add their names; or he may add a memorandum referring to the alterations, sign his name to it, and afterwards ask the attesting witnesses to do the same, each signature in both cases being made at three different times, and not in their joint presence. In the case referred to, the Court decreed probate of the alterations on an *ex parte* motion; had there been any opposition, or had its attention been drawn to the apparent violation of the 9th section, the decision would have been more satisfactory.

I am, Sir, yours, &c. A. W.

#### COUNTY COURTS.

##### Summary.

It seems that the mere fact that a case is not within the jurisdiction of the County Courts is not of itself sufficient to make it imperative upon the judge to give costs where the action is brought in the Superior Court, nor is the defendant's plea of "not possessed" sufficient of itself to justify the conclusion that title is in question. "By the last Act," said the Court in *Latham v. Spedding*, 17 Law T. 141, "the onus as to costs for the plaintiff is thrown upon the plaintiff, and we think it clear that he is bound to shew that he could not sue in the County Court by establishing that the title did *bona fide* come in question, not merely that defendant has pleaded so that it possibly might have come in question."

Another doubt on decision on the form of

(a) The 9th section of the Wills Act requires the signature to be at the foot or end, and on those words the judicial committee of the privy council has put a rigid construction.

affidavit in suggestion appears in *Charwood v. Elliott*, 17 Law T. 143; but in this case we find the rare result that the affidavit was held to be sufficient.

In the case of *Re H. Herrick*, 17 Law T. 148, in *Insolvency*, where a petition was dismissed at the insolvent's request, the costs of the opposition were allowed out of money in Court belonging to the estate.

It is stated that the judge of the Liverpool Court is not to be allowed to sit again until the inquiry is concluded.

#### COUNTY COURT HOME CIRCUIT.

COURT DAYS FOR THE MONTH OF JUNE.

Waltham Abbey—Wednesday, June 11, at half-past ten.  
Chesham—Friday, June 13, at eleven.  
High Wycombe—Tuesday, June 17, at eleven.  
Uxbridge—Wednesday, June 18, at ten.  
Hitchin—Friday, June 20, at ten.  
Watford—Monday, June 23, at ten.  
Luton—Tuesday, June 24, at eleven.  
Edmonton—Thursday, June 26, at ten.  
Hertford—Friday, June 27, at half-past ten.  
Barnet—Saturday, June 28, at eleven.  
St. Albans—Monday, June 30, at eleven.



LIVERPOOL COUNTY COURT.—It is now estimated beyond all doubt that Mr. Ramsay will not preside at the next sittings of the County Court. The Earl of Carlisle intimated to him, at the close of the proceedings in London on Tuesday, that, pending the present inquiry into the allegations of the Liverpool memorialists against him, a deputy must be appointed. This will be done; and although we are unable to state who will preside, it is important that the fact may be relied upon that Mr. Ramsay will not, at present, appear in the court. The next Liverpool sittings are fixed, we believe, for the 23rd instant.—*Liverpool Mercury*.

#### THE LAWYER.

##### Summary.

EQUITY PRACTICE.—The Trustee Act continues to yield points for discussion. In *Re Watts's Settlement*, 17 Law T. 139, the facts were, that by a settlement a power was given to appoint a new trustee in the place of any trustee becoming "incapable to act." One of the trustees became bankrupt, and was indicted for not surrendering, but went abroad. It was held that sec. 10 of the Trustee Act did not apply to a case where one of several trustees being out of the jurisdiction, and the rest continuing to act, it is only required to appoint another in his place.

COMMON LAW.—Where an action of debt and an action of covenant were brought by the same plaintiff against the same defendant for the same cause, and a judge had ordered that plaintiff should elect on which he would proceed, whereupon he selected the action of debt and recovered the full amount claimed, and then proceeded with the action of covenant for the purpose of recovering interest due, it was held that the order previously obtained prevented him from doing so. (*Jackson v. The Charing-cross Bridge Company*, 17 Law T. 141.)

The Court of Q.B. has, it will be seen, again refused the application of Mr. BARBER for readmission, repeating its former judgment.

#### PRACTICAL STATUTES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In consequence of seeing an advertisement of the book in the LAW TIMES, I sent for a copy of "The Practical Statutes of the Session of 1860," and having got it, see in the preface that "the volume is an experiment." The object of this letter is to say, that in my opinion it is a very good experiment, and one which, I hope, will answer; so that we may really get at a knowledge of those statutes which it is necessary to be acquainted with, and not have the trouble of wading through all the statutes at large of a session.

I would suggest to the publishers to let us have the book as soon as possible after the close of the session. I am, Sir, yours, &c. H.

Liverpool, June 12.

[NOTE.—The volume for the present session will be issued almost immediately after its conclusion; and, to secure this, the statutes are put into type as they are passed. For the further accommodation of those who require them immediately, they will be published in numbers at 1s. as fast as a sufficient

supply of material is received. As yet there has not been enough to fill a single sheet, so lax has been the legislation of the session.]

### ADVERTISING ATTORNEYS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Allow us to call your attention to an advertisement that appears in the *Times* and other daily papers, emanating from a Mr. Marshall, of Hatton-garden, addressed to insolvent debtors. To our own knowledge the Incorporated Law Society have been very lately applied to on the subject of this very advertisement, but it still makes its appearance notwithstanding. Whether the Society have the power (which we should almost have supposed they had) of suppressing this malpractice, or whether they have not exercised it, having such power, we cannot say. As members of an honourable Profession, and as such wishing to suppress, if possible, so gross and flagrant a breach of professional etiquette, we now beg to call your own attention, and that of the Profession in general, to the conduct of the solicitor in question, which we earnestly hope will not be repeated. We are, Sir, yours, &c.

City, June 6, 1851. A CITY FIRM.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I beg to send you a copy of a letter received by a client of mine from a "*Sham Lawyer*" (as I see you style them) in Exeter: I really think some steps should be adopted for preventing such men from practising as they do; and, considering the expense incurred by a solicitor, and the large amount of duty, payable in the shape of a stamp of 120*l.* on his articles, to say nothing of the certificate duty annually imposed upon him after he is in practice, the Government really ought to afford him some protection:—

(Copy.)

"56, Bartholomew-street, near Fore-street Hill, Exeter, May 20, 1851.

"Sir,—I am instructed by Mr. \_\_\_\_\_, of this city, ironmonger, to apply to you for the sum of 2*s.* 6*d.* and to inform you if the same is not paid to me, on or before the 30th inst. legal proceedings will be taken without further notice.—I am, Sir, your obedient servant, "PHILIP SYMS.

"To bill delivered, 2*s.* 6*d.*"

Since the above another letter has been received (which I have unfortunately mislaid), stating that a summons would positively issue on the Monday following. I should have much pleasure in joining any of my brother attorneys in punishing these fellows, if you could point out to us any course we could adopt. I am, Sir, yours, &c. LEX.

### THE MERCANTILE LAWYER.

#### Summary.

A CASE in which the law of liability of a husband for the debts of his wife is carried to its extreme extent is that of *Read v. Legard*, 17 Law T. 145, in which a lunatic was held to be liable for necessities supplied to his wife while he was in confinement in an asylum. It involved some curious questions, but the principle on which it was decided appears to be this, that an implied authority was, at the time of the marriage, given to the wife to contract for necessities, and that this was irrevocable. "The true principle," said POLLOCK, C.B. "is this: when a man marries he contracts an engagement to supply his wife with necessities, and authorises her to pledge his credit for that purpose if he neglect to do so."

The case of *Fennell v. Cooper*, 17 Law T. 145, is reported from Nisi Prius, because it is a new point decided by a very acute judge, or rather, we should say, the adoption of a new practice. It seems, according to this ruling of ERLE, J. that there is an exception to the general rule, that where there is a contract in the form of bought and sold notes it can only be proved by their production, and that is where the parties have not chosen to constitute such bought and sold notes the contract itself, but only memoranda in writing of the contract made *alunde*. In such case, "I think," said ERLE, J. "that a contract of sale may be proved by parol, and that the jury may infer that what so verbally took place was the contract, which, but for the Statute of Frauds, would be good. It being, however, a sale within the Statute of Frauds, there must be part payment in earnest, or an acceptance of the goods, or a memorandum in writing, signed by the parties or their agent, in order to satisfy the statute. Here there was a bought note signed by the agent of the defendant, and there was also a delivery, so that there is sufficient here to satisfy the statute.

### PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

THE following announcements appear in the *Gazette* of Tuesday:—Her Majesty's letters patent have passed the Great Seal of Ireland, appointing John Howley, esq. to be her Majesty's First Serjeant-at-Law; James O'Brien, esq. to be her Majesty's Second Serjeant-at-Law; and Jonathan Christian, esq. to be her Majesty's Third Serjeant-at-Law in Ireland. His Excellency the Lord Lieutenant has been pleased to appoint Henry Grattan Curran, esq. a resident magistrate, under the provisions of the Act 6 Wm. 4, c. 13, in the room of Michael Blake Bermingham, esq. deceased, and to take charge of the district of Strokestown, in the county of Roscommon.

The Lord Chancellor has appointed Arthur Ransom, of Sudbury, in the county of Norfolk, gent.; George Colquhoun, of Woolwich, in the county of Kent, gent.; and Thomas Southam, of Manchester, in the county palatine of Lancaster, gent. to be Masters Extraordinary in the High Court of Chancery.

MEMBERS RETURNED TO SERVE IN THIS PRESENT PARLIAMENT.—County of Argyll.—Sir Archibald Islay Campbell, of Succoth, bart. in the room of Duncan McNeill, esq. who has accepted the office of one of the judges of the Supreme Court of Scotland.

Combined Counties of Clackmannan and Kinross.—James Johnstone, esq. of Alva, in the room of Major-General William Morison, deceased.

### COURT PAPERS.

#### COURT OF QUEEN'S BENCH.

##### BUSINESS OF THE COURT.

LORD CAMPBELL said he had been informed by the officer of the Court, in the performance of his duty, that as many as eleven rules, granted in the last Easter Term, had not yet been heard, in addition to twenty rules which had been granted in this present Term. It was extremely desirable that, when an opportunity occurred, these rules should be disposed of as quickly as possible. The Court would, therefore, expect that the eleven rules of Easter Term would be brought on upon Monday next; they would certainly be called on peremptorily on Thursday next, but he (Lord Campbell) hoped that a considerable number of them would be brought on on Monday.

#### ATTORNEYS ADMITTED.

Easter Term, 1851.

Austin, Joseph, articled to R. Morrell; J. M. Davenport Baker, Henry Goldney, B.A.—J. Gidley Barret, Edward, jun.—E. Barret, sen. Barwis, Thomas Osmotherly—T. H. Street Blenkinsop, James—C. W. Clay; J. Swift Boorman, William—H. B. Hill Booth, George—H. M. Clark; J. Davidson Boyce, Matthias—H. S. Westmacott; J. A. M. Pinniger Bragg, George Augustus—M. W. Harvey; W. N. Bragg Brown, Joseph—W. Greatwood; R. Greatwood; E. A. Harrison Brown, William Henry—W. Brittan Brydone, Henry Gray—C. Murray; J. Murray Camp, Stephen—H. S. Westmacott; J. A. M. Pinniger; H. S. Westmacott Cattley, Bowden—W. Gray Church, Julian Roberts—J. T. Church Clark, John—J. Nichols Clayton, John Hughes—J. Clayton Clegg, George—C. Clegg Cole, Henry Edmund, jun.—C. J. Monkhouse Colquhoun, George—J. Colquhoun Cotton, Henry Morten—W. Burridge Curtler, Martin—J. B. Hyde Curwood, Capel Augustus—Sir G. Stephen, knt.; D. H. Serrell; J. Woollaston Davis, Backville—E. Thomas De Gex, Edward Peter—B. Austen Dixon, Henry—J. Young Drew, Edward—T. D. Taylor Drewe, Clifford John—A. J. Baylis D'Urban, John—J. Grogan Eaton, Charles Edward—J. S. Leigh Elkington, William Henry—R. H. Tarleton Finch, Arthur Elley—J. Finch, jun.; J. W. Taylor; W. H. Dickson Flamank, Robert May—W. Flamank; C. J. Abbott Fox, John Elliott, jun.—J. E. Fox Francis, Felix—W. W. Francis; W. Hallows Galloway, John Spencer—J. H. Galloway Glencross, James Scobell—J. E. Square Green, Henry George—W. C. Rhoades Hall, Charles Huxley—J. Bagshaw Harding, James Nott—E. J. Crosse Hicks, Alfred—T. Hicks Hinnell, Robert Gudgeon—C. Hinnell Hooper, Briscoe—E. Clark Hooper, Edmund Lewis—J. H. C. Russell; C. Crouch Houchen, Henry—J. Houchen; F. Mayhew Hughes, Henry—F. Soudamore; C. J. Palmer Hutchinson, John—R. Brown Hutchinson, William—J. Bramwell Jackson, Charles Windale—J. Smith Lawrence, Edmund George—T. Roberts Leaman, Thomas Leaman Hunt—R. Tucker

Little, George Hutchinson—D. Gray; C. Clarke; J. Woodcock Marson, Thomas Fish—T. P. Marson Martineau, Thomas—A. Ryland Mayo, William Henry—J. T. Vining Metcalfe, Walter Charles—R. B. Andrews Mew, James Alfred—J. Parker; J. H. Hearn Moon, Francis—W. Owen; R. W. Peake Moore, Henry—J. Harward; W. Skilbeck Morley, Thomas Gregory—G. Eddowes; J. Wadsworth Newman, Edmund—T. Dean Nichols, Samuel—J. Jones; G. Carew Nokes, Walter Federan—J. Nokes Paffard, James Henry, jun.—G. Price Palgrave, Reginald Francis Douce—R. R. Bayley Parry, Robert—T. Dashwood Payne, Alexander Richard—J. Payne Pearson, John Michael—O. J. Shoubridge; W. Sharpe Peers, Joseph, jun.—J. Peers, sen. Phillips, John—T. K. Stephens; J. Green Pugh, Edward—J. Lewis Ransom, Arthur—R. Ransom Reddiah, Edward, B.A.—E. Reddiah; J. Spinks Rees, Daniel—H. Morgan; T. Evans Rhodes, John Jackson—T. Rhodes Ridge, George—J. Wilson Roberts, Henry—W. Roberts Rogers, Henry—E. Rogers Sanderson, Stephen—G. Marshall Saunders, Henry, jun.—H. Saunders Sherwood, Henry Austin—B. Wallington Shindler, Robert—T. Wilkinson Smales, Henry, jun.—T. H. Faber Smith, Thomas James—J. N. G. Thompson; J. Atkinson; G. Vincent Snow, Frederick Augustus—W. Overton Stanforth, Samuel Herbert—J. Stanforth; H. Vickers Teale, Thomas Greenwood—E. J. Teale Thompson, John Richard Wake—M. Thompson Tibbits, Francis—R. Tibbits Tomlin, John—T. Wheldon; J. D. Holmes; W. Fringle Tremlett, George Gregory—W. Cowburn; D. S. Bockett Truefitt, Francis—C. S. Fallowdown; A. King Turner, Edward Goldwin—C. N. Wilde Vincent, Edmund—J. Hookley Walker, Theodore—H. G. Gridley; H. Walker Ward, Reginald—G. Faux; J. Crowley Whitfield, John—E. Morris Whitford, Henry—T. Whitford Williams, John—R. Williams Woodcock, Frederick—E. Washbourn.—Legal Observer.

### PROCEEDINGS OF LAW SOCIETIES.

#### LAW STUDENTS' DEBATING SOCIETY.

##### QUESTIONS FOR DISCUSSION.

Tuesday, June 17, 1851.

52. Does an assignment of a bill of lading for valuable consideration pass the contract for safe carriage and delivery? (*Sargent v. Morris*, 3 Barn. & Ald. 277.)

XLIV. Is any material alteration in the existing game laws desirable?

### LEGAL INTELLIGENCE.

PARDON OF AN INNOCENT MAN.—In the case of Lewis Joel, convicted in January, 1850, of felony, for having uttered a forged acceptance of Mr. John Marcus Clements to a bill of exchange, knowing the same to be forged, and sentenced by Talfourd, J. to transportation, Sir George Grey, the Home Secretary, has advised the Queen to grant Mr. Joel her royal pardon, the result of two verdicts in Ireland having established the fact that Mr. Clement's acceptance was not forged. The following notice of Mr. Lewis Joel's liberation appears in the *Dublin Daily Express*:—"We are informed that Mr. Joel—whose personal liberty has been for nineteen months sacrificed in the tardy and too often unjust operation of our judicial system—has at length been liberated. The last delay arose from Sir George Grey not having been made officially cognisant of the result of the trial which established Mr. Joel's innocence of the offence laid to his charge. Cases of this kind are unfortunately not seem to be increased in proportion. Here is a man who has been incarcerated for months on a charge now proved to be false! What does the law do for such a man, that he should silently submit to such a sacrifice of some of the prime of his life? And if the law cannot provide reparation, ought not the public to do something to mark their sense of the injustice that has involuntarily been inflicted upon him?"

It is stated that the remedy for the delays in the Court of Chancery, to be proposed this evening (Friday), will be the immediate appointment of two new judges to succeed Sir J. K. Bruce and Lord Cranworth, those learned persons being drafted into the Lord Chancellor's Court to hear appeals, with or without the presence of the chief judge in equity.

THE TEMPLE.—We understand that the benchers of the Inner and Middle Temple, with a liberality of spirit that does them the highest credit, have directed their beautiful church and halls to be kept open during the week for the inspection of the



public, and that they have prohibited the attendants from receiving any fees from the visitors.

**LONDON AND DURHAM UNIVERSITIES.**—The Masters of the Bench of Gray's Inn have recently passed an order that members of the London and Durham Universities shall have the same privileges with respect to calls to the bar at Gray's Inn as are enjoyed by members of the Universities of Oxford, Cambridge, and Dublin.

**THE HONOURABLE SOCIETY OF THE INNER TEMPLE.**—On Monday evening the students of this society presented Mr. Hurlstone with a handsome silver tea service, as a token of respect for his long and efficient duties in the society. It bore the arms of the society, and had the following inscription:—"Presented by the students of the Inner Temple to Mr. William Hurlstone, on the completion of his 37th year of his connection with the society.—Trinity Term, 1851."

**INTENDED COMPULSORY PREPAYMENT BY STAMPS OF PREPAID LETTERS.**—The whole of the postmasters in the kingdom are now allowed an immense stock of postage stamps of all descriptions on credit, and they are compelled to ascertain daily that every letter receiver in their official districts has a sufficient supply on hand for the accommodation of the public. The value of the whole of these stamps now furnished on credit to the various officials in the country is not less than a quarter of a million of money. This plan has been adopted preparatory to a general measure being put in operation for the compulsory prepayment, by stamps, of all prepaid letters posted in the United Kingdom. The accounts to be kept with the country postmasters in consequence of these regulations will cause a considerable increase of business to the stamp department, but they will ultimately cause a material diminution of Post-office labour.

**THE whole number of lawyers in the United States is 21,979, of which number New York has 4,374, Massachusetts 1,040, Rhode Island 112, Pennsylvania 1,739. It is estimated that, supposing 979 to have retired from practice, the annual emoluments of each practising lawyer average 1,500 dollars, making the total income of the profession to be 31,500,000 dollars.**

**TRINITY TERM EXAMINATION.**—The number of candidates for whom notice had been given in the present Term was 114, but 31 not having completed their testimonials in due time, the number is reduced to 83,—which, compared with former Terms, is unusually small.—*Chronicle.*

**GRAY'S INN, June 11.**—The annual examination in law, instituted by this society, took place in the Hall on Thursday and Friday, the 5th and 6th inst. and the following is the class list of the successful candidates for honours on that occasion, which was published this evening in the presence of the benchers and members of this society, and the members of the Inns of court:—

1. Mr. William Fowler, of the Inner Temple.
2. Mr. Oliver Claude Pell, of Lincoln's Inn.
3. Mr. Edward Samuel Dale, of Lincoln's Inn.
4. *Æquales* { Mr. Richard William Fisher, of Lincoln's Inn.  
Mr. Horace Townsend, of Lincoln's Inn.
5. *Æquales* { Mr. Leonard Field, of the Inner Temple.  
Mr. Joseph Napier Higgins, of Lincoln's Inn.
6. Mr. John Lindsey Reed, of the Inner Temple.
7. *Æquales* { Mr. David Kiteat, of the Inner Temple.  
Mr. George Taylor, of the Inner Temple.

Mr. Fowler received from the lecturer, Mr. W. D. Lewis, his prize, consisting of a complete set of the Reports of Vesey, junior (20 vols.)

**THE STIPENDIARY MAGISTRATESHIP AT LIVERPOOL.**—At a meeting of the Liverpool town-council held lately, it was resolved to recommend Mr. J. S. Mansfield, formerly of the northern circuit, to Sir George Grey, as the successor of the late Mr. Rushton, at the salary of 1,000*l.* a year. Two courts are to be established under the same roof, over one of which the mayor and honorary magistrates will preside. It was proposed that the name of Mr. Blair, a Liverpool barrister of some standing, should be coupled with that of Mr. Mansfield in the recommendation to the Secretary of State, but this was overruled by a majority of forty to ten. Mr. Rushton, the late stipendiary, enjoyed a salary of 1,600*l.* but he transacted the whole of the business, without the assistance of a second court.

**THE CUMBERLAND FISHING CASE.**—The fishing case, to which considerable importance has been attached, and which has been several times before the magistrates at Penrith, has, we believe, been finally disposed of. Opinions have been obtained by Mr. Milner and Mr. Hassell, in accordance with the understanding between the solicitors employed at the last adjournment, which go to show that an individual angling for trout in a fresh-water river with leave of a landowner or occupier has a legal right to do so. It will thus be seen that Mr. Jameson's objections fell to the ground; so that,

the question being now disposed of, after full inquiry and consideration, anglers need not be under any apprehension of further prosecutions under the Solway Act, if they have proper leave.—*Cumberland Packet.*

In consequence of the increase of police business in Birkenhead, an application has been made to Sir George Grey to appoint a stipendiary magistrate for Birkenhead and the surrounding townships. Sir George is favourable to the appointment, but refuses on behalf of the Government to contribute anything towards the expenses or salary. The Birkenhead commissioners have no power to appropriate any portion of their funds for such a purpose, and an Act of Parliament will be necessary.

**COMMITTAL OF A WITNESS FOR CONTEMPT OF COURT AT ROCHESTER.**—During the hearing of a case, *Dadson v. Eldridge*, before James Espinasse, esq. Recorder, involving a question of disputed tenancy of some premises, one of the defendant's witnesses, named John Bulling (the son of a publican), whilst under examination by the Recorder, having observed a person in court writing, and suspecting him of taking notes of his evidence, abruptly complained to the Recorder, "that his evidence was being taken down, and that it was not fair." He (the witness) was ordered to proceed, but, refusing to do so, was told by the Recorder that if he did not he would commit him for contempt of Court; to which witness replied, "That he did not care if he did;" on which the Recorder told him that he would not sanction such offensive conduct, and, therefore, that he (the witness) was to consider himself in custody, but should allow him to proceed with his evidence, at the conclusion of which he was handed over into the hands of the officers in court. A verdict was ultimately given for plaintiff.

## NOTICES OF NEW LAW BOOKS.

*A Practical Compendium of the Recent Statutes, Cases, and Decisions affecting the office of Coroner.* By WILLIAM BAKER, Esq. one of the Coroners for Middlesex. London: Butterworths.

This volume has very much disappointed us. From its bulk we anticipated an elaborate and complete treatise on the *Law of Coroners*, but it proves to be one of the loosest, most rambling, and inartistic law-books that has ever come under our notice. The 700 pages are filled up by the strangest medley we have, for instance, an essay on Homœopathy; and a long address from a coroner in the country on the usefulness of inquests on fires; page 135 is almost entirely occupied with an extract from *Paradise Lost*,—quite a new authority to be cited in our Courts. Under the title of *Infanticide*, we are treated with a collection of proceedings, &c. cut bodily out of the newspapers, illustrating no principle of law and no fact in science, but detailing the particulars at full length; and then there are some half-dozen pages of extracts from registrars as to the causes of infanticide. To crown the whole, *Bird's* case is reprinted at length in large type, occupying more than sixty pages! The appendix is equally a tax on the reader's pocket and patience. *The orders and regulations of the Board of Health during the cholera*, are given in full, filling no less than one hundred and ninety-four pages!!

All the law in this volume might very well have been put into 200 pages: Pity it is that so much time and type should have been wasted, in expanding it into 700, by such materials as those we have described.

## NECROLOGY OF LEGISLATORS, MAGISTRATES, AND LAWYERS.

### LORD DUNDRENNAN.

ANOTHER vacancy, by death, has occurred in the Scotch bench, being the third within the last eighteen months. The first of the three called away was Lord Jeffrey, who was at once the chief ornament of the legal Profession in Scotland, and a brilliant star in the literary horizon of the country. Then came Lord Moncrieff, a sound lawyer, a long and well-tried liberal, and a most estimable man; and now we have to record the demise of Lord Dundrennan, the successor of Lord Jeffrey. It is only about a year and a half since he received the judge's gown. He has been troubled for some time past with an attack of gout, which was followed by two severe attacks of paralysis, from the effects of one of which he died on Tuesday morning, at his residence, George-street, Edinburgh. Mr. Thomas Maitland (Lord Dundrennan) passed as an advocate in 1813, and was, comparatively speaking, a person in all the vigour of manhood when taken away. When at the Bar he had a very extensive practice. He was for several

years Solicitor-General under the Whigs, and had during a large portion of that time, a seat in Parliament, as member for Kirkcudbright.

## BIRTHS, MARRIAGES, AND DEATHS.

### BIRTHS.

**BIRKENHEAD.**—On the 8th inst. at Cottam, near Sidmouth, the wife of Thomas Birkenbeck, esq. of Settle, Yorkshire, of a daughter.  
**HARDCASTLE.**—On the 10th inst. at Writtle, Essex, the lady of J. A. Hardcastle, esq. M.P. of a daughter.  
**HOLCROFT.**—On the 6th inst. at Sevenoaks, Mrs. W. F. Holcroft, of a son.  
**TALLENTE.**—On the 10th inst. at Newark, the lady of Godfrey Tallente, esq. of a son.

### MARRIAGES.

**ARNOLD,** Matthew, esq. eldest son of the late Dr. Arnold, of Rugby, to Fanny Lucy, third daughter of the Hon. Mr. Justice Wightman, on the 10th inst. at St. Mary's, Hampton.  
**LEE,** Matthew, esq. of Newcastle, to Sarah Anne, second daughter of the late Richard Cundell, esq. of Kilburn Priory, on the 11th inst. at St. Pancras.  
**PAKINGTON,** Sir John, bart. M.P. of Westwood-park, Worcestershire, to Augusta, daughter of the late Thomas Champion De Crespigny, esq. and widow of Colonel Davies, M.P. of Himley-park, in the same county, on the 5th inst. at St. Michael's, Pimlico.

### DEATHS.

**ADAMS,** William, esq. LL.D. formerly advocate in Doctors'-commons, at Thorpe, Surrey, on the 11th inst. aged 79.  
**STORY,** John Samuel, esq. clerk of the peace for the county of Hertford, at St. Alban's, on the 6th inst. aged 71.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	211½	211½	212	211½	212½	212½
3½ Cent. Reduced Annuities ..	97½	97½	97	97½	97½	97½
3½ Cent. Consols Annuities ..	98	98	98	98½	98½	98½
Consols for Account .....	98	97½	97	97½	97½	97½
New 3½ Cent. Annuities ..	98½	98½	98	98½	98½	98½
Long Annu. (exp. Jan. 5, 1860) ..	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1859) ..	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Jan. 5, 1860) ..	7½	7½	7½	7½	7½	7½
India Stock .....	262	262	262	262	262	262
India Bonds (1,000 <i>l.</i> ) ..	53	56½	56	56	52	52
Do. do. (under 1,000 <i>l.</i> ) ..	54	56½	56	56	55	55*
South Sea Stock .....	108½	108½	108½	108½	108½	108½
Do. do. New Annuities ..	97½	97½	97½	97½	97½	97½
Exchequer Bills, 1,000 <i>l.</i> ..	43*	46*	46*	43*	42*	42*
Do. do. 500 <i>l.</i> ..	46*	47*	47*	43*	42*	42*
Do. do. Small .....	46*	47*	47*	42*	42*	42*
Do. Advertised .....	..	..	..	..	..	..

\* Premium.

## THE GAZETTES.

### Bankrupts.

*Gazette, June 10.*  
**DUMMELLOW, JAMES,** broker, Fenchurch-st. June 23, at eleven, and July 19, at half-past eleven, Basinghall-st. Off. as Nicholson. Sol. Lloyd, Milk-st. Cheapside. Petition, June 6.  
**GLAHER, WILLIAM,** grocer, Bristol, June 24 and July 22, at eleven, Bristol. Off. as Miller. Sol. Bevan, Bristol. Petition, June 7.  
**HALL, JAMES TURNER,** bookseller, Northwich, Cheshire, June 19 and July 10, at eleven, Liverpool. Off. as Bird. Sols. Barker and Cheshire, Northwich. Petition, June 7.  
**HEV, STEPHEN and JOHN,** manufacturers, Colne, Lancashire, June 26 and July 18, at twelve, Manchester. Off. as Lee. Sols. Cooper and Sons, Manchester. Petition, May 31.  
**MARTIN, HENRY,** draper, Lewes, Sussex, June 19, at two, and July 21, at eleven, Basinghall-st. Off. as Edwards. Sols. Sole and Turner, Aldermanbury. Petition, May 30.  
**RATCLIFFE, SAMUEL,** miller, Aldham, Suffolk, June 19 and July 26, at one, Basinghall-st. Off. as Whitmore. Sols. Whishaw, Gray's Inn-square, and Robinson, Hadleigh, Suffolk. Petition, May 29.  
**SMITH, LEBY DRIGHTON,** calenderer, Little Knight Ryder-st. city, June 23, at twelve, and July 16, at two, Basinghall-st. Off. as Pennell. Sol. Waller, Finsbury-circus. Petition, June 6.  
**SMITH, WILLIAM,** timber dealer, Westhill-grove, Wandsworth-road, June 24, at eleven, July 24, at twelve, Basinghall-st. Off. as Johnson. Sol. Holcombe, Chancery-lane. Petition, June 6.  
*Gazette, June 13.*  
**CLIPSON, WILLIAM,** builder, 16, Sellers-st. and Egerton-st. Chester, June 20 and July 18, at eleven, Liverpool. Com. Stevenson. Off. as Bird. Sol. Hostage, Chester. Petition, June 6.  
**FISHER, THOMAS,** pianoforte manufacturer, 85, Gower-st. Bedford-square, and 12, Tottenham-st. Tottenham-court-road, June 26, at eleven, and July 16, at two, Basinghall-st. Com. Holroyd. Off. as Groom. Sol. Cox, Pinners' Hall, Old Broad-st. Petition, June 11.  
**LATHAM, JOHN,** pianoforte manufacturer, 28, Howland-st. Fitzroy-square, June 21, at eleven, August 2, at one, Basinghall-st. Com. Goulburn. Off. as Pennell. Sol. F. Paxton, 16, Bloomsbury-square. Petition, June 11.  
**MILBURN, JOHN,** builder, 2, Oakley-terrace, Chelsea, June 24, at eleven, July 24, at one, Basinghall-st. Com. Evans. Off. as Bell. Sol. Turnley, 16, Cornhill. Petition, June 3.  
**MOODY, CHARLES,** pork butcher, poultryer, and cheese-monger, 88, Goswell-road, Clerkenwell, June 19, at half-

past one, July 25, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sols. P. Smith, Steaming, and Croft, 3, Basinghall-st. Petition, June 13.

**RATLIFF, BARNEY** (and not RATLIFF, as before advertised), miller, Aldham, Suffolk, June 19 and July 25, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. C. J. and H. Whishaw, Gray's-inn-square; and J. F. Robinson, Hadleigh, Suffolk. Petition, May 29.

**WATSON, JOHN**, licensed victualler, King's Head, Great Elder-st. St. James's, June 25 and July 25, at twelve, Basinghall-st. Com. Foulblaque. Off. as Graham. Sols. Dimmock and Burby, 2, Suffolk-lane, Cannon-st. city. Petition, June 4.

**WRIGHT, BENJAMIN**, and **FULLALOV, JOHN**, manufacturers, Ancoats, Lancashire, June 30 and July 21, at twelve, Manchester. Off. as Fraser. Sols. Hitchcock, Buckley, and Tidwell, Brown-street, Manchester. Petition, June 7.

**WOOD, JOHN MARTIN**, victualler, of the Red Cross, 33, Barbican, June 25 and July 25, at eleven, Basinghall-st. Com. Foulblaque. Off. as Stansfeld. Sols. Hine and Robinson, 33, Charterhouse-square. Petition, June 12.

### Dividends.

#### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

**Alley, G. F.** hosier and draper, first, 2s. 9d. Freeman, Sheffield. **Baines, H. T.** linen-draper, first, 4s. 2d. Edwards, London. **Barrow, C.** warehouseman, first and final, 9s. 10d. Carrick, Hull. **Beasley, C.** clerk, further, 1s. 11d. Hirtzel, Exeter. **Bonifay, J.** jun. woollen draper, first, 3s. 11d. Hirtzel, Exeter. **Buddle, W.** timber merchant, third, 9d. Edwards, London. **Champion, R.** furrier, third, 21d. Stansfeld, London. **Frampton, J.** money scrivener, first, 51d. Hirtzel, Exeter. **Friend, G.** bookseller, first, 2s. 11d. Valpy, Birmingham. **Hutton, G.** grocer, second, 2s. 6d. Freeman, Sheffield. **Jardine, J.** linen-draper, second, 8s. 3d. Edwards, London. **Keeper, W.** wire-rope maker, second, 2s. Edwards, London. **Lightfoot, C.** livery-stable keeper, first, 5s. 11d. Hirtzel, Exeter. **Manby, J. S.** ironmonger, 1s. 4d. Lee, Manchester. **Pierce and Homan**, merchants, first and final sep. of Pierce, 8d. Lee, Manchester. **Pottinger, C. R.** wine merchant, first, 1s. 3d. Edwards, London. **Saunders, J.** woollen manufacturer, third sep. 01d. Edwards, London. **Taynton, N.** law stationer, second, 3d. Edwards, London. **Weekes, W.** edge-tool maker, second, 51d. Hirtzel, Exeter. **Whitmore, Wells, and Whitmore**, bankers, eighth 11d. Stansfeld, London.

#### INSOLVENT ESTATES.

**Blight, J.** baker, 81d. Apply to P. Pearce, official assignee, East Stonehouse. **Coleman, I.** tailor, first and final, 1s. 6d. Apply to W. Stringer, official assignee, New Romney. **Cracker, W.** baker, 111d. Apply to P. Pearce, official assignee, East Stonehouse. **Delefield, R.** hairdresser, 6d. Apply to P. Pearce, official assignee, East Stonehouse. **Dodds, J.** 10d. Apply to B. Frear, official assignee, Derby. **Edmunds, W.** farmer, 2s. 21d. Apply to Mr. Galindo, solicitor, Monmouth. **Ellis, W.** hairdresser, 1s. 11d. Apply to P. Pearce, official assignee, East Stonehouse. **Johnson, G.** carpenter, first, 2s. 1d. Apply to P. Pearce, official assignee, East Stonehouse. **Leslie, W.** 1s. 6d. Apply to B. Frear, official assignee, Derby. **Marcon, E.** captain on half-pay, first, 4s. 61d. Apply to P. Pearce, official assignee, East Stonehouse. **Smith, W. H.** glider, 1s. 111d. Apply to P. Pearce, official assignee, East Stonehouse.

### Assignments for the Benefit of Creditors.

#### Gazette, June 3.

**Bennett, S. C.** tailor, Sackville-st. Piccadilly, and Hampstead-house, Avenue-rd. St. John's Wood, Middlesex, May 23. Trust. G. Stanton, woollen-draper, Marylebone-st. Regent-st. Sol. O. Richards, Warwick-st. Regent-st. **King, J.** jobber, Berden, Essex, May 21. Trust. R. Franklin, auctioneer, Thaxted. Sol. H. Wortham, Boynton. **Lamb, H.** linen-draper, Long Buckby, Northampton, May 10. Trusts. J. B. Walker, gentleman, Friday-st. city, London, and J. Rogers, farmer, Clapton-hall, Northampton. Sols. Heather and Moger, Paternoster-row, London. **Leigh, J. B.** builder, Macclesfield, Chester, May 28. Trusts. P. S. Dickens, furniture-dealer, Sutton, and J. Mellor, builder, Rainow. Sols. Brookhurshte and Bagshaw, Macclesfield. **Lloyd, L.** and **Tattersall, L.** cotton-manufacturers and copartners, Heywood, Lancashire, May 5. Trusts. G. Chambers and H. Warrens, commission agents, Manchester. Sol. J. Wilson, Manchester. **Pratt, B.** farmer, Manuden, Essex, May 6. Trusts. W. Swallow, bricklayer, J. Pratt, watchmaker, and J. Eversard, grocer, Bishops Stortford. Sol. J. Johnstone, Bishops Stortford.

#### Gazette, June 6.

**Clough, W.** and **Armstrong, W.** drapers, Blyth, Northumberland, May 8. Trusts. M. Armstrong, shipwright, and P. Sutherland, shoemaker, Blyth. Sols. Barker and Fenwick, North Shields. **Harrison, J. B.** accountant and land and building agent, Manchester, May 30. Trust. W. Hollis, provision dealer, Salford. Sol. T. G. Blain, Manchester. **Johnson, J.** cordwainer, Great Yarmouth, May 12. Trusts. J. Orfeur, Thorpe, and J. Green, Wroxham, merchants. Sol. H. Barber, Great Yarmouth. **Marfell, R.** furniture dealer, High-st. Whitechapel, May 20. Trust. C. Dear, warehouseman, Watling-st. Sols. Ashurst and Son, Old Jerry. **Scroggie, W. J.** grocer, Church-st. Hackney, May 9. Trusts. E. Crawley, wholesale tea and coffee dealer, Cullum-st. and A. King, grocer, Chiswell-st. Sols. Hindmarsh and Evans, Jewin-crescent. **Searle, J.** builder, stonemason, and brickmaker, March, Isle of Ely, May 23. Trusts. T. T. Elliott, gentleman, March, and J. Howell, coal merchant, Wisbech St. Peter's. Sol. D. Orton, March. **Ward, W.** gentleman, Quorndon, Leicester, May 12. Trusts. T. W. Warner, joiner, and J. North, farmer, Loughborough. Sol. A. Hucknall, Loughborough.

### Partnerships Dissolved.

#### Gazette, June 3.

**Allmond and Porry**, dealers in wools, &c. Wrexham, May 31. **Benn and Co.** merchants, Bahia, Dec. 31. Debts paid by Benn. **Chesham, Worrell, and Co.** brewers, Whitfield, Gloucester, May 23. Debts paid by Chesham and Hodgkinson. **Coke and Howard**, hat manufacturers, Doston, May 27. Debts paid by Coke. **Cooper and**

**Wright, maltsters**, South Clifton, May 25. **Dawson, J. W.** and **Williams, T. E.** merchants, Crescent-place, New Bridge-st. Blackfriars, June 2. **Goodman and Close**, surgeons, Manchester and Chorlton-on-Medlock, May 18. **Gourley, E. T.** and **Douglas, W. H.** coalitters, &c. Sunderland, as regards Douglas, March 28. Debts paid by Gourley. **Hewitt, T.** and **J. plumbers**, &c. Knotty Ash, near Liverpool, May 31. **Ironsides and Miller**, Bank-buildings, Ladbury, Sept. 21. Debts paid by Ironsides. **Morgan, J.** and **Rockcliffe, T.** May 28. Debts paid by Morgan. **Noblett, W.** and **B. farmers**, Preston, May 30. **Places and Eickton**, cotton spinners and coal masters, Huddlesden, Over Darwen, as regards Riahon, May 31. Debts paid by J. and P. Place. **Reynolds, J.** and **C. wire manufacturers**, New Compton-st. Soho, May 31. **Shaw and Beale**, linen-draper and mercers Bath, May 31. Debts paid by Shaw. **Welfton, L.** and **H. watch and clock manufacturers**, Manchester, May 29. Debts paid by L. Wulson.

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Excise and Customs	Friendly and Loan Societies
Factories	Gaols and Houses of Correction
Fairs	Highways and Turnpike Roads
Friendly and Loan Societies	Hundred
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Hundred	Lord's Day
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THE LAW TIMES.

SATURDAY, JUNE 21, 1851.

THE POSITION OF THE PROFESSION.

It is very important that the Profession should rightly understand its position, for its future fortunes will depend upon a right use being made of present circumstances.

The Law and the Lawyers are in a state of transition, and are enduring the evils always attendant upon that position. The old system is passing away, the new one is not established, and we have not yet learned to adapt ourselves to the new circumstances. Hence our perplexities and troubles.

But before we can enter heartily upon the work of self-adaptation, it is necessary that we should learn thoroughly to put away all hope of a restoration of the old condition of things. We can no more recal a past system than the past time: it is in the moral, social and political, as in the physical, world,—whatever is once dead, cannot be recalled to life in its old form: when it springs up again, it will be in a new shape, having new functions and formed for different ends. It is our misfortune to live in an age of change; but, as we cannot help it, so wisdom counsels us not to waste our time in vain complainings, but to take things as we find them, and make the best of them. This lesson is equally applicable to the Lawyers at his moment. Rightly or wrongly, the system of our Law is undergoing a total revolution. That is the fact, not to be evaded by endeavouring not to see it. The sooner we recognise the fact in all its meaning, and make preparations for adapting ourselves to the altered circumstances, the better for our fortunes. The process of adaptation will sufficiently occupy the thoughts of the Lawyers or a long time to come, without wasting any portion of them on futile endeavours to prevent the inevitable, or vain regrets over the perished. With new circumstances there will devolve

VOL. XVII. No. 429.

upon the Lawyers new duties, new cares, new prospects, and new hopes.

Scarcely are we conscious yet of the greatness of the revolution through which we have passed, and are still passing. We begin to measure it now by its effects. At this moment we are in that worst phase of all revolutions, where the process of destruction is almost complete, and that of reconstruction scarcely begun. We are thus deprived of the advantages of the old system without reaping the benefit of the new one. Change has proceeded far enough to destroy our former sources of emolument, without having advanced sufficiently to provide others.

As we cannot go backwards, our plain policy now is to advance as far and as fast as we can, and hasten the advent of the system that is to be substituted for that which has perished and is passing away.

It will be the duty of the LAW TIMES, and a function which it has peculiar opportunities for fulfilling, to endeavour to direct the Profession through the perilous path of transition upon which the spirit of the age has compelled it, to the new and untried future that lies before it. To be forewarned, says the proverb, is to be forearmed. By carefully surveying the way, the smoothest path will be found; by looking forward, we shall ascertain what should be done to promote the common welfare and to meet the changes with the least injury and the most advantage. Such is the task which we purpose to undertake, asking in its performance the counsel and co-operation of our thoughtful readers. Its importance to the Profession cannot be over-estimated, and out of discussion good must come.

But, as a starting point, to prevent waste of time, thought, and type, we must ask the Lawyers to cease from looking backwards—to recognise the fact that we are in the midst of a revolution, and to enter with us upon this serious inquiry, what they must do to meet the present and the future, without losing time and spirit in useless lamentation over the dead past.

REGISTRATION OF ASSURANCES.

THIS Bill has come out of committee with many improvements. We are happy to say that our remonstrance of last week against the exclusion of solicitors from the registrarships has been successful, and the Lords have agreed to a clause requiring the head registrar to be a barrister, but enabling solicitors to be appointed to the deputy registrarships, which will be as ten to one in number over the former, as there will be only one chief registrar to a large district, with many deputies.

The readiness with which proposals submitted by us on behalf of the solicitors have been acceded to by the House of Lords, as shewn in this and the County Courts Bill, will, we trust, satisfy our readers that the Profession has only to go with the stream and be prudent in its requirements for self-protection, to find the assistance to which it is entitled.

We know, from the best authority, that there exists the strongest desire that neither branch of the Profession should be damaged in the various reforms that are inevitable, and these two instances of successful effort, by politic remonstrances quietly urged in the right quarter, and in the proper tone, are gratifying proofs of it.

The Profession may rely upon a continuance of the same vigilance and the same efforts on our part to procure their protection in the changes that are going on: we only ask in return that they will exert themselves in the manner we may suggest, when we give them notice that it is the time to do so; assured that we do not advise them without a good reason, which it may not always be in our power or prudent in us to reveal.

Another improvement has been introduced. Unstamped copies of deeds may be registered

by those who desire to keep their own title-deeds—thus removing one popular objection.

THE BALANCE OF ACCOUNT.

Who will be gainers, who losers, by the proposed extension of an equitable jurisdiction to the County Courts?

Let us endeavour to ascertain.

There are eight thousand country Solicitors. They will all be *gainers* by it;—to what extent it is difficult to anticipate, but it must be very considerable. Until a cheap and speedy remedy was given for small demands at law, we did not know how vast was the sum of injustice to which the community submitted rather than incur the hazard of a lawsuit. Many hundreds of thousands of suits were thus produced, which otherwise would not have been.

If a cheap equity jurisdiction should afford the same facilities, we may expect similar results; not in number, of course, but in importance to the public, and of vastly greater value to the Profession. Nobody knows how many claims, only to be pursued in equity, are now abandoned, simply because prudence counsels submission to any amount of injustice rather than an appeal to Chancery, where the property in dispute is of less value than 200*l*. All these claims must be promoted by an attorney, and for these a fair scale of fees is to be allowed. The country Solicitors will be enabled to prosecute them in their own districts, in person, and thus the entire of the fees will pass into their own pockets. The benefits of the measure to the *country Attorneys* is, then, beyond question, and beyond calculation.

But, it is said, though the Profession in the country will benefit so enormously by the *County Courts Equity Jurisdiction Bill*, it will be injurious to the Solicitors in London. Let us see if it will be so, and to what extent.

Now, in the first place, the objectors who urge this argument mean by the London Solicitors, themselves, and not the general body. How many of the three thousand Solicitors of the metropolis possess agencies sufficiently extensive to make the removal of small suits a matter of importance to them, even if such were to be the result?—Not one hundred. But, to all the rest it will be a positive gain, for they, equally with their brethren in the country, will share the *new business* which the Bill will create: 2,900, at least, out of the 3,000 London Solicitors, will directly profit by the measure.

But will the remaining 100 be damaged by it, as they fear? Certainly not. Let them make an estimate of the sums involved in the various suits which have passed through their offices during the last twenty years, and see how many of them were for matters of less value than 100*l*. We do not believe they would be found to average one per cent. of the whole. This one per cent., then, represents the sum of the diminution of business to them, against which they are to set the multitudinous new business which the measure will create, and of which they will have their full proportion, and which, we believe, will more than compensate any loss by the removal to the County Courts of the minute fraction of their present suits that come within the proposed jurisdiction.

Thus, then, stands the account.

The *gainers* by the measure now before Parliament will be

All the country Solicitors,

Twenty-nine-thirtieths of the London Solicitors.

The remaining hundred will find any loss they may sustain balanced, at least, if not converted into a positive gain, by their participation in the vast amount of new business which the Bill will produce, and of which, with their connections, they will secure the lion's share.

Let, therefore, a Bill fraught with such great

advantages to the Profession receive its active support.

### LAW OF EVIDENCE BILL.

**BELIEVING** that the salvation of the Superior Courts depends upon the speedy passing of this Bill, wanting which it will be impossible for them to compete successfully with the County Courts, which already enjoy the great advantages it proposes to extend, we are desirous of satisfying such of our readers as may yet entertain doubts of its propriety by arguments to which no answer is ever attempted, and by authorities which will, at least, be received with respect. Therefore do we entreat every member of the Profession to peruse with attention the following letter upon this subject, addressed by Lord DENMAN to Lord BROUGHAM, and read by the latter at a meeting of the Law Amendment Society on Wednesday:—

I take the fact to be clear, that the public decidedly prefers the County Courts to the Common Law Courts in Westminster-hall for the trial of causes. The proof of this fact, that the former tribunals swarm with suitors, while the latter are almost deserted, involves another fact of a more general nature: the destitution of the Bar; the ruin of many now in business; the disappointment of many more in their just expectations; and, finally, the annihilation of a most valuable class of society, as it has existed for the advantage of the public.

If the interest of the Bar come in competition with that of the public, there cannot be one moment's hesitation as to which must be sacrificed. Neither that nor any other set of men has any vested right in misgovernment or mal-administration—no privilege to defeat, or even delay for a single hour, well-considered improvements. Could we suppose a legal system so perfect and so justly appreciated, that all persons would spontaneously act right on all occasions, from knowing that otherwise the law would force them promptly to do so, and the community would enjoy the greatest blessing ascribed by Homer to the rule of Augustus, "foram litibus orbum,"—the barrister must turn his powers to some other account, nor breathe a murmur, nor ask a farthing of compensation, still less demand the restoration of the bad old system.

But a State that should make one of its tribunals cheap and efficient, while it condemned another to a dilatory, expensive course of procedure and trial, would be deemed doubly impolitic and regardless of the people's welfare: first, in declining to place both on the most favourable footing for the attainment of justice; but secondly, in the reduction that must follow of those learned men who formerly practised in the court now so fatally eclipsed; and formed a body capable of effectual resistance to oppression, and of guarding the rights of all.

I might dwell on the value of the Bar in collateral respects, in the service of public departments, in the various relations of private society, in furnishing a constant succession of gentlemen competent to fill the judicial office, through all its ranks up to the most arduous and elevated seats of justice. The education and habits of the Bar have formed the present judges of the Common Law Courts, as well as the Recorders and other presidents in local jurisdiction.

The fact I first noticed—the favour acquired by these inferior jurisdictions at the expense of the superior—is not merely to be traced to the power of examining parties. There is a still more operative, because a grosser and more palpable cause of the same notorious effect—the enormous costs imposed on suitors in the Superior Courts.

Can we expect a sane man to resort to a court which refuses to hear him and his adversary—possibly the only two persons in the world who know the truth—and which makes him pay 20*l.* for admission into its precincts; when in another court, close at hand and always sitting, he may state his own rights as he understands them, call his antagonist to disclose the whole merits of the disputed transaction, and finally recover his own at a twentieth part of the cost?

The evil points out its own remedy. If we are right in our premises, and suitors keep aloof from courts of unimpeachable knowledge and integrity because they are exclusive and expensive, the conclusion is obvious. Make them open to receive information from all, and cheap enough to be accessible to all, and the same amount of business will be found to flock thither as was seen there before this unexpected rivalry was created by the Legislature.

I cannot help feeling sanguine in my hopes for the success of your great measure for receiving the evidence of parties [my noble, revered, and dear friend ought to say his measure, for my belief is that the

measure to which he refers is only a corollary to his great measure of 1842], and looking at the names and characters of the enlightened commissioners for inquiring into practices and pleading, I fully anticipate such a reform of abuse, such a sweeping abolition of fiction and verbiage—those pets of English lawyers—the establishment of such a natural and intelligible course of procedure in our courts, as will be satisfactory to the public and conducive both to the honour and interest of our profession.  
June 5, 1851.

Every syllable of this earnest appeal will, we are sure, have the hearty sympathy of our readers.

But sympathy alone is not sufficient. The Bill is threatened with deadly hostility from an influential quarter,—we mean influential in position. All the Law Lords are earnest in its favour, except the Lord Chancellor. But although probably few would be inclined to prefer the opinion of Lord TRURO to the united opinions of Lords DENMAN, CAMPBELL, LYNTHURST, CRANWORTH and BEAUMONT, he has the advantage of Government pocket-votes to support his own views. But if the Profession will come to the assistance of the five great authorities who support the Bill, and by petition declare their approval of it, they would ensure its success. We therefore call upon our readers to *transmit immediately*, either to Lord BROUGHAM, or Lord CAMPBELL, or Lord CRANWORTH, *petitions in favour of the Bill*.

For this purpose it will suffice, if they will take a sheet of paper, and write on it thus:—

*To the Lords Spiritual and Temporal, in Parliament assembled.*  
The humble petition of the undersigned Solicitors, practising at A.

Sheweth,—

That your petitioners have seen with satisfaction that a Bill is before your Lordships' house for amending the law of evidence, by the removal of the remaining disabilities of witnesses.

And your petitioners pray your right honourable House to pass the same into a law.

Obtain as many signatures to this as you can. If you have not time or inclination to do this, word it in the singular number, and sign it for yourself alone.

When signed, fold it so as to leave the ends open (as you do a newspaper), and addressing it to either of the above noble and learned lords, at "The House of Lords, London," and indorsing it "Petition to Parliament," it will go to its destination free of postage.

But, whatever is done must be quickly done.

## THE LEGISLATOR.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

*Friday, June 13.*  
Court of Chancery and Judicial Committee  
Owners and Lessees of Mines, Ireland  
Pharmacy.

##### BILLS READ A SECOND TIME.

*Friday, June 13.*  
Administration of Criminal Justice Improvement  
Prevention of Offences.

*Monday, June 18.*

Customs  
Inhabited House Duty.

##### BILLS READ A THIRD TIME AND PASSED.

*Friday, June 13.*  
Common Lodging Houses.

*Tuesday, June 17.*  
Survey of Great Britain, &c.  
Court of Chancery, Ireland.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

*Friday, June 13.*

Copper Mines in England Company  
Dublin, Dundrum, &c. Railway, &c.  
Great Malvern Improvement, &c.  
Shrewsbury and Chester Railway  
Waterford, Wexford, &c. Railway.

*Monday, June 18.*

European and American Printing Telegraph Company  
Itchen Bridge and Roads  
London (City) Sewers  
Trinity College, Dublin  
Wicklow Harbour  
Wrexham Improvement.

*Tuesday, June 17.*  
East Anglian Railways

Electric Telegraph Company  
Newark-upon-Trent Improvement and Market  
East Stonehouse Waterworks.

*Wednesday, June 18.*

Bath Improvement, &c.  
Fee-Farm Rents, Ireland.

*Thursday, June 19.*

Cam Navigation, No. 2.

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Par. Num.

308. Wolfendahl Church—Copies of Memorials  
343. Ordnance Survey—Returns  
379. Emigrants—Copies of Advertisement and Correspondence

Public General Acts—Cap. 12 and 13

323(1). Civil Bill Processes—Return

363. Grain, Flour, &c.—Returns

369. Licensed Distillers, Ireland—Return

Borneo—Extracts from Letter to Viscount Canning

Relations with Rome—Further Correspondence

Kafir Tribes, Cape of Good Hope—Correspondence

376. Bills—Land Clauses Consolidation, Ireland

393. — Court of Chancery and Judicial Committee

394. — Civil Bills, &c. (Ireland) (as amended by the Select Committee)

397. — Gunpowder Stores (Liverpool) Exemption Repeal (as amended by the Select Committee)

394. — Owners and Lessees of Mines (Ireland)

408. — St. Alban's Bribery Commission (as amended by the Committee and on re-commitment)

6(1). Mails on Railways—Abstract of Supplemental Return

National Vaccine Establishment—Report

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## HOUSE OF LORDS.

### COURT OF CHANCERY.

**MONDAY, June 16.**—Lord BROUGHAM called attention to the absolute necessity of improving the administration of justice in the Court of Chancery. The noble and learned lord said that the details of the measure introduced by Lord John Russell, so far as he had had the opportunity of attending to them, met with his entire approbation; but he was not prepared to say that they went far enough.

#### REGISTRATION OF ASSURANCES BILL.

**THURSDAY, June 19.**—The LORD CHANCELLOR presented a petition from the attorneys and solicitors of the metropolis in favour of this Bill.—Lord BROUGHAM wished to take this opportunity of stating that those who wished to understand this subject easily, and at the same time most accurately, might do so from a pamphlet which had been lately sent to him, and which he had perused with great satisfaction, and he might add with admiration. It was written by Mr. Hazlitt, a distinguished member of the bar, who entered fully into the whole of this important question, stating all the arguments that could be adduced in its favour, and disposing of the objections, the very slight objections, that could be urged against it with great accuracy, and with luminous perspicuity.—Lord LYNTHURST stated that considerable alterations had been made in the Bill since it was last before their lordships, and as he had not had an opportunity of examining them, he would suggest that the further consideration of the measure be postponed.—Lord CAMPBELL would, with the permission of the House, explain the alterations that had been made, and which, he trusted, would satisfy his noble and learned friend. But, before doing so, he wished to take this opportunity of concurring in the testimony which his noble and learned friend had borne to the admirable manner in which Mr. Hazlitt had explained the advantages of the Bill, and to the fair and manly way in which he had met the objections. With regard to the alterations to which his noble and learned friend had alluded, one referred to the qualification of the persons who should be selected by the Crown to hold office as registrars. The alteration proposed that the registrar should be a barrister of seven years' standing; but it was proposed that the assistant-registrars might be attorneys or solicitors. Another alteration was, that an appeal was to be allowed from the decision of a single judge to the whole Court in which he sat, so that in no case should the decision of one judge be final. Another alteration went to remove an objection which had been urged against the existing clause, that it tended to impede commercial transactions. By the new clause the registrar would be enabled to grant the holder of an estate a certificate, which being deposited with his banker, he would be able to raise such a sum of money as he desired on the instant, and without further formalities. Another alteration he might mention provided that instead of a stamped copy of the title-deeds being lodged with the registrar, the lodging of an unstamped copy would be sufficient, so that the holder of an estate might, if he pleased, keep his title-deeds in his own muniment room. These were the principal alterations in the measure, which he hoped would meet with the approbation of his noble and learned friend.—Lord LYNTHURST said he was satisfied with his noble and learned friend's explanation, but much, of course, would depend upon the terms in which



the clauses were worded.—After a few words from the Marquis of LANSDOWNE, which were wholly inaudible, the Bill was re-committed, the amendments were agreed to *pro forma*, and the report ordered to be received (as we understood) on Monday.

LORD BROUGHAM presented a petition from the attorneys and solicitors at Bungay, in favour of the County Courts, or Equitable Jurisdiction in Bankruptcy Bill.

### HOUSE OF COMMONS.

#### REFORM OF THE COURT OF CHANCERY.

FRIDAY, JUNE 13.—LORD JOHN RUSSELL moved for leave to bring in a Bill to improve the administration of justice in the Court of Chancery and the Judicial Committee of the Privy Council. The noble lord referred to the measure he had produced a few weeks back, in which it was proposed that the Master of the Rolls and one of the common law judges should sit to assist the Chancellor; but this was objected to, as tending to the delay of justice in the Rolls Court. The present Bill provided for the appointment of two new judges as judges of appeal, who should sit in the Court of Chancery as assessors to the Lord Chancellor, when he was able to be present, and without him when he was unable to give his attendance. The only objection he could anticipate to this plan was, that it would too greatly increase the judicial staff; but he was not apprehensive that great weight would be attached to it by those who considered the great increase which had taken place in the business of the Court of Chancery. It appeared, from a return presented to the other House, that from November, 1850, to May, 1851, the total number of matters disposed of by the Court of Chancery, in all its branches, was 5,207. The Bill also empowered one judge of appeal to sit and dispose of the business in case of the absence of the other. He felt that in these times, when reforms of the law were so eagerly looked for, it was desirable that the Lord Chancellor should be enabled to give his mature and deliberate attention to subjects of this kind. He had stated, on a former occasion, that he proposed that the Lord Chancellor should receive 10,000*l.* a year instead of 14,000*l.* with the same retiring pension, and that the Master of the Rolls should have 6,000*l.* instead of 7,000*l.* a year. He proposed that the two new judges should be on the same footing with respect to salary as the Master of the Rolls, each receiving 6,000*l.* a year. The increased expense would thus be 12,000*l.* with a saving on the other hand of 5,000*l.* He regarded it as impossible, with benefit to the public, that the Lord Chancellor should continue to perform the whole of his present duties, and anticipated that the result of the change would be advantageous, both as regarded the Court of Chancery and the general business of the country. He proposed that the new judges should be members of the Judicial Committee of the Privy Council, and that three instead of four should be a quorum of that tribunal, hoping thus to obviate the difficulties which had been experienced under its present constitution.—MR. J. STUART thought they had arrived at a period of the session when it was impossible that this measure could receive such a degree of consideration as would enable them to pass it. The Court of Chancery had been for the last twelve months in a peculiar and extraordinary state, and it was to be wished that time had been given to the judges to acquire habits of transacting business, as well as to others to accommodate themselves to them. It was worthy of consideration whether a great portion of the present business of the court could not be conveniently and properly transferred to other courts, where the judges complained of want of business.—MR. BETHELL earnestly hoped the House would not think it too late to entertain a measure of so much importance during the present session. The Bill provided effectually for the relief of the appellate tribunal, in which it was impossible that business could be despatched with speed and certainty whilst there was but one judge, who was unable to attend regularly. Another advantage was the doing away with appeals from one single mind to another single mind.—MR. WALPOLE thought the Bill would effect a great improvement on the present system, and should most willingly give it his cordial support.—After a discussion, in which Mr. Ellice, Mr. Horsman, Mr. R. Palmer, Mr. Henley, the Solicitor-General, Sir H. Willoughby, the Attorney-General, Mr. Hume, Mr. J. Evans, and Mr. Mullings, took part, the motion was agreed to.—On the motion of Lord J. RUSSELL, leave was also given to bring in a Bill to regulate the salaries of the Chief Justice of the Court of Q. B. and the Chief Justice of the Court of C. P.

#### THE SCOTCH JUDICIAL BENCH.

MONDAY, JUNE 16.—MR. BRIGHT called the attention of the noble lord at the head of the Government to a vacancy which had just occurred on the Scotch judicial bench. The committee on official salaries had intimated, in not at all ambiguous language, that the number of Scotch judges was much larger than necessary. Now that a vacancy had oc-

curred, would the recommendation of the committee to reduce the number be put into practice?—LORD JOHN RUSSELL said, on the occasion of a previous vacancy, a committee was appointed to consider the subject, and they were unanimously of opinion that no reduction should be made. The committee last year came to a different conclusion; but it was difficult to refer to the evidence on which that conclusion was founded. He had made inquiry of the late lamented Lord Moncrieff, and his opinion was adverse to the reduction of the number.

#### PAROCHIAL ASSESSMENTS.

WEDNESDAY, JUNE 18.—In reply to Mr. Wilson Patten, Sir GEORGE GREY said he thought, under existing circumstances, it was not possible to bring forward a Bill with regard to parochial assessments during the present session.

COURT OF CHANCERY AND JUDICIAL COMMITTEE BILL.—On Monday the Government Bill, brought forward by Lord John Russell, to improve the administration of justice in the Court of Chancery, and in the Judicial Committee of Privy Council, was printed. There are twenty clauses in the measure, and its principal features were explained on Thursday night. It is to be read a second time on Friday. Two additional judges, at 6,000*l.* a year, are to be appointed. The Lord Chancellor, instead of 14,000*l.* as Chancellor and Speaker of the House of Lords, is to have 10,000*l.* a year, and the Master of the Rolls 6,000*l.* The extra expense is to be paid out of the dividends arising from the Suitsors' Fund. The equity judges are to give their attendance at the House of Lords. There is a blank in the Bill respecting the annuities to be given to the judges on their resignation. The jurisdiction of the Vice-Chancellor in Bankruptcy is to be given to the Court of Appeal under this Bill.

### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

#### SUMMARY.

WHERE a conviction is confirmed by the Sessions on appeal, the payment of costs by the appellant is, it would seem, under the 27th section of 11 & 12 Vict. c. 43, to be made to the clerk of the peace and not to the respondent, as directed by 9 Geo. 4, c. 61, s. 29, and in default of payment the appellant can only be sentenced to imprisonment for three months. (*Reg. v. Hellier*, 17 Law T. 152.)

It has been decided in *Reg. v. Wilson*, 17 Law T. 155, that sec. 80 of 8 & 9 Vict. c. 126, gives no appeal against an order of justices adjudging a pauper lunatic to be chargeable to a county, and directing the treasurer of the county to pay a sum of money as the costs of his maintenance in an asylum. COLERIDGE, J. stated the reason in a single sentence. "In truth these are only interim orders until the settlement can be ascertained."

In *Reg. v. Scaife*, 17 Law T. 152, it has been at length decided that a deposition of a witness against a prisoner taken before a magistrate under 11 & 12 Vict. c. 42, is not admissible in evidence upon mere proof that the witness is absent and cannot be found, or that he is kept out of the way by the procurement of some person other than the prisoner. Therefore, when these prisoners were tried and it was proved that a witness was kept out of the way by the procurement of one of them, it was held that his deposition was *not* admissible in evidence against the other two.

At last there is a law for regulating the *Sale of Arsenic*. By 14 Vict. c. 13 (17 Law T. 99), it is enacted that sellers of arsenic are to keep a book in which they are to enter every sale of it in the form given in the schedule to the Act; no person is to sell arsenic to a person unknown to him, except in presence of a witness known both to the buyer and seller, who is to sign his name to the entries before delivery; nor is it to be sold to any person not of full age. Further, all arsenic sold is to be first mixed with soot or indigo, in the proportion of one ounce of soot, or half an ounce of indigo, at least, to every pound of arsenic, provided that, if it be required for any other than agricultural purposes, and in which such mixture would be injurious, it may be sold unmixed in a quantity of not less than ten pounds at one time. The penalty of 20*l.* imposed for violating any of the provisions of this Act is to be imposed on summary conviction before two justices. But the Act is *not* to prevent the sale of arsenic in medicine under a medical prescription, and it is to include all arsenious compounds.

Sir George Grey's Prosecutions Bill makes no progress. Like all other practical measures, it is deferred for impracticable ones.

The promised amendment of the Law of Settlement has not yet been introduced, although it is still promised. But what chance is there of its passing this session? E. W. C.

It having been decided by the magistrates that the fire at Downhill House, the seat of Sir Henry Bruce, was of an incendiary character, the enormous sum of 50,000*l.* will be levied off the barony of Londonderry as compensation for property destroyed, at the next Assizes. In the valuable gallery of pictures destroyed, was a picture by Raphael, well known as the "Boar Hunt."

PAUPERISM IN ENGLAND AND WALES.—On Tuesday was printed, by order of the House of Lords, some returns connected with the poor law. The total number of paupers of all classes, relieved in the sixth week of the quarter ended at Lady-day last, in England, was 806,130, and in Wales, 63,904, making 870,634, of which number 13,903 are returned as "vagrants."

### JOINT-STOCK COMPANIES' LAW JOURNAL.

AT one time it was held, in *Reg. v. The Birmingham Junction Railway Company* (2 Q.B. 61), that the impossibility of doing so was no answer by a company to a command to do what at one time they were bound to do. This irrational conclusion, however, has been overruled, and in *Reg. v. The York Junction Railway Company*, 17 Law T. 153, the Court has expressly repudiated the monstrous doctrine. "I think," said Lord CAMPBELL, "that case cannot be supported." But then it is for the company distinctly to shew the impossibility, and in the particular circumstances of this case it was held that that had not been done, and the rule for a *mandamus* was made absolute.

In *Booth v. Monmouthshire Railway and Canal Company*, 17 Law T. 154, Lord CAMPBELL expressly laid down this proposition, "There can be no doubt that if a statute imposes on any persons the duty of performing any work which relates to the public at large, and if, by their neglect to perform that work, they inflict an injury on a private individual, he is entitled to sue them for compensation for that injury."

A case of some moment as respects the companies, but involving no principle of law, turning rather upon the construction of the terms of a lease, is that of *The West London Railway Company v. The London and North Western Railway Company*, 17 Law T. 156, to which it will suffice to refer our readers who may feel an interest in the dispute.

#### WINDING UP.

THE very important decision of Lord CRANWORTH, as to the liability of contributories for calls, of which we apprised our readers a fortnight since, was fully reported last week. *Hunter's case*, 17 Law T. 151, adopts the precise views, and almost the argument, which we ventured to submit long before the point had come practically before the Courts, and when the authorities of the Profession were almost unanimously against us. It will be seen that the Vice-Chancellor takes precisely the same line of argument which we then pursued, and arrives at the same conclusion. "What the Master has to do," says his lordship, "is this: he is to make a call, it is true, not only for the debts of the company, but also for the costs; but he is to make a call in respect of the costs as well as the debts, so far, only, as the contributories shall be liable at law or in equity to pay the same. Strictly at law these costs would not be payable."

The liability to calls, as now determined, stands thus: *Upfill's case*, No. 2, has decided that a call can be made only in respect of the proportion due from the contributory for such debts as he may have rendered himself liable for in law, and, therefore that, before making the call, the Master must ascertain what are his liabilities. Then *Hunter's case*, now under consideration, decides that a call cannot be made upon a contributory for the costs of winding up, unless he is liable for some debt or debts of the concern, and then only for his share of the costs incurred by reason of such debt or debts. Nor does the number of shares held by the contri-

butory alter the amount of liability for costs. "It is quite a problem unsolvable by me," said Lord CRANWORTH, "why a man is liable to more because he has a hundred shares, than if he has fifty. These are not costs incurred in respect of the company." E. W. C.

**EASTERN COUNTIES AND SOUTHEAST JUNCTION RAILWAY.**—On Wednesday the list of contributors, consisting of those members of the provisional committee who acted and agreed to take shares, was further proceeded with before his Honour Sir W. Horne, Mr. Daniel appearing for Mr. Ewart, the official manager. Mr. Mainwaring, for whom Mr. Williams appeared as counsel, was placed upon the list, and Mr. Kemp, of Teignmouth, for whom Mr. H. Harris appeared, was struck off. The official manager, in reply to questions, stated that the chief object sought in winding up this company was to equalise payments among the contributors, some of whom had paid 300*l.* in discharge of debts, while others had only paid 50*l.*—*Daily News*.

**SHREWSBURY AND LEICESTER RAILWAY.**—On Thursday a meeting in this matter was held before Master Senior, to ascertain in what proportion certain members of the provisional committee were liable for the expenses incurred. Mr. Glasse and Mr. Dimsdale appeared for Mr. Begbie, the official manager, and the first case taken was that of Mr. Shadbolt, the chairman of the London Joint Stock Bank. Mr. Vardy, the solicitor to the company, was examined, and deposed that Mr. Shadbolt had consented to be a member of the provisional committee, and that he authorised him to go to Messrs. Dawson, the advertising agents, and use his name. It was contended for Mr. Shadbolt that this did not establish sufficient liability, and the Master, being of that opinion, struck Mr. Shadbolt's name off the list. The next case taken was that of Mr. R. A. Riddell, for whom Mr. H. Harris appeared. Mr. Jellicose, the secretary, was called, and deposed that he was engaged by Mr. Turner, solicitor, and one of the promoters of the company, at a salary of 350*l.* per annum, and that Mr. Riddell attended the meeting on the 4th of November, 1845, at which he was so engaged; but on cross-examination by Mr. Harris he admitted that his engagement was by Mr. Turner. Mr. Nelson, chairman of the company, also deposed to the presence of Mr. Riddell at the meeting. It was contended that the contract was a contract by the solicitor, but the Master ruled that Mr. Riddell was liable for the balance of salary due to the secretary. Mr. Foudrenier, Dr. Moore, Mr. W. Patterson, and other members, were held liable on like grounds for other proportions of expenditure incurred in the promotion of the scheme.

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

*Independent Assurance Company.*—Further call of 1*l.* 10*s.* per share on the contributors in classes 1 and 2. To be paid on July 7.—*Tinney*.

*Hull Public Bath Company.*—Call of 23*l.* per share on June 20.—*Horne*.

*British and American Steam Navigation Company.*—To settle list of contributors on July 3.—*Rose*.

*Tring and Reigate Railway Company.*—To settle list of contributors on July 11.—*Humphry*.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

It seems from the case of *Wayne v. Hanham*, 17 Law T. 151, that the proper form of decree on a bill for foreclosure by a mortgagee of a reversionary interest in stock, is "the common decree for foreclosure in default of payment by a day named." The mortgagee is not compelled by any rule of the Court to submit to a sale in the first instance.

An act of interruption in the enjoyment of an easement not acquiesced in for a year, is not evidence of an "interruption" within the meaning of stat. 2 & 3 Wm. 4, c. 71, s. 2, so as to defeat its operation altogether, but it is a material fact for the jury to consider in determining whether the enjoyment itself was of right. (*Eaton v. The Swansea Waterworks Company*, 17 Law T. 154.)

In *Willon v. Dunn*, 17 Law T. 155, it was held to be no answer to an action for use and occupation of premises by permission of the plaintiff, that a mortgagee to whom the plaintiff had mortgaged the premises before their occupation by the defendant had given notice to the defendant to pay him the rent that had accrued before the notice was given. "If the defendant," said Lord CAMPBELL, "had paid

the mortgagee, that might be an answer to the action by way of discharge. All that is now set up is a mere threat by the mortgagee to enforce a supposed liability. There is no authority for such a plea."

#### INCUMBERED ESTATES COMMISSION (IRELAND).

THE following is a copy of a report, dated the 3rd of May, 1851, from the Incumbered Estates Commissioners of Ireland, addressed to his Excellency the Lord-Lieutenant, with respect to their proceedings under the Incumbered Estates Commission:—

"Incumbered Estates Commission,

"Henrietta-street, Dublin, May 3.

"My Lord.—We have the honour to inform your Excellency that, on the 19th ult. we caused two returns to be transmitted to the office of the Secretary of State for Ireland, in pursuance of a requisition of the House of Commons.

"Those returns are necessarily very voluminous, as they contain a detailed account of the proceedings of the Incumbered Estates Commission down to the 31st of March, 1851. We think it right, therefore, in addition to those returns, to submit the following brief report to your Excellency.

"On the 25th of October, 1849, this court was opened for public business.

"The total number of petitions presented up to the 31st of March 1851, is 1,676.

"Upwards of one-half of the estates brought into our Court were under Chancery receivers, and in 147 cases the proprietors had taken the benefit of the Insolvent Debtors' Act.

"The number of petitions filed by owners is 319, or about one-fifth of the total number presented up to the date above-mentioned. Several petitions, however, presented in the names of incumbrancers, appear to have been so presented at the instance of the owners.

"The total number of Court orders (not including a vast number issued by each commissioner in chamber) is 5,413, viz.:—

"Conditional orders for sale ..... 1,240

"Absolute orders for sale ..... 1,036

"Miscellaneous orders ..... 3,137

"The gross total of the rentals, as set out in the petitions filed to 31st of March, 1851, is 1,036,975*l.* 11*s.* 8*d.* but the actual amount would probably not exceed 850,000*l.* as in some cases, more than one petition has been presented for sale of the same estate; and the rentals attached to the petitions frequently exceed the true rentals of the estates.

"The gross total of the incumbrances, as set out in the petitions filed to 31st of March, 1851, is 17,971,321*l.* 1*s.* 1*d.* But several of those incumbrances being judgments, and other securities collateral with mortgages and the like, are returned in duplicate in the schedule, and in this way mentioned twice; and it sometimes happens, that the same incumbrance affecting the estates of different owners is mentioned in more than one petition.

"As to estates sold:—

"The number of estates sold to March 31, 1851, is 253; the total acreage of which, statute measure, is 227,329*a.* 3*r.* 34*p.* Of this the quantity of arable land may be about 210,000 acres, or nearly one-sixty-fifth of the arable land of Ireland, which is estimated in the latest Poor Law returns to be 13,464,300 acres.

"The rental of estates sold to March 31, 1851, is 107,707*l.* 15*s.* 1*d.* or about 120th of the net annual Poor Law valuation of Ireland.

"The total amount of incumbrances on estates sold to March 31, 1851, as taken from the schedules lodged with the petitions, is 4,086,192*l.* 13*s.* 4*d.* but, as before mentioned, several of these incumbrances are returned in duplicate.

"The total amount of purchase-money for estates sold to March 31, 1851, is 1,350,616*l.* 0*s.* 4*d.* Of this amount 94,404*l.* 13*s.* 4*d.*, or about one-fifteenth part, has been allowed in payment of incumbrancers, who became purchasers.

"The commissioners have paid out to creditors and claimants up to this date, 3rd day of May inclusive, the sum of 838,356*l.* 0*s.* 1*d.*

"The 253 estates sold to March 31, 1851, have been disposed of to 587 purchasers, nearly one-half of whom are purchasers of lots that sold respectively for sums not exceeding 1,000*l.*

"Property to the amount of about 160,000*l.* has been acquired by English or Scotch purchasers (about thirty in number), as far as can be collected from their addresses, stated in the deeds of conveyance.

"Estates have sold best in Antrim, Down, Meath, Westmeath, Tyrone, and Dublin, and at lowest rates in Clare, Limerick, Tipperary, and Mayo. In the latter counties the rents reserved are generally so disproportional to the value as to afford no true measure of the income derivable out of the lands; and the heavy Poor-Law taxation in the same districts has added to the depreciation of value, but a progressive, though slow, improvement in the sales is manifest even in those counties.

"As to the rates of purchase generally, it is fallacious to estimate the number of years from the published rentals, which usually represent the rents of 1845 and previous years, and which, in many instances, were even then excessive, and far beyond any sums that could possibly be collected from the tenants. Besides, the occupying tenantry of many estates sold in this court owed several years' arrears of rent to the former owners, and much of the land had been exhausted or unreclaimed and devoid of suitable farm-buildings—a state of things which would necessarily require a heavy outlay by the incoming purchasers.

"The commissioners are of opinion that it would be most desirable to authorize them, in fit and proper cases, to sell (together with the estate) all arrears of rent due at the time of the sale.

"We have, &c.

"JOHN RICHARDS,

"MOUNTFORT LONGFIELD,

"CHARLES JAMES HARGREAVE.

"To his Excellency the Lord-Lieutenant."

#### WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In the will examined by your correspondent "O." the initials of the testator and witnesses were doubtless placed for the purpose of identifying the alterations as having been made *before* execution. Still I am decidedly of opinion (in opposition to the view taken by "A. W." in your last number), that had the alterations been made *after* execution, they must equally have been held part of the will. The Act requires subsequent alterations to be verified by the "signature" of the testator, and the "subscription" of the witnesses. These are the same terms as are employed with reference to the original execution of the will, which is directed to be "signed" by the testator, and "subscribed" by the witnesses. Now it is clear that a will may be well executed and attested, though both the testator and the witnesses are *markmen*; and if the mark of a person is a good signature or subscription by him, much more do his initials answer that requirement. Many persons never sign more than the initials of their Christian name; but if "A. W.'s" position were right, a signature thus written would, by parity of reasoning, be insufficient. On the whole, I submit that no doubt can exist as to the sufficiency of an alteration verified by the initials merely of the testator and witnesses. These witnesses must, of course, be the same as attested the will; and the Courts would probably require an affidavit of their identity, of which the correspondence of initial may perhaps be hardly considered sufficient evidence.

I am, Sir, yours, &c.

L.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Your correspondent "A. W." in an able letter on the subject of the attestation of alterations in wills, which appeared in your last number, observes, incidentally, that "the provisions of the 9th section of the Wills Act, as interpreted by the decisions, require the signature of the testator and the two subscribing witnesses to be made in the joint presence of all three."

Would your correspondent have the kindness to refer me to the decisions in question, as they have, through inadvertence, escaped my notice?

I am, Sir, yours, &c.

D. M.

Would not the following, from Cruise's Digest, be as applicable to a will as to a deed? "An interlineation, if nothing appear to the contrary, will be presumed to have been made at the time when the deed was executed, and not after. (*Troxell v. Castle*, 1 Keb. 22.) And it has also been held that an interlineation by which a power of sale was enlarged should be presumed to have been made at the time of the execution of the deed, and not after, if nothing appear to the contrary. (*Fitzgerald v. Fraucenberg*, Fitzgib. 204.)"

A.

#### Queries.

#### STAMPS.

A. CONTRACTS to sell to B. an estate, partly freehold and partly copyhold, for 350*l.* In the freehold conveyance the purchase-money is apportioned, 140*l.* for the freehold part, and 210*l.* for the copyhold. Two mortgages join in the conveyance, one of whom is in consideration of 220*l.* surrenders a term of 1,000 years, and the other, in consideration of 100*l.* (part of a larger sum extending to other property) releases, and the vendor, in consideration of 30*l.* grants, &c. The conveyance is impressed with a 1*l.* 10*s.* *ad valorem* stamp, and a 1*l.* lease for a year. Is this deed properly stamped?

B.

**OPERATIONS OF THE INCUMBERED ESTATES COMMISSION.**—On Saturday a Parliamentary paper was printed, by order of the House of Lords, showing the working of the Incumbered Estates Commission

in Ireland. The total number of petitions filed to the 30th ult. was 1,803. The number of petitions flatted in regular course was 1,367, and the total number of petitions unfatted was 242. The date of the earliest unfatted petition was the 15th of November last. The number of petitions flatted upon special application, which were filed since the 15th of November, was 194.

## COUNTY COURTS.

### Summary.

An abstract of the important measure for giving an Equity jurisdiction to the County Courts will probably interest our readers.

After reciting that it is expedient to extend the jurisdiction of the County Courts to certain matters cognizable in the Court of Chancery, and to give to the Commissioners of Bankrupt in London jurisdiction in the like cases, it provides that any person "seeking equitable relief may enter a claim against any person from whom such relief is sought, either with the clerk of the court for the district within which such last-mentioned person resides, or in any other of such courts, by leave of the judge, in any case where the party so seeking relief is or claims to be.

1. A creditor on the estate of any such deceased person, such creditor seeking payment of his debt out of the deceased's personal assets:

2. A legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy out of such deceased person's personal assets:

3. A residuary legatee, or one of the residuary legatees, of any such deceased person, seeking an account of the residue, and payment or appropriation of his share thereon:

4. The person or any of the persons entitled to the personal estate of any such person who may have died intestate, and seeking an account of such personal estate, and payment of his share thereof:

5. An executor or administrator of any such deceased person, seeking to have the personal estate of such deceased person administered, under the directions of the judge of the Court for the district within which he resides:

6. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account:

7. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting a suit for his own sole benefit:

8. A person entitled to have a new trustee appointed, in a case where there is no power in the instrument creating the trust to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

Provisions are then made for the service of claims and writs of summons according to forms given in the schedule, and the defendant is to appear within ten days, and the following are to be the proceedings upon appearance:—

VI. At the time for shewing cause named in the writ the defendant shall appear, and shew cause, if he can (and, if necessary, by affidavit), why such relief as is claimed by the plaintiff should not be had against him; and each party may, upon giving six days' notice in writing prior to such hearing of his intention so to do, examine the other party upon the matters relating to such claim, and the judge shall take down in writing such examination; and the judge, on hearing the claim, and what the plaintiff alleges in support thereof, and such other evidence, whether oral or written, or by affidavit, as he may produce in that behalf, and what may be alleged on the part of the defendant, or on an affidavit of the writ of summons being duly served, may, if he shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made (such accounts or inquiries to be taken or made before the judge, if he deem such course proper or expedient, or before the clerk of such court, at days or times to be appointed by him for that purpose), or may direct such other proceedings to be had, for the purpose of ascertaining the plaintiff's title to the relief claimed, or make such other order as, according to the nature and circumstances of the case, shall seem to be just and proper; and further, the judge may direct such persons, or classes of persons, as he shall think necessary or fit, to be summoned or ordered to appear as parties to such claim, or on any proceedings with reference to any accounts or inquiries directed to be taken or made, or otherwise; and all oral evidence given by any person before such judge relating to such claim shall be upon the oath of the person giving the same, and which oath such judge shall have power to administer.

Other sections provide for the enforcement and form of orders, empower the judge to order the

production of documents and the taking of accounts. Either party may appeal against an order of the judge to the Lord Chancellor. Claims may be removed on summary application to the Superior Courts of Equity, and the Lord Chancellor, with the Master of the Rolls, or one of the Vice-Chancellors, may make rules for regulating the practice and proceedings, and the amount of costs and fees to be paid in respect of them.

### ILLEGAL FEES.

MR. WILDING presents his compliments to the editor of the LAW TIMES, and begs to enclose a copy of a communication which he has received from the Lords of the Treasury, in reply to a letter addressed by him to their lordships, complaining of the exaction by the officers of the Oswestry County Court of an "admission fee" of five shillings, previously to his being permitted to appear as an advocate at the sitting of that Court in April last.

Shrewsbury, June 17, 1851.

(Copy.)

"Treasury Chambers, June 11. 1851.  
"SIR,—I am commanded by the Lords Commissioners of her Majesty's Treasury to state to you, in reply to your communication of the 28th of April, that the Attorney and Solicitor General have been consulted upon the case brought by you under their lordships' notice, and the law officers have expressed their opinion that the exaction of the fee, to which you objected, by the clerk of the Oswestry County Court, was illegal.

"This opinion their lordships will communicate to the judge of the Oswestry Court.

"I am, Sir, your obedient servant,  
(Signed) "G. CORNWALL LEWIS.  
"W. Wilding, Esq. Solicitor, Shrewsbury."

THE CHARGE AGAINST THE JUDGE OF THE LIVERPOOL COUNTY COURT.—On Wednesday the Chancellor of the Duchy of Lancaster held another court to hear evidence in this matter, when a number of witnesses were heard in Mr. Ramahy's behalf, and the court was again adjourned.

## THE LAWYER.

### Summary.

EQUITY PRACTICE.—In *Benyon v. Nettelfold*, 17 Law T. 149, the Lord Chancellor laid down this principle as to the right to a bill of discovery. "When a defendant is sued at law, and has a good defence founded on the illegal nature of the contract, he has a right to a discovery to establish that defence, unless there are special circumstances of exemption." It was therefore allowed in a case where its object was to shew that the consideration of an annuity deed was a prospective illicit cohabitation.

In *re Massell*, 17 Law T. 150, the Court declined to make an order under the *Trustee Act*, for distribution of a fund representing a testator's residuary estate, subject to two legacies, which had been paid into Court by the executors.

COMMON LAW.—A point in evidence was raised in *Doe dem. Lord Ashburnham v. Michael*, 17 Law T. 154, which was an action of ejectment by a landlord against a tenant. A. was steward, but for several years before 1795 the entries were signed "A. jun." and they all referred to this entry in 1795; "the above account this day settled, and the balance due thereon to A. sen. was paid by Lord A. (the landlord) to A. jun." That entry was signed by Lord A. and A. jun. The entries signed by A. jun. were held to be admissible without proof of his death, for he "does acknowledge by the entry that he has received money for which he is accountable;" and after so long a lapse of time his death may be presumed.

It will be seen in *Levien v. Heathwaite*, 17 Law T. 156, what an affidavit in support of a rule to enlarge a peremptory undertaking ought and ought not to contain.

A curious case on the liability of the owners of dangerous animals for damage done by them, was that of *Hudson v. Roberts*, 17 Law T. 158. The defendant's bull was being driven along the highway; as plaintiff was passing he pulled out an arched handkerchief, which enraged the bull, who attacked and injured him. It was sought to prove that the defendant knew that the bull was dangerous, by a conversation in which he had said that "the bull would run at anything red—a bull would run at any thing red." It was contended that this referred to the well-known tendency of bulls in general, and not to any special ferocity of the bull.

But the Court held it to be evidence for the jury of a *scienter*.

It appears from *Re Shaw and Another*, 17 Law T. 160, that an arbitrator may by consent of parties be chosen by lot, although an umpire may not be. It was also held to be no objection that the arbitrator did not take the evidence on oath, the terms of submission not directing it to be so taken.

The case of *Re Gedye*, 17 Law T. 149, is an extremely interesting one to practitioners, as relating to a matter in which they are all concerned—the taxation of costs,—and it should be carefully noted in the valuable chapter on *bills of costs* in *Pulling's Law of Attorneys*. The points decided are fully stated in the head-note. Five unsigned bills had been delivered, and the client applied to have them taxed. It was laid down by the Master of the Rolls that "the solicitor who delivers an unsigned bill shall not take advantage of this defect; that he cannot deliver an unsigned bill and take the chance of its being paid, and then if the client requires it to be taxed, say 'this bill is a mere nullity, and I will now deliver you the real bill of costs.'" It is otherwise with the client. He has a right to take it either "as a nullity, or as a bill delivered under the authority of the statute." But then the client is "not entitled to treat the bill first in one way, then in another, if the first does not suit his purpose; he cannot, for instance, first treat it as a duly signed bill, and then if he finds that it does not answer his purpose treat it as a nullity." If the client obtains an order of course for taxation of an unsigned bill, he thereby elects to treat it as a bill delivered under the authority of the statute.

In the same case another interesting point was determined. The client was himself a solicitor, and assisted in conducting his own business under terms of agreement with the actual solicitor in the cause, and aided him generally in that particular department of his business. It was held that he could not throw upon the actual solicitor the consequences of a mistake made by himself with respect to the practice.

## THE MERCANTILE LAWYER.

### Summary.

It is a question of great delicacy, what constitutes a partnership; as a general rule, a participation in profit is the test, for he who shares the benefit is held liable to share the losses. But the following was held *not* to create a partnership. In *Jones v. Whitbread*, 17 Law T. 155, a trader had assigned his estate to trustees for the benefit of creditors, empowering them to employ him in winding up his affairs, and in carrying on his trade, which was that of a publican. It was contended that this clause made the creditors partners; but the Court of C. P. held otherwise, considering it as in fact a clause for winding-up, and not for continuing the business.

In *Drew v. Collins*, 17 Law T. 158, a deed of arrangement under sec. 224 of the Bankruptcy Consolidation Act between a trader and six-sevenths in number and value of his creditors, by which they agreed to accept a composition of 6s. 8d. in the pound within one month from the date thereof, was held *not* to be within the provisions of the Act, which contemplates nothing less than the entire distribution of the estate.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

WHITEHALL, JUNE 11.—The Lord Chancellor has appointed Robert Clitherow, of Horncastle, in the county of Lincoln, gent. to be a Master Extraordinary in the High Court of Chancery.

The Lord Chancellor has appointed Robert Coster Dryland, of Speenhamland, in the county of Berks, gent. to be a Master Extraordinary in the High Court of Chancery.

MIDDLE TEMPLE.—A further call to the Bar of students of this Society was made on Saturday evening last, and they comprised the following gentlemen:—Louis Antoine Alfred Koenig, esq. and William Hemings, esq.

**INNER TEMPLE.**—A further call to the bar of students of the Honourable Society of the Inner Temple has been made, and they were sworn in on Tuesday evening, in the Hall:—Edward Pakenham Alderson, of Balliol College, Oxford, B.A.; George Slater, of Balliol College, Oxford, B.A.; Robert John Sandiford Farrar, Esq.; and Wm. Gill, Esq.

**GRAY'S INN,** June 16.—At a pension of the Honourable Society of Gray's Inn, holden this day, Jackson Gillbanks, esq. LL.B. and B.A. was called to the degree of Barrister-at-Law.

## COURT PAPERS.

### Judicial Committee of the Privy Council

Appellants.	Respondents.	Whence.
Lomi .....	Ashwell .....	Prerogative Court
Rawut Urjun Sing .....	Rawut Ghunaiam .....	Bengal
Wallace .....	Sing .....	High Court of Admiralty
Kasapche .....	Fielding .....	High Court of Admiralty
Dukensoonde Dabee .....	Smith .....	High Court of Admiralty
Bennett .....	Rasmunee Dosee .....	Bengal
Pollok .....	Free .....	Prerogative Court
Colonial Bank .....	M'Alpine .....	High Court of Admiralty
Casero .....	Cazabon .....	Trinidad
Wilkinson .....	Frosdie .....	High Court of Admiralty
Nawab Amin ood Dow .....	Wilson .....	High Court of Admiralty
lah .....	Synd Roshan Khan .....	All Bengal
Whyddon and Chase .....	Billinghurst .....	Prerogative Court
Lant .....	Burnett .....	High Court of Admiralty
Burns .....	Finney .....	High Court of Admiralty
Herring .....	Herring .....	Arches Court
Somes .....	Macbride .....	High Court of Admiralty
East India Company .....	Nathumbadoo Vee .....	Madras.
	rasurny Moodelly .....	

### Rolls Court.

#### Sittings after Trinity Term.

##### AT THE ROLLS.

Tuesday .. June 24 ..	Motions
Wednesday .. 25 ..	
Thursday .. 26 ..	
Friday .. 27 ..	
Saturday .. 28 ..	
Monday .. 29 ..	
Tuesday .. July 1 ..	
Wednesday .. 2 ..	
Thursday .. 3 ..	Motions
Friday .. 4 ..	
Saturday .. 5 ..	
Monday .. 6 ..	
Tuesday .. 7 ..	
Wednesday .. 8 ..	
Thursday .. 9 ..	
Friday .. 10 ..	
Saturday .. 11 ..	
Monday .. 12 ..	
Tuesday .. 13 ..	
Wednesday .. 14 ..	
Thursday .. 15 ..	
Friday .. 16 ..	
Saturday .. 17 ..	
Monday .. 18 ..	
Tuesday .. 19 ..	
Wednesday .. 20 ..	
Thursday .. 21 ..	
Friday .. 22 ..	
Saturday .. 23 ..	
Monday .. 24 ..	
Tuesday .. 25 ..	
Wednesday .. 26 ..	
Thursday .. 27 ..	
Friday .. 28 ..	
Saturday .. 29 ..	
Monday .. 30 ..	
Tuesday .. 31 ..	
Wednesday .. 1 ..	
Thursday .. 2 ..	
Friday .. 3 ..	
Saturday .. 4 ..	
Monday .. 5 ..	
Tuesday .. 6 ..	
Wednesday .. 7 ..	
Thursday .. 8 ..	
Friday .. 9 ..	

Short causes, consent causes, unopposed petitions, and short claims, every Saturday at the sitting of the Court.

**NOTICE.**—Consent petitions must be presented, and copies left with the secretary, on or before the Thursday preceding the Saturday on which it is intended they should be heard.

The Court will rise for the Vacation on Friday, the 8th of August.

### Court of Queen's Bench.

#### List of Middlesex Special Jury Causes for the Sittings after Trinity Term.

Collinson v. Westoby .....	Murray v. Routledge .....
Wolton v. Freese .....	Same v. Same .....
Westmacott v. Flint .....	Ingila v. East India Comp. .....
Lane v. Macqueen .....	Appleman v. Marshand .....
Roberts v. Taylor and Ora .....	Florence v. Lawson .....
	Lenton v. Booth .....

**Monday, June 23.**  
 Milner, exor. v. Harrison ..... Kean v. Stewart ..... || Edwards and Anor. v. Florence ..... | Reg. v. Gomperts and Anor. ..... |
Byland v. Agricultural Insurance Company .....	Doe dem. Stunt v. London and North-Western Railway Company .....
Flatow v. Friedericks .....	Drummond v. Tillinghurst .....
Laycock v. Wilson .....	Smith v. Larchin .....
Beales v. Young .....	Hopkinson v. De Blaquiere .....
Clark v. Vries .....	Allan v. Wilson .....
	Mason v. Moore .....

The adjournment day in London is fixed for Monday, June 30.

### Court of Common Bench.

#### Middlesex Special Jury Appointments.

Stead v. Williams .....	Newham v. Stevenson and Another .....
Burke v. Parkgate, &c. Railway Company .....	Doe dem. Goodwin v. Joyce .....
Hancock v. Somerville and Another .....	Dalby v. India and London Life Assurance Company .....
Bathurst v. Murray .....	Kuhn and Wife v. Stackpoole .....
Collman v. R. C. Foster .....	Devenage v. Borthwick .....
Higginson v. Commissioners of Admiralty .....	Brogden v. Smith and Anor. .....
Sleigh v. Warren .....	Clossman v. Bluck .....
Boyes v. Bluck .....	Coffee v. Barnard .....
Hopper v. Smith .....	Bluck v. Clossman & Boys .....
Pritchard, extr. v. Bagshaw and Others .....	Parker v. Bristol and Exeter Railway .....
Pochin v. Gooday .....	Russell v. Mackenzie .....
	Horlock v. Theaker and Others .....

### Exchequer of Pleas.

The Court will sit in Banco on Saturday, June 21, and every succeeding day up to and including Tuesday, July 1, and also on Thursday, July 10.

Sittings at Nisi Prius in Middlesex and London, before the Right Hon. Sir FREDERICK POLLOCK, after Trinity Term, 1861.

Wednesd. June 18 ..	Common Juries
Thursday .. 19 ..	
Friday .. 20 ..	
Saturday .. 21 ..	
Monday .. 22 ..	
Tuesday .. 23 ..	
Wednesday .. 24 ..	Inland Revenue and Common Juries
Thursday .. 25 ..	Common Juries
Friday .. 26 ..	
Saturday .. 27 ..	
Monday .. 28 ..	
Tuesday .. 29 ..	
Wednesday .. 30 ..	
Thursday .. 31 ..	
Friday .. 1 ..	
Saturday .. 2 ..	
Monday .. 3 ..	
Tuesday .. 4 ..	
Wednesday .. 5 ..	
Thursday .. 6 ..	
Friday .. 7 ..	
Saturday .. 8 ..	

Monday .. July 7 ..	Adjournment day, Common Juries
Tuesday .. 8 ..	
Wednesday .. 9 ..	
Thursday .. 10 ..	
Friday .. 11 ..	
Saturday .. 12 ..	
Monday .. 13 ..	
Tuesday .. 14 ..	
Wednesday .. 15 ..	
Thursday .. 16 ..	
Friday .. 17 ..	
Saturday .. 18 ..	

The Court will sit at Ten o'clock.

### SUMMER CIRCUITS OF THE JUDGES.

**WESTERN CIRCUIT.**  
 Judges.—Right Hon. Lord Campbell, Lord Chief Justice of the Q. B. and the Hon. Mr. Justice Coleridge.  
 Wiltshire—Monday, July 14, at Devizes.  
 County of Southampton—Thursday, July 17, at the Castle at Winchester.  
 Dorsetshire—Wednesday, July 23, at Dorchester.  
 Devonshire—Saturday, July 26, at the Castle at Exeter.  
 City of Exeter—Saturday, July 26, at the Guildhall of the City of Exeter.  
 Cornwall—Saturday, August 2, at Bodmin.  
 Somersetshire—Thursday, August 7, at Bridgewater.  
 City of Bristol—The day for holding the assize for the city and county, which takes place in the summer only, has not been finally determined upon.

**NORTHERN CIRCUIT.**  
 Judges.—The Hon. Mr. Baron Platt and the Hon. Mr. Justice Williams.  
 Yorkshire—Saturday, July 12, at the Castle of York.  
 City of York—The same day, at the Guildhall of the City.  
 Durham—Saturday, July 26, at Durham.  
 Northumberland—Thursday, July 31, at Newcastle-on-Tyne.  
 Town of Newcastle—The same day, at the same place.  
 Cumberland—Monday, August 4, at Carlisle.  
 Westmoreland—Thursday, August 7, at Appleby.  
 Lancashire (northern division)—Saturday, August 9, at the Castle, at Lancaster.  
 South Division—Wednesday, August 13, at Liverpool.

**MIDLAND CIRCUIT.**  
 Judges.—Mr. Baron Parkes and Mr. Justice Maule.  
 Rutlandshire—Wednesday, July 18, at Oakham.  
 Northamptonshire—The same day, at Northampton.  
 Lincolnshire—Saturday, July 19, at the Castle, Lincoln.  
 City of Lincoln—The same day at the same place.  
 Nottinghamshire—Wednesday, July 23, at Nottingham.  
 Town of Nottingham—The same day and place.  
 Derbyshire—Friday, July 25, at Derby.  
 Leicestershire—Tuesday, July 29, at Leicester.  
 Borough of Leicester—The same day and same place.  
 Warwickshire—Coventry Division—Friday, August 1, at Coventry.

Warwick Division—Saturday, August 2, at the Castle, Warwick.

**SOUTH WALES AND CHESTER CIRCUIT.**  
 Judge—Hon. Mr. Justice Talfourd.  
 Glamorganshire—Saturday, July 12, at Cardiff.  
 Carmarthenshire—Saturday, July 19, at Carmarthen.  
 Pembrokeshire—Friday, July 25, at Haverfordwest.  
 Town of Haverfordwest—The same day and place.  
 Cardiganshire—Wednesday, July 30, at Cardigan.  
 Brecknockshire—Saturday, August 3, at Brecon.  
 Radnorshire—Thursday, August 1, at Prestegyn.  
 Cheshire—Saturday, August 2, at the Castle of Chester.  
 Chester—The same day, at the Guildhall of Chester.

**HOME CIRCUIT.**  
 Hertford, July 6; Chelmsford, July 21; Maidstone, July 28; Lewes, August 4; Croydon, August 7.

### SHERIFFS' COURT.

**PROCLAMATION OF OUTLAWRY.**—At this Court on Thursday the following were called upon to surrender under penalty of outlawry:—Ulick Canning De Burgh, commonly called Lord Dunkellin, at the suit of Frederick J. Henry Temple; Bernard Gregory, at the suit of Isabella Ann Meares; Sir Wyndham Carmichael Anstruther, bart. at the suit of W. K. Hedges and another, W. Whitmore and another, and John Alexander Silk; Isaac Barrow, at the suit of George Drayson; Duncan Davidson Alves, at the suit of Thomas Spencer; Frederick William Fryer, at the suit of F. Beasley; Watkin Williams Martin, at the suit of Edward Bernard; George F. Sydenham, at the suit of Morris Mayers; Bernard Brocas, at the suit of Edward Edwards; William Wilcox Sleigh, at the suit of Daniel Davies and others; Stephen Temple, at the suit of John Dirk Vanderpant; Reuben Terwest, at the suit of Carlo Butler Cony; Catherine Morrison, at the suit of Joseph Wilkinson; Hector Hanvest, at the suit of Samuel Cathcart and Louisa his wife; John Edmunds, at the suit of Francis Brown; Howell Jones Phillips, at the suit of Anthony Hodgkins; Henry J. Noyes, at the suit of Lewis Harris; Everard St. John Midmay, at the suit of Charles T. Pratt and another; W. S. Porter, at the suit of John Henry Taylor; John Potter M'Queen (sued with another), at the suit of Joseph Joel; Winfield Attenborough, at the suit of R. K. Lane; William Wodehouse, at the suit of James King; and Henry William Marriott, at the suit of Frederick Augustus Davis.

### PROCEEDINGS OF LAW SOCIETIES.

#### METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

The committee of management held their usual monthly meeting on Wednesday, the 11th inst.; Mr. C. J. PALMER in the chair.

A case of alleged malpractice on the part of a member was further considered, and adjourned.

A case of alleged malpractice, communicated by a member, was considered, but it did not appear to be one in which the committee could effectively interfere.

Mr. S. B. Jackman, of Ipswich, and Mr. J. Sparke, of Bury St. Edmunds, the honorary secretaries of the eastern and western divisions of the Suffolk Law Society, were nominated as members of the managing committee.

Correspondence was read on the subject of the Registration of Assurances Bill, forwarding copy petitions presented against the Bill by the attorneys and solicitors of Bury St. Edmunds, and by those of Worcester; also resolutions passed at a meeting of the attorneys and solicitors of Lincolnshire.

Letters were read from members, expressing satisfaction at the last annual report.

It was reported from the Equity Committee, that a Bill had been prepared under their superintendence, to effect further reductions in, and improve the regulations of, the Chancery fees; and that it had been placed in the hands of the Master of the Rolls.

It was reported from the Common Law Committee that Mr. Mullings had consented to move for a return of all the court fees taken during the year 1850, in the Courts of Law and Equity at Westminster, shewing the detail of their collection and expenditure, in order to shew the changes which have taken place since the return for the year 1846, which is contained in the Appendix to the Report of the Select Committee (1849) on Fees in the Courts of Law and Equity.

The secretary was instructed to take the necessary steps to remove the business of the Association to their new offices at No. 8, Bedford-row.

It was resolved, in order to give the members of the Association and the Profession generally, greater knowledge of the operations of the Association, to communicate to the LAW TIMES and Legal Observer an abstract of the proceedings of the committee, to be settled by the chairman of each meeting. (Signed),

WILLIAM SHAKN, Secretary.  
 10, Lincoln's-Inn Fields.



## LAW STUDENTS' DEBATING SOCIETY.

## QUESTIONS FOR DISCUSSION.

Tuesday, June 24, 1851.

53. A. in 1800, sinks a well in his land. B. in 1850, by mining in his own land diverts the underground springs which supply A.'s well, which is consequently dried up. Can A. maintain an action against B. for the loss? (*Action v. Blundell*, 12 M. & W. 324.)

XLV. Would the repeal of the attorney's certificate duty benefit the Profession?

## LEGAL INTELLIGENCE.

**ARREARS IN THE COURT OF CHANCERY.**—According to a late return, the arrears in the Court of Chancery at Hilary Term last numbered 983 appeals, demurrers, causes, further directions, and claims.

**COURT OF QUEEN'S BENCH, WESTMINSTER, JUNE 17.**—**OBSTRUCTION IN THE APPROACHES TO THE COURT.**—Lord Campbell said he had the satisfaction of stating that the person who was in fault in closing the door of Westminster-hall on Saturday last had appeared and begged pardon for his misconduct. The party in question was a messenger appointed by her Majesty's Woods and Forests to the care of the Hall, and as this was the first time in his life that such an omission had occurred, the Court would on this occasion overlook it; but it must be understood in future that Westminster-hall was the great hall of pleas at Westminster to which suitors had a right of free admission, and that any person obstructing the free access of the public would be guilty of a contempt of this Court, and liable to be punished.

**COURT OF QUEEN'S BENCH.—BUSINESS OF THE COURT.**—It has been usual for the Court to hold sittings *in banco* after term, to dispose of the arrears in the several papers. These sittings have generally continued for about a fortnight, but on this occasion, there being no such arrears, the Court will not sit *in banco* again till next Michaelmas Term. This state of things, which is unprecedented within our recollection, has been brought about partly by a decrease of business of the least important class, in consequence of the establishment of the County Courts, but still more by the increased reluctance of the Court to grant rules for new trials, and the mode in which, in other respects, the business has been conducted, to which it would be presumptuous in us more particularly to allude. The state of business in the Court is as follows:—

New trial paper.....	Cleared.
Special paper.....	Cleared.
Crown paper.....	Two or three cases stand over.
Enlarged rule paper..	One rule enlarged at the request of the parties.

## BIRTHS, MARRIAGES, AND DEATHS.

## BIRTHS.

**BEECHING.**—On the 12th inst. at Tunbridge-wells, the wife of A. J. Beeching, esq. of a daughter.

**STEVANSON.**—On the 18th inst. at Holloway, the wife of John Stevenson, esq. solicitor, of a daughter.

## MARRIAGES.

**CHATELAIN.** A. G. solicitor, to Julie, only daughter of Félix Desvieux, M.D. of Rouen, on the 10th inst. at St. Séverin Church, Paris.

**DOUGLAS.** Clement Alexander, youngest son of the late William Douglas, esq. W. S. Edinburgh, to Eliza Harriet, second daughter of George Blakiston Robinson, esq. of 4, Grove-place, Hackney, on the 14th inst. at St. John's, Hackney.

**CRAIGIE.** John, esq. advocate, to Frances Annabella Moreton, eldest daughter of the late Rev. William Moreton Moreton, of Moreton-hall, Cheshire, on the 13th inst. at St. Paul's Chapel, Edinburgh.

**FORB.** Richard, esq. to Mary, only sister of Sir William Molesworth, Bart. M.P. on the 12th inst. at St. George's, Hanover-square.

**KNIGHT.** Rev. Thomas, incumbent of St. Mary's, Portsmouth, to Dora, eldest daughter of G. C. Stigant, esq. solicitor, Portsmouth, on the 11th inst. at St. Thomas's Church, Portsmouth.

**MANNERS.** Lord John, M.P. second son of the Duke of Rutland, to Catherine Louise Georgina, only daughter of the late Lieutenant-Colonel Marley, C.B. and granddaughter of the late Catherine Maria, Countess Dowager of Charleville, on the 10th inst. at All Souls', Langham-place.

**STACE.** Walter S. esq. Lieutenant, corps of Royal Engineers, youngest son of the late William Stace, esq. formerly Chief Commissary of the Ordnance, J. P. and D. L. for the county of Kent, to Jane Matilda, eldest daughter of Captain Sir Thomas Sabine Pasley, bart. Royal Navy, superintendent of Pembroke Dockyard, on the 16th inst. at St. John's, Pembroke Dock.

## DEATHS.

**ACLAND.** Mary, the wife of Thomas Dyke Acland, esq. eldest son of Sir T. D. Acland, of Kilkerton, bart. and daughter of the late Sir Charles Mordaunt, of Walton, bart. on the 11th inst. at Tetton, near Taunton, aged 39.

**BARNARD.** Edward George, esq. M.P. on the 14th inst. suddenly, at Gosfield-hall, Essex, aged 73.

**HADGER.** Robert, esq. a magistrate and deputy-lieutenant of the county of Surrey, many years chairman of the

Adjourned Sessions, on the 7th inst. at Brussels, aged 65.

**MAITLAND.** Thomas, esq. of Dun Drennan, one of the senators of the College of Justice, on the 10th inst. at Edinburgh, aged 51.

**MELVILLE.** the Right Hon. Viscount, on the 10th inst. at Melville Castle.

**TRENTANT.** George, esq. of the Inner Temple, Barrister, on the 12th inst. at Vichy, France, aged 41.

## NOTICES OF NEW LAW BOOKS.

*The Registration of Deeds in England; its past Progress and present Position, &c.* By WILLIAM HAZLITT, Esq. Barrister-at-Law. London: Stevens and Norton.

This pamphlet presents a very concise but intelligible sketch of the facts and arguments by which the principle of Registration of Assurances is established, with a careful analysis of the Bill of Lord CAMPBELL. We regret much that we have not space just now to present to our readers some of the curious and interesting particulars which Mr. HAZLITT has collected, but as the pamphlet is short and inexpensive, it will probably be read with interest by those who concern themselves upon the question. Mr. HAZLITT does not advance any opinion upon the specific measure now before Parliament; his object is strictly limited to stating the reasons which have induced the Legislature unanimously to affirm the principle of Registration, and those who may yet feel doubts about it can scarcely fail to have them removed by a perusal of these few pages.

But still the practical difficulty remains—how may an object in itself so desirable be accomplished without evils as great as those it is intended to remove? How is Registration to be framed so as to meet the essential conditions of accessibility and cheapness, without which it would be a nuisance instead of a benefit? There is the problem which yet remains to be solved, for we have seen no plan as yet that secures these conditions. Certainly Lord CAMPBELL's Bill does not.

We may possibly return to this pamphlet when the reports less crowd upon us. The subject will keep, for there is little chance of the Bill passing this year.

## Medical Combination against Life Insurance Companies. London: Orr and Co.

A CANDID review of the question that has been raised between the insurance offices and the medical profession with respect to the payment of fees for reporting upon the state of health of their patients; the former contending that, as it is done for the benefit of the patient, the fee, if any, should be paid by him; the latter insisting upon being paid by the offices.

This is not the case of the medical referees appointed by the companies, but of the medical attendant, who acts solely for the patient, to enable him to give a report of himself. The company's referee is paid by his employers, of course.

The writer of this pamphlet, who is master of the subject, clearly and calmly points out the difference between the duties of the two, and, consequently, the difference of their claims.

It is also a question for the public, for, if the offices are burdened with this charge, it falls, of course, upon the funds; that is to say, it diminishes the profits to be divided among the assured.

We recommend all who take an interest in the subject of assurance to peruse this pamphlet.

## JOURNAL OF PROPERTY.

## MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock.....	211½	211½	211½	211½	211½	211½
3½ Cent. Reduced Annuities	97½	97½	97½	97½	97½	97½
3½ Cent. Consols Annuities	98½	98½	98½	98½	98½	98½
Consols for Account.....	106½	106½	106½	106½	106½	106½
New 3½ Cent. Consols.....	98½	98½	98½	98½	98½	98½
Long Annu. (exp. Jan. 5, 1860)	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1859)	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Jan. 5, 1860)	shut	shut	shut	shut	shut	shut
India Stock.....	265½	265½	265½	265½	265½	265½
India Bonds (1,000£).....	55	54	54	54	54	54
Do. do. (under 1,000£).....	55	54	54	54	54	54
South Sea Stock.....	55	54	54	54	54	54
Do. do. New Annuities.....	41½	41½	41½	41½	41½	41½
Exchequer Bills, 1,000£.....	41½	41½	41½	41½	41½	41½
Do. do. 500£.....	41½	41½	41½	41½	41½	41½
Do. do. Small.....	40½	40½	40½	40½	40½	40½
Do. Advertised.....	41½	41½	41½	41½	41½	41½

\* Premium. † Ex. div. ‡ For opening. § For acont.

## THE GAZETTES.

## Bankrupts.

Gazette, June 17.

**COMMON, MICHAEL,** draper, North Shields, Northumberland, June 24, at eleven, and Aug. 5, at twelve, Newcastle-upon-Tyne. Off. as Wakley. Sols. Bell and Co. Bow Church-yard; and Messrs. Chater, Newcastle-upon-Tyne. Petition, June 4.

**DRON, THOMAS,** iron merchant, Bradford, Yorkshire, July 4 and Aug. 7, at eleven, Leeds. Off. as Young. Sols. Terry and Watson, Bradford; and Bond and Barwick, Leeds. Petition, June 5.

**EDWARDS, WILLIAM HENRY,** hosier, Leeds, July 1 and 23, at eleven, Leeds. Off. as Hope. Sols. Marsden, Friday-st. Cheap-side; and Richardson and Gaunt, Leeds. Petition, June 5.

**ISHENWOOD, SAMUEL WILLIAMSON,** woollen draper, Kingston-upon-Hull, July 23 and 25, at half-past twelve, Kingston-upon-Hull. Off. as Carrick. Sols. Wells and Co. Hull. Petition, June 10.

**MILLS, HENRY,** glover, Lynn, Norfolk, June 26, at twelve, Aug. 1, at eleven, Basinghall-st. Off. as Canna. Sols. Read and Co. Friday-st. Cheap-side. Petition, June 6.

**PHILLIPS, THOMAS GEORGE,** grocer, Newport, Monmouthshire, June 30 and July 28, at eleven, Bristol. Off. as Acraman. Sols. Lawrance and Co. Old Jewry-chambers; and Bevan, Bristol. Petition, June 7.

Gazette, June 20.

**BARTLETT, JOHN,** wine merchant, 7, Upper Thames-st. June 26 and Aug. 7, at eleven, Basinghall-st. Com. Evans. Off. as Bell. Sols. Keightley, Cunliffe, and Beaumont, 43, Chancery-lane. Petition, June 13.

**COLLINS, CHARLES,** carpet manufacturer, Wribbenhall, Kidderminster, Worcestershire, and 18, Aldermanbury, July 3 and 31, at twelve, Birmingham. Com. Daniell. Off. as Christie. Sols. Brinton, Kidderminster; and Reece, Truro-chambers, New-st. Birmingham. Petition, June 19.

**FITCH, THOMAS,** commission agent, 7, Chester-place, Kennington, July 1, at half-past two, and Aug. 5, at eleven, Basinghall-st. Com. Holroyd. Off. as Edwards. Sols. Medox and Wyatt, 30, Clement's-lane, Lombard-st. Petition, June 18.

**HUNT, JOHN,** draper, Edgeware-road, July 3, at half-past eleven, July 31, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Hardwick, Davidson, and Bradbury, Weavers'-hall, Basinghall-st.; and Ashurst and Son, Old Jewry. Petition, June 18.

**MILLS, THOMAS,** quarry master and builder, Painswick, Gloucestershire, July 4 and August 4, at twelve, Bristol. Com. Stephen. Off. as Miller. Sols. St. Patrick, Worcester; and Short and Strickland, Bristol. Petition, May 27.

**WILSON, WILLIAM,** linendraper, St. James's Barton, Bristol, July 4 and August 4, at eleven, Bristol. Com. Stephen. Off. as Hutton. Sols. W. L. and C. Clarke, Bristol. Petition, June 17.

**WHITFIELD, JOHN,** and GEORGE JAMES, cheesemongers, poulterers, and porkmen, Lamb's Conduit-st. July 4, at one, and Aug. 1, at twelve, Basinghall-st. Com. Fonblanque. Off. as Graham. Sols. Richardson and Sadler, 28, Golden-square. Petition, June 14.

**WHITMORE, JOHN PASCOE,** draper, Hackney, June 28 and Aug. 3, at eleven, Basinghall-st. Com. Goulburn. Off. as Nicholson. Sols. Marlon and Pritchard, Newgate-st. Petition, June 12.

## BANKRUPTCIES ANNULLED.

Gazette, June 17.

**GASLEY, W. C.** builder, Torriano-villas, Kentish-town, June 13.

Gazette, June 20.

**LOWES, C.** innkeeper, Chippenham, Wilts, June 17.

## Dividends.

## BANKRUPT ESTATES.

Official Assignees assign, to whom apply for the Dividends.

**Abbott, P. H.** merchant, first, 3d. Pennell, London.—*Adams and Banks*, cattle salesmen, second sep. of T. Bird, 2s. 3d. Bird, Liverpool.—*Adams*, T. partner of the Liverpool Asphalt Company, first, 4s. Bird, Liverpool.—*Bennett, J.* artists' brush manufacturers, first, 2d. Groom, London.—*Blake, G.* and *J. soap* boilers, first, 1s. 11d. Bird, Liverpool.—*Chamson, H.* haberdasher, first, 10d. Pennell, London.—*Chell, J.* oil and colourman, first, 4s. Pott, Manchester.—*Clare, G. A.* house decorator, first, 1s. 11d. Graham, London.—*Clarke and Tod*, merchants, third, 3d. Bird, Liverpool.—*Croome, J.* engineer, 2s. Hutton, Bristol.—*Dalby, T.* builder, first, 4d. Graham, London.—*Edwards, J.* corn merchant, second, 1d. Graham, London.—*Haley, J.* and *Thomas*, W. cotton manufacturers, first, 6s. 10d. Mackenzie, Manchester.—*Hall, G.* and *Fell, F. S.* timber merchants, first sep. of Hall, 6s. Baker, Newcastle.—*Harwood, J. D.* ironmonger, first, 4s. Turner, Liverpool.—*Hogg, S.* and *H. J.* auctioneers, first, 1d. Pennell, London.—*Hosking, G.* merchant, first, 0d. Bird, Liverpool.—*Jones and Brown*, victuallers, second, 7d. Pennell, London.—*Kaye, W.* paper dealer, second, 8d. Bird, Liverpool.—*MacMillan, H. B.* and *Wilson, B. S.* drapers, first, 2s. 10d. Pott, Manchester.—*Morris, S.* grocer, second, 1s. 10d. Pennell, London.—*McIntyre, D.* manufacturing chemist, first, 1d. Pott, Manchester.—*Meredith, J.* maltster, final, 2d. Bird, Liverpool.—*Murray, J.* Manchester warehouseman, first, 4s. 6d. Pennell, London.—*Edwards and Chauncy*, share brokers, 3d. Turner, Liverpool.—*Sankley, J.* blacksmith, second, 6d. Turner, Liverpool.—*Slater, D.* cabinet maker, second, 4d. Graham, London.—*Smart, W. B.* auctioneer, first, 7d. Pennell, London.—*Steele, J.* watchmaker, first, 2s. 6d. Pennell, London.—*Thurston, H.* innkeeper, 11d. Hutton, Bristol.—*Wardens, E.* tallow chandler, first, 1s. Pott, Manchester.—*Wright, B.* timber merchant, second, 2d. Graham, London.

## INSOLVENT ESTATE.

**Perr, W.** tailor, &c. 1s. 10d. Apply at the County Court, Nottingham.

## Assignments for the Benefit of Creditors.

Gazette, June 10.

**Brett, W.** picture dealer, Essex-st. Strand, May 24.

**Truets.** A. Garcia, picture dealer, Princess-st. Hanover-square, and J. B. Chamberlain, optician, High Holborn. Sol. H. B. Homfray, Margaret-st. Cavendish-square. **Evans,** T. S. grocer, Chelsea, May 15. Trust. J. Collins, wholesale grocer, Turnwheel-lane. Sol. F. Drake Bouvrie-st. Fleet-st.—**Hempstead,** W. blacksmith, Glensford, Suffolk, May 23. Trust. J. Purrr, ironmonger, Sudbury, and C. Morley, farmer, Glensford. Sol. J. F. S. Gooday, Sudbury.—**Rogers,** E. A. grocer, Lower East-st. Southampton, June 4. Trust. J. H. Cooksey and C. J. Phillips, merchants, Southampton. Sol. F. Leigh, Southampton.

#### Gazette, June 13.

**Atkins,** W. shawl dealer, New Bond-st. June 4. Trust. C. Nicholson, shawl warehouseman, St. Paul's Church-yard. Sols. Mardon and Pritchard, Christ Church-chambers, Newgate-st.—**Bugden,** R. ironfounder, Llanthyllid, Monmouth, May 20. Trust. J. J. Nicholas, timber merchant, Newport, and D. Price, brass founder, Bristol. Sol. J. T. Wilde, Union-court, Old Broad-st.—**Davies,** J. grocer, Llanthyllid, Monmouth, June 4. Trust. T. E. Williams, banker, Newport. Sol. J. T. Wilde, Union-court, Old Broad-st.—**Flawcett,** T. cattle dealer, Sedbusk, Aisgarth, York, May 23. Trust. C. Other, Esq., Elmhouse, Leyburn, R. Winn, gentleman, Nappa-hall, Aisgarth, and F. Johnson, gentleman, Hardrow, Aisgarth. Sol. H. T. Robinson, Leyburn.—**Fisher,** J. butcher, Newark-upon-Trent, May 19. Trust. E. Denman, gentleman, North Muskham, J. Allin, farmer, Kilvington, and J. Wells, auctioneer, Newark-upon-Trent. Sol. G. Hodgkinson, Newark-upon-Trent.—**Hindes,** W. wheelwright and victualler, Westoning, Bedford, May 15. Trust. T. Greene, auctioneer, Ampthill. Sol. J. Greene, Ampthill.—**Reece,** C. brewer and maltster, Leighton Bussard, Bedford, June 3. Trust. F. Bassett, banker, C. Ridgway, draper, and R. Richmond chemist, Leighton Bussard. Sols. Ashfield and Allen, Leighton Bussard.

#### Partnerships Dissolved.

##### Gazette, June 8.

**Anson, Hardy, and Co.** commission merchants, Liverpool, May 22. Debts paid by Hardy.—**Bickley,** W. and H. drapers, Stoke-upon-Trent, May 27. Debts paid by W. Bickley.—**Caledonian Tube Company,** tube manufacturers, Coatbridge, Old Monkland, Feb. 9, 1850, as regards Goddard.—**Chanter, Sneyd, and Co.** manufacturers of compositions, Cornhill, and Salmon's-lane, Limehouse, June 2nd. Debts paid by Chanter.—**Dennis and Co.** wine merchants, Lime-st. May 29. Debts paid by Dennis.—**Deuchurst, Crockett, and Co.** commission agents, Manchester, June 4. Debts paid by Dewhurst.—**Ensom,** V. F. and Kirkham, J. commission agents, iron merchants and founders, Nicholas-la. May 1.—**Fitton,** T. and Co. machine and tool makers, Manchester, May 30. Debts paid by Fitton and Barker.—**Foyster, C. and Keller,** C. eating-house keepers, Sherborne-lane, May 28.—**Gray and Crippin,** ironfounders and engineers, Runcorn, Dec. 31. Debts paid by Crippin.—**Greig, W. and Co.** merchants, Whitehart-court, Lombard-st. and Greig, G. and Co. merchants, Cape of Good Hope, Sept. 28.—**Harcourt, Thompson, and Co.** civil engineers, Parliament-st. June 5. Debts paid by Thompson.—**Harnam, J. and Ego,** J. ironfounders, Kingston-upon-Hull, June 4. Debts paid by Harnam.—**Kerby, J. and Hiscocke,** G. P. boot and shoemakers, Haymarket, May 30.—**Kinnear and Co.** Newcastle, as regards Fenwick, Jan. 1. Debts paid by Bates and Kinnear.—**Knill, W. and Co.** fruit brokers, Pudding-la. June 6. Debts paid by Knill.—**Robinson, Palmer, and Palmer,** chemists and druggists, Birmingham, May 27. Debts paid by C. F. and H. Palmer.—**Roseveare and Couch,** limeburners, St. Stephens by Saltash, June 2. Debts paid by Roseveare.—**Rose, F. and Co.** yarn agents, Kidderminster, June 3. Debts paid by F. Rose.—**Schofield, J. and B.** flustian manufacturers, and Manchester commission agents, Littleborough, June 2. Debts paid by J. Schofield.—**Smith, W. and M. and Co.** merchants and drysalters, Liverpool and Manchester, June 2. Debts paid by J. A. Smith.—**Steinthal and Co.** general commission merchants, Manchester, May 31. Debts paid by Steinthal and Samson.—**Steinthal and Co.** general commission merchants, Bradford, May 31. Debts by Steinthal.—**Sutton and Hansen,** ship chandlers, Kingston-upon-Hull, June 4. Debts paid by Sutton.—**Walker, S. and Jones,** W. joiners and cabinet-makers, Liverpool, May 31.

##### Gazette, June 10.

**Covington, J. and Son,** wharfingers and lightermen, Mac-clelland-st. City-road, and Limehouse, Oct. 1. Debts paid by J. Covington, jun. and Maude.—**Duncan, J. and Co.** warehousemen, Bread-st. May 22. Debts paid by Smith.—**Dyson, Walker, and Co.** leather dressers and dyers, Leeds, June 5.—**Ferribough, J. and Son,** tobacco manufacturers, Liverpool, May 10.—**Firth, Birkhead, and Co.** machine makers, Dewsbury, May 7. Debts paid by Firth and Birkhead.—**Flower and Hall,** Wareham, June 2.—**Hamilton, T. Adams, W. and Miles, J. F.** Paternoster-row, as regards Hamilton, June 6.—**Hancock, J. L. and W. L.** wholesale cabinet makers, Welchpool, June 3.—**Hopworth and Eys-ton,** clothiers, Newcastle and Bishopwearmouth, May 31. Debts paid by Royaton.—**Morris, S. and G.** curriers and leather sellers, Portsea and Landport, May 1. Debts paid by G. Morris.—**Payton, J. and Co.** factors, Birmingham, May 20. Debts paid by Payton.—**Shirley and Co.** Kettering, and Galibert and Co. London, June 8. Debts paid by H. P. Knill, Bridge-st. Southwark.—**Sleath and Co.** box-makers, Nottingham, May 23. Debts paid by Sleath.—**Smellie and Green,** fancy stationers, Oxford-st. June 9. Debts paid by Smellie.—**Smith and Granger,** worsted spinners, Leeds, June 2.—**Southgate, jun. and Alcock,** trunk and case makers, &c. Watling-st. and George-yard, Bow-lane, May 30. Debts paid by F. Farrar.—**Godman-st. Doctors'-commons, and J. L. Evans,** Wardrobe-place, Doctors' commons, solicitors.—**Taylor and James,** commission agents, Liverpool, May 28. Debts paid by Taylor.—**The Leader Newspaper Company,** newspaper proprietors, Crime-court, as regards Palmer, Clayton, Hunt, Fisher, jun. Congreve, Marston, Metcalfe, Baliantyne, Lewes, and Linton, March 24.—**Thompson and Cunningham,** plumbers, &c. Liverpool, June 7. Debts paid by Thompson.—**Yecerra, J. and H.** tea dealers and grocers, Preston, June 3.—**Wathen and Phillips,** attorneys, Basinghall-st. June 6.—**Williams and Sowerby,** silk merchants, Oxford-st. June 5. Debts paid by Williams.—**Williamson and Cold-beck,** silk finishers, Manchester, April 9.

#### Gazette, June 13.

**Arley Mining Company,** Dec. 16.—**Benetflak and Jones,** furnishing ironmongers, Chesapeake, June 13. Debts paid by Benetflak.—**Dawson and Smith,** boiler makers, Gaux-holme, near Todmorden, June 5. Debts paid by Dawson.—**Dunn, W. and E. B.** comb manufacturers, Osborn-place, Whitechapel, March 25.—**Field, J. W. and Jardine,** H. chemists, Clerkenwell and St. Luke's, May 24.—**Forriester, Copeland, and Forriester,** manufacturers of china, Foley, near Longton, Stoke-upon-Trent, June 11. Debts paid by M. and J. Forriester.—**Forster and Dixon,** chemists, Sunderland, April 18. Debts paid by Forster.—**Forster and Moon,** woolstaplers, Bradford, May 1.—**Garlick, R. and Clarkson,** K. ship carpenters, Knottingley, June 6. Debts paid by Garlick.—**Giffin and Edgewain,** oil merchants, Maiden-lane and Greenfield-st. Whitechapel, May 20.—**Groves, S. and Mitchell,** J. organ builders, Great Marlborough-st. and Marlborough-row, May 24. Debts paid by Groves.—**Heibronn, A. and Co.** drysalters, Great St. Helens, June 10.—**Henderson, T. and A.** drapers and tea dealers, Halifax, May 1, 1849.—**Hill, M. & Co.** coal dealers, Manchester, April 30. Debts paid by Hill and R. Taylor.—**Hughes, H. and Gregory,** J. printers, Gough-square, Fleet-st. June 10.—**Kershaw, H. and W.** woollen manufacturers, Micklehurst, July 2.—**Le Capelain and Co.** patent agents, Chancery-lane, June 13.—**Maynard, S. and J.** butchers, Queen's-road West, Chelsea, May 10.—**Parkinson and Co.** ship builders, Kingston-upon-Hull, June 11. Debts paid by Peck.—**Poppell and Wall,** commission merchants, Lime-st. Oct. 18.—**Prestley, W. and Lynam, J. and Slack,** W. ironfounders, Thorne, June 9. Debts paid by Lynam.—**Roberts and Milton,** extract of safflower makers, Derby, June 7.—**Standen, S. and W.** Battle-bridge, St. Panoras, June 9.—**Stowell, Sugden, and Co.** worsted spinners, Little Horton, Bradford, June 10. Debts paid by Sugden and Briggs.—**Sutton, J. and W. D.** printers, book-sellers, and stationers, Buxton, March 25. Debts paid by W. D. Sutton.

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## THE LAW TIMES.

SATURDAY, JUNE 28, 1851.

## TO READERS.

AN index to the points reported during the last seven weeks, in continuation of the former one, appears to-day. The previous one will be found in the number for May 10.

## REFORM OF THE COMMON LAW COURTS.

WE are assured that the Report of the Commissioners is prepared and in the press, and will be laid before Parliament immediately.

It is also stated that the reforms proposed are as extensive in their character as are the demands of the occasion, and that the just expectations of the Profession and the public will not be disappointed.

But there is a difficulty which appears to have escaped the attention of everybody.

All are agreed that the procedure of the Superior Courts must be assimilated as nearly as possible to that of the County Courts—that the technicalities of pleading must be abolished, that the parties must be admitted as witnesses, that the fees of court must be curtailed, and the costs of an action reduced to reasonable dimensions.

But it has not occurred to any person who has written or spoken upon the subject, that there is very little use in shortening procedure, unless the trial can be facilitated. Of what advantage will it be to a suitor in the country to be able to join issue in a fortnight, if six months must elapse before the cause can be brought to trial? Yet so it must be, unless some great change be made in the present system of assizes.

This is the most formidable impediment to an efficient reform of the Common Law Courts, and without the removal of which it is impossible that they can compete successfully with the County Courts, where a month is the longest interval that can elapse between

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the commencement and the termination of the suit.

We take the liberty of suggesting to the Legislature, or to the commissioners, and submitting to the consideration of the Profession, a plan which we have constructed, and which appears well adapted to remove this formidable obstacle to the reform of the Superior Courts.

At present we give only an outline of it, the minor arrangements are matters for future consideration.

We propose, then, to increase the number of circuits by a new arrangement better proportioned to the present distribution of population and wealth. To have four circuits a year, with one judge only on each.

To abolish the Quarter Sessions, transferring so much of their criminal jurisdiction as relates to offences not punishable with transportation to the County Courts, and the rest of their judicial business, including the appeals, which are now very few, and will be less, to the Assizes.

Increasing the circuits by three, and redistributing the counties, the work may well be done quarterly by a single judge, vastly to the satisfaction of the suitors, and still more so to those who have criminal and appeal business. The Assize should also be the Court of Appeal from the County Court.

This would remove the difficulty of delay, and, with the other reforms in procedure, would secure for the Superior Courts the business that is now slipping away from them, besides a great deal of new business which would arise if there was a satisfactory tribunal.

Not the least advantage of this plan would be the abolition of the Quarter Sessions.

This would necessitate a rearrangement of the Terms. If each court occupied a month (which would be the extent) in each quarter, the remaining two months would amply serve for sittings of the collected judges in banco; and, while the circuits are proceeding, the judges not required there would hold their sittings in the Court of Assize in London, whose limits should be co-extensive with those of the Central Criminal Court.

The only difficulty is as to the vacation; for it would be very undesirable to abandon that. But even for that there is a simple remedy. Instead of four Terms, as now, let there be three, of two months each, following the winter, spring, and summer Assizes; and after the autumn Assize there may be a two months' vacation, instead of a two months' Term. The arrangements of the legal year would then be thus ordered. Divide the country into ten circuits. The judicial force would be occupied thus, during the Assizes:—

- 10 Judges on the circuits.
- 4 Judges in the Courts of Assize in London.
- 1 Judge in Chambers.

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Let the Legal Year begin, as now, on Nov. 1. The arrangement would then be as follows:—

- November—Circuits and Sittings in London.
- December and January—Sittings in banco.
- February—Circuits and London sittings.
- March and April—Sittings in banco.
- May—Circuits and London sittings.
- June and July—Sittings in banco.
- August—Circuits and London sittings.
- September and October—Vacation.

These are great changes, but nothing less than such will suffice to meet existing circumstances. The plan above proposed appears to answer efficiently all reasonable demands for speedier and cheaper justice, without sacrificing anything that is substantially good in the present system.

We offer the plan to the calm consideration of the Profession, and shall be glad to have it sifted and improved, and to hear what objections are to be set off against its manifold and obvious advantages.

## REGISTRATION OF ASSURANCES.

THE prudence of the course which we have recommended in this matter has been proved by the result. From the first, we believed that opposition to the principle of Registration was hopeless, and that to contest it would be a waste of time and energy, which might be advantageously employed in modifying a measure that could not be averted.

So it has proved. By an almost unprecedented unanimity, the Bill has passed the House of Lords, without a division, and with the approval of every member of that branch of the Legislature which may be deemed peculiarly to represent the views and interests of the landowners. They may be mistaken in their anticipations of the results of Registration, but the fact still remains that they believe that it will be beneficial to them, and in this belief they have ratified the measure by an unanimous vote.

We ask, then, of our readers, if there was the remotest possibility of successful combating an opinion thus powerfully supported? Common sense will answer, no.

And what will common sense dictate as the most prudent course to be pursued in such circumstances? Manifestly to direct all efforts to the modification of the inevitable measure, so as to make it as harmless as possible. That is the course which we advised, and which was generally adopted, and with a degree of success that confirms its wisdom.

In the progress of the Registration Bill through the Committee, it received many important amendments. Much that was objectionable in it was struck out, much that was desirable was added.

Although the Registry is to be central, it is to be local also. Powers are given to divide the country into districts, with Deputy-Registrars, where the local business of Registration may be transacted, but which will be associated with the central office, so that a search might be made in either, as convenience may require. The details of the plan are left to future arrangement, as experience may suggest. This was prudent, for it would be impossible for the Legislature to anticipate the needs of a novelty.

Another great concession to the demands of the solicitors, and to which they were fully entitled, was the provision empowering their appointment as Deputy-Registrars.

Nor less commendable was the permission which has been extended to the registration of unstamped copies, instead of the originals, in cases—which, however, we presume will be but few,—where the party desires to keep possession of his title-deeds.

It has been objected to Registration, that it will prevent the raising of money by deposit of title-deeds. To us this appears to be a merit, for it is often a temptation, sometimes a fraud. At all events, the solicitors have no cause to complain of a measure which will prevent mortgages without a conveyance. Should it have the effect of materially diminishing equitable mortgages, by which the Profession profits nothing, it will, to the same extent, increase the quantity of actual mortgages, in which they must be employed.

Having carefully considered the probable working of Registration, we are unable to share the fears, either of those who anticipate a diminution of the solicitors' business, or of those who prophesy an increase of costs burthensome to the clients. We do not believe that any material effect will be produced by it in these respects; for the increase in the quantity of conveyancing, which it is sure to occasion, will compensate for any trifling diminution in the profits of each transaction. The real benefit of Registration to the public is not so much to be measured in money, as in the sense of security of title, and the consequently greater facilities with which land may be mortgaged or sold. Hitherto, al-

though a title may be apparently safe, and in fact few prove to be bad, yet there is no certainty, and in that uncertainty all share, and consequently are affected in their selling and mortgaging value by reason of it. This is the true use of Registration, and in that alone will its value be found. In practice, it will probably disappoint the extravagant hopes of benefit formed by its promoters, as well as the fears of costs and inconvenience entertained by its opponents.

## THE LEGISLATOR.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

BILLS READ A FIRST TIME.  
Friday, June 20.

Home-made Spirits in Bond  
Merchant Seamen's Fund.

Monday, June 23.  
Civil Bills, &c. Ireland.

Wednesday, June 25.  
Chief Justices' Salaries.

Thursday, June 26.  
Stock in Trade

Loan Societies  
Highway Rates  
Ecclesiastical Jurisdiction  
Registration of Assurances  
School Sites Act Amendment.

BILLS READ A SECOND TIME.

Monday, June 23.  
Court of Chancery and Judicial Committee  
Lands Clauses Consolidation, Ireland.

Thursday, June 26.  
Ecclesiastical Property Valuation, Ireland.

BILLS READ A THIRD TIME AND PASSED.

Monday, June 23.  
Lodging Houses.

Tuesday, June 24.  
Prevention of Offences (Lords).

Thursday, June 26.  
Landlord and Tenant.

#### PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Friday, June 20.  
Cheltenham Improvement and Health  
Magneto-Electric Telegraph.

Monday, June 23.  
Brighton Extra-Mural Cemetery  
Caledonian Railway, Branches  
Shrewsbury and Birmingham Railway.

Tuesday, June 24.  
St. Helen's Improvement, No. 3  
Smithfield Market.

Wednesday, June 25.  
Gunpowder Stores (Liverpool) Exemption Repeal.

Thursday, June 26.  
Athawes' Estate  
Christ's Hospital Estate  
St. Alban's Bribery Commission.

#### SESSIONAL PRINTED PAPERS.

- Par. Numb.  
395. Bills—Pharmacy  
409. — Landlord and Tenant (Amended)  
412. — Church Building Acts Amendment  
360. — Ecclesiastical Property Valuation, Ireland  
413. — Public Houses, Scotland  
418. — Prevention of Offences, as amended in Committee and on consideration of Bill, as amended  
417. — Woods, Forests, &c. amended  
419. — Home-made Spirits in Bond  
420. — Merchant Seamen's Fund  
334. Mercantile Marine Act—Return  
338. Metropolitan Commissioners of Sewers, Victoria-street Sewer—Copies of Reports  
Halifax and Quebec Railway—Further Correspondence  
230. Court of Chancery Regulation Act, 1850, Ireland—Returns  
378. Pirates, Eastern Archipelago—Copies of Despatches  
385. East India—Home Accounts  
390. Spirits—Return  
383. Registered Electors, Ireland—Abstract of Return  
386. Distillers—Return  
398. Manchester Bonding—Copies of Memorials  
407. Customs Duties—Account  
387. Wills and Administrations—Return  
401. Wine and Spirits—Account  
Colonial Land and Emigration Commission—Eleventh General Report of Commissioners  
328. Bills of Indictment (Ireland)—Abstract of Return  
416. Railway Accident (Palmer Station)—Captain Laffan's Report  
421. Metropolitan Water Supply—Report of the Commissioners on the Chemical Quality  
403. Valuation (Ireland) Return  
404. Population, Poor Relief, &c. (Scotland)—Return  
406. Mail Steamers (Halifax and United States)—Return  
383. Registered Electors (Ireland)—Abstract of Return (a corrected Copy)  
Prisons—Fifteenth Report of the Inspectors, Part 1 (Home District)

#### HOUSE OF LORDS.

REGISTRATION OF ASSURANCES BILL.

TUESDAY, June 24.—Lord CAMPBELL moved the third reading of this Bill.—Lord LYNCHURST expressed a hope that the appointments under this Bill

would be made by the Lord Chancellor, and not by the Prime Minister.—Lord CAMPBELL said, that as the appointments came under the category of judicial appointments, they would be made by the Lord Chancellor as a matter of course.—Lord BROUGHAM was not so sure of that, for since the passing of his Bill in 1833 the Prime Minister had claimed and exercised the right of sharing with the Lord Chancellor in the appointment of Masters in Chancery.—Lord LYNCHURST wished the matter to be put beyond doubt by the insertion of some words, but Lord CAMPBELL objected to that, on the ground of want of precedent.

The Bill was then read a third time.

On the question that the Bill should pass,

The Marquis of LANDSDOWNE availed himself of that opportunity of calling the attention of their lordships, and through them of the public, to the circumstances under which this measure was about to receive the final sanction of the House. By means of this Bill their lordships had arrived at the satisfactory solution of a most important and difficult question, which, for more than a century, had been more or less agitated in this country. He felt the less hesitation in saying that this was a satisfactory solution of the question, because the measure, though called a Government Bill, and introduced with the full sanction of the Administration, as well as mentioned in the Queen's speech at the opening of the session, was the result of the united efforts of many able and learned men, including his noble and learned friend the Chief Justice, who was at the head of one of the commissions appointed to inquire into the subject, and who had been indefatigable in his efforts to bring that inquiry to a happy issue. Under these circumstances the public and the other House of Parliament would be aware that the Bill had not been rashly and inconsiderately adopted; but, on the contrary, was the result of the most complete and careful inquiry by which any great measure of legal reform had ever been recommended. The Bill had received greater sanction than any measure which had ever left their lordships' house, and, more than any other measure, was entitled to the approbation of the public. He trusted that it would receive the concurrence of the other House also.

The Bill was then read a third time and passed, *nemine contradicente*.

#### CHARITABLE TRUSTS.

The second reading of the Charitable Trusts Bill was moved by the LORD CHANCELLOR, who explained its provisions. The principal feature in the measure is the appointment of five commissioners (two of them to be paid), who should be invested with a general control over all charities, to whom the trustees of charities might apply for advice, and annually furnish a list of their accounts. On the other hand, trustees were to be indemnified where it was shown they had acted by the advice of the commissioners, and no action for fraud or malversation was to be commenced against trustees without the consent of this newly constituted body.—After some remarks from Lord BROUGHAM and Lord STANLEY, approving generally of the objects of the Bill, though they avoided committing themselves to the details, the Bill was read a second time.

#### HOUSE OF COMMONS.

##### CHIEF JUSTICES' SALARIES BILL.

WEDNESDAY, June 25.—On the motion of the ATTORNEY-GENERAL this Bill was read a first time.

##### PAROCHIAL ASSESSMENTS.

In reply to Mr. WILSON PATTEN, —Sir GEORGE GREY said he thought, under existing circumstances, it was not possible to bring forward a Bill with regard to parochial assessments during the present session.

##### NEW BILLS.

Mr. BOUVIER moved for and obtained leave to bring in the four following Bills:—1. Bill to continue an Act to amend the laws relating to loan societies. 2. Bill to continue an Act for authorising the application of highway rates to public roads. 3. Bill to continue the exemption of inhabitants from liability to be rated as such in respect of stock in trade. 4. Bill for further continuing certain temporary provisions concerning ecclesiastical jurisdiction in England.

The above Bills were severally read a first time, and ordered to be read a second time on Monday.

#### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

##### Summary.

THE effect of a subsequent statute upon the proceedings of a corporation was considered in *Reg. v. Bills*, 17 Law T. 162. A corporation, empowered by charter to make bye-laws for the government of the inhabitants and the management of the property of the borough, made a bye-law authorising the

imposition of a rate for the maintenance of a sea-wall. A subsequent Act transferred the property of the corporation to trustees, and made void all bye-laws made for its management. It was held that the trustees were not authorised to make a rate as before, the power of the old corporation to do so being dependent upon the bye-law, which was avoided by the new Act.

In *Reg. v. The Governors of the Poor of St. Mary, Newington*, 17 Law T. 163, it was held to be no ground for a *mandamus* to a board of guardians to elect churchwardens and overseers under the powers of a local Act, that certain votes were improperly received at an election which had taken place.

It seems that the justices, who are required by a local Act to enforce the orders of the commissioners appointed by that Act, and thereby empowered to determine whether certain things are nuisances and order their removal, are not to sit in judgment, as a Court of Appeal, upon the decision of the commissioners, but are bound to enforce the order if legal. "It is clearly for the commissioners," said Lord CAMPBELL, "to determine the question of nuisance or no nuisance, subject to the appeal given by the Act. But when no appeal is brought and an order of the commissioners is not obeyed, the magistrates who are asked to enforce it are not to sit as a Court of Appeal from the judgment of the commissioners." (*Reg. v. Mills*, 17 Law T. 164.)

The law of *Master and Servant* has yielded another case, to be carefully noted in *Hertslett's* treatise on this subject. It was there decided to be necessary that a warrant of commitment (under 4 Geo. 4, c. 34, s. 3) of a servant for leaving his employ without lawful excuse must shew either that the contract was in writing, or that the servant had, in fact, entered upon the service. Wanting such an allegation, it is bad. (*Ex parte Ashew*, 17 Law T. 169.)

The Court, in *Reg. v. The Recorder of Manchester*, 17 Law T. 170, granted a *mandamus* to the recorder of a borough, who had refused to hear an appeal merely on the ground that as a copy only, and not the original of an order of removal had been filed, the Court had no power to enter upon the appeal. It suffices, therefore, to file a copy.

Game cases are now comparatively rare. It is long since we have had occasion to notice one. But *Ex parte Hyde*, 17 Law T. 170, in our last, is of this nature. A conviction under 1 & 2 Wm. 4, c. 32, s. 3, was held to be bad, because it did not adjudicate to whom the penalty was to be paid, and also because the justices had not jurisdiction to direct the defendant to be imprisoned in default of paying the penalty (the adjudication of which was informal), consequently, that the *certiorari* was not taken away by the 45th section of 1 & 2 Wm. 4, c. 32, which applies to matters of form merely.

#### Queries.

##### POWER OF CORONERS.

CAN any of your readers refer me to any decisions or law relating to the duties of a coroner in cases where he and his jury are refused admission into a house for the purpose of viewing a body or encountering any similar obstruction? W. F.

EXPENSES OF CRIMINAL PROSECUTIONS IN SCOTLAND.—The expenses of criminal prosecutions have, for the last three or four years, formed a frequent subject of discussion at the annual meetings of the commissioners of supply of the different counties in Scotland. It was insisted, and with justice, that Scotland should be placed on the same footing as England, where all the expenses connected with the criminal prosecutions have been paid for some time past out of the Consolidated Fund. We are glad now to have it in our power to announce that the boon which was granted to England by Sir Robert Peel, as some compensation to the landowners for the repeal of the Corn Laws, has been extended to Scotland—the Lords of the Treasury having consented to defray the expenses of prosecution in summary cases, as they have hitherto done in cases that were reported to crown counsel and tried before a jury. The expenses of such summary prosecutions used to be paid in the different counties by an assessment called the rogue money, which sometimes formed a pretty heavy local tax. No positive instructions have, as yet, reached the Queen's Remembrancer's Office on the subject; but what we have stated above may be relied on as having been agreed to by the Lords of the Treasury.—*Scotsman*.



## INT-STOCK COMPANIES' LAW JOURNAL.

HERE, by a Railway Act, the company was required "from and immediately after the opening of the railway between A. and B. for public use," to purchase the property of two companies, it was held that neither could for the contract price until the whole line from A. to B. was opened for public use, and a partial injury to one of the companies by the opening of part of the line did not give right of action to that company. (*The Witham Canal Company v. The Ambergate, Railway Company*, 17 Law T. 164.)

The Lands Clauses Consolidation Act has again in question. In *Richardson v. The North-Eastern Railway Company*, 17 Law T. , the plaintiff claimed 1,000*l.* as compensation. The company offered him 60*l.* The court assessed the claim at 215*l.* Was he entitled to the costs? The Court held him to be "If the defendants," said Jervis, C.J. and initiated the proceedings and given place to the plaintiff in pursuance of section it is plain the plaintiff would have been tied to the costs of the proceedings.

The question now is, whether the plaintiff, having recovered a larger sum than that offered defendants, is entitled to his costs. The court, looking to the 68th section, it appears to the Court that the words "in the manner herein provided" in the last clause, viz. "they shall issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided," may fairly be construed to incorporate all the previous provisions relating to the assessment by the jury.

### WINDING-UP.

GRAT NORTH OF ENGLAND AND GLASGOW RAILWAY.—On Friday a meeting was held before Master Blunt, to proceed with the list of the provisional committee brought in by Mr. Harding, official manager, for whom Mr. Roxburgh and Torr appeared as counsel. Mr. Middleton, of Leeds, former solicitor to the company, was examined at considerable length, but as Mr. Westman, who appeared for several of the provisional committee, intimated that a petition was intended to be presented to rescind the order for winding up company, the Master said that pending that application he would not decide on the liability of the parties on the list. —*Daily News*.

WORCESTER CORN EXCHANGE.—On Monday his Honour Master Kindersley appointed Mr. Henry Torr, attorney, of Coleman-street, to be the official manager of this company's affairs. —*Daily News*.

HULL PUBLIC BATH COMPANY.—At the meeting of the company on Monday, a call was proposed by Goodchap, the official manager, of 20*l.* per share, to pay off liabilities. —*Daily News*.

ASTERN COUNTIES AND SOUTHERN RAILWAY.—On Monday, before Sir Wm. Horne, Mr. E. Norris, of Liverpool, for whom Mr. Giffard appeared as counsel, was called on to shew cause why he should be placed on the list as liable to contribute, inasmuch as a member of the provisional committee, he had accepted 100 shares, and subsequently requested the number might be reduced to 20. It was contended that, inasmuch as between the date of the original allotment and the reduction there had been an alteration in the constitution of the company, the contract was not binding. The Master held otherwise, and placed Mr. Norris on the list. The next class of cases taken was that of those who had signed the deed. The first was that of Mr. H. Causton, the secretary, who had signed for shares, or 1,230*l.* The signature to the deed in Causton's handwriting was admitted by Mr. H. Norris, his solicitor, but the reception of the document in evidence was objected to on the ground that as a mere piece of parchment without the legal formalities and destitute of stamps. Mr. Daniel, for official manager, said the deed should be stamped the next meeting, so as to proceed with the cases of those directors and others who had signed it. —*Daily News*.

VOLVERHAMPTON, CHESTER, AND BIRKENHEAD RAILWAY.—On Monday, Master Brougham, in hearing Mr. Glasse and Mr. Rogers on the case Mr. William Cooper, jun. of Henley-in-Arden, allottee of twenty shares of 20*l.* each in this company, who agreed in writing to take the shares and the deposit of two guineas thereon, but who, on the day of the meeting, did not, directed Mr. Norris, official manager, as the decision will affect 1,400

allottees in the company, to carry the case forward on appeal, so that the question, which has a bearing on a great many other companies, may be determined by the House of Lords. —*Daily News*.

COMPRESSED AIR ENGINE COMPANY.—Tuesday a meeting took place before Sir William Horne, for the purpose of obtaining the Master's approval of a dividend of 4*s.* 9*d.* in the pound, which it was proposed to make to the shareholders of this company. Mr. Henry Davies attended as solicitor for the official manager, and stated that the proceedings had now been so far concluded that they were enabled to declare the above dividend, and he had much pleasure in stating that it was owing to the exertions of the official manager that the proceedings had not been productive of expensive litigation. The Master approved of the dividend which was proposed, and after directing a proper schedule of the shareholders entitled to be prepared for his signature and formal approval, stated it was a proceeding which he thought the parties were entitled to boast of, by reason of the speedy and successful manner in which they had brought it to a termination, and he took this to be an exception to the ordinary cases of proceeding under the Winding-up Act.

NORTHERN AND SOUTHERN CONNECTING RAILWAY.—On Thursday, at a meeting before Master Humphry, the list of the provisional committee brought in by Mr. Goodchap, the official manager, was proceeded with. The names of Mr. Samuel Adams, of Ware, and Mr. John Perring, Strand, on their being examined, were placed on the list in the character of provisional committeemen who had signed the deed for 200 shares each, and paid the deposit. Mr. John Castendick, of Lewisham, was also placed on in a like capacity. Mr. John Booth, of Macclesfield, in the course of a long examination by Mr. Glasse, for the official manager, denied that the signature to all the accepting shares was in his handwriting. An affidavit to this effect was also produced, signed by Mr. Booth, and the signature to which bore such a similarity to the signature appended to the letter, that the Master adjourned his decision. The assignees of Messrs. J. Graham and of D. T. Johnson, two of the members of the managing committee were placed on the list for 100 shares each. —*Daily News*.

LIVERPOOL MARINE ASSURANCE COMPANY.—On Thursday a meeting was held before Sir George Rose, to proceed with the list of shareholders, brought in by Mr. Hutton, the official manager, for whom Mr. Field, of the firm of Sharpe, Jackson, and Co. appeared. The company appears to have been originated in 1832, for effecting assurances on marine policies, and carried on an extensive business, but during the last two or three years of its existence sustained considerable losses, in consequence of which calls, which were only partially responded to, had to be made on the proprietors, thereby involving the concern in liabilities alleged to amount to 20,000*l.*; the principal object of the winding up of the company being to make those shareholders contribute in liquidation of the debts who did not originally do so. On Thursday, about seventy of those who had signed the deed were placed on the list as liable, and it is proposed to make a call of 5*l.* per share, which, together with the payment of the sums in default, will, it is estimated, discharge the liabilities. —*Daily News*.

### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

Gloucester, Aberrystwith, and Central Wales Railway Company.—To settle list of contributories on July 12. —Tinney.

Worcester Corn Exchange Company.—Appointment of Henry Adron, of 10, Coleman-street, to be official manager. —Kindersley. (June 18.)

Hull Public Bath Company.—Call of 2*l.* per share to be made on 28th June. (The contributories who have paid more than 10*l.* per share will have credit given for such payments against the call now proposed.) —Horne.

### REAL PROPERTY LAWYER AND CONVEYANCER.

THE Trustee Act is working well. In *Re Elliott's Estate*, 17 Law T. 162, where one of three trustees had become bankrupt and gone away out of the jurisdiction of the Court, an order was made, under the 10th section, vesting the estate in the two continuing trustees.

In *Re Collins's Charity*, 17 Law T. 161, charity lands had been purchased by a railway company under its compulsory powers. The Court directed the purchase-money to be invested and the dividends paid to any two of the trustees for the time being, their names to be verified by affidavit.

### WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I quite agree with your correspondent "L." on the sufficiency of the execution of an alteration in a will if made by the initials of the testator and witnesses. But I go further than he does, for I read the 21st section of the Wills Act as enacting that any alterations, &c. in a will made after its execution, are to be executed exactly in the same manner as is required for execution of the will (except as to the place for signature). Now the word "will," by the interpretation clause, is extended to a codicil; and, as different persons may be witnesses to a codicil from those who attested the execution of the will, so I think it was the intention of the Act, that different persons might be witnesses to an alteration in a will from those who attested the original execution of it. Else, after the death of either of the witnesses, no alteration could be made in the will if desired by testator. The Court of Probate would require the signature, if made by initial, or without a proper form of attestation, to be verified by affidavit, in the same way as it requires the signatures of witnesses to a will to be verified when there is any defect in the attestation.

The presumption is, that unnotified alterations in wills are made after execution. See *Cooper v. Bockett*, referred to in 8 Law T. 174.

I am, Sir, yours, &c.

G. F.

### WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—The replies to the queries of your correspondent "O." relative to the effect upon alterations in a will, have evoked three fresh correspondents. I am unwilling, for obvious reasons, to be led into a correspondence that is assuming the shape of legal opinion *versus* legal opinion, but since one of these fresh correspondents, "L." gives it as his *decided opinion* that I have erred in the opinion guardedly expressed by me (there being no decision within my knowledge on the point), "That the initials of the testator, and those of the attesting witnesses, are not sufficient strictly *per se*, their names having been previously written at length at the end of the will, to render operative alterations made after the execution of the will."—I am compelled to address you again: the words of the Wills Act are,—"But the will shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin," &c. No doubt a testator may sign by a mark, as may also the attesting witnesses, and if they have so signed and subscribed, as is required by the 9th section, their marks, or it might be initials, repeated, would be as operative as their names; but in the case in question, the will is presumed to have been signed by the testator, and subscribed by the witnesses in their respective names, the Christian name probably an initial, but the surname in full, in which event the mere use of initials for the words which compose each name, is not a signing by the one, or a subscription by the others. The words of the Act are, "the signature," and "the subscription," and both are to be repeated as previously made. Such I conceive to be the construction of the clause referred to. It has been held by the Judicial Committee of the Privy Council, that where alterations appear in a will, the legal presumption is, that they were made after execution. See *Cooper v. Bockett*, 4 Moore's Privy Coun. Ca. 419; also *Larkins v. Larkins*, 3 Bos. & Pul. 16. This replies to the observation of "A." I would refer "D. M." to the cases of *Casey v. Fulton*, 5 Moore's Privy Coun. Cas. 140, and *Moore v. King*, 3 Curt. Eccl. Rep. 243.

I am, Sir, yours, &c.

A. W.

### COUNTY COURTS:

#### Summary.

A QUESTION under the clause which excepts from the jurisdiction of the County Courts cases in which title is in dispute, was raised in *Banks v. Robbatt*, 17 Law T. 170. The defendant held the premises under a written agreement with the owner for the purchase of them, 8*s.* to be paid weekly until the purchase was completed, but to go in liquidation of the purchase-money. The defendant continuing the possession and not fulfilling his agreement, the plaintiff sought to recover possession of the tenement under the 122nd clause of the County Courts Act. But it was held by WIGHTMAN, J., in the Bail Court, not to be a case as between landlord and tenant, but a question in which title was in dispute, and therefore not within the jurisdiction of the County Court.

There are two or three cases in insolvency which the practitioner should take note of. In *Lambert v. Smith*, 17 Law T. 167, it was decided that if an insolvent knows the name of the payee or holder of

a negotiable instrument at the time of his (insolvent's) acceptance, he is bound to insert it in his schedule, although filed some time subsequently. If he should not do so, he will not be discharged, by the Insolvent Act, so far as respects such payee or holder. Particular attention should be given to this, which is very important in practice. In *Re Upton*, 17 Law T. 171, the Court ordered an assignee to make good a deficiency which had been caused in an insolvent's estate by his (the assignee's) mismanagement and misconduct.

The County Courts Extension Bill in the Commons has made no further progress. It is not yet determined, we believe, whether those before the Lords shall be proceeded with this session, but we trust that the Equity Jurisdiction Bill, at least, will be vigorously urged, for that is a matter of great moment to the public as well as to the Profession.

## THE LAWYER.

### Summary.

**COMMON LAW.**—In *Biddulph v. Chamberlayne*, 17 Law T. 164, the point was raised whether an issue may be distributed for taxation of costs, although it could not be so with respect to the verdict, i. e. when the plaintiff is entitled to the verdict on an entire issue. "I am of opinion," said Lord CAMPBELL, C.J., "that it could not conveniently be done." "I think," said COLERIDGE, J., "it would be a safe rule to limit the practice to cases in which divisible issues are presented on the record." ERLE, J. however, declared his dissent from this conclusion of the majority, with strong reasons for it.

In *Knagge v. Knagge*, 17 Law T. 170, a rejoinder concluded to the country, but the *similiter* was not added; the defendant was not allowed to move for judgment as in case of a nonsuit, on the ground that no issue was joined; and it was also held, that the "*&c.*" with which the rejoinder concluded did not include the *similiter*.

A case of considerable interest in the *Law of Libel*, is *Helham v. Blackwood*, 17 Law T. 166. It turns upon many facts, too numerous to be detailed here, and the question was whether they constituted a complete justification. They were held not to do so. MAULE, J. thus clearly, stated the law of justification. "The defendant, to make good a plea of justification, must justify every thing in the libel injurious to the plaintiff. If he charges several crimes, they must all be justified; if he charges that a crime was committed in a particular manner, he must justify that it was committed in that particular manner; *à fortiori*, if he charged the committing of the crime with circumstances of aggravation, he must justify those aggravating circumstances."

A very curious question of evidence was raised at Nisi Prius, in *Doe dem. Mackenzie v. Baylis*, 17 Law T. 172. Is the census paper admissible in evidence? It was held by WILLIAMS, J. to be admissible, but with a strong expression of opinion that it ought not to be used except in a last extremity. But it may be put into the hands of a witness to refresh his memory.

## THE MERCANTILE LAWYER.

### Summary.

**A. MORTGAGED** his shares in a vessel to B. by bill of sale, an indorsement on which contained the proviso for redemption. B. registered the bill of sale, but omitted to notice the indorsement, after which he sold to C. A. filed a bill against B. and C. to redeem, but they contended that the indorsement not being registered, the sale was absolute. The Court, however, held otherwise. Vice-Chancellor BRUCE said, "he was of opinion that the 45th section of the Act was not intended to invalidate, and did not invalidate, such a transaction." (*Whitfield v. Perfit*, 17 Law T. 161.)

Where a lessee had covenanted not "to use, or suffer to be used, the premises for the business of a schoolmaster or schoolmistress, or for any other trade or business," it was held that an establishment of Roman Catholics consisting of a lady superioress, sisters, boarders, &c. supported by donations and the private property of the ladies, was not a breach of the covenant. But where a greengrocer was

allowed to keep his horse and cart on the premises, using it for his trade, and to lodge his baskets there, and a plumber was allowed to keep his tools in the coach-house, it was held to be evidence for the jury of a trading within the covenant. (*Doe dem. Mackenzie v. Baylis*, 17 Law T. 172.)

In *Crofts v. Beale*, 17 Law T. 172, the following was held to be a *promissory note*, and not to require the agreement stamp. "The note of hand given by the undersigned A. and B. to the undersigned C. this day is intended as an additional further security to that amount of the sum of 1,000*l.* due to the said C. from the said A. on mortgage."

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to grant the place of one of the Lords of Session in Scotland to John Cowan, Esq., her Majesty's Solicitor-General for Scotland, in the room of Thomas Maitland, Esq., deceased.

The Queen has also been pleased to nominate and appoint the said John Cowan to be one of the Lords of Justiciary in Scotland, in the room of the said Thomas Maitland, deceased.

The Lord Chancellor has appointed Robert Coester Dryland, of Speenhamland, in the county of Berkshire, gent. to be a Master Extraordinary in the High Court of Chancery.

Mr. Henry Sedgewick Wyld, barrister-at-law, has been appointed one of the Registrars to the Court of Bankruptcy, in the room of Mr. Charles Waterfield, resigned.—*Globe*.

**THE LIVERPOOL STIPENDIARY MAGISTRATE.**—The Mayor of Liverpool received a communication from Sir George Grey on Saturday, stating that the recommendation of the town council had been acceded to, and that J. S. Mansfield, esq. had been duly appointed stipendiary magistrate for Liverpool, and would enter upon his duties forthwith.

Mr. Herbert Poulton Voules, one of the directors of convict prisons, is appointed inspector of prisons for the northern and eastern district, in the room of Mr. Frederick Hill, who has been appointed assistant secretary to the Post-office. Captain Irvine Smith Whitty, governor of the convict prison at Portland, has been appointed to succeed Mr. Voules in the office of director of convict prisons. Mr. William Carman is appointed Clerk of the Pleas for the Supreme Court of New Brunswick. M. de Nieuwerkerk is appointed assistant receiver-general of Berbice, British Guiana.—*Observer*.

**COMMISSION SIGNED BY THE LORD-LIEUTENANT.**—COUNTY OF CARDIGAN.—John Boulton, Esq., to be Deputy-Lieutenant.

We are enabled to state that Mr. Deas has been appointed her Majesty's Solicitor-General for Scotland, in the room of Mr. John Cowan, who has been gazetted, as a Lord of Session, in the vacancy caused by the death of Lord Dundrennan.

## COURT PAPERS.

### CHANCERY SITTINGS.

Sittings after Trinity Term, 1861.

#### Lord Chancellor's Court.

AT LINCOLN'S INN.	
Tuesday ... June 24	1st Seal. Appeal Motions
Wednesday ... 25	Appeals
Thursday ... 26	Appeals
Friday ... 27	Petition day. (Unopposed first) Lunatic and Cause Petitions
Saturday ... 28	Appeals
Monday ... 29	Appeals
Tuesday ... July 1	Appeals
Wednesday ... 2	Appeals
Thursday ... 3	2nd Seal. Appeal Motions
Friday ... 4	Petition day. Unopposed Lunatic and Cause Petitions
Saturday ... 5	Appeals
Monday ... 6	Appeals
Tuesday ... 7	Appeals
Wednesday ... 8	Appeals
Thursday ... 9	Appeals
Friday ... 10	Appeals
Saturday ... 11	Petition day. Unopposed Lunatic and Cause Petitions
Monday ... 12	Appeals
Tuesday ... 13	Appeals
Wednesday ... 14	Appeals
Thursday ... 15	Appeals
Friday ... 16	Appeals
Saturday ... 17	3rd Seal. Appeal Motions
Monday ... 18	Petition day. Unopposed Lunatic and Cause Petitions
Tuesday ... 19	Appeals
Wednesday ... 20	Appeals
Thursday ... 21	Appeals
Friday ... 22	Appeals
Saturday ... 23	Appeals
Monday ... 24	Appeals

Friday ... 25	Petition day. (Unopposed first) Lunatic and Cause Petitions
Saturday ... 26	Appeals
Monday ... 27	Appeals
Tuesday ... 28	Appeals
Wednesday ... 29	Appeals
Thursday ... 30	Appeals
Friday ... 31	4th Seal. Appeal Motions
Saturday ... Aug. 1	Petition day
N.B. Such days as his Lordship sits in the House of Lords excepted.	
The Court will sit at Ten o'clock each day.	

#### Vice-Chancellor Knight Bruce's Court.

Tuesday ... June 24	1st Seal. Motions and Claims
Wednesday ... 25	Short Causes, Short Claims, and Bankrupt Petitions
Thursday ... 26	Causes and Claims
Friday ... 27	Pleas, Demurrers, Exceptions, and Further Directions
Saturday ... 28	Petitions and Claims
Monday ... 29	Causes and Claims
Tuesday ... July 1	Causes and Claims
Wednesday ... 2	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 3	2nd Seal. Motions and Claims
Friday ... 4	Pleas, Demurrers, Exceptions, and Further Directions
Saturday ... 5	Petitions and Claims
Monday ... 6	Causes and Claims
Tuesday ... 7	Causes and Claims
Wednesday ... 8	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 9	Pleas, Demurrers, Exceptions, and Further Directions
Friday ... 10	Petitions and Claims
Saturday ... 11	Causes and Claims
Monday ... 12	Causes and Claims
Tuesday ... 13	Causes and Claims
Wednesday ... 14	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 15	Pleas, Demurrers, Exceptions, and Further Directions
Friday ... 16	Petitions and Claims
Saturday ... 17	Causes and Claims
Monday ... 18	Causes and Claims
Tuesday ... 19	Causes and Claims
Wednesday ... 20	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Thursday ... 21	Pleas, Demurrers, Exceptions, and Further Directions
Friday ... 22	Petitions and Claims
Saturday ... 23	Causes and Claims
Monday ... 24	Causes and Claims
Tuesday ... 25	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Wednesday ... 26	Pleas, Demurrers, Exceptions, and Further Directions
Thursday ... 27	Petitions and Claims
Friday ... 28	Causes and Claims
Saturday ... 29	Causes and Claims
Monday ... 30	Short Causes, Short Claims, Bankrupt Petitions, and Claims
Tuesday ... 31	Pleas, Demurrers, Exceptions, and Further Directions
Wednesday ... Aug. 1	Petitions and Claims
Thursday ... 2	Bankrupt Petitions and Claims
Friday ... 3	Causes
Saturday ... 4	Causes
Monday ... 5	Short Causes, Short Claims, and do.
Tuesday ... 6	Further Directions and Exceptions.
Wednesday ... 7	Further Directions and Exceptions.
Thursday ... 8	Further Directions and Exceptions.
Friday ... 9	Further Directions and Exceptions.
N.B. Unopposed Petitions, not exceeding ten, to be in the paper every day.	

#### Vice-Chancellor Lord Cranworth's Court.

Tuesday ... June 24	1st Seal. Motions
Wednesday ... 25	Causes and Claims
Thursday ... 26	Causes and Claims
Friday ... 27	Petition day. Cause Petitions
Saturday ... 28	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... 29	Causes and Claims
Tuesday ... July 1	Short Causes, Short Claims, and do.
Wednesday ... 2	Causes and Claims
Thursday ... 3	2nd Seal. Motions
Friday ... 4	Petition day. Cause Petitions
Saturday ... 5	Pleas, Demurrers, Exceptions, and Further Directions
Monday ... 6	Causes and Claims
Tuesday ... 7	Causes and Claims
Wednesday ... 8	Short Causes, Short Claims, and do.
Thursday ... 9	Causes and Claims
Friday ... 10	Causes and Claims
Saturday ... 11	Petition day. Cause Petitions
Monday ... 12	Pleas, Demurrers, Exceptions, and Further Directions
Tuesday ... 13	Causes and Claims
Wednesday ... 14	Causes and Claims
Thursday ... 15	Short Causes, Short Claims, and do.
Friday ... 16	Causes and Claims
Saturday ... 17	3rd Seal. Motions
Monday ... 18	Petition day. Cause Petitions
Tuesday ... 19	Pleas, Demurrers, Exceptions, and Further Directions
Wednesday ... 20	Causes and Claims
Thursday ... 21	Causes and Claims
Friday ... 22	Short Causes, Short Claims, and do.
Saturday ... 23	Causes and Claims
Monday ... 24	Causes and Claims
Tuesday ... 25	Short Causes, Short Claims, and do.
Wednesday ... 26	Causes and Claims
Thursday ... 27	3rd Seal. Motions
Friday ... Aug. 1	Petitions
Saturday ... 2	Remaining Petitions, Motions, and Causes
Monday ... 3	Causes
Tuesday ... 4	Short Causes, Short Claims, and do.
Wednesday ... 5	Pleas, Demurrers, Exceptions, and Further Directions
Thursday ... 6	Pleas, Demurrers, Exceptions, and Further Directions
Friday ... 7	Pleas, Demurrers, Exceptions, and Further Directions
Saturday ... 8	Pleas, Demurrers, Exceptions, and Further Directions
N.B. Unopposed Petitions, not exceeding ten, at the sitting of the Court daily, except seal days.	

## Vice-Chancellor Turner's Court.

Tuesday June 24	1st Seal. Motions, Causes, & Claims
Wednesday 25	
Thursday 26	
Friday 27	
Saturday 28	Pleas, Demurrers, Exceptions, Causes, and Claims
Monday 30	
Tuesday July 1	
Wednesday 2	
Thursday 3	2nd Seal. Motions and ditto
Friday 4	Unopposed Petitions, Short Causes, Short Claims, and Claims
Saturday 5	
Monday 7	
Tuesday 8	Pleas, Demurrers, Exceptions, Causes, and Claims
Wednesday 9	
Thursday 10	
Friday 11	Unopposed Petitions, Short Causes, Short Claims, and Claims
Saturday 12	
Monday 14	Pleas, Demurrers, Exceptions, Causes, and Claims
Tuesday 15	
Wednesday 16	
Thursday 17	3rd Seal. Motions and ditto

Friday 18	Unopposed Petitions, Short Causes, Short Claims, and Claims
Saturday 19	
Monday 21	
Tuesday 22	Pleas, Demurrers, Exceptions, Causes, and Claims
Wednesday 23	
Thursday 24	
Friday 25	Unopposed Petitions, Short Causes, Short Claims, and Claims
Saturday 26	
Monday 28	
Tuesday 29	Pleas, Demurrers, Exceptions, Causes, and Claims
Wednesday 30	
Thursday 31	4th Seal. Motions and ditto
Friday Aug. 1	Petitions
Saturday 2	
Monday 4	
Tuesday 5	Remaining Petitions, Pleas, Demurrers, Exceptions, Causes, & Claims.
Wednesday 6	
Thursday 7	
Friday 8	

N.B. Every Friday (after Unopposed Petitions, Short Causes, and Short Claims), 25 Claims.

NOTICE.—The Courts will rise for the Vacation on Friday, the 8th of August.

## JUDGES' CIRCUITS.

Mr. JUSTICE PATTERSON will remain in Town.

SUMMER CIRCUITS, 1851.	WESTERN.	HOME.	NORFOLK.	MIDLAND.	N. WALES.	S. WALES.	OXFORD.	NORTHERN.
Last Days for full Notice of Trial.	Ld. Campbell J. Coleridge	L.C.J. Jerrard B. Alderson	LCB Pollock J. Ousewell	B. Peake J. Maule	J. Wightman	J. Talbot	J. Erie B. Martin	B. Platt J. Williams
July	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19	24 July 12 25 July 13 26 July 14 27 July 15 28 July 16 29 July 17 30 July 18 31 July 19
August	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31	1 Aug. 20 2 Aug. 21 3 Aug. 22 4 Aug. 23 5 Aug. 24 6 Aug. 25 7 Aug. 26 8 Aug. 27 9 Aug. 28 10 Aug. 29 11 Aug. 30 12 Aug. 31

## LEGAL INTELLIGENCE.

**INVENTIONS FOR LAWYERS' USE.**—We have been asked to pass judgment on a batch of inventions suitable for lawyers; and amongst them are the ready reference files, and the inks, of Messrs. Blackwood, of London. The ready-reference file is made of three sizes, suitable severally to "agreements, contracts, &c.," to "letters," and to "notes." Each one is rather larger than the folded paper it is intended to preserve. It consists of two pieces of pasteboard, covered with morocco leather, on one of which are fixed elastic bands. The other has a *hinge* at about the centre. Between these boards almost any quantity of papers may be placed and firmly held by slipping the bands over. Additions can be easily made, and reference is also attained with the utmost facility. In either case it is necessary only to pass off the top band (which then becomes suspended to the lower board, and hence is always in readiness for readjustment), and thus release the part of the cover which folds back, and exposes in succession the whole of the indorsed ends of the papers within. A more ingenious, cleanly, or effectual mode of preserving papers, and in precisely the size and form to which lawyers have been accustomed, we have not seen. Messrs. Blackwood's

inks are of a thorough blackness; but the novelty attending them is, that they are sold in bottles having lips, to facilitate pouring out, and with registered ringed corks, which do not require a screw to extract them. The extensive use of these bottles will save the complexion of many a carpet, whose brightness is endangered whenever a stationer's ink-bottle has to be operated upon. We are sure that those who purchase the files and order Blackwood's ink, will have good cause to congratulate themselves that they adopted our recommendation.

**LORD BROUGHAM AND "COURTS OF RECONCILEMENT."**—A somewhat singular return has just been printed by order of the House of Lords, on the motion of Lord Brougham, shewing for twenty years the great advantage which it is stated has resulted from the cases treated by the Commissioners of the Courts of Reconciliation in Denmark. It will be sufficient to give the result of the last year in the return—1846. In that year 24,625 cases were undertaken, 16,068 were adjusted or stopped, 324 were postponed, 8,233 were referred to the law courts, and 2,761 were tried.

**THE COURT OF CHANCERY.**—On Tuesday a return was printed by order of the House of Lords, shewing the operation of the Act of last Session to regulate the Court of Chancery in Ireland, under

which suits were allowed to be commenced by petition instead of bill, and which return was obtained in reference to the reform of the Court of Chancery in England. It appears that from August last, when the Act came into force, to the 12th of June inst. 872 suits were commenced by petition, and in that period only 33 by bill. As many as 300 orders in the nature of decrees were made upon petitions presented and 31 final orders. No case had occurred in which a suit had been commenced by petition and the defendant had applied under the Act that the plaintiff should proceed by bill. This return is of some value at the present period, when it is urged that suits should be commenced by petition instead of by bill, and shews the number of matters brought before the Court of Chancery in a few months.

**BUSINESS IN THE COMMON LAW COURTS.**—On Thursday some returns ordered by the House of Lords were printed, shewing the number of causes tried in the common law courts from Michaelmas term, 1844, to the 30th of May last. These returns were ordered with the view of testing the operations of the County Courts Act. In the Court of Queen's Bench, from the 2nd of November, 1844, to the 30th of May, 1845, there were 352 causes tried; and in the last period given—from the 2nd of November, 1850, to the 30th of May last, the number was 298. In the Court of Common Pleas, from the 2nd of November, 1844, to the 30th of May, 1845, the number of causes tried was 181; and from the 2nd of November, 1850, to the 30th of May last, the number was 252. In the Court of Exchequer the causes tried from the 2nd of November, 1844, to the 30th of May, 1845, numbered 379; and from the 2nd of November, 1850, to the 30th of May last, the number was 352.

## BIRTHS, MARRIAGES, AND DEATHS.

## BIRTHS.

**CRIPPS.**—On the 21st inst. at West Daley, Berkshire, the wife of Henry William Cripps, esq. barrister-at-law, of a daughter.

**CROWDY.**—On the 21st inst. at Swindon, Mrs. Alfred S. Crowdy, of a daughter.

**GORDON.**—On the 25th inst. at 36, Gloucester-place, Hyde-park-gardens, the wife of J. Gordon, esq. barrister-at-law, of a daughter.

**POLLOCK.**—On the 23rd inst. in Guildford-street, Lady Pollock, of a son.

**POULDEN.**—On the 21st inst. at No. 3, Blomfield-terrace, the wife of George Poulton, esq. barrister-at-law, of a son.

**SISONS.**—On the 18th inst. at Longhope, near Gloucester, the wife of R. S. Sisons, esq. barrister-at-law, of a daughter.

**SPENCER.**—On the 23rd inst. at 37, Laverham-road, the wife of John Spencer, esq. barrister-at-law, of a son.

## MARRIAGES.

**EASTON,** Charles, esq. of Bridge-house, Twyford, and of Reading, solicitor, to Irene Emily, second daughter of John Galsworthy, esq. of 9, Howley place, Maidenhill, West, on the 24th inst. at St. James's, Westbourne-terrace.

**HARRIS,** James, esq. stipendiary magistrate of St. Kitts, West Indies, to Mary Augusta, eldest daughter of Nathaniel Hart, esq. the Colonial Treasurer of that Island, on the 19th inst. at the Chapel of the British Embassy in Paris.

**SEED,** Joseph Singleton, esq. of Alderley, Cheshire, to Sarah Anne Cooper, step-daughter of Beauvoir Brock, esq. of Loughborough, on the 21st inst. at All Saint's Church, Loughborough, by the Rev. Henry Fearon, B.D. rector.

## DEATHS.

**DEACON,** Mary Ann, widow of the late John Deacon, esq. Marshal of the Admiralty, on the 20th inst. in Stamford-street, aged 73.

**DES BARRES,** Charlotte Emily, eldest daughter of the Hon. Judge Des Barres, of Newfoundland, on the 18th inst. at Bedford-place, Kensington, aged 16.

**DIXON,** Emma, youngest daughter of the late Robert Dixon, esq. of Chancery-lane, barrister-at-law, on the 18th inst. at Boulogne-sur-Mer, aged 14.

**POOLE,** Charles Evered, esq. late of the 1st Royals, fourth son of Robert Poole, esq. of Southam, Warwickshire, on the 22nd inst. at the residence of his brother-in-law, W. H. Butler, esq. Kenilworth, aged 31.

## PROCEEDINGS OF LAW SOCIETIES.

## LAW STUDENTS' DEBATING SOCIETY.

## QUESTIONS FOR DISCUSSION.

Tuesday, July 1, 1851.

## ANNUAL MEETING.

President.—MR. CHURCH.

MEMBERS are requested to attend punctually at 7 o'clock.

The Treasurer will lay before the Meeting a statement of the payments and receipts of the Society during the past year, and a list of the unpaid fines, and subscriptions.

The Committee's Report of the proceedings of the Society during the past year will be read.

Motions, of which notices have been given, will be brought forward.

The Officers of the Society for the ensuing year will be elected.

XLVI. Is it advisable to continue the present system of transportation?

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# SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

A general meeting of the members of this society was held on Monday evening, at their offices, 21, Regent-street; Mr. James Stewart in the chair:—

The minutes of the previous meeting having been confirmed, the following gentlemen were unanimously elected members of the society:—Messrs. A. Fowler, Datchet; W. P. Urquhart, Castle Pollard; S. C. Denison, barrister, 4, Harcourt-buildings; John Fawcett, barrister, Petteril Bank; Thomas Bates, barrister, 21, Old-square, Lincoln's-inn; and Charles Roche, solicitor, 36, Old Jewry.

Mr. PITT TAYLOR then read the following report, the second from the special committee on law and equity procedure:—

On the 12th of May, 1881, the Society for the Amendment of the Law adopted, at the suggestion of the committee, the following resolutions:—

"Resolved, with reference to the separate jurisdiction of law and equity, as recognised in this country,

"1. That justice, whether it relate to matters of legal or equitable cognisance, may advantageously be administered by the same tribunal.

"2. That where the principles of law conflict with those of equity, the latter shall prevail to the exclusion of the former.

"3. That all litigation, whether it relate to matters of legal or equitable cognisance, may advantageously be subjected to the same form of procedure.

"4. That the rules of procedure be embodied in a code."

The committee now submit to the society the general heads of a code of procedure, by which, in their judgment, the proposed amalgamation of law and equity can be carried out. Many of the following rules are doubtless open to much discussion, and, collectively, they form the mere outline of a system. The committee, however, consider that this outline is amply sufficient to prove that the great legal reform sanctioned by the society has no insuperable obstacles to encounter.

## GENERAL OUTLINES OF A CODE.

1. The plaintiff shall, in all cases, commence proceedings by issuing a summons, giving notice of the general nature of the cause or causes of action, and specifying the county where the trial is proposed to be had.

2. The pleadings shall be in writing, and shall consist of a plaint on one side, and a demurrer or plea on the other; and if any new matter is set up by such plea, the plaintiff shall be at liberty to demur or reply; and, in the event of his replying, the defendant may demur.

3. No further proceedings shall be allowed on either side.

4. The plaint, plea, and replication shall respectively specify, in language concise and intelligible to a man of ordinary understanding, the particular fact or facts intended to be relied upon.

5. Any number of separate causes of action, defences, and replies may respectively be included in the same plaint, plea, and replication; but each cause of action, defence, and reply shall be numbered.

6. Where more than one cause of action is included in the plaint, the judge may in his discretion order separate trials.

7. All facts stated in the plaint which are not denied by the plea, and all facts stated in the plea which are not denied by the replication, shall, for the purposes of the trial, be deemed to be admitted, but all new facts stated in the replication must be proved by the plaintiff.

8. The demurrer shall specify, in language concise and intelligible to a man of ordinary understanding, the legal point or points intended to be raised, and no objection in point of law, other than those specified in the next rule, shall be taken to the plaint, or plea, or replication, excepting by demurrer.

9. If any pleading violate rules 4 or 8, the opposite party may take out a summons to set it aside, returnable before a judge, who may thereupon either set it aside or make such order as to amendment or otherwise as he shall think fit.

10. When judgment is given for the party demurring, such judgment shall be final, unless the opposite party can cure the defect by amending his pleading; and when judgment is given against the party demurring, he shall be at liberty to plead or reply, or to go to trial on the replication, as the case may be.

11. The plaint, plea, and replication shall respectively be verified on oath, either by the party himself or by his attorney.

12. Each of the parties, on obtaining the leave of the judge, shall be empowered to amend his pleading as often as may be necessary, and on such terms as the judge, in his discretion, shall think reasonable.

13. At any stage of the proceedings antecedent to the trial, either party may, on shewing to a judge reasonable grounds for the application, obtain an order summoning his opponent either before a judge or a commissioner to be cross-examined *vide* *vide*.

14. At any stage of the proceedings antecedent to the trial, either party may, on shewing to a judge reasonable grounds for the application, obtain an order for the production of documents in the custody or under the control of his opponent, in order that they may be examined, copied, or stamped.

15. At any stage of the proceedings the parties may agree upon a specific question or questions, either of law, or fact, to be submitted to a court or jury as decisive of the merits of the cause.

16. Parties may be admissible witnesses for themselves, and compellable to give evidence for their opponents.

17. The witnesses shall be subjected to *vide* *vide* examination in open court at the trial, excepting in those cases where a commission may now issue in an action at common law.

18. When witnesses are examined under a commission, their testimony shall be taken *vide* *vide*, unless the judge shall otherwise direct.

19. All questions of law shall be determined by the judge.

20. All questions of fact shall be determined by the judge, unless either party shall require them to be determined by a jury.

21. In the spring and autumn of each year the judges shall make circuits for the purpose of trying all questions of fact, whether arising in matters of legal or of equitable cognisance.

22. All questions of fact shall be tried in the county specified in the summons, unless a judge, at the instance of either party, on reasonable grounds, shall order the trial to be had in another county.

23. The supreme court shall consist of twenty-eight judges, and shall be divided into seven sections, each consisting of four judges.

24. All questions, whether of law or fact, which arise in each suit, and all interlocutory motions in relation thereto, shall be heard in the first instance before a single judge.

25. The decisions of such judge shall be open to review by the judges of the section to which he belongs, three of such judges to be a quorum.

26. The judge before whom any cause is tried shall, with or without the aid of a jury, as the case may be, and subject to the exceptions contained in the next rule, himself try all the questions whether of law or of fact which are necessary to be determined, in order finally to adjudicate upon the rights of the parties.

27. The last preceding rule shall be subject to the following exceptions:—

1. Where the judge is prevented from adopting this course by death, illness, or other unavoidable accident.

2. Where both parties agree that any particular question or questions shall be determined by another judge.

3. Where both parties agree that any particular question or questions shall be referred to any person or persons as arbitrators.

4. Where both parties agree that any particular matter or matters relating to the suit shall be investigated by any person who shall be authorised to report the result of such investigation to the judge.

5. Where both parties agree that any particular question or questions of law shall be determined in the first instance by the judges of the section to which the judge belongs.

28. In matters of account the judge may avail himself of the assistance of professional accountants.

29. Masters shall be attached to each of the seven sections of the Supreme Court, whose duties shall be analogous to those performed by the present Masters of the Common Law Courts.

30. All judgments, decrees, and orders, whether final or interlocutory, which emanate from the Supreme Court, shall be records.

31. The rule as to parties shall continue the same as at present prevails in Equity, subject to the following provisions, *vis*:—

1. No objection for the nonjoinder of necessary, or the misjoinder of unnecessary parties, shall be taken by demurrer or at the hearing.

2. The judge may, upon the motion of either party made prior to the hearing, add or strike out parties.

3. The judge may, without the application of either party, and at any stage of the proceedings, if it shall appear conducive to the ends of justice, and other parties.

4. Judgments, unless they be what are technically called judgments *in rem*, shall only bind the parties and their privies respectively.

5. Where trustees sue or are sued, the persons beneficially interested shall not be made parties, unless they have an interest in the suit adverse to that of the trustees, but shall be considered to be represented by the trustees.

32. With respect to all judgments and orders involving the substantial merits of a suit, an appeal shall lie from each of the seven sections to the judges of the other six sections. Seven of such judges to be a quorum.

33. The decision of the Court mentioned in the last preceding rule shall be final, first, where the matter in dispute shall not exceed the value of 1,000*l.*, and next, whatever shall be the value of the matter in dispute, where an unanimous judgment of the Court below shall be unanimously affirmed.

On the motion for the reception of the report, a protracted conversation arose, in the course of which Mr. Vansittart Neale, Mr. Goldsmith, and other gentlemen, suggested amendments and amplifications, which they thought would tend to render the report more explicit and complete. The objections urged by Mr. Neale were to the effect that affidavits were excluded by the proposed code in cases where they were either essentially necessary, or where the convenience of admitting them would be very great—as in proving births, deaths, or marriages—cases in which they were admitted in the American code by clauses specially provided. Mr. Goldsmith urged that difficulties would arise in the reconciliation of clause 7 with clause 11 of the proposed code, if it should happen that the attorney was not made aware of the whole facts of a case, and should consequently, in the absence of the party whom he was allowed to represent, swear to a falsehood without perjuring himself; he objected that power should be given to the attorney to take the gravest responsibilities upon himself in the absence of his client, without being absolutely able to assure himself of the unlimited confidence of that client.

The committee replied that they did not think that it was possible for the society fully to comprehend the scope of their report until they should have read it for themselves in print. It should also be borne in mind that the committee had strictly confined themselves to that part of the system which was touched by the proposed blending of the Courts of Law and Equity, and particularly in answer to the question of an honourable member, whether the society, in following up its recommendations to unite these Courts, were prepared to draw up a code which should accomplish that object. The proposed code was drawn up with that view: it was for actions, and not for special proceedings.

A portion of the society did not seem to think that it was stated with sufficient perspicacity on the face

of the report to what sort of cases it peculiarly applied, and that misapprehension might consequently arise on the point. An amendment was, therefore, proposed to the motion for the reception of the report, which had for its object to refer the report back to the committee, in order that they might define more distinctly the cases to which it referred.

The amendment was however, withdrawn, and the report was received and ordered to be printed and circulated, and its contents discussed at a subsequent meeting of the society.

The society then adjourned.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	212½	213	213	212½	212½	...
3 $\frac{1}{2}$ Cent. Reduced Annuities	97½	97½	97½	97½	97½	97½
3 $\frac{1}{2}$ Cent. Consols Annuities	96½	96½	96½	96½	97	97½
Consols for Account .....	96½	96½	96½	96½	97	97½
New 3½ Cent. Annuities ..	98½	98½	98½	98½	98½	98½
Long Annu. (exp. Jan. 5, 1880)	...	...	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1880)	...	...	...	...	...	...
Do. 30 yrs. (exp. Jan. 5, 1880)	...	...	7½	...	...	...
India Stock .....	265	...	...	...	...	...
India Bonds (1,000 <i>l.</i> ) .....	52	53	53	53	54	53½
Do. do. (under 1,000 <i>l.</i> ) .....	52	53	55	53	...	55½
South Sea Stock .....	...	...	...	...	...	...
Do. do. New Annuities .....	...	...	...	...	...	...
Exchequer Bills, 1,000 <i>l.</i> ..	45½	46½	46½	46½	46½	47*
Do. do. 500 <i>l.</i> .....	46*	46*	46*	46*	46*	47*
Do. do. Small .....	46*	46*	46*	46*	46*	47*
Do. Advertised .....	...	...	...	...	...	...

\* Premium.

† Ex. div.

## THE GAZETTES.

### Bankrupts.

Gazette, June 24.

BENTON, JOHN BENJAMIN, corn merchant, White Horse-st. Stepney, July 4, at half-past one, Aug. 5, at twelve, Basinghall-st. Off. as Edwards. Sols. Messrs. Hilleary, Fenchurch-st. Petition, June 20.

DAVIES, WILLIAM, coal merchant, Walbrook, City, July 3, and Aug. 7, at twelve, Basinghall-st. Off. as Johnson. Sol. Gresham, Castle-st. Holborn; Petition, June 16.

GRANTVILLE, AUGUSTUS BOZZI, boarding-house keeper, Harrow-on-the-Hill and Piccadilly, June 28, at two, Aug. 23, at eleven, Basinghall-st. Off. as Pennell. Sols. Lawrence and Flews, Old Jewry-chambers, City. Petition, May 21.

HANSON, WILLIAM, statuary, Albion-wharf, Kensington-canal-basin, Kensington, July 3, at ten, and Aug. 5, at eleven, Basinghall-st. Off. as Groom. Sol. Ladgrove, Mark-la. Petition, June 19.

PATTEN, ANTHONY, horse-dealer, Chapple, Essex, July 12, at one, and July 29, at twelve, Basinghall-st. Off. as Graham. Sols. Messrs. Hilleary, Fenchurch-st. City, and Stratford, Essex. Petition, June 21.

SOWERBY, JOSEPH, silk-mercer, Oxford-st. July 10 and Aug. 12, at eleven, Basinghall-st. Off. as Groom. Sol. Wootton, Tokenhouse-yard, City. Petition, June 12.

TIDEX, THOMAS GEORGE, bookseller, Rugby, Warwickshire, July 3 and 31, at twelve, Birmingham. Off. as Christie. Sol. Wratlaw, Rugby. Petition, June 14.

Gazette, June 27.

ALLOM, THOMAS, bookseller and publisher, 309, Regent-st. Middlesex, July 5, at half-past one, Aug. 19, at half-past twelve, Basinghall-st. Com. Goulburn. Off. as Nicholson. Sol. H. Lloyd, 36, Milk-st. Cheapside. Petition, June 24.

BALLINGALL, JAMES, pianoforte maker, Edward-st. Portman-square, July 4 and Aug. 8, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. F. Paxon, Bloomsbury-square. Petition, June 24.

BOYD, ISAAC, silk manufacturer, 20, Spittal-square, Middlesex, July 12, at one, Aug. 8, at half-past eleven, Basinghall-st. Com. Holroyd. Off. as Groom. Sol. Crowder and Maynard, 57, Coleman-st. City. Petition, June 25.

BRIDGES, WILLIAM, jun. farmer and cattle dealer, Whitteles, Cambridge, July 5, at one, Aug. 19, at twelve, Basinghall-st. Com. Goulburn. Off. as Pennell. Sol. F. Schultz, 4, Dyer's-buildings, Holborn. Petition, June 18.

CARPENTER, JOHN NELSON, miller, July 12, at half-past twelve, Aug. 11, at half-past ten, Birmingham. Com. Balguy. Off. as Whitmore. Sol. J. Suckling, Cherry-st. Birmingham. Petition, June 12.

EDWARDS, THOMAS, basket and hamper manufacturer, Liverpool, July 10 and Aug. 7, at eleven, Liverpool. Com. Stevenson. Off. as Turner. Sol. Dodge, Liverpool. Petition, June 25.

GARROW, WILLIAM, merchant, Liverpool, July 14 and 29, at eleven, Liverpool. Com. Perry. Off. as Cazenove. Sols. Messrs. Forshaw, Sweeting-st. Liverpool. Petition, June 25.

MATHESON, HUGH, merchant, Liverpool, July 14 and 29, at eleven, Liverpool. Com. Perry. Off. as Cazenove. Sols. Littledale and Bardswell, Royal Bank-buildings, Liverpool. Petition, June 23.

MURRAY, JOHN, builder, Isle of Sheppey, Kent, July 4, at twelve, Aug. 8, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sols. H. H. Beckett, South-square, Gray's-inn; and J. Ward, Sheerness. Petition, June 26.

OWEN, JOHN, flannel manufacturer, Welshpool, Montgomeryshire, July 21 and Aug. 5, at eleven, Liverpool. Com. Perry. Off. as Morgan. Sols. Woosnam and Lloyd, Newtown; and J. Mason, 30, Castle-st. Liverpool. Petition, June 23.

PRICE, JOSEPH, and LAVENDER, JOHN, papers, and co-partners, Birmingham, July 8 and 30, at twelve, Birmingham. Com. Daniel. Off. as Christie. Sol. T.

**R. T. Hodgson, Cherry-st. Birmingham. Petition, June 23.**  
**TRIST, THOMAS GEORGE, bookseller and stationer, Rugby, July 3 and 31, at twelve, Birmingham. Com. Daniel. Off. as Valpy (and not Christie, as before advertised). Sol. C. F. Wristlaw, Rugby. Petition, June 14.**  
**TUCKER, WILLIAM, jun. coal merchant, Kingston-upon-Hull, July 9 and 30, at half-past twelve, Kingston-upon-Hull. Com. Ayton. Off. as Carrick. Sols. Levett and Champney, Kingston-upon-Hull. Petition, June 18.**  
**WALPOLA, JAMES, money scrivener, Northwold, Norfolk, July 10, at twelve, Aug. 8, at eleven, Basinghall-st. Com. Fonblanque. Off. as Stanfield. Sols. Pringle, Stevenson, and Shum, King's-road, Gray's-inn; and J. L. and W. Reed, Downham Market, Norfolk. Petition, June 24.**  
**WITHERAD, WILLIAM, cabinetmaker, Lancaster, July 8 and 28, at twelve, Manchester. Off. as Pott. Sol. Bowley, Booth-st. Manchester. Petition, June 18.**

### Dividends.

#### Bankrupt Estates.

Official Assignees are given, to whom apply for the Dividends.

**Arbutnot, J. de M. merchant, first, 5s. 5d. Pennell, London.—Bar, J. builder, second, 6d. Whitmore, London.—Bates, J. watchmaker, second, 8d. Whitmore, London.—Biggs, H. R. carpenter, first, 1s. 0d. Stansfeld, London.—Bradley, T. lard refiner, first, 4d. Whitmore, London.—Charman, A. farmer, second, 11d. Stansfeld, London.—Dean, T. chemist, first, 10s. 6d. Turner, London.—Eccles, W. cotton spinner, third, 6d. Mackenzie, Manchester.—Gerlach, H. E. merchant, first and final, 1s. 7d. Wakley, Newcastle.—May, G. builder, first, 2s. 23d. Whitmore, London.—McDowell, R. draper, first, 10s. Whitmore, London.—Sharples, J. and Co. cotton spinners, final, 1s. 2d. and 5-32nds of a 1d. Mackenzie, Manchester.—Trent, E. draper, first, 4s. 11d. Whitmore, London.—Williams, T. draper, first, 1s. 2d. Stansfeld, London.**

#### Insolvent Estates.

Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.

**Bartlett, J. butcher, 20s.—Dunn, B. tide waiter, final, 1s. 9d.—Eastick, R. T. saddler, 3rd.—Faxon, J. farmer, 4s.—Hughes, W. J. captain, E.N. second, 5s. 7d.—Locker, W. earthenware dealer, 2s. 10d.—Nathan, J. cab driver, 6s.—Berrill, W. carpenter, 7s. 10d. Apply to Mr. Parrott, solicitor, Stoney Stratford.**

### Assignments for the Benefit of Creditors.

#### Gazette, June 17.

**Barwell, W. draper and grocer, Risely, Bedford, April 25. Trusts. W. Woolston, draper, Wellingborough, and W. Rayson, farmer, Slipston. Sol. W. Murphy, Wellingborough.—Berry, P. publican and licensed victualler, Thomas-st. Manchester, Lancashire. Trust. W. W. Cheetham, wine merchant, Manchester. Sol. W. Andrew, Manchester.—Bower, J. sen. and jun. and W. Flint-glass and bottle manufacturers, Hunslet, Leeds, York, May 26. Trusts. J. Longley, builder, J. Ingham, cut nail manufacturer, H. Wilson, sen. butcher, Hunslet. Sol. J. Thackrah, Leeds.—Groves, G. and E. B. tallow chandlers, Melcombe Regis, Dorset, June 10. Trusts. S. Penny, grocer, Weymouth, and S. Simmonds, cabinetmaker, Melcombe Regis. Sol. F. C. Steggall, Weymouth.—Hassell, W. grocer, Abington, Berks, June 13. Trusts. F. Fenn, wholesale grocer, Bodolph-la. and C. Underhill, grocer, Oxford. Sols. Graham and Son, Abington.—Lewis, T. surveyor and builder, Bath, Somerset, June 13. Trust. J. Keralake, plumber and glazier, and G. E. Packard, painter and glazier, Bath. Sols. T. and R. Crutwell, Bath.—Reese, C. brewer and maltster, Leighton Buzzard, Bedford, June 3. Trust. F. Bassett, banker, C. Ridgway, draper, and R. Richmond, chemist and druggist, Leighton Buzzard. Sols. Ashfield and Allen, Leighton Buzzard.—Williams, T. E. wine and spirit merchant, Kzoter, May 27. Trusts. D. Hart, wine merchant, Fenchurch-st. and H. Green, gentleman, Croome D'Abitot. Sol. T. Holland, Upton-upon-Severn.**

#### Gazette, June 20.

**Isacks, G. brush maker, Minerva-st. Hackney-road, June 7. Trust. A. Isacke, widow, Minerva-st. Hackney-road. Sols. Hancock and Young, Tokenhouse-yard.—Jones, J. currier, Ruabon, Denbigh, May 30. Trusts. T. Comer, leather factor, Liverpool, and W. Pierce, tanner and leather dealer, Wrexham. Sols. James and Owen, Wrexham.—Kirby, M. G. currier, Woodstock, Oxford, June 16. Trust. J. W. Columbus, clothier, Street, Glastonbury. Sols. Taylor and Hurford, Oxford.—Stables, W. W. woollen manufacturer and merchant, Crossland Mills and Huddersfield, York, May 22. Trusts. H. B. Taylor, drysalter, L. Parkin, woolstapler, H. Charlesworth, card maker, D. Marsden, bank manager, and J. Atkinson, woolstapler, all of Huddersfield. Sols. Brook, Freeman, and Batley, Huddersfield.—Warburton, W. hosier, Leicester, June 3. Trust. S. Carter, worsted spinner, W. Windram, trimmer and dyer, and R. Scampton, commission agent, all of Leicester. Sol. G. Toller, Leicester.**

### Partnerships Dissolved.

#### Gazette, June 17.

**Allen, J. and Co. joiners and cabinet makers, Miffield, June 11.—Atherstone and Nichols, lace joiners, Manchester, June 14. Debits paid by Atherstone.—Dane, G. and J. and Drog, W. wholesale, retail, and export ironmongers, &c. King William-st. Arthur-st. east, Arthur-st. west, and Swan-lane, and Farningham, May 31.—Fernkough J. and Son, tobacco manufacturers, Liverpool, May 10.—Gouffer and Woodley, brewers and coal merchants, Southwold and Oxford, May 1.—Gilder and Hardess, coal merchants, June 16.—Harris and Galabin, account book manufacturers, Fenchurch-st. June 14.—Jones, J. and Potts, A. ironfounders and mechanical engineers, Newton-in-Makerfield, June 11.—Lakin, J. and Payne, R. drapers, Frederick-place, Hampstead-road, June 12. Debits paid by Lakin.—Loyel and De Brumathiere, newspaper proprietors, Essex-st. Strand, June 16.—Merrivott and Chambers, canvas manufacturers, Sunderland, June 10.—Robinson, Brothers, brick manufacturers, Sheffield and Maccabrough, June 12. Debits paid by James Robinson, at Sheffield, and by Joseph Robinson, at Maccabrough.**

#### Gazette, June 20.

**Allen, G. and R. wine merchants and brewers, Falmouth, June 9. Debits paid by G. Allen.—Chesbrough, J. and A. woolstaplers, Bradford, June 16. Debits paid by A. Chesbrough.—Corker and Underwood, general dealers, Manchester, June 17.—Denham and Newton, builders and contractors, Todmorden and Longfield, June 13.—Fletcher, G. and Brothers, coal proprietors and dealers, Brompton, Prestwick-cum-Oldham, June 9. Debits paid by G. Fletcher.—Heath, Walker, and Bott, brick-makers, Longton, Stoke-upon-Trent, June 14. Debits paid by Heath and Bott.—Hewitt, J. and Co. hosiers, Liverpool, June 18.—Illingworth and Raistricks, cloth manufacturers and scribblers, Idle, as regards Illingworth, May 6. Debits paid by J. A. and G. Raistrick.—Llynwionen Fire Brick Company, fire brick manufacturers, Llynwionen, May 28.—Miles, Schofield, and Nephew, grocers, Oldham, June 11. Debits paid by A. Schofield.—Naylors, Oxley, and Co. merchants and commission agents, Valparaiso, Tacna, and Lima, as regards Oxley, Dec. 31.—Offley, Webber, and Forrester, wine and general merchants, England and Oporto, June 16. Debits paid by Cramp, Offley, and Webber.—Ommamney, Son, and Co. navy agents, Charing-cross, as regards W. H. Palin, May 31.—Rice and Co. land and water carriers, Worcester, Dec. 24. Debits paid by Rice.—Shuttleworth, W. and Co. worsted spinners, Lower Woodlands, Bradford, June 14. Debits paid by Shuttleworth.—Tidbury, C. and Co. print and book sellers, Upper St. Martin's-lane, and Tichborne-st. Haymarket, June 17.—Tindall and Douthett, curriers, Great Sutton-st. Clerkenwell, June 19.—Tringham and Merritt, wine, spirit, and beer merchants, Trinity-square, Tower-hill, April 30. Debits paid by Tringham.—Turnor and Laws, drapers and mercers, Church-st. Hackney, June 13.—Whitehouse, E. and Co. gas tube manufacturers, Wednesbury, June 6.—Wilkins and Weatherly, wire rope manufacturers, High-st. Wapping, June 1.—Willels, J., Lowe, J. and Willels, W. factors, Birmingham, as regards W. Willels, May 29. Debits paid by J. Willels and J. Lowe.**

### VALUABLE FREEHOLD BUILDING

LAND AND DWELLING-HOUSES, situate at Woodhouse, Leeds, Yorkshire.—TO BE SOLD, in several lots, pursuant to an order of the High Court of Chancery, made in a cause, "Lyndon v. Woolcock," with the approbation of James William Farrer, Esq., one of the Masters of the said Court, at Leeds, in the county of York, in the month of OCTOBER NEXT, of which due notice will be given, A FREEHOLD ESTATE, adapted to building purposes, situate near Little Woodhouse, in the town of Leeds, with several substantial Dwelling-Houses, and which said Estate forms a portion of the property of Mrs. Julia Lyndon, late of Boston, in the parish of Bramham, in the county of York, deceased.—Particulars are in course of preparation, and may shortly be had gratis, at the Master's Chambers, Southampton-buildings, Chancery-lane, London; of Messrs. RICHARDSON and SADLER, Solicitors, 28, Golden-square, London; of Mr. BENJAMIN MARTINDALE, Solicitor, of 19, Cecil-street, Strand, London; of Messrs. BISCOFFE and COX, Solicitors, 19, Coleman-street, London; of Mr. JOHN MOSS, Solicitor, Derby; Mr. THOMAS WILLIAM TOTTIS, Solicitor, Leeds; and Mr. THOMAS NEWSAM, Land-Surveyor, Leeds, aforesaid.

RICHARDSON and SADLER,  
 Plaintiff's Solicitors, 28, Golden-square.

June 21, 1851.

**COPYRIGHT MEETING.**—The attendance of British Authors, Publishers, Printers, Stationers, and others, interested in an equitable adjustment of British and Foreign Copyright, is requested at a Public Meeting, to be held at the HANOVER-SQUARE ROOMS, on TUESDAY, the 1st of JULY, at Two o'clock, to consider their interests as affected by a recent decision of a Court of Law, tending to deprive them of all prospect of reciprocal rights, by removing the inducements for International Copyright.

The Chair will be taken by SIR EDWARD BULWER LYTTON, Bart., punctually at Half-past Two, and Mr. HENRY G. BOWR, will act as Vice-Chairman.

CHAS. STEVENS, Hon. Sec.  
 4, South-square, Gray's-inn.

**CARRIAGES for SALE, NEW and SECOND HAND,** of the best make, and very cheap for cash, consisting of step piece barouches, elegant and stylish George IV. phaetons, driving ditto, sociables, single and double Broughams, the head-opening forming a summer carriage, plentiful with mahogany fittings, cab phaetons and pony phaetons. Twelve months' warranty given, and a saving of twenty-five per cent. at 29, DAVIES-STREET, BARKLEY-SQUARE.

SEVERAL LIGHT BROUGHAMS and CAB PHAETONS, Second hand, at 55 and 76 guineas each.

### TO CARRIAGE PURCHASERS.

I. ROGERS begs respectfully to invite all who are in quest of first-rate CARRIAGES, at a moderate price, to view his well-selected STOCK, comprising broughams of the highest finish (both new and second-hand), barouches on C and elliptic springs, Stanhope and George IV. phaetons, handsome roomy pair-horse clearances, most admirably adapted to family use, chariots by Hobson, britskas, &c. At 28, North Audley-street, Oxford-street.

(Prices moderate.)

### SUMMER CARRIAGES, NEW AND SECONDHAND, OF THE BEST DESCRIPTION.

MESSRS. ROBSON and CO. 56, SOUTH AUDLEY-STREET, corner of Mount-street, Grosvenor-square, have ready for immediate use several step-piece barouches, with and without Cee and under springs, Charlotte, Landau, Coaches, and Britskas. Also very elegant and stylish George-the-Fourth Phaetons, Driving Phaetons, and others; and Sociables, single and double-bodied, Broughams, and Clearances, for one and two horses, to let on hire, with liberty to purchase. All carriages sold warranted twelve months.

Several second-hand Light Broughams from 55 guineas to 67 guineas.

### PROMOTER LIFE ASSURANCE and ANNUITY COMPANY, 9, Chatham-place, Blackfriars, London; established in 1836: subscribed capital, 240,000.

This Society effects every description of life assurance, both domestic and foreign, on most advantageous terms, either on the bonus or non-bonus systems.

Tables of rates, with all further particulars, may be obtained at the office.

M. SAUARD, Secretary.

### LAW REVERSIONARY INTEREST AND INVESTMENT SOCIETY.

Offices, 30, Essex-street, Strand, London.

In shares of 25l. each.

Not more than 12. to be called for at one time, nor at less intervals than three months.

This Society was partly formed three years ago, and a great number of shares were subscribed, but the then depression of the money market compelled its postponement.

The improved state of the country causing safe and profitable investments to be sought for, suggests the propriety of now proceeding to complete the establishment of a society whose design has met with such extensive support.

Another peculiarly advantageous circumstance is the means now afforded by the formation of the Law Property Assurance and Trust Society for the conducting of the business of the Law Reversionary Interest and Investment Society at a comparatively trifling cost, it being proposed to make an arrangement with the former flourishing Society for the use of its offices and officers, instead of incurring the great expense of a separate establishment, thus immensely increasing the profits of the Reversionary Interest Society.

The plan is shortly as follows:—

1. The Law Reversionary Interest and Investment Society, to be formed of holders of shares of 25l. each. Deposit, 2s. 6d. per share.

2. Calls not to exceed 1l. per share, nor at less intervals than three months.

3. The business to be conducted at the offices and by the establishment of the Law Property Assurance and Trust Society; but entirely as a distinct Society, with distinct books, accounts, &c.

4. The Profession to have the advantage of a fair commission on all business its members may bring to the office.

5. To the public it will offer the advantage of fair prices or Reversionary Interest and Policies of Assurance, with an option of converting Reversionary Interests into present income, so as to make provision for immediate wants, and otherwise to facilitate family arrangements.

6. For persons having money which they desire to invest both securely and profitably, and in any sum, small or large, it is well known that there is no such safe and advantageous method of doing so than in such a Society, which differs from all others in this, that there is no risk, for the whole of its funds being secured, its profits can be calculated with accuracy, and the capital is only called for as it is wanted to be profitably employed. Any persons may be members of it, so that solicitors can recommend it to their clients as a desirable investment.

It is remarkable that, while boasting of so many flourishing Assurance Offices, the Legal Profession has not yet sought to secure for itself the still greater advantages resulting from a Reversionary Interest Society. That defect will now be supplied, under peculiarly favourable circumstances.

Applications for shares, in the form below, to be addressed to the Secretary, at the offices of the Law Property Assurance and Trust Society, 30, Essex-street, Strand.

HERBERT COX, Secretary pro tem.

### FORM OF APPLICATION FOR SHARES.

To the Promoters of the Law Reversionary Interest and Investment Society.

Gentlemen,—Be pleased to allot me shares in the Society, on the terms named in the Prospectus.

Yours, &c.

Dated ..... Name .....

Address .....

N.B. Unless the Society is formed, the entire deposit will be returned, and the expenses paid by the promoters.

### THE UNITED KINGDOM TRADE PROTECTION ASSOCIATION.

OBJECTS.

1. The collection of debts for members.  
 2. The collection of rents for members.  
 3. Professional attendance at the County Courts for members.

4. Confidential inquiries for members as to the responsibility of parties.

Secretary and Solicitor.—Mr. JAMES TOWNLEY.

Agent and Collector.—Mr. Thomas Adams.

Office, 1, Moorgate, London-wall, London: office hours, 10 till 5 o'clock.

Annual subscription, one guinea.

N.B.—By the County Court Acts, a person suing in those courts, and employing a solicitor or recognized agent, need not appear personally, unless as a witness. In this Association the solicitor or his deputy will conduct the cases free of further charge to the members, with the exception of the disbursements, and 5 per cent. on sums received. Charge for collecting rents 5 per cent.

Members becoming acquainted with fraudulent conduct, are requested to communicate same confidentially, for the use of the members.

Professional agents required throughout the United Kingdom. None but solicitors need apply.

### TATE'S EXCHEQUER INK (for Legal

Records and all important Writings) is manufactured upon principles that insure a fine, limpid black ink for steel or quill pens, without sediment or the slightest tendency to thicken in the stand. It is the purest and most concentrated preparation for commercial purposes that has been invented, and is not affected by climate.

"A very useful ink."—Morning Chronicle.

May be had at 18, Ironmonger-lane, Chesapeake; and of all Stationers. Country-Agents Wanted. See specimens in the Exhibition.

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## To Readers and Correspondents.

"W." and "LEX" complain that London Solicitors send them agency business, and then, not only do not pay, but will deny no reply to applications. What is to be done? We answer, send them a County Court summons. "E. L. C."—A short report of this case will appear.

## SCALE OF CHARGES FOR ADVERTISEMENTS.

Under Fifty Words..... 20 5 0  
For every additional Ten Words..... 0 0 6

Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.

Advertisements ordered for the first page are charged one-half more. If not so ordered, they will take the chance of position.

We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, JULY 5, 1851.

## NOT SO BAD AFTER ALL.

LORD BROUGHAM has obtained some returns from the Common Law Courts, of the trials had in them at two periods of six months before and after the establishment of the County Courts, the object being to ascertain what is the actual diminution of business of which such vigorous complaints are made. The results will probably surprise our readers as much as they have astonished ourselves.

The periods chosen for the experiment were the flourishing one of 1844-45, and the equally prosperous one of 1850-51; the former, it will be observed, preceding the railway litigation, and the latter succeeding it. The results shew a total of 912 causes tried in the half-year of 1844-5, and of 902 tried in the like half-year of 1850-1; being a decrease of ten only!

We confess ourselves fairly puzzled by this unexpected revelation, as we know that on all the Circuits there has been a great diminution.

It is, therefore, plain that, up to this time, the County Courts have inflicted no material injury upon the Superior Courts. They have not as yet stolen away their business, and the prevalent belief that they have done so must have proceeded from a fallacious impression, that the vast number of suits disposed of by the County Courts were so many taken from the Superior Courts. Such, however, is not the fact. The greater portion of the business of the County Courts is positively new, created by the facilities they afford for the redress of wrong, and without them it would have been non-existent.

But, nevertheless, the fact that with extending commerce and increasing population, the business of the Superior Courts has declined, though to a trifling extent, when it should have increased largely, is significant, and demands

serious consideration. That business is still declining, as every pleader's chambers and every agent's office knows but too well. To arrest the downward progress should be the aim of all who desire to preserve the ancient tribunals of the land in their dignity and their usefulness. To this end, a bold reform of procedure proposed by the Commissioners, combined with the Law of Evidence Bill, just sent down to the Commons with the unanimous approval of the Lords, will be the surest means; and with such improvements, and a re-arrangement of the times and places for trial similar to that which we last week proposed, there can be no doubt that the business of the Superior Courts will not only revive, but become vastly more extensive than ever it has yet been. The people would prefer to seek justice there if they were only permitted to procure it with tolerable certainty, speed, and cheapness.

## LAW OF EVIDENCE BILL.

LORD DENMAN's eloquent appeal has carried conviction into all minds. Notwithstanding the threats of opposition, which made the friends of justice tremble for its fate, the Law of Evidence Bill has passed the House of Lords without a dissentient voice. It has now to undergo the ordeal of the Commons.

We trust that its reception there will be equally unanimous. It is very desirable that a measure so important to the administration of justice, which has been advocated by the thinking few for many years, but which has made its way slowly into the convictions of the unreflecting many, should go forth stamped with the approving vote of the whole Legislature. If the House of Lords could find no flaw in it, and, after the most careful investigation in committee, could pass it without even a division, it is not too much to ask of the House of Commons, less competent to investigate such a question, that they should accept the Bill on the faith of the ordeal to which it has been subjected by the tribunal peculiarly qualified to try it, and not to hazard its existence at this late period of the session by another committee of their own.

Seemingly unconscious that the future prosperity of the Superior Courts is dependent upon the success of this measure, the Law Institution petitioned the House of Lords against it!! Nay, it is a fact, readers, difficult as it may be for you to believe. The House of Lords paid no heed to the petition. Not a solitary peer could be found to support it with his vote. We know not whether this lamentable exhibition by the representative of our Profession is to be repeated in the Commons: for the credit of the lawyers of England, we trust that there will, at least, be wisdom enough not to shew how far their Society is behind the intelligence of the time. But if that petition should be repeated in the Commons, we trust that the example of the Lords will be followed, and that neither in the Commons may it be possible to find a solitary vote in furtherance of its prayer. But it is wise never to feel too secure. Time presses, and amid the hurry of the closing session opportunities are afforded for delaying and damaging the best measures. We know not who has undertaken the charge of the Bill in the Commons; but whether it be confided to the Government or to a private member, of this we can assure them,—that many eyes are upon it, many good wishes go with it, its success is a matter of incalculable moment to the Superior Courts, and if it be permitted to be put aside on any pretence of the lateness of the season, they who may be parties to the delay will be exposed to public censure.

We recommend those who feel an interest in the preservation of the business of the Superior Courts to petition the Commons to pass the Law of Evidence Bill during the present session.

## TRIALS.

THE plan which we propounded last week for completing the contemplated reform of the Common Law Courts by facilitating trials, appears to be generally approved, the only objection offered to it being the extent of the proposed changes.

But small changes are useless now, as the Common Law Commissioners have found. The system is a whole, and cannot be amended without making more mischiefs than are cured. The Commissioners, it is said, first tried their hands at amendments, but as they patched one rent they made two, and they have ended by pulling down the edifice of procedure and rebuilding it on a new plan. So it must be with that important portion of the administration of justice which relates to trial. To shorten procedure without speedy trial would be a manifest folly. Trial cannot be facilitated without more frequent Assizes. There cannot be more frequent Assizes without a re-arrangement of the Circuits and redistribution of the legal year. It would be an extreme inconvenience to have four Sessions and four Circuits in the year. From this it follows that the Sessions, as the least worthy, should give place to the Assizes. Some change is certainly necessary, and any change will compel more changes, until it will be seen that nothing short of that which we have proposed will meet the demands of the occasion. And that will do it effectively.

It has been said that, with the increased business that would certainly result from the improvements suggested, we do not allow a sufficient time for the circuits, especially as only one judge will be sitting. If so it be, the remedy is easy. We have calculated on four judges for the London Court of Assize. Three would suffice, and the fourth might permit of an eleventh circuit being formed. If a month be not sufficient for the circuits, five or six weeks may be allowed, and ample time would yet remain for the business of the Term in banco.

And to meet the possible contingencies of illness or excess of business the commission should still contain the names of the Queen's Counsel and Sergeants of the circuit, and if the assistance of any of them should be required they should be paid for it by a fee, to be fixed by the Act.

## REGISTRATION.

IT seems to be generally admitted, even by its warmest advocates, that the benefits of Registration are prospective. Some years must elapse before a clear title will appear upon the Register, and until that time arrives, there must be an investigation of title anterior to the register.

There is, therefore, no doubt that Registration will be of pecuniary advantage to our own generation of lawyers. The solicitors now living or in embryo will profit largely by it. They may, therefore, be excused if they accept with equanimity a boon which has not been sought by them, but which has been thrust upon them in despite of their own remonstrances. We have now done our duty. We have told the Legislature and the public in plain terms, "This measure will increase your costs and our profits." Patriotism demands no further effort to repel the gift. We may now, without compunction of conscience, submit to receive the advantage that has been provided for us, and leave posterity to take care of itself.

## ASSURANCE OF TITLES.

A SHOAL of correspondents have inquired the meaning of Assurance of Titles, now in practical operation.

It may be stated generally, that it proposes to extend to the risks that affect titles the same principles of assurance which guard



against risks by fire, by hail, by water, or to life.

Many titles are legally defective; some link in the evidence is wanting; an heir cannot be found; a party having a minute interest is under disability; a death cannot be proved, although there is no doubt about it: these, and a hundred similar defects, are continually occurring, by consequence of which property is prevented from being sold or mortgaged, or, if sold, it suffers great deterioration in value, by reason of the defect in title.

Assurance is a cure for such defects. A small sum, paid either at once or annually, will obtain a policy of assurance which guarantees to the holder of the property for the time being its full value, should it be lost to him by reason of a defect in title.

Accompanied with such a policy, a title, however in itself defective, is not only as good as the best title, but actually much better, because it is absolutely secure: it is placed beyond all risk, and therefore will command a much better price in the market than property not so secured. Mortgagees should not advance money without it. A trustee would scarcely be justified in putting out trust-moneys on property without requiring such an assurance of the title, because a trustee is bound to require the best security that can be had; and if, having the means of securing his money, he neglects it, and by any accident it should be lost by reason of a defective title, he would be personally responsible.

Some instances of assurance, which have actually occurred, will shew to what uses it may be applied.

A solicitor had the care of some title-deeds. He sold his business. His successor could not find them. The owner had been in possession many years. The property was sold, but no deeds being to be found, there was no title. An assurance was effected, and the policy is as good as the deeds, for it guarantees the value should the property be lost.

A husband seized in fee died. Dower was barred. The widow remained in possession fifteen years. No heir could be found. A marketable title could not be made to a purchaser, so an assurance was effected against the chance of an heir appearing and recovering the estate.

A property was sold in small lots, each of 50l. value. The cost of separate investigations of the title by each purchaser would have been more than the purchase-money—in fact, it would have prevented a sale. The owner assures the title of each lot, and the policy is accepted in lieu of a ruinous, and indeed, impossible investigation by each of the purchasers.

These are some of the instances, which have actually occurred, of the beneficial application of assurance to titles. They will serve, better than any description of a plan, to make the principle and the practice intelligible to our correspondents.

## THE LEGISLATOR.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

Friday, June 27.

Burgess's and Freemen's Parliamentary Franchise Marriages, India.

Monday, June 30.

Veterinary Surgeons' Exemption  
Assessed Taxes Composition  
General Board of Health, No. 2.

Tuesday, July 1.

Mercantile Marine Act Amendment  
Public Works, Ireland  
Public Works, Fisheries, &c.  
Salmon Fisheries, Scotland  
Arrest of Absconding Debtors.  
Law of Evidence Amendment.

Wednesday, July 2.

Conveyance of Mails by Railways.

Thursday, July 3.

Turnpike Trusts Arrangements.

Monday, June 30.

##### BILLS READ A SECOND TIME.

Chief Justices' Salaries.  
Loan Societies  
Highway Rates  
Ecclesiastical Jurisdiction  
Merchant Seamen's Fund  
Burgesses and Freemen's Parliamentary Franchise.

Tuesday, July 1.

School Sites Acts Amendment.

Wednesday, July 2.

Ecclesiastical Residences, Ireland.  
Churches and Chapels, Ireland  
United Church of England and Ireland  
Pharmacy.

Thursday, July 3.

Assessed Taxes Composition  
Public Works, Ireland  
Public Works, Fisheries, &c.  
Veterinary Surgeons' Exemption.

##### BILLS READ A THIRD TIME AND PASSED.

Monday, June 30.

General Board of Health.

Thursday, July 3.

Oath of Abjuration, Jews  
Highway Rates  
Ecclesiastical Jurisdiction  
Burgesses's and Freemen's Parliamentary Franchise.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

Friday, June 26.

Waterford and Tramore Railway.

Tuesday, July 1.

Warkworth Harbour Dock.

Thursday, July 3.

Imperial Continental Gas Association  
Saint Bartholomew's Hospital Estate  
Saint Pancras, Middlesex, paving.

#### SESSIONAL PRINTED PAPERS.

- Par. Numb.  
400. Ecclesiastical Commission, and Archbishoprics and Bishops—Returns  
415. Railway Accident, Clay Cross Station—Copy of Report  
402. St. David's College, Lampeter—Treasury Minute  
330. Lists of Voters—Abstract of Return  
399. Clogheen Union—Copies of Correspondence  
423. New Churches—Account  
435. Birkenhead Land and Works—Return  
445. Committee of Selection—9th Report  
437. Bills—Chief Justices' Salaries  
436. — Stock in Trade  
438. — Loan Societies  
439. — Highway Rates  
440. — Ecclesiastical Jurisdiction  
441. — New Forest Deer Removal, &c. as amended by the Select Committee  
364. — County Courts further Extension (Amended)  
444. — School Sites Acts Amendment  
451. — Ecclesiastical Titles Assumption, as amended by Committee, and on Consideration of Bill as amended  
443. — Registration of Assurances  
452. — Burgesses and Freemen's Parliamentary Franchise  
453. — Marriages (India)  
458. — Veterinary Surgeons' Exemptions  
459. — Assessed Taxes Composition  
460. — General Board of Health (No. 2.)  
461. — County Courts further Extension (as amended by the Committee, and on Re-commitment)  
471. — Salmon Fisheries (Scotland)  
472. — Arrest of absconding Debtors  
473. — Law of Evidence Amendment  
374. Royal Palaces, &c.—Account  
414. Ceylon—Account  
434. Kafir Tribes—Return  
386. Agar Town, St. Pancras—Report by R. D. Grainger, esq.  
Navigation (Netherlands);—Copy of Laws  
467. Court of Chancery (Salaries, &c.);—Return  
432. Ernest Charles Jones;—Copy of Letter, &c.

#### HOUSE OF LORDS.

##### CHARITABLE TRUSTS REFORM.

THE LORD CHANCELLOR introduced to the House of Peers, on Thursday, a Bill for facilitating and better securing the due Administration of Charities in England and Wales. The subject has been under the consideration of Parliament for the last seventy years; and since 1786 five commissions have been issued to examine into it—four under the authority of Parliament, and one under the signmanual of the Crown: thirty-two reports have been presented on the subject. There are 28,840 charities in England and Wales, more or less to be inquired into. Of these, those with an income less than 5l. a year are no less than 13,000, nearly half; those between 5l. and 10l. are 5,000; and those between 10l. and 100l. are 4,000. Of course, any litigation respecting the administration of the smaller of these charities would swallow up in law charges many years of their income. In 1840, various Bills, founded on the valuable reports made, were submitted to Parliament; but all unfortunately failed to meet its approbation. In 1845, Lord Lyndhurst brought in a Bill, which passed through that House almost unanimously; but matters of great importance occupying the other House, and the Government of that day declining to press this Bill forward, it was lost. In 1845, another Bill was thrown out in the other House, by a majority of two. It has been endeavoured to avoid the objections

urged by the last Bill, without impairing the efficacy of the present measure; and if this Bill fail, there will be little chance of settling satisfactorily hereafter a matter universally acknowledged to require legislative interference. One of the great causes of abuse in the administration of charities is the want of publicity, and of check, to their accounts. One charity lost no less than 30,000l. in that manner. There is another, where an annual rent of only 2l. was paid for property which now lets at 1,500l. a year. In many cases rent-charges had come to be considered as the permanent value of the charity. In others the proceeds of the charities had been permitted to fall into the hands of a single trustee; in the course of time he died, and then it was discovered that he had failed to discharge his trust. It is proposed to establish a board of five commissioners, to be called the "Charity Commissioners;" two of the commissioners are to be paid, and the others not paid. The board is to be made a corporation. It is to have power to issue precepts for the production of accounts and documents and the attendance of witnesses; to have the duty of advising trustees as to their acts, and the power to exonerate them from the consequences of acts done under such advice; and to have the power of putting the Attorney-General in motion, and continuing his action, in cases which they think require his interference. Jurisdiction in cases under 30l. a year is given to the County Courts; in cases between 30l. and 100l. a year, to a Master in Chancery. The accounts of the trustees of the charities must be filed yearly in the County Court of the district including the charity; and the accounts of the commission must be yearly laid before Parliament. The expenses of the board, and of working the law, are to be paid by a tax of twopence in the pound on the income of all charities above 10l. a year; and it is estimated that such a tax will produce 8,500l. a year. The Bill makes provision for the union of small charities; and it will deal with permanently endowed charities only, and not with charities supported by voluntary contributions. Petitions have been presented to be heard by counsel; but as their lordships knew all that can be said for or against the Bill, surely they can dispense with the speeches of counsel.—Lord BROUGHAM, Lord STANLEY, and the Earl of CHICHESTER—the last having been a member of the commission on the subject—gave the Bill their general good word; but Lord STANLEY intimated an apprehension that a Bill read a second time at the end of June will not be able to pass the ordeal of a House of Commons looking anxiously for the termination of its labours.

##### LAW OF EVIDENCE AMENDMENT BILL.

FRIDAY, JUNE 27.—Lord BROUGHAM proposed certain verbal alterations in this Bill, which had been adopted on the suggestion of his noble friend the Lord Chancellor.—The Bill was then read a third time. On the question that the Bill do pass, Lord BROUGHAM said—I congratulate your lordships and the country on this most important measure having received your sanction, and being, as may be confidently expected, about to pass into a law. You have conferred an inestimable benefit upon the community, you have incalculably improved the administration of justice, effaced from our jurisprudence its greatest blot, planted our judicial system upon solid grounds, and provided the best security to the bench and the safest protection to the bar. Let me further say how grateful I feel on behalf of my revered and most dear friend, not now present to partake of our satisfaction. You have this day gladdened his heart—you have renewed his illustrious youth.—The Bill was then passed.

##### COUNTY COURT JURISDICTION.

LORD WHARNCLIFFE presented a petition from the borough of Leeds, against the two bills now before the House with reference to the extension of County Court Jurisdiction to cases of bankruptcy and equity, on the ground that the duties of the judges of the County Courts are already extremely onerous.—Lord BROUGHAM admitted that the grievance to which this petition had reference was very great, for, although recent legislation tended to cast a great increase of business upon those learned judges, there was no increase of remuneration. The present amount of salary he considered very scanty, and at the same time he was ashamed to say the surplus revenue resulting from the labours of the judges of the County Courts was paid into the consolidated fund. From that increased revenue remuneration might well be paid for increased labour. He (Lord Brougham) had received numerous complaints from the judges of the County Courts themselves on this subject, and he thought nothing could be more fair than the prayer of the petition, that if compensation was denied, extra labour should not be imposed.—Lord CAMPBELL presented a petition from the solicitors of Southampton in favour of the extension of County Court jurisdiction, and took the opportunity to express his concurrence with the noble lord (Lord Brougham), that it was highly desirable these County Court Judges should not be overworked.



## PREVENTION OF OFFENCES BILL.

Lord CAMPBELL proceeded to move that the Commons' amendments in the Prevention of Offences Bill should be taken into consideration, expressing his regret that a Bill for the improvement of criminal proceedings, sent down at the same time with this Bill, had not been returned.—Lord BROUGHAM warmly commended his noble and learned friend (Lord Campbell), and assured their lordships that the noble lord had not in the least degree overstated, but rather understated, the great pains which had been taken with respect to the Improvement of Criminal Proceedings Bill. He (Lord Brougham) was quite mortified that it should have been sent before a select committee elsewhere, because at that critical period of the session the delay which must necessarily arise would jeopardise the passing of the Bill. He begged to ask the noble lord if he could give any information, as to when it was likely the report of the commissioners on Common Law proceedings, would be made.—Lord CAMPBELL was deeply grieved that he could afford no satisfactory information. Some time since, he had asked when the report would be made, and he was told in a fortnight, but they had now arrived at the 27th of June, and no report had been made. He thought it was very much to be deplored, as it had prevented the judges from carrying into effect some very salutary reforms which they had contemplated.—The Commons' amendments in the Prevention of Offences Bill were then agreed to.

## HOUSE OF COMMONS.

## GENERAL BOARD OF HEALTH BILL.

On the order of the day for the third reading of this Bill, Lord EBRINGTON moved the omission from the first clause of the words "so as the same are authorised by the Public Health Act." He objected to them from the practical experience of their effect in towns now suffering from their introduction in the former Act.—Mr. FRENCH seconded the motion.—Mr. MULLINGS thought the words in question only made the Bill consistent with the former Act.—Lord SKYMOUR said the words were introduced into the Act of last year on the best legal advice he could get in that house, and, acting on the same advice, he had introduced them into this Bill.—The ATTORNEY-GENERAL said, that if the words were omitted, the provisions of the Public Health Act might be overturned. The amendment was then negatived without a division.—Mr. FULLER moved that Hastings be inserted in the schedule.—Sir W. VERNER seconded the motion.—Lord SKYMOUR opposed the proposition. He was quite ready to admit that Hastings was one of the dirtiest towns in England; but the point was, that St. Leonard's, being a clean town, could not be justly laden with the expense of cleansing Hastings.—Mr. HOLLAND supported the motion.—Lord EBRINGTON reminded the House that under the Health of Towns Act there was ample power to rate particular districts according to their special wants, without burdening contiguous localities. The House divided. The numbers were—

For the motion .. .. .	95
Against it .. .. .	77
Majority .. .. .	—18

The borough of Hastings was accordingly inserted in the schedule.

## COUNTY COURTS FURTHER EXTENSION BILL.

TUESDAY, July 1.—Clauses from 1 to 6 were agreed to.—On clause 7, giving general power to the Lord Chancellor to make orders for carrying the Bill into execution in respect of causes and matters pending in the Court of Chancery.—Clause 9 was struck out.—On clause 10, enabling the Lord Chancellor to establish a schedule of fees to be received on account of Equity business done by the judges, and declaring that such fees shall not be paid to the judges, but be paid in to the consolidated fund, Capt. FITZROY protested against throwing additional labour upon the County Court judges, and withholding fair remuneration from them. The Government would be unable to procure the services of competent persons if they treated gentlemen belonging to a liberal and learned profession in so shabby a manner.—Sir G. GREY.—The hon. and gallant member assumed that the Bill proposed to throw additional labour upon the judges of the County Courts without giving them any additional remuneration; but such was not the fact. The Bill proposed to give them additional remuneration, which the Government had the power to award to them, if necessary. The 20th clause, as it came down from the other House, proposed that the Lord Chancellor should have the power of fixing the salaries, with the consent of the Treasury; but it was not thought right that this power should be given to the Lord Chancellor, by whom these gentlemen were appointed. The Bill substituted a *maximum* of 1,500*l.* for one of 1,200*l.* for the judges, and an increase for clerks in the same proportion. This proposal, however, to increase the *maximum* where necessary was not to be understood as holding out any approximation to a pledge or promise on the

part of the Government that this *maximum* should be reached. The time of many of these judges was not fully occupied, and it was therefore necessary to make a distinction. In taking power to increase the salaries, therefore, he was not giving the judge the right to claim the increase. The clause was then agreed to, and the remainder of the clauses were disposed of.—Mr. MULLINGS proposed a clause, giving the judges of the Superior Courts power to certify that certain actions brought before them ought to have been brought in the County Courts, in which case the plaintiff would not be entitled to his costs.—The ATTORNEY-GENERAL could not agree to this clause. If the Legislature gave parties the right to sue in the Superior Courts, it would be rather hard to punish them for so doing. If the action ought to have been brought in the County Courts, make the plaintiff go there, but it would be arbitrary and unjust, when a plaintiff had exercised the privilege which the law gave him to deprive him of his costs.—The ATTORNEY-GENERAL then proposed the addition of a clause. The clause was rendered necessary in consequence of the attorneys practising at these courts having actually entered into a confederacy to exclude barristers, who could not take a brief from the suitors in the court. At no distant period it might be expected that the extension of the County Courts would absorb the whole provincial business of the country, and it was not desirable that the Bar of England should be annihilated, especially as it was from it that the judges of these courts must on vacancies be recruited. He believed that the higher branches of the Profession of solicitors by no means desired to encroach on the privileges of the Bar, and it was not only in the interest of the Bar, but also of the suitor and the public, that he proposed in these Courts in matters between 20*l.* and 50*l.* to place the attorney and the solicitor in the same relative position they occupied in other courts.—Mr. FITZROY felt bound to oppose the clause in its present shape, for it was his object to make justice cheap. He had been told that the attorneys in some courts had made combinations to exclude the bar, but he thought there was some error on this point, for he found in Oxfordshire, where he was told this had been done, that several members of the law had agreed to accompany the County Court judge on his circuit, and to form a regular County Court Bar. If this was effected in one instance it might in all; but it would be most unjust to compel parties to go to the expense of employing both counsel and attorney in cases between 20*l.* and 50*l.* Mr. P. HOWARD recommended the postponement of the clause.—Mr. J. EVANS supported the clause, but hoped the Attorney-General would strike out the latter part of it, which would have this effect, that if two barristers attended a County Court, they might be employed to the exclusion of everybody else.—Mr. WAKLEY proposed that the discussion be adjourned. He regretted that the clause had been proposed, introducing a new principle of action in the County Courts, which were at present working satisfactorily and economically.—Sir G. GREY, the modified clause was added to the Bill, with the understanding that the Bill as amended should be reprinted and re-committed.—The House then resumed, and the Bill being ordered to be reprinted, its re-commitment was fixed for next Tuesday.

## PARLIAMENTARY PAPERS.

COURT OF CHANCERY.—On Thursday, a return to the House of Commons was printed, shewing that since the passing of the Act 5 & 6 Vict. c. 103 (1842), the total sum due or paid for salaries, office expenses, and compensations, amounted, on the 25th November last, to 589,054*l.* 17*s.* 4*d.* The four late sworn clerks who were appointed taxing masters have received, in the same period, for salaries and compensation, the large amount of 211,086*l.* 13*s.* 11*d.*

THE MAGISTRATE,  
AND PAROCHIAL AND MUNICIPAL LAWYER.

## Summary.

It is much to be desired that the Charity Estates Bill, now before the Lords, should be passed into a law during the present session, and then there will be no necessity for such applications to the Court as that made in *Ex parte the Corporation of Bristol*, 17 Law T. 173, in which trustees had held a secret meeting for the election of new trustees while a petition was before the Court upon the subject.

For this they were rebuked, and the report was ordered to be sent back to the Master to be reviewed.

A very remarkable case is that of *The Great Western Railway v. Tilehurst*, 17 Law T. 180, but not for what the Court decided, but for what it refused to decide. It was another phase of the railway rating question, raising a world of fresh difficulties in the application of the principle, if it may be called such, laid down by previous decisions. The Q. B. fairly abandoned the subject in despair, and postponed judgment in the avowed hope that the Legislature would interfere to fix some definite rule of rating. It is quite certain that no rule yet laid down is capable of general application, and probably it would be impossible to devise one that would be perfectly equitable. Would not the following be a tolerable approach to justice, and offer the advantage of simplicity? Given the value of the land, with the cost of improvements upon it, as the basis. From this deduct the annual average cost of keeping it in the same state of repair. Estimate the value at a rental of five per cent. upon this sum, and let that be the rateable value.

Another rating case is that of *Reg. v. Haslem*, 17 Law T. 182. Buildings were used as chemical works; their value was increased by certain leaden vessels, which rested on sand, inclosed within foundation walls of strong masonry, and surrounded by a wooden framework supported by the foundation walls. Pipes for conveying gases to the vessels connected them with the buildings, but those pipes could be removed without injury to the freehold, and if sufficient force were used the vessels themselves might be lifted from the soil without displacing any part of the freehold. It was held that the premises were to be rated at the increased value given to them by these vessels.

The manner in which the indictment should charge the offence of aiding and assisting a prisoner to escape from gaol was questioned in the case of *Holloway v. The Queen*, 17 Law T. 182, for particulars reference should be made to the report. In the same case it was decided that where sentence had been passed by an inferior tribunal upon an indictment containing good and bad counts, it was competent to the Court above, on a writ of error, to arrest the judgment on the bad counts, and pass sentence on the good ones.

The meaning of the word "house," in a local lighting and paving Act, was considered in *Reg. v. the Justices of Warwickshire*, 17 Law T. 183, and it was held to include not merely an inhabited dwelling-house, but buildings; as a coach-house, &c. occupied therewith, and forming part of the same premises.

In *Reg. v. Hogan*, 17 Law T. 192, an indictment against a mother for deserting her illegitimate child in a parish in which it is not settled, with intent to injure the inhabitants and burden them with its maintenance, was held to be bad, as shewing no offence. "Here," said POLLOCK, C.J. "there is no allegation of injury to the child, or that the mother had the means of supporting it. As to the supposed injury to the parish, we are not disposed to go beyond the authorities, and there is no authority for saying that any person is indictable who occasions loss to a parish by throwing upon it the maintenance of a child as casual poor."

From the Court of Ex. in Ireland, we have also an interesting decision of the judges in an *Excise* case. It was held, in *Reg. v. Ryan*, 17 Law T. 192, that a private vehicle, driven by and belonging to a private person, is within the 42nd sec. of 8 & 9 Vict. c. 87, which authorises an Excise officer, on reasonable suspicion, to stop and examine "any cart, waggon, or other means of conveyance;" and imposes a penalty of 100*l.* upon all persons "driving or conducting such cart," &c. for refusing to stop when required to do so. E. W. C.

Mr. Mansfield, the new stipendiary magistrate of Liverpool, took his seat yesterday morning, at eleven o'clock, being introduced by Mr. Crosshwaite.

JOINT-STOCK COMPANIES' LAW  
JOURNAL.

ARE shares in joint-stock companies within the operation of the Mortmain Act, was the important question reconsidered in the case of *Ashton v. Lord Langdale*, 17 Law T. 175. In accordance with previous decisions they were held by Vice-Chancellor BRUCE *not to be so*. Neither are railway debentures. "There was

nothing on the face of the debentures, and nothing extraneous had been shown by which it would appear that the debts were enforceable against property, otherwise than as every obligation is which is enforceable against an individual."

But it is otherwise with regard to mortgages of tolls or of the undertaking itself: "they proceeded directly from the company itself; they clearly affected hereditaments and were within the words of the Act."

In *Cort v. The Ambergate, &c., Junction Railway*, 17 Law T. 179, the company had contracted for goods to be delivered from time to time under the direction of the company's engineer. After delivery of part, the engineer ordered the vendor to deliver no more. The jury were held to have been rightly directed to consider whether the company had constituted the engineer their agent, so as to be bound by his acts.

The difficulties that surround the rating of railways grow with every attempt to apply the rules laid down by previous decisions or to frame new ones. In *The Great Western Railway Company v. Tilehurst*, 17 Law T. 180, the Q.B. refused to come to a decision on the points raised, expressing a hope that the Legislature would immediately interfere to determine a matter so full of doubt and difficulty.

#### WINDING-UP.

**BARNET AND NORTH METROPOLITAN RAILWAY.**—On Saturday a meeting in this matter was held before Master Tinney, to consider the claims of former officers of the company, amounting to 400*l.*; and of advertising agents, 65*l.* remaining undischarged, brought in by Mr. Norris, the official manager, together with other minor claims. The Master decided on disallowing them as claims against the company, but gave the claimants opportunity of establishing their demands against any of the promoters or contributories individually.—*Daily News.*

**HULL PUBLIC BATH COMPANY.**—On Saturday, after some opposition, the Master (Sir W. Horne) declared a peremptory call of 22*l.* per share, payable on 185 shares in this company, to pay off liabilities, ascertained by Mr. Goodchap, the official manager, to amount to 4,070*l.*; consisting of about 2,103*l.* due to divers creditors; 1,390*l.* advanced by shareholders, who will be recompensed out of the call; and 600*l.* the estimated cost of winding up the concern.—*Daily News.*

**LONDON AND BIRMINGHAM EXTENSION RAILWAY.**—A call of 2*l.* 4*s.* is proposed to be made on those who are shareholders in this company, to discharge its debts.—*Daily News.*

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

**Worcester Corn Exchange Company.**—Creditors to come in and prove.—*Kindersley.*

**Saint James's Club, late the Military, Naval, and County Service Club, and formerly the Military and County Service Club.**—Petition to wind up presented on 28th June; expected to be heard on 11th July.

**Brighton, Lewes, and Tonbridge Wells Direct Railway Company.**—A call of 17*s.* on each of the contributories included in that portion of the list numbered from 1 to 60; to be made on July 10.—*Horne.*

**Compressed Air-Engine Company.**—A return of 4*s.* 9*d.* per share is now payable to the shareholders and contributories who paid up 2*s.* on each of their respective shares.—*Horne.*

#### REAL PROPERTY LAWYER AND CONVEYANCER.

It will be observed that in *Backhurst v. King*, 17 Law T. 175, the Court made an absolute decree of foreclosure where the mortgagor was a lunatic, although not so found by inquisition, and the property was of less value than the principal and interest due, the plaintiff undertaking to pay the costs of the defendant's guardian.

A case of very considerable importance is that of *Marker v. Marker*, 17 Law T. 176. Trustees were restrained from cutting ornamental timber, the settlor having settled the estate to the use of the trustees for a term, without impeachment of waste, to cut and sell the timber, except ornamental timber, of which enough should always remain "to preserve the beauty of the place unimpaired." It was held that the meaning of the settlor was a standard of beauty defined by the existing state of the place at the time of the settlement, and that

500 of the oaks which were in the woods and ornamental to the house and pleasure-grounds, and the views and prospects of the same, ought to be protected.

In the law of *Landlord and Tenant* we have another decision in the case of *Masey v. Goodall*, 17 Law T. 181, in which it was held, *ERLE, J.* however, dissenting, that in a declaration by a landlord for breach of covenant, by a tenant, not to sell straw produced on the farm, it is *not* necessary to aver that the breach occurred during the tenancy.

A tenant for life, without impeachment of waste, with power to lease for twenty-one years without taking fine, premium, or foregift, and so that none of the lessees should be thereby authorised to commit waste or exempted from punishment for waste, allotted a portion of the premises to poor persons who dug up ancient pasture and converted it into gardens. She then leased the premises for twenty-one years, reserving a yearly rent payable half-yearly, the first payment to be made on the 1st of January then next, which was only three weeks after the date of the lease, and the lease contained a covenant that the lessee should not at any time during the term convert into tillage any part of the pasture "except for the purpose of carrying out the allotment system" introduced by the lessor. It was held—1st, that this mode of reserving the rent was not a fine, premium, or foregift; 2nd, that the exception in the covenant of the lease did not authorise the tenant to commit waste or exempt him from punishment for so doing. (*Doe dem. Hopkinson v. Ferrand*, 17 Law T. 183.)

The soil and freehold of certain common lands were vested in A. as lord of the manor, subject to certain rights of common, and the coal and minerals, and unopened stone quarries, &c. belonged to him as part of the freehold. By an *Inclosure Act* it was provided that certain allotments should be made to the lord for his right "to and in the soil," and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors of lands for digging coals and minerals; and it provided, also, that if the lord should enter on any of the lands for the purpose of digging, &c. "any coals or other minerals," he should make compensation for damage done, but no mines or minerals were expressly reserved to him. He was held to be entitled to the produce of the stone quarries under the common, paying compensation for damage done in getting at the stone. The decision in a previous case was also confirmed, that *stone is a mineral*, in a legal sense. (*Mickellthwaite v. Winter*, 17 Law T. 185.)

The question, always one of difficulty, whether a transaction is *usurious*, was raised in *O'Brien v. Lord Kenyon*, 17 Law T. 187. A. being indebted, assigned his real estate to trustees for the benefit of creditors, upon trust, 1st, To pay the expenses of the trust; 2nd, To pay the annuities charged on the estate; 3rd, To divide the rents into two shares proportioned to the amount of debts specified in two schedules; the first to be divided equally between the creditors in the first schedule, and the second in like manner among those in the second schedule. The trustees covenanted to insure the life of B.; the sum assured to be applied to pay the creditors in full, with 5 per cent. interest, and that any bonus that might be declared on the policies should belong to the creditors named in the second schedule. The question was, whether this division of the bonuses on the policies, in addition to the 5 per cent. interest, made the transaction *usurious*. The Court held it *not* to do so. "It was in the option of the trustees to insure in an office which gives no share of profits to the assured, or in one which does; and, in the latter case, there is the possible risk of being considered a partner. . . . In this view of the case, there is no ground to say that the transaction is *usurious*, and we are all of opinion that it is *not*."

*Smith v. Howell*, 17 Law T. 188, is also one of the many in the last number to be noted by the Real Property Lawyer. A. lessee for seventy-two years, let, for twenty-one years, to B. taking from him a covenant for rent, repairs, &c. A. then assigned the reversion to C. B. afterwards assigned the remainder of his term of twenty-one years to D., with a like covenant of indemnity, and D. assigned to E., taking a like covenant.

C. (assignee of the reversion) brought an action on the covenant for rent, repairs, &c. against B., who suffered judgment by default, and paid C. the amount with costs, and then brought an action for the whole against D. on the covenant. D. defended and incurred costs, and then sued E. on his covenant for the whole sum, including his costs.

For how much of this accumulated demand was E. liable? It was held, that he was liable for the amount paid by B., including his costs, but for nothing more, because the liability of E. commenced as soon as B.'s liabilities were ascertained, and that B. had done rightly in suffering judgment by default.

There is likewise another case to be noted on the law of *Distress*. In *Yates v. Eastwood*, 17 Law T. 189, it was held that the remedy for excessive distress is not by action for money had and received, but by special action on the case on the stat. 2 Wm. & M. sess. 1, c. 5, s. 2, which directs that, after the sale of a distress, the overplus (if any) shall be left in the officer's hands for the owner's use.

#### COUNTY COURTS.

##### SUMMARY.

ALL cases involving questions of Jurisdiction are of very great importance, and should be carefully noted by our readers, especially by the judges and clerks of the County Courts. Such an one was *Ex parte Carrey*, 17 Law T. 189, in which it appeared from the plaint and particulars that the cause of action was for "having assaulted the wife of the plaintiff, and maliciously charged her with stealing a shawl." It was properly ruled that this was in fact an action for malicious prosecution, and not for an assault, and a prohibition was ordered.

The *Charity Estates Bill*, which the Lord Chancellor has laid before the House of Lords, gives to the County Courts the jurisdiction over charity estates of less value than 30*l.* per annum.

It is not known as yet, and probably not decided, whether the two Extension of Jurisdiction Bills now before the Lords will be proceeded with during the present session.

Two or three cases on *Insolvency* have to be noted. In *Re Collingridge*, 17 Law T. 191, bail was not allowed to be opposed by affidavit; and in *Re Madden*, 17 Law T. 191, where an insolvent had brought an action of *fort* between the date of the vesting order and discharge, and obtained judgment before adjudication, the amount was held to vest in the assignees for the benefit of creditors.

#### COUNTY COURT, HOME CIRCUIT.

(Before Mr. J. H. Cox.)

Court Days appointed during July, 1881.

Bishop's Stortford, Monday, 7, at ten  
Waltham Abbey, Wednesday, 8th, at half-past ten  
Okeham, Friday, 11th, at eleven  
High Wycombe, Tuesday, 15th, at eleven  
Uxbridge, Wednesday, 16th, at ten  
Watford, Friday, 19th, at ten  
Hitchin, Monday, 21st, at ten  
Luton, Thursday, 24th, at eleven  
Edmonton, Friday, 25th, at ten  
Hertford, Monday, 28th, at eleven  
St. Alban's, Wednesday, 30th, at half-past ten  
Barnet, Thursday, 31st, at eleven.

COUNTY COURTS.—There has just been printed, by order of the House of Lords, an interesting return respecting the County Courts. It appears that since the establishment of the Courts to the 31st of December last the judges' fees amounted to 168,369*l.* and their salaries to 135,000*l.* leaving an excess of 33,369*l.* The clerks' fees were 27,674*l.* and 22,828*l.* were paid to clerks and to clerks in clerks' offices; leaving an excess of 4,846*l.* On account of the general fee fund the receipts were 195,131*l.* 0*s.* 4*d.* and the disbursements 207,379*l.* 3*s.* 4*d.* leaving an excess of expenditure of 5,248*l.* 3*s.* The excess of the fees over the payments amounted to 38,217*l.* which has been applied to the payment of the travelling expenses of the judges and treasurers, and of the claims made under the 54th section of the County Courts Act.

#### THE LAWYER.

##### SUMMARY.

EQUITY PRACTICE.—Two points of considerable interest were decided by Vice-Chancellor TURNER in *Marker v. Marker*, 17 Law T. 176, first, that infant defendants appearing by the same solicitor as in a former suit in which they were plaintiffs are not thereby bound by allegations made in such former suit; secondly, that acquiescence by one of several plaintiffs in an act proposed to be done by the defendant is an answer to a motion for an injunction only so far as such plaintiff is concerned; but other parties would not be held to acquiesce in claims unless fully cognisant of their right to dispute them.

The law of *domicile* very rarely comes under discussion in our courts, and therefore it is, perhaps, that English lawyers are generally so ill acquainted with it. But it is a curious and interesting subject, and will always be found to reward perusal. The Rolls Court has presented us with the latest case, the facts of which are too numerous for repetition, and should be sought in the report. (*Whicker v. Hume*, 17 Law T. 173.) But some rules of law were laid down in it, which properly come to be noticed in this summary. Thus it was held generally, and contrary to a popular notion, that a person may acquire a domicile "without repudiating his nationality—his character or quality of Scotchman, or in a country where he was only a lodger and not a housekeeper." It was also held that where a testator describes himself in his will as of the place of his original domicile, the words of description may indicate the fact that he was born there, but no description given of himself can by itself have any effect in determining his actual domicile.

## THE MERCANTILE LAWYER.

ALTHOUGH containing such a mass of reports from almost every Court of Law and Equity, the last number was remarkably barren of cases on Mercantile Law. In *Cort v. The Ambergate, &c., Junction Railway Company*, 17 Law T. 179, it was held that where the contract is for goods to be supplied from time to time and to be paid for after delivery, if the purchaser, after accepting and paying for part of the goods, gives notice to the seller not to make any more, and he does not want and will not accept them, the vendor, being able and willing to complete the contract, may maintain an action for breach of it without making and tendering the rest of the goods. The judgment in this case is careful and elaborate, and should be read attentively.

We hasten to direct the attention of our readers to the fact that after a two days' trial, and very conflicting evidence, a jury has found that a crossed cheque payable specially to a banker named can only be paid to that banker. If, therefore, it is desired to make such a cheque payable to any banker, it should be crossed with merely "— and Co." omitting any name. This decision is certainly in accordance with common sense, for if A. direct a cheque to be paid to A. and Co. it could not be intended to mean B. and Co.

### CROSSED CHEQUES. IMPORTANT DECISION.—

A trial which was concluded yesterday in the Court of Exchequer will satisfactorily settle all doubts for the future regarding the degree of security obtained by writing a banker's name across a check. The amount involved was 2,586l. Messrs. Coutts and Co. having paid a draught for that sum, although it was specially crossed "Bank of England," with the additional words, "For the account of the Accountant-General," to Messrs. Goslings, the bankers of the person in whose favour it was nominally drawn, and who, when he obtained the money at his account made away with it instead of appropriating it to the purposes for which the check was put into his hands. The defence of Messrs. Coutts was, that it is not the general custom if a check is crossed to one banker to refuse to pay it to another, and upon this the representatives of various London banking firms were examined. Some of them stated that they pursue the strict rule of regarding any such crossing as a special direction always to be attended to, and the majority admitted that at least it should invariably lead to particular inquiry. In one or two instances, however, it was contended that the object of crossing was merely to secure that it should be paid to no one but a banker, and that there was "no custom to prevent a holder of a cheque striking out one banker's name and putting another in the cross." The jury took the view warranted by the preponderance of the testimony, and the one that is also in harmony with common sense—namely, that when a cheque is crossed "Bank of England" it does not mean "Goslings," and that if a person intended merely to indicate that it was to go through some bank, no matter which, he would content himself by writing "— and Co." instead of capriciously nominating a particular house. A verdict was accordingly rendered for the plaintiffs, and it will therefore for the future be understood that if bankers disregard a special crossing for the sake of obliging an individual, or for any other cause, they will have to assume the re-

sponsibility. At the same time they may, as a body, congratulate themselves that the matter has been thus decided, since otherwise the advantages of payments by cheque would be greatly diminished, and their business would be proportionably injured.—*Times of Monday.*

## PROMOTIONS, APPOINTMENTS, ETC.

(Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.)

THE Queen has been pleased to appoint Lambert De Nieuwerkerk, esq. to be Assistant Receiver-General of Berbice, in the colony of British Guiana.

The Queen has also been pleased to appoint Thomas Mackenzie, esq. advocate, to be sheriff of the shires or sheriffdom of Ross and Cromarty, in the room of George Deas, esq. advocate.

The Queen has been pleased to grant the office of Solicitor-General for Scotland to George Deas, esq. advocate, in the room of John Cowan, esq. appointed a Lord of Session.

Her Majesty has also been pleased to appoint William Carman, esq. to be Clerk of the Pleas in the Supreme Court of the province of New Brunswick.

### THE NEW QUEEN'S COUNSEL.

THE following gentlemen have received letters from the Lord Chancellor notifying their appointment as Queen's Counsel:—Messrs. Ingham, Warren, Pashley, Atherton, and Hugh Hill, of the Northern Circuit; Messrs. Willmore and Mellor, of the Midland Circuit; Mr. Bramwell, of the Home Circuit; Mr. Slade, of the Western Circuit; Mr. Phillimore, of the Oxford Circuit; and Messrs. Willcox, Headlam, Follett, W. T. S. Daniel, Glasse, Campbell, Craig, Chandless, and Bailly, of the Chancery Bar.

MEMBER RETURNED TO SERVE IN THIS PRESENT PARLIAMENT.—BOROUGH OF GREENWICH.—David Salomons, of Great Cumberland-place, Hyde-park, in the county of Middlesex, esq. and Alderman of the city of London, in the room of Edward George Bernard, esq. deceased.

COMMISSION SIGNED BY THE LORD-LIEUTENANT OF THE COUNTY OF HEREFORD.—The right Hon. William Bateman Lord Bateman to be deputy Lieutenant.

## COURT PAPERS.

### ATTORNEYS ADMITTED.

Trinity Term, 1851.

Adams, Edward—W. S. Adams  
Apps, Thomas Robert—T. Poole; A. F. Chamberlayne  
Ashwell, John, jun.—J. Bowley; W. Ford  
Bannister, Edward—C. G. Bannister  
Bassett, Joseph—H. F. Loose; H. Falkner  
Batman, Henry Wesley—R. H. Anderson  
Benson, James—W. Palmer  
Berners, Charles—W. H. Brown; H. Brown  
Bower, Arthur Perry—T. H. Bower  
Brett, John—W. W. Oldershaw; W. S. Vardy  
Bristow, George—Lodge—A. Lester  
Brittlebank, George—Goodwin—J. Brittlebank  
Brown, George—Fowler—E. M. Hawksworth; W. E. Mounsey  
Brunkill, James—E. W. Scott; C. H. Bower  
Burns, Richard—Higgins—Potts and Brews  
Bush, James—Day—C. Dowling  
Caldock, Frederick—Mowbray Berkeley—C. Berkeley  
Carver, William—Henry—J. Eaden, jun.  
Champ, Augustus—Bertram—G. Badham; W. Houghton; G. B. Canning  
Chapman, Charles—W. Chapman  
Christopher, Dauby—Stevens—J. D. Christopher  
Cole, John—Bassett—J. N. Bennett  
Cooper, John—A. Adey  
Cooper, Richard—Kelsall—C. Cooper  
Cridland, Joseph—John—S. M. Cooper  
Crose, Edwin—J. A. M'Leod  
Dodsworth, Charles—T. Hair; W. Boycot, jun.  
Downey, Marcus—T. F. Dearden; J. Moleworth  
Elliott, Henry—Charles—W. Andrews; C. H. Collette  
Fisher, Edward—G. Tallents  
Fogg, William—J. Hurley  
Forster, Thomas—T. H. Hodgson  
Gill, Jeremiah—W. Willis  
Greenbank, Richard—Hewetson—W. S. Cookson  
Hall, Stephen—John—W. Burdell  
Holden, Lawrence—J. H. Sherson; H. P. Sharp; re-assigned to J. H. Sherson  
Hatchins, Frederick—Leigh—W. T. Longbourne  
Jay, George, jun.—G. Jay, sen.  
Jennings, Henry—Napleton—T. F. Jennings; R. F. Jennings  
Jennings, Henry—R. Barr  
Jones, Evan—Miller—J. Greene  
Jones, Henry—H. S. Coke  
Kirk, John, jun.—T. Greene  
Lawrence, Julius—P. T. Harbin  
Lightfoot, Frederick—James—R. H. Sawyer  
Matthews, Thomas—J. Sangster  
Mawe, Frederic—Eustace—T. J. Mawe  
Mellersh, Robert—Edmund—T. Mellersh  
Mitsell, John—Bellamy—B. P. Squance; T. Tilson  
Morris, Francis—Burdett—C. Condell  
Norris, Charles—Musgrave—A. Horfall  
Peacock, Christopher—Gilbert—R. Carline  
Pearson, Ellis—J. Pearson

Pearson, Matthew Tom—T. T. Pearson; G. P. Nicholson  
Peterson, Thomas—Pexton—R. B. Ward; D. Gould  
Pinniger, Henry—William—H. Pinniger  
Prentiss, Henry—W. H. Johnson  
Preston, William—Richard—W. T. Pritchard; W. S. Long  
Rees, John—Charles—J. Rees  
Renner, Charles—G. S. Renner  
Roach, George—Charles—H. S. Coke  
Sanders, Benjamin—Hadley—Minshall and Vernon; R. D. Johnson  
Smith, Thomas—Henry—W. W. Hastings; W. Best  
Smith, William—J. B. Smith; E. Prior  
Thomas, Cadogan—Morgan—A. Outhbertson; J. H. Rowland  
Tucker, Walter—James—C. B. Tucker  
Walker, Thomas, jun.—C. Walker  
Watson, John, jun.—J. Wadsworth; J. Stuart  
White, George—T. Nettleton; J. Pratt  
Williams, Robert—Edmond—W. F. Batt  
Wilson, John—Oochat—O. Carter, jun.  
Worman, John—Cadel—G. H. Ellis.—*Legal Observer.*

## QUESTIONS AT THE EXAMINATION.

Trinity Term, 1851.

### I. PRELIMINARY.

1. Where, and with whom, did you serve your clerkship?
2. State the particular branch or branches of the law to which you have principally applied yourself during your clerkship.
3. Mention some of the principal books which you have read and studied.
4. Have you attended any, and what, law lectures?

### II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

5. By what process are personal actions commenced in the Court of Queen's Bench, Common Pleas, and Exchequer?
6. What is the difference in the commencement of an action of ejectment from other actions? State what is the first proceeding in an action of ejectment.
7. An infant cannot prosecute an action either in person or by an attorney; how, then, may he, and how does he, usually sue?
8. If a feme covert be sued alone, how must she appear, and why so?
9. For any debt due to a bankrupt previously to a bankruptcy (in which debt he is personally interested), who should sue, before assignment of his effects, and after such assignment?
10. State the distinction between an irregularity in practice and a nullity?
11. Will a verbal promise to pay the debt of another be sufficient to found an action?
12. In what cases is a husband liable for debts contracted by his wife during coverture?
13. How must corporations aggregate sue or defend?
14. In what cases are hundredors now liable for damages done by rioters?
15. What are the principal requisitions of the statute 1 & 2 Vict. c. 110, relating to warrants of attorney, a strict compliance with which is required by the courts?
16. Where a judge's order is made by consent given by any trader defendant, in any personal action, authorising judgment to be entered up, and execution issued, what is necessary to be done with such order, so as to prevent the same, and the proceedings under it, from becoming null and void?
17. If a plaintiff bring an action in either of the Superior Courts and recover, by verdict, a sum less than 20l. and obtain no certificate from the judge who tries the cause, is the plaintiff entitled to tax his costs upon producing the *postea*; or is the defendant any longer bound to take any step to deprive the plaintiff of costs?
18. Does it make any difference if the defendant suffers judgment by default?
19. Can a party prosecute a plaint in a County Court upon a judgment recovered in one of the Superior Courts, for a debt less than 50l.?

### III. CONVEYANCING.

20. Describe an estate of inheritance.
21. State the distinction between legal and equitable estates.
22. Into what sorts are estates in fee simple divided?
23. What are estates less than freehold?
24. Define what is meant by the term "title by purchase."
25. What is the difference between uses and trusts? and state the words or form of expression by which each is created.
26. State the law of primogeniture.
27. Who is capable of conveying real estate? and who (in the technical sense of the term) of purchasing?
28. What is a deed? and what are its requisites?
29. How may a deed be avoided?
30. Enumerate the ordinary kinds of conveyances at Common Law of land of freehold tenure.
31. To what persons does the power of transmission by will belong?

32. What solemnities are necessary to the due execution of a will?

33. Under what formalities may a will be cancelled by the order, and in the lifetime, of the testator?

34. What are extraordinary conveyances, or those by matter of record?

#### IV. EQUITY AND PRACTICE OF THE COURTS.

35. All persons materially interested in the subject of a suit ought to be parties to it. State why, and whether this rule admits of any and what exceptions?

36. Has a Court of Equity power to control proceedings in Courts of Common Law, and how and in what cases is the power exercised?

37. What are the principal matters in which Courts of Equity have practically exclusive jurisdiction and power to afford relief?

38. In what respect do the remedies given by a Court of Equity and a Court of Law respectively, for the non-performance of a contract, differ?

39. Is or is not an attesting witness to the execution of a deed affected with notice of the contents of the deed, and why?

40. In the administration of legal assets by the Court of Chancery, in what order are debts payable?

41. If a party interested in a fund in Court assign it to another, either absolutely or in mortgage, what course is the assignee to take to make his assignment available?

42. What relief does a Court of Equity give, where a tenant in common desires to have the property divided, in the cases of land and a house respectively?

43. What acts constitute "waste"?

44. Will a Court of Equity, in any case, restrain a tenant for life without impeachment of waste from committing waste, and, if so, in what cases?

45. Describe the proceedings, as well those necessary as those usually incidental, in a suit for the administration of a testator's estate, where the personal assets are large.

46. How is the time for putting in an answer enlarged?

47. What is the mode of putting in an answer, and may the oath or signature be dispensed with, and how?

48. What is the ordinary division or arrangement of the contents of a bill in Chancery?

49. State in what cases a Court of Equity directs an issue at law, or a case for the opinion of Common Law, and to what courts the issue or case may be sent.

#### V. BANKRUPTCY, AND PRACTICE OF THE COURTS.

50. Detail the necessary steps to be taken to procure an adjudication in bankruptcy.

51. State what persons are, by the Bankrupt Law Consolidation Act, not to be deemed traders.

52. What must be the nature of the petitioning creditors' debt, and when must it have accrued?

53. How and when are creditors' assignees chosen?

54. Can a creditor who has assigned his debt vote in the choice of assignees?

55. Is there any appeal from the decision or order of a commissioner, and if so, to whom and in what form?

56. What are the principles of reputed ownership, and give instances in which property, whereof the bankrupt is reputed owner, does not pass to his assignees?

57. Under what circumstances do goods seized in execution pass to the assignees?

58. If after the property of an insolvent debtor is vested in the provisional assignee of the Insolvent Court, the insolvent is declared bankrupt, does the property so vested in the assignees of the Insolvent Court pass to the assignees in bankruptcy?

59. If in the above case the bankruptcy is afterwards superseded, in whom do the insolvent's goods vest?

60. If a verdict is obtained against a person before his bankruptcy, subject to a reference, and the award is made after the bankruptcy, is the amount awarded provable by the plaintiff?

61. What step is necessary to enable an executor who has become bankrupt to prove against his own estate?

62. If an executor carries on the trade of his testator for the benefit of the testator's estate, and is not otherwise a trader, is he (the executor) amenable to the Bankrupt Laws?

63. When goods are pledged by an agent who becomes bankrupt, for what sum can the owner of the goods prove under the bankruptcy, if he redeems them; and for what sum if he does not?

64. In an action by the assignees, what course must be pursued by the defendant who intends to dispute the petitioning creditor's debt, the trading, and the act of bankruptcy?

#### VI. CRIMINAL LAW, AND PROCEEDINGS BEFORE MAGISTRATES.

65. What is the general distinction between felony and misdemeanour?

66. What is homicide, and its different kinds?

67. What is burglary, and what are the hours within which it must be committed? and if the offence is committed in an adjoining building, occupied with a dwelling-house, what is necessary to constitute burglary?

68. Is a party liable to be indicted for concealing, retaining, and applying to his own use property casually found by him?

69. Can husband or wife be a witness for or against each other, in any and what cases?

70. Can the first husband be a witness against his wife, or the first wife against her husband, on an indictment for bigamy?

71. Is the stealing or destroying of title deeds a criminal offence or actionable?

72. Is it lawful to set a man-trap or spring-gun, or other instrument calculated to destroy human life, or to inflict bodily harm in any and what place or places, and during what part of the twenty-four hours?

73. Is a witness in a criminal matter entitled before leaving home to be paid his travelling expenses, or for his loss of time?

74. Is any and what property qualification necessary for a person to become a county magistrate; and what are the steps necessary to be taken to get him appointed and to enable him to act?

75. What are the different modes by which a parochial settlement can be gained?

76. Before whom are questions of parochial settlement tried? and is a jury necessary? and can the legality of the decision be disputed in any and what manner?

77. Is the evidence of the mother of an illegitimate child of itself sufficient to obtain an order of filiation and maintenance on the putative father, or is any other and what evidence necessary?

78. Under what circumstances can persons playing musical instruments in the streets of the metropolis be required to desist?

79. Is an attorney liable to serve as a juror upon the trial of a criminal matter or upon a coroner's inquest?—*Legal Observer*.

## PROCEEDINGS OF LAW SOCIETIES.

### LAW STUDENTS' DEBATING SOCIETY.

#### QUESTIONS FOR DISCUSSION.

For Tuesday, July 8, 1851.

54. Is the case of *Darley v. The Queen*, 12 Cl. & Finn. 520, rightly decided?

XLVII. Ought the Statute 27 Eliz. c. 4, to be amended by avoiding voluntary conveyances only in the cases of, and as against, after purchasers for valuable consideration without notice? See *Doe dem. Otley v. Manning*, 9 East, 71.

**THE UNITED LAW CLERKS' SOCIETY.**—The nineteenth anniversary of this charitable association was held in the Hall of Lincoln's-inn on Wednesday evening; Vice-Chancellor Knight Bruce in the chair. The right hon. gentleman was supported by Vice-Chancellor Turner, the Right Hon. the Master of the Rolls, the Attorney-General, Lord Cranworth, and several other distinguished gentlemen. The secretary read the report, which stated that the society had prospered every year since its establishment. During the past year the number of claimants on the sick fund had been thirty-one, and the applicants had received sums amounting to 276l. 15s. Since the commencement of the society it had afforded assistance of this kind to the extent of 2,447l. 17s. Two additional claims on the life annuity have been allowed after careful consideration. They are to receive, for the rest of their lives, 31l. 4s. annually. One of the members who is to receive this annuity is aged forty-eight, and the other but thirty-one years. The committee regret the loss of the Earl of Cottenham, and express their gratitude to the present Lord Chancellor, who has consented to fill the office of president of the society. It is gratifying to state that a great number of the profession who have hitherto held aloof have become members of the society, and that the funded property, which last year amounted to 12,376l. 4s. 2d. has been increased in the present year to 13,458l. 18s. 8d. The dinner was served in the best style by the proprietors of the Freemasons' Tavern; and the band of the 2nd Life Guards, assisted by Miss Ransford, Miss Poncioni, Miss Law, and others, materially contributed to the amusements of the evening. The stewards were more than efficient, and the company separated at a late hour.

**PATENT READING EASEL.**—We have seen a very convenient reading stand, patented by Messrs. Warren, of Oxford-street, which combines the advantage of portability and adaptability. It is light, so as to be readily moved to any part of the room, and the desk slides up and down, so as to accommodate itself to any height; it also revolves, so that it

is adapted for any posture, and it may be used even while lying down. It is the best thing of the kind that has ever come under our notice.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	313	314	314	317	317	317
3 1/2 Cent. Reduced Annuities .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
3 1/2 Cent. Consols Annuities .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
Consols for Account .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
New 3 1/2 Cent. Annuities .....	98 1/2	98 1/2	98 1/2	98 1/2	98 1/2	98 1/2
Long Annu. (exp. Jan. 5, 1860) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1860) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Jan. 5, 1860) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
India Stock .....	300 1/2	300 1/2	300 1/2	300 1/2	300 1/2	300 1/2
India Bonds (1,000l.) .....	55	55	55	55	55	55
Do. do. (under 1,000l.) .....	55	55	55	55	55	55
South Sea Stock .....	100	100	100	100	100	100
Do. do. New Annuities .....	45	45	45	45	45	45
Exchequer Bills, 1,000l. .....	45	45	45	45	45	45
Do. do. 500l. .....	45	45	45	45	45	45
Do. do. Small .....	45	45	45	45	45	45
Do. Advertised .....	45	45	45	45	45	45

\* Premium.

† For account.

‡ 107 1/2 Kr. div.

## NECROLOGY

### OF LEGISLATORS, MAGISTRATES, AND LAWYERS.

**DEATH OF THE EARL OF DERBY.**—His lordship, who died at Knowsley-park on Monday, was the son of the twelfth earl, by the only daughter of the sixth duke of Hamilton. He was born on the 21st of April, 1775, and married in the domestic chapel at Knowsley on the 30th of June, 1790, to his cousin, the second daughter of the Rev. Geoffrey Hornby. In the year 1796 the deceased peer was elected member for Preston, which borough he continued to represent for fourteen years. Having been then returned for Lancashire, he held the representation of that county till the passing of the Reform Act. After holding a seat in the House of Commons for upwards of 34 years, he was called to the Upper House, during his father's lifetime, by the title of Baron Stanley of Bickerstaffe. His father dying in October, 1834, he became thirteenth earl of Derby. The noble earl just deceased was well remembered as an efficient member of the House of Commons, as a man of very sound understanding, of high character, and most amiable disposition. He graduated M.A. at Cambridge in 1795, and was chosen a Knight of the Garter on the 17th of April, 1839.

### BIRTHS, MARRIAGES, AND DEATHS.

#### BIRTHS.

**BROOKS.**—On the 28th ult. at Barlow-hall, Lancashire, the wife of William Cunliffe Brooks, esq. barrister-at-law, of a son.

**HENDERSON.**—On the 28th ult. at 7, Park-place-village, Maida-hill West, the wife of William Henderson, esq. barrister-at-law, of a son.

**HUMPHREYS.**—On the 26th ult. at 48, Gordon-square, the wife of J. J. Hamilton Humphreys, esq. barrister-at-law, of a daughter.

**NAAH.**—On the 2nd inst. the Lady Naah, of a son and heir.

#### MARRIAGES.

**CHALLENGE DE LA RIVIERE, Jules François, of Courvoisier, to Elizabeth, second daughter of the late Thomas Gibson Brewer, esq. barrister-at-law, on the 24th ult. at St. Heliers, Jersey, and afterwards at the French Catholic Chapel, Staffordshire.**

**CLERK, James, eldest son of the Right Hon. Sir George Clerk, bart. M.P. of Penicuik House, Edinburgh, to Jane, eldest daughter of Major-General Marwar, G.B. on the 26th ult. at All Souls' Church, Langham-place.**

**CRESPIGNY, George B. C. capt. H.M.'s 20th regiment, second son of Charles Fox Crespiigny, esq. of Harfield-house, Uxbridge, to Elizabeth Jane, eldest daughter of Alexander Buchanan, esq. Q.C. on the 11th ult. at Montreal.**

**FOX, Charles James, esq. solicitor, Canterbury, to Frances, youngest daughter of Thomas Boorman, esq. of Canterbury, on the 19th ult. at St. Mildred's Church, Canterbury.**

**HASLEWELL, John, third son of Edmund Gilling Haslewell, esq. M.P. of the Royal Crescent, Cheltenham, to Eliza Catherine, second daughter of William Brodhurst, esq. of the Friary, Newark, on the 26th ult. at Newark.**

**TADY, James, son of Thomas Blackburn, esq. of North-down-hall, Isle of Thanet, to Sarah, second daughter of Lebbeus Charles Humphrey, esq. Q.C. of Great Queen-street, St. James's-park, and of St. Peter's, Thanet, at St. Margaret's, Westminster, on the 21st ult.**

#### DEATHS.

**BERRY, Mr. William, of Kensington, author of several valuable works upon heraldry, genealogy, &c. on the 2nd inst. at the residence of his son, Spencer-place, Brixton, aged 76, having survived his wife only two months.**

**CRAYEN, the Hon. Richard Keppel Craven, on the 28th ult. at Naples.**

**SOMMER, Colonel Dyce, on the 1st inst. at No. 8, Terrace, Davies-street.**

**PIDCOCK, Benjamin, esq. late of her Majesty's Dockyard, on the 28th ult. at Church-hill, Woolwich, Kent, aged 69.**

**THOMAS, James Duncan, esq. of Porchester-terrace, Baywater, late of Sunny Bank, Breconshire, and a magistrate for that county, on the 24th ult. at Weston-super-Mare.**



**RAVENSCOTT, Humphrey William**, judges' wigmaker, of Serle-street, Lincoln's-inn, the place of his birth, as also of his father, the house and business having been in the possession of his family for upwards of a century, on the 20th ult. at Camberwell, aged 66.

## THE GAZETTES.

### Bankrupts.

*Gazette, July 1.*

**HERVEY, JAMES**, sharebroker, Halifax, Yorkshire, July 17 and August 26, at eleven, Leeds. Off. as Young. Sols. Parker and Adam, Halifax; and Courtenay and Compton, Leeds. Petition, June 23.

**SAUNDERS, FRANCIS WOOLHOUSE**, harness maker, Thame, Oxfordshire, July 12, at eleven, and August 19, at one, Basinghall-st. Off. as Pennell. Sols. Cooke, Lincoln's-inn-folds. Petition, June 30.

**SPARROW, OWEN**, grocer, Aldgate High-street, City, July 11, at half-past one, and August 13, at eleven, Basinghall-st. Off. as Whitmore. Sols. Surr and Gribble, Lombard-st. Petition, June 27.

**THOMAS, LLEWELLYN**, grocer, Bristol, July 14 and August 13, at eleven, Bristol. Off. as Miller. Sols. Bigg, Bristol. Petition, June 26.

*Gazette, July 4.*

**COLLINS, CHARLES**, and **ROSS, GEORGE TALBOT**, carpet manufacturers, Bowdley and Wribbenhall, Kidderminster, Worcester-shire, and Aldermanbury, July 15 and August 12, at twelve, Birmingham. Com. Daniell. Off. as Christie. Sols. Boycott and Tudor, Kidderminster. Petition, June 31.

**ELLIS, JOHN SOLOMON**, tailor, 13, Aldgate, July 12, at half-past eleven, Aug. 8, at twelve, Basinghall-st. Com. Fomblanque. Off. as Stansfeld. Sols. Overton and Hughes, 25, Old Jewry. Petition, June 26.

**GRAY, ROBERT**, piano forte maker, 89, Edward-st. Hampstead-road, July 11, at twelve, Aug. 15, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sols. H. Moxon, 44, Rowland-st. Fitzroy-square. Petition, July 1.

**ROSE, TIMOTHY**, furniture dealer, Manchester, July 18 and Aug. 8, at twelve, Manchester. Off. as Lee. Sols. G. Waller, jun. Finsbury-circus, and W. K. Taylor, Cooper-st. Manchester. Petition, June 18.

### Debts.

#### BANKRUPT ESTATES.

*Official Assignees are given, to whom apply for the Dividends.*

**Bayly, R.** grocer, second, 14d. Graham, London.—**Barnard, E.** wine merchant, second, 51d. Graham, London.—**Benton, S.** händler, second, 14d. Stansfeld, London.—**Courtesy, G.** clothier, final sep. 1s. 3d. Stansfeld, London.—**Dawson, J.** shipowner, first, 2s. 6d. Stansfeld, London.—**Dicken, W.** grocer, third, 2s. 6d. Graham, London.—**Ford, J.** victualler, second, 24d. Graham, London.—**Harris, C. A.** saw-planer, first, 3d. Graham, London.—**McKee, E. and Glass, J.** coal merchants, first, 2s. 1d. Graham, London.—**Rosetti, J.** merchant, second, 10d. Bird, Liverpool.—**Shaw, W.** and **S. B.** timber merchants, first and final sep. of W. Shaw, 20s. Fraser, Manchester.—**Smith, W.** timber merchant, fourth, 3d. Stansfeld, London.—**Williamson, J.** iron master, 5th, 9d. Bird, Liverpool.

#### INSOLVENT ESTATES.

**Robinson, T.** grocer, hosiery, and butcher, first and final, 4s. 31d. Apply at the County Court Deventry.—**York, W.** farmer, 7d. Apply to Mr. W. Summers, of Thrapstone.

### Assignments for the Benefit of Creditors.

*Gazette, June 24.*

**Bevitt, B.** and **J. B.** brass and iron founders, Pontefract, Yorkshire, June 19. Trusts, J. Wordsworth, ironmonger, Pontefract, and D. Leake, merchant, Allerton-Bywater. Sols. H. J. Coleman, Pontefract.—**Johns, W.** licensed victualler, Bromford-road, near Oldbury, Worcester-shire, June 7. Trusts, J. Barrows, wine and spirit merchant, Birmingham. Sols. J. Bartlett, Birmingham.—**Jones, P.** painter and glazier, St. Asaph, June 10. Trusts, A. Forrest and J. Bromley, glass and lead merchants, Liverpool. Sols. T. G. Edwards, Denbigh, and T. Dodge, Liverpool.—**Lee, M.** needle manufacturer, Redditch, Worcester-shire, June 7. Trusts, H. English, needle stamper, Redditch, and T. Parr, paper maker, Beoley. Sols. E. Browning, Redditch.—**Lloyd, J.** upholsterer and cabinet maker, Coventry, June 3. Trusts, J. R. Hunter, upholsterer, Moorgate-st. and R. Swinerton, timber merchant, Weddington. Sols. J. Hollams, Mincing-lane, and S. S. Baxter, Atherton.—**Mumford, T. D.** builder, Newcastle-upon-Tyne, June 9. Trusts, J. Miller, plane manufacturer, Newcastle-upon-Tyne, and R. Madeley, merchant, Birmingham. Sols. Swan and Burnup, Newcastle.

*Gazette, June 27.*

**Bancutt, L.** tailor and clothier, Chelmsford, Essex, June 5. Trusts, R. Sampson, tailor, Princes-st. Leicester-square, and W. Courtney, clothier, Houndsditch. Sols. W. B. James, Basinghall-st.—**Bowen, W.** linen draper, High-st. Poplar, June 12. Trusts, W. Wightman, gent. Friday-st. Sols. Sole and Turner, Aldermanbury.—**Clayton, W.** provision dealer, Liverpool, June 4. Trusts, J. S. Kirkpatrick and F. Morton, provision merchants, Liverpool. Sols. H. Bremner, Liverpool.—**Guy, G.** timber merchant, Bridgewater, Somerset-shire, June 13. Trusts, W. Woodland, brass founder, Bridgewater. Sols. Lovibond and Carlisle, Bridgewater.—**Headford, J.** mariner, Bridgewater, Somerset-shire, June 2. Trusts, P. Horsey, grocer, Bridgewater. Sols. Lovibond and Carlisle, Bridgewater.—**Leeson, H.** corn dealer, Rushden, Northampton-shire, May 20. Trusts, J. Barnicot, gent. Friday-st. Sols. Heather and Moger, Paternoster-row.

### Partnerships Dissolved.

*Gazette, June 24.*

**Bowley and Co.** varnish manufacturers, King's Head-court, Beech-st. Barbican, Feb. 1. Debts paid by Bowley.—**Davidson and Co.** japanners, Rotherhithe New-road, June 14.—**Brotherton and Co.** oil merchants, Hungerford-ward, Strand, June 31. Debts paid by Bryan and Peto.—**Day and Burman**, millwrights and engineers, Dewsbury, June 31.—**Dent and Page**, drapers, Leamington Priors,

June 23. Debts paid by Page.—**Dowell, W.** and **G.** grocers and ship chandlers, Wapping-wall, June 19.—**Griffith, P. T.** and **E. W.** wine and brandy merchants, Pall-mall, Dec. 31.—**Langworthy and Pratt**, veterinary surgeons, Farm-st. Berkeley-square and East King-st. Portman-square, June 19.—**Leeds, Morley, and Booth**, small ware manufacturers, Manchester, June 16. Debts paid by Morley and Booth.—**Masey, J.** Neptune-st. Wandsworth-road, and **Umpleby, T.** High-st. Lambeth, potters, June 19.—**Milward, T.** and **Southey, J.** millers, Uffculm, June 19. Debts paid by Southey.—**Parsons and Edwards**, builders, Colchester-st. Whitechapel, and Haverstock-st. Hampstead-road, May 22.—**Pigott, J. B.** and **Newton, R. N.** linen manufacturers, Barnsey, June 21. Debts paid by Pigott.—**Seafie, W.** and **Hunter, J.** cab proprietors, Bradford, June 12.—**Short and Blake**, ship chandlers, Liverpool, June 19. Debts paid by Blake.—**Tattersall and Pilling**, machine makers, Salford, June 10. Debts paid by Tattersall.—**Thackeray, J.** and **Son**, cotton doublers, Radford, April 7.

*Gazette, June 27.*

**Beard, G.** and **W.** brewers and builders, Great Coggeshall, June 23. Debts paid by G. Beard.—**Brailsford, M. E.** and **Birley, J. H.** teachers of a ladies' seminary, Kingston-upon-Hull, June 24.—**Bull and Cossens**, carpenters and builders, Southampton, June 24. Debts paid by Bull.—**Cox, F.** and **Co.** grocers, Ripley, June 17. Debts paid by Cox.—**Desprez, C.** and **Green, T.** watchmakers, jewellers, &c. Bristol, March 25.—**Dobson, B.** and **Metcalf, J.** machine makers and brass and iron founders, Little Bolton, Nov. 30.—**Hardaker, W.** and **Co.** stone masons and builders, Bradford, June 17. Debts paid by A. Hill.—**Harrison and Wood**, cabinet-makers, Bradford, June 11.—**Hobson and Bryne**, fustian manufacturers, Manchester, June 23. Debts paid by Hobson.—**Hodding, W. H.** and **Goodman, C. E.** surgeons, accoucheurs, &c. Gloucester-place, Portman-square, March 25. Debts paid by Hodding.—**Jessop, S. Parker, J. H.** and **Harris, S.** common carriers, Aldersgate-st. June 24.—**Longbottom, W.** and **Son**, screw and bolt makers, Leeds, June 25. Debts paid by G. Longbottom.—**Mackintosh, C.** and **Co.** water-proofers and manufacturers of India rubber articles, Thornton-upon-Medlock, and Aldermanbury, as regards H. Birley, T. H. Birley, jun. and J. H. Birley, March 31.—**Muff, W.** and **Bewley, E.** gold beaters, Manchester, June 24. Debts paid by Muff.—**Nelson, J. H.** and **Adam, W.** West India merchants, Great Tower-st. April 30.—**Novell and Illingworth**, timber merchants, Bradford, July 30.—**Sproat and Koy**, drapers, Crown-st. Finsbury, June 27.—**Thomas, E. P.** and **Towers, J.** hosiery, Leicester, June 25.—**Twiss, G. J.** and **Marshall, J. E.** attorneys, Cambridge, March 15.—**Van Kempen, P.** and **Sanders, C.** wine and spirit merchants, Crutchedfriars, June 24.—**Wayne and Co.** tin plate manufacturers, Carmarthen, May 9.—**Wightwick and Damant**, architects, Plymouth, June 24. Debts paid by Damant.

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## To Readers and Correspondents.

"J. T. H."—The advertisement in question is very wrong, unless he is an agent of some candidate or party; but we dare not assume that he is not so, lest we should be mistaken. We are compelled to be very cautious in these matters.

"A. C. S."—By some person present at the birth, or who has personal knowledge of the fact that on a certain year the child was an infant.

"R. S. S."—The statement is too general to be serviceable. The redress is by appeal to the judge.

**ERRATUM.**—In the case of *Furnell v. Cawley* (the County Court appeal case), in our last number, owing to an oversight in the shorthand-writer's note of the judgment, it is stated that an order was made for the costs of appeal. Our attention has been called to the circumstance, and the indorsement on Mr. Barstow's brief laid before us, from which it satisfactorily appears that no such order was made.

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## THE LAW TIMES.

SATURDAY, JULY 12, 1851.

## TO READERS.

AN extraordinary mass of important information which the week has produced has compelled resort to a double number. The New Rules of Practice in the County Courts, the Registration of Assurances Bill, the New Statutes, and the Report of the Common Law Commission form a combination of materials of extraordinary interest to the Profession, such as have not occurred before since this record of its doings has been preserved.

## REPEAL OF THE ATTORNEYS' TAX.

ANOTHER victory! Again the House of Commons has declared, by a still increased majority, that the injustice of the Attorneys' Tax shall be removed.

Lord ROBERT GROSVENOR, with great prudence, did not propose to disturb the financial arrangements of the year. He asked only a prospective repeal, and offered to withdraw the Bill if the Chancellor of the Exchequer would give him a promise that he would repeal the impost next year, should there be a surplus. The Chancellor of the Exchequer refused, upon the plea that other interests had better claims for a remission of taxation, and, going to a division, he was ignominiously defeated. After this second protest of the Legislature against it, no Government

can venture to continue the tax for another year.

But let us make assurance doubly sure. We have a majority now, and do not let us lose the opportunity to place this act of justice beyond the reach of chance and change. If the Bill be carried this session, the tax will expire of itself next session, and we shall have no occasion to go again with petitions and remonstrances, troubling our friends and occupying the time and thoughts of the Legislature. Therefore we say, secure the present Bill, and that it may be secured, it will be necessary to keep our representatives in memory of their further duties, and to entreat their attendance at every future stage of the Bill, which will be assuredly contested to the last by the Government. To those who voted for it let letters of thanks be addressed by their constituents, and asking continued support; to those who were absent let there be sent from their neighbourhoods letters of remonstrance, entreating their presence and vote at the subsequent stages of the Bill; and with those who voted against the Bill, our readers will know how to deal when the general election comes on in the Spring.

## POSITION AND PROSPECTS OF THE PROFESSION.

THE revolution proceeds; it cannot be stayed; it must run its course: the Profession will be but throwing away valuable energies in vain attempts to oppose it; our truest wisdom will be to swim with the tide, and endeavour to direct a movement which we cannot stay.

That is the conclusion at which we have arrived; and now the question comes, what we should endeavour to do for the purpose of moulding and modifying the impending changes, and adapting the Profession to the new circumstances in which it is placed.

Let us consider separately the case of the Bar and of the Attorneys.

The effect of all the changes that have been and will be made is unquestionably most disastrous to the Bar. The reforms of the Common Law Courts will destroy the greater portion of the business which has hitherto maintained its junior members; and then the question will arise, how a Barrister is to subsist during the period of probation that must elapse before he can obtain that position as an Advocate for which experience only can qualify him? Advocates there must continue to be, as ever, but of necessity they must be few, because few possess the requisite faculties, and there is a natural desire to employ the most competent men that can be obtained, so that, practically, the business of advocacy will in every court be monopolised by three or four. Hence, while they will thrive, the multitude who are waiting their turn, or the chance of their turn, must starve, unless these have other resources than the produce of their profession.

The result of this must be to exclude from the Bar all but the wealthy, who can afford to wait in unprofitable idleness the business which only time can bring them.

We are not now considering whether this is a desirable result; upon that opinions may differ. The Bar is one of the institutions which, until of late, has been held in esteem as the school where are trained our judges, our statesmen, our legislators,—the makers and the administrators of the law. In Parliament and in the press, probably representing the views of society, this conviction no longer prevails; on the contrary, there is an evident desire to effect the annihilation of a profession once held in honour.

Such is the fact, and we cannot change it by trying not to recognize it. Coverdly and openly the war is waged. A desire is publicly proclaimed in Parliament and in the newspapers that the Bar should be excluded from all but the Courts at Westminster, although nineteen-twentieths of the business of those

Courts has been transferred to other Courts. It is said plainly, "You are not wanted. We are content to do without you." The *Times*, usually the faithful organ of public opinion, does not disguise its contempt for the Bar, as an institution that has outlived its uses, and is unfitted for the age. It taunts us for maintaining the rule that the Barrister should not practise without the intervention of an Attorney. But that rule has not been framed from any selfish motive, and it is not quite fair to cast it in our teeth.

From all this the conclusion is, that the Bar can no longer hope to escape the changes that are going on. Its annihilation is certain, unless it will accommodate itself to the circumstances of its new position. Its rules were made for a state of things very different from that it has now to encounter.

What those changes should be will require careful consideration, and the manner of accomplishing them is no less anxiously to be deliberated. Whatever is done should be done by the whole body, not partially by a few. Perhaps the better course would be to appoint a committee to revise the existing rules of etiquette, and to frame new ones adapted to the changes that have been effected or in progress. These, having been first circulated for consideration, should be submitted for the ratification of a general meeting, and should thenceforth be the code regulating the conduct of the Profession.

But we cannot hope that any changes will now restore the Bar to anything like its ancient greatness. It will not find employment sufficient for the support of its junior members, when the utmost that will be required by suitors will be the assistance of an Advocate. Modification, in accordance with the new circumstances of the Profession, may prevent its entire annihilation and that union of the functions of Advocate and Attorney which is so much to be deprecated; but its glory is gone, its greatness has departed. Whether the public will in the end find this to be an evil or a benefit, is not now the question, for at present we are engaged in reviewing the fact of the position of both branches of the Profession, and in seeking to learn what each should do to adapt itself to altered circumstances.

In our next notice we shall endeavour to trace the position and prospects of the Attorneys, and suggest the course which they also should adopt, in order to place themselves in accord with the changes that have been and are to be.

## THE BAR IN THE COUNTY COURTS.

AN attempt has been made to obtain for the Bar exclusive audience in the County Courts in cases above 20*l*.

The plea for this was plausible; so long, it was said, as the County Courts were only what they were at first intended to be, courts for the recovery of small debts, a Bar was not required there. But since a considerable portion of the business of the superior courts has been transferred to the County Courts, it is only fair that the Bar should be permitted to follow the business, and enjoy the same privilege in the new courts as in the old ones.

To this the ready answer is, that the very purpose of transferring that business to the County Courts was to diminish costs; and to give to the Bar exclusive audience would be to defeat the objects of the Legislature, by compelling the suitor either to conduct his own case, or to fee both a barrister and an attorney.

We confess that this answer appears to us to be conclusive, and that any attempt to obtain a monopoly for the Bar in the County Courts will be nugatory.

But then the Bar has a right to complain of a positive grievance inflicted upon them by the law as it is. If it be unjust to the suitor to forbid him to employ an attorney without a



barrister, it is equally unjust to him not to permit him to employ a barrister without an attorney. If the old rules of professional etiquette are to be abolished in the County Courts, it is manifestly but equitable that they should be wholly and not partially rescinded. To permit a suitor to have an attorney without a barrister, and not permit him to have a barrister without an attorney, is so clearly an unfairness to him, that the House of Commons has deemed it right to rescind so one-sided a regulation.

We are and we shall ever be averse to the union in the same practitioner of the functions of Advocate and Attorney, for we believe that the administration of justice is best promoted by keeping them distinct. But as it is deemed desirable that the distinction shall no longer exist in the County Courts, and that the same person shall be permitted, for special reasons, there to perform the double duties, there is no reason why the new rule should extend to one and not to another; nor why that should be forbidden to one branch of the Profession which is allowed to the other.

We yet hope that the consequences of this great change in the forms of our Courts, and the arrangements of the Profession, may be accomplished without the mischiefs we anticipate from it, and we think they might be avoided by the adoption of some such plan as that we recommended long since, for creating a class of Advocates among the Attorneys, who shall practise exclusively as such, and thus prevent that union of the functions from which so much practical inconvenience arises, and which nowhere exists without depressing the status of both branches of the Legal Profession.

But we have not space now to treat the important question as it deserves: we propose to give it careful consideration in an early number.

### THE LAW OF DIVORCE.

A COMMISSION is now sitting for the purpose of submitting to the Legislature improvements in this branch of the law, whose reproach it has been and is that, from its expensiveness, it is a luxury only for the rich. The poor have no redress, but must endure their wrongs or become vicious.

But there is one question which we fear to have been overlooked by the commission.

As the law is, a marriage cannot be avoided by reason of that terrible calamity—hopeless insanity. Thus a husband or a wife is linked by an inseparable tie to a being who cannot be a partner; who is only human in form; who can fulfil none of the purposes of marriage. We marry a mind as well as a body; when the mind is dead there is a civil death for all other purposes. Why not for this? The deficiency of our law in this particular leads necessarily to immorality; it gives a sort of sanction to improper connections; it encourages profligacy; it is at once irrational and noxious. We trust the commissioners will propose a remedy for it, making ample provision that no injustice be done.

### THE REGISTRATION OF ASSURANCES BILL.

THIS Bill is at length before us, and we hasten to communicate to our readers a summary of its contents.

In the first place, it is necessary to correct an error into which we had been led by the reports of the debates in the House of Lords, before we had an opportunity of inspecting the Bill itself. We much fear that it does not contemplate, as we had understood, a division of the country into districts, for the purpose of registration, but only for the purpose of an index. The 6th sect. provides that England may be divided into districts "for facilitating searches in the separate indexes to be kept as hereinafter mentioned," &c. If this be all that is contemplated, the measure cannot be too strenuously resisted. We have no hesitation in saying,

that a general registry will be an unmitigated mischief, and every expedient should be adopted to defeat, by delay and obstruction, so obnoxious a measure.

The plan, as proposed by the Act, is as follows: One public office, to be called "The Land Register Office," is to be established; the Queen is to appoint a Registrar and Assistant Registrars; the former to be a barrister, but the latter may be attorneys; the Lord Chancellor is to appoint the clerks and other inferior officers.

Assurances of land, executed after the commencement of registration, may be registered by depositing the original.

An index, to be called "The Index of Titles," is to be kept for all England, and assurances to be indexed under heads designated by numbers; an index is also to be kept of the names of grantors.

Sects. 11 to 17 provide for registration of special documents affecting land thus:—

Entries may be made of appointments of new trustees, &c. in Index to Testators and Intestates, instead of the Index of the Names of Grantors, 11.

Decrees in Equity creating, declaring, &c. interests in land, and also decrees in equity by which any such decree is varied or reversed, to be considered assurances, 12.

All private Acts of Parliament affecting lands to be assurances, 13.

Where, by a public Act, lands are vested upon payment of money, &c. a memorandum of such payment or other Act may be registered, and evidence of the payment deposited with it; this provision not to extend to the vesting of the estate of a bankrupt or insolvent, 14.

Equitable mortgage by deposit of deeds, and liens by reason of nonpayment of purchase-money, may be registered by depositing a memorandum, 15, 16.

Assurance to be considered to have been made by the person whose right, &c. in the lands shall be bound by the decree, &c. 17.

Wills to be registered by deposit of the original, or, if proved, by a memorial and letters of administration and affidavit of intestacy to be registered also, and an index of these is to be kept. We now again copy the side notes, which, for present purposes of information sufficiently explain the provisions of the Bill:—

Where the original is lost, a copy or extract may be deposited; but in case of an extract, the registration to be effectual only as far as the extract agrees with the original, 21.

Where the document directed to be deposited at the Register-office is required to be deposited at any other office or place, a copy may be deposited at the register office, 22.

Any person claiming under an assurance may compel the registration thereof, by application to a judge, 23.

Judge may make order as to costs, and order an office copy to be furnished at the expense of the applicant, 24.

Application may be made to the Court against the order of judge, or upon his refusal to make an order, 25.

Where order or rule for delivery of any document to be registered is not complied with, the order or rule may be registered in lieu thereof, 26.

Proceedings in bankruptcy and insolvency affecting land are to be registered, and an index kept.

The effects of registration, or rather of non-registration, are specifically provided for thus:—

Assurances authorised to be registered to be void as against purchasers, if not registered, 30.

Estate or interest arising under Act upon payment of money, &c. equitable mortgage by deposit of deeds, and lien for purchase money, to be void as against purchasers, unless memorandum registered, 31.

If assurance duly entered as to part only of the lands it shall be deemed duly registered as to such part only, 32.

Unregistered will to be void against purchaser from persons entitled under a registered will, or in default of a will where letters of administration or affidavit of intestacy registered, 33.

Court of Chancery may order registration of affidavit of a will to be cancelled, 34.

Purchasers protected against bankruptcy and insolvency, unless appointment of assignees, &c. to be registered, 35.

Protection of purchasers against subsequent adjudication in bankruptcy where the petition is not registered, 36.

The priority given by the foregoing provisions to be enforced in equity, notwithstanding notice, 37.

Notice of uses or trusts not manifested by a registered assurance, and uses or trusts declared by reference to an unregistered assurance, not to affect purchaser for valuable consideration, 38.

So much for the *protection of purchasers*. Then follows an extensive series of provisions for the *protection of claimants*. An inhibition against alienation may be entered in the Index of Titles, and persons claiming under assurances made while it is on the register, are to take subject to uses and trusts not shown by a registered assurance. Caveats also may be entered. Other effects of registration are these:—

Entries to be made immediately on receipt of documents, and time of receipt to be marked, 44.

Assurances registered at the same time to have priority according to the time of execution; 45.

The protection of the Act to extend to persons who claim under purchasers, 46.

Priority or protection by legal estate and tacking not to be allowed, 47.

Assurance which would have the effect of merging any interest not to have such effect as against a subsequent purchaser of such interest, unless an entry be made to lead such purchaser to the assurance, 48.

Certificates of registration may be delivered out, and may be deposited by way of equitable mortgage, 52.

Registration substituted for enrolment under 3 & 4 Wm. 4, c. 74, and 4 & 5 Wm. 4, c. 92, as respects lands in England, 53.

Duplicate originals of deposited documents may be compared at the office, and certified; and every document so certified shall be received as evidence that another part of the same assurance has been deposited, 55.

In cases where there are duplicates of a registered assurance, one duplicate to be exempted from stamp duty, provided the other is duly stamped; but the exemption not to apply to duplicates of leases where either part is executed by lessee, 57.

Memorials, office copies, extracts, and certificates, requisitions, &c. to be exempt from stamp duty, 58.

Searches are to be made thus:—The registrar is to issue tickets of search on the application of persons registering assurances,—such tickets to be transferable, and to be limited to the property to which such assurance relates. Then follow clauses for the protection of attorneys in the exercise of their duties:—

The duty of an attorney, &c. to be deemed fulfilled if he have caused an office search to be made; attorneys, &c. indemnified in relying on the accuracy of certificates, 62.

Registrar may order that documents to be deposited shall be written bookwise, or otherwise, &c.; additional payment on persons sending documents to be deposited which shall not be conformable with such an order, 63.

Registrar may require statements for regulating the entries to be sent with assurances, 64.

Regulations are to be made by the registrar, and approved by the Lord Chancellor, Master of the Rolls, and two Common Law judges, and to report to Parliament; fees are to be fixed by the Treasury; expenses to be paid out of the Consolidated Fund, into which receipts are to be paid. Local Register Acts are repealed, and no assurance to be there registered after December, 1856; compensation is to be made to the officers of local registries; copyhold and rack-rent leases, ~~where the premises, and lands within the Bedford Level, are not to be affected by this Act, and none of the exemptions to affect the provision to prevent protection by legal estates or tacking.~~

Some minor provisions are made for the protection of officers, punishment of perjury, &c.; and an interpretation clause concludes the Bill, which comprises no less than 102 sections.

Notwithstanding the unanimity with which it was accepted by the Lords, it will encounter an active opposition in the Commons, and, if well fought, might yet be thrown over for the session, which would enable those who are conscious of its defects to frame a better Bill by next session. Let the Profession prevent, if it can, the passing of the present measure now, and then let themselves propose a more practicable and less obnoxious one. If they will do this, instead of shouting merely, "No! no!" they will convert a public mischief into a general benefit.

### THE LEGISLATOR.

Imperial Parliament.

### PUBLIC BUSINESS TRANSACTED.

BILLS READ A FIRST TIME.

Friday, July 4.

Unlawful Oaths, Ireland  
Turnpike Roads, Ireland  
Private Lunatic Asylums, Ireland.



Monday, July 7.

Militia Ballots Suspension  
Turnpike Acts Continuance.

Wednesday, July 9.

Attorneys' and Solicitors' Certificate Duty  
Copyhold and Inclosure Commissions.

Thursday, July 10.

Constabulary Force, Ireland.

BILLS READ A SECOND TIME.

Friday, July 4.

Summary Jurisdiction, Ireland  
Marriages, India.

Monday, July 7.

Stock in Trade  
Turnpike Trusts Arrangements.

Tuesday, July 8.

Mercantile Marine Act Amendment  
Militia Ballots Suspension.

Wednesday, July 9.

Arrest of Absconding Debtors  
Law of Evidence Amendment  
Turnpike Acts Continuance.

Thursday, July 10.

Unlawful Oaths, Ireland  
Turnpike Roads, Ireland  
Private Lunatic Asylums, Ireland.

BILLS READ A THIRD TIME AND PASSED.

Friday, July 4.

Ecclesiastical Titles Assumption  
School Sites Act Amendment  
Ecclesiastical Property Valuation, Ireland.

Monday, July 7.

Loan Societies.

Thursday, July 10.

Chief Justices' Salaries  
Inhabited House Duty  
Assessed Taxes Composition  
Public Works, Fisheries, &c.  
Public Works, Ireland.

PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Friday, July 4.

Hartlepool Pier and Port.

Monday, July 7.

Cubitt's Estate  
Kensington Improvement  
Wexford Free Bridge  
Patent Law Amendment.

Wednesday, July 9.

Caledonian Railway, Glasgow, Garmkirk, &amp;c. Branch.

Thursday, July 10.

Farmers' Estate Society, Ireland.  
Manchester, Burton, &c. Railway.

SESSIONAL PRINTED PAPERS.

- Par. Numb.
- 427. Dingle Union Workhouse—Captain Spark's Report
  - 428. Trade and Navigation—Accounts
  - 429. Lunatic Asylum, Ireland—Fifth General Report
  - 430. Bills—Summary Jurisdiction, Ireland
  - 431. — Mercantile Marine Act Amendment
  - 432. — Public Works, Ireland
  - 433. — Public Works, Fisheries, &c.
  - 434. — Conveyance of Mails by Railways
  - 435. — Court of Chancery and Judicial Committee, amended
  - 436. — Turnpike Trusts Arrangement
  - 437. — Lands Clauses Consolidation, Ireland (amended)
  - 438. — Battersea Park Amendment and Extension
  - 439. — Unlawful Oaths, Ireland
  - 440. — Turnpike Roads, Ireland
  - 441. — Private Lunatic Asylums, Ireland
  - 442. — Militia Ballots Suspension
  - 443. — Petty Sessions, Ireland, amended
  - 444. — Collection of Fines, &c. Ireland, amended
  - 445. — Administration of Criminal Justice Improvement, amended by the Select Committee
  - 446. — Turnpike Acts Continuance
  - 447. — Woods, Forests, &c. as amended in Committee and on Re-commitment
  - 448. — Patent Law Amendment
  - 449. — Criminal Offenders, Ireland—Tables
  - 450. — Registrars of Deeds, Middlesex—Return
  - 451. — Eastern Archipelago Company—Correspondence
  - 452. — St. Helena—Return
  - 453. — Coroners' Inquests, Ireland—Return
  - 454. — Cape of Good Hope—Copies of Letters Patent concordat, Spain and Rome—Copy of
  - 455. — Poor Law Unions, Clare—Copy of Letter
  - 456. — Coal Mines—Copy of Instructions
  - 457. — Emigration, Australian Colonies—Despatches, New South Wales, Part I
  - 458. — Emigration, North America—Despatches
  - 459. — Irish Packet Station: Report of Commissioners
  - 460. — Pirates' Head Money—Return
  - 461. — Militia Estimates—Report
  - 462. — Spirits, Ireland—Accounts
  - 463. — Licensed Distillers—Account
  - 464. — Emigrants—Further Return
  - 465. — Merchant Seamen's Fund—Abstract of Returns
  - 466. — Indian Archipelago—Paper
  - 467. — Public General Acts—Cap. 14, 15, 16, 17, 18, 19, 20, and 21.

## HOUSE OF LORDS.

COUNTY COURTS.

**TUESDAY, July 8.**—Lord BROUGHAM presented a petition from the Society for the Protection of Trade, in favour of the extension of bankruptcy jurisdiction to County Courts. Also from solicitors at Winchester, and a place in Devonshire, in favour of the extension of equitable jurisdiction to County Courts, which they stated that a person could not go into ancry with a suit involving less than 1,000l.; his noble and learned friend behind him (Lord Aldhurst), said that after what he had recently said, he would not go into Chancery in a matter in-

volving less than 10,000l. His lordship also presented a petition from the attorneys and solicitors of the county of Devon, in favour of a Bill which had already passed their lordships' House, and which he hoped and believed would also pass the other House of Parliament—he meant the Bill for the Amendment of the Law of Evidence. He also presented petitions from the attorneys of Winchester, Stafford, and some other places, but to what effect the petitions were we have no knowledge.

## ATTORNEYS' AND SOLICITORS' REGULATION ACT AMENDMENT BILL.

The Marquis of CLANRICARDE moved the second reading of this Bill. In asking that the same privileges be granted to attorneys educated in the Queen's colleges in Ireland, as they had when educated in English colleges, the noble marquis took occasion to congratulate the country on the success of the Irish colleges.—Lord MONTEAGLE expressed the same feeling, and condemned the resolutions of the synod of Thurles, which had been so much disapproved of that they had not yet been forwarded to Rome.—The Bill was then read a second time.

## EXPENSES OF PROSECUTIONS BILL.

On the motion of Lord CRANWORTH, this Bill was read a third time and passed.

## COUNTY COURTS—JURISDICTION IN BANKRUPTCY.

**THURSDAY, July 10.**—Lord BROUGHAM observed, that about ten days ago he had told their lordships that he would inform them of the course which he intended to pursue with regard to two very important Bills, one of which had come to a second, and the other to a third reading. Those Bills had excited great attention in the country, and considerable interest had been exhibited regarding them both in and out of the Profession. He would now mention the course which he intended to pursue respecting both of them, and the reasons which had induced him to pursue it. The Extension of the County Courts (No. 2) Bill was a Bill to consolidate the system of bankruptcy with that of the County Courts. Considerable objections had been urged against this Bill both by the Bankruptcy Commissioners and the judges of the County Courts, on account of its retrospective operation. It had been said, that if a barrister had left his court and his profession to take upon himself the office of a judge in the County Courts, without any stipulation that he should reside in his district, he ought not to be compelled to reside permanently in that district. He so far agreed with those who advanced that objection as to think that the Act should be made prospective, and should not affect the judges already appointed. It was not his intention, however, to proceed any further with that Bill, nor with any portion of it, during the present session. It was a measure which ought to be taken up by his noble and learned friend on the woolsack, and ought to be carried through Parliament as a Government measure. The other was a Bill, in favour of which he had presented many petitions, and which he verily believed would confer great benefit on the country. It was a Bill to confer upon the County Courts in certain cases an equitable jurisdiction. No single measure would tend more to facilitate the working of the great measure in progress at present for amending the proceedings in the Court of Chancery. To make that court tolerable to the country it would be found necessary, in addition to the new regulations which were now under consideration in the other House, to make a functional improvement in its proceedings. Increase its judicial force as you would, still you would not give a real substantial relief to that court and to the country if you did not make a very great—he would not say a radical—alteration in its proceedings. In his belief the addition of an equitable jurisdiction to the County Courts would be a relief useful and salutary to the Court of Chancery, but yet not enough for the country. He was sorry that he was not in a position to proceed further with that measure now, but the 10th of July was a critical period in any session. He, therefore, proposed to postpone that Bill till next session.

## HOUSE OF COMMONS.

COUNTY COURTS EXTENSION BILL.

**TUESDAY, July 8.**—Mr. MULLINGS presented a petition from the Incorporated Law Society of England and Wales against the passing of this measure in its present shape.

## ATTORNEYS' CERTIFICATE DUTY.

Lord R. GROSVENOR, after presenting the petitions noticed above, moved for leave to introduce a Bill the same as that of last year, which he said had gone through all its stages but two, for the purpose of repealing the attorneys, solicitors, and proctors' annual certificate duty. Last year, he had stated at some length the origin, nature, and operation of this tax. He had shewn to the House that it had every vice in principle which a tax could possibly have, and that its operation was in consequence partial and oppressive. And he had great reason to believe that the House had been satisfied with his arguments; for though, upon a fifth division, the Chan-

cellor of the Exchequer had got a majority, yet on four successive occasions the House had affirmed the principle he advocated,—on one occasion by a majority of 259 to 224—a considerable majority for the motion of a private individual. It was therefore useless to urge reasons of the validity of which the House had declared itself satisfied. The repeal of this tax was virtually carried; the only question was, the time when it should take place. It might have been a more prudent course for the Chancellor of the Exchequer to have included it in his arrangements for the year; but, as finance minister, he probably thought it necessary more severely to test the opinion of the House before yielding to it. He (Lord R. Grosvenor) had intended bringing forward this question at an earlier period of the session; but he had thought it would not be well to do so during a ministerial crisis, or when it might interfere with more important measures. At the present period of the session he could hardly hope to proceed much further with the measure; all he could do would be to ask permission of the House to lay it on the table, with a view to proceed with it next session. It would be most unwise and impolitic in the Chancellor of the Exchequer to oppose this motion, as the House would, no doubt, adhere to its former judgment. But so little did he desire to embarrass his right hon. friend in any way, that if he would only give him to understand that, next year, if the income-tax were granted, and no unforeseen circumstances arose to make it impossible, he would repeal this duty, he (Lord R. Grosvenor) would be contented simply to lay the Bill on the table, or even not to do so much. If he could not have that assurance from the right hon. gentleman, it would be his duty to make the motion of which he had given notice. The motion being seconded, the CHANCELLOR of the EXCHEQUER said it was his painful duty to resist the motion. It would be far more agreeable to him if he could remit all the taxes, if he could say yes to all the numerous deputations who came to Downing-street asking for money in one shape or other. But, unfortunately, it was his duty to resist those applications which he did not think were founded on sound principles or for the good of the public credit. He had already carried through the House, to its last stage, the financial proposal for the year. Some had reproached him for not allowing a sufficient margin in the course of the present year; and the hon. member for Bucks had brought forward a motion declaring that no reduction whatever of taxes ought to take place, and that no further revenue should be sacrificed. He could not suppose that the gentlemen who supported that motion could possibly agree to the motion of his noble friend. He had felt it his duty to stand by the proposal he had made to the House; it would have been exceedingly unfortunate had he withdrawn from the country the boon promised in the early part of the session; he was therefore bound to resist this motion. He would put it to hon. gentlemen on his own side of the House, whether, in their opinion, this was the first tax of which they should claim the repeal. They were in favour, generally speaking, of a reduction of duties pressing on the consuming population; would any one get up and say that this was such a tax? They had been in favour of the reduction of duties on raw material, as affording the means of employment to the people: would any one say that this was a tax interfering with the employment of the people? Hon. members on the other side had expressed their opinion that the first reduction ought to be a reduction of the income-tax; but every sinner they sacrificed in repealing a tax of this kind, so far prevented the possibility of the reduction they sought. If both sides of the House were of opinion that this was the first tax that ought to be repealed, he should have no more to say in opposition to it. If, on the contrary, they thought that it ought only take its turn with other taxes, and that there were others which had a prior claim, let them resist this motion. The noble lord did not propose the reduction in the present year; it would be more unwise on his part to give any pledge as to the next. He had reserved but a very moderate surplus after repealing the window duty, about 300,000l.; and, at present, they knew not what claims might be made upon them for the cost of the Kaffir war. Would it, then, be wise in him to promise, or in the House, to pledge itself, to sacrifice 120,000l. a year in this tax, looking at the circumstances which might occur? If, in the course of next year, there should be a considerable surplus, and the House was prepared to maintain the income-tax as it stood, then he would take into consideration what other taxes should be reduced or modified. Until they knew what would be the probable income and expenditure for next year, it would be unwise and injudicious to pledge themselves to sacrifice 120,000l. The contrary policy had always been acted upon by his predecessors. Should the House now pledge itself to repeal this 120,000l., it would be to that extent incapacitated next year from reducing taxes which it might be thought more necessary to get rid of. The tax complained of was not an especial burden upon the

solicitors; conveyancers and other parties paid the same tax. He hoped the House would not agree to repeal this tax, either in the present year or the next, till they saw what was their financial position, and until it was known whether the income-tax was to be renewed or not.—Lord R. GROSVENOR said as his right hon. friend had confined himself merely to general assertions, and had not ventured on the hopeless task of attempting to prove the justice of this tax, he would refrain from making any reply.—The House then divided—

For the motion ..... 162

Against it ..... 132—30

Leave was accordingly given to bring in the Bill.

#### ATTORNEYS' AND SOLICITORS' CERTIFICATE DUTY.

WEDNESDAY, July 9.—Lord R. GROSVENOR brought up the Bill for the abolition of the duty on attorneys' and solicitors' certificates, which was read a first time, and ordered to be read a second time on Wednesday, the 23rd inst.

The Arrest of Absconding Debtors Bill was read a second time, Mr. CARDWELL presenting petitions in its favour from the Chamber of Commerce, Liverpool, and the Guardian Society, Liverpool.

The Law of Evidence Amendment Bill was also read a second time.

#### NEW STATUTES.

14 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 99.)

##### CAP. XIV.

An Act to amend the Law for the Registration of certain Persons commonly known as "Compound Householders," and to facilitate the Exercise by such Persons of their Right to Vote in the Election of Borough Members to serve in Parliament. (July 3, 1851.)

1. 2 & 3 Wm. 4, c. 45—11 & 12 Vict. c. 90—Persons having once claimed to be rated in respect of premises, and paying or tendering, on or before 20th July, the rates due 5th Jan. preceding, not required to renew such claim.—Whereas by an Act passed in the second year of the reign of his late Majesty King William the Fourth, intitled "An Act to amend the Representation of the People of England and Wales," it is enacted, that no person shall be registered to vote for members to serve in Parliament in any year in respect of the occupation of premises in any city or borough unless such person shall have been rated in respect of such premises to all rates for the relief of the poor in the parish or township where the same are situated made during the time of such his occupation, nor unless such person shall have paid on or before the twentieth of July in such year all the poor's rates and assessed taxes which shall become payable from him in respect of such premises previously to the sixth day of April then next preceding: and whereas the said Act was amended, in so far as relates to the period when such rates and taxes shall be required to be paid, by an Act passed in the Session held in the eleventh and twelfth years of her present Majesty, intitled "An Act to regulate the Times of Payment of Rates and Taxes by Parliamentary Electors:" and whereas by the said firstly-recited Act it is further enacted, that it shall be lawful for any person occupying premises in any city or borough which shall return a member or members to serve in any future Parliament, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof, and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situated are thereby required to put the name of such occupier upon the rate for the time being; and in case such overseer shall neglect or refuse so to do, such occupier shall, nevertheless, for the purposes of the said Act, be deemed to have been rated to the relief of the poor in respect of such premises from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid: And whereas it is often inconvenient or impracticable for such persons to make continual claim in respect of each rate, and many persons are consequently deprived of the franchise: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act no person so claiming to be rated, and paying or tendering on or before the twentieth day of July in each year the full amount of the rate or rates (if any) due in respect of such premises on the fifth day of January preceding, shall be required to make any further claim in regard to any future rate upon the premises in respect whereof his right to

vote in any such election as aforesaid shall arise, but shall be entitled to be put on the list and to be registered as a voter, provided he shall have occupied the premises in the manner and for the time required by the firstly-recited Act, and provided the poor's rates and assessed taxes chargeable upon the same shall have been paid for the period and up to the time required by law in respect of all persons entitled to vote in the election of members of Parliament for any borough under the provisions of the said firstly-recited Act.

2. *The liability of the claimant to rates to continue so long as he occupies the premises and remains on the register.*—Provided always, that every person so claiming as aforesaid who shall be registered as a voter in respect of the premises to which his claim relates shall, in respect of every rate for the relief of the poor made and published after such claim as aforesaid, while he continues to occupy the same premises and to be a registered voter in respect thereof, be liable to the same extent and in the same manner as in respect of the rate published next before the making of such claim.

3. *Compositions with landlord to determine amount of rate to which tenant is liable.*—Provided always, that in cases where by any composition with the landlord a less sum shall be payable than the full amount of rate which, except for such composition, would be due in respect of the same premises, the occupier claiming to be rated shall not be bound to pay or tender more than the amount then payable under such composition.

##### CAP. XV.

An Act to Amend the Court of Chancery (Ireland) Regulation Act, 1850. (July 3, 1851.)

##### CAP. XVI.

An Act for the better Management and Control of the Highways in South Wales. (July 3, 1851.)

##### CAP. XVII.

An Act farther to Explain and Amend an Act for the Regulation of Process and Practice in the Superior Courts of Common Law in Ireland. (July 3, 1851.)

##### CAP. XVIII.

An Act to continue the Stamp Duties granted by an Act of the Fifth and Sixth years of her present Majesty, to assimilate the Stamp Duties in Great Britain and Ireland, and to make Regulations for collecting and managing the same. (July 3, 1851.)

##### CAP. XIX.

An Act for the better Prevention of Offences. (July 3, 1851.)

Whereas it is expedient to make further provision for the prevention of burglary and other offences in the night: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: That—

1. *Any person found by night armed, &c. with intent to break into any house and commit any felony therein, or having in his possession, without lawful excuse, any implements of housebreaking, or having his face disguised, or being found by night in any house with intent to commit any felony therein, shall be guilty of a misdemeanor.*—If any person shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever with intent to break or enter into any dwelling-house or other building whatsoever and to commit any felony therein, or if any person shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of housebreaking, or if any person shall be found by night having his face blackened or otherwise disguised, with intent to commit any felony, or if any person shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned, with or without hard labour, for any term not exceeding three years.

2. *Any person convicted of such misdemeanor after a previous conviction of felony or such misdemeanor, guilty of misdemeanor, &c.—Form of indictment.*—Certificate of previous conviction.—If any person shall be convicted of any such misdemeanor as aforesaid committed after a previous conviction, either for felony or such misdemeanor as aforesaid, such person shall on such subsequent conviction be liable, at the discretion of the Court, to be transported beyond the seas for any term not less than seven years and not exceeding ten years, or imprisoned, with or without hard labour, for any term not exceeding three years; and in any indictment for such misdemeanor committed after a previous conviction, as aforesaid, it shall be sufficient to state that the offender was at a certain time and place convicted of felony or misdemeanor against "The Act

for the better Prevention of Offences, 1851" (as the case may be), without otherwise describing the previous felony or misdemeanor; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.

3. *Persons using chloroform, &c. in order to commit a felony, guilty of felony.*—And whereas it is expedient to make further provision for the punishment of persons using chloroform or other stupefying things in order the better to enable them to commit felonies: Be it enacted, that if any person shall unlawfully apply or administer, or attempt to apply or administer, to any other person any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or other person in committing, any felony, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

4. *Persons inflicting grievous bodily harm guilty of a misdemeanor, and liable to three years' imprisonment.—Not to repeal sect. 29 of 10 Geo. 4, c. 34.*—And whereas it is expedient to make further provision for the punishment of aggravated assaults: Be it enacted, that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned, with or without hard labour, for any term not exceeding three years: provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the twenty-ninth section of the Act passed in the tenth year of the reign of his late Majesty King George the Fourth, chapter thirty-four.

5. *On the trial of any indictment for feloniously cutting, &c. the jury may acquit of the felony, and convict of unlawfully cutting, &c.*—If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding.

6. *Persons wilfully placing wood, &c. on railways, taking up rails, &c. turning machinery, or shewing signals, &c. with intent to commit injury to railway or endanger the safety of persons, guilty of felony.*—If any person shall wilfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall wilfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall wilfully and maliciously tam, move, or divert any points or other machinery belonging to any railway, or shall wilfully and maliciously make or shew, hide or remove, any signal or light upon or near to any railway, or shall wilfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, or to endanger the safety of any person travelling or being upon such railway, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his natural life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

7. *If any person shall cast any wood, &c. upon any railway carriage with intent to endanger the safety of any person therein, such person to be guilty of felony, &c.*—If any person shall wilfully and maliciously cast, throw, or cause to fall or strike against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine,

tender, carriage, or truck, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his natural life or for any term not less than seven years, or to be imprisoned with or without hard labour, for any term not exceeding three years.

8. *Any person wilfully setting fire to any railway station, &c. guilty of felony.*—If any person shall wilfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding ten years nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

9. *Upon the trial of persons for subsequent offences under the 12 & 13 Vict. c. 11 and this Act, the previous conviction not to be stated to the jury or given in evidence until after a verdict of guilty of the subsequent offence, unless the defendant gives evidence of good character.*—And whereas provision is made in a certain Act of Parliament passed in the twelfth year of the reign of her present Majesty Queen Victoria, intituled, "An Act to amend the Laws in England and Ireland relative to Larceny and other Offences connected therewith," and also in this Act, for the more exemplary punishment of persons who shall commit certain offences after one or more previous conviction or convictions for the like or other offences, and it is expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: be it enacted, that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: provided, that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

10. *Any person may apprehend persons committing offences against this Act, and convey them before a justice.*—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this Act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

11. *Any person may apprehend persons committing indictable offences in the night, and convey them before a justice.*—And whereas doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night; for remedy thereof be it enacted, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

12. *Any person assaulting a person entitled to apprehend him to be guilty of a misdemeanor.*—If any person liable to be apprehended under the provisions of this Act shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, or any term not exceeding three years.

13. *The night, in offences against this Act, to be as in burglary.*—The time at which the night shall commence and conclude in any offence against the provisions of this Act shall be the same as in cases of burglary.

14. *Costs of prosecutions.*—In all prosecutions for any offence against the provisions of this Act, it shall be lawful for the Court before which any such offence

shall be prosecuted or tried, to allow the expenses of the prosecution in all respects as in cases of felony.

15. *Nothing in this Act to repeal 5 Geo. 4. c. 83.*—Nothing in this Act contained shall be deemed to repeal wholly or in part the fifth of George the Fourth, chapter eighty-three, intituled, "An Act for the Punishment of Idle and Disorderly Persons and Rogues and Vagabonds, in that part of Great Britain called England," but no person shall be liable to be punished for the same offence both under the said last-mentioned Act and under this Act.

16. *Not to extend to Scotland.*—Nothing in this Act shall extend to Scotland.

## CAP. XX.

An Act to extend the Remedies provided by the Renewable Leasehold Conversion Act, for the Recovery of Fee-farm Rents under that Act, to all other Fee-farm Rents, and to other Rents in Ireland reserved upon grants of land in which the grantors have no reversion.

(July 3, 1851.)

## CAP. XXI.

An Act to amend an Act of the Sixth and Seventh Years of Her Majesty, to amend an Act of the Nineteenth and Twentieth Years of King George the Third, for empowering Grand Juries in Ireland to prevent Bridges and Tolls to be paid for passing the same, in certain cases.

(July 3, 1851.)

### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

SIR GEORGE GREY'S Prosecutions Bill, of which we had last night, appears to have been passing quietly through Parliament, for it was read a third time, and passed in the House of Lords on Tuesday.

Lord Campbell's Bill for the Administration of Criminal Justice is still before the Select Committee of the Commons, but we understand that it is to be passed before the session closes.

Mr. Baines has deferred his projected alterations in the Law of Settlement until next session.

The supplement to *Archbold and Roscoe*, containing all the criminal cases decided and criminal statutes enacted during the last four years, including Lord Campbell's new Bill and the other important criminal statutes of this session, is in the press, and will be issued as soon as Lord Campbell's Bill becomes law. It is edited by E. W. Cox and W. St. Leger Babington, Esqs. Barristers-at-Law. The second and third parts of Cox's *Criminal Law Cases* will also be published at the beginning of next week, containing all the cases decided to this time, with an Appendix of Precedents of indictments and the new criminal statutes.

The new part of *Wise and Evans's Law Digest*, comprising all the cases decided during the half-year just closed, will be published on Saturday next, so as to be ready for use on the circuits, now commencing.

## JERVIS'S ACTS.

TO THE EDITOR OF THE LAW TIMES.

SIR.—The task of the lawyer too often seems to be to evade the intentions of the Legislature. In nothing has this been more apparent than in the frequent evasion of Acts of Parliament passed for the protection of magistrates. The last general measure intended for their indemnity (11 & 12 Vict. c. 44), seemed at first to place them beyond the reach of adverse attorneys, and excited wonder that a popular Government should so far extinguish all remedies against the improper exercise of power which appeared to be left almost irresponsible. But, how mistaken was that opinion. Several decisions have convinced us that Her Majesty's justices of the peace may still incur very considerable loss and annoyance, even while acting without malice or any improper motive. In your last number but one there are two cases showing how astutely points of form are to be adhered to, and an adverse construction put upon the language of the instruments issued by magistrates. In *Re Ashew*, p. 169, it was held necessary to state that a servant had entered into a service from which he was charged with having absented himself; and in *Ex parte Hyde*, p. 170, a conviction was held to be bad,—although it followed the form of Jervis's Acts in adjudging the penalty "to be paid and applied according to law," inasmuch as

it did not show how the penalty was to be distributed, and to whom it was to be paid. The 11 & 12 Vict. c. 43, was expressly intended to consolidate and clearly define the procedure as to summary convictions. The 17th section enacts that "In all cases of conviction upon statutes hitherto passed, whether any particular form of conviction have been therein given or not, it shall be lawful for the justice to draw up his conviction in such one of the forms of conviction in the schedule as shall be applicable to such case or to the like effect."

I have no doubt that clerks to magistrates have gladly availed themselves of forms affording the advantages of concise uniformity. Where a discretion in awarding the penalty was exercised by justices, I have generally, in the conviction, if not in the commitment, shewed how the money was to be ultimately applied. But I deemed that *abundantum cautela*. But now, after all that has been decided since Jervis's Acts were passed, I beg leave to ask whether they do not afford as much good as evil, and whether they have not covered up traps; instead of removing them all? Gradually we discover, by vexatious experience, that this provision, or that procedure, does not apply to such and such a case, and that, in fact, we must not rely upon the Act to be half so universal in its application as it was intended, and we expected it to be. The magistrate who acted in *Hyde's* case will doubtless think the statute an *ignis fatuus*. And magistrates' clerks must beg Mr. Saunders, or some other very nice legal critic, to exercise the utmost ingenuity in shewing how far what was deemed so great a boon is really useless, and how little it may be relied upon. We still need specific instructions how to proceed in each class of offences. Mr. Oke's admirable books must be revised; and new blank forms must be prepared and printed. Thus endless expenses are entailed upon magistrates and their clerks. It would confer a real boon upon them, and upon the public also, if all the laws to be administered by justices of the peace were completely codified, and if all future legislation were made with some regard to the uniform procedure so provided. As it is, it seems to me, that Jervis's Acts, however well intended, are something worse than a failure,—as they *mislead*.

We never hear of actions against the judges of the Superior Courts. Why, then, should those of the inferior ones be visited with such punishments—especially where they are unpaid? If the public must be protected from the improper exercise of their power, let them be liable to proceedings by leave of a judge in the Bail Court. The expense and publicity of opposing such rules would be an ample check, and render actions against magistrates as scarce as criminal informations.

I am, Sir, yours, &amp;c.

A MAGISTRATE'S CLERK.

## Answers to Queries.

## CORONERS.

SEE *Rex v. Justices of Kent*, 11 East, 229. A.

ABSCONDING OF THE TUNBRIDGE WELLS TOWN CLERK.—For the last few days the town has been in quite a commotion in consequence of the absence of Mr. Benjamin Lewis, a man who was all but universally respected, and who had all the honours of the town and district thrust upon his shoulders. The cause of his absence is a defalcation in money matters to a very serious amount, but the precise sum is not yet clearly ascertained, and perhaps never will be. In addition to that of town clerk he held some thirteen or fourteen other appointments, amongst which were the appointments of vestry clerk and collector of all the rates and assessed taxes for the parish of Speldhurst, secretary and collector to the Gas Company, and secretary and collector to the Tunbridge Wells Water Company, the annual income for which could not have been less than 400l. It is stated that within the last three weeks he has received from various sources upwards of 700l. out of which he has not paid away more than 70l. or 80l. The gas company, we understand, are losers by his defalcations of upwards of 500l. and the water company of the like sum, and we fear it will be found, upon a minute investigation of the accounts, that a similar system has been carried out by him in all the appointments held. We have not heard of one that is quite right. Whether he has fled is not known, but it is generally supposed that he is on his passage to America. A warrant has been issued for his apprehension, but up to the time of our report no reward has been offered.—*Sussex Express*.

PRISONERS COMMITTED FOR TRIAL AT SESSIONS.—On Thursday a Parliamentary paper, printed by order of the House of Lords, was issued, shewing the commitments of persons for trial at Sessions in England and Wales. The return extends to 22 pages, and its value would have been increased had a summary been made by the officials who prepared the document. It appears that in the county of Middlesex, from the October Quarter Sessions, 1849, to the



Quarter Sessions in January last, 1,164 prisoners were committed for larceny.

**STATISTICS OF PRISONERS.**—Yesterday a return ordered by the House of Lords was printed, from which it appears that the number of prisoners tried at the Spring Assizes in 1850 and 1851, in the counties of Hertford, Essex, Sussex, Kent, and Surrey, was in the first year 365, and in the second 383. Singularly enough, in the county of Kent the number was the same in each year, 172, being more than double the number in either of the other counties.

**EXTENSION OF THE FRANCHISE.**—An important alteration has just been made by Parliament with respect to voters known as "compound householders," and the Act, if taken advantage of before the 20th instant, will extend the franchise. By the Reform Act (2 & 3 Wm. 4. c. 45) the poor-rates are required to be paid by the 20th of July in each year which were payable by the 6th of April; and by another Act, regulating the payment of rates and taxes by Parliamentary electors (11 & 12 Vict. c. 90), the rates were to be paid by the same period which were payable on the 5th of January. It seems that "compound householders" are required to make continual claims to be registered, and it is declared to be "often inconvenient, or impracticable, for such persons to make continual claim in respect of each rate, and many persons are consequently deprived of the franchise." Therefore it is enacted that persons having once claimed to be rated in respect of premises, and paying or tendering on or before the 20th of July the rates due by the 5th of January preceding, shall not be required in future to renew such claim. The liability of a claimant to rates is to continue so long as he occupies the premises and remains on the register. The compositions with the landlord are to determine the amount of the rate to which the tenant is liable.

**TURNPIKE TRUSTS ARRANGEMENT.**—Mr. Cornwall Lewis and Mr. Bouvier have brought a Bill into the House of Commons, which is now printed, to facilitate arrangements for the relief of turnpike trusts. The Bill proposes that the trustees of insolvent turnpike trusts, with consent of two-thirds in value of the creditors, may apply for a provisional order for a reduction of the rate of interest on the mortgage debts charged or secured on tolls or revenues, and for extinguishing in whole or in part the arrears of the interest on such debts.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

Two important questions in this branch of the law were raised in *M'Intyre v. Connell*, 17 Law T. 197. First, is the Union Bank of London, which is not formed by charter nor by letters patent, but under the Joint-Stock Banking Acts, and thereby empowered to sue and be sued in the name of one of its officers, a public company within the meaning of sec. 14 of 1 & 2 Vict. c. 110? It was held to be so, and, therefore, that shares in such a company might, under that statute, be charged with judgments at law.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

*Brighton, Lewes, and Tonbridge Wells Direct Railway Company.*—A call of 17s. on each of the contributories in numbers 1 to 69, on 10th July.—Horne.

## REAL PROPERTY LAWYER AND CONVEYANCER.

ONE of the points raised in the case of *Marker v. Marker*, 17 Law T. 176, upon which we commented last week, was taken by appeal to the Lord Chancellor, and is reported under the title of *Kekewick v. Marker*, 17 Law T. 193. It is unnecessary to repeat the facts, for they will be remembered by the reader: suffice it to say, that the Court held that it would not control the trustees in the exercise of a discretion as to the mode of raising the money, by sale of timber or by charging the inheritance, and that the tenant for life, taking an interest in the timber, which is a portion of the inheritance, but subject to prior right and discretion of the trustees, would be restrained by injunction from cutting timber and thereby depriving the trustees of the power of exercising the discretion the settlor intended to give them.

Another question on the construction of a will was raised in *Smith v. Stewart*, 17 Law T. 195.

Residuary personal estate was given to legatees by name, and the will directed that all the legatees should have the benefit of survivorship between them in the event of one or more of them "dying without leaving issue." It was held that these words did not refer to the death of the legatees in the testator's lifetime. In *Habershon v. Vardon*, 17 Law T. 196, a gift of personal estate to be applied towards the political restoration of the Jews to Jerusalem, was held to be void, as being against public policy, for "it was a gift for the purpose of creating a revolution in a foreign state."

*Love v. Carpenter*, 17 Law T. 203, is important as being a question of presumption on the *Limitations Act*, 2 & 3 Wm. 4. c. 71. It was there held that a plea of twenty or even of forty years' user under sections 2 and 4, is not supported by proof of user from a period of fifty years before the commencement of the action down to within two years of it, for to support such a plea the defendant must be in the habit of using. It must be an actual, not a constructive, enjoyment during all the period. In the same case PARKE, B. threw out a dictum that should be noted as a valuable authority upon the construction of the statute. "If it were necessary to decide the point, which it is not, I own my opinion would be that there is no good title under the statute unless user be proved at least once in every year."

The *Registration of Assurances Act* will be published as soon as passed, edited, with practical notes and a copious index, by WILLIAM HUGHES, Esq. Barrister-at-Law, author of *The Practice of Sales, Concise Precedents in Modern Conveyancing*, &c. of a size to form an appendix to, and be bound up with, *The Practice of Sales and The Practice of Mortgages*, or as a distinct work.

## WILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—The practical interest of the question involved induces me to trouble you with a defence of my opinion, as expressed in your number of the 21st ult. from the attacks of "A. W." and "G. F." the former of whom says I go too far; the latter, not far enough.

"A. M.'s" position (as explained in his last letter) is, that the signature or subscription opposite to the alteration must correspond *literatim* with that by which the will itself is attested; but I confess myself unable to find anything in the Act tending to such a conclusion. If a testator write "J. Smith" against an alteration, it is surely none the less his signature because he may have written John in full at foot of the will, where he had greater space. Any character or combination of characters which a person may choose to adopt is "the signature" of that person, and his having at one time signed in full cannot preclude him from thenceforth signing by initial.

But I cannot agree with "G. F." that any witnesses will suffice. The Act gives validity to an altered will if verified by the subscription of "the witnesses." The question arises, witnesses to what? and the grammatical import seems to be, the witnesses to the will, for it is the will (with the alterations, it is true) that the clause directs shall be deemed duly executed.

But apart from dry verbal criticism, I submit that this is the more reasonable construction. The philosophy of the clause appears to me to be, that when two persons have attested a will, the law is content to presume (be the fact as it may) that the alterations verified by their signatures with that of the testator were made with the like formalities as the will itself, and if the will be well executed the alterations thus verified shall be deemed so also; but when the witnesses are different no such presumption can arise. Nor is this construction open to the objection raised by "G. F." that it would prevent alterations after the death of the witnesses to the will; for in that case the will as altered might be re-signed, or the alteration alone might be executed and a separate memorandum of attestation appended.

I am, Sir, yours, &c. L.

## COUNTY COURTS.

THE announcement that the new rules of practice were to come into operation only three days after they were issued has taken all parties by surprise, and occasioned immense confusion and inconvenience, for none of the Courts could be supplied with the requisite forms in so short a time.

Very unpleasant rumours are abroad as to the cause of this most improper proceeding, and coupled with facts that have come to our knowledge, we have too much reason to fear

that it is part of a system of jobbery which has been manifested more than once in quarters having the control of the affairs of the County Courts. We shall endeavour to trace the affair to its source; and, if the facts should verify present suspicions, we shall unflinchingly expose them to the reprobation of the public. We have given these new rules of practice below.

A new edition (the FOURTH) of *Cox and Lloyd's Law and Practice of the County Courts* is now in the press, and will be issued as speedily as possible after the Bills now before Parliament are disposed of. It will necessarily be almost entirely reconstructed, and will contain full instructions for judges, officers, and practitioners under the various new jurisdictions, together with all the cases decided to this time, and all the rules, forms, and statutes. In the meanwhile, for the convenience of those who possess the former editions, the new rules of practice will be issued at two shillings, to serve them till the work itself can be completed.

A chapter, containing full instructions to judges, officers, and practitioners, for their practice under the new equity jurisdiction, has been prepared for this work by a County Barrister.

It will be seen that Lord BROUGHAM has postponed the two County Courts Extension Bills before the Lords till next session.

Another appeal from the County Courts was reported last week, and it involves many interesting points of County Courts law. The facts were these:—A. brought plaint against B. for £4. balance due for goods sold and delivered. B. pleaded the Statute of Limitations. The goods were sold in 1842, and the plaintiff relied mainly on a letter from the defendant, dated April 25, 1845, the material part of which was—*"I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out."* A witness also proved that in 1844 he had an interview with defendant respecting the debt, when accounts were stated, and the balance now sued for agreed to be due; and that in March 1845 it was agreed that plaintiff should take goods belonging to the defendant from the Pantechnicon; that the goods were selected, but defendant refused to forward them. Upon this evidence the judge gave judgment for the plaintiff, against which the present appeal was lodged. The Court of C.P. now reversed the decision of the County Court, holding it not to be such an acknowledgment as would take the debt out of the statute.

But the Court threw out some suggestions of very great moment. First, it expressed strong doubts whether, under the statute, an appeal lies at all from the decision of the judge, when a case is determined by him by consent without a jury, the reason being that the statute confines the appeal to cases in which either party "shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence;" and as the judge sitting alone is to determine both law and fact, the Court above could not separate the one from the other so as to review his decision. The other point was still more explicitly stated. The Court will not assign reasons for its decision, but simply give it as done with assessed tax cases; because the Chief and Justices are excluded from the Appeal Court, and the etiquette is, that reasons for a judgment shall only be given *seriatim* when a Chief is present. (*Cawley v. Farnell*, 17 Law T. 201.)

Both of these constructions of the Act so seriously impede its working, that provision ought to be made for the removal of the difficulty by the Bill now before the House of Commons.

## RULES OF PRACTICE TO BE USED IN THE

### COUNTY COURTS IN ENGLAND.

WHEREAS by an Act passed in the thirteenth year of her present Majesty, intituled "An Act to amend the Act for the more easy Recovery of Small Debts and Demands in England, and to abolish certain Inferior Courts of Record" (12 & 13 Vict. c. 104. s. 12), it was enacted, that it should be lawful for the



Lord Chancellor to appoint and authorise five of the judges of the courts holden under an Act of the tenth year of her Majesty, intituled "An Act for the more easy Recovery of Small Debts and Demands in England," to frame such general rules and orders as to them should seem expedient, for and concerning the practice and proceedings of the courts holden under the last-mentioned Act, and for the execution of the process of such courts, and in relation to any of the provisions of the same Act, as to which there might have arisen doubts or have been conflicting decisions in the said courts; and all such rules and orders as aforesaid, as should be certified to the Lord Chancellor under the hands of the judges so appointed or authorised, or any three of them, should be submitted by the Lord Chancellor to three or more of the judges of the Superior Courts of Common Law at Westminster, of whom the Chief Justice of the Court of Q. B. or C. P. or the Chief Baron of the Court of Ex. should be one; and such judges of the Superior Courts might approve or disallow, or alter or amend such rules and orders, or any of them, and such of the rules as should be so approved by such judges of the Superior Courts should forthwith, after the approval thereof, be laid before both Houses of Parliament, if Parliament were then sitting, or, if Parliament were not then sitting, then within five days after the next meeting thereof; and no such rule or order should have effect until six weeks after the same should have been so laid before both Houses of Parliament; and any rule or order so approved should, from and after the expiration of such time as last aforesaid, be of the same force and effect as if the same had been enacted by authority of Parliament.

And whereas, by virtue and in exercise of the power for that purpose given to the Lord Chancellor by the said recited Act of the thirteenth year of her Majesty as aforesaid, the undersigned Alfred Septimus Dowling, Sergeant-at-law, Robert Brandt, James Espinasse, Charles James Gale, and William Furner (five of the judges of the courts holden under the said Act of the tenth year of her Majesty), were on the 2nd day of February, 1850, appointed by the Lord Chancellor to frame such general rules and orders as to them should seem expedient for and concerning the practice and proceedings of the courts holden under the said last-mentioned Act, and for the execution of the process of such courts, and in relation to any of the provisions of the said Act, as to which there might have arisen doubts, or have been conflicting decisions in the said courts.

In pursuance of the powers thereby vested in us, we, the said Alfred Septimus Dowling, Sergeant-at-law, Robert Brandt, James Espinasse, Charles James Gale, and William Furner, have framed the following rules and orders, and we do hereby certify the same to the Lord Chancellor accordingly.

A. S. DOWLING, S. L.  
ROB. BRANDT.  
JAMES 'ESPINASSE.  
C. J. GALE.  
WM. FURNER.

1. The rules of practice and the forms made in pursuance of sec. 78 of 9 & 10 Vict. c. 95, shall, from and after the rules and forms hereinafter set forth come into operation, cease to be used in the said last-mentioned courts, and in lieu thereof the following shall be the rules of practice and forms adopted and used in the County Courts in England.

#### SITTINGS OF THE COURT.

2. On or before the 1st day of January, 1852, the judges shall appoint the days and hours for holding each of their courts during the months of January, February, and March, in the said year, and on or before the first day of every month after the said month of January, the judges shall appoint the days and hours for holding each of their courts during the month next following the three months previously appointed; and a notice of such appointments shall forthwith be put up by the clerk in some conspicuous place in the court-house and in the office of the clerk; and whenever any day so appointed for holding the court shall be altered, notice of such alteration and the time when it will take effect shall be put up in some conspicuous place in the court-house and clerk's office; provided, that the judge may from time to time hold additional courts besides those hereinbefore required to be appointed.

3. Two courts shall not be held before the same judge on one day.

#### INTERPRETATION.

4. In these rules the words "Home Court" shall be understood to mean the court from which process originally issued: and the words "Foreign court" shall be understood to mean the court of the district into which process is issued from another court: and the words "home district" shall be understood to mean the district of the home court: and the words "foreign district" shall be understood to mean the district of the foreign court: and the word "district" shall be understood to mean a locality over which a Court has jurisdiction: and the words "on oath" shall be understood to

mean "on oath *videlicet* voce or by affidavit," and unless there be something in the context inconsistent therewith, the provisions of s. 142 of the 9 & 10 Vict. c. 95, shall apply to the interpretation of these rules.

#### INFANT.

5. 9 & 10 Vict. c. 95, s. 64.—Where an infant applies to enter a plaint for any cause of action (other than for wages or piecework, or for work as a servant) he must procure the attendance of a next friend, at the office of the clerk at the time of entering the plaint, and no plaint shall be entered until the next friend has undertaken, in the form in the schedule, to be responsible for costs; and on entering into such undertaking, he shall be liable in the same manner and to the same extent as if he were a party in an ordinary suit, and the cause shall proceed in the name of the infant by such next friend, and such undertaking shall be filed by the clerk, and no order of the Court shall be necessary for the appointment of such next friend. If the plaintiff fail in, or discontinue, his suit, and shall not pay the amount of costs awarded by the Court to be paid by him to the defendant, such proceedings may be taken for the recovery of such amount from the next friend as for the recovery of any debt or damage ordered to be paid by the same Court.

#### CLERKS' DUTIES.

6. *Office.*—The clerk of every court shall keep an office at each place where the court of which he is clerk is held, and such office shall be kept open every day from ten o'clock in the morning until four o'clock in the afternoon, except Sundays, Christmas-day, Good Friday, or any day appointed by royal proclamation for a public fast or thanksgiving.

7. *Books.*—9 & 10 Vict. c. 95, s. 27.—The clerk of every court shall keep the books, in the schedule mentioned in the forms there given, and every entry in such books shall have a number prefixed corresponding with the number of the plaint to which the entry relates.

8. *Deputy.*—9 & 10 Vict. c. 95, s. 26.—Whenever the clerk, or his lawful deputy, is absent from the court, the judge shall appoint a deputy to act on behalf of the clerk, and an entry of such appointment, and the cause of such absence (if known), shall be made on the minutes of the court.

9. 9 & 10 Vict. c. 95, s. 26.—Whenever a clerk appoints a deputy, the reason of such appointment shall be entered on the minutes of each court for which such deputy acts.

10. 9 & 10 Vict. c. 95, s. 27.—All duties required to be performed by the clerk, except that of acting in court as clerk or signing the minute book, may be performed by the clerk, or by the assistant clerk or clerks provided by him.

11. *Suitors' money.*—9 & 10 Vict. c. 95, s. 82.—The money to which suitors are entitled shall be paid out upon demand (in cash if required) at any time when the clerk's office is open.

12. 9 & 10 Vict. c. 95, s. 92.—Whenever money is paid into or deposited in court, whether before or after judgment, an acknowledgment in writing of such payment or deposit shall be given by the clerk.

13. *Treasurer may inspect books.*—9 & 10 Vict. c. 95, s. 92.—All the books of the court, including the banker's book and cash book, shall at all times be open to the inspection of the treasurer.

14. *Accounts.*—The clerk shall, whenever required by the treasurer, make out an account of the receipts and disbursements of the court, and of cash still in hand, and shall produce the same to the treasurer, and shall pay over the balance to the treasurer; and if such account be correct, the treasurer shall certify that he has received such balance, and shall sign the account.

15. Rule 14 shall apply to receipts and disbursements in protection cases, under the Acts 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.

16. *May not sign ledger.*—No clerk, deputy clerk, assistant clerk, bailiff, or other officer of the court, shall sign the ledger, or any other book, or receive money on account of suitors, or otherwise act as an agent for that purpose.

17. *Or become surety.*—No clerk, deputy clerk, assistant clerk, bailiff, or other officer of the court, or any practising attorney, or clerk of such attorney, shall become surety in any case where, by the practice of the court, security is required.

#### BAILIFF'S DUTIES.

18. *Absence of.*—Whenever the high bailiff shall not attend any sitting of the court, the cause of his absence shall be entered on the minutes of the next succeeding court.

19. *Attendance.*—The high bailiff or a bailiff of the court shall attend, for the purpose of receiving summonses, or for the performance of other duties, at the office of the clerk once every day.

20. *Return of summonses.*—Eight days before the day of holding any court, the high bailiff of that court shall deliver to the clerk a return of all summonses on plaints before judgment, issued to him ten days before the holding of such court, returnable at such court, and such return shall state the

mode of service of each summons, and the high bailiff shall, at the same time, deliver to the clerk the copy of every such summons, indorsed as required by rule 52.

21. *Book of orders, &c.*—The high bailiff shall enter in a book, to be kept by him for that purpose, the particulars of all orders for the payment of money or costs, or both, which he shall have received, and of the mode in which he shall have served the same; and once in every calendar month at least, he shall lay the same before the judge of the court, who shall sign the same and attest its having been duly laid before him.

22. *Return of executions.*—Once in every calendar month, or oftener if the judge shall so order, the high bailiff shall deliver a return to the clerk of the court, pursuant to the form in the schedule, of what shall have been done since his last return under every process of execution or commitment which he has been required to execute, whether originally issued from such court or from any other court; and at the court held next after the delivery of every such return, the clerk shall lay the same before the judge of the court, who shall sign the same and attest its having been duly laid before him.

23. *Payment of money levied.*—Every bailiff levying or receiving any money by virtue of any process issuing out of the court of which he is bailiff, shall, within twenty-four hours from the receipt thereof, pay over the same to the clerk of such court, and shall file and retain such process in his custody.

24. *Foreign execution.*—Whenever a warrant of execution required to be executed in a foreign district, cannot be executed in due time according to the exigency of these rules by the bailiff of the foreign court, he shall return such warrant to the clerk of the home court within twenty-four hours from the expiration of such time, and shall indorse on such warrant the reason why the same could not be executed, and he shall sign such indorsement.

#### PLAINT.

9 & 10 Vict. c. 95, s. 59.—Every plaint shall, upon application at the office of the clerk, be entered in the form in the schedule, and all particulars required by such form shall be entered by the clerk before issuing the summons: provided, that if the plaintiff is unacquainted with the defendant's christian name, the defendant may be described by his surname, or by his surname and the initial of his christian name, or by such name as he is generally known by, and the defendant may be so described in the summons; and in the event of the plaintiff or defendant not appearing, the proceedings under secs. 79 and 80 of the 9 & 10 Vict. c. 95, may be taken as if the true christian name and surname had been stated in the summons, and all subsequent proceedings thereon may be taken in conformity with such description.

25. *Husband and wife.*—Claims by husbands, in their own right, may be joined with claims in respect of which the wife must be joined as a party.

#### PARTICULARS.

27. On entering the plaint, the plaintiff shall, in all cases, if the sum sought to be recovered shall exceed forty shillings, deliver at the office of the clerk as many copies of a statement of the particulars of his demand or cause of action as there are defendants, and an additional copy to be filed, and all such copies shall be sealed with the seal of the court; and such particulars shall be taken to be and be treated as part of the summons.

28. *In actions on deeds within 8 & 9 Wm. 3, c. 11.*—In actions for penalties to secure the performance of covenants, within the meaning of the 8 & 9 Wm. 3, c. 11, the plaintiff shall deliver particulars of the breaches on which he relies, in the same manner as required by the last rule, which when delivered shall be taken to be and treated as part of the summons; and if the Court shall be of opinion that the plaintiff is entitled to recover, judgment shall be entered for the penalty, not exceeding the amount over which the Court has jurisdiction, and an entry shall be made on the minutes, of the damages awarded to the plaintiff, and execution may issue for the amount of such damages; and in case of subsequent breaches, the plaintiff may enter a plaint and sue out a summons in the nature of a *scire facies* on such judgment, and shall deliver particulars of such subsequent breaches in the manner before mentioned, and which shall be taken to be and treated as part of such summons.

#### PLAINT NOTE.

29. At the time of entering the plaint, the clerk of the court shall give to the plaintiff or his agent a note under the seal of the court, according to the form in the schedule; and no money shall be paid out of court to the plaintiff or his agent, unless on production of such note, or by order of the judge.

#### GENERAL FUND.

30. 9 & 10 Vict. c. 95, s. 52.—The general fund fee shall in no case be taken more than once in respect of the same demand in the same court, except in the case of a fresh action after a nonsuit, and a proceeding in the nature of a *scire facies* shall,

for the purposes of this rule, be deemed a proceeding in respect of the original demand.

31. On applications to recover possession of tenements, in pursuance of the 9 & 10 Vict. c. 95, s. 122, the general fund fee shall be calculated and taken on the yearly rent or value of the premises sought to be recovered.

#### MILEAGE.

32. The mileage in foreign districts shall be determined according to the table of distances to these rules annexed, but must be calculated on a distance less by two miles than the distances there stated, and in home districts the mileage may be ascertained by the clerk, by such means as he shall think proper, and his determination thereon shall be final: provided always, that the Commissioners of her Majesty's Treasury may from time to time make such alterations in the said table as to them shall seem fit; and such alterations, when communicated to the clerks of the County Courts respectively, shall have the same force and effect, and shall be applicable in the same manner, as the table of distances to these rules annexed.

#### POSTAGE.

33. Postage necessary for the transmission of any process, order, notice, or other matter by the clerk or high bailiff shall be paid in the first instance by the party on whose behalf the proceeding required to be notified is taken, and shall be costs in the cause, and all letters sent by the parties or the officers of the courts concerning the business of the court shall be prepaid; but this rule, except as to the prepayment of letters, shall not apply to notices of payment into court.

#### PARTIES TO ACTIONS.

[See Amendment.—Rules, Nos. 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, and 105.]

#### SUMMONS TO APPEAR TO A PLAINT.

34. *Form*.—9 & 10 Vict. c. 95, s. 59.—The summons to appear to a plaintiff shall be in the form in the schedule, and shall be dated of the day on which the plaintiff was entered, and shall correspond in substance with the plaintiff, and the date thereof shall be the commencement of the suit.

35. *When returnable*.—Such summons may be returnable either at the next court after the entry of the plaintiff, or at any subsequent court within three months.

36. *How issued*.—The clerk of the court shall issue the summons to the bailiff forthwith after the plaintiff is entered.

37. The clerk shall in cases where, by these rules, particulars are required, annex to the summons a copy of the plaintiff's particulars, sealed with the seal of the court; and shall also make and deliver to the bailiff a true copy of the summons for indorsement, as hereafter required, and it shall be the duty of the bailiff to ascertain, by examination and comparison with the summons, the correctness of the copy.

38. 9 & 10 Vict. c. 95, s. 60.—Leave to issue a summons out of the district shall be granted if the judge is satisfied, by statement on oath, that the party applying has a cause of action, and not otherwise; but it shall not be necessary to enter a plaintiff before applying for such leave.

39. Where a summons issues by leave of the Court, it shall be in the form in the schedule, and no written order of the Court for such leave shall be necessary.

40. *Concurrent summonses*.—Concurrent summonses, grounded on the same plaintiff, may, by leave of the Court, be issued into different districts on payment of the additional fees on such increased number of summonses; and where a previous summons or summonses have not been served, successive concurrent summonses may issue in like manner and on the same terms as successive summonses may be issued: provided that the costs of more than one summons shall not be allowed against the other party, unless by order of the judge.

41. *Successive summonses*.—Where a summons has not been served, successive summonses may be issued by the clerk on the application of the plaintiff, under the circumstances and on the conditions following, unless the judge shall otherwise order: if the non-service has been caused by the defective description given by the plaintiff of the defendant, or of his place of business or residence, or by any other act or neglect of the plaintiff, successive summonses shall be issued only on payment of the poundage for a summons and the bailiff's fee for serving the same; if the non-service has not been so caused, and has not been caused by the neglect of the bailiff, successive summonses shall be issued only on payment by the plaintiff of the bailiff's fee for serving the same; if the non-service has been caused by the neglect of the bailiff, the poundage for such summons shall be paid by the plaintiff, and such successive summons shall be served by him without further fee; and the successive summons or summonses shall bear the same date and number as the summons first issued, and shall be a continuance of the first summons: provided that the costs of such successive summons or summonses shall not

be allowed against the defendant, unless the judge shall otherwise order.

#### SERVICE OF SUMMONS TO APPEAR TO A PLAINT.

42. *When*.—9 & 10 Vict. c. 95, s. 59.—A summons to appear to a plaintiff must be issued and served at least ten clear days before the holding of the court at which it is returnable: provided that a summons may be issued at any time before the holding of any court on production by the plaintiff of an affidavit shewing that the defendant is about to remove out of the jurisdiction of the Court, and service of such summons at any time before the return day may be deemed good service, if at the hearing it shall be proved on oath to the satisfaction of the judge that such party was about to remove out of the jurisdiction of the Court, but in every such case the judge may in his discretion, and on such terms as he shall think fit, adjourn the hearing.

43. *On whom*.—The service of the summons, except in the cases hereinafter specially provided for, must be either personal, or by delivering the same to some person, apparently of sixteen years of age at least, at the house or place of dwelling, or place of business of the defendant; but no place of business shall be deemed the place of business of the defendant, unless he shall be the master or one of the masters thereof.

44. *On board ship*.—Where a defendant is living or serving on board of any ship or vessel, it shall be sufficient service to deliver the summons to the person on board who has, at the time of such service, charge of such ship or vessel.

45. *In barracks*.—Where a defendant is residing or quartered in any barracks, and serving her Majesty as a soldier or marine, it shall be sufficient service to deliver at such barracks the summons to the adjutant of the corps, or any officer or sergeant of the company to which such soldier or marine belongs.

46. *Prisoner*.—Where a defendant is a prisoner in a gaol, it shall be sufficient service to deliver the summons at such gaol to the governor, or any head officer in charge thereof.

47. *Mine*.—Where a defendant is working in any mine or other works underground, it shall be sufficient service to deliver the summons at such mine or works to the engine-man, banks-man, or other person in charge of the mine or works.

48. *Railway company*.—Service of the summons may be effected on a railway company or other corporation by delivering the summons at any station or office of the defendant, within the district of the court in which the summons is to be served, to a secretary or clerk of the defendant.

49. *Where defendant keeps a house*.—Where a defendant keeps his house or place of dwelling or place of business closed, in order to prevent a bailiff from serving the summons, and such summons shall have been affixed on the door of such house or place of dwelling or place of business, such affixing shall be good service.

50. *Or resists bailiff*.—Where a bailiff is prevented by the violence or threats of the defendant, or of any other person or person in concert with him, from personally serving such summons, and the bailiff leaves the same as near to the defendant as practicable, such leaving shall be good service.

51. *Where service not personal*.—Where the summons has not been served personally, and the defendant does not appear, in person or by his attorney or agent, at the return day, it must be proved on oath to the satisfaction of the judge, that the service of such summons has come to the knowledge of the defendant before the return day, except in the cases specially mentioned in the rules 48, 49, and 50.

52. *Indorsement of service*.—If the service of the summons has been personal, the bailiff who served the same shall indorse on the copy of the summons hereinafter directed to be delivered to him by the clerk, the fact of such service; and if the service has not been personal, he shall indorse on the copy of the summons the statement which has been made by the person to whom the summons was delivered, or other circumstances from which it may be inferred that the service of the summons has come to the knowledge of the defendant, and if the summons has not been served, the reason of such non-service shall be indorsed on such copy; and the bailiff shall deliver such copy so indorsed to the clerk, at the time of making the return required by rule 20; and such copy shall be produced at the time of the trial by the clerk, and shall be filed by the clerk.

53. Whenever a summons has been served in one of the modes hereinafter mentioned, but it appears that it has come to the knowledge of the defendant less than ten days clear before the day of hearing, the cause may, at the discretion of the judge, proceed or be adjourned, whether the defendant appears or not.

54. *In foreign district*.—9 & 10 Vict. c. 95, s. 61.—The summons, where required to be served in a foreign district, shall be transmitted by the clerk to the bailiff of the foreign court, and such bailiff is authorized and required to serve the same.

55. 9 & 10 Vict. c. 95, s. 61.—The summons, where required to be served in a foreign district, shall be served by the bailiff of that district, unless by special order of the judge of the home court, the bailiff of the home court shall be directed to serve it: provided that in the latter case, in taxing costs between party and party, the costs of such service shall not be allowed to an amount greater than if the same had been effected by the bailiff of the foreign court, unless the judge shall otherwise order.

56. Where the summons is required to be served in a foreign district by the bailiff of that district, he shall forthwith, after serving the summons, transmit the copy thereof, with an affidavit of such service, to the clerk of the home court, which affidavit shall state the same particulars as are required by rule 52, to be indorsed on a summons which has been served; and if such affidavit be defective, it shall be amended by such bailiff, at his own expense, in conformity with the direction of the home court; and if such bailiff fail so to do, the judge of the home court may direct the treasurer of the foreign court to withhold from the bailiff his fees in respect of such summons, and in such case the treasurer shall not pay the same without the authority in writing of the judge of the home court for that purpose.

57. Where the summons is required to be served in a foreign district, but cannot be served in due time, according to the exigency of these rules, by the bailiff of that district, he shall forthwith transmit the summons to the clerk of the home court, with the reason indorsed thereon why the same could not be served.

58. *Fees*.—9 & 10 Vict. c. 95, s. 62.—When the summons is required to be served in a foreign district, the clerk of the home court shall in all cases demand and receive from the plaintiff the fee to be paid to the person before whom the affidavit is sworn, as well as the fee to the bailiff for serving such affidavit, and in case the summons is not served, such fees shall be returned to the plaintiff, if demanded; and if not so demanded within one calendar month, shall be paid over to the treasurer, and shall become part of the general fund of the home court.

59. Where an affidavit of service is sworn before a judge of a County Court, the fee on such affidavit shall be taken by the clerk, and accounted for to the treasurer at his audit, and shall be applied as the judges' fees are applicable.

60. *Rules to apply to all service*.—The above rules as to the mode, but not as to the time, of service of summonses to appear to a plaintiff, shall apply to the mode of service of all notices and processes whatsoever, except where otherwise directed by statute or by these rules.

61. *Holidays*.—No summons, order, or other process, or notice, shall be served on Sunday, Christmas-day, or Good Friday, or any day appointed by royal proclamation for a public fast or thanksgiving; but such days shall be counted in the computation of the time required by these rules.

#### PAYMENT INTO COURT WHETHER BEFORE OR AFTER JUDGMENT.

62. 9 & 10 Vict. c. 95, s. 82.—Where the defendant is desirous of paying money into court, it must be so paid five clear days before the return day of the summons, with costs proportionate to the amount paid in, together with the fee for paying in, and for notice of payment to the plaintiff; and the clerk shall within twenty-four hours from the time of such payment send to the plaintiff notice thereof by prepaid post letter: provided that at any time before the hearing of the cause the defendant may pay money into court, with such costs as aforesaid, and the clerk shall give notice thereof to the plaintiff as aforesaid; but where money is so paid in less than five clear days before the return day of the summons, it shall be lawful for the Court to order the defendant to pay such costs as the plaintiff shall have incurred in preparing for trial, before the notice of such payment was received by him, or in attending the court.

63. *Acceptance by plaintiff*.—9 & 10 Vict. c. 95, s. 82.—If the plaintiff elect to accept in full satisfaction of his claim, such money as shall have been paid into court by the defendant, and shall send to the defendant by prepaid post letter, or leave at the defendant's place of dwelling or place of business a written notice, stating such acceptance, two clear days, or within such reasonable time as the time of payment by the defendant has permitted, before the return day of the summons, the action shall abate, and the plaintiff shall not be liable to any further costs, but in default of such notice from the plaintiff the cause may proceed.

64. The fee on paying money into court shall be paid by the party paying the same; and the fee on paying money out of court shall be paid by the party receiving the same.

#### INSPECTION OF DOCUMENTS.

65. Where in any action the defendant is desirous of inspecting any deed, bond, or other instrument under seal, or any written contract, or other

instrument, in which he has an interest, and which shall be in the possession, power, or control of the plaintiff, the defendant may, within five days from the service of the summons to appear, give notice by prepaid post letter or otherwise, that he desires to inspect such instrument at any place to be appointed by the plaintiff, and the plaintiff shall appoint a place accordingly; and if the plaintiff shall neglect or refuse to appoint such place, or to allow the defendant or his attorney to inspect it within three days after receiving such notice, the judge may, in his discretion, on the day of hearing, adjourn the cause for the purpose of such inspection, and make such order as to costs as he shall think fit.

#### WITHDRAWAL BY PLAINTIFF.

66. If the plaintiff be desirous of not proceeding in the cause, he may give notice thereof to the clerk and to the defendant, by prepaid post letter, and after the receipt of such notice the defendant shall not be entitled to any further costs than those incurred up to the receipt of such notice, unless the judge shall otherwise order.

#### DEFENCES.

67. 9 & 10 Vict. c. 95, ss. 76, 81.—Where the defendant intends to rely on a set-off, infancy, coverture, Statute of Limitations, or discharge under a bankrupt or insolvent Act, his notice shall contain the particulars hereinafter mentioned: provided that in case of non-compliance with this rule, or those rules applying to such six grounds of defence, and the plaintiff will not consent at the hearing to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the hearing of the cause to enable the defendant to give such notice.

68. *Set-off*—9 & 10 Vict. c. 95, s. 76.—Where a defendant intends to set off any debt or demand alleged to be due to him by the plaintiff, he must give notice thereof in writing to the clerk of the court, and deliver to such clerk a particular of such set off, at least five clear days before the return day of the summons.

69. *Infancy*—9 & 10 Vict. c. 95, s. 76.—Where a defendant intends to rely on the defence of infancy, he must give notice thereof in writing to the clerk of the court, at least five clear days before the return day of the summons, setting forth in such notice the supposed place and date of his birth.

70. *Coverture*—9 & 10 Vict. c. 95, s. 76.—Where a defendant intends to rely on the defence of coverture, she shall give notice thereof in writing to the clerk, at least five clear days before the return day of the summons, setting forth in such notice the place and date of marriage, together with the christian name and surname of her husband.

71. *Statute of Limitations*—9 & 10 Vict. c. 95, s. 76.—Where a defendant intends to rely on the defence of any Statute of Limitations, he shall give notice thereof in writing to the clerk of the court, at least five clear days before the return day of the summons.

72. *Discharge under Bankrupt or Insolvent Acts*—9 & 10 Vict. c. 95, s. 76.—Where a defendant intends to rely on the defence of a discharge under any statute relating to bankrupts, or any Act for the relief of insolvent debtors, he shall give notice in writing to the clerk of the court, at least five clear days before the return day of the summons, setting forth in such notice the date of his certificate, discharge, or final order, and the Court by which such certificate, discharge, or final order was granted or made.

73. *Copies of Notice*.—In all cases, unless otherwise expressly ordered, when any notice or statement is required to be given by any party, such party shall, at least five clear days before the day of hearing, deliver to the clerk as many copies thereof as there are opposite parties, and an additional copy to be filed, and all the said copies shall be signed by the party giving such notice, his attorney or agent; and the clerk shall, within twenty-four hours from the time of receiving the same, transmit, by prepaid post letter, one copy of such notice to each of the said parties.

74. *Tender*.—Where the defence is a tender, such defence shall not be available unless, before, or at the hearing of the cause, the defendant pays into court (which may be without costs) the amount alleged to have been tendered.

#### EVIDENCE.

75. *Summons to witness*.—Witnesses may be summoned without leave of the Court, either in the home or foreign district, and the clerk shall forthwith on issuing the summons deliver it to the bailiff.

76. *Service of*.—It shall be sufficient if a summons to a witness be served a reasonable time before the actual hearing.

77. *Notice to admit*—9 & 10 Vict. c. 95, s. 85.—Where either party proposes to give a judgment of a Superior Court or any other document, whether printed or written in evidence, he may, by a demand in writing made a reasonable time before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in

evidence) the document to be read in evidence without proof; and if such demand be not made, no costs of proving such document shall be allowed, unless the judge shall otherwise order. If such demand be not complied with, and the judge think it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the event of the cause.

78. *Wife of party*—9 & 10 Vict. c. 95, s. 83.—Either party may call the other or the wife of the other party as a witness, and appearance may be enforced by summons as in the case of any other witness.

#### JURY.

79. *Demand of*—9 & 10 Vict. c. 95, s. 70.—Every notice of a demand of a jury must be made in writing to the clerk of the court two clear days before the day of hearing, and the summonses to the intended jurors shall be delivered to the bailiff forthwith.

80. *Adjournment*—9 & 10 Vict. c. 95, s. 70.—Where notice of a demand of a jury has not been given in due time, or if at the hearing both parties desire to try by a jury, the judge may, on such terms as he shall think fit, adjourn the cause in order that the necessary steps for such trial may be taken, and the trial shall take place accordingly.

81. *Interpleader and replevin*.—Cases of interpleader, and of replevin, may at the instance of either party be tried by a jury, and in the same manner as ordinary actions.

82. *No poundage fee*.—The poundage fee upon summonses shall not be payable upon any summonses to a jury or jurymen, but the bailiff's fees for service on each jurymen shall be payable as upon the service of a summons to appear to a plaintiff.

83. *Number summoned*.—In all cases to be tried by a jury the number of jurymen summoned shall be ten, unless the judge shall otherwise order.

#### ADJOURNMENT OF CAUSE.

84. *By consent*.—Where a summons has been served the parties may by consent, at any time before the cause is called on, on payment to the clerk of the fee on an adjournment, postpone the hearing to such subsequent court as the judge shall direct; but, where a cause is called on, the hearing fees shall be forthwith payable, and if the plaintiff on being required thereto do not pay such fees, he shall be deemed not to have appeared; and if the cause be adjourned, after being called on, and the hearing fees paid, the fee on an adjournment shall then be paid by the party requiring the adjournment; and at the adjourned hearing or hearings of such cause, no further hearing fee shall be payable, but the cause may from time to time be adjourned on payment of the fees on an adjournment.

85. *No order for*—9 & 10 Vict. c. 95, s. 81.—Where a cause is adjourned, no order of adjournment shall be served on either party unless by direction of the judge.

86. *To comply with practice*—9 & 10 Vict. c. 95, s. 81.—When anything required by the practice of the Court to be done by either party, before or during the hearing, has not been done, the judge may, in his discretion, and on such terms as he shall think fit, adjourn the hearing to enable the party to comply with the practice.

#### HEARING.

87. *Hearing fee*—9 & 10 Vict. c. 95, s. 79; 13 & 14 Vict. c. 61, s. 10.—Where a cause is struck out in consequence of the non-appearance of both parties, no hearing fee shall be payable.

88. *Non-appearance of plaintiff*.—If at the return day of a summons, or at any continuation or adjournment of the Court at which it is returnable, the plaintiff does not appear, the judge may, in his discretion, award to the defendant costs in the same manner, and to the same amount, as to counsel, attorney, witnesses, and other matters, as if the cause had been tried, but no hearing fee shall be charged.

89. *Roll of attorneys*.—No attorney shall be allowed to appear for any person in a County Court until he has signed a roll or book to be kept by the clerk for that purpose, but no fee shall be payable for that purpose.

90. *No notice of employment of counsel or attorney*.—It shall not be necessary for either party previous to the hearing to give notice to the other, or to the Court, of his intention to employ a barrister or attorney to act as his advocate at the hearing, and the allowance of costs for such barrister or attorney shall not be affected by such want of notice.

91. *Insolvency and protection*.—The provisions of the statute 9 & 10 Vict. c. 95, s. 91, as to the persons who shall be allowed to appear for any party in any proceeding in the County Courts, shall apply to all proceedings in insolvency and for protection.

92. *Infant defendant*.—Where an infant defendant appears at the hearing, and names a person willing to act as guardian, and who then assents so to act, such person shall be appointed guardian accordingly; but if the defendant do not name a guardian, the judge may appoint any person in court willing to become guardian, or in default of such person, the

judge shall appoint the clerk of the court to be guardian, and the cause shall proceed thereupon as if another person had been appointed guardian, and the name of the guardian appointed shall be entered in the form in the schedule, and no responsibility shall attach to the person so appointed guardian.

93. *Joint contractors*.—Where a plaintiff avails himself of the provisions of sec. 68 of 9 & 10 Vict. c. 95, and proceeds against only one or more of several persons jointly answerable, the defendant or defendants sued may avail himself or themselves of any set-off or other defence to which he or they would be entitled if all the persons liable were made defendants.

#### AMENDMENT.

94. Where a person, other than the defendant, appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents, and thereupon the cause shall proceed as if such person had been originally named in the summons, and, if necessary, the hearing may be adjourned on such terms as the judge shall think fit, and the costs of the person originally named as defendant shall be in the discretion of the judge.

95. *Representative character*.—Where a party sues or is sued in a representative character, but at the hearing it appears that he ought to have sued or been sued in his own right, the judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly, and the case shall then proceed in all respects, as to set-off and other matters, as if the proper description of the party had been given in the summonses.

96. Where a party sues or is sued in his own right, and it appears at the hearing that he should have sued or been sued in a representative character, the judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly, and the case shall then proceed in all respects, as to set-off and other matters, as if the proper description of the party had been given in the summonses.

97. *Error in name or description of plaintiff*.—9 & 10 Vict. c. 95, s. 59.—Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may at the hearing be amended, at the instance of either party, by order of the judge, on such terms as he shall think fit, and the cause may then proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made.

98. *Of defendant*—9 & 10 Vict. c. 95, s. 59.—Where the name or description of a defendant in the summons is insufficient or incorrect, and the defendant appears and objects to the description, it may be amended, at the instance of either party, by order of the judge, on such terms as he shall think fit, and the cause may proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made; but if no such objection is taken, the cause may proceed, and in the judgment, and all subsequent proceedings founded thereon, the defendant shall be described in the same manner.

99. *Husband and wife*.—In actions by or against a husband, if the wife is improperly joined or omitted as a party, the summonses may at the hearing be amended at the instance of either party, by order of the judge, on such terms as he shall think fit, and the cause may proceed, as to set-off and other matters, as if the proper person had been made party to the suit.

100. *Too many plaintiffs*.—Where it appears at the hearing, that a greater number of persons have been made plaintiffs than by law required, the name of the person improperly joined may, at the instance of either party, be struck out by order of the judge, on such terms as he shall think fit, and the cause may proceed, as to set-off and other matters, as if the proper party or parties only had been made plaintiffs.

101. *Too few plaintiffs*.—Where it appears at the hearing, that a less number of persons have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added by order of the judge, on such terms as he shall think fit, and the cause shall proceed as to set-off and other matters, and judgment shall be pronounced, as if the proper persons had been originally made parties; and, unless the person whose name is so added shall assent thereto, either at the hearing or some adjournment thereof, personally or by writing signed by him, or his attorney, proceedings on the judgment shall be stayed until the court next after five clear days from the day of hearing, and if the person whose name is added shall at the hearing, or an adjournment thereof, consent to become a plaintiff (such consent being in writing, signed by him or his attorney), execution shall issue as the judge shall think fit; but if such party shall

not consent to become a plaintiff in manner aforesaid, either at the hearing or at an adjournment thereof, judgment of nonsuit may be entered.

102. *Too many defendants.*—Where it appears at the hearing, that more persons have been made defendants than by law required, the name of the party improperly joined may, at the instance of either party, be struck out by order of judge, on such terms as he shall think fit, and the cause shall proceed, as to set-off and other matters, as if the party or parties liable had been sued, and judgment shall be given for the party improperly joined.

103. *Where all defendants not served.*—Where several persons are made defendants, and all of them have not been served, the name or names of the defendant or defendants who have not been served, may, at the instance of either party, be struck out by order of the judge, on such terms as he shall think fit, and the cause shall then proceed in all respects, as to set-off and other matters, as if all the defendants had been served.

104. *Variance between proceedings and evidence.*—Where at the hearing a variance appears between the evidence and the matters stated in any of the proceedings in the County Court, such proceedings may, at the discretion of the judge, and on such terms as he shall think fit, be amended, and such amendment, as well as amendments as to parties, when ordered, shall be made in open court, and during the sitting of the Court.

105. In all cases of amendment, a corresponding amendment shall be made in the presence of the judge, in the proceedings of the Court, antecedent to such amendment, and the subsequent proceedings shall be in conformity therewith.

#### COSTS.

106. *Taxation of—9 & 10 Vict. c. 95, s. 88.*—All costs between party and party shall be taxed by the clerk of the court, but his taxation may be reviewed by the judge, upon the application of either party; and it shall not be necessary that the costs shall be taxed in court, or during the sitting of the Court at which judgment is given. (a)

107. *Witnesses—9 & 10 Vict. c. 95, s. 88.*—The judge shall in each case direct what number of witnesses are to be allowed on taxation of costs, and their allowance for attendance shall be according to the scale in the schedule, unless otherwise ordered, but shall in no case exceed the allowances therein mentioned.

108. *9 & 10 Vict. c. 95, ss. 83, 85.*—The costs of witnesses, whether they have been examined or not, may, in the discretion of the judge, be allowed, though they have not been summoned.

109. *Money paid into court.*—Money paid into court on a judgment shall be appropriated, first in satisfaction of the costs, and afterwards in satisfaction of the original demand.

110. *Of warrants.*—The calculation of fees payable for the issuing and execution of warrants, shall be governed by the direction given in the table of fees, that where the sum demanded is above twenty pounds, the poundage shall be taken on twenty pounds only. Provided that this rule shall not apply to cases in which jurisdiction is given by consent, under sec. 17 of 13 & 14 Vict. c. 61.

111. *9 & 10 Vict. c. 95, s. 94.*—Costs of unexecuted or unproductive warrants against the goods shall not be allowed against the defendant, unless the judge shall otherwise direct.

112. Costs of warrants of commitment on which the defendant has not been taken, shall not be allowed against the defendant, unless the judge shall otherwise direct.

113. Costs of executed warrants, whether of commitment or against the goods, shall be allowed, unless the judge shall otherwise direct.

#### ORDERS.

114. *Service of—Orders for payment of money or costs, or both, and orders of adjournment, when directed by rule 86, to be served, shall in all cases be*

(a) The following table shews what fees may be taken by counsel and attorneys:—

*In Covenant, Debt, Detinue, or Assumpsit.*

	Attorney.	Barrister.
	£ s. d.	£ s. d.
Under 5 <i>l.</i> .....	0 15 0	1 3 6
Above 5 <i>l.</i> and not exceeding 20 <i>l.</i> .....	1 10 0	2 4 6
20 <i>l.</i> .....	2 0 0	2 4 6
30 <i>l.</i> .....		
50 <i>l.</i> .....		

*In Trespass, Case, or Trover.*

	Attorney.	Barrister.
	£ s. d.	£ s. d.
Under 5 <i>l.</i> .....	0 15 0	1 3 6
Above 5 <i>l.</i> and not exceeding 20 <i>l.</i> .....	1 10 0	2 4 6
20 <i>l.</i> .....	2 0 0	2 4 6
30 <i>l.</i> .....		
50 <i>l.</i> .....		

served by the bailiff of the home court, or be sent by him in a prepaid post letter to the party ordered to pay the same. Provided that in no case shall any mileage be allowed, but the bailiff shall be entitled to be paid only as upon a service within two miles of the court-house, and if the bailiff elect to serve by post, he shall, at his own expense, prepay the letter. Provided always, that it shall not be necessary for the party in whose favour such order was made to prove that it was served previous to taking proceedings thereon.

115. *Where proceeding taken by leave of Court.*—Where the Court gives leave to take any proceeding, it shall not be necessary to draw up any order, nor shall any order be drawn up to warrant such proceeding.

#### INSTALLMENTS (PAYMENT BY).

116. *When payable—9 & 10 Vict. c. 95, s. 92.*—Where an order is made for the payment of any debt, damages, costs, or other sum of money by instalments, such instalments shall be payable at such periods as the Court shall order; and if no period be mentioned, the first shall become due on the twenty-eighth day from the day of making the order, and every successive instalment shall become due at a like period of twenty-eight days, from the day of the previous instalment becoming due; and such instalments shall be paid at the office of the clerk, and not to the party in whose favour such order was made.

117. *Notice to plaintiff.*—When an order is made for payment by instalments or otherwise, the clerk shall give notice to the plaintiff by prepaid post letter, according to the form in the schedule, of every payment made, and the fee allowed for such notice may be deducted from the amount paid in, whether such sum is paid out to the plaintiff or not, and such fee shall not be paid by the defendant: provided that such notice shall not be given, nor the fee taken, where the instalment does not amount to ten shillings, unless the plaintiff shall, by writing under his hand, require the clerk to give him such notice.

#### PROCEEDING ON A JUDGMENT MORE THAN A YEAR OLD.

118. No warrant of execution, or summons for commitment, shall, without leave of the judge, issue on a judgment more than a year old (unless an instalment has been paid on such judgment, or a warrant of execution against the goods or a warrant of commitment has been issued within a year from the time of obtaining such judgment), or if more than a year has elapsed since an instalment has been paid, or since the expiration of the warrant against the goods, or of the last warrant of commitment; but no notice to the defendant, previous to applying for such leave, shall be necessary, and such leave shall be expressed on the warrant under the seal of the Court.

#### EXECUTION.

119. *Date and duration of—*Warrants of execution shall bear date on the day on which they are issued, and shall continue in force for three calendar months from such date, and no longer.

120. *Where default by defendant—9 & 10 Vict. c. 95, s. 95.*—Where a defendant has made default in payment of the whole amount awarded by the judgment, or of an instalment thereof, execution may issue against his goods without leave of the court, and such execution shall be for the whole amount of the judgment and costs then remaining unsatisfied, unless in the case of instalments the judge otherwise direct at the time of giving judgment.

121. *Indorsement on—9 & 10 Vict. c. 95, s. 94.*—The clerk shall, on issuing a warrant of execution, indorse on such warrant the amount to be levied, distinguishing the amount of the debt or damages and costs adjudged to be paid, the amount of the fees for issuing the warrant, and the bailiff's fees for its execution, including mileage to the place in which the bailiff is directed to take the goods, and no further mileage shall be taken by the bailiff.

122. *Successive warrants.*—Successive warrants of execution against the goods may be issued without leave of the Court, and they may also be issued under the same circumstances, and on the same conditions as in the case of successive summonses to appear to a plaintiff, except that the fee for issuing such warrants shall in all cases be paid, and such successive warrants shall bear date of the day on which they are issued. See rule 41.

123. *9 & 10 Vict. c. 95, s. 95.*—Successive warrants against the goods may be issued when only a part of the judgment is satisfied, on payment of fees proportioned to the amount of the judgment remaining unsatisfied.

124. *Concurrent warrants.*—Warrants of execution against the goods may be issued concurrently into one or more districts, provided that the costs of more than one warrant shall not be allowed against the other party, unless by order of the judge.

#### SUMMONS FOR COMMITMENT.

125. *How issued and served—9 & 10 Vict. c. 95, s. 98.*—Every summons for a party to appear, pursuant to the 98th section of the 9 & 10 Vict. c. 95,

may issue at any time without leave of the Court, except in cases provided for by rule 118, and shall be forthwith issued by the clerk to the bailiff, and shall be served personally not less than three clear days before the day on which the party is required to appear to such summons, unless it be proved on oath at the hearing, to the satisfaction of the judge, that such party was about to remove out of the jurisdiction of the court, or was keeping out of the way to avoid service, in which case service upon the party at any time before the time appointed for the appearance of such party shall be sufficient.

126. *When heard in foreign court—9 & 10 Vict. c. 95, s. 100.*—Where a summons for commitment is heard in a court other than that in which judgment was obtained, and the order of such last-mentioned court is altered by the judge of such other court, all payments under such order shall be made into, and execution thereupon against the goods shall be issued by, the court which alters the order.

127. Where a certified copy of a judgment is obtained, the clerk shall make a memorandum of having given such certificate on the minute of the judgment, and no execution against the goods or summonses for commitment shall issue upon such judgment from the court in which the judgment was obtained, until it is shewn to the Court whether any and what proceedings have been taken thereon in any other court.

128. *Successive summonses.*—Successive summonses for commitment may be issued without leave of the court, and they may also be issued under the same circumstances, and on the same conditions as in the case of successive summonses to appear to a plaintiff. See rule 41.

129. *Concurrent summonses.*—Concurrent or successive summonses for commitment may be issued in the same district or in different districts by the several courts thereof, provided that in no case shall a summons for commitment be issued except by the court of the district wherein the party summoned then dwells or carries on business; and the costs of more than one summons shall not be allowed against the other party, unless by order of the judge.

#### COMMITMENT.

130. *9 & 10 Vict. c. 95, ss. 99 and 101.*—When a defendant does not dwell or carry on business in the district of the court to which he has been summoned to appear to a plaintiff, he shall not be liable to be committed at the hearing of such summons, whether he appears to such summons or not.

131. *Date and duration of—*Warrants for commitment whenever issued shall bear date on the day on which the order for commitment was made, and shall continue in force for three calendar months from such date, and no longer; but no order for commitment shall be drawn up or served.

132. *Indorsement on.*—In cases of commitment under secs. 99 or 101 of the 9 & 10 Vict. c. 95, the amount of the judgment, and all costs payable by the defendant, shall be indorsed on the warrant, and the amount due to the bailiff for execution shall be stated separately.

133. *Payment by defendant.*—Where an order is made for commitment for non-payment of money, the defendant may, at any time before his body is delivered to the custody of the gaoler, pay to the bailiff the total amount indorsed on the warrant, and on receiving such amount the bailiff shall discharge the defendant out of custody, and shall within twenty-four hours from receiving the same pay over the amount of the judgment and costs to the clerk.

134. *Form of order—9 & 10 Vict. c. 95, s. 110.*—In all cases of commitment for non-payment, it may be made part of the order that on production of the clerk's certificate, stating that payment or satisfaction of the sum and costs remaining due at the time of making the order for imprisonment, together with the costs of obtaining such order and all subsequent costs, has been made, the defendant shall be discharged.

135. *Successive warrants.*—Successive warrants of commitment may, by leave of the judge (without issuing a fresh summons when no previous warrant has been executed), be issued under the same circumstances, and on the same conditions as in the case of successive summonses to appear to a plaintiff, except that the fee for issuing such warrant shall in all cases be paid, and such successive warrants shall bear date of the day on which leave was given.

136. *Concurrent warrants.*—Warrants of commitment may be issued concurrently against the same party into the same or different districts; provided that the costs of more than one warrant shall not be allowed against the other party unless by order of the judge.

#### TRANSMISSION OF FEES AND PROCEEDS OF EXECUTIONS TO AND FROM FOREIGN DISTRICTS.

137. *9 & 10 Vict. c. 95, s. 61.*—Where a summons is required to be served in a foreign district, the clerk of the home court shall transmit such summons to the bailiff of the foreign court in a letter, according to the form in the schedule, stating



herein the amount of fees due to the bailiff of the foreign court, and the clerk of the home court shall account for and pay to the treasurer of his court, at the time of making his monthly return of fees, &c. o such treasurer, the bailiff's fees received by him or the service of the summons in the foreign district, and the bailiff of the foreign court shall serve such summons, and shall produce to the treasurer of his court, at the time of audit, the letter from the clerk of the home court transmitting the summons, and thereupon such treasurer shall pay to the said bailiff the amount of the fees therein stated, unless he judge of the foreign court or the judge of the home court shall, by writing, have signified to the treasurer that such fees shall not be paid, and in such case the amount of such fees shall be placed to the credit of the general fund of the foreign court.

138. 9 & 10 Vict. c. 95, s. 104.—In all cases of executions issued into a foreign district, whether against the goods or the person, the fees due to the clerk and bailiff of the foreign court, for the issuing and execution thereof, shall be paid and accounted for by the clerk of the home court to the treasurer of his court at the time of making his monthly return of fees, &c. to such treasurer, and the clerk of the foreign court shall immediately, on the receipt of the said warrant, make an entry, in the form prescribed in the schedule, in a book to be called "The Foreign Execution Book;" and after the bailiff shall have made his return as directed, the amount of fees herein mentioned shall be, at the time of audit, divided and applied by the treasurer of his court, as directed by the order of the Secretary of State of the 5th November, 1850, unless the judge of the foreign court or the judge of the home court shall, by writing, have signified to the treasurer that the bailiff's fees shall not be paid, and in such case the said-mentioned fees shall become part of the general fund of the foreign court.

139. 9 & 10 Vict. c. 95, ss. 104, 106.—Where, by virtue of any process issued into a foreign district, any money shall have been received by the bailiff of the foreign court, such bailiff shall, within twenty-four hours from the receiving of such money, pay over the same to the clerk of the foreign court, and shall make a return in writing of the amount received; and in the case of a levy having been made, the bailiff shall state in the return the gross amount produced by such levy, the particulars of the appraiser's and broker's charges, and the fees allowed for keeping possession, and pay over to the clerk of the foreign court the amount levied, less such charges and fees, and the clerk of the foreign court shall certify in the said return the amount paid into court, and the correctness of the said charges, and in all the above cases shall account for and pay over the same amount to the treasurer of his court, at the time of making his monthly return of fees to such treasurer, or at such time as the treasurer shall require; and the high bailiff shall thereupon transmit such return to the high bailiff of the home court as directed by the 104th section of 9 & 10 Vict. c. 95, and such latter bailiff shall, within twenty-four hours from the receipt of such return, deliver the same to the clerk of his court, who shall thereupon pay out if any money in his hands, to the plaintiff in the cause, the amount certified in such return to have been received by the clerk of the foreign court, as he proceeds of the execution, and shall enter in a book the amount so certified in the form given in the schedule; and the clerk of the home court shall file such return, and the clerk shall be allowed by the treasurer of his court, at his audit, the amount so paid.

140. Where any money is paid or received by any treasurer as the proceeds of fees or executions in respect of process issued into a foreign district, an account thereof shall be kept by the treasurer, and in account of the sums so paid and received shall be transmitted by him to the Commissioners of her Majesty's Treasury, at such times and in such manner as they shall direct.

#### NEW TRIAL.

141. Application for—9 & 10 Vict. c. 95, ss. 80, 39.—An application for a new trial or to set aside proceedings may be made and determined on the day of hearing, if both parties are present, or may be made at the first court held next after the expiration of twelve clear days from such day of hearing, and the party intending to make such application shall, seven clear days before the holding of such court, deliver a notice in writing, signed by himself, his attorney or agent, stating the grounds of his intended application, and also the court at which such application is proposed to be made, to the clerk at his office, and give a similar notice to the opposite party by serving the same personally on such party, or by leaving the same at his place of abode or business, and such notice shall not operate as a stay of proceedings, unless the judge shall otherwise order; and if money be paid into court under any execution or order in the suit, the clerk shall retain the same to abide the event of the application aforesaid, and if no such application be made, the money shall, if required, be paid over to the party in whose favour

the order was made, unless the judge shall otherwise order; and if such application be not made at the court mentioned in the notice, no subsequent application for a new trial or to set aside proceedings shall be made, unless by leave of the judge, and on such terms as he shall think fit.

142. Fee on.—The fee payable for an application for a new trial, or to set aside proceedings, shall be paid by the party intending to make such application at the time of giving notice of his intention so to apply.

143. Jury.—Where a new trial is granted, the judge may in his discretion make it a condition of granting such new trial, that it shall take place before a jury, although the former trial did not take place before a jury.

144. Security.—In all cases where security is required to be given in any proceeding in the County Court, whether under section 127 of 9 & 10 Vict. c. 95, or in any other case, such security shall be at the expense of the party giving it.

#### INTERPLEADER.

145. 9 & 10 Vict. c. 95, s. 118.—Particular of claim.—Where any claim is made to or in respect of any goods or chattels taken in execution under the process of any County Court, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, and summonses have been issued on the application of the officer charged with the execution of such process, such summonses shall be served in such time and mode as hereinbefore directed for a summons to appear to a plaintiff, and the claimant shall be deemed the plaintiff and the execution creditor the defendant; and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or, in case of a claim for rent, of the amount thereof, and for what period, and in respect of what premises, the same is claimed to be due, and the name and description and address of the claimant shall be fully set forth in such particular, and any money paid into court under the execution shall be retained by the clerk until the claim shall have been adjudicated upon: provided that, by consent, an interpleader claim may be tried, although the above rule has not been complied with.

146. Summonses.—Interpleader summonses may be issued by the clerk, on the application of the bailiff, without leave of the Court.

147. Interpleader summonses shall be issued from the court of the district in which the levy was made, and the execution creditor and claimant may be summoned to such court without leave of such Court.

148. Where the claim to any goods or chattels taken in execution, or the proceeds or value thereof, shall be dismissed, the costs of the bailiff shall be retained by him out of the amount levied, unless the judge shall otherwise order.

#### APPEAL.

149. Statement of grounds of—12 & 13 Vict. c. 61, s. 14.—Any party dissatisfied with the determination or direction of the Court, in point of law, or upon the admission or rejection of any evidence, may, before the rising of the Court on the day of the trial, deliver to the clerk a statement in writing signed by him, his counsel or attorney, containing the grounds of his dissatisfaction; and in default of such statement being delivered as aforesaid, the successful party may proceed on the judgment, unless the judge shall otherwise order; but it shall be competent for the judge to direct proceedings to be taken on the judgment, notwithstanding such statement has been delivered: provided always that the party so dissatisfied may appeal, on grounds different from those contained in such statement, and although he shall not have delivered any such statement.

150. Notice of.—The ten days within which notice of appeal may be given, shall be reckoned exclusive of the day of trial.

151. The notice of appeal shall be in writing, and shall state the grounds on which the party appeals, and shall be signed by the appellant, his attorney or agent, and such notice must be served on the clerk as well as on the successful party, by prepaid post letter or otherwise.

152. Where execution has issued.—If before notice of appeal as aforesaid is served upon the clerk, execution shall have issued, and the amount of the judgment and costs of execution shall have been paid into the hands of the bailiff, or levied and not paid over to the successful party, the same shall remain in court to abide the order of the Court.

153. If before an appealing party shall have given the required security, execution shall have issued, the clerk shall, upon the appealing party giving such security, forthwith send notice thereof by prepaid post letter or otherwise to the bailiff, and proceedings on such execution shall forthwith be stayed.

154.—Security.—The security on appeal, required under sec. 14 of the 13 and 14 Vict. c. 61, may in all cases be either a deposit of money or a bond exe-

cuted by the appellant and two sureties, conditioned in conformity with the provisions of the statute, and which shall be substantially in the form in the schedule.

155. In all cases of appeal, where the appellant proposes to give a bond, he shall serve by prepaid post letter, or otherwise, on the opposite party and the clerk, at his office, notice of the sureties whom he proposes to submit for the approval of the clerk; and such notice shall contain the matters stated in the form in the schedule.

156. The sureties shall, unless by consent of the successful party, make an affidavit of their sufficiency in the form in the schedule.

157. The bond shall be executed in the presence of the clerk, or some one of the persons mentioned in sec. 23 of 13 & 14 Vict. c. 61: provided always, that if it be executed in the presence of the clerk, it shall not be necessary for him to attest the same.

158. At the time of giving security, the appellant shall deliver to the clerk a statement in writing, shewing to which of the Courts of Common Law at Westminster he proposes to appeal.

159. The successful party shall be the obligee of the bond, and it shall be deposited with the clerk, until the cause is finally disposed of.

160. Where the appellant makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by prepaid post letter or otherwise, of such deposit having been made.

161. Where money is paid into court to abide the event of an appeal, whether by way of security or in pursuance of an order of the judge, the clerk shall give the party paying it a written acknowledgment of such payment.

162. Form of case.—All cases shall be signed by the judge, and shall be presented to him for signature, unless he shall otherwise order, at the court next after twelve clear days from the giving such determination or direction, and sealed with the seal of the Court; and when signed and sealed, one copy thereof shall be deposited with the clerk, and another sent by prepaid post letter or otherwise, by the appellant, to the successful party within three clear days next after the time of signing and sealing the same; and if the appellant does not comply with this rule, the successful party may proceed on the judgment, unless the judge shall otherwise order.

163. Transmission of.—The appellant shall, within three clear days next after the case is signed and sealed, transmit two copies thereof, by post or otherwise, in conformity with the provisions of sec. 15 of the 13 & 14 Vict. c. 61; and notice of such transmission shall forthwith be served by the appellant on the successful party, by prepaid post letter or otherwise; in default whereof the successful party may proceed on the judgment, and shall, on application to the court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings: Provided that instead of proceeding on such judgment, the respondent, if he thinks fit, may, within twenty-eight clear days from the signing of the case, transmit it in the manner prescribed, and give the like notice to the appellant of such transmission.

164. Where appellant does not prosecute appeal.—If, after the case has been transmitted, the appellant does not prosecute his appeal with due diligence, according to the practice of the Court of Appeal, the party successful in the County Court may apply to the judge thereof for leave to proceed on the judgment, and leave for that purpose may be granted accordingly, if the judge shall think fit; and the successful party shall also be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings, which costs shall be added to the judgment.

165. Judgment of Court of Appeal.—When the Court of Appeal has pronounced judgment, either party may deposit the original order of the Court of Appeal, or an office copy thereof, with the clerk of the County Court, and within forty-eight hours from the time of such deposit, give notice thereof in writing to the other party, by prepaid post letter, or otherwise.

166. New trial.—A new trial in pursuance of the order of the Court of Appeal shall be entered for trial at the County Court which shall be held next after twelve clear days from the time when such order or office copy thereof shall have been deposited as aforesaid, unless the parties agree that it shall take place sooner, or the judge shall otherwise order, and it shall be conducted in the same manner as any new trial granted by the County Court itself.

167. Entry of judgment.—If the order of the Court of Appeal be that judgment shall be entered for either party, then such judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as upon a judgment of the County Court.

#### ABATEMENT.

168. Death of one of several plaintiffs or defendants.—Where one or more of several plaintiffs or defendants dies before judgment, the suit shall not abate, if the cause of action survive to or against such parties.

169. Where one or more of several plaintiffs or defendants shall die after judgment, proceedings thereon may be taken by the survivors or survivor, or against the survivors or survivor, without leave of the court.

170. *Married women.*—Where a married woman is sued as a *feme sole*, and she obtains judgment on the ground of coverture, proceedings may be taken thereon, in the name of the wife, at the instance of the husband, without leave of the court.

171. *Bankruptcy or insolvency of plaintiff.*—Where the plaintiff has become bankrupt or insolvent before judgment, the cause may proceed to judgment, at the instance of the assignee, in the name of the plaintiff.

#### APPLICATIONS OR PROCEEDINGS IN THE NATURE OF A SCIRE FACIAS.

172. *Proceedings in nature of a scire facias.*—Execution on a judgment shall not issue by or against any person not a party to such suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same and shall be subject to the payment of the same fees, except the General Fund fee, as in ordinary cases.

173. Where a judgment has been given for or against a person deceased, his executors or administrators may in the same manner sue or be sued upon the judgment.

174. In all proceedings in the nature of a *scire facias*, a jury may be summoned in the same manner and under the like restrictions as are provided by sections 70, 71, 72, and 73 of 9 & 10 Vict. c. 95.

[For proceedings on judgments for penalties under the 8 & 9 Wm. 3, c. 11, see rule 28.]

#### PROCEEDINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

175. *Costs of plaintiff.* 9 & 10 Vict. c. 95, s. 66.—In actions by executors or administrators, or if the plaintiff fail, the costs shall, unless the Court shall otherwise order, be awarded in favour of the defendant, and shall be levied *de bonis propriis*.

176. *Non-appearance at hearing.*—Where an executor or administrator, plaintiff or defendant, shall not appear on the day of hearing, the provisions of sections 79 and 80 of the 9 & 10 Vict. c. 95, and of section 10 of the 13 & 14 Vict. c. 61, shall apply respectively, subject to the rules applicable to executors or administrators suing or being sued.

177. *Summons.*—A party suing an executor or administrator may charge in the summons in the form in the schedule, that the defendant has assets, and has wasted them.

178. *Judgments against.*—In all cases, if the Court shall be of opinion that the defendant has wasted the assets, the judgment shall then be, that the debt or damage and costs shall be levied *de bonis testatoris, si, &c. et si non, de bonis propriis*, and the nonpayment of the amount of the demand immediately, on the Court finding such demand to be correct, and that the defendant is chargeable in respect of assets, shall be conclusive evidence of wasting to the amount with which he is so chargeable.

179. Where an executor or administrator denies his representative character, or alleges a release to himself of the demand, whether he insists on any other ground of defence or not, and the judgment of the Court is in favour of the plaintiff, it shall be that the amount found to be due and costs shall be levied *de bonis testatoris, si, &c. et si non, de bonis propriis*.

180. Where an executor or administrator admits his representative character, and only denies the demand, if the plaintiff prove it, the judgment shall be, that the demand and costs shall be levied *de bonis testatoris, si, &c. et si non, de bonis propriis*.

181. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, and the defendant proves the administration alleged, the judgment shall be to levy the costs of proving the demand *de bonis testatoris, si, &c. et si non, de bonis propriis*; and as to the whole or residue of the demand, judgment of assets, *quando acciderint*, and the plaintiff shall pay the defendant's costs of proving the administration of assets.

182. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does not prove the administration alleged, the judgment shall be to levy the amount of the demand, if such amount of assets is shown to have come to the hands of the defendant, or such amount as is shown to have come to them, and costs, *de bonis testatoris, si, &c. et si non, de bonis propriis*, and as to the residue of the demand, if any, judgment of assets, *quando acciderint*.

183. Where a defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall be for assets *quando acciderint*, and the

plaintiff shall pay the defendant's costs of proving the administration of assets.

184. Where a defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, the judgment shall be to levy the amount of the demand, if so much assets is shown to have come to the defendant's hands, or so much as is shown to have come to them, and costs, *de bonis testatoris, si, &c. et si non, de bonis propriis*, and as to the residue of the demand, if any, judgment of assets, *quando acciderint*.

185. Where judgment has been given against an executor or administrator, that the amount be levied upon assets of the deceased *quando acciderint*, the plaintiff or his personal representative may issue a summons in the form in the schedule; and if it shall appear that assets have come to the hands of the executor or administrator since the judgment, the court may order that the debt, damages, and costs be levied *de bonis testatoris, si, &c. et si non*, as to the costs, *de bonis propriis*: provided that it shall be competent for the party applying to charge in the summons that the executor or administrator has wasted the assets of the testator or intestate, in the same manner as in rule 177 and the provisions of rule 178, shall apply to such inquiry; and the court may, if it appears that the party charged has wasted the assets, direct a levy to be made as to the debt and costs, *de bonis testatoris, si, &c. et si non, de bonis propriis*.

186. *Payment into court.*—Where a defendant admits his representative character, and the plaintiff's demand, and that he is chargeable with any sum in respect of assets, he shall pay such sum into court, subject to the rules relating to payment into court in other cases.

187. *Costs of defendant.*—In actions against executors or administrators for which provision is not hereinbefore specially made, if the defendant fails as to any of his defences the judgment shall be for the plaintiff as to his costs of disproving such defence, and such costs shall be levied *de bonis testatoris, si, &c. et si non, de bonis propriis*.

#### NOTICES.

188. Where by these rules any party is required to give notice according to a form mentioned in the schedule, it shall be sufficient if the notice given complies substantially with such form.

189. *Holidays.*—In all cases where any notice or thing is required by the these rules to be given or done within a period of twenty-four hours, such period shall be understood to mean forty-eight hours if any part of Sunday, Good Friday, or Christmas-day, or any day appointed by royal proclamation for a public fast or thanksgiving, is included in such twenty-four hours.

#### STATUTE OF LIMITATIONS.

190. *Successive summonses.*—Successive summonses may be issued without leave of the Court for the purpose of preventing the operation of any statute whereby the time for the commencement of any action is or may be limited, and such summonses shall be in force for four calendar months from the time of issuing the same, including the day of such issuing; and shall be issued before the expiration of the previous summons and entered in the plaint book of the court: Provided, that on entering the plaint in the first instance the usual fees shall be paid, as if the defendant resided within two miles of the court; but for every successive summons no further fee shall be paid, nor shall it be necessary that any attempt be made to serve such summons, unless the plaintiff requires the same, when the proper bailiff's fees for such service shall be paid, in addition to those already received; and such successive summonses, when so entered, shall be a continuance of the action from and inclusive of the day on which the first summons was issued.

#### REMOVAL OF CAUSE.

[See New Trial, rule 141, and Replevin, rules 197, 198.]

#### ARBITRATION.

191. 9 & 10 Vict. c. 95, s. 77.—Where a plaint is entered the judge may, with the consent of the parties, as well in cases within the ordinary jurisdiction of the Court as in cases of consent under sec. 17 of the 13 & 14 Vict. c. 61, make an order for a reference under the provisions of sec. 77 of the 9 & 10 Vict. c. 95, without awaiting the return of the summons, and all the provisions in the said last-mentioned Act contained, and all rules of practice of the Court as to references, shall apply to a reference proceeding under such an order; provided that the same fees shall be paid as on the hearing of the cause.

#### REPLEVIN.

192. In actions of replevin no other cause of action shall be joined in the summons.

193. *Particulars.* 9 & 10 Vict. c. 95, s. 119.—On entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars, the cattle, or the several goods and chattels taken under

the distress, and of the taking of which he complains.

194. *How tried.*—All actions of replevin in case of distress for rent in arrears, or damage done, shall be tried in a summary way on other occasions the courts held under the authority of the said Act, and of the 9 & 10 Vict. c. 95, and the places therein, in ordinary cases, whether for plaintiff or defendant, shall be according to the form in the schedule.

195. *Judgment in, when distress for rent.*—Where the distress has been for rent, and the defendant succeeds in the action, if the defendant requires, the judge shall, if the cause is tried without a jury, and the jury shall, if the cause is tried with a jury, find the value of the goods distrained, and if the value is less than the amount of rent in arrears, judgment shall be given for the amount of such value; but if the amount of the rent is more than the value so found, judgment shall be given for the amount of such rent, and may be enforced in the same manner as any other judgment of the court.

196. *When for damage done.*—When the distress was for damage done, and the defendant is entitled to judgment for a return, if the plaintiff requires, the judge shall, if the cause is tried without a jury, and the jury shall, if the cause is tried with a jury, find the amount of the damage done by the defendant, and judgment shall then be given in favour of the defendant, in the amount, for a return, or for the amount of the damage done.

197. *Removal of plaint.*—9 & 10 Vict. c. 95, s. 121.—*Notice of.*—Where either party desires of removing any plaint in replevin, in pursuance of section 121 of the 9 & 10 Vict. c. 95, he shall, at least five clear days before the return day of the summons, deliver to the clerk two copies of a notice, signed by himself, his attorney or agent, stating the ground of such removal, together with the names of the two sureties whom he proposes to become bound with him, in the form in the schedule, and the clerk shall forthwith transmit one of the said copies of the said notice to the opposite party or parties by prepaid post letter, and unless such notice is given, the party removing shall pay all the expenses to which the opposite party has been put in consequence of such non-compliance with this rule, unless he pays shall otherwise order; and in case a reasonable time has not been allowed to enable the clerk to ascertain the sufficiency of the notice, the court shall be postponed at the expense of the party seeking to remove, or upon such terms as the judge shall think fit.

198. *Security.*—9 & 10 Vict. c. 95, s. 121.—The amount of the sum for which the security is taken, shall, unless the judge shall otherwise order, be the same as that of the security given to the sheriff, and such security shall be given at the expense of the party seeking to remove.

#### RECOVERY OF TENEMENTS.

199. *Plaint.*—9 & 10 Vict. c. 95, s. 122.—All plaints for the recovery of the possession of tenements shall be brought in the district where the tenements are situated.

200. *Warrants.*—9 & 10 Vict. c. 95, s. 122.—Warrants for giving possession of tenement shall bear date of the day named by the judge for the issuing thereof, and shall issue to the bailiff, requiring and authorizing him to give possession of the premises within a period therein named, which shall be a period commencing with the date of such warrant, and ending at a time not less than seven nor more than ten days from such date; and the bailiff may execute such warrants forthwith on the receipt thereof, or at any time during the period therein named.

201. *Stay of execution.*—9 & 10 Vict. c. 95, s. 126.—Upon application of a tenant who seeks under section 126 of the 9 & 10 Vict. c. 95, to stay execution of a warrant of possession, he must apply for that purpose in person, or by his attorney or agent, to the court, and the judge shall then fix the time for which security is to be given, and the names and for which security is to be given, and the names and the description of the sureties shall be given to the clerk within such time as the judge shall direct, and the giving such security shall be at the expense of the party applying.

202. *Confessions under 13 & 14 Vict. c. 61.*—All confessions to be made under section 126 of the 9 & 10 Vict. c. 95, shall be delivered to the clerk five clear days before the return of the summons: provided, that, at any time before the return day of the summons, the defendant may make a confession and deliver the same to the clerk, which, however, to an order by the judge to pay such costs as the plaintiff has incurred in consequence of the defendant not having delivered such confession as hereinbefore required.

203. In all cases of consent under section 126 of the 13 & 14 Vict. c. 61, it shall be competent for the defendant to confess the amount of the plaintiff's costs besides the court fees, and the judgment may

is entered accordingly, and the amount of the plaintiff's costs shall be stated separately.

#### CONSENT CASES UNDER 13 & 14 VICT. c. 61, s. 17.

204. Where the parties, in pursuance of 13 & 14 Vict. c. 61, s. 17, agree to try any of the questions herein mentioned, a plaintiff shall be entered, and a summons issue thereon, as in other cases, and all the rules and practice of the court shall be adopted in such cases so far as the same are applicable.

#### PROCEEDINGS UNDER THE FRIENDLY SOCIETIES ACT.

205. In cases of reference to the County Court under 13 & 14 Vict. c. 115, s. 22, the party proposing to refer shall enter a plaintiff, and a summons shall issue thereon, and for the purpose of determining the amount of the subject of the reference in case shall be treated as a debt or demand, for the trial of which the consent of both parties is necessary under sec. 17 of the 13 & 14 Vict. c. 61, all the rules and practice of the Court shall be adopted with respect to such matter of reference so far as the same are applicable.

#### PROCEEDINGS UNDER 12 & 13 VICT. c. 108.

206. In cases of reference to the County Courts, under 12 & 13 Vict. c. 108, s. 22, to take or receive evidence under the said Act, or under 11 & 12 Vict. c. 35, the same fees shall be payable on such reference as on the entering and trial of a plaintiff for the trial of which the consent of both parties is necessary, under section 17 of the 13 & 14 Vict. c. 61; and all the rules and practice of the court shall be adopted with respect to such examinations, so far as the same are applicable.

#### FORMS.

207. In proceedings for which forms are not provided in the schedule, the clerk of the court shall be, as guides in framing the forms required, those which are prescribed in the schedule.

#### REGISTRATION OF JUDGMENTS.

208. The clerk of every court shall, if at any future time the Commissioners of her Majesty's Treasury shall require, transmit to such place and in such form as the said commissioners may appoint, a statement of the judgments, whether by consent or otherwise, which have been entered for the sum of ten pounds and upwards at every court, between that court and the court next preceding; and such statement shall be transmitted within three days from the holding of each court; and the said clerk shall, when required by the said commissioners, transmit a similar return of all judgments of a certain amount which have been entered by consent or otherwise, since the 14th of August, 1850.

209. The clerk shall in every such case certify the correctness of the return, and the remuneration for making the same shall be such as the Commissioners of her Majesty's Treasury shall be pleased to point and award, to be paid out of the fund provided by fees to be taken for searches in the said register.

#### INSOLVENCY.

210. The rules of practice and orders in insolvency and protection cases as used by the Court for the Relief of Insolvent Debtors in London, shall be adopted and used as the rules of practice and orders in insolvency and protection cases in the County Courts, so far as the same are applicable to said courts.

A. S. DOWLING, S.L.  
ROB. BRANDT.  
JAMES B. FINANCE.  
C. J. GALE.  
WM. FURNER.

approve of these Rules,  
JOHN JERVIS.  
F. ERLE.  
AMUEL MARTIN.

#### ALLOWANCE TO WITNESSES.

	£	s.	d.
Gentlemen, merchants, bankers, and professional men	0	7	6
Attorneys, auctioneers, accountants, clerks, and yeomen	0	5	0
Workmen, labourers, and the like	0	2	0
Traveling expenses per mile, one way	0	0	6

## THE LAWYER.

### SUMMARY.

**JURISDICTION PRACTICE.**—In *Re Strachan's Estate*, Law T. 198, Vice-Chancellor TURNER ruled that he had no jurisdiction to order the costs of a tenant in fee of property taken by commissioners under the Improvement Act, incurred in proving the title to the property, to be paid out of the corpus of the pension before investment.

In *Shardlow v. Gaze*, 17 Law T. 196, Vice-Chancellor BAUCE explained a mistake that had been made as to some observations which had fallen from him with respect to a plaintiff's affidavit in

support of a claim. "What he meant was," he said, "that such an affidavit was not evidence where there was a conflict of affidavits, but where there was no opposition, he was willing to treat the plaintiff's affidavit as evidence."

In *Barker v. Birch*, 17 Law T. 196, it was decided, that where interrogatories are settled by the Master, and a party is dissatisfied, the proper course is to wait until the hearing and then to object to the depositions being read.

In *Grent v. Small*, 17 Law T. 196, Vice-Chancellor BAUCE refused a motion, that an injunction to stay the trial of an ejectment brought by the parties moving, together with two other defendants now out of the jurisdiction against the plaintiffs in equity, and which had been dissolved against the plaintiffs moving, might be dissolved as to the two other defendants, or that the plaintiffs moving might be at liberty, notwithstanding the injunction, to proceed to trial of the ejectment in the joint names of the twelve; the two defendants out of the jurisdiction had, after the action was commenced, left the country. Vice-Chancellor BAUCE said, "that the parties moving were not now parties to the cause, and therefore he doubted their ability to make such an application in the suit."

**COMMON LAW.**—A nice point of practice occurred in *Williams v. The Lords Commissioners of the Admiralty*, 17 Law T. 200. In a writ of summons the defendants were described as "the Commissioners for executing the Office of Lord High Admiral," &c. It was served on one of them. By statute the Commissioners might sue and be sued by that name for certain things, but it appeared on affidavit that the present action was not for any one of those specified things, and that they were not a corporate body. But upon motion to set aside the writ and service on this account, the Court held that it could not in this form take notice of the merits of the cause of action, or that it was not one which could not be sued for in this form, and also that the service on M. was not irregular, where the Commissioners could be sued in their collective name.

Another interesting case on evidence is to be noted. In *Pritchard v. Bagshawe*, 17 Law T. 199, a writ of summons had been issued to save the Statute of Limitations, and regularly continued by *alias* and *pluries* writs; on issue joined on the plea of the statute, the plaintiff must show by *extrinsic evidence* that the date and return of the first writ were indorsed on the last writ at the time of the service on the defendant, and that neither the roll containing the statement of the writs, nor the writs themselves containing the indorsements, are evidence of the fact.

## SUPERIOR COURTS OF COMMON LAW. FIRST REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY IN HER HIGH COURT OF CHANCERY.

WE, your Majesty's commissioners appointed to inquire into the process, practice, and system of pleading of the Superior Courts of Law at Westminster, the manner of conducting suits and other proceedings in such courts and on the circuits, and the costs, charges, and expenses incidental thereto, the practice at the judges' chambers, and the duties of the several officers, clerks, and other persons of and connected with such courts, circuits, and judges' chambers, humbly certify to your Majesty that we have proceeded to consider with the utmost attention in our power the matters thus submitted to our investigation.

On entering upon the duty imposed on us we found the field of examination an inquiry so extensive that it would be impossible to report on all the matters comprehended in it without an injurious delay of some objects which seem to require immediate attention and reform.

The ordinary and in most cases the exclusive remedy for the redress of civil injuries, and the enforcement of legal rights between subject and subject, in the Superior Courts of Law, being the remedy by action, we deemed it expedient to direct our attention, in the first instance, to the proceedings in an action, and we have carefully considered every usual and ordinary step therein, from the commencement to the conclusion, in order to ascertain what alterations might be beneficially made in the present practice. With this object we read and considered the report of the former commissioners, who acted under commissions issued by their late Majesties King George IV. and King William IV. and have further availed ourselves of all the information which we could procure from the various publications relating to the subject. And in order to obtain the opinions and judgment of members of both branches of our Profession, we prepared, and caused to be

very extensively circulated, suggestions as to such alterations as seemed to us advisable, and invited and received many communications upon them of the most valuable kind, and from which we have derived much advantage.

In an appendix annexed to this report we have stated, in a separate form, a summary of the amendments which we recommend.

The first step in an action at law is that of summoning the party against whom the action is brought into the court in which the action is intended to be carried on.

This is effected in personal actions by what is termed a writ of summons. The present writ was introduced by the Uniformity of Process Act, 2 & 3 Wm. 4, c. 39, and is a great improvement on the former modes of commencing actions.

In the present form of writ the nature or subject matter of the action is required to be stated. This requirement is utterly useless, and leads to capricious objections, and to much fruitless expense and delay. To shew its inutility it is only necessary to mention that it is complied with by stating in the writ that the action is "on the case," which may mean that the plaintiff sues upon the warranty of a horse, or for the negligent conduct of a suit by an attorney, or for carelessly driving over the plaintiff, or for the infringement of a patent, or slander, or seduction, or any of numberless other causes of complaint; or to state that the action is "on promises," which may be for goods sold, or to recover a railway deposit, or for breach of promise of marriage, or for defect of title to an estate, or for breach of warranty of a horse, or upon a bill of exchange; and so of other forms of action. We therefore recommend one general form of writ for every action, and that it shall not be necessary to mention any form or cause of action in the writ.

The writ of summons is prepared by the plaintiff or his attorney, and brought to the office to be authenticated by the seal of the Court, and the plaintiff is required to deliver to the officer a memorandum called a *præcipe*, which contains the names of the plaintiff and defendant, the name of the attorneys issuing the writ, and the date. This memorandum has been objected to as useless, but in practice it is not so. The officer files it, and enters the full particulars of it in a book. This itself proves the precise day when the writ was issued, and operates as a check on fraudulent plaintiffs, who might otherwise antedate it, to the effect of a tender, or of the Statute of Limitations, or for other purposes. We therefore recommend that it be retained.

It has been suggested that provision might be made to dispense altogether with sealing the writ at the office, by providing that parties might issue their own writs, and that the date of the latter should be authenticated by a note or registered post letter being sent to the office on the same day. It is certainly true that the writ is prepared by the plaintiff himself, and that any one is entitled to issue it at his pleasure; but the present practice gives rise to no complaint, and the great and daily increasing facility of communication between London and every part of the country tends to lessen any inconvenience which may be occasioned by it. We therefore do not recommend any alteration in this respect. The substitute proposed of sending a notice to the office, would be entirely new, perhaps not very well understood or attended to, and liable to error and fraud.

A writ is served by delivering a copy to the defendant personally, and shewing to him the original, if it be required; so that where expedition is desired, and there are several defendants living in different places, or where it is not known where a single defendant is living, two original writs are extremely convenient. We therefore recommend that it should be made competent to a plaintiff to take out concurrent writs.

As to the duration and continuance of writs, it is, in our opinion, not advisable that writs should be of indefinite duration. On the other hand, it is plainly impossible to prevent a plaintiff from commencing a new action after the period for serving a former writ has expired; and as he sometimes is really unable to serve the first writ, and therefore may be fairly entitled to its cost, there is no reason why he should not be allowed to continue it. Besides this, there are many cases arising from the Statute of Limitations and other statutes, as well as from the law of tender and set-off, which make it a matter of necessity to continue the original writ. We think, therefore, that a writ of summons should have a limited duration, but that it should be capable of being renewed or continued. At present this is done by further writs, called *alias* or *pluries* writs, which may be issued at any time, except where a writ is renewed to save the Statute of Limitations, in which case the renewed writ must be issued within one month after the expiration of the first. Now, if the second writ be not issued within that period, an absurd consequence follows, that on the same record the same words (i.e. "the commencement of the suit") have different meanings: thus it has been held, that if the Statute of



Limitations be pleaded, and it appear in evidence that the cause of action accrued more than six years before the date of the second writ, the jury ought to find for the defendant; because, the first writ not having been continued within a month after its expiration, the action for the purposes of this plea did not commence on the date of the first writ; while if a set-off be also pleaded, and it appear that the set-off accrued between the dates of the issuing the first and second writs, the jury must find that there was no set-off at the commencement of the suit, because for the purposes of that plea the action did commence at the date of the issuing of the first writ.

A further inconvenience which arises from the present system is the expense and trouble incurred, where the Statute of Limitations is pleaded, in making up and proving the roll on which the writs and continuance must now be entered, a proceeding which, as experience has proved, presents opportunities for fraud and serious technical difficulties. We think that the practice may easily be amended, and the incongruities above pointed out avoided, without allowing the plaintiff to resume at any time an action in which he has done nothing but issue the writ. We therefore propose that the writ of summons shall have a limit, but that it may be renewed, and if renewed, shall be for all purposes renewed in the same manner. We suggest that the duration of the writ be six months, in lieu of the present period, which is four months, and that it may be renewed from six months to six months within each period of six months. We suggest the period of six months because it was proposed by the former commissioners, and is very much preferred by the Profession.

We recommend a new mode of continuance or renewal, by a stamp or seal on the writ itself. It will be both cheaper and more simple, and the writ will on its face shew its own date, and that of its renewal. We propose that the renewal stamp be obtained in the same way as an alias writ is at present obtained, viz. by delivering a *præcipe* as on an alias; so that a record of the renewal and of its date will exist at the office.

In order to give every facility to the suitor, in cases where it is necessary to renew a writ which may be at a distance or mislaid on the eve of its running out, we propose that a concurrent writ may be issued and renewed, in like manner as the first writ might have been, and with like effect. The date and particulars of the first writ can be obtained at the office from the entries there, and the new concurrent writ may be issued, and then renewed, as the first writ might have been.

At present the writ can only be served in the county named in it, or within two hundred yards of its boundary. This practice, we have reason to know, is contrary to the intention of the very eminent persons who suggested the Uniformity of Process Act. It leads often to delay and to expense, from the necessity of issuing a fresh writ when the defendant proves to be in a different county. The writ is directed to the defendant: not to the sheriff of the county; and we are not aware of any advantage whatever arising from the restriction. We therefore advise that provision be made that the writ of summons may be served anywhere within the jurisdiction of the court.

According to the present practice, it is necessary that the writ of summons should be served personally on the defendant, and we have hitherto considered the course of proceeding where the defendant has been served with the writ; but cases frequently occur in which, owing to the defendant purposely keeping out of the way to avoid service, or to his being out of the jurisdiction of the court, service is impossible. The plaintiff's remedy, where the defendant avoids service of the writ of summons, is by a writ of *distringas*, which issues in two cases; one to compel an appearance, or to authorise a plaintiff to proceed; the other to ground proceedings, to outlawry.

For the former purpose it is obtained on an affidavit giving the Court or a judge reasonable ground to believe that a defendant who is in England keeps out of the way to avoid service. The writ is directed to the sheriff, commanding him to distrain the defendant's goods to compel him to appear. A copy of the writ is delivered to the officer who is employed to execute it, to be served on the defendant, if he can be met with, or if not, to be left at the place where the *distringas* is to be executed. The sheriff serves the copy of the writ upon the defendant, if he can be met with, and also executes the writ upon his goods, if he have any. If the defendant has no goods the copy of the writ is still served upon him if possible; that service, of itself, where there are no goods, being a sufficient execution of the writ. Where the defendant cannot be met with, and no goods can be found to distrain upon, after every reasonable effort has been made to find him and his goods, a return is made of *non est inventus* and *nulla bona*. On the writ being executed, or on a return of *non est inventus* and *nulla bona* being made, together with an affidavit, shewing that due exertions have been used to serve and execute the writ, the plaintiff is

permitted to proceed. If it were certain, in all cases where the judge or Court is led to conclude that the defendant is keeping out of the way to avoid service of the writ of summons, that he really is doing so, no further proceeding could be necessary, for the object of the writ is to give the defendant notice of the action, and it is useless to persevere in attempting to do so when he shews he has had such notice by keeping out of the way to avoid service. But as there is a possibility that, from the fraud or error of the plaintiff, or from partial information, an erroneous conclusion on this head may be come to by the tribunal to which the question is referred, the process of *distringas* has been provided. In substance this process is an attempt to give notice to the defendant to appear.

According to the present practice, the *distringas* is a very expensive, and, as it appears to us, unnecessary process. We propose that the writ be abolished, and, in lieu of it, that power be given to the Court or judge either to order that the plaintiff may proceed at once as if personal service had been effected, or to direct a notice to be served or attempted to be served, in such manner as may be directed, requiring the defendant to appear; and upon this being done, to authorise the plaintiff to proceed.

If the defendant has any goods which can be seized under a *distringas*, such a notice as above proposed is as likely to come to his knowledge as the fact of his goods having been seized; and if he has not, there will be more likelihood of his obtaining such knowledge than under the present system. It is true that at present the *distringas* is put into the hands of an officer of the sheriff, who is to swear to his efforts to execute it. No doubt this is some though no great additional security against fraud; but when it is considered that at present the law trusts to a plaintiff himself to swear to the personal service of the writ of summons on the defendant, there need be no great difficulty in allowing him to swear that he has tried to effect such service, for in reality a false statement on the latter question is more easy of contradiction than on the former.

With respect to the *distringas* to ground proceedings to outlawry, that proceeding is open to even stronger objections. From the beginning to end the proceedings to outlawry on means process are founded on fiction and built up of technical forms. Outlawry is in theory a judgment pronounced for contumacy in neglecting to appear in one of the Superior Courts, to be amenable to proceedings there instituted. Such a judgment is pronounced after issuing one process called an exigent, directed to the sheriff of the county in which the plaintiff has thought proper to lay the venue, commanding him to exact, i.e. demand the appearance of the defendant at five successive County Courts, and another process, called a writ of proclamations, which ought to be directed to the sheriff of the county in which the defendant is dwelling at the time of issuing the exigent, but which, in total disregard of the statute 31 Eliz. c. 3, is generally directed to the same sheriff who executes the writ of exigent, and which commands three proclamations to be made requiring the defendant to appear, one at the County Court, another at the general Quarter Sessions, and another (a month at least before the fifth exaction, or *quinto exactus*) on a Sunday immediately after divine service or sermon, at or near the usual door of the nearest church or chapel of the town or parish where the defendant was dwelling when the exigent was awarded, or affixing a notice of such proclamation on or near to the doors of all the churches and chapels within such town or parish previously to the commencement of divine service. If the defendant do not appear before the five exactions and three proclamations have been made, judgment of outlawry is pronounced, and he becomes an outlaw; the consequence is, that he becomes liable to imprisonment, forfeits to the Crown his goods immediately, and his chattels real and the profits of his land upon office found, is incapacitated from maintaining civil actions, and becomes subject to other disabilities, which he can only get rid of by procuring his outlawry to be set aside or reversed. If he does neither, the creditor may proceed, in cases where the outlaw has any property, to cause Crown process to issue upon the judgment of outlawry, the proceeds of which, if any, may, by means of a petition to the Lords of the Treasury, be made available for the satisfaction of his debt—a result which, we believe, very rarely happens. In case, however, the outlaw should be desirous of setting aside or reversing the proceedings, he may always, in practice, do so, without any difficulty; and to effect that object he may proceed in one of two ways: first, by setting aside the outlawry on application to a judge at chambers; or, secondly, by a reversal of it upon a writ of error. The former may be effected in a few days as a matter of course, without swearing to a defence on the merits, merely upon payment of the costs of the outlawry and entering an appearance to the action, upon which the plaintiff must proceed to judgment in the ordinary way. The latter may be effected after some delay, but equally as a matter of

course, without paying the plaintiff the costs of the outlawry, and without even entering an appearance to the action, so that the plaintiff is left in a worse position than he was before the proceedings to outlawry were instituted, by the delay which has intervened, and the costs that have been thrown away, and with no better remedy than to proceed afresh to another judgment of outlawry, which may in like manner be reversed without payment of costs, and without even entering an appearance. This is the inevitable result of the conflict between the rule of law, that no man shall be outlawed who is not within the kingdom at the time of the exigent awarded, and the rule of practice adopted by the Courts, not to allow a *distringas* to issue for the purpose of proceeding to outlawry unless it be established that the defendant is out of the kingdom at the time; so that the proceeding can practically only be instituted in cases where the result is sure to be erroneous. A strong instance of this is to be found in the case of *Matthews v. Erbe*, 1 Lord Raymond, 349; Carthew, 459, S. C., where proceedings to outlawry against a foreigner, who had never been in this country, were sustained on a motion, though undoubtedly they might have been reversed on a writ of error. It seems, therefore, that the only effect of this clumsy procedure is to induce defendants, in consequence of the superior ease and speed with which they can get rid of the erroneous proceedings by motion or summons before a judge, to prefer that course, though accompanied by the incidents of payment of costs and entry of an appearance, to the more dilatory though equally certain proceeding in error, by which additional expense may be imposed upon the plaintiff; but payment of his costs and the entry of an appearance may be avoided. It seems to us that the principles on which this proceeding is founded are wholly false and unworthy of the jurisprudence of a civilized country.

In confirmation of our own views we may here refer to the following passage in the first report of the former commissioners:—

The practice of outlawry is one of those abuses which are prejudicial to the rights of both the contending parties. It inflicts on the plaintiff the evils of delay and expense, it subjects the defendant, on the other hand, to surprise and oppression. In its original design it was intended to give the most ample and reiterated notice of the suit, and its penal operation attached only on the contumacious or fraudulent, who after such notice chose to set the King's authority at defiance, by refusing obedience to the exigency of his writs. But in its modern form it can scarcely be said to have any tendency over to apprise the defendant of the action, much less to warn him by distinct and repeated summons. In fact, he is never summoned during the whole course of the proceeding. The original writ, capias, alias, and pluries are not even delivered to the sheriff to be executed, but are returned as a mere matter of form, and the exactions in London are not very likely to come to the defendant's knowledge, even if he be resident there, much less in the ordinary case of his being in another county at the time. Nor does any greater effect in general attend the proclamations, unless the defendant should reside at the time in the parish in which proclamation is made, or in its vicinity; but this can seldom happen, for at the time of awarding the exigent he is commonly abroad, or if in England, his existing place of abode there is unknown.

A defendant against whom judgment of outlawry passes has therefore in general had no previous notice that the suit has been commenced, and may probably have no opportunity of becoming acquainted with that fact, and it is quite possible that even his property may be seized and sold, and the proceeds paid even to the plaintiff, before he is aware that any action is pending against him. It is true that where the plaintiff has veraziously proceeded to outlawry against a defendant who was constantly to be met with, and might have been arrested or served with a writ, the Court will oblige the plaintiff in such case to reverse the outlawry at his own expense; but it is apprehended that this is not always an effectual check even against such improper use of the process; while, on the other hand, its allowed application, viz. to persons within the realm who cannot be found by the plaintiff, or to persons abroad whether their place of residence there be known to him or not, appears to have a very harsh and oppressive tendency. To this it may be added that the mode of reversing an outlawry is not so easy as it ought to be where it has been awarded against a person who had no previous intimation of the suit, and has therefore been guilty of no contumacy or wilful default; for it is attended with considerable expense, involving in the case of a regular outlawry the payment to the plaintiff of the whole costs attendant upon that proceeding, including the fine on the original writ.

In this condemnation of outlawry we concur; we think it impossible to justify a practice which is never adopted except when avowedly erroneous, which only incidentally and casually effects its purpose, and is often attended with injustice and oppression. Nothing has been done to carry into effect the views of the former commissioners; and we think that a very simple and efficacious proceeding, and one consistent with modern views and usages, may easily be provided.

In lieu of the proceedings to outlawry, the total abolition of which we recommend, we propose that a writ of summons may issue against, and be served upon, a British subject resident abroad; and that the Court or a judge may have power to authorise proceedings to be had to judgment and execution, upon being satisfied by affidavit that the writ was served upon the defendant, or came to his know-



ledge, and that he wilfully neglects to appear to the writ. We see no reason whatever why a British subject, by going out of the jurisdiction of the Court, should deprive his creditor of the benefit of a judgment; and the Court or judge would always take care that proceedings were not carried on to judgment without the defendant having ample opportunity of defending himself, if he should think fit. We believe that it will afford some check to persons recklessly or fraudulently contracting debts here, and then setting their creditors at defiance by leaving the country—a practice of no unfrequent occurrence.

Having considered the writ of summons as applicable to the commencement of suits brought against persons resident within, and British subjects resident out of, the jurisdiction, we propose to suggest a plan enabling persons within the jurisdiction to prosecute actions against foreigners resident abroad. At present this can be done, but only by means of the machinery of outlawry, which we have suggested should be abolished.

In other countries—for example, France—a power exists of suing a person resident in England, and it seems but reasonable that British subjects should have the same advantage of availing themselves of the process of their own courts against foreigners; and if such a power ought to exist, it certainly ought not to be burdened with the necessity of incurring the heavy expense of such complicated proceedings as those which are connected with outlawry.

It will rarely, if ever, occur that proceedings will be instituted against foreigners unless they have property in this country, and when this is the case, there invariably exist some means of communication with the owner, so that we cannot anticipate any serious difficulty in giving the requisite notice of the action.

Difficulties have been suggested as to any writ issued by the courts of this country being served in another country on a foreigner as a means of compelling him to appear and defend an action, and we think this objection may be obviated by serving a notice that a writ has been issued in this country, instead of serving the writ itself.

We recommend, therefore, that in such cases a writ may be issued for the purpose of commencing the suit in the form contained in Appendix B, No. 3; that a notice of this writ, according to the form contained in the same Appendix, may be served on the defendant. It will be observed that this notice affords precisely the same information that the service of the writ itself does in other cases. The subsequent proceedings as to the mode of obtaining judgment will be similar to those which we propose should be adopted against a British subject resident abroad.

(To be continued.)

#### AGENCY CHARGES.

##### TO THE EDITOR OF THE LAW TIMES.

SIR,—Your correspondents, "W." and "Lex," in reference to the nonpayment of agency charges for serving process, &c. by the London solicitors, complain of a matter which has long been felt to be a grievance by the Profession in the country. I would suggest a course by which it would be entirely obviated in future, viz. that the Taxing Masters should disallow all charges of this nature for which a voucher is not produced.

The only objection to this course which strikes me is, that it might occasion loss or delay where the object was to tax the costs and sign judgment at once; but where the matter pressed, it would be very easy for the firm in Town, when sending the notice of declaration or rule to compute, or other last process in the action, to send with it a post-office order for the fee for service. They would thus receive a voucher for the payment with the letter of advice that service was effected; and from the previous charges they would know the amount their country agent would charge.

While on this subject, I would mention an increasing practice of sending process to the bailiffs of the County Courts and other parties for service. This is not the way members of the Profession should treat one another, but the country solicitors have it in their own hands. Let them refuse to a man to swear affidavits of service for these parties, and the thing is stopped; and I hope they have sufficient spirit and union to do this, and thus protect themselves from this inroad on their privileges and emoluments, which, though small in degree, is bad in principle.

I am, Sir, yours, &c.

AN OLD SUBSCRIBER.

Southampton, July 8, 1851.

#### THE MERCANTILE LAWYER.

WHERE a partnership had been formed for the manufacture and sale of a patent medicine, a partner who does not shew that he lawfully possessed the secret of its preparation is not entitled

to an injunction to restrain the other partners from using the distinctive stamp or the dies deposited for that purpose at the Stamp Office, nor can he compel the other partners to permit him to participate in the use of them. (*Moat v. Morison*, 17 Law T. 198.)

In *Parker v. The Bristol and Exeter Railway Company*, 17 Law T. 202, the Court emphatically affirmed the rule, that an action for money had and received will lie to recover back money obtained through compulsion, even although it had been received by an agent who acted for the principal. Another question on the same form of action was raised in *Armstrong v. Parkinson*, 17 Law T. 204. A wife, living with her husband, let apartments, and with the money so produced, without her husband's knowledge, bought shares in a building society, which she afterwards sold and gave the proceeds to C. It was held that it could be recovered back from C. in an action for money had and received.

A question of *Salvage* was raised in the case of *The Samuel*, 17 Law T. 204. Two agreements were made with one set of salvors, the conditions of which they were unable to complete. A second set of salvors saved a portion of the property after the agent had given notice that no further assistance was required. The service was rendered in December, 1849, but the action was not commenced by the second salvors till May, 1850. It was held, first, that the first set of salvors were entitled to remuneration; secondly, that the agents of the owners had a right to refuse assistance; thirdly, that two of the second set of salvors who had notice of the refusal were not entitled to compensation, owing to their delay in instituting proceedings; fourthly, the Court refused to the second set of salvors more than 100*l.* because of their delay.

#### PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Borough will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Lord Chancellor has appointed William Lloyd Chandler, of Tewkesbury, in the county of Gloucester, and William Waters Heming, of Banbury, in the county of Oxford, gents.; to be Masters Extraordinary in the High Court of Chancery.

The Right Hon. Sir John Jervis has appointed Edward John Patteson, of Poulton-in-the-Fylde, in the county of Lancaster, gent. to be one of the Perpetual Commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the county of Lancaster.

THE EARL OF SEFTON IS APPOINTED LORD LIEUTENANT of the county of Lancaster, vice the late Earl of Derby. The vacant Garter will be conferred on Earl Fitzwilliam.

THE CIVIC ENTERTAINMENT.—The Lord Mayor received a communication from Lord John Russell on Thursday evening, conveying her Majesty's approval of all the arrangements at the entertainment at Guildhall on Wednesday last, and intimating that her Majesty had been pleased to confer upon his lordship the dignity of a baronet of the United Kingdom.

COMMISSION SIGNED BY THE LORD-LIEUTENANT OF THE COUNTY OF RADNOR.—Loftus Charles Otway, esq. to be Deputy-Lieutenant.

#### CORRESPONDENCE.

##### UNION OF LAW AND EQUITY.

###### TO THE EDITOR OF THE LAW TIMES.

SIR,—I have carefully read in your paper of the 28th ult. the report of the Society for Promoting the Amendment of the Law, and beg to say that I have not read anything more startling for many years.

It is neither more nor less than a proposal to introduce into this country the practice of the Court of Session of Scotland, than which no greater curse can possibly befall the mercantile community.

Endless litigation would be the consequence.

If any person shall doubt my latter assertion, let him sojourn in Edinburgh for a year or two (as I have done) and there learn what legal delays mean.

Each step in an action produces a debate. Each debate produces fresh papers. In fact, the system is absurd and ruinous to all parties; to the litigants, by delays and consequent expenses; to the lawyers, by the wearing out contests upon trifles.

Pray put my brethren upon their guard in time. Special pleading is a blessed—aye, thrice blessed—system, when compared with that proposed by the "General Outlines of a Code."

I am, Sir, yours, &c.

A. T. STEAVENSON.

Darlington, 4th July, 1851.

#### LEGAL INTELLIGENCE.

THE FRIMLEY MURDER.—A good many rumours and statements having been circulated with regard to the disposal of the accomplice in the above melancholy affair, it may not be uninteresting to the public to know how the matter really stands. At the conclusion of the trial Mr. Baron Parke, who tried the case, signed a warrant ordering the accomplice to be kept in custody till the next assizes, and at the conclusion of the assizes he was taken back to the county gaol, Horsemonger-lane. He has repeatedly complained of the course adopted by the authorities towards him, and a few days back he requested the attendance of Mr. Neale, the solicitor who conducted the defence, and that gentleman, at his (Smith's) request, has addressed a memorial to the Secretary of State, setting forth the facts of the case, and requesting Sir George Grey to fulfil the conditions under which Smith consented to give evidence, and also claiming a portion of the reward. No answer has yet been received to this memorial; but it is understood that the intention of the Government is to hand over a small sum of money to Smith, and make some arrangements that will remove him from this country.—*Evening Paper*.

LAW REFORM.—Her Majesty's Commissioners for inquiring into "the Process, Practice, and System of Pleading in the Superior Courts of Common Law," have made their first report, which is printed, and which will be presented to both Houses of Parliament early in the ensuing week. It is signed by Chief-Justice Jervis, Baron Martin, Sir A. C. Cockburn (who were appointed before their elevation to their present offices), and by Messrs. W. H. Walton, G. W. Bramwell, and J. S. Willes. Sir James Graham and Mr. Henley (Oxfordshire) have been appointed to the Commission of Inquiry into the Constitution and Practice of the Courts of Equity. These additions have been made at the suggestion of the House of Commons, that two laymen should be added to the commission, which, on its first appointment, included Sir John Romilly, Sir W. Page Wood, and other members of the Chancery bar, and Mr. Crompton of the common law. Several amendments have already resulted from the inquiries instituted, and a very comprehensive report may soon, we understand, be expected.—*Observer*.

LORD MAYOR NOT A PRIVY COUNCILLOR.—The Lord Mayor is no more a Privy Councillor than he is Archbishop of Canterbury. The title of "right honourable," which has given rise to that vulgar error, is in itself a mere courtesy appended to the title of "lord;" which is also, popularly, though not legally, given him: for in all his own acts he is designated officially as "mayor" only. The courtesy-title of lord he shares with the mayors of Dublin and York, the Lord-Advocate of Scotland, the younger sons of dukes and marquises, &c. &c. and all such lords are styled by courtesy "right honourable;" and this style of right honourable is also given to privy councillors in virtue of their proper official title of "Lords of her Majesty's most Honourable Privy Council." So, the "Right Honourable the Lords of the Treasury and Admiralty." This establishes the *rationale* of the case, but there is a precedent that concludes it:—"On the 27th May, 1768, Mr. Thomas Harley, then Lord Mayor of London, was sworn of his Majesty's most honourable Privy Council"—an honour never conferred on any mayor or alderman, and which could not have been conferred on him if he had already been of that body.—*Notes and Queries*.

INSTITUTE OF ACTUARIES OF GREAT BRITAIN AND IRELAND.—Midsummer Examinations.—Examiners: David Jones, esq. Universal Life Office; Arthur Scratchley, M.A. Western Life Office. The following candidates have just passed for their certificate of qualification as actuaries (names being arranged alphabetically): B. Cheshire—Institute of Actuaries. C. Child—Alliance Assurance Office. A. Colvin—United Mutual Assurance Office. J. Meikle—Scottish Provident Assurance Office. H. Thomson—Northern Assurance Office.

MONEY ORDER OFFICES.—GENERAL POST-OFFICE, JUNE.—The under-mentioned offices will be opened as minor money-order offices on the following days, viz.:—On July 1: Poulton-le-Filde, Lancashire; Thorp Arch, Yorkshire; Whitchurch, Herefordshire. July 3: Staunton, Worcestershire. July 5: Wickwar, Gloucestershire. July 7: Kingswinford, Worcestershire. July 8: Badminton, Gloucestershire. July 10: Purton, Wiltshire. July 12: Shrivenham, Berkshire. July 15: Bidford, Warwickshire. July 23: Bexhill, Sussex; Droxford, Hampshire; Northfleet, Kent; Withyham, Sussex.

ALTERATION OF DISTRICTS OF COUNTY COURTS.—By an order made by her Majesty, with the advice of her Privy Council, in pursuance of the 10th of Victoria, entitled "An Act for the more easy recovery of Small Debts and Demands in England," dated June 25, 1851, it is directed that from and after the 31st day of July inst. certain alterations, set forth at length in the said order, shall be made

in the respective districts of the County Courts of Middlesex, viz. the districts of Clerkenwell, Shoreditch, and Whitechapel; of the County Courts of Cardigan, Monmouthshire, Suffolk, Sussex, Warwickshire, Yorkshire, Essex, Derbyshire, Staffordshire, and Westmoreland.

### BIRTHS, MARRIAGES, AND DEATHS.

#### BIRTHS.

**BARBER.**—On the 4th inst. at 64, Chesapeake, Mrs. William Henry Barber, of a daughter.

**CARRICK.**—On the 8th inst. at Bookhalls-lodge, Cricklewood, Middlesex, the lady of Mr. Frederick Chincock, of a daughter.

**MIDDLETON.**—On the 2nd inst. at Grove-house, near Deeds, the wife of Joseph Middleton, esq. barrister-at-law, of a son.

#### MARRIAGES.

**BRENNELL.** Richard Augustus, esq. of the Middle Temple, eldest son of Richard Bethell, esq. M.P. one of her Majesty's counsel, to Mary Florence, youngest daughter of the Rev. Alexander Fowles Luttrell, rector of East Quantoxhead, on the 5th inst. at Dunster, Somersetshire.

**FORD.** William Augustus, eldest surviving son of G. S. Ford, esq. of Stratton-street, Piccadilly, and Brunswick-square, Brighton, to Katherine Mary, eldest daughter of the late John Thomas Justice, esq. barrister-at-law, of Abbey-house, near Abingdon, Berks, and Parliament-street, London, at St. Mary's, Cheltenham, on the 2nd inst.

**HOLT.** George Henry, of Horbury, near Wakefield, solicitor, eldest son of William Holt, esq. of the same place, solicitor, to Josephine, youngest daughter of the late Moritz Engel, esq. of the city of Hamburg, on the 28th of June last, at Hamburg.

#### DEATHS.

**BARFIELD.** John, esq. solicitor, Thatcham, Berks, on the 5th inst. admitted in Easter Term, 1795.

**SMYTHSON.** Sir Francis, F.R.S. one of her Majesty's Counsel, and a bencher of Lincoln's-inn, on the 8th inst. at 21, Bedford-place, aged 70.

**WEST.** James Eldridge, esq. of Tonbridge, Kent, Deputy-Lieutenant for the county, on the 30th ult.

### JOURNAL OF PROPERTY.

#### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	214	215	215	215	215	215
3 1/2 Cent. Reduced Annuities	97 1/2	97 3/4	97 3/4	97 3/4	97 3/4	97 3/4
3 1/2 Cent. Consols Annuities	97	97	96 1/2	96 1/2	96 1/2	96 1/2
Consols for Account	97	97	96 1/2	96 1/2	96 1/2	96 1/2
New 3 1/2 Cent. Annuities	99	98 1/2	98 1/2	98 1/2	98 1/2	98 1/2
Long Annu. (exp. Jan. 5, 1860)	78	78	78	78	78	78
Do. 30 yrs. (exp. Oct. 10, 1859)	78	78	78	78	78	78
Do. 30 yrs. (exp. Jan. 5, 1860)	78	78	78	78	78	78
India Stock	202 1/2	202 1/2	202 1/2	202 1/2	202 1/2	202 1/2
India Bonds (1,000l.)	63	63	63	63	63	63
Do. do. (under 1,000l.)	62	63	63	63	63	63
South Sea Stock	53	53	53	53	53	53
Do. do. New Annuities	53	53	53	53	53	53
Exchequer Bills, 1,000l.	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2
Do. do. 500l.	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2
Do. do. Small	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2
Do. Advertised	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2	49 1/2

\* Premium.

† Ex. div.

### THE GAZETTES.

#### Bankrupts.

Gazette, July 8.

**ALLMAND.** JOHN, haberdasher, Wrexham, Denbighshire, July 18 and Aug. 8, at eleven, Liverpool. Off. as. Turner. Sols. Edgworth and Pugh, Wrexham; and Evans and Son, Liverpool. Petition, July 4.

**CHEW.** JONATHAN, stuff manufacturer, Manchester, July 18 and Aug. 8, at twelve, Manchester. Off. as. Mackenzie. Sol. Bennett, Manchester. Petition, June 17.

**CROOM.** ROBERT, butcher, Downend, Gloucestershire, July 23, at twelve, Aug. 20, at eleven, Bristol. Off. as. Hutton. Sols. Ray and Co. Bristol. Petition, July 5.

**HALL.** JOSEPH, hotel and tavern keeper, Brighton, July 12 and Aug. 23, at one, Basinghall-st. Off. as. Pennell. Sols. Brisley, Pancras-lane; and Houseman, Brighton. Petition, June 25.

**HOWELL.** JOHN, bookseller, Liverpool, July 18 and Aug. 8, at eleven, Liverpool. Off. as. Bird. Sols. Barrett, Doctors'-common; and Mallaby and Townsend, Liverpool. Petition, June 25.

**KENDALL.** WILLIAM, and STANDISH, JOHN, grocers, Leeds, July 18 and Aug. 20, at eleven, Leeds. Off. as. Young. Sols. Lawrence and Plews, Old Jewry-chambers, City; and Bond and Barwick, Leeds. Petition, July 3.

**MONKMAN.** JAMES, cotton spinner, Oldham, Lancashire, July 26 and Aug. 15, at eleven, Manchester. Off. as. Mackenzie. Sols. Matthews, Leeds; and Ascroft, Oldham. Petition, July 2.

**TEDD.** BENJAMIN, cotton dresser, Coventry, Warwickshire, July 23 and Aug. 20, at twelve, Manchester. Off. as. Valpy. Sol. Harrison, Birmingham. Petition, July 5.

Gazette, July 13.

**AYRES.** WILLIAM, jun. grocer and tea dealer, Cardiff, Glamorganshire, July 24 and Aug. 21, at eleven, Bristol.

**Com. Hill. Off. as. Hutton.** Sols. Stanley and Wabrough, Bristol. Petition, July 4.

**BARNES.** THOMAS, schoolmaster and bookseller, Cambridge, July 18, at one, Aug. 15, at half-past eleven, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sols. Pickering, Smith, and Thompson, 4, Stone-buildings, Lincoln's-inn; and T. and G. Archer, Ely, Cambridgeshire. Petition, July 5.

**BRUNWELL.** RICHARD, draper, Halifax, Yorkshire, July 28, at twelve, Aug. 20, at eleven, Manchester. Off. as. Pott. Sols. Sale, Worthington, and Shipman, Manchester. Petition, July 2.

**CLARK.** FLETCHER, wine and spirit merchant, Hawes, Yorkshire, July 28 and Aug. 21, at eleven, Leeds. Com. Ayrton. Off. as. Hope. Sols. Robinson, Leyburn; and Bond and Barwick, Leeds. Petition, July 4.

**HOYLE.** JAMES and THOMAS, cotton manufacturers, Salford, July 24 and Aug. 15, at twelve, Manchester. Off. as. Lee. Sol. Rowley, Manchester. Petition, July 9.

**JOHNSON.** WILLIAM EDWARD, coal merchant, New-wharf, Little Abington-st. Westminster, July 19, at twelve, Aug. 23, at eleven, Basinghall-st. Com. Fane. Off. as. Cannon. Sol. T. J. Jerwood, 17, Ely-place, Holborn. Petition, July 9.

**MURRAY.** JAMES, woollen warehouseman, Gresham-st. London, July 18, at one, Aug. 15, at eleven, Basinghall-st. Com. Fonblanque. Off. as. Stansfield. Sols. Messrs. Linklater, Charlotte-row, Mansion-house. Petition, July 8.

**POWELL.** JAMES, and YOUNG, JAMES, brewers, Pin-mill Row, Ardwick, Manchester, July 21 and Aug. 13, at twelve, Manchester. Off. as. Fraser. Sol. Lyett, Manchester. Petition, July 1.

**RUFFORD.** PHILIP, RUFFORD, FRANCIS; and WRAIGGE, CHARLES JOHN, bankers, Stourbridge, Worcester, July 28 and Aug. 18, at half-past ten, at Birmingham. Com. Balguy. Off. as. Whitmore. Sols. J. Harward, Stourbridge; and Mottram, Knight, and Emmet, Bennett's-hill, Birmingham. Petition, June 30.

**RUFFORD.** PHILIP, and FRANCIS, bankers, Bromsgrove, Worcester, July 28 and Aug. 18, at half-past ten, Birmingham. Com. Balguy. Off. as. Whitmore. Sols. J. Harward, Stourbridge; and Mottram, Knight, and Emmet, Bennett's-hill, Birmingham. Petition, June 30.

**STREET.** SAMUEL, shoemaker, Devises, Wilts, July 24 and Aug. 21, at eleven Bristol. Com. Hill. Off. as. Aoraman. Sols. Abbot and Lucas, Albion-chambers, Bristol. Petition, July 7.

**TAYLOR.** WILLIAM, and WYLD, JAMES, flock, wadding, and mop manufacturers, 61, Wood-st. London, and Lock's Fields, Walworth, July 21, at twelve, Aug. 23, at one, Basinghall-st. Com. Fane. Off. as. Whitmore. Sols. Leppard, Bannatyne, and Gammon, 9, Cloak-lane, City. Petition, July 7.

**THOMPSON.** ELIZABETH, brushmaker, Reading, Berks, July 23 and Aug. 23, at one, Basinghall-st. Com. Groom. Off. as. Holroyd. Sol. J. D. Finney, 6, Farnival's-inn, Holborn. Petition, July 17.

**WILLIAMS.** WILLIAM, contractor and builder, Ashford, Kent, July 19 and Aug. 15, at twelve, Basinghall-st. Com. Fonblanque. Off. as. Stansfield. Sols. Laurence, Plews, and Boyer, Old Jewry-chambers. Petition, July 9.

#### BANKRUPTCIES ANNULLED.

Gazette, July 8.

**Geo. W. tuscan** and straw hat manufacturer, Murray-st. Hoxton.—**Tredinnick.** R. mining agent, Threadneedle-st.

#### Dividends.

##### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

**Alanson.** E. wine merchant, second, 7s. 6d. Bird, Liverpool.—**Albert.** D. F. dealer in mathematical instruments, final, 34d. Lee, Manchester.—**Armstrong.** R. shipwright, first and final, 24d. Wakley, Newcastle.—**Barber.** J. V. banker, sixth, 6d. Valpy, Birmingham.—**Bradford.** W. A. cheesemonger, first, 4d. Stansfield, London.—**Bourne.** T. B. cotton broker, first, 3s. Bird, Liverpool.—**Butterworth.** T. woollen draper, first, 7s. and first on new proof, 1s. 6d. Lee, Manchester.—**Buttiffant.** H. S. haberdasher, first, 5d. Stansfield, London.—**Cooke.** H. D. paper hanger, first, 7d. Bird, Liverpool.—**Drake.** H. attorney, 4d. Hirtzel, Exeter.—**Firth.** J. draper, first, 2s. Young, Leeds.—**Grey.** T. schoolmaster, second, 1s. 7d. Wakley, Newcastle.—**Hulme.** W. tailor, final, 1s. Lee, Manchester.—**Johnson.** J. banker, first and final, 1s. 3d. and 9-10ths of 1d. Wakley, Newcastle.—**Less.** W. merchant, second, 24d. Bird, Liverpool.—**Luckes.** T. provision dealer, first, 7s. 2d. Hirtzel, Exeter.—**Phillips.** W. builder, first, 3s. 4d. Christie, Birmingham.—**Phelps.** J. T. draper, 3s. 4d. Wakley, Newcastle.—**Pope.** T. cowkeeper, first, 1s. Whitmore, London.—**Richards.** W. printer, 2s. 3d. Hernaman, Exeter.—**Vouillon.** F. F. court milliner, first, 10d. Whitmore, London.—**Wade.** R. grocer, 5s. Hernaman, Exeter.

##### INSOLVENT ESTATE.

**Denner.** W. yeoman, 9d. Apply at the County Court, Honiton.

#### Assignments for the Benefit of Creditors.

Gazette, July 1.

**Kingdon.** C. tailor and outfitter, Bristol, June 5. Trust. E. Carpenter, woollen draper, Bristol. Sol. H. A. Salmon, Bristol.—**Leaver.** W. eating-house keeper, High-st. Whitechapel, June 3. Trust. C. J. Andrews, iron-founder, Reading. Sols. Finch and Shepherd, Moorgate-st.—**Petchell.** E. and Petchell, T. wireworkers, Newark-upon-Trent, June 14. Trusts. E. W. Harms-ton, iron-monger, and E. Norton, wireworker, Newark-upon-Trent. Sol. P. E. Falkner, Newark-upon-Trent.—**Wilson.** J. H. O. draper and grocer, Burton-in-Lonsdale, York, June 3. Trust. W. Haythornthwaite, druggist, Kirkby Lonsdale. Sol. E. Robinson, Settle.

Gazette, July 4.

**Burnan.** J. farmer, Boston, Bramham, Yorkshire, June 21. Trust. E. Burnan, innkeeper, Bramham. Sol. J. Coates, Wetherby.—**Hardy.** G. E. grocer, Wisbeach, Cambridgeshire, June 19. Trusts. J. R. Delafosse and H. Wathen, wholesale tea dealers, Fenchurch-st. Sols. Scott and Tabourdin, Lincoln's-inn-fields.—**Ruby.** T. wheel-

wright, Newton Abbott, Devonshire, June 29. Trusts. C. Nelson, banker, Teignmouth, and J. S. Cull, timber merchant, Newton Abbott. Sols. G. W. Turner, Exeter, and J. H. Mackenzie, Teignmouth.—**Slater.** W. farmer, Askew, Yorkshire, June 6. Trusts. J. Slater, farmer, Barnham, and J. Slater, grocer, Armlay. Sols. W. Robinson, Richmond, and S. Powell, Knaresborough.

#### Partnerships Dissolved.

Gazette, July 1.

**Allen.** J. and Brother, merchants and dealers, Manchester, June 27. Debts paid by J. Allen.—**Austen.** D. and W. common brewers, Ramsgate, June 26. Debts paid by W. Austen.—**Bone.** G. and Co. Bury, March 6. Debts paid by Bone.—**Britton and Thompson.** iron merchants and ironmongers, Gloucester, June 28. Debts paid by Thompson.—**Boyd.** Brown, and Edwards, commission merchants, Liverpool, May 6.—**Commins and Robinson.** grocers, Pleasant-place, King's-cross, Nov. 23. Debts paid by Commins.—**Cosens and Sunley.** ship and insurance brokers, George-yard, Lombard-st. June 30. Debts paid by Cosens.—**Dyson and Mallinson.** cloth finishers, Honley, Almondbury, June 25. Debts paid by J. Haigh, Huddersfield.—**Elam.** B. and Sons, woollen drapers, Backville-st. Piccadilly, as regards B. Elam, June 30.—**Fraser.** James and Co. manufacturers of mineral composition, paint, and varnishes, Millwall, Poplar, June 25. Debts paid by Fraser.—**Fraser.** H. B. M., and J. grocers, Bickerstaffe, June 28.—**Giles.** R. B. and Pearce, G. chemists and druggists, Bristol, June 24. Debts paid by Giles.—**Houghton and Benson.** commission agents and warehousemen, Broad-st. June 11. Debts paid by Benson.—**Jackson.** J. and J. victuallers, Kingston-upon-Hull, June 23.—**Kruse.** C. and Macdonald, W. ship chandlers, Savage-gardens, Tower-hill, and Three Colt-st. Limehouse, June 30. Debts paid by Kruse.—**Lemon.** C. B. and Co. merchants, general commission agents, and brokers.—**Miller.** Borthwick, and Co. commission merchants, Liverpool, April 30.—**Nicholson.** C. and Holladay, W. silk mercers, St. Paul's-churchyard, Feb. 18.—**Parnall.** M. and J. Plymouth, and Jump, saddlers and ironmongers, June 23.—**Pashby.** T. and Plevins, T. builders, architects, and surveyors, Birmingham, June 28.—**Ring and Conquest.** tinplate workers, Banner-st. St. Luke's, June 30. Debts paid by Ring.—**Settle.** R. and Clarke, R. A. surgeons and apothecaries, Farnworth, Jan. 1. Debts paid by Clarke.—**Shaw.** Sale, and Co. silk throwsters, Derby, June 24. Debts paid by Shaw.—**Staniland.** S. and Long, W. attorneys, Rouverie-st. June 24.—**Thompson and Taylor.** carriers, Salford, May 5. Debts paid by Taylor.—**Thomas and Blyth.** shipwrights and joiners, Great Hermitage-st. and Wapping High-street, June 28.—**Waterson.** J. P. and Darby, J. builders, upholsters, and house agents, June 21.—**Wilson.** J. and Doherty, J. general commission merchants, Liverpool, June 27.—**Debts paid by Wilson.**—**Wolenden.** J. and Co. cotton spinners, Oldham, April 28, 1847.—**Wood and Chorlton.** cheese factors, Manchester, June 26. Debts paid by Wood.—**Woodcock.** J. and Co. manufacturing chemists, High-town, Bristol, June 28. Debts paid by Woodcock and Cragg.

Gazette, July 4.

**Amory.** Nelson, Travers, and Vyas, attorneys, Throgmorton-st. [March 25.—**Batley.** J. and J. cloth dressers, Marsh, near Huddersfield, July 1.—**Bottomley and Thompson.** surgeons, Croydon, June 30. Debts paid by Bottomley.—**Brown.** J. and Co. dealers in coal, iron, and marine stores, Colchester, June 30. Debts paid by Brown.—**Brugger.** Beck, and Co. Blackman-st. Borough, Dec. 2.—**Caldecott and Son.** flour and provision dealers, Birkenhead, May 1.—**Cloy.** J. and Langford, G. J. surgeons, Birmingham, June 30. Debts paid by Cloy.—**Delorme and Co.** general merchants, Mark-lane, July 3.—**Foljambe.** T. Dixon, B. and Pickett, E. J. attorneys, Wakefield, as regards Foljambe, June 30.—**Gibson and Broadbridge.** corn and commission merchants, Liverpool, June 30.—**Greatwood.** J. and E. confectioners, Birmingham, July 2. Debts paid by J. Greatwood.—**Grindal.** J. and J. mercers and drapers, Penrith and Wigton, June 28. Debts paid by John Grindal at Penrith, and by Joseph Grindal at Wigton.—**Harkison.** J. J. jun. and Bulman, G. corn and flour factors, Newcastle-upon-Tyne, June 30.—**Hart and Batson.** grocers, Deptford, June 30.—**Heale and Norris.** builders and undertakers, Bristol, June 30. Debts paid by Norris.—**Holland and Son.** printers, plumbers, &c. Belper, June 19. Debts paid by W. Holland.—**Jones.** W. and J. M. machine makers, Manchester, June 30. Debts paid by W. and J. Jones.—**Langman.** Ward, and Co. Wolverhampton, June 18. Debts paid by Langman.—**Liddons.** R. and Braden, W. printers, Plymouth, June 30. Debts paid by Liddons.—**Lucas.** C. and Co. Hayfield, and Wilkinson, Bond, and Co. calico printers, Manchester, June 19.—**Merrill and Richards.** manufacturing and general stationers, Drury-lane, June 24. Debts paid by Merrill.—**Newland and Co.** wine merchants, Manchester, Nov. 23.—**Page and Son.** tailors and drapers, Croydon, May 13. Debts paid by F. M. Page.—**Pitcher.** C. R. and Johnson, R. C. patent agents and starch manufacturers, Strand, and Greenwich, June 24.—**Piller and Andrews.** iron and brass founders, Great Yarmouth, June 30. Debts paid by Andrews.—**Powell.** G. H. and Son, merchants, Laurence Pountney-place, July 1.—**Romanson.** J. and Brothers, carriers, Burnley, July 2. Debts paid by J. Romanson.—**Reynolds.** G. and Daft, R. O. tailors, Old Cavendish-st. Oxford-st. July 1.—**Richmond and Detmold.** merchants, Billiter-st. July 5.—**Rogers and Roberts.** Liverpool, July 1.—**Rushforth and Tichell.** surgeons, Upper Norton-st. June 24.—**Saunders.** S. and Herron, G. folk-mongers, Redbourne.—**Soyer.** A. and Feeny, J. restaurateurs, Gore House, Kensington, July 1. Debts paid by Soyer.—**Stewart and Currie.** wine, spirit, and commission merchants, Liverpool, June 30.—**Stinson.** R. and Address, J. boot and shoe maker, Nottingham, July 1. Debts paid by Address.—**Sutton.** G. F. E., Evans, C., Osmann, F. and Prudence, W. London, June 30.—**Tobiesen and Neltz.** tailors and drapers, Hull, June 27. Debts paid by Tobiesen.—**Vinings and Danger.** corn factors and merchants, Bristol and Gloucester, June 30.—**Ward and Capel.** coal merchants, Bridgewater-wharf, Blackfriars, July 2. Debts paid by Capel and Bramble.—**Woolmer.** R. and Co. printers and proprietors of a newspaper, Exeter, June 23. Debts paid by Woolmer.—**Wright.** C. and Co. printers and parchment label manufacturers, Albion-buildings, Bartholomew-close, July 2. Debts paid by Wenham.

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## To Readers and Correspondents.

Mr. Crookford will forward by post a copy of the Report of the Common Law Commissioners to any person transmitting 3s. by order or in postage stamps.

"J. H."—The rule of law-reporting is to give only that which is material to the point of law decided, with which alone is a law report concerned. If this rule were not observed, the reports could not be contained within any reasonable compass. It should be remembered that these are reports of the law decided and not of facts.

"F. C. H."—This is already done, as he will see by the advertisement.

"J. E." (Newport).—Stephens's Blackstone, Hughes's Practice of Suits, Albutt's Practice of Wills and Administrations, Taylor's Law of Evidence. Just now it would be dangerous to read books on Common Law Practice. No queries sent anonymously are noticed.

## SCALE OF CHARGES FOR ADVERTISEMENTS.

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We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, JULY 19, 1851.

## THE REPORT.

We have given place to-day to the Recommendations of the Common Law Commissioners, although they appear at the end of the Report, as being of most immediate interest to the Profession.

The body of the Report is of great length, and therefore can only be published here in parts.

## THE ADVOCATE AND THE ATTORNEY.

DEEPLY do we lament the partial breaking down of the barrier that has hitherto, in this country, severed the functions of the Advocate and the Attorney and which has been effected by the recent legislation on the County Courts. The more we reflect upon it the more formidable appear to be the evils that will flow from it—evils not limited to one branch of the Profession, but extending alike to both.

We ask our readers to give to the subject their most serious thought, and to suggest, if they can, any means by which the threatened mischiefs may be mitigated. To do this, their nature and extent must be understood.

The House of Commons has declared, in unequivocal terms, that the County Courts shall know no privileges; that they shall be open to competition, not only between the two branches of the Profession, but even to Sham Lawyers, if the Judges shall so please. An Attorney instructed by the party and a Barrister instructed by the party or by an Attorney is to be heard as of right, but by

leave of the Judge any other person may be heard.

Such is the provision approved by the House of Commons and carried by acclamation. It is not difficult to anticipate its consequences.

At present, the etiquette of the Bar is, that Counsel shall not see the client or accept a brief except through the intervention of an Attorney. This rule was a fair return to the Attorneys for the privilege of exclusive audience enjoyed by the Bar. It was as much as to say, "You are forbidden to practise as Advocates; but we will take no advantage of this; we will not trespass on your province, but will refuse to accept a brief without you." And certainly, upon the whole, the regulation has worked well for both.

Unfortunately, the establishment of the County Courts has produced an entire change of circumstances. The suitors there object to pay two Lawyers, and Parliament refuses to compel them to do so. It has resolved to open these Courts to competition, without regard to privileges, and plainly tells the Bar, "You must take your chance there; if the suitors prefer you, they may employ you; but if they like an Attorney better, they may have him. We will not place you under any disability, but we cannot help you."

In the County Courts, then, the reason for the old rule of etiquette being gone, the rule will, of course, be abandoned, and the Attorneys practising as Advocates without a Barrister, the Bar will take briefs without the Attorneys. We are well aware that this is the inevitable result of circumstances which could not be controlled, but it is not the less lamentable.

The consequence will be a rivalry in the County Courts between the Barristers and the Advocate Attorneys, which may not improbably lead to disastrous results to both. Its certain tendency must be to lower the tone of the Bar. Taking instructions directly from the clients, they will become, to a considerable extent, Attorneys, or, at least, the legal advisers of the public. In short, functions will become united in practice which hitherto have been kept distinct, and with a probability of equal loss to both; for as much as the Attorneys will take from the Bar by becoming Advocates, so much at least will the Bar take from the Attorneys by receiving instructions directly from the clients.

In this state of things we are most desirous that some plan should be devised by which the threatened evil may be averted or modified. It can only be done by mutual concession. Could not terms be devised upon which an honourable agreement might be made between the Bar and the Attorneys for preserving their several functions, without mutual invasion and rivalry, which can benefit neither, and must degrade both? Some rule of etiquette might be framed now for the guidance of both which shall define the province of each in the County Courts, and secure harmony of action, keeping them still mutual supporters instead of rivals. We entreat both branches of the Profession to take the matter into their most earnest consideration at the earliest moment, and, before any step is taken in accordance with the new circumstances in which they are placed, anxiously to consult together what course will be the best for the common good of the whole Profession, whose true interests are substantially identical, however sometimes seemingly divergent.

## THE REPORT OF THE COMMON LAW COMMISSIONERS.

Our readers will, doubtless, remember that, some months ago, we submitted to them, in a series of articles, the details of a plan for an entire reform of the procedure at Common Law, the adoption of which, or of something very like it, and at least equally extensive, would alone save the Superior

Courts from a destructive competition with the speedier and cheaper justice of the County Courts.

With this remembrance of the spirit in which we formerly approached the subject, we trust that, in the following remarks upon the recently issued report of the Common Law Commissioners, credit will be given to us for being uninfluenced by the prejudices of our craft, seeing that the reforms now universally demanded were advocated in these pages long before they found favour and supporters elsewhere.

The Times has severely assailed the recommendations of the Commissioners as not going far enough, — as modifying, instead of abolishing, a system essentially bad.

In this condemnation we cannot concur, and we think that few lawyers will be found to echo it. The recommendations appear to us to accomplish almost all that the most rigorous reformer could desire; we know not, indeed, how more could be effected without abolishing pleading altogether, and conducting a trial in the Superior Courts like a complaint in a Police Court.

But in truth the objections of the Times go to this. They proceed upon the assumption that it is possible to administer justice without any written pleadings. But this we, and probably all of our readers, know to be impossible.

If there be written pleadings, that is to say, a statement in writing of the demand or complaint, and a similar statement of the answer to it, so as to enable both parties to come prepared to try a specific question, these pleadings must be subject to some rules. If they are designed to give information and to determine what is the question to be tried, they must be framed to effect that object, and some principle must guide the Court in resolving whether they do or do not attain their purpose.

We, therefore, agree with the Commissioners that some form of pleading must be preserved.

But we have already contended that this form should not be technical. Keeping the object in view, that object should be accomplished in the simplest manner, in accordance with common sense and the English language.

The Commissioners have so provided. Their thirty-first recommendation is—

That every declaration and subsequent pleading which shall clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient, and it shall not be necessary that such matters should be stated in any technical or formal language or manner, or that any technical or formal statements should be used.

This certainly seems to meet all the requirements, and to refute the objection of the Times. The recommendations afterwards give a series of forms of pleadings by way of specimens of the brevity of which they are capable, and which it would sorely puzzle the objectors still further to abbreviate.

For instance, Trespass to Land:—

That the defendant broke and entered certain land of the plaintiff, called the Big Field, and depastured the same with cattle.

On a promissory note:—

That the defendant on, &c. by his promissory note now overdue, promised to pay to the plaintiff £ two months after date, but did not pay the same.

For Breach of Promise of Marriage:—

That the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day, yet the defendant neglected and refused to marry the plaintiff.

For Crim. Con.:—

That the defendant debauched and carnally knew the plaintiff's wife.

For an Assault and False Imprisonment:—

That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police-office.

Surely, these are sufficiently short and intelligible. The forms of answer are equally curt. Thus—

Plea of payment:—

That before action he satisfied and discharged the plaintiff's claim by payment.

Plea of Leave and Licence:—

That he did what is complained of by the plaintiff's leave.



## Of Self-Defence:—

That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

## Of Set-off:—

That the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's claim for (stating cause), which amount the defendant is willing to set off against the plaintiff's claim.

Pleading, therefore, is reduced to the smallest span, so far as the language is concerned. But the *Times* objects that too many of the processes of pleading are preserved. Let us examine the validity of this objection.

When you are sued for damages for a certain act done, you may have two answers to it, either that you did not do it, which is a question of *fact*, or that you had a right to do it, which is a question of *law*.

As a jury determines the one, and the judge the other, it is very important that they be distinctly stated on the pleading. For this reason, that if the facts are not disputed, but the question is one of law only, you might be put to the needless cost of proving the facts at the trial; whereas you ought to be allowed to answer immediately, "the facts are true, but the plaintiff has no right in law to this action," and the Court might determine, without farther delay, whether this action is sustainable or not. If not, there is an end to it; if sustainable, then it should be permitted to proceed to trial of the facts if any are in dispute, or to the ascertaining of the amount of damages.

Now, this proceeding, which no ingenuity could dispense with, is, in truth, a demurrer, only we will not call it by so unpopular a name. The *Times* is frightened by the formidable name, forgetting the great difference between a demurrer as it will be and the alarming thing it was.

There is better foundation for one of the objections urged by the *Times*. It complains that a defendant should be permitted *both* to traverse the entire facts, and also to put in issue any material allegation, as leading to the present evil of a multiplicity of pleas.

In this we agree with the *Times*. There is no reason why a defendant should be allowed to set up several inconsistent defences. He should be required to deny the whole, or a part of the charge, but not *both*; he should not be permitted at once to say, "I did not do it," and "I had a right to do it." The *Times* is right in its assertion, that pleading should not be an invention of the lawyer, but the assertion of a truth, or, at least, of that which the party believes to be the truth; and, therefore, we think it would be an improvement to require all pleadings to be taken upon oath. The great error of our procedure has consisted in a sort of tacit assumption that a lawsuit was not so much a proceeding for the ascertainment of the very truth, and the doing of actual right and justice between the parties, as a game of skill, in which it was allowable to trip one another by any device, the merits being held of less account than the strategy. The legal mind has become indoctrinated with this notion, and it requires some effort of reason to shake off the prejudice. It larks still in some parts of this report; but when we remember that, but five years since, we were soundly rated for suggesting alterations not quite so extensive as those proposed by the Commission, the progress which opinion has since made is marvellous. Stranger still it is to see, that the only fault now found with propositions that were then deemed rash and quixotic, is, that they do not go far enough.

If then the Profession had but listened to the voice of warning that was raised, and volunteered the work of inevitable change, very different indeed would have been their position now.

Let us profit by the past to be wiser for the future.

## THE LEGISLATOR.

PARLIAMENT is in earnest now, and more business has been got through during the last week than in the whole of the session previously. Members anticipate a release about the 12th of August, so they do not object to work a little harder now.

The *Law of Evidence Amendment Bill*, has passed through committee with unanimous approval, and it produced the remarkable declaration from the Attorney-General, that the country would not be satisfied with anything less than the union of *Law and Equity*! and the Solicitor-General approved

some clauses in the Bill, because they advanced that object. The Attorney-General stated also that the Common Law Commissioners would propose some extensive and valuable improvements in the Law of Evidence. But nothing can remain to be done so good or so great as that which this Bill will do. It is the most valuable improvement in the law that has been accomplished within our memory, and will do more to restore the business of the Superior Courts than anything that could have been devised. And yet when, six years ago, we proposed this very measure, now so universally applauded, we were met with ridicule and anger, and scarcely found a supporter in the Profession or in the press!

The Registration of Assurances Bill will be the only remaining measure of importance to occupy the attention of the Commons.

## Imperial Parliament.

## PUBLIC BUSINESS TRANSACTED.

## COMMONS.

## BILLS READ A FIRST TIME.

*Saturday, July 13.*

Tithe Rent-charge Assessment.

*Monday, July 14.*

Poor Relief Act Continuance  
Sale of Beer (No. 2).

*Tuesday, July 15.*

Grand Jury Oath (Ireland).

## BILLS READ A SECOND TIME.

*Saturday, July 13.*

General Board of Health (No. 2).

*Monday, July 14.*

Copyhold and Inclosure Commissions  
Constabulary Force, Ireland.

*Tuesday, July 15.*

Tithe Rent-charge Assessment.

*Wednesday, July 16.*

Local Acts Preliminary Inquiries Bill.

## BILLS READ A THIRD TIME AND PASSED.

*Saturday, July 13.*

Militia Ballots Suspension  
Woods and Forests Bill  
Civil Bills, Ireland  
Ecclesiastical Residences, Ireland  
Churches and Chapels, Ireland  
United Church of England and Ireland, Ireland.

*Tuesday, July 15.*

Unlawful Oaths, Ireland  
Turnpike Roads, Ireland  
Private Lunatic Asylums, Ireland  
Turnpike Acts Continuance  
Turnpike Trusts Arrangement.

*Wednesday, July 16.*

Stock in Trade Bill.

## PRIVATE BUSINESS TRANSACTED.

## BILLS READ A FIRST TIME.

*Thursday, July 17.*

Representative Peers for Scotland  
Commons Inclosure (No. 2).

## BILLS READ A THIRD TIME AND PASSED.

*Thursday, July 17.*

Marriages, India.

## SESSIONAL PRINTED PAPERS.

- Par. Num.  
431. Portpatrick Harbour Light—Correspondence  
447. Poor Law Unions, Ireland—Return  
466. Hull Trinity House—Return  
474. Pharmaceutical Society—Copy of the Royal Charter  
540. Ernest Charles Jones—Copy of a Letter  
509. Law of Partnership—Report from Committee  
Canada and New Brunswick Boundary—Papers  
536. Bills—Poor Relief Act Continuance  
537. — Sale of Beer (No. 2)  
516. — Attorneys' Certificates  
523. — Constabulary Force (Ireland)  
517. — Pharmacy (amended)  
531. — Marriages, India (amended)  
523. — Petty Sessions, Ireland (as amended by the Committee, and on re-commitment)  
539. — Local Acts, Preliminary Inquiries  
536. — Tithe Rent Charge Assessment  
531. — Summary Jurisdiction, Ireland (amended)  
524. — Coalwhippers, Port of London (amended by the Select Committee)  
534. — Metropolitan Buildings  
450. Coals, Cinders, and Culm—Account  
496. Patent Law Amendment Bills—Lords' Report  
Protestants (Turkey)—Correspondence  
63 (48). Local Acts—Report of the Admiralty  
533. Victoria Park  
Museum of Irish Industry, Destructive Distillation of Peat—Report  
484. Police, Limerick—Copy of Minutes of Evidence  
446. Education (Scotland)—Return  
477. Revenue, &c. (Ireland)—Accounts  
479. Metropolitan Interment Act (Preliminary Proceedings)—Report  
372. Steam Communications with India, &c.—1st Report from Committee, and Evidence  
511. Criminal Prosecutions, &c. Scotland—Treasury Minute  
513. Benefices—Return  
538. Moneys in the Exchequer—Account  
539. Lieutenant-Colonel Rose—Correspondence.

## HOUSE OF LORDS.

## COURT OF CHANCERY BILL.

MONDAY, July 14.—The Marquis of LANSDOWN having moved the first reading of the Court of Chancery and Judicial Committee Bill, Lord BROUGHAM apologised to the House for addressing the House on this stage of the Bill, but the state of his health was such that if he did not speak now he should not have an opportunity of doing so again this session. He approved the present measure as a step, though not a stride, in the right direction; but if any one supposed that any structural alteration of the Court of Chancery would satisfy the wants of the public, he was a dreamer, and would some day awake to a sad reality. He desired no rash changes, but the House might rest assured that if efficient measures of Chancery reform were not speedily introduced, the inevitable result would be, that the good would be swept away with the bad, and the jurisprudence and judicature of the country would be reduced to a state which would supply a wholesome warning to those who, from a fear of granting moderate and safe reform, exposed their lordships to the dangers of a violent revolution.—The LORD CHANCELLOR having expressed his satisfaction that the Bill met with the approbation of Lord Brougham, it was read a first time.

## HOUSE OF COMMONS.

## REGISTRATION OF ASSURANCES BILL.

FRIDAY, July 11.—Sir J. GRAHAM wished to present a petition of some importance, and he was anxious it should be presented in the presence of the noble lord at the head of the Government. It was a petition from the Incorporated Law Society of Solicitors and Proctors practising in the United Kingdom against the further progress of the Registration of Assurances Bill. It set forth that the society had been charged with an interest in this Bill adverse to that of the landed proprietors; they disclaimed any such interest, because they said that, although the effect of the Bill might be to diminish the number of transfers of land, yet the cost for each transfer would be considerably greater than at present. It then set forth that this Bill, as it had come down from the other House, would render necessary the preparation of all deeds in duplicate, would lead to a disclosure of family arrangements and settlements that would be unsafe; that the experience of the registration in Middlesex afforded a very doubtful example; that it would be adverse to the sale and purchase of small properties in land; that the machinery provided by the Bill was inadequate, and that it contained an entirely novel principle, at variance with the stream of legislation on real property. Under all these circumstances, considering the advanced period of the session, they asked the Government either that the Bill should be postponed until another session, or at all events, if it were really the intention of the Government to proceed with it this session, that there should be some inquiry on the subject. He wished to ask the noble lord whether he intended to proceed with the second reading of the Bill that evening, and whether it was the intention to press this Bill to its final consummation in the present session.—Lord J. RUSSELL said it was not his intention to move the second reading that evening. It was a Bill of such importance that the provisions of it ought to be clearly explained to the House, and he asked his right hon. friend the Master of the Rolls, who had very kindly consented to move the second reading of the Bill. He should propose that the second reading be taken on Monday, the 21st inst. and it certainly was the intention of the Government,—considering the very great importance of the provisions of this measure, after being considered by a commission for a very long time, and having been before the House of Lords, and, as he hoped without any irregularity, he might say, having met with the general consent of the noble lords in that House learned in the law,—to press the consideration of this Bill in the present session.

## PUBLIC HEALTH ACT.

SATURDAY, July 12.—Mr. C. LEWIS obtained leave to bring a Bill to amend the mode of assessing tithe rent-charges under the Lighting and Watching Act, and the Public Health Act. The House then adjourned at half-past two.

## COUNTY COURTS EXTENSION BILL.

TUESDAY, July 15.—The House discussed, in committee, several clauses in the County Courts Further Extension Bill, the most important of which was the 13th, which, in the shape proposed by the Attorney-General, gave to Barristers the right of exclusive audience in cases above 20l. and under 50l. After a discussion of considerable interest the clause was modified into a form which enables parties to retain either a Barrister, an Attorney, or a third person, without any right of pre-audience or exclusive audience, but subject to rules to be made by the judge. The Chairman then reported progress, and the House adjourned.



## COPYHOLD ENFRANCHISEMENT BILL.

Mr. AGLIONEY begged to move that it be an instruction to the committee sitting on the Copyhold Enfranchisement Bill that they have power to consolidate the two Bills into one.—Agreed to.

## CORONERS' BILL.

WEDNESDAY, July 16.—Mr. BOUVIER moved that this Bill, which stood for a second reading that day, be read a second time that day three months. The gentleman who had charge of the Bill was not present, but there was no objection on his part to the adoption of the amendment.—The Bill was then ordered to be read a second time that day three months.

## ARREST OF ABSCONDING DEBTORS BILL.

This Bill passed through committee.

## THE LOCAL ACTS (PRELIMINARY INQUIRIES) BILL.

This Bill was read a second time.

## COPYHOLD AND INCLOSURE COMMISSIONERS BILL.

The House went into committee on this Bill. The CHANCELLOR of the EXCHEQUER, in reply to Sir Henry Willoughby and Mr. Henley, stated that the number of commissioners would be reduced to three, and that the establishments connected with the different boards would be gradually reduced. The Bill then passed through committee, and the House resumed. It was ordered that the Bill should be reported on the following day.

## THE STOCK IN TRADE BILL.

This Bill was read a third time and passed.

## COUNTY COURTS FURTHER EXTENSION BILL.

The Bill has been in committee for two sittings, and was the subject of long discussion. The following is a summary of what was done.—Clauses 1 to 10 were agreed to. Clause 11 proposed to exempt from the operation of the measure the provisions of the 9 & 10 Vict. by which no person is entitled to practise in a County Court, "unless he be an attorney at law, or a barrister instructed by such attorney, or, by leave of the judge, any other person allowed by the judge to appear instead of such party; and no barrister, attorney, or other person, except by leave of the judge, is entitled to be heard as counsel for any other person."—The ATTORNEY-GENERAL, in support of the clause, said he by no means desired to create any undue monopoly on the part of the Bar, but, on the other hand, he desired, and he trusted the House participated in the feeling, that the Bar might not be destroyed. At present, in these courts, under the operation of the statute, the attorneys, by whose intervention alone could barristers be employed, were allowed to practise themselves as advocates; and the result of this had been a widespread conspiracy on the part of the attorneys who practised in these courts to keep all the advocate business to themselves, and utterly to exclude all barristers from any participation in it whatever. The hon. and learned gentleman read from the *County Courts Chronicle* of February, 1850, an address from an attorney practising in those courts, in which he pointed out to his colleagues throughout the country, that all they needed to do was to carry out the provisions of the Act in their favour, and they would effectually and for ever exclude the bar from any share whatever in the County Court business. The hon. and learned gentleman also read a letter from a tradesman, who complained that having a demand in prosecution in a County Court for 48l., the attorney whom he had employed had threatened to throw up the case, if he persisted in his request that a barrister might be employed. In a word, it might be affirmed that from the infinite majority of these courts barristers were excluded, and the question was whether, for the sake of the public itself, this was a desirable thing? It appeared to him simply as a general proposition that the business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. It was quite clear that at present the attorneys practising in these courts were, as a general fact, not of the higher class in their profession; but, be they whom they might, it was in his opinion essential to the due administration of and to the dignity of justice that in these Courts, as in the Courts above, the persons who prepared the case up to a hearing should—in all matters above those of a quite ordinary character—not be the persons also to conduct the hearing. It was a fallacy to suppose that economy was consulted in behalf of the public by the exclusion of barristers, for the fee which would be received by counsel would be no greater in amount than that which the attorney duly pocketed when he appeared as attorney-advocate; and therefore the expense was precisely the same to the client whether he was heard by attorney-advocate or by barrister-advocate. He had received a letter from a gentleman of entire veracity, mentioning to him a case in which a snug party of seven attorneys having got possession of a county court, and completely ousted all barristers, had leagued together to accept no retainer whatever unless with a fee of three guineas, paid beforehand. This was an illustration of the cheap

justice which the public was to have if the attorneys were to have things all their own way in these courts. It was, in his opinion, eminently essential that a well-trained bar should be attracted to these courts by the expectations of a fair maintenance.

After a long discussion in which Mr. Hume, Mr. Denison, Mr. Freshfield, the Solicitor-General, Lord Robert Grosvenor, and Mr. Anstey took part—Mr. CARDWELL proposed to put in a short intelligible form. Let them repeal the statutory restriction which prevented the bar from communicating with the parties themselves, and then let the bar review its own etiquette. He would then propose to unite in this clause the provision of the statute of the 9 & 10 Vict. and then let them say, "Be it enacted that the said last-recited provision be repealed," and then enact as follows, "and that it shall be lawful for any person or party to the suit, or for an attorney conducting the suit, or a barrister retained by or on behalf of either party to the suit, or, by leave of the judge, any other person, to appear for him and address the Court without any right of pre-audience or exclusive audience, but subject to such regulations as the judge should from time to time direct for the transaction of the business of the court."

The clause as thus amended was agreed to. It was expressly stated to be the purpose of this clause to prohibit an attorney from taking a brief from another attorney, but only to permit him to appear when instructed by the client personally. Clauses were added permitting appeals to be heard by the Superior Courts during Term; and giving an appeal although the cause was tried without a jury, and enabling the judges to make rules for the regulation of appeals.

## LAW OF EVIDENCE AMENDMENT.

This Bill went through committee. Upon the clause that empowered the judges to, order an inspection of documents, so as to save the cost and delay of a Bill of Discovery, the SOLICITOR-GENERAL said he looked at this as the commencement of a most important course; there was a clause in the Patent Law Amendment Bill with the like tendency, giving power to Courts of Law to proceed by injunction. It would be a most important principle, if we determined that wherever a Court of Law had jurisdiction over the subject-matter it should exercise all the ancillary jurisdiction that a Court of Equity would.—The ATTORNEY-GENERAL apprehended that the applicant under this clause would be required to shew the nature of the deed he wanted, and why he wanted it. He joined with the Solicitor-General in hailing this as the commencement of a new era in our judicial proceedings. He hoped we were gradually getting in "the thin end of the wedge," and that we should eventually have that fusion of law and equity, without which the public would never be satisfied.—Mr. S. WORTLEY set a great value upon this clause. It was most desirable, at all events in this instance, so far to break down the barrier between law and equity as to prevent the glaring injustice of a man being driven "from pillar to post," going into a court of law and being told his remedy was in equity, and going into a court of equity and being told his remedy was at law.—The ATTORNEY-GENERAL observed, that he took this Bill as it came down from the Lords, and did not desire to be understood as holding that the amendments required in the law of evidence were confined to those embodied in this measure. The whole subject would very shortly be under the consideration of the Common Law Commission; they intended to make it one of searching inquiry, and he hoped they would be able to suggest very many ameliorations and improvements.

## COUNTY RATES AND EXPENDITURE.

THURSDAY, July 17.—Sir J. PAKINGTON wished to put a question to the right hon. member for Manchester respecting the Bill on the subject of county rates and expenditure. He believed that after being a long time in committee, the Bill had been reported to the House that very day, and he was anxious to know what were the intentions of the right hon. gentleman with regard to its further prosecution this session? He trusted that, considering the advanced period at which they had arrived, and the unfortunate illness of the right hon. gentleman the Secretary for the Home Department, the Bill would not be proceeded with any further this year?—Mr. M. GISSON said, that as the Bill had been very much altered by the Government from the form in which it was submitted to the House, and as the Home Secretary, who had taken a very active part in the committee, was absent, he should think it could hardly be proceeded with before the end of the session. Besides, if this were not so, he thought there would not be much prospect that a Bill which contained so many clauses, respecting some of which there would doubtless be a discussion, would be carried through the Parliament at this late period of the year. As, however, the Bill was ordered to be committed, the House would of course go into committee upon it on the day fixed for that purpose, unless the hon. baronet saw fit to move that it be

committed that day three months, which would of course dispose of the matter.

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER. Summary.

Two statutes of considerable interest have just received the Royal Assent, and were published *in extenso* last week. 14 Vict. c. 19, is intitled "An Act for the better Prevention of Offences," it punishes as a misdemeanour the offence of being found by night armed with intent to break into any house, or having in possession, without lawful excuse, any implements of housebreaking, or having the face disguised, or being in any house with intent to commit a felony therein. Another clause makes the use of "chloroform, laudanum, or other stupefying, and overpowering drug, matter, or thing, with intent" to commit a felony, a misdemeanour subject to three years' imprisonment. It is provided that on the trial of any indictment for feloniously cutting, the jury may acquit of the felony and convict of unlawfully cutting or wounding, for which defendant shall be liable to be punished as if he had been convicted on an indictment for the misdemeanour of cutting, &c. Persons wilfully and maliciously placing anything across a railway, or removing or displacing any rail, sleeper, &c. or diverting the points, &c. or removing any signal with intent to obstruct, upset, &c. any engine or carriage, or endanger the safety of any person travelling on it, to be guilty of felony, and punishable with seven years' transportation or imprisonment not exceeding three years, and the like penalty is by the next section imposed upon persons throwing anything at any railway carriage with intent to endanger any person therein. Setting fire to any station or other building belonging to any railway company is to be felony, punishable with ten years' transportation or three years' imprisonment. Previous convictions are not to be stated to the jury or given in evidence, until after the verdict of guilty for the subsequent offence, unless the defendant gives evidence of good character. Any person may apprehend persons committing offences against this Act and convey them before a justice, and to assault a person entitled to apprehend is a misdemeanour; the night to be defined as in burglary, and cost of prosecutions to be ordered by the Court.

The other new statute is known as "The Compound Householders' Act," 14 Vict. c. 14, and enacts that persons having once claimed to be rated in respect of premises, and paying or tendering before the 20th July the rates due on the 5th of January preceding, are not to be required to renew such claim, but shall be entitled to be put on the list of voters, provided they shall have occupied the premises and paid rates and taxes as required by law. The liability of the claimant to pay rates is to continue so long as his name remains on the register in respect of such qualification. But when landlords have compounded for rates, the occupier claiming to be rated is not to be bound to tender more than the amount then payable under such composition. E. W. C.

## JERVIS'S ACT—11 &amp; 12 Vict. c. 43.

## TO THE EDITOR OF THE LAW TIMES.

SIR,—A magistrate's clerk, in your journal of the 12th instant, writes in great alarm upon the recent decision of Mr. Justice Wightman, in the Bail Court, in the case of *Ex parte Hyde*, 17 Law T. 170, 171, which would, if affirmed by the full Court hereafter, have the effect of upsetting the convictions and provisions of Jervis's Acts; but having referred to the reports of the case of *Chaddock v. Wilbraham* (reported in 5 C. B. 645; 17 L. J. N. S. M. C. 79; 12 J. P. 167), relied upon by Mr. Hawkins in support of the rule, it appears to me to be inapplicable to the facts in *Ex parte Hyde*, for in the former case the conviction, which was under the Assault Act, 9 Geo. 4, c. 31, s. 27, adjudged the penalty to be paid to another and different person than those expressly mentioned in the Act; in the case now under consideration, the adjudication is in conformity to Jervis's Consolidation Act (Form I. 2), in stating the penalty "to be paid and applied according to law," without mentioning the person, that being immaterial to the defendant, who can pay the penalty to a constable, the justice's clerk, or gaoler, and obtain his discharge if in custody. It must also be borne in mind, that *Chaddock v. Wilbraham* was decided several months before Jervis's Act came into operation, and is, therefore, now also inapplicable. From this fact, and also the remarkable one of the provisions contained in sects. 14, 17, and 32 of

Jervis's Act, authorizing the forms to be used, and sect. 31, by which all penalties, &c. are to be paid to the justice's clerk, upon whom alone the burthen of applying them, "according to law," is thrown, not having been brought to the learned judge's notice, your correspondent, and other magistrates' clerks need not, I think, feel alarmed that new books and forms will ever on that account be necessary; for I feel confident that the full Court will, when the whole law is laid before them, sustain the conviction in *Ex parte Hyde*. At the last sessions the convictions from this division were drawn up and filed in the usual forms, and will continue to be so done until they are declared invalid. For any additional reasons in favour of my opinion I would refer your readers to "Locke on the Game Laws," 3rd ed. p. 49, where the author, after giving the form of conviction now pronounced bad, says, "this form, by the words 'to be paid and applied according to law,' gets rid of the necessity of adapting the conviction to meet the provisions of the 5 & 6 Wm. 4, c. 20, s. 21" (the section cited in moving for the rule).

With reference to the case of *Re Askew*, 17 Law T. 169, it decides nothing new, as your correspondent seems to think it does, and the statement of the offence was clearly very faulty in not shewing, according to the language of sec. 3 of 4 Geo. 4, c. 34, creating the offence, that the servant had "entered into the service," without which averment the justices' jurisdiction to convict for the absconding did not appear. I beg to observe that the proper forms of stating the offences under that Act are to be found in one of my magisterial works (to which your correspondent kindly alludes), the "Formulist," pp. 138, 159.

Apologising for troubling you at this length, I remain, Sir, Your obedient servant,

GEORGE C. OKE.

Newmarket, 16th July, 1851.

**PUNISHMENT FOR ASSAULTS.**—Power is given by Lord Campbell's new Act to Criminal Courts to sentence persons convicted of aggravated assaults to three years' imprisonment (instead of two), with or without hard labour.

**THE STEPMY ABDUCTION CASE.**—It will be recollected that, at the May sessions of the Central Criminal Court, a young man named William Day was convicted, under the Bishop of Oxford's Act, of the abduction of a young woman named Harriet Newman, whose statement was a very extraordinary one. He was sentenced to twelve months' hard labour; but since the conviction took place, a statement of facts has been laid before Sir George Grey, through the exertions of Mr. Field, of the Society for the Protection of Young Females, and the right hon. baronet, after taking them into consideration, advised her Majesty to grant the prisoner a free pardon. He is now at liberty.

**BOARD OF HEALTH.**—Some returns have been presented to Parliament, from which it appears that the number of towns from which petitions have been received for the application of the Public Health Act since it has passed is 215. The total number of towns in relation to which examinations and reports have been made by inspectors, and provisional orders have been applied with the sanction of Parliament, is 46, and, by order in Council, 52. That the total number of places in relation to which reports and examinations have been made by inspectors is 34, for orders in Council 12, and towns or places awaiting second inquiries or not yet reported upon to the Board is 55, and places in which the application of the Act is suspended is 12. The average expense of the local examination, the printing and publication of the reports (of which 342 copies is the average number of copies locally circulated), and of the application of the Act, by provisional order, is 121*l.* and, by order in Council, 83*l.* The average expense of passing Towns Improvement Acts during the years 1849 and 1850, was 2,012*l.* each Act. The total number of applications made to the General Board of Health for assistance under the Diseases Prevention Act was 1,925: of special complaints as to public nuisances, 1,379; of letters received, 18,581; of letters transmitted from September 1848, to May 1851, 56,742; of Board meetings, 617; of claims to compensation examined and awarded under the Metropolitan Interments Act, 169 parishes.

**MILITARY BALLOTS SUSPENSION.**—The Bill brought into the House of Commons by Mr. Bouverie and the Secretary-at-War to suspend the making of lists, and the ballots and enrolments for the militia of the United Kingdom, has been printed. It contains three clauses, to the effect that all general and sub-division meetings relating to the militia, &c. should be suspended until the 1st of October, 1852, provided that proceedings may be had during such suspension by order in council. The Act will extend to wardens of stanneries, and to corps of miners in Cornwall and Devon.

**POOR-LAW RELIEF.**—A somewhat curious return, by order of the House of Commons, has been printed, shewing the "causes" of relief to 147,509

able-bodied paupers on the 1st of January last. In the out-door department there were 200 adults males (married or single) relieved in cases of sudden and urgent necessity; 19,799 adult males relieved in cases of their own sickness, accident, or infirmity; 7,489 adult males on account of sickness, &c. of any of the family, or of a funeral; 5,347 adult males relieved on account of the want of work or other causes. There were 26,399 wives of adult males, 50,628 widows, 6,385 single women without children, 3,703 mothers of illegitimate children, 1,910 wives relieved on account of their husbands being in gaol, 544 wives of soldiers, sailors, and marines relieved, and 3,359 wives of other non-resident males relieved.

**REFORM ON THE CAB-RANK.**—A correspondent says, that within the last few days the Metropolitan Commissioners of Police have suspended the licenses of 800 cab-drivers. The commissioners having ascertained that numbers of the licensed drivers were brothel-keepers and otherwise improper persons to be entrusted with the public service, on the last annual licensing day in 1850 gave individual notice that strict inquiries would be made on the next occasion, and all who were found as above-mentioned or notorious drunkards would be deemed unfit persons and their licences refused. The result has been the suspension of upwards of 800. These vigorous measures of the commissioners have astonished the whole fraternity, and several meetings have been held to consider the position of the body.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

ANOTHER extremely interesting case on the *Law of Calls* was reported last week from the Rolls Court.—Is the legal or equitable owner of shares liable for calls? That is to say, will Equity relieve the equitable owner, and impose the burden upon the real owner? It was held that it could not do so: that the Companies Clauses Consolidation Act expressly makes that party liable whose name appears upon the register of shareholders. But, nevertheless, the *cestui que trust* might be made liable by special contract between himself and the company. The Act has regard to legal relations only, and all that a Court of Equity can do is, to enforce the trusts against the parties to it, at their instance. At the instance of the company it can take no notice of the trusts so as to enforce payment of the calls themselves by the *cestui que trusts*. (*Newry, &c. Railway Company v. Moss*, 17 Law T. 206.) This case should be carefully noted in the collected edition of the Consolidation Acts.

*Webb v. The Direct London and Portsmouth Railway*, 17 Law T. 210, is also a case of considerable importance to companies, for it shews how cautious they should be in entering into agreements, and that all contracts should be conditional upon the railway being proceeded with. Here a Bill for making a railway had been opposed by a landowner, who withdrew his opposition on an agreement that the company should pay him a certain sum for a certain portion of his land, and a certain amount of costs. A memorandum was at the same time signed by the promoters, agreeing that if the Act should not be obtained, the agreement for purchase should not be binding. The Act passed: the line was afterwards abandoned, but the landowner was held to be entitled to specific performance of the agreement. The judgment in this case should be read with attention by all who are interested in Railway Law.

## WINDING UP.

THE House of Lords has not yet given judgment in the *Allottee* Question, but there can be no doubt what that judgment will be, for the judges who were called in to assist them have pronounced a unanimous opinion that a mere allottee is *not* liable as a contributory, whether he did or did not pay his deposit, and this opinion will of course govern the Lords.

But, in the progress of the argument, a still more important question was raised incidentally, but strangely enough submitted to the judges, although not properly arising in the case then under consideration, namely, whether the provisionally registered railway bubbles are within the Winding-up

Acts at all. It is said, that although there was some difference of opinion among the judges upon this point, the majority of them were of opinion that these cases are *not* properly within the Act. It is probable that the Lords will not decide that question now, as the cases before them were disposed of upon the other point; but it being known that a doubt exists, the question will of course be raised in a direct shape.

Should the Lords then hold that these cases are not within the Acts, as it is most probable that they will, the consequences will be, that the proceedings in all the winding-up cases, where the company had not been completely registered, will be avoided, and all the costs incurred will fall upon the petitioners or their solicitor. In some instances this will operate very hardly; in many, however, it will only be a just retribution for the rapacity which tempted them to reopen matters which had been practically settled, with no other object than to make costs for themselves at the price of the ruin of their two-fold victims.

It will be remembered that long ago we contended for the view now taken by the judges, strenuously arguing that the Winding-up Acts did not extend to schemes for companies, but only to actual companies, and that the difficulty of working them was found only in an attempt to apply them where they were never intended to be applied.

It is not often that we have had occasion to express a doubt about the correctness of any decision of Lord Cranworth, but we are bound to declare dissent from the judgment in *Carrick's Case* (17 Law T. 209.) The appellant had been a member of the preliminary executive committee, and had attended meetings, at which orders were given, officers appointed, &c. Nevertheless, he was held *not* to be a contributory. Now, clearly, these acts would have rendered him liable, *in law*, for the expenses so incurred: goods supplied or orders given at meetings, at which he was present, taking a part, might be recovered from him in an action at law, and if liable to a single creditor he is *quo facto* a contributory. E. W. C.

**LIVERPOOL MARINE ASSURANCE COMPANY.**—There was a meeting before Master Rose on Monday, to confirm a call of 5*l.* per share, declared at the last sitting. From the statement laid before his Honour, by Mr. Hutton, the official manager, it would appear that the liabilities of the company upon admitted claims amount to 13,477*l.* 6*s.* 10*d.* out of which sum there is due to Messrs. Heywood and Co. for payments to policy holders in discharge of their claims upon the company, 10,162*l.* 11*s.* 8*d.* Of the three calls made by the directors to discharge the debts and wind up the affairs of the company, there remain now due and unpaid 24,393*l.* 10*s.*; in respect of this it is expected to realise about 6,000*l.* inasmuch as the Master has confirmed the calls upon which the above large sum is owing. In conclusion, the official manager recommends the declaration of a call of 5*l.* per share upon the fifty-eight contributories who have been included in the list, and who hold 1,761 shares, and the receipts from which call Mr. Hutton estimates at 8,805*l.* There being no further opposition to the proposed call, it was then confirmed by the Master. This company was originated in 1831, with a proposed capital of 200,000*l.* in 2,000 shares of 100*l.* each, and continued to carry on business up to November, 1849, and profits to a large extent were, during the interval, divided amongst the shareholders. Messrs. Field and Co. appeared for the official manager.

**GLOUCESTER, ABERYSTWITHE, AND CENTRAL WALES RAILWAY.**—There was a sitting on Saturday before Master Tinney, in the matter of this company, for the further arrangement of the list of contributories. Mr. Hetherington, who appeared for the official manager, Mr. Wryght, said it was proposed to go as far as the letter "L" in the list, at the present meeting, and the cases taken would be those of original allottees who had paid the deposit on their shares, and had likewise signed the company's deed. Though the scheme was what was termed an "abortive" one, yet he (the counsel) contended that, as the parties who executed the deed had contracted to pay all the expenses, they were now liable to be placed on the list in respect of the shares for which they had signed. The Master inquired what was the state of the law as respected allottees? Mr. Hetherington: That mere allottees, or allottees who have only paid the deposit, are off the list; but that allottees who had paid deposit, and executed the deed, as was the case in this company, were to be put in. The Master then examined the deed, and having satisfied himself that notices of the meeting had been sent to the various parties interested, proceeded to include all those persons who did not appear (with the exception of those to whom letters were sent, but returned through the Post-office), and they amounted to more

than 200. A few opposed cases were adjourned. The list contains 731 names, and of those nearly 400 were taken at this meeting.—*Daily News*.

**YORK AND LONDON ASSURANCE COMPANY.**—Friday, an adjourned meeting was held before Master Blunt, to discuss the balance of a claim amounting to 1,300*l.* brought in by the London and Westminster Bank. The original loan was about 5,000*l.* which has been repaid to the bank by the directors, with the exception of the above balance. Mr. Roxburgh appeared in support of the claim, which Mr. Hetherington, on the part of Mr. Goodchap, the official manager, opposed, mainly on the ground that the directors had not the power under the deed to borrow money for the purposes of winding-up. After a dry legal argument, his Honour decided upon allowing the claim, being of opinion that in the present case the directors had not exceeded their power in concluding the loan.

## REAL PROPERTY LAWYER AND CONVEYANCER.

A NEW point was raised in *Salmon v. Dear*, 17 Law T. 206, viz. whether a mortgagee can, by giving notice to the tenant of a mortgaged estate not to pay any more rent to the mortgagor, acquire title to rents that had previously accrued due. In accordance with common sense, the Lord Chancellor held that he could not.

The *Trustee Act* has been again brought under discussion in *Rovley v. Adams*, 17 Law T. 207. It involved several questions, for which the reader is referred to the report.

Will cases are still abundant. Two were reported last week. In *Jackson v. Craig*, 17 Law T. 207, the will ran thus:—"Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family somewhere; excepting 200*l.* a year, to be laid by as a marriage portion for my daughter B. C. D. is heir to the whole estate." Here there is no provision for the personality, and it was directed to be distributed as if the testator had died intestate. The real estate also descended: it was not a gift to the heir. In *Methold v. Turner*, 17 Law T. 208, a testator died in 1815, giving his residuary estate to trustees upon trust, after the decease of his wife, to apply the income for the benefit of his son. The son was found lunatic in 1818. In 1832 the widow died, and gave by will the residue of her personal estate to trustees, upon trust to apply a sufficient part of the income in the maintenance of the son, and to invest the surplus on certain trusts. The income of the two estates exceeded the sum allowed by the Court for the maintenance of the lunatic, but the income from the mother's estate was less than that sum. It was held that the income of the mother's estate should be first applied to the maintenance, in exoneration of the father's estate.

*Stokes v. Salomons*, 17 Law T. 209, was a question upon the construction of a will, whether there was anything in the context which would restrain the operation of the New Wills Act, which passes real estate acquired after the date of the will, unless restrained by the context. It turned upon its facts rather than upon any principle of law.

In *Thornhill v. Manning*, 17 Law T. 208, the Court enlarged the time appointed for payment after a final decree of foreclosure, on a case for it being shewn, although the decree had been made absolute, and the order absolute had been signed and enrolled.

For a notice of the case of *Tarleton v. Liddell*, 17 Law T. 211, the reader is referred to the Summary under the department of "Mercantile Lawyer," for it is also a real property case.

**REGISTRARS OF DEEDS (MIDDLESEX).**—From a return printed by order of the House of Commons, it appears that in 1849, 4,029*l.* and in 1850, 4,275*l.* were received as fees by the registrar of deeds in Middlesex, the expenses for each of the years having been respectively 1,912*l.* and 1,991*l.* The emoluments of the four registrars were, therefore, in 1849, 2,116*l.* and in 1850, 2,284*l.* In 1850, 36*l.* was received for searching the new indexes, in addition to the customary fee of 1*l.* The new indexes are made up since 1836, and were provided at the cost of the deputy registrar, for the purpose of rendering facilities to the searchers, who are charged 1*l.* 6*d.* in excess of that paid for searching the old indexes, it being optional to parties to search the new or old indexes. When the costs of preparing the new indexes are defrayed, it is stated in the return that the books will be opened to the public free of any additional charge beyond 1*l.*

## COUNTY COURTS.

THE new Rules of Practice are already in operation. We last week presented them to our readers complete, omitting only the Schedule of Forms, which are almost exclusively required by the officers of the courts, to whom a copy of the rules has been sent from the Treasury.

They and the recent statutes, with the Bill now passing through Parliament, have wrought so entire a change, that it has been found necessary to rearrange and rewrite almost the whole of *Cox and Lloyd's Law and Practice of the County Courts*, so as to adapt it to the new jurisdiction and new practice. The new edition is quite prepared for press, and waits only the passing of the Bill to be proceeded with and published. It will contain all the cases decided to this time, and the entire of the new statutes, rules, forms, &c.

But in the meanwhile the Profession will require to have the new Rules of Practice in a convenient shape for carriage and ready reference. For this purpose they have been copiously indexed by the Editor of the *County Courts Chronicle*, and are now published at the LAW TIMES Office, with a table of fees appended, in a small book for the pocket, at 2*s.* or in cloth, 2*s.* 6*d.*

To persons who order the new edition (the FOURTH) of *Cox and Lloyd's Law and Practice of the County Courts*, this pocket edition of the new rules will be sent without charge, to serve them until the passing of the pending statute permits the publication of the work, which will contain all the Law and Practice as it is. Orders are requested to be sent as soon as possible, and the copies ordered now will be forwarded by post in the rotation in which the orders are received.

It should be added, that the new rules provide expressly that the Practice of Insolvency and Protection in the County Courts shall be regulated according to the Practices of the Insolvent Debtors' Court in London. As many practitioners hesitated to procure Mr. Macrae's comprehensive work on this subject, fearing lest it should be affected by the new rules of the County Courts, the fact should be known that there is no alteration, and, therefore, that this work continues to be the authority on the subject of insolvency, as it is indeed the only one which the Profession possesses that fully treats the subject.

The County Courts Extension Bill has again been twice before the committee of the Commons. The principal contest was upon the clause proposed by the Attorney-General for repealing the provisions of the original County Courts Act, which prohibits a barrister to appear uninstructed by an attorney. It was ultimately determined that it should stand thus:—An attorney instructed by a party, or a barrister instructed either by an attorney or a party, is to be heard as of right; but the judge may permit any other person to be heard. It was resolved to prevent attorneys acting as Advocates, unless for their own clients, and they are not to be instructed by another attorney. The equity jurisdiction clauses were assented to without objection. Some further facilities were given for appeals, and they are to be allowed to be heard in Term. The Bill has been so changed in its progress, that it has become almost a new measure.

With respect to the passage read by the Attorney-General from the *County Courts Chronicle*, it is, perhaps, right to say that it appeared in a letter from an angry practitioner, writing in reply to another correspondent, who was claiming exclusive audience for the Bar, and not only is it altogether opposed to the views advocated by the editor, but its sentiments are certainly not shared by the Profession generally. Our own opinions are frankly expressed in the paper on this subject among the leading articles of to-day.

## APPENDIX A.

### RECOMMENDATIONS OF THE REPORT OF THE COMMON LAW COMMISSIONERS.

#### WRIT OF SUMMONS.

1. That all personal actions shall be commenced by writ of summons, in the form set forth in Appendix B. No. 1, when the defendant is residing, or supposed to reside, within the jurisdiction.
2. That it shall not be necessary to mention any form of action in the writ.
3. That a plaintiff may at any time during the six months from the issuing of the writ of summons issue a concurrent writ, to be served within the same period as the first writ, to be marked with the word "concurrent" and with the date.

4. That there shall be no alias or pluries writ; but that the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of renewal, and so from time to time during the currency of the renewed writ, by having it marked with a seal or stamp bearing the date of the day, month, and year, to be kept for that purpose at the office. And that a writ so renewed shall remain in force from the date of the issuing of the original writ, to save the Statute of Limitations, and for all other purposes; provided that a writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

5. That the writ of summons may be served in any county.

6. That the service of the writ of summons, wherever practicable, shall be personal; but that the plaintiff shall be at liberty to apply from time to time, if necessary, on affidavit, to the Court or a judge, who may, if satisfied that the writ has come to the knowledge of the defendant, or that he wilfully evades service, order that the plaintiff be at liberty to proceed as if personal service had been effected.

7. And that when any defendant (being a British subject) is residing out of the jurisdiction, it shall be lawful for the plaintiff to issue a writ of summons in the form set forth in the Appendix B. No. 2, which shall bear an indorsement that it is for service out of the jurisdiction, and in which the time for appearance shall be regulated by the distance from England of the place where the defendant resides; and that it shall be lawful for the Court or a judge, upon being satisfied by affidavit that the writ was served upon the defendant, or that the writ came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty so proceed in such manner, and subject to such conditions as to such Court or judge may seem fit; but that the plaintiff shall be required to prove the amount of the debt or damages, either before a jury upon a writ of inquiry, or before the Master, as a judge may direct, as a condition precedent to his obtaining judgment.

8. That the proceedings against foreigners out of the jurisdiction be the same as those against British subjects, save that instead of the form in Appendix B. No. 2, there shall be used for that purpose the form Appendix B. No. 3; provided that the substitution of either of such forms for the other of them, or for the form in Appendix B. No. 1, shall not be an objection to the plaintiff's proceedings, but that any mistake in that respect may be amended by a judge *ex parte* without costs.

9. That any affidavit for the purpose of enabling the Court or a judge to direct proceedings to be taken against defendants out of the jurisdiction may be sworn before any consul-general or consul appointed by her Majesty at any foreign port or place.

10. That the writ of *distringas*, whether for the purpose of compelling appearance or for proceeding to outlawry, shall be abolished.

11. That it shall remain obligatory on the plaintiff to make the indorsement upon the writ prescribed by the rule of Hilary Term, 2 Wm. 4, rule 2, unless he adopts the more special indorsement hereinafter mentioned.

12. That in all cases where the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied; *e. g.*

On a bill of exchange, promissory note, or cheque, or other simple contract debt;

Or,

On a bond or covenant under seal;

Or,

On a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt or penalty;

Or,

On a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note;

The plaintiff shall be at liberty to make a special indorsement of the particulars of his claim in the form or to the effect contained in Appendix B. No. 4.

#### APPEARANCE AND JUDGMENT FOR NON-APPEARANCE.

13. That entering appearance by the plaintiff according to the statute be abolished.

14. In case of non-appearance, where the writ is indorsed in the special form, That the plaintiff shall be at liberty, on filing the affidavit of service or judge's order to proceed, and a copy of the writ, at once to sign final judgment (which may be entered in the form given in the Appendix B. No. 5, and on which no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ,

with interest at the rate specified, if any, to the date of the judgment, and a sum to be fixed by the Masters for costs, unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; but execution shall not issue until the expiration of eight days from the last day for appearance.

15. In case of non-appearance, where the writ is not indorsed in the special form, That a declaration may be filed, indorsed with a notice to plead in eight days in all cases, without reference to whether the defendant does or does not reside within twenty miles of London, and judgment by default may be signed at the expiration of the indorsed time to plead, according to the present practice; and in the event of no plea being delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ before proposed, the judgment shall be final, and execution issue for an amount not exceeding the amount indorsed on the writ, with interest at the rate specified, if any, and the sum fixed by the Masters for costs as before mentioned, unless the plaintiff claim more, in which case they must be taxed; and in such case the plaintiff shall not be entitled to more costs than if he had made the indorsement, and signed judgment upon non-appearance. Provided that in all cases where a writ has been indorsed in the special form, no further particulars need be delivered with the declaration.

16. That the defendant shall be at liberty to appear at any time before judgment, and after such appearance he shall be entitled to have all pleadings subsequent to his appearance delivered to him or his attorney; but in the event of his appearing after the time specified in the writ, or in any rule or order to proceed as if personal service had been effected, he shall give notice of appearance to the plaintiff, to entitle him to such delivery.

17. That the appearance, if in person, shall give an address, and at the address so given it shall be sufficient to leave all pleadings and notices; and in the event of such address not being given the appearance shall not be received, or if the address be illusory or fictitious, the appearance shall be irregular, and may be set aside on application to a judge.

18. In the case of several defendants, some of whom appear and others not, where the writ is indorsed in the more special form, That the plaintiff may, if he think fit, sign judgment against the non-appearing defendant or defendants alone, and issue execution accordingly, abandoning his action against the other defendants before declaration. Or the plaintiff may, if he prefer it, declare against the defendants who have appeared, suggesting the judgment obtained against the others, and in that case the judgment against the non-appearing defendant or defendants shall operate as at present; or if thought proper, the plaintiff may at once be allowed to issue execution against the defendant who suffers judgment by default, proceeding with the action against the other defendants; provided that such defendant or defendants may plead satisfaction obtained by the plaintiff against any other defendant or defendants since the action commenced.

#### JOINDER OF PARTIES.

19. That the joinder of too many plaintiffs be not fatal to any action, but that the plaintiff or plaintiffs entitled may recover.

20. That the defendant, in an action in which there is more than one plaintiff, on pleading a set-off may obtain the benefit of the set-off on proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the action was or were indebted to him.

21. That it shall be competent for the defendant to compel by subpoena the attendance of one or more of several co-plaintiffs as a witness or witnesses at the trial, and to call as a witness any of them who may appear to have been improperly joined.

*Note.*—This will be unnecessary if it shall be resolved to make the parties to a suit competent witnesses.

22. That the non-joinder of a person as plaintiff in an action on contract shall be a variance to be amended at the trial by the judge, if it shall appear to him that such non-joinder was not for the purpose of obtaining an undue advantage, and that injustice would not be done by amending, and that the omitted party consent to be joined as a co-plaintiff; provided, however, that no such amendment shall be made if the defendant shall at or before the time of pleading have given written notice to the plaintiff that he objects to such non-joinder.

23. And in case such notice be given, or any plea of non-joinder be pleaded, the plaintiff shall be at liberty to amend the writ and other proceedings by adding the name of the person alleged to be improperly omitted as plaintiff, on payment of costs, and with liberty to the defendant to plead *de novo*.

24. That where too many defendants are joined in an action on contract, the plaintiff shall be entitled to recover against such defendant or defendants as

appear to be liable, and that the other defendants shall be acquitted, with like provisions respecting set-off and evidence as in the case of too many plaintiffs.

25. That upon a plea in abatement of non-joinder of a co-contractor as defendant, it shall be competent for the plaintiff to amend his writ and declaration, serve the amended writ on the added defendant, and proceed against both; and that the date of such amendment shall, as between the added defendant and the plaintiff, be considered for all purposes the commencement of the suit.

26. In such case, if upon the trial of the cause it shall appear that the added defendant was jointly liable with the original defendant, the original defendant shall be entitled to the cost of the plea in abatement and amendment; but if at the trial it shall appear that the plaintiff cannot maintain his action against the original and added defendants, but can maintain his action against the original defendant alone, the added defendant shall be acquitted, and the plaintiff shall be entitled to recover against the original defendant, with costs, including those of the plea in abatement, and such costs as the plaintiff may have to pay the added defendant.

27. That in any action brought by a man and his wife for an injury to the wife in respect of which she is a necessary plaintiff, there may be joined claims by the husband alone: provided that in the case of the death of either plaintiff, the suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

#### QUESTIONS RAISED BY CONSENT, WITHOUT PLEADING.

28. That the parties, after writ issued, may, by leave of a judge, state any question for trial which they may think fit, without any pleadings, and with or without an agreement, that according as it may be determined an agreed sum of money, or a sum to be ascertained by the jury, shall be paid, and as to payment of costs.

29. That upon such finding judgment may be entered and the proceedings recorded.

30. That a question or questions of law may be stated for the opinion of the Court without pleading, and with similar agreements as to money and costs to be recovered, and with or without an agreement to bring error, which may be brought when agreed.

#### PLEADING.

31. That every declaration and subsequent pleading which shall clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient, and it shall not be necessary that such matters should be stated in any technical or formal language or manner, or that any technical or formal statements should be used.

32. That all statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial, that of losing and finding and bailment in actions for goods or their value, the statements of acts of trespass having been committed with force and arms, contrary to the form of the statute or statutes, and against the peace of our lady the Queen, the statement of promises which need not be proved, as promises in *indebitatus* counts, and mutual promises to perform agreements, and the like statements, be omitted; and that where any clearly unnecessary statement is vexatiously made, or any statement is made with unnecessary prolixity (as, for instance, where evidence of the fact is pleaded instead of or as well as the matter of fact itself) or otherwise, it may be struck out amended by the Court or a judge, with or without costs.

33. That it shall be open to either party to object by demurrer to the pleading of the adverse party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and that where issue is joined on demurrer the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and that no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect, or lack of form.

34. That, except in the cases hereinafter particularly mentioned, no pleading shall be deemed insufficient for any defect now objectionable on special demurrer only.

35. That duplicity, argumentativeness, and uncertainty shall no longer be grounds of objection to a pleading, unless the effect of such duplicity, argumentativeness, or uncertainty shall be to embarrass the opposite party; but if any pleading, by reason of duplicity, argumentativeness, or uncertainty, shall be so framed as to embarrass or mislead the opposite party, it shall be competent to the latter to apply to a judge to have such pleading amended, which application shall be by summons, wherein the party shall state the particular ground of objection, and require that the pleading be amended.

36. And upon the hearing of such summons, if the judge shall be of opinion that the objection is well founded, and that the pleading is, in the respect

objected to, so pleaded as to embarrass or mislead the opposite party, he may order the party pleading to amend in such manner as he may direct; and in the event of such amendment not being made within a limited time, the party complaining shall be at liberty to demur; but if the judge shall not be of such opinion, he shall dismiss the summons, and the party complaining shall have no further right of objection as to the point mentioned in the summons, or as to any other point of duplicity, argumentativeness, or uncertainty.

37. That a demurrer on any such ground as aforesaid shall state that it is pleaded by leave of a judge, and shall repeat the objection taken in the summons, and that only.

38. That upon the argument of such a demurrer the Court shall give judgment according to the validity or invalidity of the specified objection and the substance of the pleading.

39. That the Court or a judge shall in all cases have power to set aside frivolous or vexatious pleadings and pleadings colourably amended in pretended compliance with a judge's order to amend.

40. That all statutory enactments allowing parties to plead the general issue or other general plea, and to give special matter in evidence under such general plea, be repealed.

41. That express colour shall be abolished.

42. That profert be abolished.

43. That each party shall be entitled to demand of the other a copy or inspection, or both copy and inspection, of any deed, agreement, bill, or other written document mentioned or referred to in his pleading, or whereof inspection could be obtained by a bill of discovery, and in the event of such copy not being delivered, or such inspection not being granted, shall be entitled to apply to a judge for an order for such copy or inspection, or both, as the judge may think fit.

44. That such demand, summons, or order shall be no stay of proceedings, except specially ordered.

45. That a party pleading in answer to any pleading in which such document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material; and that the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

46. That a plaintiff or defendant may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify the condition or conditions precedent the performance of which he intends to contest.

47. That a defendant may traverse generally the facts contained in the declaration, where the general issue would now be applicable; and may by a plea of denial put in issue any material allegation in the declaration, although it might have been included in a general traverse.

48. That in all cases a plaintiff shall be at liberty to deny the whole of any plea or subsequent pleading of the defendant by a general denial, or to deny all but some admitted part or parts, or to deny any one or more allegations.

49. That a defendant shall in like way be at liberty to deny the whole or part of a replication or subsequent pleading of the plaintiff.

50. That in all cases of general denial the jury shall, if required, find as to the truth of the several allegations denied; and costs shall be awarded accordingly, as though the findings had been on different issues.

51. That special traverses shall be abolished.

52. That in any action for a trespass to person or property, the defendant shall be entitled to particulars identifying the cause of action for which the plaintiff is proceeding, and the plaintiff to particulars of any justification pleaded by the defendant; and that a judge may order plans of the *locus in quo* to be exchanged between the parties.

53. That no more than one new assignment shall be pleaded to any number of pleas to the same cause of action; and that the new assignment shall state that the plaintiff proceeds for causes of action different from all those which the pleas to which it is pleaded profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both.

54. That no plea shall be pleaded to a new assignment which has already been pleaded to the declaration, except in denial.

55. That in all actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying it, without any prefatory averments to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged slander or libel; and that where the words or matter set forth with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient.

56. That upon an application to strike out one or more of several counts, on the ground that they are founded on the same subject-matter, the Court or judge shall have a discretion to allow such counts to stand upon such terms as he or they may think fit.



although not satisfied that a distinct subject-matter of complaint is intended to be established in respect of each count; that the Court or judge shall have a discretion as to the costs of such an application; and that the rule of H. T. 4 Wm. 4, s. 5, so far as it relates to pleas, and also so much thereof as relates to depriving a party of the costs of a count on which he succeeds, shall be rescinded.

57. That the plaintiff shall be at liberty to reply several matters, a defendant to rejoin several matters, and so of subsequent pleadings, in the same manner as a defendant may plead several pleas.

58. That either party may, by leave of a judge, plead and demur to the same pleading at the same time; and that it shall be in the discretion of the Court or a judge which issue shall first be disposed of. Nevertheless the party omitting to demur may move in arrest of judgment, or for judgment *non obstante veredicto*; but in such cases the party so moving shall pay all the costs of the abortive trial; and the Court shall make all such amendments as may appear, either by the judge's notes or by other satisfactory proof, to be justified by the facts of the case.

59. That the technical forms of action be done away with.

60. That different causes of action, of whatever kind, may be joined in the same suit, provided they be by and against the same parties and in the same rights; but that the Court or a judge shall have power to prevent the trial of different causes of action together, if such trial would, in their judgment, be inexpedient, and in such case may order separate records to be made up and separate trials to be had; provided, that when two or more of such causes of action are local and arise in different counties, the venue may be laid in either of such counties.

61. That every declaration, when the defendant is within the jurisdiction, whether delivered or filed, shall bear an indorsement requiring the defendant to plead within eight days, otherwise judgment.

62. That rules to declare, or declare preemptorily, to reply, and plead subsequent pleadings, be abolished, and a four-day notice substituted for them in all cases; that such notice shall be in a similar form to the notice to plead, and either indorsed on the pleading or delivered separately; and that in default of compliance therewith judgment may be given.

63. That the rule to plead and the demand of plea be abolished, and the notice to plead, which may thereto be indorsed on the declaration or delivered separately, be alone retained.

64. That no leave to plead several matters shall be necessary where the opposite party indorses a consent on an abstract of the pleas.

65. That the rule to plead several matters shall be abolished, and that a judge's order for that purpose shall suffice in all cases where a judge's order is necessary.

66. That all objections to the pleading of several pleas, on the ground that they are founded on the same subject matter, shall be disposed of upon the summons to plead several matters.

67. And that leave to plead several matters shall be necessary in cases where the rule to plead several matters is now obtained as of course, or in a case of such ordinary pleas as payment, accord and satisfaction, release, not guilty, denial that the case is the plaintiff's, leave and licence, and *non scilicet demesse*, which are usually allowed by the judge as of course.

68. That the signature of counsel shall not be required to any pleading.

#### JUDGMENT BY DEFAULT.

69. That the rule to compute shall be abolished.

70. That in all actions for liquidated demands judgment by default shall be final.

71. That in all cases in which damages are substantially matter of calculation, the Court or a judge may direct that the amount for which final judgment to be signed be ascertained by the Master without requiring a writ of inquiry.

72. That in all actions where the plaintiff recovers money, the amount which he is entitled to shall be awarded to him by the judgment, without any discretion being made as to whether it is for debt or damages.

#### NOTICE OF TRIAL.

73. That ten days' notice of trial before the sitting in London and Middlesex, the adjournment day in London, and the commission day at the Assizes, all, unless otherwise ordered by the Court or a judge, be sufficient notice in all cases.

#### NISI PRIUS RECORD.

74. That the Nisi Prius record shall not be sealed passed, but that it be delivered to the proper officer, to be by him entered as at present, and there remain until disposed of.

#### JURY PROCESS.

75. That the venire and *distingas* or *habeas pora juratorum*, and the entry *jurata ponitur in pectus*, be abolished.

76. That the precept now issued by the judges of assize to the sheriffs, except those of London and Middlesex (which precept is at present confined in its form to matters of a criminal nature, to be tried at the assizes under the commissions of oyer and terminer), be altered in form, directing that jurors shall be summoned for the trial of all issues, whether civil or criminal, to come on for trial at the assizes; that a printed panel be made and kept in the sheriff's offices, both in London and Middlesex and in the country, for seven days before the commission day, for public inspection; and a printed copy of the panel be annexed to each Nisi Prius record.

#### SPECIAL JURIES.

77. That in London and Middlesex the special juries be nominated and reduced by the undersheriff of Middlesex and secondary of London, in like manner as is now done before the Masters of the Superior Courts.

78. That in all the counties except London and Middlesex, a precept shall be issued to the sheriffs, directing them to summon a number of special juries, say forty-eight in counties in which many special jury causes are usually tried, and a smaller number in other counties; that the persons so summoned shall be the jury for trying the special jury causes at the assizes; that each party shall have a limited right of challenge; and that, for the purpose of meeting some cases of an extraordinary character where local prejudice is alleged to prevail, a power may be given to the Court or a judge to direct that a jury shall be struck according to the present practice.

79. That in any county, except London and Middlesex, the mode of obtaining a special jury by a plaintiff, except in replevin, shall be by his giving a notice to the defendant of his intention that the cause shall be tried by a special jury, which notice shall be given at such time as would be necessary for a notice of trial; and that, except in London and Middlesex, the mode of obtaining a special jury by a defendant or a plaintiff in replevin, shall be by giving a notice within the time now limited for a defendant or a plaintiff in replevin obtaining a special jury; provided that a judge may, on summons, at any time order that a cause shall be tried by a special jury.

80. That where the defendant or plaintiff in replevin gives such notice, and the venue is in London or Middlesex, the Court or a judge shall have power, if satisfied that such notice is given for delay, to order that the cause be tried by a common jury, or to make such other order as to the trial of the cause as they or he may think fit.

81. That either party in any action in which notice has been given to try by special jury may, six days before the first day of the sittings or commission-day, give notice to the sheriff that the action is to be tried by a special jury; and in case no such notice be given, no special jury need be summoned, and the cause may be tried by a common jury.

82. And that in all cases where a special jury is not summoned, the cause may be tried by a common jury.

#### VIEW.

83. That the proceedings in the case of a view shall be by rule instead of writ.

84. That the sheriff, upon request, shall deliver to the parties the names of the viewers, and also return their names to the associate, for the purpose of their being called as jurymen upon the trial.

#### ADMISSION OF DOCUMENTS.

85. That the rule 10 of Hilary Term, 4 Wm. 4, as to admission of documents, be altered by giving a similar effect to the notice to admit as the order of the judge now as under that rule; that is to say, that either party may call on the other by notice to admit any document, and in case of refusal or neglect to admit that the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the admission required was unreasonable; and that no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is in the opinion of the Master a saving of expense.

86. That an affidavit of the attorney in the cause, or his clerk, of the due signature of the admissions annexed to such affidavit, shall be in all cases sufficient evidence of the same.

87. That an affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served.

#### EXECUTION.

88. That a plaintiff or defendant having obtained a verdict in a case tried out of Term shall be entitled to issue execution in fourteen days, unless the judge who tries the cause, or some other judge, or the Court, shall otherwise order, with or without terms.

89. That it shall not be necessary to issue a ground writ, or writ directed to the sheriff of the venue county, but that writs of execution may issue at once into any county, and be directed to and executed by the sheriff of any county, whether a county palatine or not, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county.

90. That writs to be executed in the counties palatine shall be directed to the sheriff of such counties and returned by them.

91. That in all writs of execution against the goods of a plaintiff, the defendant may levy the poundage fees and expenses of execution, over and above the sum recovered by the judgment, in like manner as a plaintiff may.

92. That a writ of execution, unexecuted, shall not remain in force for more than one year from the teste, unless renewed; but that it shall be competent to the party issuing the writ to renew it, in the same manner as we have already proposed with respect to writs of summons, or by giving a written notice to the sheriff, signed by the party or his attorney, and bearing the seal or stamp of the Court, and thereby secure priority according to the original delivery.

93. That the attorney in the cause shall have authority to discharge the opposite party out of execution on a *capias ad satisfaciendum*, unless the client gives notice to the contrary to the sheriff, gaoler, or person in whose custody the party may be; the imprisonment and the discharge to be no satisfaction of the debt, unless the discharge be made by the authority of the creditor.

94. That a person already in the prison of the Court may be charged in execution, without *habere corpus ad satisfaciendum*, by order of a judge, on affidavit that judgment has been signed and is not satisfied; and that service of such order on the keeper of the prison shall have the effect of a detainer.

#### SCIRE FACIAS.

95. That during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment.

96. In cases where it becomes necessary, by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, that the party alleging himself to be entitled to execution shall be allowed, either to sue out a writ in the nature of a *scire facias*, to be called a writ of revivor, according to the form set forth in Appendix B. No. 6, or to apply to the court or a judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the Court that he is entitled to execution of the judgment, and to issue execution thereupon, such leave to be granted by the Court or a judge upon a rule to shew cause, or a summons, to be served as at present, or in such other manner as may be directed by such Court or judge, which rule or summons may be in the form given, Appendix B. No. 7; and that upon such application, in case it manifestly appears that the party making the same is entitled to execution, the Court or judge shall allow such suggestion to be entered in the form given, Appendix B. No. 8, and execution to issue, and order whether or not the costs of the application shall be paid to the applicant, and in case it does not manifestly so appear shall discharge the rule or dismiss the summons, with or without costs; and that the party applying shall in such case nevertheless be at liberty to proceed by *scire facias* or action upon the judgment.

97. That the writ of revivor shall be directed to the party called upon to shew cause why execution should not be awarded: that it shall bear teste on the day of its issuing, and after reciting the reason why such writ has become necessary, shall call upon the party to whom it is directed to appear within eight days, after service thereof, in the court out of which it issues, to shew cause, &c.; and that it shall be served in any county, and otherwise proceeded upon in the same manner as a writ of summons in an ordinary action.

98. That the same alterations be made in writs of *scire facias* for other purposes, such as against bail on their recognizance, *ad audiendum errores* against members of a joint-stock company on a judgment recovered against a public officer, and the like.

99. The name of *scire facias* will, strictly speaking, be inapplicable to the altered form of process, which will not contain the words from which that name was taken; we propose, therefore, it should be called a writ of revivor.

#### ARREST OF JUDGMENT, AND JUDGMENT NON OBSTANTE VEREDICTO.

100. That a party shall be at liberty, after the trial of an issue on fact (as by the present practice), to move in arrest of judgment, or for judgment *non obstante veredicto*, or, where there has been no opportunity of so doing, to move on like grounds to set aside the judgment, but that no such motion

shall be allowed except upon the terms of payment by the party moving of the costs occasioned by the trial of the issues arising out of the defective pleading; and that the Court shall have power to make all such amendments as may appear, either by the judge's notes or by other satisfactory proof, to be justified by the facts of the case, such costs to be awarded by the judgment of the Court upon arresting the judgment, or giving judgment *non obstante veredicto*, or of reversal.

101. That upon motion made to arrest or set aside the judgment, or for judgment *non obstante veredicto*, by reason of the non-averment of some alleged material fact or facts, or material allegation or other cause, the party whose pleading is said or adjudged to be defective shall be at liberty to shew that such facts were proved at the trial, or, with leave of the Court, to suggest the existence of the omitted fact or facts or other matter, which, if true, would remedy the alleged defect, and that such suggestion, if denied by the opposite party, shall be tried; and that if the fact or facts suggested be found to be true, the party suggesting shall be entitled to such judgment as he would be entitled to if such fact or facts or allegations had been originally stated in such pleading, together with the costs of and occasioned by the suggestion; but that if it be found to be untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion, in addition to any other costs to which he may be entitled.

#### ERROR.

102. That no error in law shall be assigned except upon a judgment of the Court actually given, either upon demurrer or special verdict, or motion to arrest or set aside the judgment, or for judgment *non obstante veredicto*, but that this regulation shall not extend to the case of error on bills of exceptions.

103. That error shall not be brought after six years from the time of signing judgment.

104. That the writ of error be abolished, and the proceeding to error be a step in the cause; and that the course of proceeding be as follows:

105. The party alleging error in law shall deliver to one of the Masters of the Court a memorandum alleging error, whereupon the Master shall deliver to him a note of its receipt, of which note a copy shall be served on the opposite party, together with a statement of all grounds of error intended to be argued; the service of such note shall have the same effect, and be followed up by the same proceedings as the service of the notice of allowance of a writ of error in law.

106. The party alleging error in fact shall, in like manner, deliver to one of the Masters a memorandum alleging error, accompanied by an affidavit of the truth of the alleged error; whereupon the Master shall deliver to him a note of its receipt; a copy of which note, together with a copy of the affidavit of the truth of the error alleged, shall be served on the opposite party; the service of such notice shall have the same effect as the service of the rule for allowance of a writ of error in fact as at present; and the subsequent proceedings in error in fact *coram nobis* or *vobis* shall be the same as at present.

107. With respect to error in law, that the assignments of and joinder in error be abolished, and a suggestion to the effect that error is alleged by the one party, and denied by the other, shall be entered on the judgment roll, which roll, and not a transcript, shall, without any return by the chief judge of the Court, be brought by the Master into the Exchequer Chamber on the day of its sitting, and shall be a sufficient warrant for the Court of Error to adjudicate upon the errors in law, if any, in the record.

108. That Courts of Error shall in all cases have power to give such judgment, and award such process as the Court below ought to have done, without regard to the party alleging error.

#### AMENDMENT.

109. That the Superior Courts of Westminster Hall, and every judge thereof, and Courts sitting at Nisi Prius, shall have at all times the power of amending all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party or not; and all such amendments may be made with or without costs as to the Court or judge may seem fit; and that all such amendments as may be necessary for the purpose of determining (in the existing suit) the real question in controversy between the parties shall be made.

#### EJECTMENT.

110. That instead of the present proceeding by ejectment a writ be issued, directed to the persons in possession by name, and all persons entitled to defend the possession of the property claimed, which shall be described in the writ with reasonable certainty.

111. That the writ shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed to appear within a given number of days in the court from

which it issued, to defend the possession of the property sued for, or such part thereof as they may be advised, and shall contain a notice that in default of appearance they will be turned out of possession. The form of the writ will be found in Appendix B. No. 9.

112. That the writ be dated of the day on which it is issued, and be in force for a year.

113. That it be served in the same manner as an ejectment is at present served, or in such manner as the Court or a judge shall order; and in case of vacant possession by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property.

114. That the persons named as defendants in the writ, or either of them, shall be allowed to appear within the time appointed.

115. That any other person shall be allowed to appear, on filing an affidavit that he is in possession of the land either by himself or his tenants.

116. That an appearance without a notice confining the defence to part shall be considered as a defence for the whole.

117. That any person appearing shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty, in a notice entitled in the Court and cause, and signed by the party appearing or his attorney, to be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any, and if none then to be filed in the Master's office.

118. That want of "reasonable certainty" in the writ or notice shall not nullify them, but only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases.

119. That the Court or a judge shall have power to strike out or confine defences set up by persons not in possession by themselves or their tenants.

120. That in case no appearance shall be entered within the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply; which judgment may be in the form contained in Appendix B. No. 10.

121. That in case an appearance shall be entered, an issue may at once be made up without any pleadings by the claimants or their attorney, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what part defence is made, and directing the sheriff to summon a jury.

122. That, by consent, and leave of a judge, a special case may be stated, as at present; and that, by consent, such special case may be taken before a Court of Error, in the same way as a special verdict, and that the Court of Error shall have the same powers as the Court below to determine such special case.

123. That the claimants may, if no special case be agreed to, proceed to trial upon the issue, in the same manner as in other actions; and the question at the trial shall, except in the cases hereinafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled.

124. That the jury may find a special verdict, or either party may tender a bill of exceptions, as at present.

125. That upon a finding for the claimants judgment may be signed, and execution issue for the recovery of possession, and costs, as at present in the action of ejectment.

126. That upon a finding for the defendants or any of them a judgment may be signed, and execution issue for costs against the claimants named in the writ.

127. That in case of such an action being brought by some or one of several persons entitled as joint tenants, tenants in common, or coparceners, any joint tenant, tenant in common, or coparcener in possession may at the time of appearance, or within four days after, give notice, in the same form as in the notice of a limited defence, that he defends as such, and admits the right of the claimant to an undivided share of the property, but denies any actual ouster of him from the property, and within the same time file an affidavit stating the same facts with reasonable certainty, and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question, of whether an actual ouster has taken place, shall be tried, as at present in an action of ejectment.

128. That the effect of a judgment in such an action shall be the same as that of a judgment in the present action of ejectment.

129. That the provisions of the several statutes affecting the action of ejectment as at present constituted, especially the statutes of 4 Geo. 2, c. 28; 1 Geo. 4, c. 87; 11 Geo. 4 & 1 Wm. 4, c. 70, be made

applicable by express enactment to the substituted proceeding.

130. That the several courts and the judges thereof respectively shall and may exercise over the proceedings in the action the same jurisdiction which is at present exercised in the action of ejectment, so as to insure a trial of the title, and of actual ouster when necessary, only.

#### OFFICERS AND FEES AT NISI PRIUS AND JUDGES' CHAMBERS.

131. That the duties of the marshal and clerk at Nisi Prius in the Queen's Bench, and marshal and associate in the Common Pleas and Exchequer, be performed by one officer in each court, to be paid by salary, in like manner as the masters of the court now are under the statute passed in the first year of your Majesty's reign; that the office be held during good behaviour; the appointment to be, as at present, by the Chief Justices and Chief Baron.

132. That such officer be allowed to appoint one or two clerks, also at fixed salaries.

133. That convenient offices be provided for the transaction of the business in the offices of the respective courts, or their immediate vicinity.

134. That a fixed sum be paid to the marshal on each circuit for his services.

135. That the associate on the circuits, where the duty is performed by a separate officer, shall be appointed in like manner as the clerk of assize, and paid by salary.

136. That the Chief Justices and Chief Baron may appoint three clerks, one of whom is to act as clerk on the circuit and in London and Middlesex, and the other judges two clerks each, one of whom is to act as clerk on the circuit.

137. That they shall continue to hold their office during good behaviour, except the clerk who stands personally on the judge, and that such clerk shall hold his office at will.

138. That all these clerks shall be paid by salaries.

139. That the fees hitherto received by these officers be altogether abolished.

Or (if it be deemed expedient that the officers of the court shall still be paid by fees imposed upon the suitors), that the fees received in the several courts, whether in Banc, Nisi Prius, or at Judges' Chambers, shall be paid into one general fund to be applied in payment of the salaries of the officers and the official expenses of the courts; and that any temporary surplus of that fund shall be retained and applied on the same account; and that a thorough revision of all fees shall be made by competent persons selected from the masters of the court, and new tables of fees framed by them (subject to the approval of the judges), which tables shall be calculated to produce an amount sufficient for such payments, and no more; and that an officer (who may be one of the masters) shall be appointed to superintend the accounts of the courts, and to report from time to time as to any alteration or reduction in the fees which may appear necessary or beneficial.

#### SUPERIOR COURTS OF COMMON LAW. FIRST REPORT.

(Continued from page 143.)

THE immediate object of the writ of summons is to cause the defendant to appear, such appearance being necessary to enable the plaintiff to proceed in the action.

Until the reign of George the First it was essential in order to obtain a judgment against the defendant that he should have appeared to answer the plaintiff, either by himself or by his attorney.

In that reign an Act of Parliament passed authorising the plaintiff, on an affidavit that the defendant was personally served with the writ, to enter an appearance for him, which is called "an appearance according to the statute." This practice still subsists, and the substance of it is, that on such an affidavit the plaintiff may proceed as if the defendant had appeared. We propose to abolish the entry of an appearance by the plaintiff for the defendant, which is really an unmeaning form, but to retain the substance by permitting the plaintiff, on making such affidavit, to proceed as though the defendant had been served. It has, indeed, been suggested, that an appearance by the defendant is altogether needless, but in our judgment it is a convenient mode of intimating to the plaintiff the defendant's intention of resisting the action.

We propose that the defendant shall be at liberty to appear at any time before judgment, and after such appearance be entitled to have all pleadings delivered to him or his attorney, provided only that if the appearance be after the time limited by the writ he must give the plaintiff notice of it.

We also recommend that the appearance shall in all cases state an address at which notices and proceedings can be served. This will be a great advantage to plaintiffs, who are now frequently put to much trouble and expense in finding defendants in order to serve them with documents subsequent to the writ. It will also be a benefit to defendants, inasmuch as it will save expense, and insure them

notice. By the present practice plaintiffs are compelled to incur the expense and annoyance of an application to the Court or a judge on affidavit for permission to serve the notice, by what is called sticking it up in the office, or by other means, which are such that in all probability the notice never comes to the defendant's actual knowledge at all; and it is necessary to repeat this step on every occasion on which a rule or notice is to be served. If, therefore, a defendant will not, when he appears, give an address, it is not unreasonable to conclude either that he does not intend to defend at all, or that he is willing to watch the office or the Court to see what further proceedings are lodged against him.

The defendant having appeared to the writ of *habeas corpus*, the next stage of the proceedings is the delivery by the parties in the cause of statements of their respective grounds of action and of defence.

Before, however, entering upon this part of the subject, it is desirable to call attention to the state of the law relating to the joinder of parties to actions, which is usually treated of in connection with the subject of pleading.

In actions on contract the omission of a party as plaintiff who ought to be joined, or the joinder of a party who ought not to be joined, may be fatal to the action; so the joinder of a person as defendant who ought not to be joined is likewise fatal; whilst the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions of tort a joinder of a party who ought not to be plaintiff is fatal, whilst the non-joinder of a party, who ought to be a co-plaintiff, can only be taken advantage of by a plea in abatement, and in such actions the joinder of persons who are not liable as defendants only entitles them to an acquittal, and the non-joinder of persons jointly liable is of no consequence.

These rules often tend to a defeat of justice, and we think the law in this respect may be altered with advantage; we therefore propose, as to the joinder of plaintiffs, that the joinder of too many plaintiffs be not fatal to any action, but that the plaintiff or plaintiffs entitled may recover.

That the defendant in an action in which there is more than one plaintiff, on pleading a set-off, may obtain the benefit of the set-off, by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the action was or were indebted to him.

And inasmuch as a person might be improperly joined as plaintiff, for the purpose of excluding his evidence under the rule that parties cannot be examined, we propose that it shall be competent for the defendant to compel by a *subpoena* the attendance of one or more of several co-plaintiffs as a witness or witnesses at the trial, and to call as a witness any of them who may appear to have been improperly joined.

As to the non-joinder, we propose that the non-joinder of a person as plaintiff in an action on contract shall be amended at the trial by the judge as a variance, if it shall appear to him that such non-joinder was not for the purpose of obtaining an undue advantage, and that injustice would not be done by mending, and the omitted party consent to be joined as a co-plaintiff; provided, however, that no such amendment shall be made if the defendant shall, at or before the time of pleading, have given written notice to the plaintiff that he objects to such non-joinder.

And in case such last-mentioned notice be given, any plea of non-joinder be pleaded, the plaintiff shall be at liberty to amend the writ and other proceedings, by adding the name of the person alleged to be improperly omitted as plaintiff, on payment of costs, and with liberty to the defendant to plead *de novo*.

That where too many defendants are joined in an action on contract, the plaintiff shall be entitled to recover against such defendant or defendants as appear to be liable, and that the other defendants shall be acquitted, with like provisions respecting set-off and evidence as in the case of too many plaintiffs.

That upon a plea of abatement for non-joinder of co-contractor as defendant, it shall be competent for the plaintiff to amend his writ and declaration, serve the amended writ on the added defendant, and proceed against both; and that the date of such amendment shall, as between the added defendant and the plaintiff, be considered for all purposes the commencement of the suit.

This latter provision is necessary for the protection of the added defendant, in order to enable him to rail himself of any defence which he may have owing to the lateness of the period at which the action has been commenced against him.

In such case, if upon the trial of the cause it shall appear that the added defendant was jointly liable with the original defendant, the latter shall be entitled to the costs of the plea in abatement and of the amendment; but if at the trial it shall appear

that the plaintiff cannot maintain his action against both the original and added defendant, but can maintain his action against the original defendant alone, the added defendant shall be acquitted, and the plaintiff shall be entitled to recover against the original defendant, with costs, including those of the plea in abatement, and such costs as the plaintiff may have to pay the added defendant.

We further propose that in any action brought by a man and his wife for an injury to the wife in respect of which she is a necessary plaintiff, there may be joined claims by the husband alone; provided that in the case of the death of either plaintiff, the suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

We do not propose, except in the case of husband and wife, that causes of action accruing to the plaintiff in different rights should be joined. The funds to which the sums recovered in such cases would be applicable, and the judgment with respect to each, would be different, from which inconvenience might arise; but with respect to the joinder of a cause of action arising to a husband in his own right with one accruing to him in respect of his wife, as the judgment in the event of his recovering a verdict, and the fund to which the judgment would be applicable, would be the same, we see no objection to permit the joinder, in order to prevent the necessity of bringing two actions in respect possibly of a cause of action arising out of the same transaction; as, for instance, where an injury has been done to the wife and the husband by the same wrongful act. We have provided for the only difficulty which occurs to us as likely to arise in the case of the death of either party, by proposing that the suit should continue as to such part of the cause of action as would survive, and abate as to the rest.

We now arrive at that part of our duty which is by far the most difficult and anxious, the consideration of the subject of pleading; upon which we regret to say that we have not found the uniformity of opinion which we could have desired among those to whom we submitted the suggestions we thought it right to circulate for consideration.

Before we proceed to consider the different views entertained on this subject, and to state the alterations which we deem necessary, it will be convenient that we should shortly state what is meant by the pleadings in an action at law. They are written statements made by the plaintiff and defendant of their respective grounds of action and defence. The object is to ascertain what are the matters really in controversy between the parties, so as to avoid all discussion and inquiry on those which are not so,—thus simplifying the matter for the decision of the judge or jury, and saving the parties unnecessary expense and trouble. To accomplish this object, the plaintiff in the first place is required to state the facts which constitute his cause of action. The defendant is required to answer, and in so doing is compelled, at his option, to take one of the following courses: either he denies the statement of the plaintiff; or, confessing it, avoids its effect by asserting some fresh fact; or, admitting the facts alleged, he denies the legal effect of them as contended for. In the second case put, the plaintiff will be under the like necessity, and will have to reply to the fresh matter of fact alleged by the defendant, subject to the same rule. In like manner, if necessary, the defendant rejoins; and so the parties proceed till it is ascertained that there is some fact asserted by the one side and denied by the other, or that there is some proposition of law affirmed on the one hand and denied on the other. The questions so raised are called issues in fact or in law, as the case may be. The following example will afford a sufficient illustration of the system. Let us suppose that the plaintiff complains in his declaration of an assault by the defendant. If the defendant in his plea denies it, an issue in fact is at once raised; if, admitting the fact of the assault, he pleads that he committed it in self-defence, here, nothing being as yet denied, no issue would be raised. But, fresh matter being alleged, the plaintiff is called on to reply to it: if he denies the truth of the plea in his replication, the parties will be at issue; but he may admit the plea to be true, and say that he assaulted the defendant to protect his (the plaintiff's) goods from being carried away by the defendant: the defendant again, may deny this, or say that the goods were on his land, and that he was in the course of removing them; again, the plaintiff may deny this, or may say that he had the defendant's licence to put them there, till at length one party will be compelled to deny the other's statement, and so an issue will be raised. Or, one of the parties may admit the truth of the other's statement, but deny its legal sufficiency as an answer: for instance, in the case put of a verbal licence being set up, the defendant might object to the plea on the ground that in law a licence for such a purpose should be by deed or in writing, and thus would arise an issue in law. So, in an action on a bill of exchange, the defendant may admit every statement of the plaintiff, but plead that

time was given to some other party to the bill, whereby he, the defendant, was discharged. By these means clear and precise questions are evolved, and the parties know what are the points in dispute: for example, in the case first put, if the defendant simply denies the assault, the plaintiff knows that this is all that is in controversy; if the defendant pleads that he committed the assault in self-defence, and the plaintiff denies that, they both know that there is no other question between them. So in the case secondly put, the plaintiff has not to prove the drawing, accepting, or presenting of the bill, the defendant's handwriting to it, the several indorsements whereby the plaintiff became entitled, or its dishonour. The defendant has to prove the fact which he has pleaded; if he fails to do so, the plaintiff is entitled to recover.

(To be continued.)

## THE NEW RULES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—The remarks contained in your paper of the 12th inst. on the sudden appearance of the new rules in the County Courts, and the suspicion of jobbery connected with them, induces me to call public attention to the unhandsome manner in which some of the County Court judges have been treated by those who deemed it to their interest to smuggle these rules through Parliament. About sixteen of the judges practising in the country districts objected to that rule which compels them to hold only one Court a-day; their labours being of necessity much more in demand for some Courts than others, and the appropriation of an entire day to certain comparatively insignificant Courts being, in their opinion, a most useless waste of public time and money. These gentlemen accordingly took steps to prevent this rule being passed, but were induced to relax in their efforts, in consequence of one of the judges of the Superior Courts, before whom the rules were laid for revision, stating it to be his opinion that the rule in question required much modification. After this intimation of opinion by that learned judge, it was of course supposed either that the rule would be modified, or that some reason would be given for its being retained, or at least that the County Court judges would have had some opportunity of getting it corrected in Parliament. The rules, however, were laid on the tables of Parliament without any notice whatever of that fact being given, either to the County Court judges or any other person interested in opposing or altering them.

I trust, for the honour of British legislation, that this secret mode of affecting the rights of persons through the instrumentality of regulations, many of which are inevitably drawn up by individuals having private interests to serve, will not be permitted to continue. I am, Sir, yours, &c.

July 16, 1851.

A CONSTANT READER.

## QUESTIONS ON POINTS OF PRACTICE.

### INSOLVENCY.

If an insolvent have obtained from a creditor a receipt expressed to be in full of all demands, need the debt so discharged be included in the schedule? It was decided in a case in the Bankruptcy Court in London, that the mere verbal foregoing of a debt did not dispense with the insertion of the amount in the schedule; but no case has been found which establishes that such a receipt as that referred to above would not be equivalent to a release by deed.

INQUIRER.

## THE MERCANTILE LAWYER.

THE case of *Tarleton v. Liddell*, 17 Law T. 211, belongs as much, or perhaps more, to Real Property Law than to this department of the LAW TIMES.

The question raised by it was, whether a certain voluntary conveyance was void as against creditors. A trader, tenant for life of settled estates, with remainder to his wife for life, remainder to his son B. for life, with remainder over, joined his wife and B. in making a tenant to the *precipue* and suffering a recovery. By deed of the same date the uses were declared to be to B. and his heirs, during the life of A. for his own proper benefit, remainder to the wife for life, remainder to B. for life, remainder to his first and other sons in tail male, remainders over. By the same deed, other estates which A. held in fee were conveyed to the same uses, except that B. was to take an immediate estate for life in them. A. knew that he was insolvent, and executed these deeds for the purpose of defrauding his creditors; but B. was ignorant of the fraud. A. shortly afterwards became bankrupt. It was held that the deeds of recovery were void as against creditors; that the 4th section of stat. 13 Eliz. c. 8, did not apply to B. who was a party to the reco-

very, but only to persons who had estates in remainder or reversion expectant upon the estates of the parties to the recovery; that either the deed declaring the uses was void altogether by reason of his fraud, or that the declaration of uses was void altogether, by reason of the fraud of A. or that the declaration of uses was a voluntary conveyance within the statute of Eliz.

A case of unusual length in its facts, its arguments, and its judgment, but which derives its importance from being the decision of a Court of Error, is that of *Turner v. The Trustees of the Liverpool Dock Company*, 17 Law T. 212. The facts were briefly these:—A. a merchant at Charleston, bought cotton on account of B. and delivered it on board a vessel belonging to B. sent to Charleston expressly to carry it. The cotton was delivered to the captain, who was B.'s servant, and who signed a bill of lading for it, "to be delivered at Liverpool to order, or to our assigns, paying freight for the cotton nothing, being owner's property," and A. indorsed the bill of lading thus: "Deliver the within to the Bank of Liverpool, or order." A. afterwards drew bills on B. for the amount, and in the abstract of invoice sent it was stated that the cotton was shipped "for and on the account and risk of B." Afterwards, a full invoice was sent, describing the cotton as "shipped for Liverpool by order and for the account of B. and to them consigned." Before the goods arrived B. became bankrupt, and the defendants stopped them, and the assignees now brought an action to recover them. It was held that the plaintiffs had the right to stop *in transitu*, because there was not an absolute delivery to B. the bill of lading making the cotton deliverable to their order or their assigns. It was determined, also, that it mattered not that A. had funds belonging to B. in their hands, as no particular portion of the cotton was bought with those funds.

**LAW OF PARTNERSHIP.**—The report of the Select Committee on the Law of Partnership was issued this morning. After alluding to the report on the investments of the middle and working classes last session, when the subject was partially investigated, although no opinion was given, except in the two recommendations that charters of limited liability should be granted at less cost, and that co-operative societies should have facilities for protecting themselves against the dishonesty of individual associates, the committee proceed to state their conclusions upon the general question of responsibility—first, with reference to that of shareholders; and, secondly, to that of partners in private firms. As regards investments in industrial undertakings, it is shown that the progress of trade and population and the increase of large towns have had the effect of augmenting the amount of capital employed in connection with houses, manufactories, stores, &c. to the extent of about 130 per cent. from 1815 to 1848, while the augmentation in the capital representing land has been only 5 per cent. This enormous and constant increase of investments in personal property denotes the necessity for removing injurious obstacles with regard to them, more especially when it is considered that a principal feature of the accumulation is its great division among large classes of the community in the middle or more humble ranks of life. The modification or repeal of the usury laws and the several laws against combinations, as well as the introduction of various general Acts in favour of joint-stock associations, building societies, &c. are quoted as evidences of the wise tendency of modern legislation in this direction. Under the existing law, however, no person can advance capital to any undertaking, unless it be a chartered one, without becoming liable to his last shilling and his last acre. The committee contend that whatever advantages may result under some circumstances from such a system, it often deters persons of moderate capital, and who are esteemed for their intelligence and probity, from taking part in local enterprises of the nature of water and gas works, roads, bridges, markets, baths, lodging-houses, &c. and that it would be desirable, under the supervision of a competent authority, to grant charters in all such cases upon a definite form of application. With regard to private partnerships on limited liability, the committee, having found great diversity of opinion, hesitate to express an unqualified view. The best informed persons, however, seem unanimously to consider that additional facilities to settle partnership disputes in accounts, and some cheaper tribunal than Chancery, are wanting, and the committee, therefore, have come to the resolution that the law of partnership in general requires careful and immediate revision, and that a commission should be appointed of adequate legal and commercial knowledge to suggest such changes as may be requisite, whether as respects "the establishment of improved tribunals or the important and much

controverted question of limited or unlimited liability of partners." They state, also, the existence of a decided feeling that if a relaxation of the law of partnership should take place, increased stringency should be given to the Bankruptcy laws. An alteration of the usury laws is likewise recommended, to increase the facility of persons embarked or embarking in business to obtain increased capital, which the committee conceive would be one of un-mixed public advantage. They, therefore, suggest that power should be given to lend money for not less than a year at a rate of interest varying with the rate of profits in the business in which it may be employed; the claim for repayment of such loans being postponed to that of all other creditors; that in such case the lender should not be liable beyond the sum advanced; and that proper and adequate regulations be laid down to prevent fraud. From this latter recommendation it will be seen that the committee concede the chief point that has been desired by the advocates of restricted liability. The principle contended for was that men should be allowed to invest their money at their own pleasure, and to run the chance of profit or loss simply to the extent of such investment, and if they are set free to do this by way of loan, the end will in a great measure be gained, while, at the same time, the public will run no risk of misapprehending their position. In dealing with the question as to public companies, the recommendation of the committee is apparently neither so judicious nor so simple. They propose that the power of associating for useful enterprises under a limitation of liability should be extended by a greater facility in granting charters under rules published and enforced by the proper authorities, but Parliament are to take upon themselves to specify what are "useful enterprises," instead of relying upon the much safer results of individual sagacity.—*Times*.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Lord Chancellor has appointed Henry Wilcocks Hooper, of the city of Exeter, gent. to be a Master Extraordinary in the High Court of Chancery.

H. S. Chapman, esq. one the judges of the Supreme Court of New Zealand, is appointed Colonial Secretary in Van Diemen's Land. H. Falconer, esq. is appointed Colonial Secretary in Western Australia. Mr. J. Bell is appointed Crown Solicitor for Western Australia.

## COURT PAPERS.

**PROCLAMATION OF OUTLAWRY.**—BURNELL.—Thursday being County Court day, proclamation of outlawry was made by the authorised officer in the usual form. The following persons were called upon to surrender to the suit of their respective creditors: Duncan Davidson Alves, at the suit of Thomas Spencer; F. William Fryer, at the suit of Frederick Beasley; Watkin William Martin, at the suit of Edward Barnard; George F. Sydenham, at the suit of Morris Mayers; Bernard Brocas, at the suit of Edward Edwards; William Wilcocks Sleight, at the suit of Daniel Davies and others; Stephen Temple, at the suit of John Dick Vanderpont; Reuben Terriwest, at the suit of Carlos Butler Coney; Sir Windham Carmichael Anstruther, at two suits; Catherine Morrison, at the suit of Joseph Wilkinson; Hector Harvest, at the suit of Samuel Cathcart; John Edwards, at the suit of Francis Brown; Bernard Gregory, at the suit of Isabella A. Meares; Henry J. Noyes, at the suit of Lewis Harris; Edward St. John Mildmay, at the suit of Charles Thomas Pratt; William S. Porter, at the suit of J. H. Taylor; John Potter Macqueen, at the suit of Joseph Joel; Winfield Attenuburgh, at the suit of Richard Kirkman Lane; William Wodehouse, at the suit of James King; Henry William Marriot, at the suit of Frederick Augustus Davis.

## PROCEEDINGS OF LAW SOCIETIES.

### METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

THE Committee of Management held their usual monthly meeting on Wednesday, the 9th inst.; Mr. Watson, of Liverpool, in the chair.

The meeting was attended by a deputation from Liverpool and Manchester.

It was reported from the Equity Committee that Mr. Field, Mr. Gregory, Mr. Lake, and Mr. Kennedy had been examined before the Select Committee of the House of Lords upon the Master's Primary Jurisdiction in Equity Bill, and that other

members were expected to be examined. That the various steps taken by this Association had been laid before the Select Committee, and that a report strongly in favour of the Bill might be expected. The provisions of the Bill were further discussed, and some additional amendments agreed to.

Correspondence on the subject of the Registration of Assurances Bill was read from members and from the secretaries of the Law Societies of Bristol, Northampton, Gloucester, Liverpool, Kent, Beverley, Leeds, York, Hull, Manchester, and Preston. After a prolonged discussion it was resolved—"That in the opinion of this committee the proposed scheme of registration will not facilitate the transfer of real property, or satisfactorily remedy any of the evils affecting the present system of conveyancing; but that it will, on the contrary, considerably increase the expense of all transactions, more especially those of small amount, and that it will throw great obstacles in the way of, if not entirely prevent, the procuring temporary loans upon the deposit of title-deeds."

The secretary was instructed to prepare a petition against the Bill.

Mr. S. B. Jackman, of Ipswich, the hon. secretary of the eastern division of the Suffolk Law Society, and Mr. James Sparke, of Bury St. Edmunds, the hon. secretary of the western division of the same Society, were elected members of the Committee.

The committee adjourned until the 16th instant.  
WILLIAM SHAEN, Secretary.  
8, Bedford-row.

## LAW STUDENTS' DEBATING SOCIETY.

### QUESTIONS FOR DISCUSSION.

For Tuesday, July 22, 1851.

56. Is it necessary that non-compliance with the provisions of the 17th section of the Statute of Frauds should be specially pleaded? (*Barnett v. Glossop*, 1 Bing. N.C. 633.)

XLIX. Is a Government system of Secular Education desirable?

## CORRESPONDENCE.

### TO THE EDITOR OF THE LAW TIMES.

SIR,—I beg to call your attention to the Bill in the House of Commons to repeal the certificate duty on attorneys, and to the resolution of the House to make provision therein for including proctors, writers to the signet, and notaries.

Feeling that the special pleaders and conveyancers have an equal claim to be relieved of this burthen, I trust that you will use your powerful influence to obtain justice for these branches of the Profession also.

I am, Sir, yours, &c.

HENRY M. BURT.

23, Chancery-lane, July 10, 1851.

## LEGAL INTELLIGENCE.

### The Assizes.

#### WESTERN CIRCUIT.

DEVIZES, July 15.—The commission was opened here yesterday by Mr. Justice Coleridge. The business is wonderfully light—only one case, and but eighteen prisoners. This morning Mr. Justice Coleridge took his seat in the Nisi Prius Court at ten o'clock. Not a single Queen's Counsel was in court; and the only counsel employed were Mr. Arney for the plaintiff, and Mr. Hodges for the defendant. The Bar looked blank and uncomfortable.

#### NORFOLK CIRCUIT.

BEDFORD, July 16.—Mr. Justice Cresswell opened the commission for the county of Bedford yesterday afternoon, and this morning proceeded to try the prisoners. There being but seven prisoners in the calendar, and no cause entered for trial, Sir F. Pollock did not take any part in the business of the assizes. Among the offences included in the calendar were four of arson, one of burglary, one of malicious shooting, and one of larceny.

#### OXFORD CIRCUIT.

ABINGDON, July 15.—The commission for this county was opened here yesterday by Mr. Justice Erle. Business began to-day at half-past ten. The calendar contained the names of twenty-four prisoners. Of these, one was charged with manslaughter, one with rape, two with shooting at with intent to do grievous bodily harm, one with arson, two with highway robbery, three with burglary, five with housebreaking, six with larceny, one, a relieving officer, with forging signatures with intent to defraud the guardians of the Hungerford Union, and one with maliciously killing a pig, the property of the guardians of the Bradfield Union.

#### HOME CIRCUIT.

HERTFORD, July 17.—The business of this court commenced yesterday by the opening of the commission for the county of Hertford, and this morning both courts were opened at ten o'clock, Chief Justice



Jervis presiding on the Civil side, and Mr. Baron Alderson in the Crown Court. The gaol calendar and the cause list are both very light, and the Chief Justice disposed of the whole of the common jury cases in little more than an hour, and he then tried some prisoners.

#### MIDLAND CIRCUIT.

OAKHAM, July 16.—Mr. Justice Maule arrived at Oakham on Tuesday afternoon, and on Wednesday morning he opened this commission. In his charge to the grand jury he congratulated them on the fact of there being no prisoners for trial. There was only one cause for hearing at Nisi Prius.

#### NORTH WALES CIRCUIT.

CARDIFF, July 14.—The commission for these Assizes was opened here before the Honourable Sir T. N. Talfourd, on Saturday. Yesterday his lordship, attended by the high-sheriff, Mr. Turberville, attended Divine service at St. Mary's Church. This morning his lordship addressed the grand jury, and the routine business of the Court commenced. The calendar is unusually light, containing only twenty-four prisoners for trial. As yet two civil causes only, an action for trespass and an action for debts, have been entered for trial.

LAW REFORM.—Her Majesty's Commissioners for inquiring into "the Process, Practice, and System of Pleading in the Superior Courts of Common Law," have made their first report, which was on Monday presented to both Houses of Parliament. It is signed by Chief Justice Jervis, Baron Martin, Sir A. C. Cockburn (who were appointed before their elevation to their present offices), and by Messrs. W. H. Walton, G. W. Bramwell, and J. S. Willes. Sir James Graham and Mr. Henley (Oxfordshire) have been appointed to the Commission of Inquiry into the Constitution and Practice of the Courts of Equity. These additions have been made at the suggestion of the House of Commons, that two laymen should be added to the commission, which, on its first appointment, included Sir John Romilly, Sir W. Page Wood, and other members of the Chancery bar, and Mr. Crompton of the common law. Several amendments have already resulted from the inquiries instituted, and a very comprehensive report may soon, we understand, be expected.

THE BENCH AND THE BAR AT SCHOOL.—The bench is making decided advance in the knowledge of life. We remember when Lord Abinger was caught tripping in the quotation of an expression familiar enough. As he was gravely summing up, he following colloquy arose:—*Lord Abinger* (to be jury)—"And then the defendant said he would lay hell and Jemmy with him." *Mr. Sergeant Linthwaite*—"Hell and Tommy, my Lord." *Lord Abinger*—"Thank you, brother Linthwaite. (Proceeding.) And the defendant said that he would lay hell and Tommy with him." But in our day it is the Bench that corrects the Bar. In the case of *Smith v. Brown* we have the following interlocution:—*Mr. Montagu Chambers* said that there was no accounting for tastes. 'Some like grapes and some onions.' *The Lord Chief Justice*—"No, no: 'Some like apples, some like lions.'"

SIR J. L. KNIGHT BRUCE'S COURT.—BUSINESS OF THE COURT.—His Honour said that in future, in simple and undisputed cases, he should be willing to receive evidence at the hearing without sending the parties into the Master's office.

ATTORNEYS' CERTIFICATES.—The Bill brought into the House of Commons by Lord Robert Grosvenor and Sir F. Theiger, to repeal the annual certificate duty payable by attorneys, solicitors, notaries, writers to the signet, and notaries, has been ranted. A certificate will be given under this Act, which will be, in all respects, equivalent to the present stamped certificate.

BENEFICES.—A return has been made to Parliament of all benefices, rectories, or vicarages which have been united under the Act 13 & 14 Vict. c. 98. Since the passing of the Act, on the 14th August 1st, two orders for disunion have passed the Privy Council, and six orders for separation of chapelries, relating in the whole ten new benefices.

THE MASTERS' JURISDICTION BILL.—In the House of Lords, the committee on the Masters' Jurisdiction Bill was assembled during the hearing of the cause, which was stopped for some time in order that Lord Brougham's evidence might be taken previous to his leaving town. The Lord Chancellor was in the chair, and Lord Brougham as sworn at the table and examined. He stated that he of course approved generally of the Bill which he had himself introduced, but as to some minor details he reserved to himself their consideration after hearing the evidence. But he added, that though he regarded the measure as well calculated to effect a most important improvement in the proceedings, and to remedy some of the greatest evils now complained of, he was very far from considering as sufficient to meet all the mischiefs of the system—that this could only be done by making the judges of the court work out their own decrees, sitting in court to hear important matters of a general

nature with the aid of counsel, and disposing of matters of detail by sitting in chambers. He said he was aware that this change involved the necessity of increasing the judicial force of the Court and dispensing with the Masters' offices, which would become superfluous. His lordship observed that the statements which he had made the day before in his place were all such as to support the conclusion given in the opinion now expressed, though he might have omitted to point them towards that conclusion from assuming that those who heard him were aware of what had passed in the committee. The Lord Chancellor asked Lord Brougham if he could give the names of the cases to which he had referred in his statement? Lord Brougham said they were all—save one in the first day's evidence—reported from the committee and already printed, and he would send a note of them before he left town. The committee then ended and the cause went on.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### MARRIAGES.

APPELBY, R. H. barrister, of Lincoln's-inn, esq. eldest son of the late Richard Smith Appelby, esq. to Charlotte Mailla, only child of the Rev. W. Stamer, D.D. rector of St. Saviour's, Bath, on the 13th inst. at All Souls' Church, Langham-place.

GARRACU, Victor, esq. barrister-at-law, to Grace Helen, eldest daughter of the late Robert Stewart Cumming, esq. M.D. of the 7th Hussars and Royal Artillery, on the 13th inst. at Edinburgh.

##### DEATHS.

CATCAIRN, John F. of the Bengal Civil Service, youngest son of the late Lord Alloway, one of the Judges of the Supreme Courts of Session and Judiciary in Scotland, on his way home from India, at Lausanne, in Switzerland, aged 40.

BINGLEY, William Cottrell Warwick, eldest son of the late William Cottrell Bingley, of Queen's-buildings, Brompton, solicitor, at Northolt, near Uxbridge, on the 15th inst.

WALKER, Edmund, esq. of the Exchequer Office, Lincoln's-inn, and of 5, Clifton-villas, Warwick-road, Paddington, on the 17th inst. aged 70.

#### JOURNAL OF PROPERTY.

##### Public Sales.

By Mr. MOORE, at the Mart.

A convenient six-roomed dwelling-house, on the Mercers' estate, being No. 6, Paterson-street, Stepney; let at 21s.; term, 50 years; ground-rent, 4s.—156s.

Also, No. 7 adjoining, of a like description—166s. An eight-roomed semi-detached residence, with garden and forecourt, No. 10, Coburn-street, Bow-road; let at 28s.; term, 55 years; ground-rent, 6s.—275s. and the fixtures at a valuation.

And a six-roomed house in Friendly-place, Mile-end; let at 17s.; vendor paying rates; term, 55 years; ground-rent, 11s. 2s.—135s.

#### THE GAZETTES.

##### Bankrupts.

Gazette, July 18.

ACHES, RANDALL, jun. tinkeeper, Fuckeridge, Braughing, Hertfordshire, July 26 and Aug. 30, at twelve, Basinghall-st. Com. Fonblanque. Off. as. Stansfeld. Sols. Jenkinson, Sweeting, and Jenkinson, Clement's-lane, Lombard-st.; and Richardson, Munch Hadham, Herts. Petition, July 14.

BARNETT, WILLIAM HENRY, miller, and corn and flour merchant, Gloucester, Aug. 6 and 20, at eleven, Bristol. Com. Stephens. Off. as. Miller. Sol. Brotherton, Gloucester. Petition, July 7.

BRUNSKILL, WILLIAM, silk and ribbon manufacturer, 9, Paternoster-row, and York-place, Battersea, July 26, at half-past twelve, and Aug. 23, at half-past one, Basinghall-st. Com. Fane. Off. as. Cannan. Sols. Crowder and Maynard, Coleman-st. Petition, July 18.

BURMAN, WILLIAM, picture dealer, 35, Gerard-st. Soho, July 20, at one, and Aug. 30, at two, Basinghall-st. Com. Goulburn. Off. as. Pennell. Sol. Bodman, 25, Bucklersbury. Petition, July 16.

PROST, HENRY CHARLES, boarding and lodging-house keeper, Russell-square, July 26 and Aug. 30, at one, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sol. Steinberg, Broad-st. Chesham. Petition, July 9.

MATY, RICHARD, fancy colour and enamelled paper manufacturer, Paul's-wharf, Upper Thames-st. July 26 and Aug. 30, at one, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sol. Loughborough, Austin-frars. Petition, July 15.

OWERS, GUTHRIE LEAH, woollendrapier, Enniscoorthy, Wexford, Ireland, July 26 and Aug. 26, at twelve, Manchester. Off. as. Fraser. Sols. Sale, Worthington; and Shipman, Manchester. Petition, July 9.

SUMMERS, ROBERT, pawnbroker and silversmith, 37 and 39, Bath-st. City-road, Aug. 1, at eleven, and Aug. 30, at half-past twelve, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sol. Whittington, 3, Dean-st. Finsbury-square. Petition, July 4.

WALTON, JOHN, coach builder, Nantwich, Cheshire, July 26 and Aug. 18, at eleven, Liverpool. Com. Perry. Off. as. Casenove. Sol. Broughton, Nantwich, Cheshire. Petition, July 13.

##### Dividends.

##### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

Adams, W. B. and Bolton, G. engineers, first joint,

7s. 6d. Cannan, London.—Atkinson, W. jun. shipwright, first, 2s. 6d. Hope, Leeds.—Boyle, R. jun. merchant, first and final, 2s. 11d. Carrick, Hull.—Cassels, M. J. F. merchant, third, 1s. 4d. Edwards, London.—Houston, J. hotel keeper, first on new proofs, 4s. 4d. Young, Leeds.—Lumley, G. cotton manufacturer, final, 1d. Lee, Manchester.—Nicholson, S. druggist, first, 2s. 6d. final, 5d. Hope, Leeds.—Taylor, H. A. artist, first, 2s. 6d. Hope, Leeds.

#### Assignments for the Benefit of Creditors.

Gazette, July 8.

Asmuck, H. C. grocer, Wakefield, Yorkshire, June 26. Trusts. W. Hornby, tobacco manufacturer, Leeds; T. Little, commission agent, Wakefield; and A. W. Spence, grocer, Wakefield. Sols. Lamb, Sons, and Stewart, Wakefield.—Griffiths, J. draper, Strand, May 23. Trust. J. Baggallay, warehouseman, Love-lane. Sols. Sole and Turner, Aldermanbury.—Oakes, E. ironmonger out of business, Sheffield, June 24. Trusts. C. Marshall, saw manufacturer, and E. Stacey, plater on steel, both of Sheffield. Sol. W. B. Fernell, Sheffield.—Parrington, E. licensed victualler, Norfolk Arms Hotel, Strand, July 3. Trusts. J. Shenton, wine merchant, Bine Stile, Greenwich, and G. Gilbert, gentleman, Bedford-st. Strand. Sol. H. Levy, Arundel-st. Strand.—Frettingham, J. P. grocer, Plymouth, May 26. Trusts. D. Millward, jun. merchant, and J. King, and S. Stanbury, grocers, all of Plymouth. Sol. W. Lavers, jun. Plymouth.—Taylor, H. corn miller and farmer, Treoton, Yorkshire, July 1. Trusts. W. Brown, bank manager, Sheffield, and W. Burket, corn factor, Chesterfield. Sols. E. Bramley and E. J. Gainsford, Sheffield.—Webb, W. jun. merchant, Llanelli, Carmarthenshire, June 9. Trust. H. J. Evans, banker, Llanelli. Sol. B. Jones, Llanelli.

Gazette, July 11.

Butler, J. joiner and cabinet maker, Preston, Tynemouth, Northumberland, June 5. Trust. E. Storey, timber merchant, Tynemouth. Sols. Barker and Fenwick, North Shields.—Stock, W. maker-up and packer, Manchester, July 1. Trusts. T. Briggs, manufacturer, and J. Fleming, rope maker, Manchester. Sol. W. M. Atherton, Manchester.

#### Partnerships Dissolved.

Gazette, July 8.

Arnall and Allender, stock brokers, Copthall-chambers, June 30.—Barry and Plant, stock brokers, Leeds, July 3.—Best and Fletcher, curriers and leather cutters, Sheffield, July 5. Debts paid by Best.—Brook, J. Sons, and Golden, Huddersfield, and Brook, Sons, and Co. London and elsewhere, wool merchants, as regards Golden, June 30. Debts paid by J. & G. H. Brook.—Brown, Sharpe, and Co. muslin manufacturers, Paisley and London, as regards W. Sharp, June 30.—Bryant and Sons, drapers and wine merchants, Ventnor, May 23.—Chase, R. and Co. cheese factors and provision merchants, Bristol, as regards F. Cundy, June 30. Debts paid by R. Chase and T. H. Cundy.—Deane, G. and J. gun manufacturers, King William-st. March 25.—Edlin and Co. merchants, Liverpool, June 11.—Goodacre, S. and J. grocers, and hop, malt, and seed merchants, Liverpool, June 30. Debts paid by S. Goodacre.—Gratrix, Brother, and Co. worsted spinners, Preston, and Keighley, G. and Co. commission agents, Bradford, July 8. Debts paid by J. and C. Gratrix.—Harrison and Nichols, ship and insurance brokers, Three Kings-court, Lombard-st. as regards W. M. Nichols, June 30. Debts paid by T. and C. Nichols.—Hemman and Malone, photographers, Regent-st. July 7. Debts paid by Hemman.—Jackson and Brinkell, surgeons, Chaddesley Corbett, June 26.—Knowles, J. and J. corn millers and farmers, Shipley, July 3. Debts paid by John Knowles.—Marral, W. M. and Parker, W. chemists and druggists, Westchester, July 5. Debts paid by Parker.—McDiarmid, A. and Johnson, E. teachers of navigation, &c. Liverpool, July 5.—Mellor, Venables, and Co. manufacturers of china and earthenware, Burslem, June 30.—Merrides and Delmar, colonial brokers, Mincing-lane, July 3. Debts paid by Delmar.—Pomfret, T. and W. innkeepers, Blackburn, July 2. Debts paid by W. Pomfret.—Robinson, G. F. and Brother, cotton spinners, Stockport and Manchester, June 30. Debts paid by G. F. Robinson.—Sadler, Firth, and Ross, seed crushers and mustard manufacturers, Great Guildford-st. Southwark, June 30. Debts paid by Ross.—Sheridan and Sheriff, cotton and linen manufacturers, Manchester, July 6. Debts paid by Sheriff.—Sutton, G. F. F. Evans, C. Ommansy, F. T. and Brothers, hotel keepers, Durham, June 29. Debts by J. Ward.—Waterfall and Co. iron and steel manufacturers, Tankersley, as regards Waterfall, July 1. Debts paid by remaining partners.—Watson and Siddons, ironfounders, West Bromwich, as regards J. F. Watson, July 2. Debts paid by J. M. Watson and J. Siddons.

Gazette, July 11.

Arnall and Allender, stock and share brokers, Copthall-chambers, June 30.—Brookes, W. and Cooper, G. C. London, July 10.—Buchler and Carstanien, merchants, Fenchurch-st. July 11.—Church, J. and Milton, H. M. horse dealers and livery-stable keepers, Oxford-st. July 7.—Compton, E. and Co. brewers and flour dealers, Ilford, and Silver-st. Bloomsbury, July 1.—Cooper and Allway, coal merchants and ship brokers, Southampton, June 30. Debts paid by Allway.—Dallas and Lyon, coach builders and harness makers, Preston, June 25. Debts paid by Myroes and Vevers, Preston.—Dixon, Jos. and John, rice cleaners, City-road, July 9.—Emanuel, Bebarfeld, and Son, oap manufacturers, Hounslow, as regards Emanuel, July 9.—Freeman, T. and Richardson, C. cement, brick, and lime merchants, South Wharf-road, Paddington, July 9. Debts paid by Richardson.—Harrison, H. and Haigh, G. P. wine and spirit merchants, Martin's-lane, June 30.—Hayes, T. and Co. porter dealers, Liverpool, July 6. Debts paid by Hayes.—Hudson and Bottomley, scabbling millers, Kirkstall, June 1, 1850.—Lewis and Co. jewel-case makers, Newman-st. Oxford-st. July 3. Debts paid by Lewis.—Mawd, J. and Rose, J. carpenters and fixture dealers, Wittenham-buildings, Old-st. road, July 9.—Morgan, E. and S. woollaplers, Newtown, July 1.—Newstead and Co. wine and spirit merchants, Manchester, Nov. 23.—Quigley and Postlethwaite, brush manufacturers, Manchester, June 24. Debts paid by Postlethwaite.—Reynolds, S. and G. iron-plate workers, Grafton-st. Soho, as regards S. Reynolds, June 30.—Wilson, C. and Hall, T. Wellington-chambers, London-bridge, Feb. 7, 1850.

## LAW REVERSIONARY INTEREST

AND INVESTMENT SOCIETY,  
Offices, 30, Essex-street, Strand, London.

In shares of 25*l.* each.

Not more than 1*l.* to be called for at one time, nor at less intervals than three months.

This Society was partly formed three years ago, and a great number of shares were subscribed, but the then depression of the money market compelled its postponement.

The improved state of the country causing safe and profitable investments to be sought for, suggests the propriety of now proceeding to complete the establishment of a society whose design has met with such extensive support.

Another peculiarly advantageous circumstance is the means now afforded by the formation of the *Law Property Assurance and Trust Society* for the conducting of the business of the Law Reversionary Interest and Investment Society at a comparatively trifling cost, it being proposed to make an arrangement with the former flourishing Society for the use of its offices and officers, instead of incurring the great expense of a separate establishment, thus immensely increasing the profits of the *Reversionary Interest Society*.

The plan is shortly as follows:—

1. The *Law Reversionary Interest and Investment Society*, to be formed of holders of shares of 25*l.* each. Deposit, 2*s.* 6*d.* per share.

2. Calls not to exceed 1*l.* per share, nor at less intervals than three months.

3. The business to be conducted at the offices and by the establishment of the *Law Property Assurance and Trust Society*; but entirely as a distinct Society, with distinct books, accounts, &c.

4. The Profession to have the advantage of a fair commission on all business its members may bring to the office.

5. To the public it will offer the advantage of fair prices or Reversionary Interest and Policies of Assurance, with an option of converting Reversionary Interests into present income, so as to make provision for immediate wants, and otherwise to facilitate family arrangements.

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Applications for shares, in the form below, to be addressed to the Secretary, at the offices of the *Law Property Assurance and Trust Society*, 30, Essex-street, Strand. HERBERT COX, Secretary pro tem.

March 14, 1851.

### FORM OF APPLICATION FOR SHARES.

To the Promoters of the Law Reversionary Interest and Investment Society.

Gentlemen,—Be pleased to allot me shares in the Society, on the terms named in the Prospectus.

Yours, &c.

Dated ..... Name .....

Address .....

N.B. Unless the Society is formed, the entire deposit will be returned, and the expenses paid by the promoters.

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## To Readers and Correspondents.

"W. B." misunderstands the arrangement. The Society proposes to employ the attorney who brings the business. It designs only to relieve the trustee, not to remove the business from the solicitor who had the conduct of it before.

"A CLERK."—Yes. The County Courts Chronicle pocket edition of the *New Rules of Practice in the County Courts* is given without any charge to persons who order the new edition of Cox and Lloyd's Practice, and it is forwarded by post, paid.

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## THE LAW TIMES.

SATURDAY, JULY 26, 1851.

## THE ATTORNEYS' TAX.

LORD ROBERT GROSVENOR has withdrawn his Bill for the repeal of this tax.

At present we know not the motives that influenced this determination to retreat in the very moment of victory.

But we have no doubt, from the good generalship which his lordship has displayed before, that he is acting prudently now. We have little doubt, indeed, that he has received a promise from the Government that it will bow to the repeated decisions of the House, and, without the compulsion of a statute, voluntarily abandon this iniquitous impost in the next financial arrangement.

If so it be, Lord ROBERT GROSVENOR will have acted prudently in withdrawing his successful Bill. He will have turned his victory to the best account.

## REGISTRATION OF ASSURANCES BILL.

THIS Bill has been withdrawn for the present session.

It will be revived next year; but it must be fought after a different fashion. Let the Lawyers, who know its practical difficulties and defects, meet it, not by a mere negative, but with a measure of their own.

During the Vacation we will discuss the merits of such a measure. It is *thus* that we must protect ourselves for the future.

The means for effecting that object shall also be brought under the consideration of the Profession.

VOL. XVII. No. 434.

## FREE TRADE IN LAW.

THE die is cast. Free trade in Law has been openly advocated in the House of Commons, and has actually received a partial recognition by the Legislature. The small end has been inserted of the wedge which is to rend the Profession to pieces.

"Why should not the suitor be permitted to employ whomsoever he pleases to be his Advocate? Why should there be given to the Bar a monopoly of advocacy? Let the public be free to choose between the Barrister and the Attorney. Away with the distinction of functions which has been hitherto observed. Let them be as one, so will there be competition, and competition will bring down the price of law. The two classes of Advocates will bid against one another for employment, and the suitor will reap the profit in diminished charges."

Such, in sum and substance, was the argument that prevailed with the House of Commons formally to abolish in the County Courts the distinction between the Advocate and the Attorney, to overthrow the established rule of the Profession, and to permit a Barrister to take instructions without an Attorney, and the Attorney to perform the duties of a Barrister.

From the confusion of functions that will thence arise we anticipate incalculable mischiefs. There will be jealousies and rivalries between those who ought to be mutual assistants and supporters. Instead of the Attorney aiding the Barrister by employing him to conduct the case he has prepared, and the Barrister in return for this helping the business of the Attorney by refusing to see the client or to take instructions save through the medium of an Attorney, we shall see, in the County Courts, Barristers receiving briefs from the clients, and Attorneys endeavouring to supersede the Barristers and secure the double fee of the twofold office. In this unseemly struggle it can scarcely be expected that both will not suffer in reputation as well as in pocket. Nor is such a result conjectural. We have the positive experience of all other countries in which the functions of Advocate and Attorney are permitted to be joined, as in France, and Italy, in America, and in all of them the consequence has been the depression of the *status* of the whole Profession. We see in them what we shall be before this generation shall have passed away.

But the worst remains. What has been done is only a beginning. The principle that has been avowed and acted upon is of far wider application. The advocates of free trade in law, who say that there should be no distinction between Advocate and Attorney, and that the suitor should be permitted to employ either one or the other, who call the privileges of the Bar a monopoly, and war against them as such, must in common consistency carry out their argument, and protest against the monopoly of the Attorneys. The argument is at least as applicable to them. "Why should the suitor be compelled to employ an Attorney to do his legal business for him? Why should he not be allowed to go to *any* person, in whom it pleases him to place confidence? Doubtless many would be found to do his work for him quite as well at half the price. You have abolished the monopoly of advocacy by the Bar, you cannot refuse to abolish the monopoly of the Attorneys?"

Such will be the argument, and how can it be answered? Who can doubt that it will be urged again and again, that it will be carried out practically, step by step, and that its final consummation may be witnessed by many who are now living?

Indeed already the first blow has been struck, the first step has been taken. The same Bill that destroys the privilege of the Advocate also invades the privilege of the Attorney. It provides that *any person* may be

heard in the County Courts with leave of the judge. Thus the privilege of the Profession is made to depend upon the mere will of the judge, instead of being, as hitherto, a right which none was permitted to invade. Is not the danger more imminent than our readers had imagined? Do they not see how very little more is now required to set the door wide open, and to overwhelm them with a deluge of sham lawyers, agents, accountants, and debt collectors?

And why has the Profession been dragged to this precipice, and subjected to this invasion, that threatens the destruction of *both* its branches? We are in duty bound to tell our readers frankly the cause of this peril. *It is the consequence of want of unanimity.* They have not pulled together, as they ought to have done; they have forgotten that they are in the same boat, and will swim or sink together. The Attorneys have inconsiderately sought to invade the province of the Bar, instead of striving to maintain those privileges as akin to their own, and the Bar have not sufficiently remembered the interests of the Attorneys, and supported them by their influence in and out of Parliament. While surrounded with an active foe without, we have been indulging in rivalries and difference within, and the common enemy has availed himself of this to destroy us in detail, by first invoking the aid of the Attorneys to the overthrow of the privileges of the Bar, and then it will invite the willing aid of the public to sweep away the privileges of the Attorneys.

It is in these circumstances and with such prospects that we call upon the whole Profession, without distinction of names, as Lawyers, having a common interest, to throw aside their rivalries, to devise together measures for the general good, which may serve to prevent the fatal consequences of recent legislation, and enable them to present a bold and united front against further invasions of the interests of either, assured that one cannot be injured without the other being damaged also.

In this paper we have sought to indicate the mischief that has been done, and the greater mischiefs that are threatened, and to awaken the Lawyers to a sense of their peril, and of the duty of union, which is now incumbent on them. How they should unite, and to what objects they should direct their common efforts, will be considered in future papers; and we invite our thoughtful readers to give us the benefit of their suggestions on this most anxious and serious inquiry.

## LAW OF EVIDENCE BILL.

THE Commons have made a material alteration in this great measure, by restoring the provision which the Lords had struck out, compelling a wife to give evidence against her husband in civil cases.

There can be no doubt in the mind of any person supporting the principle of the Evidence Bill, that the Commons have only carried out that principle to its proper consequences. But it is greatly to be feared that it may endanger the safety of the Bill in the Lords. Although it passed the Upper House without a division, it has there many secret enemies, and notably the Lord Chancellor, who would be glad to seize upon any plausible excuse for its rejection. We trust, therefore, that if the Lords continue to shew a repugnance to the provision introduced by the Commons, the latter will not persist in it. The Bill is so vast an improvement of the law that it ought not to be imperiled by adhesion to a point of very secondary importance.

In the meanwhile the pendency of this measure has produced a curious effect upon litigation. The extraordinary diminution of civil business on the present Circuits is not wholly the result of the County Courts, but, to a considerable extent, a temporary consequence of the *Law of Evidence Amend-*

ment Bill, which is operating thus. That measure being designed to permit the examination of the parties to the suit as witnesses, impending trials have been delayed, notice of trial recalled, and records withdrawn, purposely to await the passing of the Bill, which will enable the cases to be proved more certainly and with half the cost than they could be if they were to be tried at these present Assizes.

What an emphatic testimony is this to the merits of Lord Brougham's Bill!

### THE OATH.

WITH the political question which Mr. Alderman SALOMONS has caused to be raised in the House of Commons we have no concern, nor do we care about it. But the legal question is of great interest and importance, and having elicited opposite opinions from two such great authorities as Mr. BETHEL and the SOLICITOR-GENERAL, we cannot pass it by without notice.

It certainly seems to us to be sufficiently clear.

A statute prescribes an *oath*, in a form there given, to be taken by members of the House of Commons.

It is a rule that when an oath is directed to be taken by law it is to be taken in the form that is most binding upon the conscience of the person taking it.

An oath, therefore, consists of two parts, the *oath proper*, or that which the party swears to do or not to do, and which is the substance of the oath, and the adjuration or sanction, which is the form in which the substance of the oath is taken.

When a law prescribes an oath, the substance cannot be varied, but the form in which it is administered is varied according to the belief of each person called upon to take it.

Thus it is that, in a court of justice, while the substance of the oath is never altered, the form of its adjuration is varied continually, to meet the various scruples of conscience, every person taking it in the manner which he believes to be the most binding upon his own conscience.

To apply this principle and practice of the law to the case of the House of Commons oath.

The statute there has prescribed an oath; the adjuration of that oath is "on the true faith of a Christian." A Jew objects, of course, to repeat such a formula, but he is ready to take the substance of the oath in the form most binding on his own conscience.

Can that portion of the prescribed oath be legally dispensed with?

We have no doubt that it can. The same rule is applicable to this as to any other oath; and all other oaths are in their administration adapted to the conscience of the taker. The practice of the law is to permit the form to be varied, provided the substance, that is, the *oath* properly so called, is strictly observed. Now, the words "on the true faith of a Christian" are no part of the *oath* itself, the member is not required to swear that he is a Christian, it is nothing more than the form in which the oath is administered, and which, not being the form most binding upon the conscience of a Jew, is not the form in which it ought, according to the practice of the law, to be administered to him.

But, as if to make the absurdity of any different construction the more palpable, the House allowed the oath to be administered on the *Old Testament*, thus admitting the principle that the form may be varied to meet the particular conscience. This once admitted, it is very difficult to say why a similar variation might not be legally made with the same purpose in another portion of the form, which is not of the substance of the oath.

We trust that this very curious and interesting question will in some shape be brought

under the consideration of the judges, and fairly and fully argued. Were it not for the confident assertion of the two Law officers of the Crown, we should feel scarcely a doubt that their decision would be in accordance with the argument which we have sought to state briefly, but, we trust, intelligibly.

## THE LEGISLATOR.

### Imperial Parliament.

#### PUBLIC BUSINESS TRANSACTED.

##### BILLS READ A FIRST TIME.

Saturday, July 19.

Soap Duty Allowances  
Mercantile Marine Act Amendment.

Monday, July 21.

Sheep, &c. Contagious Diseases Prevention  
Commissioners of Railways Act Repeal  
Attorneys and Solicitors Regulation Act Amendment.

Tuesday, July 22.

Consolidated Fund  
Metropolitan Sewers  
Emigration Advances, Distressed Districts, Scotland.

Wednesday, July 23.

Lunatic, India.

Thursday, July 24.

Canada and New Brunswick Boundary.

##### BILLS READ A SECOND TIME.

Friday, July 18.

Grand Jury Oath, Ireland  
Poor Relief Act Continuance.

Saturday, July 19.

Conveyance of Mails by Railways.

Monday, July 21.

Commons Inclosure, No. 2  
Soap Duty Allowances  
Militia Pay.

Wednesday, July 23.

Consolidated Fund.

Thursday, July 24.

Metropolitan Sewers  
Emigration Advances, Distressed Districts, Scotland  
Church Building Acts Amendment  
General Board of Health, No. 3  
Sheep, &c. Contagious Diseases Prevention  
Commissioners of Railways Act Repeal  
Representative Peers for Scotland.

##### BILLS READ A THIRD TIME AND PASSED.

Friday, July 18.

Copyhold and Inclosure Commissions  
Charitable Institutions Notices  
Tithe Rent-charge Assessment.

Monday, July 21.

Merchant Seamen's Fund.

Tuesday, July 22.

Grand Jury Oath, Ireland  
Mercantile Marine Act Amendment  
Arrest of Absconding Debtors  
New Forest Deer Removal, &c.  
Local Acts, Preliminary Inquiries.

Wednesday, July 23.

Commons Inclosure, No. 2.

Thursday, July 24.

Customs  
Soap Duty Allowances  
Militia Pay  
General Board of Health, No. 2.

#### PRIVATE BUSINESS TRANSACTED.

##### BILLS READ A THIRD TIME AND PASSED.

Friday, July 18.

Victoria Park.

Saturday, July 19.

Jackson's Estate  
Lethbridge's Estate  
National Land Company, Dissolving  
General Board of Health, No. 3  
Militia Pay.

Monday, July 21.

Sheffield and Glossop Road, No. 3  
Hove Improvement.

Thursday, July 24.

Sheffield and Glossop Road, No. 3  
Inverness Bridge, No. 2.

#### SESSIONAL PRINTED PAPERS.

Par. Num.

410. Ecclesiastical Courts—Abstract of Return  
485. Ships, Mediterranean—Copy of Memorial  
492. Ships, *Leander*, *Phaeton*, &c.—Return  
506. Poor Relief—Return  
508. Lunatic—Returns  
515. Victoria-street Sewer—Return  
520. Harbours of Refuge—Returns  
536. Poor and County Rates, &c. Ireland—Abstract of Returns  
476. Lead, Copper, Tin, Zinc—Account  
480. Pauperism, Bedfordshire—Report of R. Weale, esq.  
507. County Rates—Return  
528. Land Tax, Bradley Haverstoe—Copies of Letters  
530. Navy, Vessels purchased—Return  
548. Harwich Election Petition—Proceedings of Committee  
554. Rate in Aid, Ireland—Account  
455. Greenwich Hospital Schools—Annual Report  
506. Lunacy—Returns  
537. Free Sittings in Churches—Return  
549. Redundant List, Public Departments—Abstract of Returns  
Criminal Offenders, England and Wales—Tables  
140. Public Income and Expenditure, &c.—Accounts, a corrected copy

511. Criminal Prosecutions, &c. Scotland—Treasury Minute, a corrected copy  
557. Civil List Pensions—Annual List  
562. Schools, Ireland—Abstract of Return  
563. Electoral Divisions, Ireland—Return  
566. Steam Vessels—Return  
585. Coalwhippers, Port of London, Bill—Report from Committee

#### Inspectors of Factories—Reports

New Zealand—Papers

542. Bills—Grand Jury Oath, Ireland  
544. — Arrest of Absconding Debtors, amended  
557. — Sheep, &c. Contagious Diseases Prevention  
571. — Law of Evidence Amendment, amended  
576. — Steam Navigation, as amended by the Select Committee

578. — Metropolitan Sewers  
579. — Emigration Advances, Distressed Districts, Scotland

551. — Emancipation of Copyholds, No. 3

560. — General Board of Health, No. 3

561. — Militia Pay

563. — Conveyance of Mails by Railways, amended

568. — Commissioners of Railways Act Repeal

569. — Attorneys and Solicitors Regulation Act Amendment

547. — County Rates and Expenditure, as amended by the Select Committee, and on recommendation

553. — Commons Inclosure, No. 2

559. — Soap Duties

549. — New Forest Deer Removal, &c. amended by Select Committee

552. — Representative Peers for Scotland

### HOUSE OF LORDS.

#### ROYAL ASSENT BY COMMISSION.

THURSDAY, July 24.—The Royal assent was given, by commission, to the following bills:—

The Survey of Great Britain Bill, the School Sites Amendment Bill, the Landlord and Tenant Bill, the Prisons (Scotland) Bill, the British White Herring Fishery Bill, the Common Lodging-houses Bill, the Lodging-houses Bill, the Ecclesiastical Jurisdiction Bill, the Highway-rates Bill, the Loan Societies Bill, the Militia Ballots Suspension Bill, the Assessed Taxes Composition Bill, the Public Works, Fisheries, &c., Bill, the Apprentices to Sea Service (Ireland) (No. 2) Bill, the Marriages (India) Bill, the Turnpike Acts Continuance Bill, the Turnpike Trusts Arrangement Bill, the Inhabited House Duty Bill, and the Burgesses and Freemen's Parliamentary Franchise Bill. More than fifty other bills, local and private, also received the Royal assent.

### HOUSE OF COMMONS.

#### ADMINISTRATION OF CRIMINAL JUSTICE IMPROVEMENT BILL.

WEDNESDAY, July 23.—The House went into committee upon this Bill. On clause 1, Mr. BAINES said he was anxious, as chairman of the select committee which had sat upon this subject, to state briefly the extremely important objects which he apprehended would be carried into effect by this Bill. The measure itself was for the improvement of the administration of criminal justice in this country, and it was one of a series for the purpose of effecting real and valuable improvements in the law, for which the public were indebted to the present Lord Chief Justice of the Queen's Bench. The Bill had come down from the House of Lords with the approbation, he believed, of all the law lords in that House, but there were some provisions, with regard to which one or two of the judges felt a difficulty; yet a great proportion of the learned judges both in England and Ireland were decidedly in favour of it. By the first clause powers of an extensive nature were given to the Court of amending any variance which might appear between the indictment on which the prisoner was tried and the evidence, regard being had that the prisoner should not be prejudiced or the merits of the case perverted by such amending. This was analogous with the power which had been given to amend in civil cases by an Act passed so long ago as 1832 (the 3 & 4 Wm. 4, c. 42). He believed that great advantage would result from this clause, and he hoped that the House would think that the courts might safely be entrusted with the power in this respect which the Bill proposed to give them. Another object which the Bill had in view was that of shortening and simplifying the form of criminal pleading. At present indictments might be made of very great length, entailing great expense in the framing of them, and great risk of variance in the proofs. The counts were multiplied to an incredible extent, there being sometimes as many as 10, 15, or 20 in a simple case of homicide, ringing the changes upon every possible mode by which the death might be supposed to have been occasioned. These counts were frequently exceedingly contradictory in themselves; and, after all, it might happen that the right cause had escaped attention. By the Bill before the House, instead of being necessary to recite the precise means and manner by which the homicide had been effected, it would be sufficient to state, in cases of murder, that the party "did wilfully and feloniously kill and murder;" and, in cases of manslaughter, that he "did feloniously kill and slay." The third object of great importance had reference to strictly formal objections. With regard to



several of these, it was provided that there should henceforth be no opportunity of taking such objections at all,—objections, for instance, such as those to the formal conclusion of an indictment, leaving out the words “against the peace,” &c. Another object of the Bill was this, that if it should turn out on the trial that the party had not been guilty of the entire offence, but of an attempt to commit it, then it would not be necessary, as at present, to prefer a new indictment, but the jury might convict the party of the attempt to commit the offence, and the Court should have power to sentence upon that finding, just as if the indictment had been for the attempt in the first instance. The Bill also contained provisions for rendering more easy and certain prosecutions for the crime of perjury. At present the indictments were of most unwieldy length, and it was only the Superior Courts which, by virtue of the statute of George II. had the power of ordering prosecutions for that offence. This Bill would enable the judge of a County Court and of the inferior courts generally, if they had reason to suspect that perjury had been committed, to direct that a prosecution should be instituted against the party, which might proceed to trial under the order of the Court. A simpler form of indictment also was given, but still it was not reduced so far as to prevent the defendant from having every information as to the real nature of the charge against him. There were several other objects of inferior importance contemplated by the Bill, with which he would not trouble the House. His belief was, after a good deal of experience in watching the administration of the criminal law, and some also in the actual administration of it, that it would have a very great tendency to improve the administration of criminal justice—that it would render it cheaper, more simple, and more certain in its results—that it would have the effect of doing away, in a great measure, with the technicalities which often enabled a prisoner to escape from justice, and that it would reduce the matter to a mere finding upon the truth.

The Bill then went through committee after a short discussion.

#### ATTORNEYS' AND SOLICITORS' CERTIFICATE BILL.

The second reading of this Bill was postponed till that day three weeks.

#### REGISTRATION OF ASSURANCES BILL.

THURSDAY, July 24.—MR. MULLINGS asked, whether it was intended to proceed with the Registration of Assurances Bill in this session?—Lord J. RUSSELL had been very anxious to proceed with this Bill, which was of great importance, and was founded upon principles recommended by some of the highest authorities; but he found that not only would it be necessary to explain the Bill at considerable length upon the second reading, probably leading to great debate, but that, afterwards, either the Bill ought to go to a select committee, or it must take up very considerable time in discussion in the Houses. Under these circumstances, considering the period of the session, he must very reluctantly postpone this Bill. It would not answer any purpose now to have it explained on the second reading, because there were some objections which might be made to it, and which might be obviated on bringing forward the Bill in another year, and therefore part of the discussion might involve loss of time. He would repeat that he attached very great importance to the Bill, and to the object it was intended to promote. He should move next day that it be read a second time three months hence.

#### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

##### Summary.

ALREADY the new Criminal Offences Act has produced a difficulty and doubt, which will occupy the Court of Criminal Appeal, unless provision be made for it in the Bill now before the House of Commons. The 9th section of that statute (14 Vict. c. 19) provides that in the case of offences which are made felonies only after previous summary convictions, “it shall not be lawful to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever, in any indictment, any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid,” except in case of violence given of good character. Upon this a practical difficulty has arisen as to the mode in which the charge is to be stated to the jury, and he plea taken; for if the reading is deferred, how is he prisoner to plead to the whole indictment, the very charge being that having been previously convicted he is now chargeable with felony? In a report from the Home Circuit (17 Law T. 223), his question was asked of the Court by the Clerk of

the Arraignment, and, after consultation, the two judges (ALDERSON, B. and JERVIS, C.J.) agreed that as it was impossible to act up to the strict letter of the statute, the old practice should still be observed, and the prisoner called upon to plead to the whole indictment, and then, when given in charge to the jury, that portion of it which related to the former conviction should be omitted.

The House of Commons is pursuing a very rigid course with all Turnpike Bills. Defeated in the endeavour to regulate them by a general measure, the same object is sought to be attained in detail, and as new Acts or Continuance Acts are required, a committee of the House, specially appointed for the purpose, inserts the principal provisions of the rejected Bill.

We hope very shortly to submit to our readers a succinct statement of the requirements of the committee in all new Turnpike Bills, which has been promised to be supplied to us by the Parliamentary agent who has been most extensively engaged in the conduct of them. E. W. C.

#### REG. v. HYDE.

##### TO THE EDITOR OF THE LAW TIMES.

SIR,—I observe with much regret the decision of Mr. Justice Wightman, in *Reg. v. Hyde*, 17 Law T. 170, as it will serve to shake the impression generally entertained that the forms given in 11 & 12 Vict. c. 43, would suffice in all cases, especially after the case of *Reg. v. Johnson*, 8 Q. B. 102; 15 L. J. M. c. 7; and 6 Law T. 121, had decided that a conviction in the form given by statute is good, although it does not appear who the informer is to whom the moiety of the penalty is to be paid. There the statute on which the conviction was had, directed one moiety of the penalty to be paid to the informer, and the other moiety to the Crown; and the conviction following the statutory form directed the penalty “to be distributed as the Act directs,” and this was held to be sufficient. It does not appear that *Reg. v. Johnson* was cited in argument in *Reg. v. Hyde*, as it is not likely a single judge would have overruled the decision of the full Court. Will any of your numerous readers afford me their views on the bearing of the case of *Reg. v. Johnson*?

I am, Sir, yours, &c.

July 19, 1851. A MAGISTRATE'S CLERK.

#### Queries.

##### CORONERS.

In your number of the 28th ult. I observed a question by “W. F.” relating to the duties of a coroner, “where he and his jury are refused admission into a house for the purpose of viewing a body.” Having some interest in coroners' duties, I was curious to observe what answer would be given to the query, and find, in your number of the 12th inst. a reference by “A.” to *Res v. Justices of Kent*, 11 East, 229, but it does not appear to me that that case at all answers the query of “W. F.”

I was disposed at first to think that a coroner in the case stated might, *virtute officii*, force an entrance; but on further consideration I am inclined to think that such a course would not be lawful. If a body on which an inquest ought to be held is interred before the coroner had viewed it, the township might be amerced, and I see no reason why the coroner should not then issue his warrant for disinterment. H.

**SALE OF BEER.**—The Bill prepared and brought into the House of Commons to amend the laws relating to houses licensed for the sale of beer, by Sir J. Pakington, Mr. Deedes, Mr. Headlam, and Mr. Brotherton, has been printed. The principal objects proposed by the Bill are—to require proper certificates of the character of persons applying for licenses—to restrict licenses to sell beer to be drunk on the premises to real residents or occupiers, and to houses rated at not less than 20*l.* per annum in cities, towns, &c. containing 10,000 inhabitants, 15*l.* in places exceeding 2,500 inhabitants, and 10*l.* a year elsewhere. Persons licensed before the passing of the Act may have licenses granted to them whilst they occupy the same house, although it be below the qualification. No debt for beer, &c. drunk on the premises will be recoverable at law.

**CHIMNEY-SWEEPERS.**—Lord Shaftesbury has just laid on the table of the House of Lords a Bill for the further regulation of chimney-sweepers. It is proposed that no person under the age of 21 shall use the trade of a chimney-sweeper, unless duly apprenticed. Persons under 16 years are similarly prohibited, except to carry the apparatus. Penalties are to be imposed for disobeying the new regulations.

**COPYHOLD, INCLOSURE, AND TITHE COMMISSIONS.**—As the appointments of the Tithe, Copyhold, and Inclosure Commissioners expire at the end of the present session of Parliament, Mr. Bouverie

and Sir George Grey have brought a Bill into the House of Commons, which is now printed, to consolidate and continue for two years the Copyhold and Inclosure Commissions, and to provide for the completion of the proceedings under the Tithe Commutation Act.

**COUNTY RATES.**—Mr. Milner Gibson, M.P. has obtained a return, which was printed on Saturday, respecting the county rates. It appears that in 1849 and 1850 there was expended of the grants made by Parliament in aid of the county rates the sum of 455,647*l.* 14*s.* of which 382,483*l.* 14*s.* 6*d.* was for counties, and 73,163*l.* 19*s.* 6*d.* for boroughs and liberties.

**FREE SITTINGS IN CHURCHES.**—From a return printed by order of the House of Commons, it appears that there are 304,062 free sittings established in the churches built under the Church Building Acts with aid of grants from the Church Building Commissioners, since the Act 58 Geo. 3, c. 45.

#### JOINT-STOCK COMPANIES' LAW JOURNAL.

THE liabilities of railway companies as carriers have been again disputed in the case of *Wilson v. The York, &c. Railway Company*, 17 Law T. 223. The facts were these. A railway professed to carry goods from A. to B. within a specified time. The owner of a cargo of fish applied to the station clerk, who promised that they should be forwarded to a station C. beyond B., the line of another company, by a particular hour. The owner consequently sent the fish in this manner, but they were detained between B. and C. and spoilt. On an action brought by the owner against the company for their value, it was held that the company were liable, being bound by the express promise of their clerk, even although they had published a general notice that they would not be responsible for forwarding goods beyond B.

#### WINDING-UP.

IN the case of *Re The St. James's Club*, 17 Law T. 219, Vice-Chancellor BRUCE has held a club to be “an association” within the meaning of the Winding-up Acts; and he would not refuse the order, because it might be that none of the members of the club were responsible for its debts. Their liabilities were, he considered, questions for subsequent consideration by the Master.

Lord CREANWORTH has refused to stay, pending the reference to the Master, proceedings in a suit that had been instituted on behalf of the shareholders in a company for the purpose of fixing certain losses on the directors, and for other objects than the mere winding up of the affairs of the company. The late Lord Chancellor had previously refused a similar application in the case of this very company. (*Deeks v. Walker*, 17 Law T. 219.)

#### REAL PROPERTY LAWYER AND CONVEYANCER.

A CASE that has a curious interest, as shewing how the words of a will may be construed differently from their apparent meaning, in order to accomplish the real intent of the testator, was that of *Gundry v. Pinniger*, 17 Law T. 217. A. by a codicil, gave stock to trustees for her grandniece, B. for life, remainder to her children; but in case she should die without issue, or they should all die before their shares became payable, “then on trust, after the decease of B. to pay or assign and transfer the stock to testator's grandnephew, C. if he should be then living; but if he should be then dead, then unto his next of kin, in a legal course of distribution, *ex parti a maternâ*.” It was held that these latter words were mere surplusage, and did not exclude next of kin *ex parte paternâ*, and that the next of kin of C. at the time of his death were entitled under the ultimate limitation. Another case, on the construction of a will, reported last week, is *Read v. Strangeways*, 17 Law T. 218, but it presents no peculiar point of interest. A third wills case was that of *Illingworth v. Cooke*, 17 Law T. 220. A. bequeathed property to all her grandchildren, “except ———,” leaving a blank for the name, which she had omitted to fill up. It was held that none of them was thereby excluded, but that the bequest took effect in favour of all.

But the two most important and interesting decisions in the Law of Real Property are to be found in the cases of *Doe dem. Palmer v. Eyre*, and *Doe dem. Baddeley v. Massey*, 17 Law T. 221, both of which involve very nearly the same points, and, therefore, should be read and noted together. For the first time the Court was called upon to put a construction upon the stat. 7 Wm. 4, and 1 Vict. c. 28, and its effect upon the previous stat. 3 & 4 Wm. 4, c. 27. The later stat. reciting that doubts had been entertained as to the effect of the former stat. so far as the same related to mortgages, empowered the person claiming under any mortgage of land to maintain an action for its recovery at any time within twenty years next after the last payment of any part of the principal money or interest received by such mortgagee, although more than twenty years may have elapsed since the time at which the right to bring such action shall have first accrued. In the present case the facts were that A. was admitted tenant at will to certain land by B. and remained in possession more than twenty years, without any payment of rent or acknowledgment of title. After A.'s tenancy had commenced, B. mortgaged the land to C. and continued to pay interest upon it, until within two years of action brought by C. (the mortgagee) against A. (the tenant), to recover the premises. It was contended that, by the strict words of the statute, the possession of A. barred C.'s title. But the Court of Q.B. held otherwise. "We must learn," it said, "the object of the Legislature from the language of the statute, and it clearly appears to have been to make mortgages available securities, where the mortgagee, having received payment of his interest, cannot be charged with *laches*. This object would be effectually defeated if we were to adopt the limited construction proposed, by interpolating the words necessary for that purpose. In the vast majority of mortgages in England, the mortgagor is not in actual possession of the mortgaged lands when the mortgage is executed, and they afterwards remain in possession of his tenants. The mortgagee and those who advise him are perfectly satisfied if, upon reference to a conveyancer, the title to the premises to be mortgaged is pronounced good, and on reference to a surveyor the value is found to be sufficient. If a mortgagee receives regularly the payment of his interest under the mortgage, he never inquires, and he would not be allowed to inquire, whether rent is regularly paid by the tenant to the mortgagor." In the other case the facts were these: A. claimed under a conveyance executed both by mortgagor and mortgagee, when the mortgage was paid off. The action was brought within twenty years from that time, but not within twenty years from the time at which the right of entry first accrued. It was held that A. was a person "claiming under a mortgage," within the meaning of the above cited stat. (1 Vict. c. 28), and that the period of twenty years was to be calculated from the last payment of any part of the principal or interest thereby secured.

These cases should be carefully noted in *Hughes's Practice of Mortgages*.

Another of those painful questions as to the liabilities of trustees, which are continually recurring to warn prudent men against undertaking so thankless and yet so dangerous an office, is reported to us from the Court of Chancery in Ireland. In *Worthington v. Pakenham*, 17 Law T. 224, it was held, that where trustees incur, by reason of neglect of duty, a joint liability, and that liability is discharged by one of them, he is entitled to contribution from his co-trustees. But where the trustee against whom it was sought to enforce this contribution had never interfered in the execution of the trust, and the other trustee had the entire management, the Court permitted an inquiry—not whether he should be exempted, that would be too complete an act of justice, and too liberal to a trustee,—but as to the amount of contribution he should pay to his co-trustee, by whom alone the loss had been incurred! and this is called equity!

#### REGISTRATION OF ASSURANCES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Having always been opposed to the present Registration Bill, from a persuasion that its evils would be greater than its benefits, I am naturally pleased to find that feeling to be considerable; yet, as it is clear that something should, and indeed must be done, I read with great pleasure in your paper of the 7th of June, your article on Registration by indorsement on Title Deeds, and also the able

letter of Mr. Gotobed on the same subject, in your paper of the 14th June, and I entirely concur in the views there expressed, that a perfectly efficient system of registration may thereby be accomplished; and, if so, what immense advantages as to cheapness, convenience, and proper secrecy will then be gained. I will only add a suggestion, that the system may be beneficially extended beyond (as I understand it) Mr. Gotobed's view, by the endorsement on the original deed of conveyance of a derivative conveyance, when such derivative conveyance does not comprise the whole estate contained in the original conveyance. I am, sir, yours, &c.

July 23, 1851.

F.

#### Queries.

##### STAMP DUTIES.

Will you inform me, through the medium of your paper, how the progressive duty clause of the late Stamp Act is to be construed? Is it (the duty) to be calculated for every fifteen folios after the first fifteen or after the first thirty, according to the old plan? The solicitors here still adhere to the old way, and I am anxious to have them set right.

To make my meaning more clear, if possible, suppose a deed of forty-five folios, and the *ad val.* duty above ten shillings, is the progressive duty to be impressed twenty shillings or only ten.

South Shields, July 22, 1851. JOHN SALMON.

[The progressive stamp duty is still payable under the old system, that is, if it exceeds fifteen folios, but does not amount to thirty, one stamp will be sufficient; but if it amounts to thirty or upwards, an additional stamp will be required for every succeeding fifteen folios.—W. H.]

ENFRANCHISEMENT OF COPYHOLDS.—This Bill, brought into the House of Commons by Mr. Aglionby, Mr. Shafto Adair, and Mr. Hobhouse, to effect the compulsory enfranchisement of lands of copyhold and customary tenure, has been printed. The Bill proposes that manorial rights should be made subject to commutation by the copyhold commissioners on the application of either the lord or the tenant, whether the other assent to the commutation or not. The provisions made for compensation, &c. are similar to those already agreed upon.

To the Honourable the Commons of Great Britain and Ireland in Parliament assembled. The humble petition of the magistracy of the three several Ridings of Yorkshire, in Court of Gaol Sessions assembled, this 17th day of July, in the year of our Lord 1851, sheweth, that in consequence of a Bill having already received the sanction of the Lords spiritual and temporal in Parliament assembled, for the establishment of a general registry office in London, which Bill if carried into a law, will, in the opinion of your petitioners, materially injure and affect the interests of all landowners and several others in the county of York, we, the petitioners aforesaid, humbly pray that your honourable House will be pleased so to alter the said Bill as to exempt and exonerate the county of York from being affected by its provisions, inasmuch as each of the said several Ridings has already its own individual register offices, which are found efficiently to answer the several purposes for which they have been established for a series of years. And your petitioner, as in duty bound, will ever pray, &c.

He (Mr. Currier) moved the adoption of the petition. H. B. Darley, esq. seconded the motion, which was carried unanimously, and Lord Hotham was requested to present the petition.

THE INCUMBERED ESTATES COMMISSION.—A return has been printed by order of the House of Lords of some importance in reference to the Incumbered Estates Commission. It appears that the amount of incumbrances, as set forth in the petitions, which have been left unpaid in cases where the lands have been sold and the produce of the sales distributed by the commissioners, was set forth at 503,286l. 5s. 2d. and that the amount paid over to the owners by the commissioners out of the proceeds of the sales after the discharge of the incumbrances was 7,307l. 10s. 10d.

THE REGISTRY BILL.—At a meeting of the magistrates of Yorkshire, at York Castle, the Rev. D. R. Currier said he begged to submit a petition with reference to the establishment of a general registry office in London. The petition was as follows:

#### COUNTY COURTS.

##### Summary.

It was omitted to be stated last week that as the *County Courts Extension Act*, now passing through Parliament, gives to the County Courts a large jurisdiction in Equity, vesting in them the same powers and duties as are exercised in the Masters' offices, the new edition (the fourth) of *Cox and Lloyd's Law and Practice of the County Courts*, which is now in the press, will contain a chapter devoted entirely to the instruction of judges, clerks, and solicitors in their duties and practice under this

new Equity jurisdiction, and which is written for that work by a Chancery Barrister. It describes minutely what are the usual subjects of reference, the proceedings to be taken upon the order of reference, and forms to be observed; the mode of taking examinations; how the report is to be framed and returned; in fact, complete instructions as to what is to be done by the officers and practitioners under the new jurisdiction.

The new edition is already printed, up to the point at which it is likely to be affected by the Bill now in progress; and, as soon as that is passed, it will be completed as speedily as the printer can produce it,—so that there will be no long waiting for it. But it will very much facilitate the arrangements for early transmission of it, if those who purpose to possess it will forward their orders immediately.

We should add that, by excision of repetitions of sections of the statutes, and the omission of cases and discussions that have been superseded by the new rules of practice, it is expected that the size of the volume will be materially lessened, notwithstanding the additional chapters required by the new jurisdictions. And should the size be decreased, in the same proportion will be the price.

The House of Commons has consented to an increase in the salaries of the judges and clerks. Remonstrances have not been repeated in vain.

#### THE ADVOCATE AND THE ATTORNEY.

TO THE EDITOR OF THE LAW TIMES.

SIR,—The report of the progress of the "County Courts Further Extension Bill," contained in the *LAW TIMES* of last week, is certainly calculated to appeal every true lover of the Profession of Law, however desirous he may be for the administration of cheap and speedy justice. It is in vain to hope with the Attorney-General, that the Bar may not be annihilated; because, if the House of Commons really be the true exponent of the wishes and feelings of the public, it seems pretty clear that not only the Bar, but the majority of the Attorneys, are doomed to be quietly disposed of, as being men whose presence and aid the legal wants of the community will no longer require. It is fearful to contemplate the ruinous consequences, not only to the lawyers, but also to the public, which must necessarily result from the complete hotchpot into which the whole Profession is thrown by this enactment. For my own part, I conceive that a well-trained Bar is, in more ways than one, absolutely essential for the satisfactory dispensation of the law and the better advancement of justice, and it is equally essential to the interests of the public that there should exist a class of men whose sole business it should be to attend to those interests in all the endless and minute details which must necessarily come under the cognizance of some legal mind before the majority of cases can be reduced to intelligibility. The barrier which has hitherto existed between Advocates and Attorneys has clearly defined the nature of their several functions, and in so doing has recognised the distinction which is suggested by public convenience. But the fiat has gone forth, and I am afraid the Profession will, in spite of all they can do, be obliged to submit. It is vain for Mr. Cardwell to say, "Let the Bar review its own etiquette;" for how would this meet the evil? It is the etiquette of the whole Profession that must be re-modelled, and I would gladly suggest some means of doing it, were I able to do so. For how can this be done without a complete unanimity between the Attorneys and the Bar, founded upon the conviction that it is proper and expedient that their several functions should be kept distinct? It is well known that great jealousy has always existed between the Bar and Advocate Attorneys, and the status of the latter having now received Parliamentary recognition, it is folly to expect the lawyers to effect a reconciliation amongst themselves. In conclusion, Sir, I think, it behoves the whole Profession to be up and stirring, for, really, the injudicious haste, and the sweeping tendency of modern legal legislation, is enough to startle the most thorough-going legal reformer, and make him declare, whether he will or not, "*Stabo super vias antiquas!*"

I am, Sir, Yours, &c.

A GENTLEMAN, ONE, &c.

Stockton, July 21, 1851.

#### EQUITABLE MORTGAGES.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I am sorry to perceive that the Bill now before the House of Commons for giving an extended jurisdiction to the County Courts contains no provisions relating to equitable mortgages. It is a very common thing in the country for the owners of small properties to borrow money upon a mere deposit of title deeds. The proprietor of a freehold field of the value of 150*l.* has seldom much difficulty

in procuring an advance of 120*l.* or 130*l.* upon a deposit of his title deeds; but in case he should be unable to repay the money, and the lender has to resort to his security, he is very often entirely remediless. He can only file a bill in Chancery for a conveyance or sale, and in the cases I am alluding to, where the value of the property does not much exceed the amount advanced, every professional man knows that the costs of the suit will often exceed the value of the property, and the unfortunate mortgagee will never receive back a sixpence of his money. Surely such cases might safely be entrusted to the jurisdiction of the County Courts.

I am, Sir, yours, &c.

A SOLICITOR.

**COUNTY COURTS.**—A return, by order of the House of Lords, relating to the County Courts, is issued. In undefended cases the costs would be simply the fees paid, which vary in amount, according to the sum sued for. The costs would be 3*s.* 7*d.* in the pound on the amount sued for, or admitted. The costs in cases above 20*l.* are the same as in cases for 20*l.* only. There are no judgments by default in County Courts. In case a defendant does not appear, on proof, the plaintiff would obtain judgment, and the costs would be the same as in an undefended suit.

## SUPERIOR COURTS OF COMMON LAW.

### FIRST REPORT.

(Continued from page 158.)

SUCH is the groundwork of the English system of pleading. It is obvious that there are many advantages in it; the parties are not taken by surprise, they know precisely what is in dispute, and the expense is saved which would otherwise be incurred in coming prepared to prove matters not intended to be controverted. Moreover, as, by the law of England, questions of fact are determined by a jury, and questions of law by the Court, it is essential, as far as possible, to keep those questions distinct, so that each may be referred to the proper tribunal. Such are the results effected by *pleading*, which, thus explained, appears not only not open to objection, but entitled to great admiration and praise for its simplicity and usefulness. This, however, is the bright side of the subject, and it cannot be denied that on a system so simple and sound in principle defects and abuses have been engrafted which have gone far to destroy its utility. This has arisen in great measure from an over-anxiety to ensure exact precision and certainty, and from the rigorous character of the rules introduced for the attainment of these objects. Some degree of strictness, no doubt, is necessary. The fraudulent litigant must be made to be clear; he must be prevented from being ambiguous and tricky; he must be brought to a question, and not allowed to mix up a variety of statements from which no one can ascertain the case upon which he relies, either in point of law or fact. But unhappily the rules framed to prevent these mischiefs have been abused, and they and certain arbitrary regulations and forms have caused the existence of those objections to the practice of special pleading, the justice of which we thoroughly feel.

The former Commissioners appointed to inquire into this matter thus expressed themselves: (a)

"We conceive that considerable misapprehension popularly prevails upon the subject of *special pleading*. That system was characterized, no doubt, at former periods of our legal history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an over-strained observance of form; and, notwithstanding material modern improvements, it still exhibits too much of the same qualities. These its advantages are prominent and well understood; its recommendations are, perhaps, less obvious, but when explained cannot fail to be recognized as of far superior weight. Special pleading, considered in its principle, is a valuable forensic invention, peculiar to the common law of England, by effect of which the precise point in controversy between the parties is developed, and presented in a shape fit for decision. If that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to be decided by the jury, and are enabled to prepare their proofs with proportionate precision. If, on the other hand, it turns out to be matter of law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a trial, by demurrer; that is, by referring the legal question so involved to the determination of the judges."

There is also the authority of Lord Mansfield for saying, that the substantial rules of pleading "are founded on strong sense and the soundest and closest logic, and so appear when well understood and explained, though, by being misunderstood and misapplied, they are often used as instruments of chicanery." We fully concur in these observations as to the merit of what may be termed the essential principles of the system; but it is equally certain

that there now exists in the public, and a large portion of the Profession, a strong dissatisfaction with pleading as at present practised. We think such dissatisfaction well founded, and that the defects by which the system is vitiated must be cut away with an unsparing hand.

Before, however, we address ourselves particularly to the defects complained of and the remedies which we propose, we must dispose of a preliminary question, namely, whether any pleadings or preparatory statements by the parties to a cause should be required. Some persons, irritated by the mischiefs which have followed from the abuse of technical rules, have proposed that parties should come into court without any previous authentic information as to the complaint or answer. From this we wholly dissent. Such a mode of, or rather want of, procedure, may answer the purpose in a rude state of society, or in matters of very trifling moment, in which, from the nature of the case, the parties know beforehand the precise matter in dispute; but in a highly civilised state, where commercial transactions are numerous and complicated, it would lead to intolerable fraud, oppression, and expense; and we believe that it has never existed in the code of any civilised nation. Dishonest plaintiffs would make unfounded claims, the nature of which could not be ascertained by previous inquiry. The party summoned must either come prepared with all the witnesses who could depose to anything that had ever passed between him and the plaintiff, or must hear the complaint, and then be entitled to an adjournment to bring his witnesses at a future day. In the former case, great and unnecessary expense would be incurred, and frequently incurred with a view to oppression. In the latter case there would, in truth, be a notice given by word of mouth before the judge, which had much better have been previously given. In many cases an adjournment would be necessary for the purposes of justice, but dishonest defendants would equally claim it, and every case would be something like twice tried, each party being at the expense and trouble of twice attending with witnesses. But we do not believe that any one, on reflection, will be found seriously to support this plan; and we, therefore, at once pass on to the next question, viz., What should be the nature of the notice which the parties should give to each other?

Some persons, whose opinions are entitled to respect, think that a general notice of the plaintiff's claim and of the defendant's defence would answer every good purpose: for instance, the plaintiff's declaration or statement to be thus:

"The plaintiff complains that the defendant did not pay a bill of exchange for 50*l.*"

The defendant's plea:

"The defendant says he is not liable on the bill."

If a plaintiff might declare in this way, it would follow, that it never would be ascertained by the pleadings whether the plaintiff had a sufficient cause of action or not; and such a general plea would leave it uncertain whether the defendant denied the acceptance of the bill, or any other of the legal requisites to make him at one time liable; or whether, admitting these, the defendant meant to set up in defence some additional matter by way of answer, as that the bill had been fraudulently obtained from him; nor, where the whole matter in dispute was a question of law, could it ever be disposed of as such, but every case would have to be brought before a jury before it could be ascertained that there was no fact in dispute. Many of the evils, therefore, of giving no notice at all would exist in these cases; much expense would be incurred; parties would go prepared to prove everything relating to the case in question, though only one matter was really in dispute, and very often would find they came unprepared with proof on some point which had escaped attention until noticed by their adversary. If the system of giving a general notice were universally permitted, applications for new trials on the ground of surprise would greatly increase,—a serious evil in itself, as attended with waste and vexation; and, in addition, we are satisfied that in actions for breaches of agreement, in actions on charter-parties and policies of insurance, and in actions of trespass, if the present more specific system of pleading were abolished, there would be a great increase in the number of special cases, special verdicts, and bills of exceptions. It may be admitted, that there would be less liability to technical mistake in the first instance; but we think this advantage is more than counterbalanced by those to be derived from the present system of pleading, especially when the latter shall have undergone those changes which we propose with a view to prevent the captious and technical objections which can now be made. Upon the best consideration we have been able to bestow upon the matter, we are satisfied that a substitution of notices for the present mode of pleading would not be an improvement, but, on the contrary, a serious disadvantage. We therefore think, that the plaintiff should be required to state his title to sue, and the nature of his cause of action; that the defendant should likewise be required to state his ground of defence with certainty and precision.

This is really the substance of pleading, the object of which, as we have before stated, is to ascertain the points in controversy, with the view of informing the parties themselves and the tribunal which is to decide between them what are the real questions to be disputed.

The merit of the antagonistic systems was very fully considered by the former commissioners with reference to the question of substituting a more special statement of defences in lieu of the general form of defence called the general issue. Previously to that commission, the three principal kinds of action—*assumpsit*, debt on simple contract, and trespass on the case,—it was competent to the defendant to raise almost every sort of defence under the general issue, which was no more than a general denial of his liability, by which no information was given to the opposite party of the defence intended to be relied on. The Commissioners recommended that all defences, except the mere denial of the facts alleged by the plaintiff, should be pleaded specially. The reason of this alteration was the great inconvenience that was felt from causes being sent to trial without any definite knowledge, either on the part of the plaintiff or of the judge who was to try the case, of what were really the issues intended to be raised; hence the plaintiff was obliged to take witnesses to prove a case, the whole or part of which the defendant might never attempt to deny, and might, after all, be surprised by the defendant setting up a defence which, if attention had been called to it by the pleading, might have been capable of being answered or disproved; and the judge was called upon, on the instant, to decide whether or not the defence, or any answer given to it, was valid in point of law, while, if it had appeared on the record, the question might have been decided on demurrer, and the most expensive part of a suit, viz. the trial *ad Nisi Prius*, might have been altogether dispensed with.

(To be continued.)

## THE LAWYER.

### SUMMARY.

**EQUITY PRACTICE.**—Some points of *practice* appear among the reports of last week. In *Zulueta v. Vinent*, 17 Law T. 217, an injunction dissolved on the merits was permitted to be revived after amendment on special motion and verification of it by affidavit. For the framing of the affidavits in such a case the practitioner is referred to the report.

The words "last answer" in the 68th Order of May 1845, "have been held to apply to the last answer to an amended as well as an original bill." (*McIntosh v. The Great Western Railway Company*, 17 Law T. 219.)

We are glad to see the Courts resolved to permit of no narrowing of the field within which proceedings by claim may be taken in preference to suit by bill. In *Scott v. Lord Hastings*, 17 Law T. 230, Vice-Chancellor TURNER refused to stay proceedings on a claim where a bill had been filed for the same, and also some additional purpose.

Where a plaintiff was resident out of the jurisdiction of the Court, but at the time of filing the bill was an officer on full pay, and afterwards went on half pay, the defendant was held to be entitled to security for his costs. (*Long v. —*, 17 Law T. 223.)

And in *Sadler v. Whalley*, 17 Law T. 224, it was determined that, to maintain a plea of pendency of a prior suit, it must appear that the suits are for the same purpose, and that the parties are the same.

In the same case the question was raised, what constituted a *party to a suit*, and it was held that a party merely defendant *ad inuitum*, taking no part in the suit, is not such a party as to be barred from instituting proceedings of his own to recover a portion of the charge vested, and for the recovery of another portion of which the first suit was instituted.

## THE MERCANTILE LAWYER.

THE *Law of Carriers* was once more the subject of elaborate review, and of a difference on the judicial bench in the case of *Hart v. Basendale*, 17 Law T. 222. The question was, whether the stat. 1 Wm. 4, c. 68, which exempts carriers from liability beyond a certain value for the loss of certain articles specified, if notice to that effect be given in their offices, extends to the case of goods received by them otherwise than at the office, as in the street, or some other place than those where the notice is affixed. In a very interesting judgment, which we recommend to the perusal of our readers, the majority

(a) Second Report, p. 45.

of the Court held that the protection of the statute did not extend to such a case. "On the whole we are of opinion that the defendant, by receiving the goods in the cart in the street, has placed himself in the situation of a carrier at common law who has given no notice, and is, therefore, liable to pay for the loss of the goods, although they may be articles of the description mentioned in the statute, such as he could not have been liable for if delivered at the office where the notice was fixed." In answer to an objection as to the inconvenience to carriers of such a construction of the law, the Court said, "Upon this, which, after much consideration, we think the true construction, there will be no hardship on the carrier. It is his duty to receive goods in the street in the cart, which, as a common carrier, he is bound to do, unless he makes a public profession to the contrary. He can only protect himself by special contract with each person bringing goods to him. But this he would have no difficulty in doing. It will be a question with him whether it will be more convenient, on the whole, to abstain from receiving goods elsewhere than at the receiving-house, or to take the trouble of delivering a special notice to each person bringing a parcel to his servant elsewhere, and so creating a special contract."

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

Her Majesty having been pleased to appoint the Right Hon. Charles William Earl of Sefton to be Lord-Lieutenant and Custos Rotulorum of the county palatine of Lancaster, his lordship this day took the oaths appointed to be taken thereupon, instead of the oaths of allegiance and supremacy.

The Lord Chancellor has appointed William Woodlock, of Albert-terrace, Black-rock, in the county of Dublin, gent. to be a Master Extraordinary in the High Court of Chancery in that part of the United Kingdom of Great Britain and Ireland called Ireland.

The Lord Chancellor has appointed James Benson, of Birmingham, in the county of Warwick, gent. and Thomas Addenbrooke, of Stourbridge, in the county of Worcester, gent. to be Masters Extraordinary in the High Court of Chancery.

The Right Hon. Sir John Jervis has appointed Richard Toller, of Leicester, in the county of Leicester, gent. to be one of the Perpetual Commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the county of Leicester.

Mr. Serjeant Kinglake has been appointed to the office of Recorder of the city of Exeter, vacant by the death of F. N. Rogers, esq. Q.C.

Mr. C. Denison has been appointed Deputy Judge Advocate General, in place of F. N. Rogers, esq. Q.C. deceased.

Mr. C. Romilly has been appointed Clerk of the Crown in Chancery in the room of the present Earl of Cottenham, resigned.

**MEMBERS RETURNED TO SERVE IN THIS PRESENT PARLIAMENT.**—JULY 16.—Borough of Knaresborough: Thomas Collins, the younger, of Knaresborough, in the county of York, esq. in the room of the Right Hon. William Sebright Lascelles, deceased.—July 17.—Borough of Arundel: The Right Hon. Edward Strutt, of Kingston-hall, in the county of Nottingham, in the room of Henry Granville Fitzalan Howard, commonly called Earl of Arundel and Surrey, who has accepted the office of Steward of her Majesty's Chiltern Hundreds.

Tuesday's *Gazette* contains the notice of the grant of a baronetcy to the Lord Mayor, John Musgrove, esq.

## COURT PAPERS.

### NEW ORDER IN CHANCERY.

#### SALES OF PROPERTY.

The following order of Court was issued on Saturday:—

"The Right Hon. Thomas Lord Truro, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Hon. Sir John Romilly, Knight, Master of the Rolls, and the Right Hon. the Vice-Chancellor Sir James Lewis Knight Bruce, the Right Hon. the Vice-Chancellor Robert Mounsey Lord Cranworth, and the Right Hon. the Vice-Chancellor Sir George James Turner, Knight, doth hereby order and direct in manner following, that is to say:—

"1. That when any property is directed to be sold before the Master, the Master shall be at liberty to order the same to be sold at such place, either in London or in the country, and by such person as he shall think fit.

"2. That when any property is directed to be sold before

the Master, the Master shall be at liberty to fix a reserved bidding for the same, if sold entire, or, if sold in lots, one bidding for each lot, and such reserved bidding shall be made one of the conditions of sale under which the said property shall be sold; and in order that the Master may form his judgment as to such reserved bidding, the parties shall carry in before him such proposals as they may think fit; and the Master shall use his discretion as to communicating such reserved bidding to the parties, or any of them, or their solicitors; and the Master, previously to such sale, if he shall think fit, shall cause to be put under a sealed cover, and delivered to the person appointed to sell, a note in writing of the sum at which he shall fix such reserved bidding for each lot; and in case no person shall bid a price equal to, or higher than, the sum mentioned in the said note, then the Master, or the person appointed by him to sell the said property, shall declare that such lot is not sold, but has been bought in on account of the persons interested in, or entitled to, the property.

"3. That when any property is directed to be sold before the Master, the Master shall be at liberty to fix an amount to be paid as a deposit by the purchasers respectively at such sale, and to appoint some proper person to receive the same, who, if required by the Master, shall give security, to be approved of by the Master, duly to account for and pay what he shall receive in respect of such deposit, in such manner as the Court shall have directed in respect to the moneys to arise from such sale; and the person appointed to receive such deposits shall, within such time as the Master shall appoint, and without any special order for the purpose, pay the moneys which he shall receive in respect thereof (the amount of such moneys to be certified by the Master) in such manner as the Court shall have directed with respect to the moneys to arise from the sale.

"4. That when any property is directed to be sold before the Master, the Master shall be at liberty, either before or after such property shall have been put up for sale by public auction, to receive proposals for the sale thereof, or of any part thereof, by private contract; and he shall make his report thereof, with his opinion thereon, to the Court; which report shall be submitted to the Court for confirmation, in the same manner as reports made upon special reference, as to sales by private contract.

"TAUNTON C.  
"JOHN ROMILLY, M. R.  
"J. L. KNIGHT BRUCE, V. C.  
"CRANWORTH, V. C.  
"G. J. TURNER, V. C."

## PROCEEDINGS OF LAW SOCIETIES.

### METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

The managing committee held an adjourned meeting on Wednesday the 16th inst. Mr. C. J. Palmer in the chair.

A further report was made from the Equity Committee, as to the progress of the Master's Primary Jurisdiction in Equity Bill, but that the Lord Chancellor had expressed himself opposed to the passing of any measure of reform in equity practice until the Chancery Commission should have made their report.

A draft petition against the Registration Bill was read, discussed, and adopted, and ordered to be presented.

Several letters were read upon the clause in the County Courts further Extension Bill, giving barristers exclusive audience in those courts in all business except their original jurisdiction under 20/.

A petition had been prepared against the clause, but it having been modified on the previous evening, so as only to give to barristers the right to appear if instructed by or on behalf of a party and without either exclusive audience or pre-audience, it was resolved that the petition should stand over.

A letter was read from Mr. Mullings, M.P. advising that the returns of common law fees should not be pressed for, and Mr. Palmer having reported that the most important portion of the information required was contained in the report of the Commissioners on Process, Practice, and Pleading at Common Law, it was resolved that the matter should not be pressed.

A letter was read from a member, communicating the names of gentlemen who had agreed, on his explanation of the nature and objects of the association, to become members.

A letter was read from a member, requesting the opinion of the committee upon the right of notaries to practise as conveyancers.

The question was considered, and the secretary was instructed to consult Mr. Maugham upon the subject, and to communicate the result to the member.

A letter was read from the secretary to the Suffolk Law Society upon a case of malpractice.

The secretary was instructed to consult Mr. Maugham as to the expediency of an application to the judges for a rule compelling attorneys applying for leave to renew their certificates to serve the summons upon the registrar of attorneys, instead of as now applying *ex parte*.

The best thanks of the committee were voted to Lord R. Grosvenor for his constant, zealous, and judicious advocacy of the repeal of the annual certificate duty.

## LAW STUDENTS' DEBATING SOCIETY.

### QUESTIONS FOR DISCUSSION.

For Tuesday, July 29, 1851.

57. A. married and seized of land prior to 1834, makes a voluntary settlement in 1840 in favour of his son, and his wife joins in and acknowledges such settlement in order to bar her dower. After the settlement, A. conveys the same land to a purchaser for valuable consideration, but his wife does not join in this conveyance. Does B. take the estate discharged from all claims in respect of the dower?

L. Is the substitution of Triennial for Septennial Parliaments desirable?

## LEGAL INTELLIGENCE.

### The Assizes.

#### NORFOLK CIRCUIT.

CAMBRIDGE, July 21.—The commission for this county was opened on Saturday. The Chief Baron presides on the civil side, where there is an entry of two causes, and an indictment for disturbing a congregation in a Methodist chapel; and Mr. Justice Cresswell in the Crown Court, where there is a very heavy calendar, containing the names of twenty-seven prisoners charged with twenty serious offences, among which are two cases of murder, six of arson, four of felonious wounding, two of burglary, four of larceny, and one of an assault with intent to ravish; the prisoner in this last case being Mr. Winteringham, an under-graduate of Corpus Christi College, in this University, against whom an indictment was found at the last assizes.

HUNTINGDON, July 18.—Both the learned judges of assize for this circuit opened the commission for this county yesterday, at two o'clock, and having also attended Divine service in the afternoon, both the courts were opened for the despatch of business this morning, at ten o'clock. The cause list contains but one cause, which is for trial by a special jury. The calendar contains the names of eleven prisoners, whose alleged offences embrace one case of manslaughter, one of bigamy, two of wounding and shooting, six of arson, one of felony, and one of embezzlement.

#### HOME CIRCUIT.

CHELMSFORD, July 22.—The commission for the county of Essex was opened on Monday, and this morning the business of the Assize was proceeded with in both Courts, Chief Justice Jervis presiding on the Crown side, and Baron Alderson at Nisi Prius. There are eleven causes to be tried on the civil side, three of which are special jury cases. In the Crown Court there are thirty-five prisoners for trial, and some of the cases are of a serious character.

#### MIDLAND CIRCUIT.

LINCOLN, July 20.—The learned judges arrived here yesterday afternoon, and Baron Parke proceeded immediately to open the commissions for the city and the county. There is but one prisoner in the city, charged with concealing the birth of a child. The calendar for the county contains the names of eighteen prisoners, of whom one is charged with child murder, two with manslaughter, three with the offence of shooting with intent to do grievous bodily harm, one with cutting and wounding, one with an abominable assault, one with forgery, three with burglary, two with robbery, two with horse-stealing, and one with simple larceny. Six causes only have been entered.

LINCOLN, July 21.—Baron Parke took his seat in court this morning at eight o'clock, for the purpose of trying the only city prisoner, who was convicted of concealing the birth of a child, and sentenced to six weeks' imprisonment. His lordship then proceeded with the trial of causes. The cause list contains an entry of nine causes only, of which two were undefended.

NOTTINGHAM, July 23.—Baron Parke arrived here this morning at ten o'clock, and at once proceeded to open the commission for the county and the town. The calendar for the county contains the names of twenty-six prisoners; but, with a very few exceptions, the charges are not of a serious character. There is, however, one charge of murder, one of rape, one of wounding, three of robbery with violence, one of burglary, and one of embezzlement. In the town there were only three cases—one of larceny, one of embezzlement, and one of uttering counterfeit coin—all of which were disposed of by Baron Parke in about an hour.

#### OXFORD CIRCUIT.

WORCESTER, July 21.—The Assize business of this county began to-day at ten o'clock. The cause list proved unexpectedly and unusually heavy, containing thirteen entries, of which one was marked for a special jury. The calendar contained the names of fifty-seven prisoners, but the majority of them were charged with offences of a trivial character, such as are commonly tried at Sessions. Seven were charged with cutting and wounding, three with



rape on children, one with rape on a woman (this bill has been thrown out), two with sacrilege, seven with burglary and housebreaking, one with concealing a birth, two with forgery, one with sheep-stealing, two with uttering counterfeit coin, three with false pretences, and twenty-five with larceny. Of the fifty-seven, thirteen could neither read nor write, forty-two could read or read and write imperfectly, eleven could read and write well.

#### THE ATTORNEY'S TAX.

THE following memorial has been addressed to Sir John T. Duckworth, Bart, M.P. for Exeter, by fifty of the practising attorneys of that city:—

"We, the undersigned Solicitors practising in the city of Exeter, beg very sincerely to thank you for your late vote in support of Lord Robert Grosvenor's motion for leave to introduce a Bill for the repeal of the certificate duty charged exclusively on our branch of the Profession, and not paid by either of the other professions; and for these and various other reasons already stated to you, a most unjust tax on us; and we hope and trust that, as the House of Commons has on five several occasions affirmed the principle of the repeal of this tax, you will not fail in your attendance at the House during the future stages of the Bill brought in by Lord Robert Grosvenor.

"We exceedingly regret the vote given by your colleague, Mr. Divett, against the introduction of the Bill, for we anticipated the requisitions sent to him, signed by nearly sixty Solicitors, his constituents, requesting his support of their claims, and proving the injustice of the tax, would have produced a different result.

"17th July, 1851."

**LORD BROUGHAM.**—The *Times* concludes an article on law reform with a tribute to the labours of Lord Brougham, which has our hearty concurrence: "We are merely entering upon the path of law reforms, and few men would be more valuable as guides or helpers in our onward course than Lord Brougham. It is, then, with unfeigned regret that we find the following passage in the speech he delivered on Monday night in the House of Lords:—'Nothing should have tempted him to take so unusual and unprecedented a course as to address their lordships on the motion that this Bill be read a third time, but that, during the last five or six weeks, he had with the utmost difficulty, and against the opinion of his medical advisers, attended the service of their lordships' House. During the last week or on days the difficulty had increased and become more severe. In the hope of assisting in the passing of this great measure in a cause to which his life had been devoted, he had struggled to the last, until he found that he could struggle no longer.' The truth of a claim so feelingly advanced was instantly acknowledged by the House, as it will be by the country. We very sincerely grieve that a man who has rendered such eminent service to his country should be suffering from indisposition, which, let us hope, is only of a transitory character, and within the healing reach of change of air and of repose. We would not, however, allow such an opportunity to pass by without a recognition of Lord Brougham's claim to the character of a law reformer. Not only by his own direct interference, by his fearless habit of investigation, and his singular powers of exposing abuse, has the service been performed, but he has given a tone and a character to law reform in England which it would not have possessed but for the support of a man in so eminent a station. The cause of law reform in England for the last forty years can never be disjoined from the name of Henry Brougham."

**MR. ROGERS, Q.C.**—By the demise of this gentleman, the offices of Recorder of Exeter and Deputy Judge Advocate-General become vacant. Mr. Rogers was called to the Bar in 1816, and was the author of works on the law of elections, and other legal subjects.

**FEES AT THE JUDGES' CHAMBERS.**—In the report of the Common Law Commissioners just issued, which contains a good deal of valuable information, the commissioners recommend the abolition of fees in law proceedings. Further, they express an opinion that "fees ought not to be imposed upon the suitor for purposes of revenue." It seems that a good deal of business is transacted at the Judges' Chambers, in Serjeants'-inn. Each chief judge has three clerks, and each puisne judge two. Much dissatisfaction has been expressed as to the payment of fees at the chambers. The commissioners state—"We are of opinion that such dissatisfaction is well grounded." It appears by the report of the House of Commons in 1847, that in the year the receipts of twelve of the judges' clerks at chambers and on circuit amounted to £5,581. 6s. 4d. It also appears that in 1842 the clerks of the judge who stayed in town and attended chambers during the circuit received no less than 000*l.* in six weeks. After some observation, the commissioners add: "We think that the payment of fees ought to be altogether abolished; that all officers of the court ought to be paid in like manner

as the judges. Be this as it may, there can be no doubt that fees ought not to be imposed upon the suitor for the purpose of revenue."

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTHS.

**FILLITER.**—On the 23rd inst. at Wareham, Dorset, the wife of Mr. Freeland Filliter, of that town, solicitor, of a son.

**MURRAY.**—On the 21st inst. at Danesfield, Bucks, the Hon. Mrs. Scott Murray, of a daughter.

**PEARSON.**—On the 11th inst. in Chester-terrace, Regent's-park, the Hon. Lady Pearson, of a daughter.

**RAWLINSON.**—On the 19th inst. at No. 30, Oxford-terrace, Hyde-park, the wife of Thomas Abraham Rawlinson, esq. barrister-at-law, of a daughter.

**STEVENS.**—On the 17th inst. at 13, Warwick-villas, Maidenhill, the wife of Henry Stevens, esq. barrister-at-law, of a son.

##### MARRIAGES.

**APPLEYARD, Richard Hall, esq. barrister of Lincoln's-inn, eldest son of the late R. Appleyard, Bloomsbury-square, to Charlotte Matilda, only surviving child of the Rev. Wm. Stamer, D.D. rector of St. Saviour's, Bath, and granddaughter of the late Sir William Stamer, of the county of Clare, bart. on the 13th inst. at All Souls' Church, Langham-place.**

**CLARK, John Forbes, esq. only son of Sir Samuel Clark, bart. attaché to H.M.'s embassy at Paris, to Charlotte, only daughter of the late Mr. Justice Coltman, on the 19th inst. at St. George's, Hanover-square.**

**HENDERSON, J. esq. Cleveland Villa, Lee, Kent, and Great Tower-street, to Harriett, elder daughter of W. Hodgson, esq. solicitor, Acree-lane, Brixton, and Red Lion-square, on the 17th inst. at Lambeth Church.**

##### DEATHS.

**BREKEDOFF, Louisa, Viscountess, on the 21st inst. at Bedgebury-park, Kent.**

**BLEW, the Rev. Robert Stapylton, vicar of Tintagel, and magistrate for the county of Cornwall, on the 10th inst. in Durnford-street, Stonehouse.**

**BOON, Mr. James, solicitor, of Warminster, Wilts, on the 11th inst. at No. 8, Wilson-street, Finsbury-square, the residence of his son, aged 55.**

**BRAME, Mr. B. late a magistrate for Ipswich, on the 21st inst. aged 79.**

**DAVIES, Elizabeth Maria, the wife of D. A. Saunders Davies, esq. M.P. for Carmarthenshire, on the 19th inst. at Centre, Frenobrookshire.**

**KEIGHTLEY, Francis Thomas, the infant son of T. D. Keightley, esq. on the 21st inst. at 37, Blomfield-road, Maidenhill.**

**POWELL, Charles Jones, esq. formerly of the 49th Regiment, eldest son of the late Richard Jones Powell, esq. of Hinton-court, recorder of Hereford, and chairman of the county sessions, on the 14th inst. in Castle-street, Hereford, aged 37.**

**ROGERS, Francis Newman, esq. Q.C. Bench of the Inner Temple, and Recorder of Exeter, on the 19th inst. at his house, 1, Upper Wimpole-street, aged 59.**

**SPURGEON, Charles Wasley, esq. of King's Lynn, Norfolk, on the 9th inst. at Cromer.**

#### JOURNAL OF PROPERTY.

##### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	214	216	216	215	216	216
3 1/2 Cent. Reduced Annuities .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
3 1/2 Cent. Consols Annuities .....	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
Consols for Account .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
New 3 1/2 Cent. Annuities .....	99 1/2	99 1/2	99 1/2	99 1/2	99 1/2	99 1/2
Long Annu. (exp. Jan. 5, 1860) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1859) .....	..	..	..	..	..	..
Do. 30 yrs. (exp. Jan. 5, 1860) .....	..	..	..	..	..	..
India Stock .....	262 1/2	263 1/2	263 1/2	263 1/2	263 1/2	263 1/2
India Bonds (1,000 <i>l.</i> ) .....	62 1/2	62 1/2	62 1/2	62 1/2	62 1/2	62 1/2
Do. do. (under 1,000 <i>l.</i> ) .....	62 1/2	62 1/2	62 1/2	62 1/2	62 1/2	62 1/2
South Sea Stock .....	..	106 1/2	..	..	..	..
Do. do. New Annuities .....	..	..	..	..	..	..
Exchequer Bills, 1,000 <i>l.</i> .....	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. do. 500 <i>l.</i> .....	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. do. Small .....	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. Advertised .....	..	..	..	..	..	..

\* Premium.

#### THE GAZETTES.

##### Bankrupts.

*Gazette, July 15.*

**ATLEY, WILLIAM, market gardener, Hanwell, Middlesex, July 23 and Aug. 28, at twelve, Basinghall-st. Com. Fane. Off. as. Cannan. Sols. Poole and Gamlen, Gray's-inn-square; Riches and Woodbridge, Uxbridge, Petition, July 9.**

**BATLIS, BENJAMIN, woolstapler, Gloucester, July 28, and Aug. 28, at eleven, Bristol. Com. Stephen. Off. as. Acreman. Sols. J. Lovegrove, Gloucester; Abbot and Lucas, Bristol. Petition, July 4.**

**BIBBY, JOHN, draper and grocer, Llanrhaidel-yu-Mochnant, Denbigh, July 28 and Aug. 18, at eleven, Liverpool. Com. Perry. Off. as. Morgan. Sols. T. L. Boyle, Llanfyllin; Evans and Son, Liverpool. Petition, July 13.**

**BUDGEN, RICHARD, iron founder, Llanhilleth, Newport, Monmouth, July 29 and Aug. 28, at eleven, Bristol. Com. Hill. Off. as. Miller. Sol. W. Bevan, Bristol. Petition, July 4.**

**HARRISON, HENRY GEORGE, wheelwright, King's-road, Hoxton Old-town, July 23, at eleven, Aug. 23, at half-past one, Basinghall-st. Com. Fonblanque. Off. as. Stansfield. Sols. May and Sweetland, Queen-square, Bloomsbury. Petition, July 13.**

**JOULE, SAMUEL and JOHN, ribbon manufacturers and cotton spinners, Macclesfield and Rainow, Chester, July 30 and Aug. 20, at twelve, Manchester. Off. as. Pott. Sols. Parrott, Colville, and May, Macclesfield. Petition, July 11.**

**KAY, HILTON, ROBERT, and WILLIAM, cotton spinners and manufacturers, Heywood, Lancaster, July 28 and Aug. 18, at twelve, Manchester. Off. as. Mackenzie. Sols. Worthington and Karle, Manchester. Petition, July 10.**

**MENGER, ROBERT DAVID, silk merchant, Church-passage, Spital-square, Bishopsgate-st.-without, July 19, at one, Aug. 30, at eleven, Basinghall-st. Com. Goulburn. Off. as. Nicholson. Sols. Bridger and Collins, King William-st. Petition, June 30.**

**TENCH, JAMES, and PRATE, THOMAS, drapers and grocers, Oswestry, Salop, July 30 and Aug. 20, at twelve, Birmingham. Com. Daniell. Off. as. Whitmore. Sols. Sale, Worthington, and Shipman, Manchester; Mottram, Knight, and Emmet, Birmingham. Petition, June 19.**

**WAKEFIELD, ISAAC, tea dealer, Liverpool, July 28 and Aug. 18, at eleven, Liverpool. Com. Perry. Off. as. Morgan. Sols. Evans and Son, Liverpool. Petition, July 7.**

**WARD, THOMAS, coal merchant, Stoke Prior, Worcester, Aug. 23, at twelve, Birmingham. Com. Balguy. Off. as. Christie. Sols. Chaplin, Richards, and Stubbins, Paradise-st. Birmingham. Petition, July 10.**

**WILLIAMS, THOMAS ELSON, wine and spirit merchant, Exeter, July 25, at one, Aug. 23, at eleven, Exeter. Com. Bere. Off. as. Hirtzell. Sols. Wilde, Rees, and Co. College-hill, Queen-st. Cheapside; W. Jones, Exeter. Petition, June 27.**

**WILLING, RICHARD, miller, Ashburton, Devon, July 24, at one, Aug. 30, at eleven, Exeter. Com. Bere. Off. as. Hernaman. Sols. Geare, Mountford, and Geare, Exeter; J. Stogdon, Exeter. Petition, July 3.**

*Gazette, July 23.*

**BRADFALL, SAMSON CLAY, and MATHER, WILLIAM, linen-draper, High-st. Kensington, July 28 and Aug. 20, at one, Basinghall-st. Off. as. Whitmore. Sols. Hardwick and Co. Weaver's-hall, Basinghall-st. Petition, July 10.**

**BROWN, THOMAS, ship owner, Sunderland, Durham, July 31, at one, Aug. 28, at eleven, Newcastle-upon-Tyne. Off. as. Baker. Sols. Crosby and Compton, Church-court, Old Jewry; Hoyle, Newcastle-upon-Tyne; Moore, Sunderland. Petition, June 25.**

**BURER, SYDNEY VINCENT, saddler, Taunton, Somersetshire, Aug. 6 and 26, at eleven, Exeter. Off. as. Hirtzell. Sols. Woodland, Taunton; and Stogdon, Exeter. Petition, July 10.**

**DEWLEY, GEORGE EDWIN, ironfounder, Brunswick-terrace, Trinity-st. Dover-road, Newington, July 30 and Sept. 3, at one, Basinghall-st. Off. as. Graham. Sol. Long, Gray's-inn-place. Petition, July 16.**

**DIXON, SAMUEL, draper, Leeds, Aug. 1, at half-past one, Sept. 4, at eleven, Basinghall-st. Off. as. Whitmore. Sols. Sole and Turner, Aldermanbury; and Blackburn, Leeds. Petition, July 12.**

**GRANT, GORDON JOHN JAMES, tobacco broker Liverpool, July 31 and Aug. 28, at eleven, Liverpool. Off. as. Bird. Sols. Wadson and Co. London; and Loe and Co. Liverpool. Petition, July 9.**

**HILBROTH, ADOLPH, and HARRISON, JOHN, drysalers, Great St. Helen's, City, Aug. 1 and 20, at one, Basinghall-st. Off. as. Whitmore. Sols. Messrs. Linklater, Charlotte-row, Mansion-house; and Cox, Pinner's-hall, Old Broad-st. Petition, July 17.**

**KEMPSON, GEORGE, pork butcher, Clifton, Bedfordshire, July 30, at two, and Sept. 3, at half-past one, Basinghall-st. Off. as. Graham. Sols. Trinder and Eyre, John-st. Bedford-row; and Austin, Sheffield, Bedfordshire. Petition, July 12.**

**MITCHELL, JOSEPH, carpenter, Camden-st. Camden-town, Aug. 1, at half-past twelve, and Aug. 29, at eleven, Basinghall-st. Off. as. Cannan. Sol. Turner, Charles-st. City-road. Petition, July 18.**

**MOOREY, WILFRED, and WILSON, THOMAS, corn merchants, Liverpool, July 31 and Aug. 28, at eleven, Liverpool. Off. as. Turner. Sol. Daly, Liverpool. Petition, July 17.**

**PAINTER, THOMAS, builder, Okehampton, Devonshire, Aug. 6 and 26, at eleven, Exeter. Off. as. Hirtzell. Sols. Stogdon, Exeter, and Fryer, St. Thomas's, near Exeter. Petition, June 27.**

**PASHELY, WILLIAM and FRANCIS, knife manufacturers, Sheffield, Aug. 9 and 30, at ten, Leeds. Off. as. Freeman. Sol. Fennell, Sheffield. Petition, July 19.**

**ROYCE, JOSEPH, currier, Nottingham, Aug. 1 and 20, at half-past ten, Nottingham. Off. as. Bittleston. Sols. Bowley, Nottingham; Hodgson, Birmingham. Petition, July 9.**

**WARREN, ZACHARIAH, miller, Ardeigh, Essex, July 30, at twelve, Sept. 3, at one, Basinghall-st. Off. as. Stansfield. Sols. Wire and Child, Swin's-lane, City; Barnes, Colchester. Petition, July 17.**

*Gazette, July 25.*

**ELLIS, HENRY JAMES, ironmonger, 19, Rotherhithe-wall, Rotherhithe, Aug. 6, at half-past twelve, and Sept. 3, at eleven, Basinghall-st. Com. Fonblanque. Off. as. Stansfield. Sol. Carpenter, 64, Old Broad-st. City. Petition, July 23.**

**HAMMOND, THOMAS, boot and shoe maker, 21, Conduit-st. Westbourne-terrace, Paddington, Aug. 1, at half-past eleven, and Sept. 3, at two, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sol. Hartley, Southampton-st. Bloomsbury. Petition, July 22.**

**ALLANSON, JOSEPH, draper and grocer, Kirby Moorale, Yorkshire, Aug. 15 and Sept. 5, at eleven, Leeds. Com. West. Off. as. Young. Sols. Shackles and Son, Hull. Petition, July 21.**

**RICHARDS, WILLIAM BENJAMIN, grocer and provision dealer, Hill Top, Staffordshire, Aug. 9 and 28, at twelve, Birmingham. Com. Balguy. Off. as. Valpy. Sols. H. Holland, Westbromwich; T. R. T. Hodgson, Cherry-st. Birmingham. Petition, July 19.**

**BW, ROBERT, grocer and tea dealer, Selby, Yorkshire, Aug. 15 and Sept. 5, at eleven, Leeds. Com. West. Off. as. Young. Sols. Weddall and Parker, Selby; Bond and Barwick, Leeds. Petition, July 23.**

**IRLAM, THOMAS, and WAKSTROCHT, WAKSTROCHT VINCENT, brokers and shipowners, Liverpool, August 7 and Sept. 5, at eleven, Liverpool. Com. Stevenson.**

Off. as. Bird, Sols. Sharp, Field, and Jackson, London; Miller and Peel, Liverpool. Petition, July 22.  
**BATSON**, JOHN NUTTING, cotton spinner, Haworth-croos, Rochdale, Lancashire, Aug. 6 and 20, at twelve, Manchester. Off. as. Leo. Sols. W. Harper, Bury, Lancashire; E. Bennett, 40, Princess-st. Manchester. Petition, July 16.

### Dividends.

#### BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

**Bonsusan and Brandon**, merchants, first, 11d. Graham, London.—**Belbin**, J. coach maker, first, 6d. Stansfeld, London.—**Cockburn**, J. merchant, seventh, 11d. Graham, London.—**Collins**, W. tailor, second, 5d. Stansfeld, London.—**French**, A. plumber, first, 8d. Graham, London.—**Gough**, C. ironmonger, second, 1s. 3d. Mackenzie, Manchester.—**Harrison**, J. F. wine merchant, first, 2d. Graham, London.—**Harrison**, W. merchant, first, 4d. Baker, Newcastle.—**Hobhouse**, Phillott, and **Lowder**, bankers, fifth, 4d. Miller, Bristol.—**Holland and Warden**, tallow chandlers, first, 4s. 2d. Pott, Manchester.—**Kearley**, T. and J. L. leather merchants, second, 2d. and the 11-16ths of 1d. Stansfeld, London.—**Lloyd**, J. and G. Lee, Manchester, builders, first, 2s. 11d.; and first sep. of J. Lloyd, 18s.—**Lloyd**, J. hosier, second, 1s. 11d. Pennell, London.—**MacLeod**, W. merchant, first, 11d. Graham, London.—**Maunder**, W. victualler, first, 1s. 5d. Pott, Manchester.—**Morrison**, W. stationer, final, 3d. Stansfeld, London.—**Pulham**, J. first, 6d. Pennell, London.—**Racine and Jacques**, dyers, final, 3d. Stansfeld, London.—**Simpson**, W. starch manufacturer, first, 6d. Pott, Manchester.—**Thompson**, W. grocer, second, 1s. Baker, Newcastle.—**Williams**, W. draper, second, 5d. Stansfeld, London.

#### INSOLVENT ESTATES.

Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.

**Bayly**, S. grocer, 6s. 5d.—**Bushman**, J. S. student in medicine, 1s. 3d.—**Chant**, J. clerk, 5d.—**Mason**, J. cabinet maker, 2s. 4d.—**Mortleman**, W. grocer, 1s. 3d.—**Stringer**, E. spirit merchant, 1s. 5d.—**Woodley**, W. Capt. R.N. 1s. 2d.—**Burd**, E. millwright, 8d. Apply at the County Court, Nottingham.—**Brown**, R. blacksmith, 8d. Apply at the County Court, Bingham.—**Burnard**, T. master mariner, first and final, 2d. Apply to W. Roberts, official assignee, Newport.—**Byron**, R. bricklayer, 7d. Apply at the County Court, Nottingham.—**Haynes**, M. dealer in game, first and final, 10d. Apply to W. Roberts, official assignee, Newport.—**Murley**, W. Commander R.N. 3s. Apply to Mr. Galpin, druggist, Crewerne.

### Assignments for the Benefit of Creditors.

#### Gazette, July 15.

**Hunt**, W. saddler and harness maker, Bath, July 5. Trusts: H. Tremlett, tailor and woollen draper, Bath, and W. Chavasse, saddlers' ironmonger, Walsall. Sols. Graves and Bellamy, Bath.

#### Gazette, July 18.

**Chaplin**, J. T. draper's assistant, Ludgate-hill, City, July 5. Trust: W. H. Holyland, wholesale warehouseman, Watling-street. Sols. Ashurst and Son, Old Jewry.—**Geary**, C. C. C. (known as Charles Geary) cheesemonger and grocer, Colchester, Essex, June 21. Trust: G. F. King, provision merchant, High-st. Southwark. Sol. J. Butler, jun. Tooley-st. Southwark.—**Kent**, H. M. builder and joiner, St. Stephen's-st. Borough, Kingston-upon-Hull, July 12. Trusts: J. Young, ironmonger, and T. Thorne, timber merchant, both of Hull. Sols. Thorne and Son, Hull.—**Nichols**, W. cooper, Midhurst, Sussex, July 9. Trusts: J. Farley, carpenter, Singleton, and S. Cover, timber merchant, Stedham. Sol. E. Wardroper, Midhurst.—**Skakshaft**, T. leather seller, Brill-row, Somers-town, July 1. Trusts: B. Hooper, leather factor, Beething-lane, and G. Newman, woollen draper, Southwark-bridge-road, Newington. Sol. R. Sleg, Farish-st. Southwark.—**Welch**, J. tobacconist, Coventry, June 28. Trusts: J. Burrows, merchant, Birmingham, and J. Fletcher, tobacco manufacturer. Sol. H. I. Davis, Coventry.

### Partnerships Dissolved.

#### Gazette, July 15.

**Collinson**, A. and **Hulme**, J. mercers and drapers, Burslem, July 12.—**Cookson**, E. P. and **Reid**, W. flour dealers, Liverpool, July 11.—**Ortleigh** and **Searle**, vinegar makers and manufacturing chemists, Liverpool, Dec. 31, 1849.—**Dean**, W. and **Aspinall**, J. grocers, Ashton-under-Lyne, July 8. Debts paid by Aspinall.—**Franklin**, T. and **Woodrow**, W. tailors, Princes-st. Hanover-square, July 1.—**Hooper** and **Wilson**, grocers, tallow-chandlers, and maltsters, Hereford, July 8. Debts paid by Hooper.—**Jamieson** and Co. Calcutta, **Jamieson**, **Edger**, and Co. Canton and Hong-Kong, as regards Edger, Dec. 31.—**Levick**, R., **Haythorn**, J. W., **Cope**, T. and **Haythorn**, J. lace and tatting manufacturers, Nottingham, July 11.—**Matthews**, R. sen. and jun. paper makers and farmers, Huxham, and **Ewe**, June 24. Debts paid by R. Matthews, jun.—**Moore** and **Tatum**, surgeons, New Sarum, July 12.—**Newall**, **Burt**, and Co. merchants, Liverpool, Dec. 31.—**Parker** and **Haine**, milliners and dressmakers, Welbeck-st. Cavendish-square, June 24.—**Pearce** and **Burrows**, working silversmiths, Banner-st. Bunhill-row, July 11. Debts paid by Pearce.—**Watton**, J. and G. B. booksellers, Shrewsbury, July 11. Debts paid by J. Watton.

#### Gazette, July 18.

**Adcock** and **Carter**, cabinet makers, Bradford, June 17. Debts paid by Adcock.—**Bell** and **Marshall**, general merchants, South Shields, April 11.—**Blades**, A. and **Dearing**, L. butchers, Hastings, July 12.—**Buxton**, **Bennett**, and **Holt**, engravers to calico printers, Manchester, as regards Holt, July 17. Debts paid by Buxton and Bennett.—**Cartwright**, R. and S. millers, Wollerton, Hodnet, July 15. Debts paid by R. Cartwright.—**Cooke**, T. jun. and Co. cotton-spinners, Ashton-under-Lyne, July 1.—**Corburn** and **Batley**, joiners, Heckmondwike, July 11.—**Crook**, W. and Co. commission agents, Liverpool, June 1.—**Fairhurst**, I. and **Anthony**, F. makers-up and packers, Manchester, June 30. Debts paid by Fairhurst.—**Harrison**, L. and **Forewood**, shipping agents, Liverpool, July 14.—**Howes**, S. and Co. commission merchants and ship brokers, Liverpool

and elsewhere, July 15. Debts paid by S. Howes, jun.—**Howson**, T. **Crocodile**, J. and **Calvert**, J. power-loom cloth manufacturers, Bighton, June 35. Debts paid by Howson.—**Joseph**, J. **Kirklaff**, and Co. cigar merchants, Manchester, July 4. Debts paid by Joseph.—**Keeler** and **Saville**, table-knife manufacturers, Sheffield, July 12. Debts paid by Saville.—**Moles** and **Taylor**, Perry Barr, Handsworth, July 10. Debts paid by Moles.—**Norcliffe**, S. and C. maisters, Wakefield, July 1. Debts paid by C. Norcliffe.—**Riddle** and **Lightfoot**, manufacturers of china, Longton, Stoke-upon-Trent, July 14. Debts paid by Riddle.—**Symonds**, **Cunliffe**, and Co. bleachers and calico printers, Handforth and Manchester, as regards Le Mare, July 15. Debts by Symonds and Cunliffe.—**Tyler**, J. and **Holmes**, J. F. Gray's-inn, attorneys, &c. July 16.

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The improved state of the country causing safe and profitable investments to be sought for, suggests the propriety of now proceeding to complete the establishment of a society whose design has met with such extensive support.

Another peculiarly advantageous circumstance is the means now afforded by the formation of the Law Property Assurance and Trust Society for the conducting of the business of the Law Reversionary Interest and Investment Society at a comparatively trifling cost, it being proposed to make an arrangement with the former flourishing Society for the use of its offices and officers, instead of incurring the great expense of a separate establishment, thus immensely increasing the profits of the Reversionary Interest Society.

The plan is shortly as follows:—

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2. Calls not to exceed 1*l.* per share, nor at less intervals than three months.

3. The business to be conducted at the offices and by the establishment of the Law Property Assurance and Trust Society; but entirely as a distinct Society, with distinct books, accounts, &c.

4. The Profession to have the advantage of a fair commission on all business its members may bring to the office.

5. To the public it will offer the advantage of fair prices or Reversionary Interest and Policies of Assurance, with an option of converting Reversionary Interests into present income, so as to make provision for immediate wants, and otherwise to facilitate family arrangements.

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March 14, 1851.

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Yours, &c.

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## To Readers and Correspondents.

"PLAIN TRUTH."—It is a strict and necessary rule of the Law Times not to insert any communication sent anonymously. If "Plain Truth" will forward his name (not for publication, but for personal assurance that he is entitled to be heard on the question) his letter shall be inserted next week.

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We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

## THE LAW TIMES.

SATURDAY, AUGUST 2, 1851.

## LAW OF EVIDENCE BILL.

THE calculations that have been made for delay in trial of existing suits, in order to take advantage of the new Law of Evidence Act, will be disappointed. A clause has been introduced expressly providing that it shall not be applicable to any pending action or suit.

In cases, therefore, in which it may be important to the parties to make use of it, the question will now be, whether it will not be less expensive and more safe to *discontinue*, and commence a new action, than to proceed with the present one,—and this should be well considered.

## THE ATTORNEYS' TAX.

WE have been unable to obtain any positive information as to the motives that led to the abandonment of this Bill, or whether it was indeed the result of a promise of relief from the Government. Nothing less than this could have justified retreat at the moment of victory.

## LAW AND EQUITY.

NOT a twelvemonth has elapsed since the Law Amendment Society published among its announcements of subjects for consideration, the fusion of Law and Equity.

The suggestion was discussed, approved, and referred to a committee of inquiry. It appeared that the thing had actually been done very lately in the state of New York; the manner of doing it and the results were investigated. One of the judges of that State attended in person a meeting of the Society, and communicated his experience. So likewise did a lawyer in large practice there. An extensive correspondence was undertaken, and the result was a report from the committee of the Society unanimously approving the project.

VOL. XVII.—No. 435.

The suggestion was at first received by the Profession with a smile of incredulity. The idea of two distinct jurisdictions, belief in the essential differences between law and equity as two divisions of jurisprudence, arising out of the nature of things, was so fixed in the legal mind of England, that to question it appeared to be almost as presumptuous as to dispute the Newtonian philosophy. We had received it as an axiom; we had accepted it as an acknowledged truth, without reasoning upon it and without ever suspecting for a moment that it might not be true. Hence our astonishment and incredulity at the first denial of it, mingled with something of indignation at the daring of the proposal to abolish the distinction.

But discussion produced its usual fruits. The lawyers were induced to reflect, to examine into the foundations of their faith, and inquire into the practical results of the system founded upon it. Then it appeared that indeed there was not any natural distinction between law and equity, but that it was purely an artificial creation; that it did not prevail everywhere, but, on the contrary, was not found in Scotland, had been abolished in several of the States of America, who had originally borrowed it from ourselves; and that it was unknown to any other country.

It was discovered, also, to be the parent of most of the defects in the administration of our law. This it was that had made the Court of Chancery the most gigantic abuse the world has ever seen, and out of this came most of the practical difficulties that stood in the way of a reform of the Common Law.

Wonderful was the progress of opinion on this question. The more the lawyers reflected the more plain did the proposition appear. Although every prejudice was enlisted against the novelty, and it was at its first announcement received with distrust and alarm, in an incredibly short time it has succeeded in overcoming both, and recommending itself to the regards even of those most hostile to it. Already a large number of our most eminent lawyers have publicly declared themselves converts. Lord BROUGHAM led the way; Mr. BETHELL, the leader of the Chancery Bar, has more than once avowed his approval. The Attorney-General, in the House of Commons, supported certain clauses in the Evidence Bill, as being the first step to the fusion of law and equity, without which, he said, no great improvements in the law could be effected, nor did he think that the public would be satisfied with anything less. The Solicitor-General followed on the same side. Other lawyers in the House echoed the sentiment. In short, there would appear to be already almost unanimity among all who have given any thought to the subject.

We must confess that at the first blush we felt, and we believe we expressed, the same surprise and incredulity which were shared by the Profession generally at the vision of so startling a novelty. But as it was our duty, in preparation for the discussions it would be sure to involve, and in which it would be our business to take an active part, with a view to the protection of the interests of the Profession against any destructive proposition, we have given to the subject reading and reflection, and, going back to the foundation, we have sought to ascertain if there be any natural and necessary distinction between equity and law that should demand two different tribunals, two forms of procedure, two sets of principles and rules of law.

The result has been with us as it was with others. We have come to the same conclusion; that there is no necessity for the distinction; that it is purely arbitrary and artificial; that it is productive of most of the evils complained of in the administration, and to which the lawyers are at least as averse as their clients, and that the fusion of equity and law offers the only effectual remedy for abuses, which injure all and profit none; and in the

abolition of which none are so directly and extensively interested as the Profession, which is falsely supposed to profit by them.

Now, we are desirous of imparting to our readers the reasons that led to this conclusion, for the question will soon become a prominent one, and probably will absorb all minor questions of reform in the administration of the law; for if this be accomplished, all the rest will be involved in it, and affected by it. It is right, therefore, that our readers should thoroughly acquaint themselves with the principles upon which it rests.

But as we are unwilling to break the chain of an argument, and these introductory remarks have run to so great a length that it would be impossible to do justice to them in this paper, we will defer the statement of them until next week.

## REGISTRATION OF DEEDS.

THE respite afforded by the withdrawal of the Bill for this Session, will give to our readers an ample opportunity for determining upon some course of action in relation to it previously to its introduction next year, which shall have the unanimous support of the whole Profession, and upon which all its great influence may be brought to bear.

We have no hesitation in asserting that, instead of the desultory and useless warfare hitherto pursued, and consisting only of objections which have no weight, because they are supposed to be the language of self-interest, the lawyers should produce a bill of their own, accomplishing the same end by more efficient and practical means. This would obtain for us respect and confidence, instead of mistrust and ridicule.

What the principle of the lawyers' Registration should be, whether by *local registries*, or by *indorsements on the title deeds*, will be a subject for serious consideration, as will also the manner of securing for it the general assent and aid. On these points we ask suggestions.

## THE LEGISLATOR.

## Imperial Parliament.

## PUBLIC BUSINESS TRANSACTED.

## BILLS READ A FIRST TIME.

*Saturday, July 26.*  
Metropolitan Intermittent  
New Zealand Settlements.  
*Monday, July 28.*  
Christ Church (Oxford) Estate.  
*Tuesday, July 29.*  
Ballot.  
*Wednesday, July 30.*  
Episcopal and Capitalist Estates  
Chimney Sweepers' Regulation Act Amendment  
Church Building Act Amendment  
General Board of Health, No. 4  
Canterbury Association  
Nuisances' Removal and Diseases' Prevention.  
*Thursday, July 31.*  
Charitable Trusts  
County Rates.

## BILLS READ A SECOND TIME.

*Friday, July 25.*  
Patent Law Amendment.  
*Monday, July 28.*  
Metropolitan Intermittent  
New Zealand Settlement  
Lunatics, India  
Attorneys and Solicitors Regulation Act Amendment.  
*Thursday, July 31.*  
General Board of Health, No. 4  
Episcopal and Capitalist Estates' Management  
Canterbury Association  
Nuisances' Removal and Diseases' Prevention.

## BILLS READ A THIRD TIME AND PASSED.

*Saturday, July 26.*  
Consolidated Fund Appropriation  
Representative Peers for Scotland.  
*Monday, July 28.*  
Lands Clauses Consolidation, Ireland  
Sheep, &c. Contagious Diseases' Prevention  
Poor Relief Act Continuance  
Battersea Park Amendment  
Emigration Advances, Scotland.  
Commissioners of Railways Act Repeal.  
*Tuesday, July 29.*  
Medical Charities, Ireland.  
*Wednesday, July 30.*  
Coalwhippers, Port of London  
Steam Navigation.

Thursday, July 31.  
Coal Duties, London and Westminster, &c.  
Metropolitan Sewers  
Law of Evidence Amendment  
Canada and New Brunswick Boundary.

### PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Friday, July 25.  
St. Andrew's and Quebec Railway.  
Saturday, July 26.  
St. Helen's Improvement, No. 3  
South Holland Drainage Acts Amendment.  
Monday, July 28.  
Glasgow Provident Bank Estate  
Musselburgh, Arrangement with Commissioners.  
Thursday, July 31.  
Shelley's Estate  
Moore's Estate  
Barton's Estate.

### SESSIONAL PRINTED PAPERS.

Par. Numb.  
391. County Cess, Ireland—Abstract of Return  
456. Post-office—Return  
468. Lunacy—Account  
539. Belfast Union, &c.—Copies of Communications  
Western Highlands and Islands—Report by Sir John M'Neill  
New Zealand Papers, a corrected leaf  
468. Iron, Accounts  
519. Ordnance Survey, Scotland—Report from Committee  
581. Bills—Lunatics, India  
589. — Ballot  
606. — Crown Estate Paving, as amended by the Select Committee  
607. — Episcopal and Capitular Estates' Management, No. 2  
608. — Chimney Sweepers' Regulation Act Amendment  
586. — Canada and New Brunswick Boundary  
588. — Lands Clauses' Consolidation, Ireland, amended in committee and on re-commitment  
590. — Church Building Acts Amendment, amended  
594. — Metropolitan Interment  
596. — New Zealand Settlements  
573. Exhibition of 1851—Return  
Census of Ireland, 1841 and 1851—Abstracts  
575. Drainage, Ireland—Return  
592. Metropolitan Commission of Sewers—Returns  
558. Newspaper Stamps—Report  
584. Coroners—Report  
Census of Great Britain, 1851—Tables  
555. Morayshire Railway—Report of Commissioners  
565. Wheat, Barley, and Oats—Account  
573. Male Convicts—Returns  
510. Manchester Warehousing—Copy of Evidence  
598. Police Force, Limerick—Return  
590. Poor Relief, Ireland—Return  
605. Steam Communications with India, &c.—Second Report from Committee  
British Fisheries—Report by Commissioners.

### HOUSE OF LORDS.

#### COURT OF CHANCERY AND JUDICIAL COMMITTEE BILL.

THURSDAY, July 31.—The LORD CHANCELLOR, in moving the second reading, explained its various provisions, and stated that it had the assent of Lords Lyndhurst and Brougham. He also took occasion to deny the impression which generally prevailed, that no attempt had been made to improve the administration of justice in the Court of Chancery, and recited at some length the various orders which Lords Eldon, Lyndhurst, Brougham, and Cottenham had made as to the practice of the Court.—The Earl of ABERDEEN said the extent of Lord Lyndhurst's approbation was that it was a very small step in the right direction. He took that opportunity of calling attention to the unsatisfactory state of the arrangements respecting the hearing of Scotch appeals, which presented the anomaly of the principles of the Scottish law being administered by judges who had not made that system of jurisdiction their early study.—Lord CRANWORTH and the LORD CHANCELLOR admitted the theoretical anomaly, but contended that the practice worked well.

### HOUSE OF COMMONS.

#### EPISCOPAL AND CAPITULAR ESTATES MANAGEMENT BILL.

THURSDAY, July 31.—The order of the day was read for the second reading.—Colonel SIBTHORP moved as an amendment that the Bill be read a second time that day six months.—The SOLICITOR-GENERAL explained the principle of the measure, which was to promote the enfranchisement of leasehold estates, giving power to the lessors and lessees to buy and sell, and thereby change their condition, if they so thought fit.—Mr. HENLEY thought the proposed manner of dealing with church property a very loose one.—The House divided and negatived the amendment by 45 to 34.

#### COUNTY RATES.

Mr. FRESHFIELD moved for leave to bring in a Bill for consolidating and amending the laws relating to the assessment and collection of county rates.—Agreed to. The Bill was brought in and read a first time.

#### ATTORNEYS AND SOLICITORS REGULATION ACT AMENDMENT BILL.

This Bill passed through committee.

LAW OF EVIDENCE AMENDMENT BILL.  
This Bill was read a third time, and passed.

### PARLIAMENTARY PAPERS.

MALE CONVICTS.—On Wednesday some returns were printed by order of the House of Commons respecting male convicts of Great Britain. The largest number sentenced to transportation in the last thirteen years (1839 to 1851 inclusive) was in 1842, when the number was 3,921. In 1842, as many as 4,085 were sent abroad. On the 1st of January last, 6,191 were detained in Great Britain, in which year not one was sent abroad. Last year 29 escaped, 108 were pardoned on the expiration of a moiety of the sentence or on special grounds, and 64 on medical grounds. In Ireland in the same period there were 12,966 ordered to be transported. The number sent abroad was 7,211. The number who escaped in the last three years was 41, and the number pardoned in the same time was 223.

NEW ACT RELATING TO LANDLORD AND TENANT.—A new Act came into force on Thursday last (14 & 15 Vict. c. 25), to improve the law of landlord and tenant in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures. It enacts that, on the determination of leases or tenancies under tenant for life, &c. instead of claims to emblements, the tenant shall continue to hold and occupy such farms or lands until the expiration of the current year. Growing crops of the tenant seized and sold under an execution shall, in default of sufficient goods and chattels of the tenant, be liable for the accruing rent; "notwithstanding any bargain and sale, or assignment, which may have been made or executed, of such growing crops, by any such sheriff or other officer." A tenant may remove the buildings and fixtures erected by him on a farm, unless the landlord shall elect to take them. Further, it is provided that on a tenant quitting the place, leaving the tythe rent charge unpaid, the landlord may pay the same, and recover it from the first-named tenant as if it were a simple contract debt. The Act, which is not to extend to Scotland, contains five clauses.

### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 133.)

#### CAP. XXII.

An Act to continue the Survey of Great Britain, Berwick-upon-Tweed, and the Isle of Man.

(July 24, 1851.)

#### CAP. XXIII.

An Act to authorise for a further period the advance of money out of the Consolidated Fund, to a limited amount, for carrying on Public Works and Fisheries and Employment of the Poor.

(July 24, 1851.)

#### CAP. XXIV.

An Act to amend the Act for the granting of Sites for Schools.

(July 24, 1851.)

The statute merely provides that the word "parish," in the 4 & 5 Vict. c. 38, s. 9, and 12 & 13 Vict. c. 69, s. 3, shall signify "an ecclesiastical district in any divided parish."

#### CAP. XXV.

An Act to improve the Law of Landlord and Tenant in relation to Emblements, to growing Crops seized in Execution, and to Agricultural Tenants' Fixtures.

(July 24, 1851.)

We give this statute entire.  
Whereas it is expedient to amend the law to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom, and also the law relating to growing crops seized under executions, and to agricultural fixtures: Be it therefore declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:—

1. On determination of leases or tenancies under tenant for life, &c. instead of emblements tenant to hold until expiration of current year, &c.—That where the lease or tenancy of any farm or lands held by a tenant at rackrent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the

tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid.

2. Growing crops seized and sold under execution to be liable for accruing rent.—That in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of *fi. facias* or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

3. Tenant may remove buildings and fixtures erected by him on farms, unless landlord elect to take to them.—That if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: Provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same.

4. Tenant quitting, leaving tithe rentcharge unpaid, landlord, &c. may pay the same, and recover from the first-named tenant as if it were a simple contract debt.—That if any occupying tenant of land shall quit, leaving unpaid any tithe rentcharge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rentcharge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment.

5. Act not to extend to Scotland.—Nothing in this Act shall extend to Scotland.

#### CAP. XXVI.

An Act to amend the Acts relating to the British White Herring Fishery.

(July 24, 1851.)

#### CAP. XXVII.

An Act to amend certain Acts for the Improvement of Prisons and Prison Discipline in Scotland.

(July 24, 1851.)

#### CAP. XXVIII.

An Act for the well-ordering of Common Lodging Houses.

(July 24, 1851.)

We give this statute entire.

Whereas it would tend greatly to the comfort and welfare of many of her Majesty's poorer subjects if



provision were made for the well-ordering of common lodging-houses: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; to wit,

1. *Short title.*—In citing this Act for any purpose it shall be sufficient to use the expression "The Common Lodging-houses Act, 1851."

2. *Interpretation of Terms in this Act.*—The following words and expressions in this Act have, for the purposes and execution of this Act, the following meaning; to wit,

The word "place" includes county, riding, hundred, and other division or part of a county, city, borough, parish, district, and other place whatsoever:

The word "borough," and the expressions "mayor, aldermen, and burgesses," and "borough fund," have respectively the same meaning as in the Act for the regulation of municipal corporations:

The expression "Improvement Act" means an Act for regulating and managing the police of, and for draining, cleansing, paving, lighting, watching, and improving a place, and an Act for any of those purposes:

The expression "common lodging-house" includes, in any case in which only a part of a house is used as a common lodging-house, the part so used of such house.

3. *By whom the Act is to be executed.*—This Act shall be executed as follows: to wit,

1. Within and for all or any part of the metropolitan police district, by "The Commissioners of Police of the Metropolis," or such one of them as is from time to time appointed in that behalf by one of her Majesty's Principal Secretaries of State:

2. Within and for all and any part of any place not being within the metropolitan police district, but being now or hereafter the district of a Local Board of Health, by the Local Board of Health for the district:

3. Within and for all and any part of any other place not being within the metropolitan police district, and not being the district of a Local Board of Health, but being now or hereafter an incorporated borough regulated under the Act for the regulation of municipal corporations, or any Act for the amendment thereof, or any charter granted in pursuance of any such Act, by the mayor, aldermen, and burgesses of the borough acting by the council of the borough:

4. Within and for all and any part of any other place not being within the metropolitan police district, and not being the district of a Local Board of Health, and not being such an incorporated borough, but being now or hereafter the place within the limits of an improvement Act, by the commissioners, trustees, or other body, by whatever name known, for executing the Improvement Act:

5. Within and for all and any part of any other place not being one of the places hereinbefore specified by the justices of the peace acting in petty sessions for the place.

4. *As to expenses of executing this Act.*—The expenses of and incident to the executing of this Act shall be borne and paid as follows: to wit,—

1. With respect to the metropolitan police district, as part of the general expenses of executing the Acts for the time being in force relating to the Metropolitan Police Force:

2. With respect to the district of a Local Board of Health as part of the expenses of executing the Acts for the time being in force relating to the Local Board of Health, and as charged upon and payable out of the moneys carried, under the Public Health Act 1848, to the district fund account of the Local Board of Health:

3. With respect to an incorporated borough, as part of the expenses of carrying into execution within the borough the provisions of the Act for the regulation of municipal corporations, and as charged upon and payable out of the borough fund of the borough:

4. With respect to a place within the limits of an Improvement Act, as part of the general expenses of executing that Act, and as charged upon and payable out of the moneys from time to time applicable for those expenses:

5. With respect to a place in which this Act is executed by justices in Petty Sessions, as part of the general expenses of the constabulary of the place, and as charged upon and payable out of the moneys from time to time applicable for those expenses:

And the moneys from time to time required for the payment of the expenses of and incident to the execution of this Act shall be assessed, levied, raised, recovered, and paid accordingly.

5. *Meaning of the term "the local authority."*

—The expression in this Act "the local authority," means, with respect to the purposes and execution of this Act with respect to any place, the body or person by this Act authorised to execute with respect to the place the several provisions of this Act.

6. *Notice of this Act to be given to the keepers of common lodging-houses.*—Within three months after the passing of this Act the local authority shall, and from time to time thereafter the local authority may, give to the keeper of every common lodging-house already or hereafter within the jurisdiction under this Act of the local authority, notice in writing of this Act, and shall give such notice by leaving the same for such keeper at the house, and shall by such notice require the keeper to register the house as by this Act provided, and such notice may be in the form in the schedule to this Act annexed, or to the like effect.

7. *Registers of common lodging-houses to be kept.*—The local authority shall keep a register in which shall be entered the names and residences of the keepers of all common lodging-houses within the jurisdiction of the local authority, and the situation of every such house, and the number of lodgers authorized according to this Act to be received therein.

8. *Lodgers not to be received in common lodging-houses until registered under this Act.*—After one month after the giving of such notice to register as by this Act provided, the keeper of any common lodging-house or any other person shall not receive any lodger in such house until the same has been inspected and approved for that purpose by some officer appointed in that behalf by the local authority, and has been registered as by this Act provided.

9. *Power to local authority to make regulations respecting common lodging-houses.*—The local authority may from time to time make regulations respecting common lodging-houses within its jurisdiction for all or any of the purposes respecting the same for which the Local Board of Health are by the Public Health Act, 1848, authorised to make by-laws, and for the well-ordering of such houses, and for the separation of the sexes therein: provided always, that the regulations made under this Act by the local authority shall not be in force until they have been confirmed by one of her Majesty's Principal Secretaries of State.

10. *Power to local authority to impose penalties for offences committed against regulations.*—The local authority shall have the same power of imposing penalties on offenders against the said regulations, subject to the same restrictions, as the Local Board with respect to offenders against such by-laws, and such penalties shall be recoverable in the same way as is provided in the said Act with respect to the penalties imposed on offenders against such by-laws; and a copy of the said regulations, purporting to be signed by the Secretary of State, and also to be signed by the local authority (or to be sealed with the seal of the same, in case it have a seal), shall be receivable in evidence of such regulations, and of the duly making and confirming thereof.

11. *Keepers of common lodging-houses to give notice of fever, &c. therein.*—The keeper of a common lodging-house shall, when a person in such house is ill of fever or any infectious or contagious disease, give immediate notice thereof to the local authority, or some officer of the local authority, and also to the poor-law medical officer and the poor-law relieving officer of the union or parish in which the common lodging-house stands.

12. *As to inspection of common lodging-houses.*—The keeper of a common lodging-house, and every other person having or acting in the care or management thereof, shall, at all times when required by any officer of the local authority, give him free access to such house or any part thereof.

13. *As to cleansing of common lodging-houses.*—The keeper of a common lodging-house shall thoroughly cleanse all the rooms, passages, stairs, floors, windows, doors, walls, ceilings, privies, cesspools, and drains thereof, to the satisfaction of and so often as shall be required by or in accordance with any regulation or by-law of the local authority, and shall well and sufficiently, and to the like satisfaction, limewash the walls and ceilings thereof in the first week of each of the months of April and October in every year.

14. *Penalty for offences against this Act.*—If the keeper of a common lodging-house, or any other person having or acting in the care or management thereof, offend against any of the provisions of this Act, or any of the bye-laws or regulations made in pursuance of this Act, or if any person in any common lodging-house be confined to his bed for forty-eight hours by fever or any infectious or contagious disease, without the keeper of such house giving notice thereof as required by this Act, every person so offending shall for every such offence be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding forty shillings for every day during which the offence continues: Provided always, that this Act shall not exempt any person

from any penalty or other liability to which he may be subject irrespective of this Act.

15. *Recovery of penalties.*—The clauses and provisions of the Railways Clauses Consolidation Act, 1845, "with respect to the Recovery of Damages not specially provided for, and of Penalties, and to the Determination of any other Matter referred to Justices," are for the purposes and execution of this Act incorporated with this Act.

16. *General powers of local authority, &c.*—The local authority, and all justices, constables, and others, shall respectively have full jurisdiction, powers, authorities, and indemnities for executing the several provisions of this Act; and the restrictions of the Public Health Act, 1848, as to the hours within which common lodging-houses may be entered by persons authorised by a Local Board of Health, shall not apply to this Act.

17. *Act not to extend to the city of London.*—That this Act shall not extend to the city of London or the liberties thereof.

18. *Act not to extend to Scotland.*—That nothing in this Act shall extend to Scotland.

## SCHEDULE.

### Form of Notice.

Take notice, that on the \_\_\_\_\_ day of \_\_\_\_\_ an Act called "The Common Lodging Houses Act, 1851," was passed, and that before the \_\_\_\_\_ day of \_\_\_\_\_ you, being the keeper of a common lodging-house within [here state the place over which the jurisdiction of the local authority giving the notice extends], must have your common lodging-house registered, and that the register is to be kept at [here state where the register is to be kept], and that if you do not have your common lodging-house so registered you will be liable to a penalty not exceeding five pounds for every lodger whom you receive in your common lodging-house while it is not so registered; and that on applying to [here the name and address of the person to keep the register] he will register your common lodging-house free of all charge to you. Dated \_\_\_\_\_ &c.

### CAP. XXIX.

An Act for further continuing certain temporary Provisions concerning Ecclesiastical Jurisdiction in England. (July 24, 1851.)

### CAP. XXX.

An Act to continue an Act for authorising the Application of Highway Rates to Turnpike Roads. (July 24, 1851.)

This Act continues to the 1st of October, 1852, and the end of the then next Session of Parliament, the Act of 4 & 5 Vict. c. 59.

### CAP. XXXI.

An Act to continue an Act to amend the Laws relating to Loan Societies.

This Act continues to the 1st October, 1852, and the end of the then next Session of Parliament, the Act 3 & 4 Vict. c. 110, entitled "An Act to amend the Laws relating to Loan Societies."

### CAP. XXXII.

An Act to suspend the making of Lists and the Ballots and Enrolments for the Militia of the United Kingdom. (July 24, 1851.)

### CAP. XXXIII.

An Act to enlarge the Period allowed for compounding for Assessed Taxes. (July 24, 1851.)

This Act extends the time for giving notice of intention to compound for Assessed Taxes, enlarged until the 1st October, 1851.

THE NEW DUTY ON HOUSES.—By the Act 14 & 15 Vict. c. 36, the new house-duty is to commence from 5th April last, from which day the window duty will cease to be payable. The new duty is 6d. in the pound, where houses shall be occupied and used, and 9d. in the pound when not used and occupied for residence, trade, &c.

VOTE BY BALLOT.—On Thursday Mr. H. Berkeley's Bill for the protection of the Parliamentary electors of Great Britain and Ireland by taking the votes by way of ballot, was printed. It provides that the returning officers are to procure ballot boxes, and to deliver them to the poll clerks on day of election. The boxes are to be of such construction as shall be approved by the Secretary of State, and to be paid for out of the Consolidated Fund.

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

### Summary.

It is not often that questions in this department of the law come under the consideration of the House of Lords. For the first time since we have been keeping a record of the progress of the law do we find a parochial question of great importance decided by the

**High Court of Appeal.** In *Scadding v. Loran*, 17 Law T. 225, several points were raised as to the validity of a poor-rate in the parish of St. Pancras. It was in the form of an action of replevin. The local Act required notice to be given of adjourned meetings with their object. A meeting to make a poor-rate was held and adjourned, but no such public notice of adjournment was given. It was held that the notice of the original meeting sufficed to satisfy the requisitions of the statute, for that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting. It was held also that a vestryman *de facto* was as competent to join in the making of a poor-rate as a vestryman *de jure*. "When it was considered," said the judgment, "that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence."

**STATISTICS OF CRIMINAL OFFENDERS.**—According to the returns to Parliament there were 26,813 persons committed for trial in England and Wales in the course of last year. The number in the preceding year (1819) was 27,816. Of the number committed last year 2,578 were ordered to be transported, and 17,602 to imprisonment. The number sentenced to death was 49.

**BURGESSES' AND FREEMEN'S PARLIAMENTARY FRANCHISE.**—By an Act of Parliament which received the Royal Assent on Thursday (14 & 15 Vict. c. 39), burgesses and freemen are exempted from the operation of an Act for the better assessing and collecting the poor-rates and highway-rates in respect of small tenements. It is now provided that the right of voting reserved by the 2 & 3 Wm. 4, c. 45, to persons then entitled, is not to be affected by the change of rating under the 13 & 14 Vict. c. 99. The word "tenement" is to include apartment, cottage, or building or land in the same parish.

**EDUCATION OF THE POOR.—SITES FOR SCHOOLS.**—An Act of Parliament has just been printed (14 & 15 Vict. c. 24) to amend the law for the granting of sites for schools. It seems that by former Acts the portion of land to be converted into a site for a school for the education of poor persons in religious and useful knowledge was confined to an acre in a parish. "And whereas by reason of the great extent of some parishes, wherein the population is very large, this limitation is found to be productive of inconvenience, and to prevent the extension of the education of the poor," the word "parish" in former Acts, is to signify an ecclesiastical district in a divided parish, by which more than one school can be erected. The present is to be construed as one with the Acts 4 & 5 Vict. c. 38, and 12 & 13 Vict. c. 49.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

*Burmister, P. O. v. Norris, O M.* 17 Law T. 232, is a case of considerable importance to Joint-Stock Companies. The deed of settlement contained this clause: "That the affairs and business of the company shall be under the sole and entire control of the directors, &c.; and three of them shall form meetings of the directors, and shall for all purposes be competent to act." The deed gave no express power to borrow money, but its general purport was to carry on a concern by means of capital subscribed. The Court held that the directors had no power to borrow money. "It would make a vast difference to the subscribers if the power contained in those words were to be construed as imposing an unlimited responsibility on the parties who have entered into the concern beyond the capital they supposed themselves to have subscribed, and with which capital the concern was to be entirely carried on."

A delivery of an attorney's signed bill of costs against a provisionally-registered railway company is a somewhat difficult matter, and it was very fully considered in a Court of Error in the case of *Phippe v. Daubney*, 17 Law T. 232. The facts were as follow. A. the solicitor for a railway company, employed B. another solicitor, to do work for the company. B. sent to A. by post the bill of costs, signed, and headed "C. Railway to B., Dr." Defendant was a member of the provisional committee. A copy of that bill was given to him, and he said he had seen it before, and it was not intended to dispute the items. The person who brought that copy to him took it away again. Upon these facts it was held, 1st, that the form of the bill was sufficient, as the heading imported that plaintiff meant to charge all the persons liable for the work done by him for the C. railway; 2nd, that there was evidence for the jury of a sufficient delivery of the bill, as the jury could have come to the conclusion that the defendant might have kept the copy if he had pleased.

## WINDING-UP.

**DUISBURY IRON COMPANY.**—On Thursday. the list of contributories to this company was proceeded with before his Honour Master in Chancery Humphry.

**SEA, FIRE, AND LIFE ASSURANCE COMPANY.**—On Wednesday there was a numerous meeting of the shareholders, to settle their respective liabilities before the Master in Chancery Tinney, when the list was partially settled.

**BRIGHTON, LEWES, AND TONBRIDGE RAILWAY.**—The call of 175*l.* upon each of the directors of this company has been postponed for the present.

## PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]  
*Direct Western Railway Company.*—Ordered to be wound up on July 19.

## REAL PROPERTY LAWYER AND CONVEYANCER.

THE rights of a husband to the property of his wife involve some very curious law. An interesting case of this class was last week reported from the Rolls Court. In *Rogers v. Acaster*, 17 Law T. 229, the facts were, that a wife was entitled to an interest to the extent of 500*l.* in a bond executed to another person, payable after that person's death. She joined her husband in releasing the 500*l.* for a consideration to the trustees of the obligor. The husband afterwards died in the lifetime of the person to whom the bond had been executed, and after whose death it was to be payable. That person died, and the widow claimed the 500*l.* contending that it was not a valid release. She was held to be entitled to it, because a husband cannot release a debt not due to a wife herself, but in which she has only an interest. "Now I decide nothing," said the Master of the Rolls, "as to a debt due to the wife herself; but there is a great distinction between an immediate and accruing right of action, as, for instance, suppose a covenant on the death of the husband, he could not release that."

Another case in the *Construction of Wills* is that of *Huskison v. Bridge*, 17 Law T. 230. A. gave all his property to his wife, "to enjoy the same in the fullest and most unconstrained manner, subject, nevertheless, to the following provisions." He then gave certain legacies to relations of himself and wife, and expressed his desire to be that his wife should make her own will: "and it is also my will and desire that the said will should be made in such a manner that my whole property which at my dear wife's decease may be then remaining, shall be so divided between the relations hereinbefore mentioned as shall be pretty nearly in amount between my own relations and those of my dear wife, and in such portions to each individual as she may think they deserve," &c.; and concluded thus: "But it is my express will that the precautionary clause or power lastly provided for is not to do away with, or in any the least to deprive my said wife from exercising the entire right and will over my said property should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself." The widow, by her will, made no disposition of the residue of her estate. Was the above direction obligatory? It was held not to be so; that the testator's pro-

perty vested absolutely in the widow, and passed to her next of kin.

In *Typing v. Howard*, 17 Law T. 231, it was held, that the words "legal representatives" in an instrument required to be explained by the context. "There were three possible interpretations of these words," said the Court, "either of which led to the same result." They might mean 'executors or administrators,' and be therefore merely what was commonly called words of limitation, or, if words of substitution, they applied to those persons living at the date of the settlement; or they were void for uncertainty."

The construction of a covenant in a lease, and whether it was a condition precedent, was considered by a Court of Error in *Prior v. Gray*, 17 Law T. 233. The lease contained a proviso, that on giving eighteen months' notice to quit before the end of the eighth year, and all arrears of rent paid, and "all covenants and agreements on the part of the lessee having been observed and performed," the lease should determine at the end of the eighth year; "nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." Some covenant had not been performed. It was held, reversing the judgment of the Court below, that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease.

## Queries.

### MANOR COURTS.

In the absence of any express stipulation between the lord and steward, which of the following expenses fall upon the lord and which upon the steward, viz. court books or rolls, advertising court, letters advising parties thereof, journey to court, and court dinner; and is the steward entitled to make any charges whatever against the lord in respect of the preparations for or attendance at a court? H. W. J.

### COUNTY COURTS.

#### THE BAR AND THE ATTORNEYS—COUNTY COURT ADVOCACY.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In the present unsettled state of professional etiquette, as applicable to the right of advocacy in the County Courts (our future Courts of Nisi Prius), is it not advisable that some friendly and amicable arrangement should be come to, in order to avoid an unseemly contest which must inevitably degrade both parties?

No doubt the great changes which have taken place in respect to legal matters has induced a struggle for business, and this struggle will no doubt increase; but at the same time, for the interest and convenience of all parties, let it be done decently and respectably, which will not be the case if left to find its own level in a sort of "cadging" and "touting" rivalry, and in which case the rebase of the Bar, and the dregs of the Profession, will be the parties left to fight out such a contest,—or, to use Mr. Attorney-General's graphic expression (in his complimentary and ungrateful return for his obligations to the Profession), the "hybrids," both of the Bar and Attorneys.

As to there being a conspiracy among the Attorneys to keep out the Bar, I most emphatically deny it. There may be one or two instances in which Attorneys may have full confidence in themselves and their legal abilities, upon all points and all occasions; but then we see they are beaten at times as well as other advocates. As to a conspiracy, as stated by the Attorney-General, it is all moonshine.

I am quite willing, if my legal brethren will join me, immediately to form a committee for the purpose of ascertaining the feeling and tone of the Legal Profession on the subject, and to invite a conference with the Bar and see what can be done. Suppose, for instance, the Bar say they will not interfere in cases under 20*l.* and the Legal Profession engage to employ them in all cases above 20*l.*, where brief, &c. is allowed, or something of that kind. At all events, let us meet and see what is best to be done, as "in the multitude of counsel there is wisdom."

I shall be most happy to assist to bring about, in my opinion, so desirable an event, and will attend to and receive any communication on the subject. Ought not the Metropolitan and Provincial Legal Association to take up this matter?

I am, Sir, yours, &c.  
EDWD. CLARKE.

29, Bedford-row, July 30, 1851.

## THE LAWYER.

## Summary.

**EQUITY PRACTICE.**—Where executors of a testator had invested a sum to meet claims against the estate, and paid the dividends to the tenant for life under the will; on his death the Court directed an inquiry by the Master as to who was entitled to the fund, and ordered the dividends to be paid, in the meantime, to the person entitled to the testator's estate. (*Blackford v. Toller*, 17 Law T. 231.)

The Court, upon petition, directed the appointment of a receiver where real estate had descended to an infant. (*Re Leeming*, 17 Law T. 231.) But in *Re Dickinson*, 17 Law T. 231, it refused to make an order on petition for a conveyance, where A. had contracted to sell real estate to B. and before conveyance executed died, leaving an infant heir.

**COMMON LAW.**—A case deciding what is not a sufficient justification in law to an action for libel is merely named here, that the practitioner may note it in his text-book. It is that of *Shew v. Odum*, 17 Law T. 236. Another case upon the service of an attorney's bill against a railway company is noticed in the *Joint-Stock Companies Law Journal*.

## THE MERCANTILE LAWYER.

A Patent case has been decided by the Lord Chancellor. In *Warwick v. Hooper*, 17 Law T. 228, it appeared that certain patentees had by deed licensed the defendant to use their patent, paying certain royalties to be made up to 2,000l. yearly, reserving a power to revoke the licence if that sum was not paid. The plaintiffs received for several years a less yearly sum than was agreed, and then gave notice to revoke the licence. It was held, in strict accordance with justice, that the plaintiffs had by their acceptance of the smaller sum, waived their right to treat the nonpayment of the larger sum as forfeiture of the licence.

On an appeal from a County Court, in *Clay v. Trofts*, 17 Law T. 231, it was decided that a printed prospectus of a school which had been handed to defendant as the terms of the contract between him and the plaintiff, except in the alteration of the sum to be paid, did not require an agreement stamp. "It was," said PARKE, B. "nothing but a proposal for an agreement, the terms of which are afterwards to be arranged between the parties. I think the section in the Stamp Act applies to cases not only where the document is signed, but where it also contains the actual terms of the agreement between them."

On demurrer for one of those points of form which disgrace our law, but which are now about to be abolished, it has been decided that the provision of the 122nd section of 6 Geo. 4, c. 16, that the certificate of a bankrupt shall state that he has made a full discovery, &c. and "that there does not appear any reason to doubt the truth or fulness of such discovery," means that the Commissioner shall "certify both as to the truth and fulness," and therefore a plea of the certificate, stating that the Commissioner had certified to the fulness only if the discovery was held to be bad. (*Wagner v. Aubrie*, 17 Law T. 231.)

## ASSURANCE CHRONICLE.

The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

**THE ALFRED LIFE INSURANCE COMPANY.**—The quinquennial meeting of the shareholders and policy holders in this company was held on Wednesday, at the offices of the company, 7, Lothbury. W. H. Maxwell, esq. in the chair. The secretary then read the report, embracing a term of five years, viz. from 1846 to 1851. Up to the 30th of June last, the company had issued 1,135 policies of various kinds, assuring the sum of 995,580l. (nearly one million sterling); 54 annuities had been granted, securing to the grantees in the aggregate 4,061l. 12s. 9d. per annum, and 132 re-assurances had been effected for the sum of 123,750l. Of the lives assured, out of the 1,135 only 61 had dropped, entailing claims of not more than 38,559l. whilst amongst the 54 an-

nuitants not less than 16 had died, and a total annual payment of 1,343l. 12s. had, in consequence, reverted to the company. After deducting these and the policies lapsed by surrender and other causes, the number in force on the 30th of June last had been carefully ascertained, and the amount guaranteed, as well as the premiums receivable in respect of them, accurately determined. From the balance-sheet it appeared that the total assets of the company are 391,057l. 8s. 6d. and that after making ample provision for the fulfilment of the company's various engagements, for the proprietors' capital, and other less important items, a clear surplus remains of 56,692l. 2s. 9d. available for present and future bonuses, expenses, and other extra contingencies. This admitted of a bonus on the paid up capital of fifteen per cent. or 15s. on each 5l. share. The bonuses given now and on a former occasion constituted together an addition to the amount originally assured equal in many instances to no less than sixty-seven per cent. on the premiums paid." After some discussion, in the course of which a pretty general desire was expressed that the mutual principle should be adopted, provided the shareholders would surrender their shares for a moderate premium, Messrs. Gay, James, Heatley, and Ambrose Moore, were appointed a committee to confer with the directors as to the desirability and practicability of effecting the proposed change.

**RELIANCE MUTUAL LIFE ASSURANCE SOCIETY.**—On Wednesday a general meeting of the members of this society was held at their offices, in King William-street, City, when the retiring directors and auditors were unanimously elected. The accounts submitted showed a premium receipt of 10,043l. 17s. 7d. within the year, to which may be added 224l. 11s. 8d. in respect of assurance accepted before the close of June and since completed, and 1,475l. 19s. 3d. for interest on invested funds. The claims on the society, which were stated to have been all promptly discharged, amounted to 1,850l. in respect of four lives deceased, being about fifty per cent. of the estimated risk. After deduction of all outgoings, the improvement of the funds of the society for the period under consideration were estimated to exceed 6,300l.

## PROMOTIONS, APPOINTMENTS, ETC.

(Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.)

The Queen has been pleased to appoint Henry Samuel Chapman, esq. to be Colonial Secretary for the Island of Van Diemen's Land.

Her Majesty has also been pleased to appoint Thomas Falconer, esq. to be Colonial Secretary for the territory of Western Australia.

The Lord Chancellor has appointed Thomas Miles, the younger, of Leicester, in the county of Leicester, gent. to be a master extraordinary in the High Court of Chancery.

The Lord Chancellor has appointed William Woodlock, of Albert-terrace, Black Rook, in the county of Dublin, gent. to be a master extraordinary in the High Court of Chancery in that part of the United Kingdom of Great Britain and Ireland called Ireland.

The Right Hon. Sir John Jervis, knight, has appointed Charles Stockdale Benning, of Dunstable, in the county of Bedford, gent. to be one of the perpetual commissioners for taking the acknowledgment of deeds to be executed by married women in and for the county of Bedford, also in and for the counties of Hertford and Buckingham.

The Right Hon. Sir John Jervis has appointed George Slade Butler, of Rye, in the county of Sussex, gentlemen, to be one of the Perpetual Commissioners for taking the acknowledgments of deeds to be executed by married women in and for the counties of Sussex and Kent.

**COUNTY COURTS.**—John D. Burnaby, esq. with the approbation of the Lord Chancellor, has appointed Mr. W. D. Gaches, solicitor, Peterborough, chief clerk to the Peterborough district in place of the late Mr. Spurgeon, deceased.

## PROCEEDINGS OF LAW SOCIETIES.

## LAW STUDENTS' DEBATING SOCIETY.

QUESTIONS FOR DISCUSSION.

For Tuesday, August 5, 1851.

58. Can parol evidence be received of the contents of a lost written acknowledgment under statute 3 & 4 Wm. 4, c. 27, s. 14? (*Haydon v. Williams*, 7 Bing. 163; *Edmunds v. Downes*, 4 Tyr. 173.)

LL. Is it expedient to curtail the present civil and military power of the East-India Company in British India?

The meetings of the Society will be adjourned from this evening, until Tuesday, Oct. 28, 1851.

## LEGAL INTELLIGENCE.

## The Assizes.

## OXFORD CIRCUIT.

STAFFORD, July 25.—The business began in the Nisi Prius Court to-day at twelve o'clock, with the smallest entry ever known in this county, so far as the records of the circuit go back. There were only two indictments for conspiracy among workmen, removed by *certiorari* to the civil side; two special, and seven common jury causes. These last were so very trivial that all were disposed of in three hours and a half, except one. Baron Martin presided in the Crown Court. The number of prisoners was very considerable for the summer assizes, being no less than 78 who were mentioned in the calendar, besides 6 more who were brought in since the publication of the calendar. Of the 78 two were charged with murder, 1 with attempting to murder, 4 with manslaughter, 1 with infanticide, 2 with concealing a birth, 8 with cutting, wounding, and shooting, 8 with rape, 12 with burglary and housebreaking, 3 with robbery, 14 with larceny, 8 with receiving, 3 with perjury, 3 with false pretences, and 6 with pound-breach and rescuing 4 cows.

## MIDLAND CIRCUIT.

DERBY, July 26.—The cause list for this county contains an entry of nine causes, three of which are to be tried by special juries. The calendar contains the names of 29 prisoners, including 3 charges of manslaughter, 1 of cutting and wounding, 6 of robbery with violence, 2 of burglary, 1 of night poaching, 1 of arson, 1 of an unnatural offence, and several of common larceny.

LEICESTER, July 29.—Mr. Baron Parke arrived here shortly before 1, and proceeded immediately to open the commissions. He afterwards went to church; and has since been engaged in trying the town prisoners. Mr. Humphrey, Q.C., presided in a second court. The calendar for the town contains the names of 13 prisoners, all charged with common larcenies. That for the county contains the names of 32 prisoners, most of whom are also charged with common larcenies only. There is, however, one charge of an unnatural offence, one of wounding with intent to murder, one against five persons for assaulting a constable, and three of burglary.

## WESTERN CIRCUIT.

EXETER, July 28.—The commission for the county of Devon was opened in the county hall adjoining this city on Saturday last by Mr. Justice Coleridge. This morning, at ten o'clock, Lord Campbell commenced the civil business. There were only six cases in the cause list, two of which were undefended, and two are to be tried by special juries. Mr. Justice Coleridge opened the Crown Court at eleven o'clock. The calendar has the names of 46 prisoners, some of whom are charged with very serious offences. A few cases from the city have been handed over to the judge for trial on account of the death of Mr. Rogers, the Recorder of Exeter. We may take the opportunity of saying that few persons can be more regretted than this learned gentleman. Although not brilliant as an advocate, he filled the judicial seat both as Recorder of Exeter and as occasional assistant-judge on the circuit with great ability and judgment, bringing a sound discretion and excellent common sense to aid considerable experience in his profession, high-minded and independent in principle, painstaking in endeavouring to arrive at the truth, displaying extraordinary good temper and coolness, and kind and condescending to all, he carried out the intentions of the law with general satisfaction. With his judicial conduct every one was pleased, while in every station he filled all would unite in saying, that in every sense of the word Mr. Rogers was a gentleman. Those with whom he was in constant communication deeply deplore his loss. They miss one who was an honour to their body.

## HOME CIRCUIT.

MAIDSTONE, July 29.—The commission for the county of Kent was opened on Monday, and Mr. Baron Alderson afterwards charged the grand jury, and proceeded to dispose of some of the criminal cases. A rather ludicrous incident occurred during the trial of one of the prisoners. The learned baron was about to direct the attention of the jury to a solemn dictum of law as laid down by Lord Hale, when, from some unknown circumstance, his chair slipped back, and the learned judge measured his length upon the floor of the Bench, amid a heap of books and papers that were displaced by his fall. His lordship, upon recovering himself, laughed very heartily at what had occurred, and the Court, as may be imagined, was in a roar of laughter, which it required some little effort finally to repress.

The cause list contains 16 entries, three of which are special jury cases. On the Crown side there are 57 prisoners for trial, but the cases all appear to be, with one or two exceptions, of the ordinary character.

#### NORTHERN CIRCUIT.

**DURHAM, July 28.**—The commission was opened here on Saturday by Mr. Justice Williams. This morning their Lordships proceeded to the court at ten o'clock, Mr. Baron Platt sitting on the Crown side. The calendar contains the names of forty-four prisoners: of these, one is charged with bigamy, one with an unnatural crime, two with night poaching, one with burglary, and four with obtaining goods under false pretences. The rest are ordinary cases of larceny. The cause list is unusually heavy for Durham. Eleven causes are entered, of which six are marked for special juries, and it is said these causes will all take some time to try. There is a heavy title cause, an issue to try the right of the bishop to certain waste lands at Sunderland, and a crim. con. case among them. The common jury cases, which were all disposed of to-day, were of an ordinary character, a question as to a fraudulent preference under the Bankruptcy Act occupying the greater part of the day, and none of them possessed any interest.

**EXTRAORDINARY AFFAIR.**—We hear from a private source that a rather extraordinary case is likely shortly to occupy the attention of the Bristol District Court of Bankruptcy. So long ago as 1769 a person named Constable became bankrupt, and his affairs were wound up. It so happened that some time before his failure he had made a deposit of 500*l.* in one of the Bristol banks; but, through some inadvertence the deposit note was overlooked among the rest of the papers, and no mention was made of it, either in the balance-sheet or any of the proceedings under the fiat. Constable shortly afterwards died, and in the course of years a change took place in the banking firm, and in the arrangement of the private affairs of the partners at this time (1820), the 500*l.* deposited by old Constable was paid to one of the retiring partners. Through a series of almost romantic circumstances, the papers in Constable's bankruptcy fell, with some others, into the hands of a highly respectable solicitor of this city, who, in searching for some other documents, alighted upon the deposit note of Constable for 500*l.* which sum had thus been lying at compound interest, at 2 per cent. during nearly a century, and which has accumulated to the large sum of 1,700*l.* The gentleman who made this discovery at once communicated the fact to the official assignees. All the creditors and other persons interested in the bankruptcy have long since died; but it was resolved to try to obtain this money for their representatives. With this view, it is intended to reopen the fiat, under the power given by the Bankrupt Law Consolidation Act, and for that purpose an application will shortly be made to one of the learned commissioners for this district.—*Bath Gazette.*

There is a rumour in the courts of law that the health of Sir John Jervis requires an immediate resignation of office, and that he proceeds at once to Madeira. According to the same rumour, he is to be succeeded by Lord Cranworth. It is also said that Sir John Romilly will leave the Rolls to act as one of the assessors in the new Court of Appeal, and that he is to be succeeded by the Vice-Chancellor Knight Bruce.—*Chronicle.*

**A JUDGE AT A CRICKET MATCH.**—At the conclusion of the trials at Winchester, Mr. Justice Coleridge, having disposed of all the cases of the assizes, afterwards presided at a cricket match between the Bar of the Western Circuit and the North Hants Club; and his lordship found that the learned gentlemen were as eminent in the field as in the court, for they beat their adversaries by eighteen runs, the number being—for the Bar, 145; for the North Hants, 127.—*Western Luminary.*

**THE LAW AMENDMENT SOCIETY** wound up business for the season by its yearly dinner, at the Crown and Sceptre, Greenwich, on Saturday last. Lord Brougham, as chairman, summed up the labours of the past year in a speech apparently quite unpremeditated, but comprehensive in scope and full of matter. With congratulations on the past he combined good hopes of still further and further victories by law reformers.

**PROPERTY-TAX, CLAIMS OF EXEMPTION.**—It is important that it should be known that persons entitled to exemption as not possessing incomes of 150*l.* a year, and who desire to claim repayment of property-tax for any of the three years to the 5th of April, 1851, must forward their claims to the surveyors of taxes for the districts in which they respectively reside on or before the 10th of October next, otherwise the claims will not be admitted.

**THE PROPERTY OF LUNATICS.**—A return to Parliament of some importance respecting the property of lunatics has just been printed. There are a number of commissions of lunacy now in force, under which property is administered. Returns are

given from the year 1839. Of 1849 (the last year given) there are now in force thirty commissions. The total amount of the annual incomes of the parties is 12,753*l.* 10*s.* 10*d.*; and the sum allowed for their maintenance is 7,903*l.* 15*s.* 8*d.*

**APPELLATE JURISDICTION OF THE HOUSE OF LORDS.**—At a meeting of the Edinburgh Faculty of Advocates, held on Wednesday, for the purpose of considering whether any and what steps should be taken to procure some alteration in the constitution of the House of Lords as a Court of Appeal in Scotch cases, resolutions were agreed to, strongly recommending the appointment of some Scotch lawyer, whose duty it should be, either as a member of the House or simply as an assessor in it, to sit along with the law lords when hearing Scotch cases, and to give his opinion on them.—*Scotch Press.*

**ATTORNEYS AND SOLICITORS REGULATION ACT.**—The Bill, which originated in the House of Lords, for amending the several Acts for the regulation of attorneys and solicitors, was brought before the House of Commons on the 17th of July. The object of the Bill is to extend to the degree of bachelor of arts and laws in Queen's University in Ireland the provisions of former Acts relating to the admission and enrolment as attorneys of bachelors of arts or laws at Oxford, Cambridge, and Dublin. Also to extend to students of Queen's colleges attending lectures, and passing examinations in the faculty of law during the collegiate years, the provisions of former Acts as to persons bound for five years, and serving part of that time, not exceeding one year, with a barrister or special pleader.

Mr. Dyce Sombre, it is said, has left a paper, intended to be his will, the validity of which must form the subject of some legal investigation. By this document, the whole of his property, with the exception of small legacies to the family of his two sisters, is given to the directors of the East India Company, in trust, for the foundation of educational establishments throughout Hindostan.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTHS.

**FISHER.**—On the 28th ult. at 11, Gloucester-road, Old Brompton, the wife of R. A. Fisher, esq. barrister-at-law, of a daughter.

**FLOYER.**—On the 23rd ult. at West Stafford, Dorset, the wife of John Floyer, esq. M.P. of a son and heir.

**HERBERT.**—On the 30th ult. at Wilton-house, Salisbury, the Hon. Mrs. Sidney Herbert, of a daughter.

**LINDSELL.**—On the 24th ult. at Broome-hall, Bedfordshire, the wife of John Lindsell, of Lincoln's-inn, esq. of a son.

**ROCHE.**—On the 29th ult. at Twyford Abbey, the residence of her mother, the wife of Edmund Burke Roche, esq. M.P. of a son.

**STEPHEN.**—On the 26th ult. at 25, Mortimer-street, Cavendish-square, the wife of James Stephen, esq. barrister-at-law, of a son.

**WRIGHT.**—On the 29th ult. at Doncaster, the wife of Mr. Joseph Wright, solicitor, of a son.

##### MARRIAGES.

**BUCHANAN.** Niel R. esq. of Knockahinnock, Ayrshire (late Captain 93rd Highlanders) to Elizabeth Jane Griffiths, only surviving daughter of the late Richard Griffiths, esq. barrister-at-law, and grand-daughter of the late Richard Griffiths, esq. of Thordgrove, Worcestershire, on the 24th ult. at All Souls Church, Marylebone.

**HAWKES.** Rev. John, incumbent of Red Hill, Hants, eldest son of Lieutenant-general Sir Thomas Hawker, K.C.H. Colonel of the 6th Dragoon Guards (Carabiniers), to Elizabeth, daughter of William Adair Bruce, esq. barrister-at-law, of Ashley, Wilt, on the 29th ult. at St. James's Church, Dover.

**IRELLI.** Lieutenant-colonel John Barclay Wilmot, of her Majesty's 32nd Regiment, son of the late Bishop of Nova Scotia, to Julia Selina, daughter of Sir Frederic Thesiger, M.P. the parish church of St. James's, Westminster, on the 19th inst.

**PREX.** Robert William, esq. of Ashton-under-Lyne, Solicitor, to Susanna Clark, only daughter of the late Joseph Holman, esq. of Folkestone, on the 31st ult. at Christ Church, Folkestone, by the Rev. Richard Baldock, Rector of Kingsworth.

**ROOPER.** Rev. Plumer Pott, second son of John Bonfon Rooper, esq. of Abbots Ripton, Huntingdonshire, to Georgiana, daughter of George Thornhill, esq. M.P. of Diddington, Hunts, on the 31st ult. at St. George's, Hanover-square.

**THOMSON.** Thomas, esq. W.S. to Elizabeth, the elder daughter of the late Alexander Cleghorn, esq. inspector-general of imports and exports for Scotland, on the 8th inst. at 26, Queen-street, Edinburgh.

**WRIGHT.** Thomas Cooke, esq. of Lincoln's-inn, barrister, to Fanny, third daughter of William Loftus Lowndes, esq. Q.C. on the 24th ult. at St. George-the-Martyr, Queen-square.

##### DEATHS.

**PARHAM.** Benjamin, esq. of Ashburton, father of the judge of the County Courts of Worcestershire, on the 24th ult. aged 81.

**PENBERTON.** Francis Leigh, the infant and only child of Edward Leigh Pemberton, jun. esq. of Lincoln's-inn, on the 27th ult. at Bognor.

**ROBSON.** Caroline Jenkins, the wife of Christopher Robson, of No. 7, Cambridge-terrace, Hyde-park, and of No. 13, Clifford's-inn, London, solicitor, on the 31st ult. aged 50.

**WILLIAMS.** Sophia Rebecca, the wife of Mr. Francis Williams, of 3, Brunswick-place, Brixton-hill, Surrey, and of the House of Commons, on the 26th ult. aged 67.

## JOURNAL OF PROPERTY.

### MONEY MARKET.

ENGLISH FUNDS.	84.	85.	86.	87.	88.	89.
Bank Stock	216 1/2	215 1/2	215 1/2	215 1/2	215 1/2	215 1/2
3 1/2 Cent. Reduced Annuities	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
3 1/2 Cent. Consols Annuities	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
Consols for Account	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
New 3 1/2 Cent. Annuities	99 1/2	99 1/2	99 1/2	99 1/2	99 1/2	99 1/2
Long Annu. (exp. Jan. 5, 1860)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1859)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Jan. 5, 1860)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
India Stock	263	263	263	263	263	263
India Bonds (1,000 <i>l.</i> )	58	57	59	58	58	58
Do. (under 1,000 <i>l.</i> )	58	57	59	58	58	58
South Sea Stock	107 1/2	107 1/2	107 1/2	107 1/2	107 1/2	107 1/2
Do. do. New Annuities	51 1/2	50 1/2	50 1/2	50 1/2	50 1/2	50 1/2
Exchequer Bills, 1,000 <i>l.</i>	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. do. 500 <i>l.</i>	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. do. Small	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2
Do. Advertised	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2	51 1/2

\* Premium.

## THE GAZETTES.

### Bankrupts.

*Gazette, July 29.*

**DAVIS, EDWARD,** currier, Northampton, Aug. 6, at half-past one, and Sept. 6, at eleven, Basinghall-st. Off. as Graham. Sol. Heath, Artillery-place West, Finsbury. Petition, July 28.

**DAW, BETSY,** miller, Lumborn-mills, Devonshire, Aug. 7, at one, and Sept. 18, at eleven, Plymouth. Off. as Henman. Sol. Elworthy, Plymouth. Petition, July 17.

**GATES, EDWIN,** grocer, Aylesford, Kent, Aug. 6, at half-past eleven, and Sept. 6, at half-past one, Basinghall-st. Off. as Stansfeld. Sols. Wilton and Blackman, Raymond-buildings, Gray's-inn-lane. Petition, July 18.

**HEATH, ROBERT; WALCH, WILLIAM; and BAKER, JOHN** HEATH, ironmasters, Tunstall, Staffordshire, Aug. 16, at ten, Sept. 2, at one, Birmingham. Off. as Vahy. Sols. Stanier and Co. Newcastle-under-Lyme, and Mottram and Co. Birmingham. Petition, July 17.

**HEERING, EDWARD,** manufacturing chemist, Trinty-st. Southwark, Aug. 7, at half-past one, and Sept. 11, at eleven, Basinghall-st. Off. as Cannan. Sol. Wood, Falcon-st. Aldersgate. Petition, July 25.

**HINTON, ALFRED,** stationer, Portsmouth, Aug. 6 and Sept. 6, at one, Basinghall-st. Off. as Graham. Sols. Weir and Smith, Cooper's Hall, Basinghall-st. Petition, July 26.

**IRLAM, THOMAS, and WANOSTROCHT, VINCENT,** brokers, Liverpool, Aug. 7 and Sept. 5, at eleven, Liverpool. Off. as Bird. Sols. Sharp and Co. London; Miller and Peel, Liverpool. Petition, July 23.

**KEEPING, RICHARD,** watchmaker, Ryde, Isle of Wight, Aug. 7, at two, and Sept. 11, at one, Basinghall-st. Off. as Whitmore. Sol. Whittington, Dean-st. Finsbury-square. Petition, July 18.

**KING, THOMAS JOHN,** innkeeper, Stourport, Worcester-shire, Aug. 13 and Sept. 8, at twelve, Birmingham. Off. as Whitmore. Sols. Watson, Stourport, and Hodgson, Birmingham. Petition, July 14.

**LEVY, WALTER,** macaroni and vermicelli manufacturer, Spitalfields, Aug. 4, at eleven, and Sept. 6, at twelve, Basinghall-st. Off. as Stansfeld. Sols. Jenkinson and Co. Lombard-st. Petition, July 25.

**LIMBIRD, JOHN,** stationer, Strand, Aug. 8, at half-past twelve, Sept. 11, at twelve, Basinghall-st. Off. as Whitmore. Sol. Smith, Basinghall-st. Petition, July 24.

**PHILLIPS, DAVID,** linendraper, Cardiff, Glamorganshire, Aug. 13 and Sept. 10, at eleven, Bristol. Off. as Accman. Sol. Bevan, Bristol. Petition, July 23.

**SEARLE, JOHN,** builder, Brixham, Devonshire, Aug. 13 and Sept. 17, at one, Exeter. Off. as Hirtzel. Sol. Stogdon, Exeter. Petition, July 26.

*Gazette, August 1.*

**ABELIS, HENRY MOWBRAY, and TUCKER, ELIJAH,** printers, Friar-st. Bobo-eg. Aug. 9, at one, and Sept. 10, at twelve, Basinghall-st. Off. as Stansfeld. Sols. Nicholson and Parker, Lime-st.

**BEANT, MOSELEY,** brickmaker, Upwell, Norfolk, Aug. 5, at half-past eleven, and Sept. 11, at half-past twelve, Basinghall-st. Off. as Whitmore. Sol. Henman, Basing-lane, Bow-lane, Chesapeake; O'ard, Upwell, Cambridgeshire.

**BROWN, JOHN,** grocer, Deal, Aug. 9 and Sept. 10, at one, Basinghall-st. Off. as Graham. Sol. Bachman, Basinghall-st.

**CUFF, EDWARD GEORGE,** wine merchant, Leicester, Aug. 15 and Sept. 12, at ten, Nottingham. Off. as Hindman. Sols. Henderson, Mansell-st.; Spooner, Leicester.

**MAY, JOHN HINE,** draper, Brecknock-terrace, Camden-town, Aug. 12, at one, Sept. 17, at half-past eleven, Basinghall-st. Off. as Whitmore. Sols. Sole, Turner, and Turner, Aldermanbury.

**MACDUFF, JOHN,** auctioneer, Brynmawr, Brecknockshire, Aug. 19 and Sept. 16, at eleven, Bristol. Off. as Hutton. Sol. Bevan, Bristol.

**MITCHELL, ROBERT,** baker, Walthamstow, Essex, Aug. 8, at two, Sept. 12, at one, Basinghall-st. Off. as Whitmore. Sol. Pownall, Birch-lane.

**SLATE, THOMAS EDWARD,** bookbinder, Hatton-garden, Aug. 8, at twelve, Sept. 12, at half-past one, Basinghall-st. Off. as Whitmore. Sols. Rutter and Trotter, Ely-place, Holborn.

**SHOW, JOHN,** wine merchant, Weedon Beck, Northamptonshire, Aug. 12, at twelve, Sept. 11, at two, Basinghall-st. Off. as Cannan. Sols. Richards and Walker, Lincoln's-inn-fields; Gery and Son, Daventry.



**Dividends.****BANKRUPT ESTATES.**

*Official Assignees are given, to whom apply for the Dividends.*

*Asle and Sons*, bookbinders, first, 2s. 6d.; first sep. of M. Asle, 3s.; and first sep. of G. Asle, 4s. Nicholson, London.—*Ende*, P. V. woolstapler, first, 2s. Nicholson, London.—*Gadsden*, R. miller, first, 2s. 9d. Stansfeld, London.—*Gawasy*, T. furrier, final, 7-12ths of 1d. Stansfeld, London.—*Green*, R. jun. ironmonger, first, 2d. Stansfeld, London.—*Hegley*, J. G. P. silversmith, second, 1s. 3d. Stansfeld, London.—*Morris*, M. merchant, final, 7-15ths of 1d. Stansfeld, London.—*Reay*, W. ship-builder, second and final, 9d. Baker, Newcastle.—*Reynolds*, J. H. money scrivener, second and final, 1d. Stansfeld, London.—*Sardison*, Western, and Murch, warehousemen, final, 2d. Stansfeld, London.—*Solomon*, S. tailor, third, 9d. Stansfeld, London.—*Stephens*, S. F. bill broker, fourth, 1d. Stansfeld, London.

**INSOLVENT ESTATES.**

*Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.*

*Austin*, J. V. clerk (deceased), 6s. 1d.—*Crutchley*, T. O. carpenter and builder, 9d.—*Mark*, J. jun. baker, 3s. 6d.—*Powell*, E. H. attorney, 6s. 9d.—*Slade*, D. D. chemist, 3d.—*Weller*, C. auctioneer, 5d.—*Wenborn*, T. jun. boot and shoe maker, 3s. 6d.

**Assignments for the Benefit of Creditors.**

*Gazette, July 22.*

*Budden*, W. grocer, Salford, Lancaster, July 3. Trusts. P. Roylance, butter merchant, and R. Jackson, tea dealer, both of Manchester. Sol. J. Barlow, Manchester.—*Clarke*, R. joiner and builder, Humeat, Leeds, July 17. Trusts. R. Harrison and J. Maude, timber merchants, Leeds. Sols. Horsfall and Harrison, Leeds.—*Longland*, C. draper and stay manufacturer, Gloucester-terrace and Britanniarow, Horton, June 25. Trusts. J. Baggallay, Love-lane, Wood-st. and W. Hitchcock, Wood-st. warehousemen. Sols. Sole and Turner, Aldermanbury.

*Gazette, July 25.*

*Cotterill*, W. grocer, Wellington and Oakengates, Salop, July 10. Trusts. G. Harries, accountant, Shrewsbury. Sol. W. Morgan, Shrewsbury.—*Gilbert*, J. bookseller, Pater-noster-row, June 30. Trusts. W. S. Orr, bookseller, Amen-corner, G. Arnold, stationer, Plumstead, and T. Sanderson, bookseller, Bond-st. Pentonville. Sol. W. J. Barrett, Doctors'-commons.—*Jones*, B. hair dresser, hosier, and glover, Kingston-upon-Hull, July 13. Trusts. J. J. Welch and J. Mair, manufacturers and printers, London. Sols. Reed, Langford, and Marsden, Friday-st. Cheapside.—*Joyce*, E. D. hosier, Fenchurch-st. July 8. Trusts. J. Mair, Friday-st. and G. Hitchcock, St. Paul's Church-yard, warehousemen. Sols. Reed, Langford, and Marsden, Friday-st. Cheapside.—*Moore*, W. builder, Ardwick, near Manchester, June 28. Trusts. R. E. Bibby, lime merchant, Manchester, and C. Hunt, timber merchant, Salford. Sol. C. Gamon, Pendleton, near Manchester.—*Richardson*, R. cabinetmaker and innkeeper, Berwick-upon-Tweed, June 28. Trusts. J. Sinclair, commission agent, and A. Christison, grocer, both of Berwick-upon-Tweed. Sol. J. Rowland, Berwick-upon-Tweed.—*Stephens*, G. brush dealer, St. James-st. Brighton, July 18. Trusts. J. Coate (of the firm of Coate and Co.) brush manufacturer, Brewer-st. Regent-st. and J. Cooper, lodging-house keeper, German-place, Brighton. Sol. E. F. Sealy, Moorgate-st.

**Partnerships Dissolved.**

*Gazette, July 22.*

*Allen*, G. and Griffith, B. brass founders, Hatton-wall, Hatton-garden, July 18.—*Appleton* E. and Co. commission agents, Manchester, June 30. Debts paid by Appleton.—*Barker* and *Smith*, stone masons, Bradford July 18. Debts paid by Barker.—*Barker*, F. W. and Co. merchants, Messina, April 6. Debts paid by Barker.—*Coolsey and Wigley*, box manufacturers, Nottingham, July 19.—*Denston*, J. G. and *Castle*, J. brewers, Tabernacle-square, July 14.—*Dow-lais Iron Company*, and *Guest*, *Lewis*, and Co. and *Guest* and Co. iron masters, miners, &c. Merthyr Tydfil, Cardiff, London, Liverpool, and Mithelcote, March 31.—*Herwing Brothers*, wholesale druggists, Aldersgate-street, July 22.—*Hiles*, G. and H. millers, Baschurch, March 25.—*Middle-ton*, T. & P. plumbers, Dover, Jan. 6.—*Ogle and Douglas*, cast iron founders and ship owners, Sunderland, July 9.—*Owen*, J. E. and *Evans*, W. O. surgeons and apothecaries, Southampton, July 18. Debts paid by Owen.—*Ritchie*, C. and *Bond*, J. silk mercers, St. Paul's-churchyard, July 21. Debts paid by Ritchie.—*Robinson*, J. W. and Co. tar distillers, Rainhill, near Prescott, July 16. Debts paid by Robinson.—*Rutter*, S. and W. working jewellers, Nassau-st. Soho, March 1. Debts paid by Rutter.—*Walker* and *Harker*, warehousemen, Manchester, July 17. Debts paid by Walker.—*Woods*, *Spence*, and Co. timber merchants, Sunderland, June 30.

*Gazette, July 25.*

*Barlow*, *Barlow*, and *Wollaston*, as regards Wollaston, July 7. Debts paid by P. W. and W. H. Barlow.—*Bell*, W., and W. T. *Stobart*, W. *Kimpster*, W. *Croudace*, W. and Co. owners of Washington Colliery, as regards W. Croudace, June 11.—*Bircumakar*, *Fletcher*, and Co. lace manufacturers, Nottingham, July 23.—*Boden*, E. *Fidler*, F. *Hodgin*, G. and T. agents for yarns and calicoes, Manchester, as regards T. Hodgin, May 5. Debts paid by remaining partners.—*Bowers*, *Murray*, and Co. railway and dock contractors, Liverpool, June 30.—*Chickens* and *Stewart*, engineers, &c. Russell-st. Blackwall, July 1. Debts paid by Stewart.—*Cosman*, *Wood*, and Co. machine makers, Bradford, as regards Cosman, July 19. Debts paid by remaining partners.—*Deagratoniet*, L. and *Forster*, W. builders, Taubbrook-st. Pimlico, July 23. Debts paid by Deagratoniet.—*Gannon*, M. and T. glass manufacturers, Birmingham, July 23. Debts paid by T. Gannon.—*Gator*, W. and G. H. millers and corn dealers, South Stoneham, July 1.—*Hodgin*, G. and Co. agents for yarns and calicoes, Manchester, July 1. Debts paid by Hodgin.—*Jackson*, T. and Co. millers and timber dealers, Altrincham, July 15. Debts paid by Jackson.—*Lambert*, F. D. and *Ridley*, J. coal factors and ship insurance brokers, St. Mary-st. Hill, July 23. Debts paid by Lambert.—*Lawrence*, N. and *Simpson*, H. maltsters, coal merchants, and corn dealers, Coventry, June 30.—*Matlock*, F. and J. provision dealers,

Manchester, April 2, 1849.—*Mitton* and *Bentley*, brokers, joiners, &c. Halifax, July 22. Debts paid by Mitton.—*Newman* and *Hales*, engineers, Bristol, July 18. Debts paid by Newman.—*Phillips*, B. L. and *Elliott*, E. H. carvers and gilders, Brooke-st. Holborn, July 23.—*Porter* and *Todd*, stone masons, Stoke Newington-green.—*Taylor*, J. B. and J. G. ship brokers, Liverpool, July 22. Debts paid by J. G. Taylor.—*Wearing* and *Knowles*, tailors and drapers, Manchester, July 17. Debts paid by Knowles.—*Worger*, J. and F. grocers and cheesemongers, Dover, July 23. Debts paid by J. S. Worger.

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Acts of Parliament	Municipal Corporations.
Aliens	Navigation
Animals	Nuisances
Assessed Taxes	Passengers (by Sea)
Bail	Petty Sessions
Bastardy	Pilot
Beer	Police (Superannuation Fund)
Boroughs	Poor:—
Bricks	Appeal and Grounds of Appeal
Bridges	Caption (of Examinations)
Certiorari	Complaint
Children, Infants, and Juvenile Offenders	Costs
Church-rate	Evidence
Churchwardens and Overseers	Order of Removal
Coal-mines	Officers (Auditors, Guardians, Overseers, &c.)
Coin (Silver)	Poor-Rate
Constables	Practice (of the Sessions)
Conviction	Settlement (Apprenticeship)
Copyright of Designs	—(Birth)
Coroner	—(Estate)
County Court	—(Payment of Rates)
County and Borough Rates	—(Tenement, Renting)
Criminal law	Out-door Paupers in Houses not being Work-houses
Statutory Enactments	Poor-law Union Charges
Crimes	Authority of Justices to act in matters relating to the Poor in Cities and Boroughs
Indictment	School Districts Contribution
Evidence	Rates (Distraining for) Rating Small Tenements
Practice and Miscellaneous Points	Population
Excise and Customs	Quarter Sessions
Factories	Rates
Fairs	Recognizances
Friendly and Loan Societies	Turnpike Trusts
Gaols and Houses of Correction	Vestries
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To Readers and Correspondents.

- "E. C."—As we do not systematically report the *Nisi Prius* cases on circuit, we have not a report of the case named.
- "W."—We have great doubt whether it would be necessary to deliver a signed bill for merely serving a writ for another attorney.
- "Lax."—The subject is one rather of speculation than of practical law. We feel as strongly as he does the absurdity of an unqualified magistracy, but there is no present hope of an alteration.
- "T. S."—No: we know of none.
- "Inquirer."—The *LAW TIMES* edition of *The Law of Evidence Act* will be published on Wednesday or Thursday next. Lord Denman's Act will be appended.

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THE LAW TIMES.

SATURDAY, AUGUST 9, 1861.

LAW OF EVIDENCE.

Most heartily do we congratulate our readers on the passing of this Bill, which we believe to be the most valuable reform of our law that has been accomplished in our time.

Not having the Act before us at this time of writing (Friday), we are unable to state what was the final arrangement with respect to its operation upon pending suits. At first, they were excluded, then that was altered for a provision that the Bill should come into effect on the 1st of November, which would practically admit pending suits to its benefits. What shape it afterwards took we have not yet learned.

THE ATTORNEYS' TAX.

It seems that our conjecture that the Bill would not have been withdrawn without a distinct understanding with the Government that the tax should be repealed next year, was unfortunately not well founded. We understand now that no such arrangement has been made; the surrender was unconditional. It may have been politic, under all the circumstances; upon this we cannot form an opinion, but it certainly wears a most disheartening aspect.

Why was the Bill deferred so late in the Session that it was impossible to pass it?

Nevertheless, let us not despair. There will be an election next year, and then —

WHAT IS TO BE DONE?

EVERY effort has proved vain. The lawyers have been defeated on all sides. The session just concluded has taught a double lesson, for it has shown us at once where lies our strength

and our weakness. Let us profit by that teaching.

Our strength was shown in the victory achieved over the Attorneys' Tax, barren though it was of any practical fruits. But it has taught us how we can command success, if we are willing to make the effort—how heaven helps those who help themselves.

The Attorneys have put forth their power, and they have beaten the Government, not as did some others, by a stratagem or an accident, but in a fair stand-up fight, with full notice and a mustering of forces on either side. However disappointing the practical result, the FACT remains. We know now what we can do, when occasion requires the effort.

The *Times* has sought about for the cause of our strength, which at first it was inclined to deride. It finds it to be, as we long ago told our readers it was, in the influence of the country attorneys. Hear what says the leading journal on this subject:—

A victory must be worthless which is conceded by indifference and security. In the successive instances of last night, however, there was something more than indifference. Neither of the two victorious causes was altogether respectable. Everybody knows why it is so easy to muster a good majority in behalf of attorneys. Do they not return the greater part of the county members? Have they not the landocracy "under their thumb?" Thrice blessed is the country gentleman who can walk erect and defy the spell of every attorney in the land. Few estates are there in which some solicitor has not acquired a vested interest, and settled himself, his heirs, and his executors therein. They are omnipotent with farmers, builders, and many other classes. Talk of Jesuits, what is the General of that order compared with the clever attorney who has managed all the loans, handled the title-deeds, sold the estates, and let every farm far and wide in his neighbourhood? Considering that at least 600 out of the 656 members of the House has an attorney on his back, the wonder is that Lord Robert Grosvenor does not muster more to his periodical but unprofitable triumphs. We do not deny that much may be said in behalf of attorneys, or rather of their clients, out of whom the whole of the tax must ultimately be extracted. We are only observing on the strength of the attorneys' interest, and the intelligible nature of Lord Robert Grosvenor's majorities.

The *Times* may be right or wrong in its reasons, but its admission of the fact of our strength is most important, for, knowing it, we may learn to use it prudently, for self-protection in the war that is being waged against us.

How?

A general election is at hand. It will probably take place in the middle of April next. Let the Lawyers then look to themselves. Let us SECURE, as we may do, the pledges of the candidates of every party to the abolition of the Attorneys' Tax, to such a reform in the practice of the law as shall make justice accessible to all in the best tribunals, and no longer to compel suitors to go to inferior Courts, as compensating for their inferiority by cheapness and speed. Let us with one voice demand such a Reform of the Superior Courts that a cause may be conducted with little more cost, and tried almost as quickly, there as in the County Courts. Then we should speedily see them restored to more than their former greatness and business.

Our weakness has been shown during the Session in the withdrawal of the Bill for the repeal of the Attorneys' Tax in the very moment of victory; and more especially in the County Courts Bill, from which the Commons expunged every one of the clauses which the Lords had passed for improving the practice of those Courts, such as those which required notice of defence to be given, and gave to professional services a reasonable remuneration.

Without these provisions, the County Courts cannot work efficiently, and, therefore, if the Superior Courts be improved by a curtailed procedure and more frequent circuits, they must carry off the greater portion of the business which now goes to the County Courts, for suitors will not continue to bring their

actions in a court where the costs fall upon themselves and not upon the defendant, if they can obtain judgment with equal rapidity in courts where the costs will fall, as they should do, upon those who have compelled the litigation.

But this, and all other measures for the protection and advancement of the Profession, can only be secured by UNION among all its members and between both its branches.

Let us pull together, and we shall prosper yet,—perhaps more than ever. We see a way now out of the difficulties that surround us. Courage, then, friends and readers, the Profession is not dead, nor even mortally wounded. We shall take a great deal more killing yet!

COUNTY COURTS EXTENSION BILL.

THIS Bill has dropped through. Its history is curious. The Lords sent it down to the Commons with seventeen clauses. The Commons struck out fifteen of them, materially altered the remaining two, and added twenty. It was not returned to the Lords until Tuesday last. Of course, there was no time to consider what was in fact a new Bill, and therefore the Lords very properly declined to entertain it.

We trust that next Session there will be a comprehensive measure, which shall not only give an equity and bankruptcy jurisdiction to the County Courts, but make many necessary amendments in their practice, which at present is very unsatisfactory, as all the Profession know. If this be done, there will be no cause to regret the delay.

We will endeavour, during the winter, to collect the opinions of practitioners upon the alterations that would be desirable, and submit them in quarters where they will receive the attention they will deserve.

THE LEGISLATOR.

Imperial Parliament.

PUBLIC BUSINESS TRANSACTED.

BILLS READ A FIRST TIME.

Friday, Aug. 1.  
Church Building Acts Amendment.  
Saturday, Aug. 2.  
Leasehold Tenure of Land, Ireland.  
Wednesday, Aug. 6.  
Ports and Harbours.

BILLS READ A THIRD TIME AND PASSED.

Friday, Aug. 1.  
New Zealand Settlements  
Lunatics, India  
Crown Estate Paving  
Collection of Fines, &c. Ireland.  
Saturday, Aug. 2.  
Metropolitan Intermittent  
Attorneys and Solicitors Regulation Act Amendment  
General Board of Health, No. 3  
Church Building Acts Amendment  
Petty Sessions, Ireland  
Summary Jurisdiction, Ireland  
Constabulary Force, Ireland.  
Monday, Aug. 4.  
General Board of Health, No. 4.  
Tuesday, Aug. 5.  
County Courts' further Extension.  
Wednesday, Aug. 6.  
Episcopal and Capitular Estates' Management.  
Thursday, Aug. 7.  
Patent Law Amendment.

PRIVATE BUSINESS TRANSACTED.

BILLS READ A THIRD TIME AND PASSED.

Friday, Aug. 1.  
Dorward's Estate  
Duke of Bridgewater's Estate  
Brown's Estate.  
Saturday, Aug. 2.  
Christ Church, Oxford, Estate  
Steylton's Estate.  
Monday, Aug. 4.  
Tayleur's Divorce  
Felstead (Lord Riche's) Charities  
Lord Bateman's Estate  
Canterbury Association.  
Tuesday, Aug. 5.  
Ripley Free School  
Duchy of Lancaster, High Peak Mining Customs and Mineral Courts.  
Wednesday, Aug. 6.  
Brentwood Free Grammar School and Almshouses  
Webster's Divorce.

## SESSIONAL PRINTED PAPERS.

- Par. Numb.  
 613. Bills—General Board of Health, No. 4  
 614. — Crantbury Association  
 615. — Nuisances' Removal and Diseases' Prevention  
 612. — Patent Law Amendment, amended  
 618. — Charitable Trusts  
 — County Courts Further Extension, amended on second recommitment  
 633. — Leasehold Tenure of Land (Ireland) Act Amendment  
 619. — County Rates  
 582. Postage Stamps—Return  
 583. Cadetships, East India—Return  
 598. Public Income and Expenditure, Balance Sheet—Account  
 — Ottago, Surrender of the New Zealand Company's Charters—Further Papers  
 541. Church Rates—Report from Committee  
 518. Income and Property Tax—Report from Committee  
 516. Trade and Navigation—Accounts, month ended 5th July, 1851, and six months ended 5th July, 1851  
 597. Ordnance Survey, Ireland—Return  
 600. Justices and Clerks of the Peace—Return  
 617. Annuity Tax, Edinburgh—Report  
 574. Police Constables—Abstract of Return  
 574. Post-office—Returns  
 590. Chamber of London—Annual Accounts  
 596. Turnpike Trusts—Return  
 602. Quit and Crown Rents, Ireland—Return  
 508. Poor Relief, Scotland—Returns  
 601. Turnpike Roads, South Wales—Return  
 631. Judicial Committee, Privy Council—Return  
 617. Annuity Tax, Edinburgh—Report, a corrected copy  
 577. Wheat, &c.—Accounts  
 626. Army Prize Money—Account  
 598. Captain Graham Moore—Copy of Letter  
 663. Attendance of Members in the House of Peers—Report from Committee.

## HOUSE OF LORDS.

## NUISANCES REMOVAL AND DISEASES PREVENTION BILL.

TUESDAY, AUG. 5.—This Bill was ordered to be read a third time that day three months, on the motion of Lord SEYMOUR, who stated that he thought it was too late in the session to press it, as it would have the effect of introducing a new principle with regard to the schemes prepared by the Board of Health under the General Act.

## ADMINISTRATION OF CRIMINAL JUSTICE IMPROVEMENT BILL.

The LORD CHANCELLOR moved the consideration of the Commons' amendments to this Bill. He would advise their lordships to agree to the amendments which had been made, with one exception. The Commons had struck out the clause which gave the judge at the trial the power of discharging the jury and postponing the trial of a prisoner, at the same time that he directed an amendment to be made. He was convinced that this would prevent many amendments being made which the justice of the case would call for, and therefore he recommended their lordships not to assent to that alteration. The motion was agreed to *nem. con.* in the terms proposed by the noble and learned lord.

## CRIMINAL LUNATICS.

The Earl of SHAFTESBURY, in presenting a petition from Somersetshire on this subject, said that a twenty years' experience had convinced him that nothing more vicious than the present system could be imagined. He should, therefore, at the earliest possible period next Session introduce a measure upon the subject.

## CHANCERY SUITS, &amp;c.

The Earl of HARRINGTON moved for a series of returns relating to suits in Chancery, and their probable duration, as well as to suits in the winding-up courts; also a copy of the orders passed under the administrations of Lords Eldon, Brougham, and Cottenham, for the relief of the suitors in Chancery, in order to promote cheap and speedy justice.—The LORD CHANCELLOR resisted the motion on the ground that it was impracticable, and that the returns would be useless even if they could be furnished. The motion, after a short discussion, was negatived without a division.

## ATTORNEYS AND SOLICITORS' REGULATION ACT.

On the motion of the Earl of CARLISLE, the Commons' amendments to this Bill were agreed to.

The Earl of CARLISLE presented a petition from Lancaster against the Registration of Assurances Bill.

## LAW OF EVIDENCE AMENDMENT BILL.

The Commons' amendments in this Bill were considered.—The LORD CHANCELLOR moved that their lordships should dissent from the amendment introduced by the Commons enabling wives to be examined in civil suits for or against their husbands. He said that this question had, when the Bill was originally before their lordships, been very much discussed, and that he believed the unanimous decision arrived at was, that it would not be advisable to alter the law with respect to the admissibility of wives as witnesses. He contended that any clause which should render their testimony admissible would be a violation of the confidence necessary to domestic life; that if such a law were to prevail there would no longer be that unrestrained and familiar intercourse between husband and wife which was

essential to real happiness; that an attorney is not permitted to disclose his client's secrets, much less ought a wife to be compellable to betray her husband; and that if a wife were competent to be examined on her husband's behalf, she would constantly be liable to undue solicitation and pressure on his part, in order to induce her to overstep the boundaries of truth. He also moved to reject the amendment of the Commons which had struck out from the Bill the clause requiring notice to be given whenever any party desired either to give evidence himself or to call his opponent. He said that this was a most beneficial clause, which would save much expense, by absolving parties from the necessity of attending in court from day to day, in the event of no notice being sent, and that otherwise they would always have, to attend lest their opponents should give some testimony which they could either contradict or explain away.—Lord CRANWORTH differed from his noble and learned friend on both points. As to the examination of wives, he originally thought, and he was still of the same opinion, that a middle course ought to be adopted between the extreme views of the Commons on the one hand, and the extreme views of his noble and learned friend on the other, and that wives ought to be competent to give evidence for their husbands; but not compellable, except in due course of cross-examination, to testify against them. There were many cases, especially among the humbler classes, where the wife acted as the husband's agent, and where to exclude her testimony would be to deprive the husband of the power of establishing a just, or defeating an unjust claim. He felt as forcibly as his noble and learned friend the expediency of preserving inviolate the sanctity of domestic confidence; but this argument did not in any way apply where the husband voluntarily tendered his wife as a witness. His noble and learned friend's illustrations with respect to attorneys was, in fact, his argument. He would place the wife in a position analogous to that which an attorney occupied, who might be examined for his client, but could not be forced to betray his secrets.—Lord MINTO strongly urged his noble and learned friend on the woolsack to yield to his noble and learned friend's suggestion, contending that it was of the greatest importance to avoid any hazard of losing so inestimable a Bill as that before the House.—Lord CARLISLE made a similar application, saying, that in order to render quite safe a Bill of such paramount importance, it was advisable to meet the Commons half way.—The LORD CHANCELLOR, however, declined to yield.—Lord CRANWORTH then said that he would not divide the House.—It was finally agreed that the Bill should be restored to its original form, so far as related to husbands and wives, the Lord Chancellor consenting to waive his motion for restoring the notice clause. Nothing, therefore, in the Bill as it now stands renders husbands and wives either competent or compellable to give evidence for or against each other. Excepting some trifling alteration, of a clause introduced in the Commons for facilitating the proof of convictions, the other amendments of the Lower House were then agreed to, and the Bill was ordered to be returned to the Commons.—The Commons amendments in the Attorneys and Solicitors Regulation Act Amendment Bill were considered and agreed to.

## NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 167.)

## CAP. XXXIV.

An Act to encourage the establishment of Lodging Houses for the Labouring Classes.

(July 24, 1851.)

Whereas it is desirable, for the health, comfort, and welfare of the inhabitants of towns and populous districts, to encourage the establishment therein of well-ordered lodging-houses for the labouring classes: Be it enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

1. *Short title of Act.*—That in citing this Act for any purpose it shall be sufficient to use the expression "The Labouring Classes Lodging Houses Act, 1851."

2. *Act may be adopted in certain boroughs and parishes.*—That this Act may be adopted for any incorporated borough in England regulated under an Act passed in the sixth year of the reign of his late Majesty, to provide for the regulation of municipal corporations, or any charter granted in pursuance of the said Act, or any Act passed for the amendment thereof, and also for any place being the district of any Local Board of Health regulated under the Public Health Act, 1848, or any Act passed for the amendment thereof, and also for any place being the dis-

trict within the limits of any Act for the paving, lighting, watching, draining, or otherwise improving of such place, and also, with the approval of one of her Majesty's principal Secretaries of State, for any parish in England, having, according to the then last census, a population of not less than ten thousand, or being a parish in any such incorporated borough, having, according to the then last census, a population of not less than ten thousand, and also with the like approval for each of several parishes as by this Act in that behalf provided.

3. *Interpretation of terms.* 59 Geo. 3, c. 12. 1 & 2 Wm. 4, c. 60.—That in this Act the following words and expressions shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say,

"Parish" shall mean every place maintaining its own poor and having a vestry:

"Borough" shall mean city, borough, port, cinque port, or town corporate:

"District" shall mean any place being the district of such a Local Board of Health, and shall also mean any place being the district within the limits of such an Improvement Act:

"Ratepayers" shall mean all persons for the time being assessed to and paying rates for the relief of the poor of the parish:

"Churchwardens" shall mean also chapelwardens or other persons discharging the duties of churchwardens:

"Overseers" shall mean also any persons authorized and required to make and collect or cause to be collected the rate for the relief of the poor of the parish, and acting instead of overseers of the poor:

"Vestry" shall mean the inhabitants of the parish lawfully assembled in vestry, or for any of the purposes for which vestries are holden, except in those parishes in which there is a select vestry elected under an Act passed in the fifty-ninth year of the reign of King George the Third, intituled "An Act to amend the Laws for the Relief of the Poor," or elected under an Act passed in the second year of the reign of his late Majesty, intituled "An Act for the better Regulation of Vestries, and for the Appointment of Auditors of Accounts, in certain Parishes of England and Wales," or elected under the provisions of any local Act of Parliament for the government of any parish by vestries, in which parishes it shall mean such select vestry, and shall also mean any body of persons, by whatever name distinguished, acting, by virtue of any Act of Parliament, prescription, custom, or otherwise, as or instead of a vestry or select vestry:

"Board" shall mean, as regards the district of such a Local Board of Health, such Local Board of Health for the time being in office and acting as such Local Board of Health, and, as regards the district within the limits of such an Improvement Act, the commissioners, trustees, or other body of persons by whatever name distinguished for the time being in office and acting in the execution of such Act:

"Commissioners" shall mean the commissioners appointed in accordance with this Act for any parish, and for the time being in office and acting as such commissioners:

"Clerk" shall mean, as regards an incorporated borough, the town clerk of such borough, and, as regards a district, the clerk of the Board of such district, and, as regards a parish, the clerk appointed pursuant to this Act by the commissioners:

"Justice" shall mean justice of the peace for the county, riding, division, liberty, borough, district, parish, or place where the matter requiring the cognisance of justices shall arise:

"Improvement Rates" shall mean the rates, tolls, rents, income, and other moneys whatsoever which under the provisions of any such improvement Act shall be applicable for the general purposes of such Act:

"Lands" shall mean lands, tenements, and hereditaments, of whatsoever nature or tenure: Words importing the masculine gender shall include the feminine:

Words of plural number shall include the singular, and words of the singular number shall include the plural.

4. *Council of any borough may adopt the provisions contained in this Act if they think fit.*—That the council of any such borough as aforesaid may, if they think fit, determine that this Act shall be adopted for such borough, and then and in such case such of the provisions of this Act as are applicable in that behalf shall thenceforth take effect and come into operation in such borough, and this Act shall be carried into execution in such borough, in accordance with such provisions and the laws for





the time being in force relating to the municipal corporation of such borough.

5. *Expenses of carrying this Act into execution in a borough shall be charged upon the borough fund, and income arising to be carried to the same.*

—That the expenses of carrying this Act into execution in any such borough in which the council shall have resolved to adopt this Act for their borough shall be chargeable upon and paid out of the borough fund, and for that purpose the council may levy with and as part of the borough rate, or by a separate rate to be assessed, levied, paid, and recovered in like manner and with the like powers and remedies in all respects as the borough rate, such sums of money as shall be from time to time necessary for defraying such expenses, and shall apply the same accordingly, as if the expense of carrying this Act into execution were an expense necessarily incurred in carrying into effect the provisions of the said Act of the sixth year of the reign of his late majesty; and the income arising from the lodging houses in any borough shall be paid to the credit of the borough fund thereof; and the council shall keep distinct accounts of their receipts, payments, credits, and liabilities with reference to the execution of this Act, to be called "The Lodging Houses Account."

6. *Any Local Board of Health may adopt the provisions of this Act if they think fit.*—That the Board of any such district, being the district of a Local Board of Health, may, if they think fit, determine that this Act shall be adopted for such district, and then and in such case such of the provisions of this Act as are applicable in that behalf shall thenceforth take effect and come into operation in such district, and this Act shall be carried into execution in such district, in accordance with such provisions and the laws for the time being in force relating to such Board.

7. *On requisition of ratepayers Board to postpone proceedings till after next day for election of members of Board.*—Provided always, that the Board shall give not less than twenty-eight nor more than forty-two days' public notice of their intention to take into consideration the propriety of adopting this Act, and of the time and place for holding the meeting at which they will take it into consideration; and if there be presented to the Board at that meeting a memorial in writing, signed by not less than one-tenth in value of the persons liable to be rated to a general district rate made by the Board, and requesting the Board to postpone such consideration until after the then next yearly day for the election of members of the Board, then and in such case such consideration shall be postponed until after that day, and shall be entered on as soon after that day as the Board think fit.

8. *Expenses of carrying this Act into execution by Local Board of Health shall be charged on the district fund, and income arising to be carried to the same.*—That the expenses of carrying this Act into execution in any such district, being the district of a local Board of Health in which the Board shall have resolved to adopt this Act for their district, shall be chargeable upon and paid out of the moneys from time to time carried to the credit of the district fund account of such district, and for that purpose the Board may levy with and as part of the general district rate of such district, or by a separate rate to be assessed, levied, paid, and recovered in like manner and with the like powers and remedies in all respects as the general rate of such district, such sums of money as shall be from time to time necessary for defraying such expenses, and shall apply the same accordingly as if the expense of carrying this Act into execution were an expense necessarily incurred in carrying into effect the provisions of the Public Health Act, 1848; and the income arising from the lodging-houses in any such district shall be paid to the credit of the district fund account thereof; and the Board shall keep distinct accounts of their receipts, payments, credits, and liabilities with reference to the execution of this Act, to be called "The Lodging-houses Account."

9. *Any improvement Board may adopt the provisions of this Act if they think fit.*—That the Board of any such district, being the place within the limits of any Act for the paving, lighting, watching, draining, or otherwise improving of such place, may, if they think fit, determine that this Act shall be adopted for such district, and then and in such case such of the provisions of this Act as are applicable in that behalf shall thenceforth take effect and come into operation in such district, and this Act shall be carried into execution in such district in accordance with such provisions and the laws for the time being in force relating to such Board.

10. *On requisition of ratepayers, Board to postpone proceedings till after next day for election of members of Board.*—Provided always, that the Board shall give not less than twenty-eight days' nor more than forty-two days' public notice of their intention to take into consideration the propriety of adopting this Act, and of the time and place for holding the meeting at which they will take it into consideration;

and if there be presented to the Board at that meeting a memorial in writing, signed by not less than one-tenth in value of the persons liable to be rated to an improvement rate made by the Board, and requesting the Board to postpone such consideration until after the then next yearly or other day for the election or appointment of members of the Board, then and in such case such consideration shall be postponed until after that day, and shall be entered on as soon after that day as the Board shall think fit.

11. *If majority of Board not elected by ratepayers, consent of ratepayers to be obtained.*—Provided always, that in any case in which the major part in number of the members of the Board of any such district are elected or appointed in any manner other than by or with the concurrence of the persons liable to be rated to improvement rates made by the Board, the Board shall not determine that this Act shall be adopted for the district, except with the sanction of the major part in value of the persons so liable present at a meeting specially convened for the purpose by the Board, by not less than twenty-eight days nor more than forty-two days public notice of the intention of holding such meeting, and of the time and place for holding the same; and such meeting shall be held at such convenient place within the district, and at such convenient time, as the Board think fit; and the procedure thereat shall be regulated by the Board.

12. *Expenses of carrying this Act into execution by Improvement Commissioners shall be charged on General Improvement Rate, and income arising to be carried to the same.*—That the expenses of carrying this Act into execution in any such district, being the place within the limits of any such Improvement Act in which the Board shall have resolved to adopt this Act for their district, shall be chargeable upon and paid out of the Improvement Rate of such district, and for that purpose the Board may levy with and as part of such Improvement Rate, or by a separate rate to be assessed, levied, paid, and recovered in like manner and with the like powers and remedies in all respects as such Improvement Rate, such sums of money as shall be from time to time necessary for defraying such expenses, and shall apply the same accordingly as if the expenses of carrying this Act into execution were an expense necessarily incurred in carrying into effect the general provisions of such Improvement Act; and the income arising from the lodging-houses in any such district shall be paid to the credit of the Improvement Rate thereof; and the Board shall keep distinct accounts of their receipts, payments, credits, and liabilities with reference to the execution of this Act, to be called "The Lodging-houses Account."

13. *Auditing accounts of Improvement Commissioners with respect to Act.*—That in every case in which any such Improvement Act contains provisions for the auditing of accounts thereunder, the accounts of the Board with respect to this Act shall be audited in accordance with those provisions; and in every case in which any such Improvement Act does not contain any such provisions, the accounts of the Board with respect to this Act shall be audited yearly by the poor-law auditor within whose district the district of the Board lies; and the Board shall produce to him their accounts, with sufficient vouchers for all moneys received and paid, and he shall examine such accounts and vouchers, and report thereon to the Board, and every such report shall be open at all reasonable times without charge to the inspection of every person liable to be rated to an improvement rate made by the Board.

14. *On the requisition of ten rate-payers, churchwardens, &c. to convene vestry meeting, to determine whether this Act shall be adopted.*—If vestry resolve to adopt the Act, a copy of resolution to be sent to Secretary of State, &c.—Resolution not deemed to be carried unless two-thirds vote for it.—That, upon the requisition in writing of ten or more rate-payers of any such parish as aforesaid, the churchwardens or other persons to whom it belongs to convene meetings of the vestry in such parish shall convene a meeting of the vestry for the special purpose of determining whether this Act shall be adopted for the parish, after public notice of such vestry, and the place and hour of holding the same, and the special purpose thereof, given in the usual manner in which notice of the meetings of the vestry is given, in each of three successive weeks before the day to be appointed for holding such vestry; and if thereupon it shall be resolved by the vestry that this Act ought to be adopted for the parish, a copy of such resolution, extracted from the minutes of the vestry, and signed by the chairman, shall be sent to one of her Majesty's Principal Secretaries of State, for his approval, and as soon as such approval shall have been signified in writing under the hand of any such Secretary of State, such of the provisions of this Act as are applicable in that behalf shall thenceforth take effect and come into operation in the parish: Provided always, that such resolution of the vestry shall not be deemed to be carried unless at least two-thirds in value of

the votes given on the question, according to the usual manner of voting at such vestry, shall have been given for such resolution.

15. *Where Act adopted vestry to appoint commissioners for carrying the same into execution.*—That in such case the vestry shall appoint not less than three nor more than seven persons, being ratepayers of the parish, commissioners for carrying this Act into execution in the parish, of whom one-third, or as nearly as may be one-third (to be determined among themselves), shall go out of office yearly (the year being reckoned from and exclusive of the day of the first appointment of commissioners), but shall be eligible for immediate re-appointment.

16. *Resignation of commissioners.*—That any commissioner may at any time resign his office as a commissioner, on giving seven days' notice in writing of his intention to resign to the clerk, and also to the churchwardens.

17. *Vacancies to be filled up by vestry.*—That any vacancy in the commissionership may be filled up by the vestry, when and as the vestry shall think fit, but at the latest at the then next yearly meeting for the appointment of commissioners.

18. *Meetings of the commissioners.*—That the commissioners shall meet at least once in every calendar month, and at such other times as they think fit, at their office, or some other convenient place, public notice of the times and place of meeting being previously given.

19. *Special meetings of commissioners.*—That it shall be at all times competent for any one commissioner, by writing under his hand, to summon, with at least forty-eight hours notice, the commissioners for any special purpose therein named, and to meet at such time as shall be therein named; and the commissioners may meet accordingly without further notice.

20. *Quorum of meetings of commissioners.*—That at all meetings of the commissioners any number, not less than one-third of the whole number when more than three commissioners shall have been appointed, and when only three commissioners shall have been appointed, then any number not less than two commissioners, shall be a sufficient number for transacting business, and for exercising all the powers of the commissioners.

21. *Commissioners may appoint and remove officers, &c.*—That the commissioners, with the approval of the vestry, may appoint reasonable salaries, wages, and allowances for a clerk and such other officers and servants as shall be necessary for the purposes of this Act, and shall appoint and may remove at pleasure such clerk, officers, and servants, and, when necessary, may hire and rent a sufficient office for holding their meetings and transacting their business, and may agree for and pay a reasonable rent for such office.

22. *Minutes of proceedings of commissioners to be entered in books.*—That all orders and proceedings of the commissioners shall be entered in books to be kept by them for that purpose, and shall be signed by the commissioners or any two of them; and all such orders and proceedings, so entered, and purporting to be so signed, shall be deemed to be original orders and proceedings, and such books may be produced and read as evidence of all such orders and proceedings upon any appeal, trial, information, or other proceeding, civil or criminal, and in any Court of Law or Equity whatsoever.

23. *Commissioners to keep accounts, which shall be open to inspection. Penalty for refusing to allow inspection.*—That the commissioners shall provide and keep books in which shall be entered true and regular accounts of all sums of money received and paid for or on account of the purposes of this Act in the parish, and of all liabilities incurred by them for such purposes, and of the several purposes for which such sums of money shall have been paid and such liabilities shall have been incurred; and such books shall at all reasonable times be open to the examination of every commissioner, churchwarden, overseer, and ratepayer, without fee or reward, and they respectively may take copies of or extracts from such books or any part thereof, without paying for the same; and in case the commissioners or any of them, or any of their officers or servants, having the custody of such books, being thereunto reasonably requested, shall refuse to permit or shall not permit any churchwarden, overseer, or ratepayer to examine the same, or take any such copy or extract, every commissioner, officer, or servant so offending shall for every such offence forfeit any sum not exceeding five pounds.

24. *Auditors to be appointed yearly, who shall examine the accounts and report to vestries.*—That the vestry shall yearly appoint two persons, not being commissioners, to be auditors of the accounts of the commissioners; and at such time in the month of March in every year after the adoption of this Act for the parish as the vestry shall appoint the commissioners shall produce to the auditors their accounts, with sufficient vouchers for all moneys received and paid, and the auditors shall examine such accounts and vouchers, and report thereon to the vestry: Provided always, that if the general accounts

of the parish be audited by a poor-law auditor, the accounts of the commissioners shall be audited by such poor-law auditor.

**25. Expenses of executing Act in any parish to be paid out of the poor's rate.**—That the expenses of carrying this Act into execution in any parish to such amount as shall be from time to time sanctioned by the vestry shall be chargeable upon and paid out of the moneys to be raised or applicable for the relief of the poor of the parish: Provided always, that the vestry shall be convened in the manner usual in the parish, and the amount for the time being proposed to be raised or applied for such expenses shall be expressed in the notice convening the vestry.

**26. Overseers to levy as part of the poor's rate such sums as vestry shall deem necessary to pay expenses.**—That for defraying the expenses so sanctioned the vestry may and shall from time to time order the overseers to levy with and as part of the rate for the relief of the poor of the parish such sums as the vestry shall deem necessary, and the amount thereof shall accordingly be assessed, levied, paid, and recovered in like manner, and with the like powers and remedies in all respects, as such rate, and shall be paid by the overseers, according to the order of the vestry, to such person as shall be appointed by the commissioners to receive the same, and his receipt shall be a sufficient discharge to the overseers for the same, and shall be allowed accordingly in passing their accounts: Provided always, that in the notices requiring the payment of the rate the proportion which the amount to be thereby raised for the purposes of this Act shall bear to the total amount to be thereby raised shall be stated as accurately as circumstances may admit.

**27. Monies raised, and the income arising from lodging-houses in the parish, to be applied towards defraying expenses.**—That the money raised for defraying the expenses of carrying this Act into execution, and the income arising from the lodging-houses in the parish, shall be applied by the commissioners in or towards defraying the expenses of carrying this Act into execution in the parish; and whenever, after repayment of all monies borrowed for the purpose of carrying this Act into execution in the parish, and the interest thereof, and after satisfying all the liabilities of the commissioners with reference to the execution of this Act in the parish, and providing such a balance as shall be deemed by the commissioners sufficient to meet their probable liabilities during the then next year, there shall be at the time of holding the meeting of the vestry at which the yearly report of the auditors shall be produced any surplus money at the disposal of the commissioners, they shall pay the same to the overseers, in aid of the rate for the relief of the poor of the parish.

**28. Vestries of two or more parishes may concur in carrying this Act into execution, subject to the approval of Secretary of State.**—That the vestries of any two or more neighbouring parishes having, according to the then last census, an aggregate population of not less than ten thousand, may, for the purpose of concurring in carrying this Act into execution, respectively adopt this Act in like manner as if the population of each of those parishes were, according to the then last census, not less than ten thousand; and the vestries of any two or more neighbouring parishes which shall have respectively adopted this Act may concur in carrying this Act into execution in such parishes, in such manner, not inconsistent with the provisions of this Act, and for such time, as they shall mutually agree; and for that purpose it may, with the approval of such Secretary of State, be agreed on between such vestries that any lodging-houses shall be erected and made in any one of such parishes, to be vested in the commissioners thereof, and that the expenses of carrying this Act into execution with reference to the same shall be borne by such parishes in such proportions as such vestries shall mutually agree, and the proportion for each of such parishes of such expenses shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of the same respective parish accordingly; and, according and subject to the terms which shall have been so agreed on, the commissioners appointed for each of such parishes shall in the management of the said lodging-houses form one body of commissioners, and shall act accordingly in the execution of this Act; and the accounts and vouchers of such commissioners shall be examined and reported on by the auditors of each of such parishes, and the surplus money at the disposal as aforesaid of such commissioners shall be paid to the overseers of such parishes respectively, in the same proportions as those in which such parishes shall be liable to such expenses.

**29. Incorporation of commissioners.**—That for the more easy execution of the purposes of this Act the commissioners of every such parish shall be a body corporate, with perpetual succession, which shall not be deemed to be interrupted by any partial or total vacancy from time to time in their office, by the name of "The Commissioners for Lodging-Houses in the Parish of ( ) in the County

of ( )," and by that name may sue and be sued in all courts, and before all justices and others, and may have and use a common seal, and by that name may take, hold, and convey any lands vested in them for the purposes of this Act.

**30. Acts of Commissioners to be good, notwithstanding informalities.**—That all acts and proceedings of any person in possession of the office of such commissioner, and acting in good faith as such commissioner, shall, notwithstanding his disqualification or want of qualification for, or any defect or irregularity in, or in any way concerning his appointment to such office, be as valid and effectual as if he were duly qualified, or there had not been any such defect or irregularity.

**31. Councils, &c. may borrow money for the purposes of the Act, with the approval of the Treasury.**—That for carrying this Act into execution in any borough, district, or parish respectively, the council, with the approval of the Commissioners of her Majesty's Treasury, and also with the approval of the General Board of Health, and the Board, with the approval of the Commissioners of her Majesty's Treasury, and also with the approval of the General Board of Health, and the commissioners, with the sanction of the vestry, and also with the approval of the Commissioners of her Majesty's Treasury, and also with the approval of the General Board of Health, may from time to time borrow, at interest, on the security of a mortgage, as the case may be, of the borough fund, or of the general district rates, or of the improvement rates, or of the rates for the relief of the poor of the parish, the money which may be by them respectively required, and shall apply the moneys so borrowed accordingly.

**32. The Public Works Loan Commissioners may advance money for the purposes of this Act.**—That the commissioners for carrying into execution an Act passed in the tenth year of the reign of her Majesty, intitled "An Act to authorize the advance of money out of the consolidated Fund for carrying on Public Works and Fisheries and employment of the Poor," may from time to time make to the council of any such borough or to any board or to the commissioners of any such parish respectively, for the purposes of this Act, any loan, under the provisions of the recited Act, or the several Acts therein recited or referred to, upon security of the borough fund, or the general district rates, or the improvement rates, or the rates for the relief of the poor of the parish, as the case may be.

**33. Certain provisions of 8 & 9 Vict. c. 16, incorporated with this Act.**—That the provisions of the Companies Clauses Consolidation Act, 1845, with respect to the borrowing of money by any company on mortgage, and the provisions of the same Act with respect to the accountability of the officers of the company, and the provisions of the same Act with respect to the making of bye-laws, subject to the provision hereinafter contained, and the provisions of the same Act with respect to the recovery of damages not specially provided for, and penalties, so far as such provisions may respectively be applicable to the purposes of this Act, shall be respectively incorporated with this Act; and the expressions in such provisions applicable to the company and the directors shall apply, as regards a borough, to the council, and as regards a parish, to the commissioners; and all deeds and writings which under such provisions are required or directed to be made or executed under the common seal of the company shall, in the application of such provisions to this Act, be deemed to be required or directed to be made or executed, as regards a borough, under the common seal of the mayor, aldermen, and burgesses, and, as regards a parish, under the common seal of the commissioners; and so much of such provisions as are applicable to the secretary of the company shall apply to the clerk; and in such of the said provisions as relate to the inspection of accounts, as regards a borough, the burgesses, and, as regards a parish, the ratepayers, shall have the privileges of shareholders.

(To be continued.)

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

### Summary.

A STATUTE of considerable interest and importance, to be administered by magistrates and local authorities, has received the Royal Assent, and was given at length last week (17 Law T. 166). It is entitled "An Act for the well-ordering of Common Lodging-houses." Its execution is, by the 2nd section, confided, in the metropolis, to the commissioners of police; to the local board of health where such exists; where there is no such board, in the municipal corporation, if there be one, and if there be none, then in the justices of

the peace acting in petty sessions. Its provisions are briefly these:—

Within three months after its date (24th July, 1851) notice is to be given by the proper authority to every keeper of a common lodging-house to register it. For this purpose a register is to be kept by such authority, in which is to be entered the names and residences of the keepers of all common lodging-houses, with the situation of the house, and the number of lodgers authorised to be received therein; and after one month after such notice served, no lodger is to be received until registration. Power is given to the local authority to make regulations for the well-ordering of common lodging-houses, and to impose penalties for offences committed against such regulations.

Keepers of lodging-houses are to give notice of leave being therein: free access is to be given to any officer of the local authority to inspect same. By the 13th section the keeper is to cleanse the house as often as required by the authority. Offences are subject to a penalty not exceeding 5l. for every offence, and to a further penalty not exceeding 40s. for every day during which the offence continues; and for the recovery thereof, the clauses and provisions of the Railways Clauses Consolidation Act are incorporated with this Act. It does not extend to the city of London—of course, no useful law for local improvement is allowed to do so.

Lord Campbell's new *Criminal Law Statutes*, with all the new criminal statutes of the last four years, and a digest of all the cases decided during the same period, will be published in a few days, price 5s. 6d., by the editor of *Cox's Criminal Law Cases*.

### COMMON LODGING-HOUSES.

A STATUTE, the 14 & 15 Vict. c. 28, has recently passed (24th July, 1851), for the well-ordering of common lodging-houses. The want of proper control and inspection had been much felt, particularly at the period when contagious disease prevailed in the country.

The provisions of the statute will have to be put in force by the commissioners of police in the metropolitan district; by the local board of health, where one is established; where no such board exists, then, in boroughs by the town-council, in other places having an Improvement Act, by commissioners, trustees, or other body for executing the same; in all other places, by the justices of the peace acting in petty sessions. The expenses incident to carrying the provisions of the Act into effect are to be borne by the police fund, the district fund of the Board of Health, the borough fund, and improvement rate; but when executed by justices, then the expense is to be borne as part of the general expenses of the constabulary, or, in other words, out of the poor-rate.

Sec. 6 enacts that within three months after the passing of the Act the local authority shall, and from time to time thereafter may, give to the keeper of every common lodging-house a notice in writing requiring the keeper to register the house. Sec. 7 directs the local authority to keep a register, in which shall be entered the names and residences of all common lodging-house keepers, the situation of every such house, and the number of lodgers according to the Act to be received therein. Sec. 9 gives power to the local authority to make regulations respecting such houses for any of the purposes respecting the same; for which the local board of health are by the Public Health Act, 1848, authorised to make bye-laws, and for the well-ordering of such houses, and for the separation of the sexes therein; such regulations, however, are not to be in force until they have been confirmed by a Secretary of State. It is probable that one uniform set of regulations will be issued under the authority of the Secretary of State; and any alterations therein, owing to local position, could be made by the local authority under the sanction of Government. Sec. 10 gives the local authority the same power of imposing penalties on offenders against the regulations, subject to the same restrictions, as the local board with respect to offenders against such bye-laws; and such penalties shall be recoverable in the same way as is provided in the said Act with respect to the penalties imposed on offenders against such bye-laws; and a copy of the said regulations purporting to be signed by the Secretary of State, and also to be signed by the local authority (or to be sealed with the seal of the same in case it have a seal), shall be receivable in evidence, of such regulations and of the duly making and confirming thereof. By the bye-laws under the Public Health Act, 11 & 12 Vict. c. 63, s. 115, may be imposed, a penalty

upon offenders against the same, not exceeding five pounds for each offence; and in the case of a continuing offence a further penalty, not exceeding the sum of forty shillings for each day after written notice of the offence from the said local board; such penalties being recoverable before two justices, with costs of proceedings. Sec. 11 directs that the keeper of a common lodging-house shall, when a person is ill of fever, or any infectious or contagious disease, give immediate notice thereof to the local authority, or some officer of the local authority, and also to the poor-law medical officer, and the poor-law relieving officer of the union or parish in which the common lodging-house stands. Sec. 12 enables any officer of the local authority at all times to have free access to the house, or any part thereof. Sec. 13 provides for the thorough cleansing of all rooms, passages, stairs, floors, windows, doors, walls, ceilings, privies, cesspools, and drains as often as shall be required by the local authority, and to limewash the walls and ceilings in the first week in the months of April and October in each year. Sec. 14 provides for any offence against the Act, or the bye-laws, or regulations, or if any person be confined to bed for forty-eight hours by fever, or any infectious or contagious disease, without the keeper giving notice thereof, and inflicts a penalty not exceeding five pounds for every offence, and a further penalty not exceeding forty shillings for every day during which the offence continues. The Act does not exempt any person from any penalty or other liability to which he might be subject irrespective of that Act. By sec. 15 the clauses and provisions of the Railway Clauses' Consolidation Act, 1845, "with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to the justices," are for the purposes and execution of the Act incorporated with the Act. By sec. 16 the local authority, and all justices, constables, and others, shall respectively have full jurisdiction, powers, and authorities, and indemnities for executing the several provisions of the Act; and the restrictions of the Public Health Act, 1848, as to the hours within which common lodging-houses may be entered by persons authorised by a Local Board of Health, shall not apply to that Act.

The Act does not extend to the city of London, or the liberties thereof, or to Scotland.

There is no power given in the Act to demand any fees to be paid by lodging-house keepers for anything done in pursuance of the Act for registering the houses. Such fees will therefore have to be borne by the local authority, whatever it may be. Upon justices in petty session divisions will devolve, in a great measure, the working of the Act, apart from towns and boroughs. Where police are established, the superintendent, or some other officer, will be the most likely person appointed as the officer of the local authority. A notice made out in duplicate should be given to the lodging-house keeper, so that one should be filed with the local authority; also a certificate should be given to the keeper of his registry, accompanied with the regulations which are to guide him. Under boards and corporate boroughs, the seal of office affixed to a copy of the regulations, when they have been approved of by the Secretary of State, will be evidence to make them so in petty session divisions. The magistrates, or the majority of them, should sign a copy to be filed with their clerk; and if the clerk were to sign a certificate of registry, and also the copy of the regulations when given to the lodging-house keeper, it would in some measure vouch that such documents were authentic. The words "common lodging-house," made use of in the statute, are of large meaning, and will require some attention to the description of such houses as would come within the jurisdiction of the local authorities. Many beer-houses are accustomed to receive tramps and wayfarers to lodge; such beer-houses would, in fact, be lodging-houses, as they are under no obligation similar to licensed publicans to receive travellers at all times, and therefore would require to be registered.

F.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

ONE of the most interesting and important cases as to the *Law of Calls* has been reported to us from the Court of Q. B. in Ireland, where it was very elaborately and learnedly argued and considered. In *The Midland*

*Great Western Railway Company v. Quin*, 17 Law T. 248, in an action *in rem* calls, defendant pleaded that he bought the shares, and then and at the time when his name was placed upon the list of shareholders, and when the calls in question were made, he was and still is *an infant*, under the age of twenty-one, and that he had not derived, and did not seek or claim to derive, any profit or advantage whatsoever from the said shares. It was held to be a bad plea, because it did not contain an averment of an *express repudiation* of any interest in the shares, a decision which amounts to this, that for an infant to escape liability, it is not enough that he does nothing to shew acceptance, he must *expressly repudiate*.

### WINDING-UP.

WE were enabled last week to give a full report of the very important decision of the House of Lords as to the *liability of allottees in Cooper's case*, 17 Law T. 237, the result of which we have already made known to our readers. It will suffice now to state, that a mere allottee of shares, who has signed no Parliamentary contract or subscription deed, is not liable as a contributory, whether he has or has not paid a deposit. Undoubtedly this was the law previous to the Joint-Stock Companies Registration Act; and the only question was, whether the provisions of that Act made a subscriber of shares a partner. We stated at some length the reasons that led to the conclusion that they did so; but the House of Lords has held otherwise, although, as it still appears to us, without sufficient grounds. But the question is now finally settled.

*Ex parte Gay*, 17 Law T. 240, was another case as to *calls*. The Master had divided the contributories into two classes, the first of whom had executed the subscription contract. Debts had been proved. To provide for these and expenses, the Master made a call upon that class. It was objected, that before a call could be made the committee of management should be required to account for the deposits received by them, which were sufficient to meet the debts; but the Master had made no distinction between the committee of management and the other shareholders. The Court was of this opinion, and *discharged the order for the call*.

TRING, READING, AND BASINGSTOKE RAILWAY.—Thursday there was a meeting in this matter before Master Richards to consider the claim of Messrs. Hill and Everell, the late solicitors, for 4,000*l*. Mr. Roxburgh, counsel for Mr. Wryghte, the official manager, opposed the claim, upon the ground that it had already been disallowed by Mr. Commissioner Fane when this company was before the Court of Bankruptcy. Mr. Everell contended that he was at liberty to go into fresh evidence before the Master, who, however, after a discussion, decided that Mr. Everell must either apply for a re-hearing before the commissioner or take the debt as disallowed.—*Daily News*.

LANCASHIRE, CHESHIRE, AND STAFFORDSHIRE RAILWAY.—Further proceedings in this matter have, with the consent of the parties, been adjourned to next term, to allow of negotiations for a compromise being carried out.

ROYAL BANK OF AUSTRALIA.—On Thursday, before Master Richards, a meeting was held to consider a compromise with the executors of Mr. J. P. Robinson, deceased. Mr. H. Harris, solicitor for the official manager, stated that an order had been made on the executors for payment of 2,500*l*. balance of calls due, but the affidavit of the executors showed that after paying certain debts and liabilities of the testator there was a very small balance in hand, and that they had also instituted a suit to administer the testator's estate. Under these circumstances the official manager consented to take 350*l*. in discharge of the Master's order, but reserving all subsequent rights as to future calls to be made under the estate. The Master confirmed the compromise.—*Daily News*.

BOSTON AND GRANTHAM RAILWAY.—On Monday two claims were brought in before Master Humphrey, consisting of 1,200*l*. for engineering and 200*l*. for surveying, with other smaller liabilities, by Mr. Belcher, the official manager. A question was also raised, but the consideration of it was adjourned, as to how far it was expedient that a gentleman who had acted as one of the members of the provisional committee should continue to act as solicitor to the official manager in winding up the company's affairs.—*Times*.

KILBRICKIN MINING COMPANY.—On Monday a final meeting in this matter was held before Master Richards, when a report of the state of affairs from

Mr. Wryghte, the official manager, was read by Mr. H. Harris, his solicitor. It appeared that the mine-situate near Ennis, county Clare, was originally bought from Mr. H. Crockford for 13,000*l*. and was worked by the company from 1846 to 1848 at a loss of 15,000*l*. To pay off undischarged debts of 565*l*. a call of 30*s*. was made, which realised 1,466*l*. or about 610*l*. more than was required, and a return dividend of 1*s*. 7*d*. was declared payable, the winding-up cost being about 200*l*.—*Daily News*.

### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]  
*Direct Western Railway Company*.—Creditors to come in and prove (*Gazette*, Aug. 5).—*Ross*.

### REAL PROPERTY LAWYER AND CONVEYANCER.

THE statute of Henry 8 has expressly included "manors," and authorised their partition among tenants in common. The difficulty consists in doing it. In *Hanbury v. Hussey*, 17 Law T. 238, one was entitled to two-thirds and the other to one-third of a manor. On a bill filed for a partition, a decree was made accordingly, and it was referred to the Master to report upon the nature of the property and the right of the plaintiffs, but the Master of the Rolls refused to say then *how* the partition should be effected.

*Will cases again*. *Bacon v. Cobby*, 17 Law T. 239, was a case of *election*. It is unnecessary to repeat here all the circumstances under which certain devisees were put to their election which they would take of two alternative benefits. *Ridgway v. Ridgway*, 17 Law T. 239, was a question of *construction*. A. gave the residue of his personal estate to trustees, in trust for his daughter B. for life, and after her death in trust for her children, with a gift over should B. die without a child, or one who should attain twenty-one or marry. B. died, leaving C. her only child, who died under twenty-one. It was held that the property vested in C. so that the income accruing between the deaths of B. and C. belonged to her. *Wilson v. Bennett*, 17 Law T. 240, was a devise of real and personal estate to A., B. and C. their heirs, &c. upon certain trusts, with power to them, and the survivors and survivor of them, his heirs, &c. to sell all or any part of the said property. B. survived, and appointed D. and E. his executors, devising to them his trust estates. They contracted to sell part of his copyhold estate to a purchaser; but it was objected that they had not a power of sale. "Hyde had devised his real and personal, copyhold and leasehold" estates to trustees, their heirs, executors, and administrators; that was, his real and copyhold "estates to the trustees and their heirs, and the personal estate to the trustees, their heirs and executors." But the point was held to be too doubtful to compel the acceptance of the title by the purchaser. In *Boulger v. Smith*, 17 Law T. 247, it was held that where a trustee, to whom property is given by will, with an unlimited discretion as to the quantity of estate he may give to the *cestui que trusts*, gives but a nominal share to one of them, the Court *will not inquire* into his reasons for so doing, unless there be an allegation that he was actuated by corrupt motives.

An interesting case under the Prescription Act, 2 & 3 Wm. 4, c. 71, is reported from the Court of Error. In *The Plasterers' Company v. The Parish Clerks' Company*, 17 Law T. 246, the question was, is the payment of a rent of 10*s*. a year evidence of the interruption of enjoyment of certain lights under the third section of that statute? Lord CAMPBELL, C.J. pronouncing the judgment of the Court, said, "I think that it is *not*. To establish an interruption, there must be a *discontinuance of the enjoyment*. Here there has been an absolute enjoyment for a space of twenty years, without any interruption."

A statute of considerable importance to the *Law of Landlord and Tenant* has just received the Royal Assent. It is 14 & 15 Vict. c. 25, 17 Law T. 166, and is to improve the law in relation to emblements, growing crops seized in execution, and agricultural tenants' fixtures. It provides that, on the determination of leases or tenancies under a tenant for life, instead of the landlord being entitled to emblements, the tenant shall hold to the expiration of the current year. Growing crops seized and sold under an execution are to be liable for the "rent which may accrue and become due to the landlord after any such seizure and sale." A proviso which

certainly appears to give the landlord quite a new, and seemingly an unjust, preference over a creditor. The next is more beneficial. It empowers the tenant to remove buildings and fixtures erected by him on farms, unless the landlord elect to take them at a valuation; and, lastly, if a tenant quit, leaving tithe rent-charge unpaid, the landlord is empowered to pay the same, and recover it from the tenant by an action at law, as if it were a simple contract debt.

#### REGISTRATION OF DEEDS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—As you invite suggestions on this subject, I venture to offer my opinion that the registration of deeds could be effected through the medium of the commissioners authorised to take the acknowledgments of married women by means of a certificate or memorial to be signed by the commissioners, and a memorandum to be indorsed on the instrument itself, and signed by the commissioners. The memorial or certificate to be registered in London. Whether an affidavit may be necessary or not, and the form of the certificate or memorial are subjects for future consideration. I think this would be an inexpensive and effectual manner of carrying out the principle of registration.

R. B.

August 4, 1851.

#### LANDLORD AND TENANT.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Allow me to call your attention to the recent Act, 14 & 15 Vict. c. 25, s. 1.

On reading the clause in question, it appears to me much hardship will be imposed on tenants holding from year to year under a tenancy created by tenant for life.

It appears that the period formerly allotted for getting in the emblements, six months, is now abolished, and the tenant is to quit on the expiration of the yearly tenancy, and without notice; so that, if tenant for life dies, say, on the 24th day of March, and the yearly tenancy should expire on the 25th of the same month, the tenant must quit on the day following the decease of tenant for life, on the terms of the contract with tenant for life as to payment for crops and seeds and the like.

Another view of the case may be stated thus, viz.: if tenant for life dies on 26th March, the tenancy would continue until the 25th March in the next following year.

Is not this rendering the law more uncertain than ever? It appears so to me.

I am, sir, yours, &c.

Birmingham,  
August 5, 1851.

EDWARD BAKER.

#### Queries.

#### COURTS BARON.

THERE is in my office, as steward of a Court Baron, a table of fees payable to the steward and to attorneys in plaints, and to witnesses and court fees. The table is thus headed:—

“Borough of } A table of the ancient and allowed fees of the Court Baron of the borough of \_\_\_\_\_, in the county of \_\_\_\_\_, as the same was transmitted to London to the honourable the commissioners appointed to survey the officers of justice in England and Wales, and to inquire into their fees in pursuance of his Majesty's commission under the great seal of Great Britain, bearing date the 27th day of July, 1733.”

Can any of your learned readers inform me what report the commissioners made of their inquiries, and where is such report to be found? and where are the returns made to them deposited? INQUIRER.

**NEW ACT RELATING TO LANDLORD AND TENANT.**—A new Act came into force on Thursday week (14 & 15 Vict. c. 25), to improve the law of landlord and tenant in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures. It enacts that, on the determination of leases or tenancies under tenant for life, &c. instead of claims to emblements, the tenant shall continue to hold and occupy such farms or lands until the expiration of the current year. Growing crops of the tenant seized and sold under an execution shall, in default of sufficient goods and chattels of the tenant, be liable for the accruing rent; “notwithstanding any bargain and sale, or assignment, which may have been made or executed, of such growing crops, by any such sheriff or other officer.” A tenant may remove the buildings and fixtures erected by him on a farm, unless the landlord shall elect to take them. Further, it is provided that on a tenant quitting the place, leaving the tithe rent charge unpaid, the landlord may pay the same, and recover it from the first-named tenant as if it were a simple contract debt. The Act, which is not to extend to Scotland, contains five clauses.

**CHARITABLE TRUSTS.**—The Bill for facilitating and better securing the due administration of charities in England and Wales was brought from the Lords on the 31st of July last. It proposes to vest with the Lord Chancellor the appointment of not fewer than five commissioners, two of whom will be paid a salary not exceeding 2,000*l.* a year. The duties of the commissioners will be to inquire into the condition and management of charities, to entertain applications for their opinion or advice, &c. They will have power to issue precepts for the production of accounts and documents by trustees, &c. of charities—to administer oaths to witnesses. They may certify certain cases to the Attorney-General, who will institute legal proceedings with respect to such cases. A charge not exceeding 2*d.* in the pound will be levied on incomes of charities not amounting to or exceeding 10*l.* in order to provide a fund for discharging the expenses of carrying the Act into execution. Jurisdiction in the cases of charities, the incomes of which do not exceed 30*l.* will be given to the district Courts of Bankruptcy and judges of County Courts. In the cases of charities for the exclusive benefit of persons of a particular religion, the trustees must be of the same religion. A reservation of rights and privileges of the Church of England, with respect to charities, is inserted in the Bill.

#### COUNTY COURTS.

##### Summary.

THE new Rules of Practice in the County Courts direct that the Rules of Practice adopted by the Insolvency Court in London shall be the rules that are to regulate the Practice of Insolvency and Protection in the County Courts. Hence to all the officers and practitioners in the County Courts the value—nay, the absolute necessity—of the reports which are here conveyed to them of the decisions of the Insolvency Court in London, for those decisions will govern them. Last week offered three which should be carefully noted in *Maerac's Practice*, which, it may be stated, is now the recognised authority in the London Courts. In *Re Cumming*, 17 Law T. 235, the word *resided* in sec. 69, which requires an insolvent to deliver a schedule stating his debts, &c. “the place or places where he has *resided* during the time when his debts were contracted” was held to include a place of business, and therefore that he must insert in his description all the places where he has carried on a trade or business. In *Re Bennett*, 17 Law T. 235, it was held that the Court might dismiss the petition filed, because a Christian name, which had been disused, was therefore omitted in the petition; and in *Re Tidmarsh*, 17 Law T. 235, a petition was dismissed where the petitioner had wilfully omitted a debt from his schedule.

*Clay v. Crofts*, 17 Law T. 231, was an appeal from the County Courts, but the question involved in it had no relation to County Courts practice, and therefore it is noticed in the department to which it properly belongs.

The case of *Buchanan v. Kinning*, 17 Law T. 244, in error, affirms the judgment of the Court below upon the question whether, under the Small Debts Act (8 & 9 Vict. c. 127), and consequently, under the corresponding clause in the County Courts Act, where a debt is ordered to be paid by instalments, the debtor failing to pay any instalment can be at once committed without a previous summons to shew cause. The Court of Error (two judges, Erle, J. and Martin B., dissenting) have decided that such a commitment without a previous summons is illegal. But upon other points raised the judgment was in favour of Mr. Buchanan, and a *venire de novo* was awarded.

The County Courts Extension Bill has been dropped for the Session, consequently the *FOURTH EDITION OF COX AND LLOYD'S LAW AND PRACTICE OF THE COUNTY COURTS*, as regulated by the new rules of practice, and containing all the new statutes, &c., will be published in a few days.

#### HOME CIRCUIT.

Court Days for the month of August.

Hitchin, Monday, 11.	Edmonton, Tuesday, 26.
High Wycombe, Tuesday, 12.	St. Alban's, Wednesday, 27.
Uxbridge, Wednesday, 13.	Hertford, Thursday, 28.
Watford, Wednesday, 20.	Barnett, Friday, 29.
Luton, Thursday, 21.	

#### THE LAWYER.

##### Summary.

**EQUITY PRACTICE.**—Although the 12th order of November 2, 1850, states that exceptions for scandal and impertinence shall be set down “by the

party filing the same,” in *Coyle v. Alleyne*, 17 Law T. 239, where the defendant, who had taken the exceptions, had neglected to set them down, the plaintiff was allowed to do so.

In *Re the Vicar of Portea*, 17 Law T. 240, the Court refused to make an order for payment of dividends due on certain funds transferred from the old Equity Court of Exchequer to the Court of Chancery, under 5 Vict. c. 5, when no dividends had since been paid.

In *Allen v. Loader*, 17 Law T. 241, a defendant absconding to avoid a criminal proceeding was held to be within the 31st order of May, 1845, (which gives leave to enter an appearance for a defendant in certain cases). And so under the 32nd order the Court will direct a solicitor to be assigned as guardian to a lunatic defendant, to appear and answer. (*Russell v. Walker*, 17 Law T. 241.)

The provisions of the Trustees Act have been again in controversy. In *Re Hodgson's Settlement*, 17 Law T. 241, power was given by a settlement to A. to appoint new trustees in place of trustees dying, or being desirous of retiring. A trustee died, and a petition was presented, stating that the other trustee was desirous of retiring, and praying that the donee of the power might be permitted to exercise it. But it appeared in evidence that the surviving trustee did not wish to retire, and it was held that the 32nd section of the Trustees Act, which empowers the Court to appoint a trustee “whenever it is expedient,” is confined to the appointment of new trustees, and does not authorise the removal of a willing one.

Two cases on *Claims* also require to be noticed. In *Hills v. McRae*, 17 Law T. 242, it was held, that the other partner was a necessary party to a claim filed by a creditor of a firm of two partners, against the personal representatives and residuary devisees of a deceased partner. And in *Lloyd v. Bettleley*, 17 Law T. 242, the leave of the Court was held to be necessary to the filing of a claim to have the trusts of a will executed which disposed of part of a testator's estate, and to have the residue administered.

In *Lond v. Murray*, 17 Law T. 248, where A. by erecting a mill weir across a river between his own mill and that of B. had caused the latter to be flooded, upon which B. brought an action and obtained a verdict for the special damage, it was held that the Court had nevertheless jurisdiction by injunction to compel A. to discontinue the nuisance. “It appears to me,” said the Lord Chancellor of Ireland, “to fall within that elementary jurisdiction inherent in this Court of giving relief when, the right having been established at law, it only remains to give effect to the rights of the parties.”

**COMMON LAW.**—It appears from the case of *Buchanan v. Kinning* (in error), 17 Law T. 244, that where a person has been wrongly imprisoned on the order of a Judge of a Small Debt Court, it is doubtful whether he can sue in trespass at all, but that, if he could, the attorney is the party liable, for ordering the judge's warrant to be put in execution.

In *Sharp v. Eveleigh*, 17 Law T. 246, a Judge at Chambers was held to have jurisdiction under 13 & 14 Vict. c. 61, s. 13, to order costs, although there was an order of reference, by which the arbitrators had the same power to certify as a judge.

The *Law of Evidence Bill* has become law. The many and great improvements which it makes, and affecting as it does all courts and arbitrations, an edition of it, with explanatory notes, and a copious index, will probably be required in every office. Such a one has been prepared, and will be published on Wednesday next, in two sizes, 12mo. and 8vo., to bind up with all books on evidence and practice. It is entitled *The Law of Evidence Amendment Act*, with notes, introduction, and index, by Edward W. Cox, Esq., Barrister-at-Law. Price, 12mo, 2s. 6*d.* boards, 3s. cloth, 4s. 6*d.* half-bound, 5s. 6*d.* bound. 8vo. edition, 3s. 6*d.* boards, 4s. cloth, 5s. 6*d.* half-bound, 7s. bound.

#### THE MERCANTILE LAWYER.

ONE manner of determining whether a loss is total or partial was shewn in *Rosetto v. Gurary*, 17 Law T. 242. A vessel and its cargo had been hypothecated (i.e. pledged), during its voyage, for repairs. After this it was again damaged, and towed into harbour by salvors. The cargo (corn) was warehoused in a damaged state; the insured gave notice of abandonment, but a portion of the cargo could have



been kiln-dried, and taken in a new bottom to its destination in a marketable state. The salvors sued for salvage in the Admiralty Court, which ordered the cargo to be sold. It was held that, in order to determine if it was a partial or total loss, the course would be to estimate the cost of warehousing, drying, and transhipping in a new bottom to its destination, and the proportion of salvage to the cargo saved, and if in the aggregate it exceeded the value of the cargo when delivered at its destination, then the loss would have been total, but not otherwise.

A singular case is that of *Longmeid v. Haliday*, 17 Law T. 243. A wife bought for her husband of defendant a lamp, which he sold, which, on her using it, burst and injured her. The defendant did not construct the lamp, but had it put together by others, in parts purchased from those persons. It was not proved that he knew of the defect, and the jury found that there was no negligence. It was held, that if there had been a breach of contract, the husband might have sued for it; but that, as there was no misfeasance towards the wife, independently of the contract, she could not sue, joining her husband, for damages.

#### Queries.

#### CREDITOR DEEDS.

IN the course of my practice I have observed that in some cases of assignments for the benefit of creditors, the deed has been executed for and on behalf of creditors by their attorney or agent, and this without any power of attorney for the purpose. By section 224 of "The Bankruptcy Law Consolidation Act, 1849," it is enacted that every deed of arrangement "signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards," shall be binding on all. I shall feel obliged if any of your subscribers can refer me to an authority that such a deed, executed by an agent without a power of attorney for the purpose, is binding on the creditor; and whether it would be treated by the Court of Bankruptcy as a deed "signed by or on behalf" of such creditor within the meaning of the 224th section.

A. B.

August 5, 1851.

#### ASSURANCE CHRONICLE.

[The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

**LONDON REVERSIONARY INTEREST SOCIETY.**—On Thursday the eleventh annual general meeting of proprietors in this society took place, at their offices, 4, New Bank-buildings—Sir Peter Laurie in the chair. From the report submitted to the meeting, it appeared that the present year was the third quinquennial period, in which the deed of settlement provided that a special investigation and valuation of the property of the society should be made, and which had accordingly been done. From the calculation of Mr. King, the actuary of the society, the present value of all reversions, policies of assurance, annuities, and cash in hand amounted to 120,027*l.* 6*s.* 10*d.*; and Mr. Peter Hardy, the eminent actuary, had valued their assets at the sum of 120,191*l.* 16*s.* 8*d.* exceeding Mr. King's estimate by 154*l.* 9*s.* 10*d.* which the directors considered as a proof of the sound and safe principles upon which the business of the society was conducted. During the past year reversions had been realised to the amount of 6,355*l.* 3*s.* 8*d.* which yielded a clear profit of 1,300*l.* after allowing compound interest at 4 per cent. Reversions to the amount of 6,341*l.* were due to the society, and would shortly be received, and reversionary property to the amount of 13,718*l.* had been purchased on advantageous terms, and 5,000*l.* invested by way of redeemable annuity. A dividend of five per cent. free of income-tax, was declared, and the directors announced their intention to convene an extraordinary meeting of proprietors, to submit for their consideration a plan for increasing the capital, and extending the operations of the society. The adoption of the report having been moved and seconded, was agreed to by the meeting, after which three of the directors, J. F. Glennie, esq. Mark Boyd, esq. and P. N. Laurie, esq. who retired by rotation, were re-elected, and the meeting broke up.

#### PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

THE Right Hon. Sir John Jervis has appointed Charles Stockdale Benning, of Dunstable, in the county of Bedford, gentleman, to be one of the Perpetual Commissioners for taking the acknowledgments of deeds to be executed by married women, in and for the county of Bedford; also, in and for the counties of Hertford and Buckingham.

The Right Honourable Sir John Jervis has appointed Edmund Ward, of Prescot, in the county of Leicester, gent., and George Slade Butler, of Rye, in the county of Sussex, gent. to be Perpetual Commissioners for taking the acknowledgments of deeds to be executed by married women in and for the county of Lancaster, and the counties of Sussex and Kent respectively.

#### PROCEEDINGS OF LAW SOCIETIES.

##### METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

THE managing committee held their usual monthly meeting on Wednesday, the 6th instant, Mr. E. W. Field in the chair.

The secretary reported the position of the various Bills before Parliament for the amendment of the law.

It was referred to the conveyancing committee to consider whether or no it would be expedient to prepare a draft Bill for a general registration; and the secretary was instructed to ascertain the views of the council of the Incorporated Society upon the subject.

It was reported from the equity committee, that they had, with the assistance of Mr. Mullings, suggested some amendments in the County Courts further Extension Bill; particularly one, rendering it imperative on the judges to award costs in the Superior Courts in cases of concurrent jurisdiction; and one extending the provisions of the audience clause, so as to include, not only suits, but all proceedings in the courts; and that these amendments had been adopted and introduced into the Bill by the Solicitor-General.

It was referred to the equity committee, to consider the expediency of preparing draft orders to carry out the objects of the Bill; and, if the committee should see fit, to prepare such orders accordingly.

A letter was read from a member, communicating the opinion of counsel upon the right of notaries to practise as conveyancers, which precisely agreed with the opinion which had been communicated to the member by the secretary.

A letter was read from Mr. R. Maugham, stating that the council of the Incorporated Society concurred with the committee in the expediency of an application to the judges for a rule compelling attorneys applying for leave to renew their certificates, to serve the summons upon the Registrar of Attorneys, instead of as now, applying *ex parte*; and that they had submitted the proposed amendment to the judges accordingly.

A case of alleged malpractice was further considered.

Letters were read from members, requesting the opinion of the committee upon doubtful points of professional duty. The points were discussed, and the secretary was instructed to communicate the opinion expressed.

The secretary was instructed, during the long vacation, to visit Lincolnshire and the Midland Counties; and to hold meetings of the local members of the Profession in principal towns, in order to explain the objects and operations of the association, and its claims to more extended support.

8, Bedford-row.

#### CORRESPONDENCE.

##### PROSPECTS OF THE PROFESSION.

TO THE EDITOR OF THE LAW TIMES.

SIR,—You begin your leading article to-day with the startling commencement that "The die is cast." If this be not so already, I fear it will very soon be the case, without the most stringent efforts are made by the Profession to prevent such a catastrophe. Every member of the Profession must, I should think, see the ruinous consequences of *free trade in law*, and they should therefore use their utmost endeavours to prevent it. The question then arises, how is this to be accomplished? Now, it seems to me that the most effectual means would be to get as many members returned at the ensuing election (which cannot be very far distant) as are opposed to the sweeping law changes of the present day: the

lawyers have great powers at electioneering times, and they must now make the best use of them, for their *very existence depends on themselves*. I would also suggest that the Law Associations should take the present state of things into their serious consideration, and that associations should be formed where none at present exist, for a like purpose: in fact, every member of the Profession should join some association or other.

I cannot close this letter without calling the attention of your readers to the very monstrous assertions from time to time made by the venal *Times* as to the existing state of the present law, as well as to the lawyers themselves. Surely these statements should not go forth to the world uncontradicted, however the Profession may be inclined to treat them with the contempt they deserve. If uncontradicted, they will undoubtedly have their weight with the million, who in the end will believe (what the *Times* seems anxious to persuade them), that the law of England, under which this country has so long flourished, is the most iniquitous, absurd, and unjust system that has ever existed in the annals of the civilised world. I am, Sir, yours, &c.

July 26, 1851.

A SOLICITOR.

#### LEGAL INTELLIGENCE.

##### The Assizes.

##### OXFORD CIRCUIT.

HEREFORD, Monday, Aug. 4.—There were but two new causes, one of which was withdrawn, and the other undefended. Of the two others, which completed the list, the first was tried two years ago, before Mr. Baron Rolfe, and now came down for a second trial, a ruling of his lordship having been set aside on a writ of error, in the Exchequer Chamber; and the second was a remanet from the last Assizes, as the judges had not time to try them before they were obliged to go to Monmouth.

The Crown business was very light, there being only 25 prisoners, of whom 1 was charged with rape, 1 with an attempt to drown an illegitimate infant, 2 with robbery with violence, 5 with burglary, 1 with horsestealing, 1 with robbery from the person, 2 with receiving stolen goods, and 11 with larceny.

##### WESTERN CIRCUIT.

BODMIN, Aug. 4.—The commission was opened here on Saturday by Lord Campbell and Mr. Justice Coleridge. Yesterday their lordships attended divine service, and this morning the business of the Assizes commenced. In the civil court, in which Mr. Justice Coleridge sat, there was, for the present circuit, a very heavy cause-list, there being no less than eight causes entered; three, however, were undefended, and a fourth was settled.

##### NORTHERN CIRCUIT.

NEWCASTLE, Aug. 1.—These Assizes commenced to-day both for the town and county. The equipage and "set-out" of the High Sheriff (Sir Horace St. Paul) have excited much attention, the hon. gentleman not having made the usual arrangements, either as it respects carriage, liveries, or attendants. All he has provided is a family coach and pair. It is said that the hon. baronet had expressed his determination not have any "display" during his shrievalty.

The Court was opened in the Moot-hall at eleven o'clock, by Mr. Baron Platt, with the usual formalities. The grand jury having been sworn in, his lordship, in his address, directed their particular attention to some cases of stabbing which were to go before them. The other cases in the calendar were not of a nature to require any observation from him; but as he had the honour of addressing gentlemen of high respectability in the county, he could not dismiss them without expressing his great regret that in this county and this country the gentry should be so reduced as not to shew the ordinary respect to the Crown; for they must give him leave to say, that it is not the judges who come here in their own name, or by their own authority—we are merely ministers under the sign manual. We have the honour to attend before you under a commission from the Queen herself, and in this country, where disloyalty or any disregard to the administration of justice would be considered a slur, he regretted much to see that the usual and ordinary garniture, by which that loyalty and respect to the laws are manifested, has not attended these Assizes.

On concluding his address, the High Sheriff (Sir Horace de St. Paul, bart.), who was sitting on the right of the judge, rose and said,—"I have been accused of disloyalty; I publicly declare that that accusation is unjust. I am as loyal as any man."

Baron PLATT immediately replied, "I am sorry that a gentleman who has the means of shewing that loyalty to the Crown in a proper manner should not have exhibited it."

His lordship then left the court.

Aug. 2.—The learned judge sat in the Nisi Prius Court at the Moot Hall, at nine o'clock this morn-

ing, and proceeded with the county cause list, which contained but three causes, and in the first the record was withdrawn, without any particulars coming before the Court.

#### MIDLAND CIRCUIT.

**WARWICK, Aug. 2.**—The Crown Court was opened this morning at ten. The calendar contained but the names of twenty-six prisoners for trial for offences committed in the county, to which must be added seven from the borough of Birmingham. The above numbers shew a very satisfactory reduction in crime as compared with former years. There is one case of arson, one of setting fire to gorse, one manslaughter, four burglaries, one bigamy, one poaching, one perjury, two stabbing with intent, &c. two stealing from the person, accompanied with violence, one of unnatural crime, &c.

**THE MONEY ORDER DEPARTMENT OF THE POST-OFFICE.**—A return to the House of Commons has been printed, from which it appears that in the year ended the 31st of December last there were 4,439,713 money orders issued in the United Kingdom, and the amount was 8,494,498l. 10s. 7d. The number paid was 4,431,235, and the amount paid was 8,483,055l. 1s. 10d. leaving a large sum unpaid of the number issued. The expenses of the department were last year 70,577l. and the commission was 73,813l. on the orders.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTHS.

**MAY.**—On the 27th ult. at Abbey-house, Sherborne, Lady Kay, wife of Sir Brook Kay, bart. of a son.  
**MACNAMARA.**—On the 7th inst. at 12, Brompton-crescent, the wife of Henry T. J. Macnamara, esq. barrister-at-law, of a son.

##### MARRIAGES.

**BLAKER, William Lamport, esq.** of Worthing, to Emily Barden, eldest daughter of the late John Drewett Austin, esq. of her Majesty's Ordnance Department, Tower, and Doddington-grove, Kennington, on the 2nd inst. at St. Mary's, Newington.  
**COLDICOTT, Mr. Henry, of Dudley, solicitor,** to Mary Ward, only daughter of Mr. Starkey, of the former place, surgeon, on the 6th inst. at Christ Church, West-bromwich.

**COWPER, William John, esq. solicitor, of Newbury,** only son of the late William Cowper, esq. of Dulwich, Surrey, to Georgina Charlotte, widow of the late A. Milliken, esq. of Dublin, and second daughter of John Alexander, esq. of Newbury, a magistrate of that borough, and coroner for the county of Berks, on the 5th inst. at St. Nicholas Church, Newbury, by the Rev. R. Court Gazeley, M.A. brother-in-law of the bride.

**HARRIS, Robert, esq. of Upper Gower-street, London, solicitor,** to Anna Maria, third daughter of the Rev. Richard John Geldart, D.D. rector of Little Billing, in the county of Northampton, on the 7th inst. at Little Billing, by the Rev. Richard William Geldart, B.A. brother of the bride.

**HOWELL, Thomas Jones, esq. of Eaton-place, West,** to Ellen, youngest daughter of the late Thomas Fooks, esq. of Sherborne, Dorset, on the 6th inst. at St. Peter's, Eaton-square.

**JUDGES, James Robert, of Ramsgate, gentleman, attorney-at-law,** to Mary, widow of Henry Frederic Hodson, esq. late of her Majesty's 14th Light Dragoons, and youngest daughter of the Rev. George Davey, incumbent of St. Peter's, Maidstone, on the 5th inst. at the Catholic Church of St. Augustine, Ramsgate, by the Rev. Thos. Coogan, and afterwards at St. George's, in the same place, by the Rev. Jas. Burrow.

##### DEATHS.

**BROWNE, Wade, esq. one of her Majesty's justices of the peace for the counties of Wilts and Somerset,** on the 2nd inst. at Monkton Farleigh, Wilts.

**CATLOW, John, esq. deputy clerk of the county court,** and for seventeen years one of the coroners of the county of Stafford, on the 31st ult. at his residence, Green Hill, Cheddle, aged 52.

**HORSLEY, John, esq. E.I.C.S. civil and sessions judge of Cuddalore,** on the 12th of June, at Madras, aged 55.

#### THE GAZETTES.

##### Bankrupts.

*Gazette, August 5.*

**LUSCOMBE, JOHN, miller, Llandulph, Cornwall, Aug. 21 and Sept. 18,** at eleven, Plymouth. Off. as. Herniman. Sol. Edmonds and Sons, Plymouth. Petition, July 26.  
**MARRIOTT, THOMAS, seed merchant, Leighton Buzzard, Bedfordshire, Aug. 13 and Sept. 12,** at half-past twelve, Basinghall-st. Off. as. Cannan. Sol. Willmott, South-wark. Petition, July 25.

**MATTHEWS, GEORGE KING, bookbinder, Paternoster-row, Aug. 12, at two, and Sept. 12, at eleven, Basinghall-st. Off. as. Cannan. Sol. Young and Son, Mark-lane. Petition, July 30.**

**QUADLING, EDWIN PARKER, railway carriage builder, Ips-wich, Aug. 13, at one, Sept. 2, at half-past eleven, Basinghall-st. Off. as. Cannan. Sol. Chilton, Union-court, Old Broad-st. Petition, July 29.**

**STRINGERS, GEORGE, wholesale Italian warehouseman, Goodman's-fields, Aug. 13 and Sept. 12, at twelve, Basinghall-st. Off. as. Cannan. Sol. Fry and Loxley, Cheapside. Petition, July 26.**

**WYNN, EDWARD AGAR, and LUMBER, JOHN, builders, East-st. Manchester-square, Aug. 13, at twelve, Sept. 10, at eleven, Basinghall-st. Off. as. Stansfeld. Sol. Bernard, Yord-road, Lambeth. Petition, July 31.**

*Gazette, Aug. 8.*

**BRAYMONT, JOSEPH, engineer, 6, Leman-st. Whitechapel, Aug. 20, at half-past twelve, Sept. 20, at one, Basinghall-st. Com. Fonblanque. Off. as. Stansfeld. Sol. Lindsay and Mason, 26, Gresham-st. City. Petition, July 26.**

**CHURCHILL, SAMUEL, Crisp-st. Poplar, and CLADEN, THOMAS, St. Thomas-road, Mile-end Old Town, builders, Aug. 20, at twelve, Sept. 10, at half-past twelve, Basinghall-st. Com. Fonblanque. Off. as. Graham. Sol. Cullen, 57, High-st. Poplar. Petition, Aug. 1.**

**CLOUGHTON, WILLIAM, auctioneer and appraiser, Kings-ton-upon-Hull, Aug. 20 and Sept. 17, at twelve, Kings-ton-upon-Hull. Com. West. Off. as. Carrick. Sol. Richardson and Lee, Hull. Petition, Aug. 6.**

**CUNDALL, JOSEPH, publisher and bookseller, 21, Old Bond-st. Aug. 20, at eleven, Sept. 20, at twelve, Basinghall-st. Com. Fonblanque. Off. as. Stansfeld. Sol. Laurence, Plews, and Boyer, Old Jewry-chambers. Petition, Aug. 5.**

**FOLLET, WILLIAM EDWARD, carver and gilder, Chenies-pl. Somers-town, Aug. 15 and Sept. 12, at one, Basinghall-st. Com. Fane. Off. as. Cannan. Sol. Lewis, Wilmington-sq. Petition, July 25.**

**FRANKS, JOHN, woollendrapers and clothiers, Portsea and Landport, both in Hampshire, Aug. 14, at one, Sept. 12, at two, Basinghall-st. Com. Fane. Off. as. Whitmore. Sol. Messrs. Linklater, 1, Charlotte-row, Mansion-house. Petition, Aug. 6.**

**HAYES, HENRY, draper and tailor, Regent-st. and Staf-ford-row, Middlesex, Aug. 18, at eleven, and Sept. 11, at one, Basinghall-st. Com. Fane. Off. as. Whitmore. Sol. Messrs. Linklater, Charlotte-row, Mansion-house. Petition, Aug. 7.**

**HENVELLY, CONSTANCE PHIPPS, miller, Seaton Mills, Chideock, Dorsetshire, Aug. 20, at eleven, Sept. 17, at one, Exeter. Com. Bere. Off. as. Hirtzel. Sol. Mansfield and Andrews, Dorchester; and J. Stogdon, Exeter. Petition, Aug. 4.**

**ISAACS, ISAAC, jeweller and trader, 18, Swan-st. Minories, London, Aug. 14, at eleven, and Sept. 11, at half-past eleven, Basinghall-st. Com. Fane. Off. as. Cannan. Sol. Messrs. Linklater, Charlotte-row, Mansion-house. Petition, Aug. 6.**

**LEWIS, HODGSON, and HENVEY, JAMES, spirit merchants, Halifax, Yorkshire, Aug. 18 and Sept. 19, at eleven, Leeds. Com. West. Off. as. Young. Sol. Vemming, Naylor, and Robins, 9, Tokenhouse-yard, London; Craven and Rankin, Halifax; and Courtenay and Compton, Leeds. Petition, July 30.**

**NEWTON, JOHN, sen. boat owner, commission agent, broker, and coal merchant, Watlingborough, Lincoln-shire, Aug. 20 and Sept. 17, at half-past twelve, Kings-ton-upon-Hull. Com. West. Off. as. Carrick. Sol. Toynbee, Lincoln; Scott and Tahourdin, Lincoln's-inn-fields; and Stamp, Hull. Petition, Aug. 6.**

**PARKINS, JAMES, clothier, Cheapside, Aug. 20, at half-past one, Sept. 20, at half-past eleven, Basinghall-st. Com. Goulburn. Off. as. Pennell. Sol. Messrs. Linklater, 1, Charlotte-row, Mansion-house. Petition, Aug. 7.**

**PENNY, JOHN, innkeeper and corn merchant, Market-Deeping, Lincolnshire, Aug. 20 and Sept. 12, at ten, Nottingham. Com. Balguy. Off. as. Bittleson. Sol. F. Brown, Market-Deeping, Lincolnshire; and J. Bowley, Nottingham. Petition, Aug. 2.**

**SPRAG, WILLIAM, snuff manufacturer, Halifax, Aug. 22 and Sept. 18, at eleven, Leeds. Com. West. Off. as. Freeman. Sol. Wavell, Halifax; and Courtenay and Compton, Leeds. Petition, July 30.**

#### Advertisements.

##### BANKRUPT ESTATES.

*Official Assignees are given, to whom apply for the Dividends.*

**ACORN, R. fellmonger, first, 2d. Cannan, London.**—Bowers, J., J. and S. A. wine merchants, first, 1d. Valpy, Birmingham. Briggs, E. hatter, first, 8d. Lee, Manchester. Brown, N. timber merchant, first, 6s. and second, on new proofs, 2s. Wakley, Newcastle. Edmond, W. and T. and Mc Kinn, R. merchants, fourth, 4d. and second sep. of W. Edmond, 2s. Lee, Manchester. East, F. E. D. merchant, first, 5s. Cannan, London. Lockert, A. A. merchant, third, 5d. Cannan, London. Moxall, S. and I. L. commission merchants, third, 8d. Bird, Liverpool. Robinson, A. G. woolstapler, second, 1d. Bittleson, Nottingham. Rose, J. woolstapler, second, 11-16ths of 1d. Valpy, Birmingham. Sanders, F. and C. corn merchants, final, 1d. and 17-32ds of a 1d. Bittleson, Nottingham. Smith, H. ironfounder, first, 11d. Valpy, Birmingham. Slaight, G. final, 6d. Pennell, London. Watson, J. and E. Y. ship builders, first sep. of J. Watson, 5s. Baker, Newcastle. Woolfall, R. butcher, first, 2d. Lee, Manchester.

##### INSOLVENT ESTATES.

*Apply at the Provisional Assignees' Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.*

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#### Assignments for the Benefit of Creditors.

*Gazette, July 29.*

**Curtis, R. corn and wine merchant, Portsea, Southamp-ton, July 29.** Trusts. E. I. Palmer, victualler, Portsea; C. Collier, corn merchant, Bishop's Sutton; M. Pothecary, maltster, Martin; W. Bound, corn merchant, Poole; and L. Byerley, baker, Portsea. Sols. Pain and Rawlins, Winchester. Poole, R. and H. flour and provision dealers, Deansgate, Manchester, July 26. Trusts. J. Bennett and R. N. Munton, corn merchants, both of Manchester. Sol. Janion, Manchester. Stimson, C. tailor and woollen draper, Chelmsford, Essex, July 8. Trusts. R. Stimson, commercial traveller, Ludgate-st. London, and T. Tid-bald, grocer, Chelmsford. Sol. J. Fraser, Dean-st. Soho.

*Gazette, August 1.*

**Daniel, J. grocer and corn dealer, Bromsgrove, Wor-ces-ter, July 19.** Trusts. W. Llewellyn, grocer, and T. Martin, miller, both of Bromsgrove. Sols. Vernon and

Minshall, Bromsgrove. Harland, J. dealer in hats, Burn-ley, Lancaster, July 28. Trusts. E. Masley, wholesale grocer, and W. Robinson, ironmonger, both of Burnley. Sol. C. Haworth, Burnley. Hewitt, J. innkeeper, Hulme, Lancaster, July 8. Trust. G. Wandsworth, agent, Man-chester. Sol. E. Aston, Manchester. Wignall, J. iron-monger, Ormakirk, Lancaster, July 23. Sol. Welaby, Ormakirk.

#### Partnerships Dissolved.

*Gazette, July 29.*

**Barker, F. and J. ironfounders, Great Mitchell-st. St. Luke's.**—Bedington, W. and Pons, W. breadmakers, Birmingham, June 24. Debts paid by Tonks. Brown and Smith, exhibitors of a panorama, July 25. Debts paid by Brown. Copes and Smith, auctioneers, &c. Manchester, May 25. Copland and Wyllie, brassers, and tin-plate workers, Manchester, July 24. Debts paid by Copland. Cressy, A. T. and Wilkinson, P. R. auctioneers, &c. Bright-on, June 30. Down, W. J. and Cook, S. painters and glaziers, Plymouth, July 23. Ferris and Gill, drapers, Totnes, July 24. Debts paid by Ferris. Fox, G. E. and Leadbeater, W. manufacturing chemists, Manchester, July 25. Hooper, A. and White, E. S. ironfounders, Birming-ham, July 25. Debts paid by Hooper. Hudson, J. M. D. merchants, London and Hull, Dec. 31. Leliot, H. and J. coal-merchants, Derby, July 7. Debts paid by J. Leliot. Land and Melvill, pawnbrokers, Preston, July 25. Debts paid by Land. Marsh, T. and Son, lender, fire-iron, and stove-grate manufacturers, Dudley, as regards T. Marsh, Aug. 12. Debts paid by remaining partners. Smith, W. Cor, and Co. cheese-makers, Derby, July 17. Debts paid by Smith and Cor. Smith and Jones, colliers, Stoke-upon-Trent, April 19. Watson and Pals, cotton-spinners, Stone-bridge, within Oswaldtwistle, July 25. Debts paid by Watson. Wincoats and Dyke, builders, Charlwood-st. Pimlico, July 26. Debts paid by Dyke. Wright, G. and E. coal and ironstone masters, Dronfield, July 26. Debts paid by R. Wright.

*Gazette, August 1.*

**Cooper, C. sen. and jun. J. and H. C. builders, Maiden-head, as regards C. Cooper, jun. July 23.** Debts paid by remaining partners. Crook, J. and Ismay, J. brickmakers, Southwam, July 28. Debts paid by Ismay. Hall and Gutch, pin and needle manufacturers, King William-st. June 24, 1846. Harris, T. and Co. malt distillers, Bristol, Sept. 30. Harrison, Collins, and Co. calico printers, &c. Manchester, July 30. Debts paid by J. C. and H. Harrison. Heale and Alberry, fellmongers, Louth, July 15. Kimberley and Co. commission agents, Birmingham, July 29. Lee and Glynn, letterpress printers, Manchester, June 24. Lloyd, R. and Co. wine and spirit merchants, Birmingham, July 29. Mehrens, H. and Bolten, C. steam boilers, Lombard-st. Spitalfields, July 25. Debts paid by Mehrens. Neal and Co. wire workers, Birmingham, July 26. Debts paid by Hawkins. Plumbo and Massey, Berlin wool dealers, Liver-pool, July 25. Debts paid by Plumbo. Radcliffe, J. and J. woollen drapers and coal merchants, Sowerby-bridge and elsewhere, July 29. Rix, J. and Bakewell, J. H. stock and share brokers, Royal Exchange, July 31. Standersmith, G. and Williams, W. H. auctioneers and accountants, Bristol, July 31. Debts paid by Standersmith. Wilson and Son, jewellers and silversmiths, Stamford, July 28. Wood-year and Pritchard, excoasters, Chesham, Manchester, July 29.

#### JOURNAL OF PROPERTY.

##### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tue.	Wed.	Thurs.	Fri.
Bank Stock .....	215	216	215	215	215	215
3 1/2 Cent. Reduced Annuities .....	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2	97 1/2
3 1/2 Cent. Consols Annuities .....	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
Consols for Account .....	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
New 3 1/2 Cent. Annuities .....	98 1/2	98 1/2	98 1/2	98 1/2	98 1/2	98 1/2
Long Annu. (exp. Jan. 5, 1890) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1856) .....	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Jan. 5, 1890) .....	281 1/2	282 1/2	283 1/2	284 1/2	285 1/2	286 1/2
India Stock .....	68	68	68	68	68	68
Do. (under 1,000) .....	57	57	57	57	57	57
South Sea Stock .....	90 1/2	90 1/2	90 1/2	90 1/2	90 1/2	90 1/2
Do. do. New Annuities .....	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Exchequer Bills, 1,000l. .....	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Do. do. 500l. .....	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Do. do. Small .....	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2
Do. Advertised .....	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2	47 1/2

\* Premium.

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## To Readers and Correspondents.

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## THE LAW TIMES.

SATURDAY, AUGUST 16, 1851.

## THE LATE SESSION.

In quantity of legislation there has not been so barren a session for many years, and a great deal that was promised has not been performed. But it has not been altogether unproductive, and in improvements of the law it has been more than usually fruitful.

First in interest and importance is the *Amendment of the Law of Evidence*, which of itself would serve to make the session illustrious in the annals of Law Reform. Although opposed by the LORD CHANCELLOR and by the Law Institution, it was so strongly supported by Lords DENMAN, BROUGHAM, CAMPBELL, and CRANWORTH, that the Woolpack and Chancery-lane united could not prevail against it. The Profession generally, and especially the Attorneys in the country, who had practical knowledge of the continual defeat of justice through the exclusion of parties, received the proposal with a cordial welcome, and, at our call, gave efficient aid to the measure by throwing their influence into the scale. In the Commons it was received with enthusiasm, and carried with acclamation; their only objection to it being that it did not go far enough. They were desirous that no evidence should be excluded, and struck out the provision that forbade the compulsory evidence of a wife against her husband. When returned to the Lords, this was again re-inserted, through the instrumentality of the LORD CHANCELLOR, and the Commons prudently accepted it, although not quite in accordance with their views. And it must be owned, that there are social objections to a wife being compelled to give evidence against her husband, which make its prudence questionable, at the least. We have great doubt whether it ought not to be placed in the category of confidential communications, and protected as such. And so, by the new law, it will be. To us, personally, the success of

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this measure is very gratifying, for we proposed and advocated it in these columns many years ago, when few were found to favour it, and have continued the endeavour to convince the Profession, by calm argument, of its propriety. It must be admitted also, in defence of the Law Institution, that in their opposition they represented what was formerly the opinion of the Lawyers; but their error in that, as in other things, is in being behind their time, and representing the *past* and not the *present* of the Profession.

The Act for establishing a Court of Appeal in Chancery is another very important measure of Law Reform, but rather as being a first step which will clear the way for other great reforms, than as in itself accomplishing much. Practically, it relieves the Lord Chancellor from his judicial duties, or at least from a considerable portion of them, and will thus prevent that fearful accumulation of arrears under which the administration of justice had come to a full stop. From announcements we have seen of the reports to be published of the cases in this court, and divers applications for the office of reporting them for the LAW TIMES, it would appear that a notion prevails that a new Court is thereby established, in addition to the existing Courts. But it is not so. The Act only appoints *additional Judges* to the Lord Chancellor's Court; and, of course, whether there be one judge or three will not affect the reports, nor render any new reports necessary. Still it will be the Court of Chancery, and will be reported by the same reporters as now report that Court. We name this, as the Profession may otherwise be misled by some announcements that have appeared, and be induced to incur a needless expense in procuring what will be, in fact, two sets of the same reports.

The *Acts for the better Administration of Criminal Justice*, for which the country is indebted to Lord CAMPBELL, are of great value. One has better defined, and affixed more appropriate punishments to, certain offences, before not very easily reached, and of which considerable use has been made already, especially for the offence of having in possession instruments used in housebreaking. The other Act will vastly facilitate the administration of the criminal law by sweeping away a number of technical objections by which justice was defeated, and by limiting trials still more to that which, after all, is the proper object of a judicial inquiry—Is the charge, in very fact, true or false? We trust that, encouraged by the cordial approval with which his efforts have been received, Lord CAMPBELL will continue his useful labours, and that he may crown them with the lasting glory of being the successful promoter of the long-promised, long prepared Criminal Code. Sir GEORGE GREY's *Expenses of Prosecutions Act* appears to be a very insufficient measure. Instead of grappling with the whole subject of prosecutions, and placing the regulation of their expenses in the hands of the Secretary of State, with requirements that in every case, whether at the Assizes or Quarter Sessions, a prosecution should be properly got up and conducted by Counsel and Attorney—properly remunerated, instead of being offered the paltry fee which Mr. Justice COLERIDGE so indignantly denounced at Dorchester—the Home Secretary has been content with a very partial regulation of the expenses of prosecutions at Quarter Sessions, and not making a provision for avoiding the public scandal and injustice of a judge acting at once as prosecutor, as prisoner's counsel, and as judge. This degrading of the judge is the foulest blot upon our criminal law, next to the refusal of a new trial in criminal cases—a protection against the fallibility of human judgment allowed in a petty affair of a few pounds, but denied when life and liberty are at stake. There was an excellent opportunity for purging out that blot, and Sir GEORGE GREY has neglected it.

These are the most important measures which the session has produced for the reform of the law, and of the administration of justice. They are enough to render that session memorable in legal annals, and will redeem some of the reproach that belongs to it for barrenness in other respects. Of the Bills that were introduced, but lost or abandoned, few were to be regretted, (except that which proposed to give an Equity Jurisdiction to the County Courts,) because, although their intent was good, they did not grasp the whole subject, and were insufficient for their professed objects. They will be renewed next year in a more perfect form, and with better hopes, and benefited, we trust, by the discussion to which they shall be subjected by the lawyers in the interval.

Upon the whole, we may congratulate our readers on the doings of the last session, and still more on the good omen it affords of better things that may be done hereafter, if they will assist in the doing of it, as it will be their interest to do, so as to secure themselves against the consequences of ignorant meddling by those who know nothing of the thing they are professing to amend, or the practical effect of the alterations they are introducing. To be efficient, law reform must be constructed by the lawyers themselves. But if we will not undertake it, we have no right to complain if we are damaged by the incompetency of those to whom we leave the inevitable task.

## POSITION AND PROSPECTS OF THE PROFESSION.

TWENTY-FIVE years have elapsed since we took our place at the desk in the clerks' room of the office of a country attorney, and commenced that acquaintance with the Profession which, first in clerkship, then in practice, has continued with growing respect and regard to this day. With such varied experience, extended through so long a period, and with peculiar opportunities for obtaining a knowledge of the opinions, wants, wishes, and interests of every section of that great, influential, and useful body, we may, perhaps, be excused for proffering recommendations, without continually repeating phrases of humility which in honest truth we do not feel, because, it being our business to procure information, and to reflect and write upon whatever concerns the welfare of the Profession, we believe that we are therefore more likely to be able to treat the subject practically than they who have not the advantage of personal experience of both branches of the Profession, and the same means of ascertaining the general views of a body scattered over the United Kingdom, and which could only be gathered by such a central medium for its collection and diffusion as is the LAW TIMES.

That the present position of the Profession is one of great peril, it is impossible to doubt. It is assailed from without, and it is disunited within. Just when the utmost strength of the whole body is required to resist the invasions of external foes, it is engaged in an internecine war, the result of which can be of no advantage to either party, and must be injurious to the common welfare. Departing from the boundaries hitherto observed, we find two departments of the Profession contemplating a mutual invasion, each of the province of the other—the Barrister proposing to dispense with the Attorney, the Attorney asking to play the part of the Barrister, while the public and the Legislature, unfriendly to both, stand by, approve the fight, and only wait the weakness and exhaustion of this unnatural contest to step in and crush both.

We are informed, by a member of the House of Commons, that it is difficult for those who only read the debates to conceive the excessive hostility with which the lawyers are regarded in the House of Commons. His expression was, "they are perfectly rabid against us."

Whatever will most damage the Profession meets the most ready support. It is more than hinted, that the majorities in favour of the abolition of the Attorneys' Tax have been influenced by the expectation that, if the special tax be abolished, an unanswerable objection will be removed to the destruction of the monopoly of the Attorneys, and that then there will be little difficulty in carrying out that which is desired by so many, a perfectly free trade in law, so that, instead of a class of lawyers, the public may have their suits conducted, and their deeds drawn, by any person whom they may be pleased to employ, by which it is expected that the costs of law will be vastly reduced.

This is the imminent danger. This is the consummation devoutly desired by the House of Commons. This is the end to which efforts are now directed.

The proposition is plausible; it falls in with popular prejudices; and, therefore, it is sure to find favour. The argument in the brain of a farmer or a tradesman will rise somewhat after this fashion.

"Why, there's Lawyer Stump over the way, who was an attorney's clerk, and knows as much of the law almost as the regular lawyer, offers to make my will and draw my leases for half the price Attorney Wellbred charges me; why should I not be allowed to employ him, if I like? And in that lawsuit with neighbour Barnes, he says, he would do the whole job for me for five pounds, if the law would let him get up the case, and fight it out for me before the judge, and he's a fine man to talk. Down with the lawyers, I say. Free trade in law, for ever!"

This sort of notion is running in many minds; it is extensively shared and powerfully supported in the House of Commons. It indicates a danger, not immediate, but not far distant, against which it behoves us to prepare while yet there is time. At all events, let us not go to sleep again in fancied security, lest they steal upon us while we slumber, and take us unprepared.

And what *should* be our defence? This may be best learned by looking back and discovering what it is that has brought us into this peril, and whether the same causes are continuing, and if so we find it to be, let us, with one accord, strive to remove them.

Now, what are the causes of the present extraordinary unpopularity and weakness for purposes of self-defence which the Profession exhibits? These we have already traced in former articles. We found the cause of our *unpopularity* to be the unwise resistance which we have offered to the introduction of reasonable reforms,—our neglect to frame, propose, and carry out reforms of our own construction; and the cause of our weakness to be our internal dissensions, or, perhaps, we might term it more correctly, the want of unanimity of feeling and action among ourselves.

In both these respects we must confess that we have erred, and we refer to them now, not by way of blame, but of warning and instruction for the future. The past is beyond our reach, and lamentation is folly. Let the dead bury their dead. But there is a future for us all, whose fortunes will be mainly of our own making. These we can control, and as we use the present, so will be our reward in the time to be.

Our surest wisdom, then, will be to abandon, as soon and as cordially as we can, the path that has led us astray, and turn into that which, if it involve more of effort and of labour, is a more worthy object of the ambition of a Profession which ought to take the lead in the society of whose very structure it is at once the architect and the custodian. We must take a part in the movement we cannot prevent, and so guide it; we must ourselves undertake the inevitable task of Law Reform, and so control it that its results may not be destructive, but conservative. Let the Lawyers,

we repeat, frame their own measures of Law Reform,—large, liberal, and genuine, but also practicable and safe,—and offer them to the acceptance of the Legislature, which would far rather accept them from us, than undergo the labour and perplexity of dealing with a matter it cannot understand.

This, sincerely and truthfully done, with an honest resolve to sweep away accumulated abuses and restore the reign of common sense and reason, adapting the law to the new conditions of a society which has outgrown it, would ere long restore the popularity of the Lawyers, and remove the prejudice against us which is now growing, and which, if not stayed, will lead to a catastrophe that would be fatal to us as a Profession.

And, secondly, we must put an end at once and for ever to the dissensions that have been fostered among ourselves. "We must close our ranks." We must take care that we do not set an example that may be cited against ourselves. We must respect our own privileges, or we cannot hope that others will respect them. We must give our enemies no excuse for invading the rights that the law and the constitution have conceded to us, by shewing disrespect for them on our own parts. The *tu quoque* is a formidable weapon to be placed in the hands of an adversary. There are points of difference between the various branches of the Profession which require to be determined. Undoubtedly there are substantial grounds of complaint against some of the rules of practice and of etiquette, that were once reasonable, but are no longer so. Let these be revised and amended. Let the Bar reconsider its own rules with purpose to adapt them to the new order of things. Let the Attorneys do likewise for themselves. Let the Bar and the Attorneys together agree upon some reasonable and liberal rules for the guidance of their mutual relationship, and to prevent unseemly rivalry, degrading competition, and trespasses upon the province one of the other, of which there is such imminent danger, and the consequences of which would be so lamentable, by lowering the social status of the whole Profession.

By such conduct would popularity without and unanimity within be restored, and the present state of doubt and danger would be exchanged for a future of prosperity and progress.

Such is the view upon which we purpose to propose to our readers a definite plan of action, and to ask them, if they approve it, to aid us in the necessary measures for carrying it into practical operation.

#### LORD BROUGHAM.

WE give in another page Lord BROUGHAM's eloquent letter to Lord DENMAN on the legal history of the last session. We are happy to be enabled to inform our readers that the health of the noble Lord is rapidly mending, and that they may yet hope to see him again at his post at the beginning of the next session. Another assurance we can give them, that Lord BROUGHAM is not hostile to the lawyers; on the contrary, he feels as strongly as any one of us the necessity of maintaining the status of both branches of the Profession, and that any provisions for their reasonable protection that are not incompatible with improvement in the law and its administration, will have his cordial support.

#### THE LEGISLATOR.

##### PARLIAMENTARY PAPERS.

STATISTICS OF PARLIAMENTARY DIVISIONS.—A curious paper has been published with the votes of the House of Commons, enumerating the several divisions that took place during the session of 1851, just closed. By this return it appears that the "Ecclesiastical Titles Assumption Bill" was not only the most important, but by far the most trouble-

some measure of the session. The number of divisions altogether amount to no less than forty-eight on the several readings and clauses. The second greater number of divisions was in committee of supply, which amount to twenty-eight divisions altogether, is far from an unusual number, and which is not to be wondered at, when the great number of items included in the miscellaneous estimates are considered, and when it is well known that in no other part of the business of the House are the Commons more naturally—and properly—jealous, than in the voting of the public money. It is worthy of remark, however, that notwithstanding these twenty-eight divisions on the money votes, not a single item was altered or cut down from the very economical and careful propositions that were submitted to the House from the several departments of the Government. The third class of measures that gave rise to the greatest number of divisions was the question of admitting the Jews to Parliament. Besides the divisions on the Bill itself, there were no less than eight divisions on the personal case of Mr. David Salomons, and one respecting Baron Rothschild.

#### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

#### CAP. XXXIV.

(Continued from page 176.)

34. Provisions of 8 & 9 Vict. c. 18, incorporated with this Act.—That the Lands Clauses Consolidation Act, 1845, shall be incorporated with this Act: Provided always, that the council, the Board, and the commissioners respectively shall not purchase or take any lands otherwise than by agreement.

35. In boroughs the council may appropriate, with consent of the Treasury, lands vested in the mayor, &c. In parishes the commissioners may, with approval of vestry, &c. appropriate lands belonging to parish; or contract for purchase of the same.—That in any such borough the council, with the approval of the commissioners of her Majesty's Treasury, may from time to time appropriate for the purposes of this Act in the borough any lands vested in the mayor, aldermen, and burgesses; and in any such district the Board, with the approval of the General Board of Health, may from time to time appropriate for the purposes of this Act in the district any lands vested in the Board, or at the disposal of the Board; and in any such parish the commissioners appointed under this Act, with the approval of the vestry and of the guardians of the poor of the parish (if any), and of the Poor-law Board, may from time to time appropriate for the purposes of this Act in the parish any lands vested in such guardians, or in the churchwardens, or in the churchwardens and overseers of the parish, or in any feoffees, trustees, or others, for the general benefit of the parish; and in any such parish the commissioners, and in any such borough the council, and in any such district the Board, may from time to time, with the like respective approval, contract for the purchasing or renting of any lands necessary for the purposes of this Act; and the property therein shall be vested in the mayor, aldermen, and burgesses in the case of a borough, or in the Board in the case of a district, or in the commissioners in the case of a parish.

36. Councils and commissioners may erect lodging-houses.—That the council and Board and commissioners respectively may from time to time, on any lands so appropriated, purchased, or rented, or contracted so to be, respectively, erect any buildings suitable for lodging-houses for the labouring classes, and convert any buildings into lodging-houses for the labouring classes, and may from time to time alter, enlarge, repair, and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite furniture, fittings, and conveniences.

37. Councils and commissioners may enter into contracts for the purposes of this Act. No contract above 100l. to be entered into without notice.—That the council and board and commissioners respectively may from time to time enter into any contract with any persons or companies for building and making, and for altering, enlarging, repairing, and improving such lodging-houses, and for supplying the same respectively with water, and for lighting the same respectively, and for fitting up the same respectively, and for furnishing any materials and things, and for executing and doing any other works and things necessary for the purpose of this Act, which contracts respectively shall specify the several works and things to be executed, furnished, and done, and the prices to be paid for the same, and the times when the works and things are to be executed, furnished, and done, and the penalties to be suffered in cases of nonperformance; and all such contracts, or true copies thereof, shall be entered in the books to be kept for that purpose: Provided always, that a contract above the value or sum of one hundred



pounds shall not be entered into by the council or the board or the commissioners for the purposes of this Act unless previous to the making thereof fourteen days notice shall be given in one or more of the public newspapers published in the county in which the borough or district or parish shall be situated, expressing the intention of entering into such contract, in order that any person willing to undertake the same may make proposals for that purpose, to be offered to the council or board or commissioners at a certain time and place in such notice to be mentioned; but it shall not be incumbent on the council or board or commissioners to accept any of the proposals so offered.

38. *Council or commissioners may purchase existing lodging-houses.*—That the council of any such borough, and the board of any such district, and the commissioners, with such respective approval as is by this Act required with respect to the purchasing or renting in any other case of any lands necessary for the purposes of this Act, may, if they shall think fit, contract for the purchase or lease of any lodging houses for the labouring classes already or hereafter to be built and provided in any such borough or district or parish, and appropriate the same to the purposes of this Act, with such additions or alterations as they shall respectively deem necessary; and the trustees of any lodging houses for the labouring classes which have been already or may hereafter be provided in any such borough or district or parish, by private subscriptions or otherwise, may, with the consent of the council of any such borough, or with the consent of the board of any such district, or with the consent of the commissioners, and with the like respective approval, and with the consent of a majority of the committee or other persons by whom they were appointed trustees, sell or lease the said lodging-houses to the said council or board or commissioners respectively, or make over to them the management of such lodging-houses; and in all such cases the lodging-houses so purchased or leased, or of which the management has been so made over, shall be deemed to be within the provisions of this Act, as fully as if they had been built or provided by the council or board or commissioners, and the property therein shall be vested in the mayor, aldermen, and burgesses in the case of a borough, or in the board in the case of a district, or in the commissioners in the case of a parish.

39. *Power to Water and Gas Companies to supply water and gas to lodging-houses.*—That any commissioners of waterworks, trustees of waterworks, water companies, gas companies, and other corporations, bodies, and persons having the management of any waterworks, reservoirs, wells, springs, and streams of water, and gasworks respectively, may, in their discretion, grant and furnish supplies of water or gas for such lodging-houses, either without charge, or on such other favourable terms as they shall think fit.

40. *Councillors and commissioners not to be personally liable.*—That anything in this Act contained shall not render any member of the council of any borough, or any member of any such Board, or any commissioner, personally, or any of their lands, goods, chattels, or moneys (other than such lands, goods, chattels, or moneys as may be vested in or under the management or control of the council, or board, or commissioners respectively in pursuance of this Act), liable to the payment of any sum of money as or by way of compensation or satisfaction for or in respect of anything done or suffered in due pursuance of this Act.

41. *Persons may appeal against orders of councils and commissioners.*—That every person who shall feel aggrieved by any bye-law, order, direction, or appointment of or by the council or board or commissioners shall have the like power of appeal to the General Quarter Sessions as under the provisions of the Companies Clauses Consolidation Act, 1845, incorporated with this Act, he might have, if feeling aggrieved by any determination of any justice with respect to any penalty.

42. *Council, &c. empowered to make sale and exchange of lands, with consent.*—That the council, with the approval of the Commissioners of her Majesty's Treasury, and the board, with the approval of the General Board of Health, and the commissioners appointed under this Act, with the approval of the vestry and of the Commissioners of her Majesty's Treasury respectively, may from time to time make sale and dispose of any lands vested in the mayor, aldermen, and burgesses, or in the board, or in the commissioners, respectively, for the purposes of this Act, and apply the proceeds, or a sufficient part thereof, in or towards the purchase of other lands better adapted for such purposes, and may, with the like approval, exchange any lands so vested, and either with or without paying or receiving any money for equality of exchange, for any other lands better adapted for such purposes, and the mayor, aldermen, and burgesses, or the board, or the commissioners, may convey the lands so sold or exchanged accordingly.

43. *When lodging-houses are considered too expensive, they may, with approval of Treasury, be*

*sold, and proceeds of sale carried to borough fund or poor's rate.*—That whenever any lodging-houses which shall have been for seven years or upwards established under the authority of this Act shall be determined by the council, or by the board, or by the vestry, in accordance with a previous recommendation of the commissioners, to be unnecessary or too expensive to be kept up, the council or commissioners, with the approval of the Commissioners of her Majesty's Treasury, or the board with the approval of the General Board of Health, may sell the same for the best price that can reasonably be obtained for the same, and the mayor, aldermen, and burgesses, or the board, or the commissioners, shall convey the same accordingly, and the purchase money shall be paid to such person as the council or board or commissioners shall appoint, and his receipt shall be a sufficient discharge for the same, and the net proceeds of such sale shall be applied in the first instance in or towards payment or satisfaction of all the debts, liabilities, and engagements whatsoever, with respect to the purposes of this Act, of the council, the board, or the commissioners, and the surplus, if any, of such net proceeds paid to the credit of the borough fund, or of the general district rate, or of the improvement rate, or of the rate for the relief of the poor of the parish.

44. *Commissioners to cease to be a corporation when their duties have ceased.*—Provided always, That whenever by reason of the sale of all the lodging-houses provided under this Act for a parish, and the application as by this Act required of the net proceeds of such sale, and the performance of all other the duties under this Act of the commissioners for the parish, or by any other reason, it becomes needless for the commissioners for a parish to continue to be a corporation, such commissioners shall thereupon cease to be a corporation, and their office as commissioners for the parish shall thereupon cease, and this Act shall thereupon cease to be in force in the parish, but nevertheless this Act may thereafter be adopted for the parish.

45. *Management to be vested in council and parish commissioners.*—That the general management, regulation, and control of the lodging-houses established under this Act shall, subject to the provisions of this Act, be, as to any borough, vested in and exercised by the council, and as to any district vested in and exercised by the board, and as to any parish vested in and exercised by the commissioners.

46. *Council, &c. may make bye-laws for regulating the lodging-houses. Bye-laws to be approved by the Secretary of State.*—That the bye-laws which the council, and board, and commissioners respectively may from time to time make, alter, repeal, and enforce, shall include such bye-laws for the management, use, and regulation of the lodging-houses, and of the tenants or occupiers thereof, and for determining from time to time the charges for the tenancy or occupation of the lodging-houses, as the council and board and commissioners respectively shall think fit, and they respectively may appoint any penalty not exceeding five pounds for any and every breach, whether by their officers or servants or by other persons, of any bye-law made by them respectively, and such bye-laws shall make sufficient provision for the several purposes respectively expressed in the schedule to this Act: Provided always, that a bye-law made under the authority of this Act shall not be of any legal force until the same shall have received the approval of one of her Majesty's Principal Secretaries of State.

47. *Bye-laws to be hung up in every room in the lodging-houses.*—That a printed copy or sufficient abstract of the bye-laws relating to the management, use, and regulation of the lodging-houses, shall be put up and at all times kept in every room therein.

48. *Charges for occupation, &c. to be fixed by councils and commissioners.*—That the Council and the Board and the Commissioners respectively may from time to time make such reasonable charges for the tenancy or occupation of the lodging-houses provided under this Act as they shall think fit.

49. *As to tenants of lodging-houses receiving parochial relief.*—That any person who, or whose wife or husband, at any time while such person is a tenant or occupier of any such lodging-house or any part of such a lodging-house, receives any such relief, other than such relief granted on account only of accident or temporary illness, shall thereupon be disqualified for continuing to be such a tenant or occupier.

50. *Lodging-houses to be open to inspection of local Boards of Health.*—That every lodging-house established under this Act which shall be within the district of a Local Board of Health shall at all times be open to the inspection of such board, and the officers thereof from time to time authorised by such board to make such inspection.

51. *Penalty on council, commissioners, or officer taking fees beyond salaries, or being interested in contracts.*—That if any clerk or other officer or any servant who shall be in anywise employed by any council or board or commissioners in pursuance of this Act shall exact or accept any fee or reward whatsoever for or on account of anything done or

forborne, or to be done or forborne, in pursuance of this Act, or on any account whatsoever relative to putting this Act into execution, other than such salaries, wages, or allowances as shall have been appointed by the council or board of commissioners, or shall in anywise be concerned or interested in any bargain or contract made by the council or board or commissioners for or on account of anything done or forborne, or to be done, or forborne, in pursuance of this Act, or on any account whatsoever relative to the putting of this Act into execution, or if any person during the time he holds the office of member of the council, or member of the Board, or commissioner, shall exact or accept any such fee or reward, or shall accept or hold any office or place of trust created by virtue of this Act, or be concerned directly or indirectly in any such bargain or contract, every such person so offending shall be incapable of ever serving or being employed under this Act, and shall for every such offence also forfeit not exceeding the sum of fifty pounds.

52. *Application of penalties.*—That such part of any penalty recovered under this Act as shall not be awarded to the informer shall be paid to the credit, as regards a borough, of the borough fund, and, as regards a district, of the general district rate thereof or the improvement rate thereof, and, as regards a parish, of the rate for the relief of the poor thereof.

53. *Not to extend to Scotland.*—That nothing in this Act shall extend to Scotland.

#### SCHEDULE REFERRED TO BY THE FOREGOING ACT.

##### 1. Bye-laws to be made in all cases.

For securing that the lodging-houses shall be under the management and control of the officers, servants, or others appointed or employed in that behalf by the council, or board, or commissioners.

For securing the due separation at night of men, and boys above eight years old, from women and girls.

For preventing damage, disturbance, interruption, and indecent and offensive language and behaviour, and nuisances.

For determining the duties of the officers, servants, and others appointed by the council or board or commissioners.

##### 2. Bye-laws to be made in boroughs, districts, and parishes wholly or partially within the districts of Local Boards of Health.

For carrying out the regulations of the local Boards of Health.

##### 3. Bye-laws to be made in parishes.

For regulating the procedure of the commissioners.

#### CAP. XXXV.

An Act to extend the Benefits of certain Provisions of the General Merchant Seamen's Act relating to Apprentices bound to the Sea Service, to apprentices bound to the Sea Service by Boards of Guardians of the poor in Ireland, and to enable such Guardians to place out boys in the Naval Service. (July 24, 1851.)

The great importance of the following Statutes has induced us to insert them entire thus early, and without regard to their numerical position:—

#### CAP. LV.

An Act to amend the Law relating to the Expenses of Prosecutions, and to make further Provision for the Apprehension and Trial of Offenders in certain Cases. (Aug. 1, 1851.)

7 Geo. 4, c. 64.—Whereas by the Act of the seventh year of King George the Fourth, chapter sixty-four, certain provisions were made relating to the allowance of costs, expenses, and compensations to prosecutors and witnesses in cases of prosecutions for felonies and certain misdemeanors therein mentioned, and the regulation and ascertaining of such costs and expenses, and relating to the allowance of compensation to persons who may have been active in the apprehension of offenders or persons charged with offences; and provisions have been made by other Acts relating to costs, expenses, and compensations in cases of prosecutions in respect of the offences therein mentioned: and whereas it is expedient to amend the law relating to costs, expenses, and compensations in cases of criminal prosecutions: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That—

1. *So much of 7 Geo. 4, c. 23, as to expenses of attendance before examining magistrate, &c. repealed.*—So much of section twenty-three of the said Act of the seventh year of King George the Fourth as provides that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate, shall be repealed.

2. *Power of Courts to allow expenses in prosecutions for certain misdemeanors extended to other misdemeanors.*—All the provisions of the said Act of

the seventh year of King George the Fourth, as amended by this Act, authorising and empowering Courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanors enumerated in section twenty-three of the said Act of King George the Fourth, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other Act for, concerning, or applicable to the payment of such costs, expenses, and compensation in cases of the said misdemeanors, shall extend and be applicable in the case of any of the misdemeanors hereinafter mentioned; namely, unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony.

3. *Parties bound by recognisance to prosecute or give evidence on bills of indictment for common assaults to be allowed costs as in cases of felony.*—And whereas by an Act of the ninth year of King George the Fourth, chapter thirty-one, it is enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and it is by the said Act provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of the said Act: and whereas it is expedient that Courts before whom such indictments shall be tried shall have power to order payment of costs to parties so bound by recognisance to prosecute or give evidence: Be it enacted, that in every case of assault so brought before such justices for summary decision in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognisance to prosecute and give evidence at the assizes or sessions of the peace, every such Court is hereby authorised and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such Court under such recognisance, together with compensation for their trouble and loss of time, in the same manner as Courts are authorised and empowered to order the same in cases of felony.

4. *So much of 7 Geo. 4, c. 64, as empowers Quarter Sessions to make regulations as to costs and expenses, repealed.*—So much of the said Act of the seventh year of King George the Fourth as empowers the justices of the peace of any county, riding, or division, or of any liberty, franchise, city, town, or place chargeable with costs and expenses as therein mentioned, in Quarter Sessions assembled, to establish and alter regulations as to the rate of any costs and expenses to be allowed by virtue of that Act, shall be repealed: Provided always, that all such regulations in force at the time of the passing of this Act shall continue in force until revoked, or until regulations in relation to the matter thereof are made under the powers of this Act.

5. *Secretary of State may make regulations as to costs, expenses, and compensations, and certificates to be granted by examining magistrates.*—It shall be lawful for one of her Majesty's principal Secretaries of State to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under the said Act or any other Act or this Act to prosecutors and witnesses, and to persons attending the court in obedience to any recognisance or subpoena, in cases of criminal prosecutions, and (except as hereinafter mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences, and also regulations as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said Act of the seventh year of King George the Fourth or any other Act or this Act to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate, and it shall be lawful for one of her Majesty's principal Secretaries of State from time to time to alter any such regula-

tions, or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all Courts and persons whomsoever.

6. *Expenses and compensations to be ascertained according to such regulation, and magistrate's certificate not to be conclusive.*—Where any court or judge empowered under the said Act of the seventh year of King George the Fourth, or under any other Act or this Act, in this behalf, shall order payment to any prosecutor or witness or witnesses for the prosecution, or to any person attending the court in obedience to any recognisance or subpoena, in the case of any prosecution for felony or any misdemeanor or offence, of any costs or expenses incurred, or of any compensation for trouble or loss of time, or order payment (except as hereinafter mentioned) to any person who may appear to have been active in or towards the apprehension of any person charged with any offence, of compensation for expenses, exertions, and loss of time in or towards such apprehension, the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court according to the regulations made under this Act; and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

7. *Act not to interfere with payments in respect of extraordinary courage, diligence, and exertions.*—Provided always, that nothing in this Act or in any regulations under this Act shall interfere with or affect the power of any Court to order payment to any person who may appear to such Court to have shewn extraordinary courage, diligence, or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such Court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence, or exertion.

8. *Powers given to judges by 7 Geo. 4, c. 64, to order payments in respect of the apprehension of certain offenders extended to Courts of Sessions of the peace.*—And whereas by the said Act of the seventh year of King George the Fourth any Court of oyer and terminer and gaol delivery, and other courts therein mentioned, are empowered to order compensation to be paid to persons who shall appear to the Court to have been active in or towards the apprehension of any person charged with murder or with any other of the crimes therein mentioned: and whereas it is expedient to extend such power to Courts of Sessions of the peace: Be it enacted, that when any person appears to any Court of Sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such Court of Sessions shall have power to order compensation to be paid to such person in the same manner as the other Courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the Court unto such person without fee or payment for the same.

9. *Clerks of the peace, &c. may be paid by salaries in lieu of fees.*—And whereas it may be expedient to authorise the payment of clerks of the peace and such other clerks as hereinafter mentioned by salaries instead of fees: Be it enacted, that it shall be lawful for the justices of the peace at their general or quarter sessions for the several counties, ridings, divisions of counties, and liberties throughout England and Wales, notice being given at the preceding quarter sessions that a motion will be made for such purpose, and the council or other governing body in every borough in England and Wales, from time to time, if they see fit so to do, to recommend to one of her Majesty's principal Secretaries of State that the clerks of the peace, the clerks of special and petty sessions, and the clerks of the justices of the peace within their several jurisdictions, or any of such clerks as aforesaid, be paid by salaries in lieu of fees and other payments, or where any such clerks are for the time being paid by salaries, by virtue of any order made under this Act or otherwise, to recommend that the amounts of all or any of the salaries for the time being payable be reconsidered, or that all or any of such clerks for the time being paid by salaries be paid by fees in lieu of salary, and where payment by salary in lieu of fees or the reconsideration of the amounts of any salaries is recommended, to state the amount of salary which in the opinion of such justices, council, or governing body should in each case be paid; and every such

recommendation being signed by the chairman of the Court of General or Quarter Sessions, or the mayor or other head officer of the borough, shall be transmitted to the Secretary of State; and it shall be lawful for such Secretary of State, when any such recommendation is so made to him, by order under his hand, if he so think fit, to direct that all or any of the clerks to which such recommendation relates be paid by salary, and to fix the amount of salary to be so paid, or vary the amount of salary for the time being payable to any such clerk, or to direct that any such clerk for the time being paid by salary be paid by fees in lieu of salary; and such Secretary of State shall cause copies of every order made under this enactment affecting any clerk of the peace, or any clerks of special sessions or petty sessions, or clerks to the justices within the district of any clerk of the peace, to be transmitted to such clerk of the peace, to be by him distributed, where occasion shall require, to such other clerks as aforesaid; and the salary for the time being payable to any such clerk under any such order shall be paid out of any county rate or rate in the nature of a county rate made in the county, riding, division, or liberty, or out of the borough fund of the borough, as the case may be, for or in which such clerk of the peace or other clerk to whom the same is payable is appointed or acts: Provided always, that in fixing the amount of any salary to be paid to any clerk of the peace or other clerk appointed before the passing of this Act, regard shall be had to the tenure of his office, and to his rights in respect thereof, but no clerk of the peace or other such clerk as aforesaid appointed after the passing of this Act shall be entitled to any compensation on account of any reduction of his emoluments occasioned by any order made under this enactment: Provided also, that no order shall be made in pursuance of any recommendation of the council or governing body of any borough in relation to the mode of payment or the amount of salary of any such clerk other than the clerk of the peace for such borough, unless the justices of such borough, at a meeting of such justices, approve of such recommendation, and such approval be certified to such Secretary of State, under the hand of the chairman of such meeting.

10. *Certain business may be excepted in fixing the salaries.*—Provided that any such Court of Sessions, or council, or governing body may, where they see fit, recommend that any description (to be specified in the recommendation) of the business of any clerk whom they may recommend to be paid by salary should not be included in fixing the amount of such salary, but that such clerk should be remunerated for the same by such fees or other payments as may be payable to him in respect thereof; and where any order is made by the Secretary of State in pursuance of such recommendation as last aforesaid, such clerk shall be entitled to receive, for his own use, the like fees or payments in respect of the business in such recommendation specified in this behalf as he would be so entitled to receive if not paid by salary; and, save as aforesaid, where any clerk is paid by salary under any order made by virtue of this Act, such salary shall include and be deemed the remuneration for all business which such clerk may, by reason of his office, be called on to perform; and no other payment shall be made for any such business, or for or to a deputy of any such clerk.

11. *Clerks paid by salaries to account for fees.*—Save as hereinbefore provided, all the fees which any such clerk as aforesaid would have been for the time being entitled to receive to his own use if such order had not been made shall, so long as any order for payment of such clerk by salary in lieu of fees is in force, be by him received and paid in any county, riding, division, or liberty to the treasurer in aid of the county rate or rate in the nature of a county rate of such county, riding, division, or liberty, and in any borough to the treasurer in aid of the borough fund, and such fees shall be accounted for from time to time in such manner and under such regulations as the justices at Quarter Sessions, or in any borough the council or other governing body may direct.

12. *Fees may be remitted by justices.*—Where any clerk is paid by salary by virtue of any order made under this Act, any justices or justice before whom any proceeding is had, whereon a fee is payable which should be accounted for by such clerk under this Act, or before whom any person is summoned for nonpayment of any such fee, may remit such fee in whole or in part for poverty or other reasonable cause, in their or his discretion, and in every such case the justices or justice by whom any fee is wholly or in part remitted shall cause an entry to be made, in a book or books to be kept for that purpose by such clerk, of the nature and amount of the several fees so remitted, and of the reason for the remission in such case, which entry shall be signed by the justice, or two or more of the justices authorising such remission, and shall be a sufficient voucher to discharge the clerk therefrom.

13. *So much of 4 & 5 Wm. 4, c. 36, as restrains justices of London, &c. from trying certain offences, &c. repealed.* Such repeal not to give power to try offences restrained from being tried

under 5 & 6 Vict. c. 38.—And whereas by the Act of the session holden in the fourth and fifth years of King William the Fourth, chapter thirty-six, it was enacted, that the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, should not, at their respective General or Quarter Sessions of the Peace, or any adjournment thereof, try any person or persons charged with any of the offences therein mentioned committed or alleged to be committed within the limits of that Act: Be it enacted, that the said recited enactment shall be repealed: Provided always, that such repeal shall not be construed to give authority to the said justices of the peace to try any person or persons for any offence which the justices of the peace acting in and for any county, riding, division, or liberty are restrained from trying under the Act of the session holden in the fifth and sixth years of her Majesty, chapter thirty-eight.

14. *Deputy to assistant judge of the Middlesex Session need not be in the commission of the peace.*—So much of the Act of the session holden in the seventh and eighth year of her Majesty as requires that any person to be appointed a deputy to the assistant judge of the Court of the Sessions of the Peace for the county of Middlesex should be in the commission of the peace for the said county, and qualified by law to act as a justice of the peace, shall be repealed, but any person, being a sergeant or barrister-at-law of not less than ten years' standing, may, in the cases and with the allowances and in the manner therein mentioned, be appointed such deputy.

15. *As to powers of Court of Quarter or General Sessions for Middlesex for dividing such sessions.*—When power exercised, the assistant judge to appoint a deputy to preside as chairman with the justices appointed to sit apart.—The Court of Quarter or General Sessions or Adjourned Session of the peace for the county of Middlesex, shall possess the same powers for dividing such Court of Quarter or General or Adjourned Sessions as are now possessed by the Courts of Quarter and General and Adjourned Sessions of the peace in counties in which there is an order in force for the appointment of a permanent chairman and deputy chairman; and whenever such Court shall exercise such power the assistant judge shall appoint a person qualified to act as deputy assistant judge to preside as chairman with the justices who shall be appointed to sit apart: Provided always, that the name of the person who shall be so appointed shall at some previous time have been transmitted to and approved of by one of her Majesty's principal Secretaries of State as a fit and proper person to be from time to time appointed as such deputy assistant judge.

16. *Presence of one of the justices so set apart not essential to formation of Court.*—The presence of one of the justices so as aforesaid set apart shall not be essential to the formation of the court in which such deputy assistant judge shall preside, but the jurisdiction of such justices shall not be in any way lessened by such appointment.

17. *So much of 9 Geo. 4, c. 43, and 6 & 7 Wm. 4, c. 12, as exempts Middlesex, repealed.*—So much of an Act of the ninth year of King George the Fourth, chapter forty-three, and of an Act of the session holden in the sixth and seventh years of King William the Fourth, chapter twelve, as enacts that nothing therein contained shall extend to the county of Middlesex, shall be repealed, and the said Acts shall be construed and take effect as if the county of Middlesex had not been excepted from the operation thereof.

18. 11 & 12 Vict. cc. 42 & 43.—*By whom warrants to be backed in the Channel Islands.*—And whereas by section thirteen of the Act of the session holden in the eleventh and twelfth years of her Majesty, chapter forty-two, provision is made for indorsing such warrants as therein mentioned by any officer within any of the isles of Guernsey, Jersey, Alderney, and Sark, who shall have jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders, and other provisions are made in the same Act, and in the Act of the same year of her Majesty, chapter forty-three, by reference to the enactment of the said section, and doubts have arisen by whom warrants should be indorsed in the said isles pursuant to the said provisions: Be it enacted, that the bailiffs of Jersey and Guernsey respectively, or in their respective absence the lieutenant bailiffs of such islands respectively, within their respective bailiwicks or jurisdictions, the judge of Alderney, or in his absence any jurat of such island within such island, and the seneschal of Sark, or in his absence his deputy within such island, shall have all such power and authority to indorse warrants as by the said Acts respectively is given or expressed or intended to be given to any officer within any of such isles having jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders, and for such purpose shall have authority to administer an oath, and all the provisions of the said

Acts shall be construed as if the officers authorised to indorse warrants by this enactment had been so authorised by the said section of the first-mentioned Act of the eleventh and twelfth years of her Majesty.

19. *In certain counties of cities and towns prisoners may be committed, and tried at Assizes held for adjoining county.*—Whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her Majesty has not been pleased for five years next before the passing of this Act to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the Court of Quarter Sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act, and the recognisances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the Court of Oyer and Terminer and Gaol Delivery for the next adjoining county; and whenever any such person shall be so committed, the keeper of such gaol or house of correction shall deliver to the judges of Assize for such next adjoining county a calendar of all prisoners in his custody so committed, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such adjoining county; and the justice, justices, or coroner by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognisances, and inquiries relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit, and the same proceedings shall and may be had thereupon at the Sessions of Oyer and Terminer or General Gaol Delivery for such adjoining County as in the case of persons charged with offences of the like nature committed within such county.

20. *Justices to declare when gaols or houses of correction are fit prisons for persons committed for trial.*—It shall be lawful for the justices of the peace, at their general or quarter sessions for any county, riding, or division, by order made for that purpose, to declare that any gaol or house of correction for such county, riding, or division is a fit prison for persons committed for trial at the assizes for such county, or for the county of such riding or division; and every such order shall be signed by the chairman of such sessions, and transmitted to one of her Majesty's principal Secretaries of State: and in case such Secretary of State see fit to approve such order, then, after the approval thereof under the hand of such Secretary of State, it shall be lawful for any justice or justices of the peace, or coroner, acting for such county, riding, or division, to commit for safe custody for trial at the next assizes, to such gaol or house of correction, any person charged with any offence triable at the assizes for such county or for the county of such riding or division; and the commitment shall specify that such person is committed under the authority of this Act; and the recognisances to appear to prosecute and give evidence taken by such justice, justices, or coroner shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the Court of Oyer and Terminer and Gaol Delivery for the county; and the keeper of such gaol or house of correction shall deliver to the judges of assize a calendar of all prisoners in custody for trial at such assizes, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such county; and the justice, justices, or coroner by whom persons charged as aforesaid may be committed shall deliver or cause to be delivered to the proper officer of the Court of Assize the several examinations, informations, evidence, recognisances, and inquiries relative to such persons at the time and in the manner that would be required in case such persons had been committed for trial as aforesaid to such common gaol, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such county as in the case of persons so committed to such common gaol.

21. *Prisoners so committed to be removed to county gaol previous to trial.*—All persons who may under the authority of this Act be committed to the gaol or house of correction of any county of a city or county of a town corporate for trial at the assizes to be holden for the next adjoining county, or to any gaol (other than the common gaol of the county) or house of correction for any county, riding, or division for trial at the assizes for such county, or for the county of such riding or division, shall in

due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of such county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

22. *Prisoners while under removal to be deemed in proper legal custody.*—Every prisoner so removed shall, for and during the time of such removal, and for and during the time of his being removed back to the gaol or house of correction from which he may have been brought, when and as often as he shall for reason be so removed back, and also for and during such time as he may be detained in the county gaol, and until he shall be delivered by due course of law, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding he may, in effecting such removal, have been taken or detained out of the jurisdiction of the county of a city or town, or out of the jurisdiction of the county, riding, or division, to the gaol or house of correction of which he may have been originally committed, into any other jurisdiction, or out of the county to the common gaol of which he is removed into or through any other county or division of a county; and no action or other proceeding shall or may be maintained by such prisoner, or by any other person, against the gaoler or keeper of the gaol or house of correction from which such prisoner is removed, or against the gaoler or keeper of the common gaol of the county, by reason or in consequence of such prisoner having been taken out of the jurisdiction of such county of a city or town, county, riding, or division, from the gaol or house of correction of which such prisoner is removed, into any other jurisdiction, or out of such county to the common gaol of which he is removed into or through any other county or division of a county.

23. *The provisions of 38 Geo. 3, c. 52, and 51 Geo. 3, c. 100, as to execution of sentences, and as to costs, extended to this Act.*—All the provisions of the Act of the fifty-first year of King George the Third, chapter one hundred, applicable to convictions in pursuance of the provisions of the Act of the Thirty-eighth year of King George the Third, chapter fifty-two, and to the execution of the sentences passed upon any convicts on such convictions, and all the provisions of the said Acts respectively concerning the payment of expenses, shall be applicable in all cases of persons who may be tried in or removed for trial to any adjoining county in pursuance of the provisions of this Act, in like manner as in cases of persons tried in or removed for trial to any adjoining county in pursuance of the provisions of the said Act of the Thirty-eighth year of King George the Third.

24. *What to be deemed the next adjoining county.*—For the purposes of this Act the counties named in the second column of schedule (C.) to the Act of the session holden in the fifth and sixth years of King William the Fourth, chapter seventy-six, shall be considered next adjoining the counties of cities and towns corporate in the first column of the same schedule in conjunction with which they are respectively named.

25. *Extent of Act.*—This Act shall not extend to Ireland or to Scotland.

# CAP. XCIX.

An Act to amend the Law of Evidence.

(Aug. 7, 1851.)

Whereas it is expedient to amend the law of evidence in divers particulars: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Recited proviso in sec. 1 of 6 & 7 Vict. c. 85, repealed.*—So much of section one of the Act of the sixth and seventh years of her present Majesty, chapter eighty-five, as provides that the said Act shall "not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," is hereby repealed.

2. *Parties to be admissible witnesses.*—On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *visd voce* or by deposition, according to the practice of the



half of either or any of the parties to the said suit, action, or other proceeding.

3. *Nothing herein to compel person charged with criminal offence to give evidence tending to criminate himself, &c.*—But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

4. *Not to apply to proceedings in consequence of adultery, &c.*—Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

5. *Nothing to repeal any provisions of 7 Wm. 4 and 1 Vict. c. 26.*—Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of Parliament holden in the seventh year of the reign of King William the Fourth and the first year of the reign of her present Majesty.

6. *Common Law Courts authorised to compel inspection of documents whenever equity would grant discovery.*—Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of Common Law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.

7. *Foreign and colonial Acts of state, judgments, &c. provable by certified copies, without proof of seal or signature or judicial character of person signing the same.*—All proclamations, treaties, and other Acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as herein-after mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other Act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as herein-before respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

8. *Apothecaries' certificates admissible without proof of seal.*—Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has

been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

9. *Documents admissible without proof of seal, &c. in England or Wales equally admissible in Ireland.*—Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

10. *Documents admissible without proof of seal, &c. in Ireland, equally admissible in England and Wales.*—Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in an Court of justice in England, or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

11. *Documents admissible without proof of seal, &c. in England, Wales, or Ireland, equally admissible in the colonies.*—Every document which by any law now in force, or hereafter to be enforced, is or shall be admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

12. *Registers of British vessels and certificates of registry admissible as prima facie evidence of their contents, without proof of signature, &c.*—Every register of a vessel kept under any of the Acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register, or such copy of a register, and also every certificate of registry, granted under any of the Acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as prima facie proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or indorsed on such certificate of registry when the said certificate is produced.

13. *Where necessary to prove conviction or acquittal of person charged, not necessary to produce record, but may be certified under hand of clerk of court.*—And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: Be it enacted, that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the Court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

14. *Examined or certified copies of documents admissible in evidence.*—Whenever any book or other document is of such a public nature as to

be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

15. *Certifying a false document a misdemeanour.*—If any officer authorised or required by this Act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanour, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

16. *Court, &c. may administer oaths.*—Every Court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

17. *Persons forging seal, stamp, or signature of certain documents, or wilfully uttering same, guilty of felony.*—If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour; and whenever any such document shall have been admitted in evidence by virtue of this Act, the Court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the Court or other proper person for such period and subject to such conditions as to the said Court or person shall seem meet; and every person who shall be charged with committing any felony under this Act, or under the Act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.

18. *Act not to extend to Scotland.*—This Act shall not extend to Scotland.

19. *Interpretation of "British Colony."*—The words "British colony" as used in this Act shall apply to all the British territories under the Government of the East-India Company, and to the islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, whatsoever and whatsoever.

20. *Commencement of Act.*—This Act shall come into operation on the first day of November in the present year.

CAP. C.

An Act for further Improving the Administration of Criminal Justice. (Aug. 7, 1851.)

Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanour by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *The Court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury.*—From and



after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town, corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the Court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such Court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius the order for the amendment shall be indorsed on the *postes*, and returned together with the record, and thereupon such papers, rolls, or other records of the Court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the Court: provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such Court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisance to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

2. *Verdicts and judgments valid after amendments.*—Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

3. *Records to be drawn up in amended form, without noticing the amendments.*—If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

4. *The means by which the injury was inflicted need not be specified in indictments for murder and manslaughter.*—In any indictment for murder or manslaughter preferred after the coming of this Act into operation it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased.

5. *Forms of indictment in cases of forgery and uttering, stealing, and embezzling, or obtaining by false pretences.*—In any indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the

same may be usually known, or by the purport thereof, without setting out any copy or facsimile thereof, or otherwise describing the same or the value thereof.

6. *In engraving plates, &c.*—In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or facsimile of the whole or any part of such instrument, matter, or thing.

7. *In other cases.*—In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof.

8. *Intent to defraud particular persons need not be alleged or proved in cases of forgery, uttering, or false pretences.*—From and after the coming of this Act into operation, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.

9. *A party indicted for felony or misdemeanor may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only.*—No person so tried to be afterwards prosecuted for the same.—And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: for remedy thereof be it enacted, that if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

10. *Repeal of the 11th section of 7 Wm. 4 and 1 Vict. c. 85.*—And whereas it is enacted by a certain Act of Parliament passed in the first year of the reign of her present Majesty Queen Victoria, intituled "An Act to amend the Laws relating to Offences against the Person," that "on the trial of any person for any of the offences thereinbefore mentioned; or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding;" and whereas great difficulties have arisen in the construction of such enactment: for remedy thereof be it enacted, that the said enactment shall be and the same is hereby repealed.

11. *On the trial of an indictment for robbery the jury may convict of an assault with intent to rob—No person so tried to be afterwards prosecuted for the same.*—If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

12. *Person tried for misdemeanor not to be acquitted if the offence turn out to be felony, unless the Court so direct.*—If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor: and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

13. *Person indicted for embezzlement as a clerk, &c. not to be acquitted if the offence turn out to be larceny, and vice versa.*—If upon the trial any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

14. *Upon an indictment for jointly receiving, persons guilty of separately receiving may be convicted.*—If upon the trial of two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property.

15. *Separate accessories and receivers may be included in the same indictment in the absence of the principal felon.*—And whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony or receivers at different times of stolen property the subject of such felony may be in custody or amenable to justice: for the prevention of several trials be it enacted, that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

16. *Three larcenies from the same person within six months may be included in the same indictment.*—It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.

17. *Where a single taking is charged, the prosecutor not required to elect, unless it appear that there were more than three takings, or more than six months between the first and last taking.*—If upon the trial of any indictment for larceny it shall appear the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for, such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

18. *Coin and bank notes may be described simply as money.*—In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of

any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person and such part shall have been returned accordingly.

19. *Certain provisions of 23 Geo. 2, c. 11, and 31 Geo. 3 (I.) extended—Any Court, judge, justice, &c., may direct a person guilty of perjury in any evidence, &c. to be prosecuted; and commit the party, unless he enter into recognisance to appear and take his trial, and bind persons to give evidence; and give certificate of prosecution being directed, which shall be sufficient evidence of the same.*—Whereas by an Act of Parliament passed in England in the twenty-third year of the reign of his late majesty King George the Second, intituled "An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual," and by a certain other Act of Parliament made in Ireland in the thirty-first year of the reign of his late majesty King George the Third, intituled "An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual, and for affirming the Jurisdiction of the Quarter Sessions in Cases of Perjury," certain provisions were made to prevent persons guilty of perjury and subornation of perjury from escaping punishment by reason of the difficulties attending such prosecutions: and whereas it is expedient to amend and extend the same: be it enacted, that it shall and may be lawful for the judges or judge of any of the Superior Courts of common law or equity, or for any of her Majesty's justices or commissioners of assize, Nisi Prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy recorder, chairman, or other judge, holding any General or Quarter Sessions of the Peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any County Court or any Court of Record, or for any justices of the peace in Special or Petty Sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the Superior Courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognisance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognisance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the Court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned Court shall specially otherwise direct; and when allowed by any such Court in Ireland such sum as shall be so allowed shall be ordered by the said Court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

20. *Extending the 23 Geo. 2, c. 11, s. 1, to other offences, and simplifying indictments for perjury and other like offences.*—In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, in-

dictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed.

21. *Extending the 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.*—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit: and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

22. *On trials for perjury and subornation a certificate of the trial of the indictment on which the perjury was committed sufficient evidence of such trial.*—A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

23. *Venue in the margin sufficient, except where local description is necessary.*—It shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

24. *What defects shall not vitiate an indictment.*—No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words, "as appears by the record," or of the words, "with force and arms," or of the words, "against the peace," nor for the insertion of the words, "against the form of the statute," instead of "against the form of the statutes," or vice versa, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

25. *Formal objections to indictments shall be taken before jury are sworn—Court may amend any formal defect.*—Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court, or other person, and thereupon the trial shall proceed as if no such defect had appeared.

26. *Repealing part of 60 Geo. 3 and 1 Geo. 4, c. 4, as to the traverse of indictments in cases of mis-*

*demeanor.*—So much of a certain Act of Parliament passed in the sixtieth year of the reign of his late Majesty King George the Third, intituled, "An Act to prevent Delay in the Administration of Justice in Cases of Misdemeanor," as provides that "whereas any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within that part of Great Britain called England, or in Ireland, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon, at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of *certiorari* for removing such indictment into his Majesty's Court of King's Bench at Westminster or in Dublin shall be delivered at such session before the jury shall be sworn for such trial," shall be and the same is hereby repealed.

27. *Provision as to traversing indictments.*—No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any Session of the peace, session of oyer and terminer, or Session of Gaol Delivery: provided always, that if the Court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such Court may adjourn the trial of such person to the next subsequent session, upon such term as to bail or otherwise as to such Court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognisance for that purpose.

28. *Provision as to plea of *autrefois convict* or *autrefois acquit*.*—In any plea of *autrefois convict* or *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.

29. *Punishment for certain indictable misdemeanors.*—Wherever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any publicising, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

30. *Interpretation of terms.*—In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any *Nisi Prius* record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment;" and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing: and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

31. *Commencement of Act.*—This Act shall come into operation on the first day of September, one thousand eight hundred and fifty-one.

32. *Not to extend to Scotland.*—Nothing in this Act shall extend to Scotland.

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

### SUMMARY.

Not content with regulating common lodging-houses, as described last week, the Legislature has also passed an Act for the encouragement of the erection of good lodging-houses for the labouring poor. (14 & 15 Vict. c. 34; 17 Law T. 174.)

This useful measure empowers the council of any borough to adopt its provisions if it pleases: the expenses of carrying it into effect to be charged on the borough fund, and the income arising from it to be carried to the same. So likewise it may be adopted by a local board of health. But, on requisition of ratepayers, the board is to defer proceedings till after the next election of members of the board. When adopted by the board, the expenses and receipts are to be charged to the district funds.

The like powers are given to any commissioners of improvement; but if the majority of such commissioners be not elected by the ratepayers, then the consent of the ratepayers must be first obtained.

On the requisition of ten ratepayers, the churchwardens are to convene a vestry meeting, to determine if the Act shall be adopted; if so resolved, a copy of the resolution is to be transmitted to the Secretary of State, but the resolution is not to be deemed to be carried unless two-thirds vote for it. If the Act is thus adopted, the vestry is to appoint commissioners for carrying it into execution.

Provision is then made for the necessary powers to the commissioners, who are to keep minutes of their proceedings, and also to keep accounts, which are to be open to the inspection of any ratepayer, and auditors are to be appointed, who are to examine and report to the vestries. The expenses are to be paid out of the poor-rates; and the moneys raised, and the income arising from lodging-houses, are to be applied towards defraying expenses. The vestries of two or more parishes may concur in carrying the Act into execution, subject to the approval of the Secretary of State. Councils are empowered to borrow money, and certain provisions of the Companies Clauses Consolidation Act are embodied, with respect to borrowing money and other powers there given to directors.

A very remarkable custom claimed by the corporation of King's Lynn has been negatived by a Court of Error, in *Smith v. Cartwright*, 17 Law T. 258. It is not necessary to repeat the facts here, as it determined no point of general law.

We direct the attention of our readers to a report of remarks made by Mr. Justice COLERIDGE, at Dorchester, on the impropriety of a Judge conducting a prosecution, and the insufficiency of the county allowance of a guinea to an attorney for preparing the brief and attending at the trial. It would be well if the forcible language of the learned Judge could be proclaimed aloud at every Quarter Sessions where the practice against which he protests so indignantly is not only persisted in, but justified. The report appears in 17 Law T. 260.

Several forms are required under the new Act for the regulation of common lodging-houses, and especially a form of a return. These have been prepared by Mr. FOOTE, of London, magistrates' clerk, and any quantity of them may be had at the LAW TIMES Office, or by order. The form of return is either on separate sheets or in books, to meet the requirements of different localities. All the notices, &c. which the Act requires have been prepared, so that complete sets of the forms necessary under this important statute may be had.

#### TURNPIKE TRUSTS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—During the last session of Parliament an attempt was made to deal in some measure with the heavy arrears of debt which clog the turnpike trusts; and to facilitate arrangements for their relief, an Act was passed (the 14 & 15 Vict. c. 38), intitled, "An Act to facilitate Arrangements for the Relief of Turnpike Trusts, and to make certain Provisions respecting Exemptions from Tolls;" and the following course is to be adopted for carrying its provisions into effect:—

1. Where the revenues applicable to the payment of interest upon the principal money are insufficient for the payment in full of such interest, the trustees are to give a notice in some newspaper usually circulated in the county of at least twenty-one days, of a general meeting to consider whether an application should be made to the Secretary of State for a provisional order to reduce the rate of interest on the mortgage debts, and to *extinguish the whole or any part of the arrears of interest, or for either of such purposes.*

2. If at such general meeting a resolution authorising the aforesaid application be made, notices are to be given to all the mortgagees or creditors of the reductions proposed, and their comments in writing applied for. Executors, administrators, guardians, trustees, and all committees of the estates of idiots and lunatics, are empowered by section 2 to give the consents required.

3. If persons entitled to two-thirds of the bonded debt consent to the proposed application, the trustees may make application to the Secretary of State for a provisional order for the said reduction or extinguishment, such application to be signed by at least three of the trustees, thereby certifying that the consents required by the Act to such application have been given.

The Act also empowers the Secretary of State, on receipt of any such application, to make a provisional order, and to publish the same as he may direct, and such order will be absolute when confirmed by Parliament, without expense to the several trusts.

It is also declared by sec. 4, that the words "implements of husbandry," in 3 Geo. 4, c. 126, s. 36, shall be deemed to include thrashing machines; and the word "constable," in 3 & 4 Vict. c. 88, s. 1, shall be deemed to include superintending constables appointed under 13 & 14 Vict. c. 20.

Swindon, Aug. 13, 1851.

F.

THE HIGH SHERIFF OF SUFFOLK AGAIN IN A DILEMMA.—The high sheriff, it will be remembered, was in March last placed in rather an awkward position, consequent upon a hangman not being obtainable to carry into execution the last sentence of the law upon Maria Clarke, for the murder of her illegitimate child, by burying it alive. Fortunately for the sheriff, on that occasion a reprieve came down for the unfortunate woman two days before that on which her execution was to have taken place. At the Assizes, held at Ipswich on the 2nd inst. Maria Emily Cage was sentenced to undergo the penalty of death for the murder of her husband, James Cage, by administering arsenic to him. Her execution was ordered to take place at Ipswich on Saturday next, in front of the County Gaol; but the same difficulty presented itself as in March. Calcraft, the hangman, on being applied to, could not attend, as he had promised to perform a similar office at Norwich. Application was then made to the hangman at Warwick gaol, but that functionary replied that he was unable to give his attendance in consequence of his having engaged himself to perform a like office at Shrewsbury on Saturday. Application was next made to the Secretary of State, setting forth the unpleasant position in which the high sheriff of Suffolk was placed, and requesting that the execution of Maria Emily Cage might be postponed. The answer from the Secretary of State was to the effect that the application could not be entertained, thus leaving the high sheriff to get out of the difficulty as he best could. The result is, that he has on his own responsibility ordered the execution to be delayed until an early day next week, to suit the convenience of Calcraft. The unhappy culprit appears to be resigned to her fate, but protests her innocence. Her sons and daughters had a final interview with her.—John Mickleburgh, of Thrandeston, who is now in the same gaol, awaiting his trial at the forthcoming Assizes on a charge of murdering Mary Baker, his servant girl, by stabbing her with a knife, is in a very low and desponding state, and able to take but little food. It is not improbable before the time arrives for his trial, he will have ceased to live.

BOARD OF GUARDIANS.—In an Act of Parliament which has just been printed (14 & 15 Vict. c. 105), there is a clause to the effect that guardians elected for the several parishes in any union shall continue to act as such until the 15th of April inclusive in each year, notwithstanding their successors may have been elected previously to that day; and from and after the 15th of April every guardian newly elected for any such parish or ward shall act as such guardian for the ensuing year.

RETIREMENT OF A POLICE MAGISTRATE.—In conformity with a previous announcement, John Palfrey Burrell, esq. the colleague of Mr. Broderip, in the magisterial presidency of the Westminster Police Court, has retired from official duty. During the seventeen years that Mr. Burrell has held this office, his career has been uniformly marked by assiduity, judgment, and independence, combined with a humane regard for want and distress under the innumerable forms under which they came before him.

ARREST UNDER THE ABSCONDING DEBTORS' ACT.—The Act by which absconding debtors can be immediately arrested had scarcely come into operation before its beneficial effects were demonstrated. A man, originally from Birmingham, has resided in this town for some time, and on Friday last it was ascertained that he had taken his passage on board the packet ship *New World*, intending, no doubt, to leave his creditors in the lurch. As soon as it was ascertained that he had made arrangements for visiting the western world, a creditor made the necessary declaration before Mr. Stevenson, one of the commissioners of bankruptcy, who issued a warrant for the apprehension of the delinquent. He was soon after taken into custody, and still remains in "durance vile," at the mercy of his creditors. As the *New World* was to sail yesterday, the absconding debtor, under the old law, would have been

enabled to get clear off, and his creditors might have remained helpless spectators of his departure.—*Liverpool Mercury.*

#### JOINT-STOCK COMPANIES' LAW JOURNAL.

At length an action for a call has been successfully fought, and the demand defeated. In *The Swansea Dock Company v. Levison*, 17 Law T. 256, to constitute a valid meeting of directors for the purpose of making a call, it was necessary that fourteen days' notice should be given in a newspaper circulating in the neighbourhood of Swansea. The advertisement appeared in the third edition of *The Sun*, and it was proved that this paper did not go to Swansea, and, in fact, that edition was printed for circulation in London. The Court held the notice to be insufficient, and the proceedings of the meeting, and therefore the call, to be invalid.

#### WINDING-UP.

The House of Lords has deferred till next Session its judgment upon the two important questions raised as to the validity of calls upon contributories, but with a strong intimation of opinion that they are liable only each one for his own individual orders, and that there is no joint liability. The other points mooted were, whether incompletely registered companies are within the Winding-up Act, about which the judges entertain strong doubts, and whether a contributory is liable to the extent of his equal share with the other solvent contributories, or only in respect of his proportion of the whole as represented by the number of shares he holds; that is to say, if there be ten thousand shares and a contributory holds one share only, but there are only ten contributories, is he liable for the tenth part, or the ten thousandth part only, of the expenses? Surely common sense would say for the ten thousandth part of the whole, because that was the interest which he took in the concern. The debts of the bubble companies are *in truth* the debts of those only who actually gave the orders; and the attempt to make others liable only complicates difficulties, and makes settlement impossible.

But the Lords would best disentangle the inextricable web by cutting it. Nobody doubts that these so-called companies are *not* within the Winding-up Acts; and as that question has never yet been decided by the Lords, it is open to them so to settle it, and put an end at once to a conflict which must be ruinous to all, and beneficial to none but a few speculators in litigation.

In *Holroyd's case*, 17 Law T. 251, Lord CRANWORTH allowed a contributory to appeal against the decision of the Master, although the time had passed for doing so, on the ground that he had already paid a large sum towards the expenses.

KILBRICKEN MINING COMPANY.—Since the declaration of a return of 14s. 7d. per share, a notice has been served on the official manager, by Mr. Crookford, the owner of the mines, to the effect that he intends appealing against his individual exclusion from a participation in the dividend on the ground of his having given a release.

GERMAN MINING COMPANY.—It is found impossible at present finally to wind up this company's affairs, in consequence, it is understood, of the continued unsettled state of Germany. The property at sale is estimated to be worth 20,000*l.*; and Mr. Odenherman, government surveyor of mines in Germany, confirms the value of the property.

DUISBURG IRON COMPANY.—At the last meeting in this matter before the Master in Chancery (Humphry), the list of contributories was proceeded with. The company was projected to work iron and zinc mines in Westphalia, and Viscount de Sequeville, the petitioner for winding up its affairs, alleged that there is a sum of 70,000*l.* now due to him.

MADRID AND VALENCIA RAILWAY.—On Saturday last, the Master in Chancery Blunt made a decree confirming the compromise made by the official manager on behalf of the shareholders with the directors of this company, for the settlement of all matters in dispute. The terms of compromise, as published a fortnight ago, have been amended by the Master, and stand substantially as before, with the following exceptions. Mr. Chadwick is to pay the official manager 12,000*l.* by instalments of 3,000*l.* per annum, with interest at 5 per cent.; the first instalment to be paid on the 7th of August, 1852.

## REAL PROPERTY LAWYER AND CONVEYANCER.

### Summary.

In *Mathew v. Brise*, 17 Law T. 249, a very curious question was raised, whether a testamentary guardian, appointed by virtue of stat. 12 Car. 2, c. 24, was a trustee, so as to let in as against him the rule of law which excludes the operation of the Statute of Limitations between the trustee and the *cestui que trust*. It was decided that he was a trustee, and that he could not set up the statute in bar to a bill for an account.

A case of very great importance upon the *Law of Wills*, and which should be carefully noted in *Allnut's Practice of Wills*, or whatever practical book the reader uses, is that of *Doe d. Shawcroft v. Palmer*, 17 Law T. 252. It was there decided, that if a will duly executed have upon its face an alteration or interlineation, the presumption will be that it was made after the execution of the will, and it is invalid. But evidence will be admissible to rebut such presumption. For that purpose evidence is admissible of statements made by the testator at a time prior to the execution of the will, indicative of an intention to devise his property in the manner in which it is given in the will as altered or interlined. Lord CAMPBELL's elaborate and very able judgment in this case will well reward perusal.

It will be seen by the report from the Prerogative Court of the case of *Re E. Martin*, 17 Law T. 260, that administration, with the will annexed, of the wife of a convicted felon, was granted, on an affidavit that the property disposed of was acquired after conviction.

## COUNTY COURTS.

### Summary.

Two cases of insolvency are reported from the Superior Courts. In Chancery it has been decided, in *Dew v. Clarke*, 17 Law T. 249, that the Court has not power to discharge a prisoner in contempt for nonpayment of an order under Sir E. Sugden's Act; but that he must apply to the Insolvent Debtors' Court, and take the benefit of the Insolvent Act in the usual way; and in *Hamber v. Hall*, 17 Law T. 254, the Court of C.P. has held that, where there is no express contract for the payment of the messenger's fees, the creditors' assignee in insolvency is not liable for them. This should be noted in *Macrae's Practice*, as it is a question very likely to recur. *Estob v. Wright*, 17 Law T. 260, was an action brought against the clerk and bailiffs of a County Court for an alleged illegal execution. Several points were decided in it. 1st, the notice of action stated that it would be brought in the C.P.; and it was, in fact, brought in the Q.B. It was held to be insufficient. 2nd, the notice was for breaking plaintiff's house and taking furniture therein without expressly claiming the furniture as belonging to plaintiff. It was held to be therefore also insufficient. The notice should state the special damage, if any is to be claimed. It was also intimated, although not expressly decided, that if execution issues from the County Court against the goods of A. and the house of B. is entered and his goods taken by mistake, the clerk and bailiffs are entitled to notice of action.

THE COUNTY COURTS AND THE BAR.—At the "Grand Court" of the Northern Circuit, holden at Lancaster on Monday evening last, a very important resolution, affecting the etiquette of the Bar with reference to the County Courts, was carried by a large majority. It has hitherto, since the institution of these courts, been considered doubtful whether a barrister could, consistently with the old-established etiquette of the Profession, accept a brief in any of these court without a special fee, i. e. with a fee less than two guineas. This question was brought under the consideration of the Grand Court

on Monday evening, and at a very full Court it was decided that it was not contrary to etiquette for a barrister to hold a brief in a County Court without a special fee; but that any barrister might accept and hold a brief in any of these courts with a fee of one guinea only, if he thought fit to do so. It was not denied that the etiquette of the Profession had been otherwise up to that time, but it was declared by the Court that the County Courts were likely to introduce so great a change in a considerable part of the practice of the Profession, and that they formed a case so very different from that of the courts in which the ancient practice had been observed, that it had become necessary to abandon the old rule, so far as the County Courts were concerned. It was also decided at the same Grand Court that it was quite in accordance with the etiquette of the Profession for barristers to attend, and to sit in the County Courts, and to form a Bar there, if they thought fit to do so.

## THE LAWYER.

### Summary.

EQUITY PRACTICE.—It appears from the case of *Dew v. Clarke*, 16 Law T. 249, that the Court of Chancery has not power to discharge a prisoner committed for contempt for nonpayment of money ordered by the Court to be paid under stat. 1 Wm. 4, c. 36 (Sir E. Sugden's Act), but if unable to pay he must apply to the Insolvent Court, and obtain his discharge by regular process there.

Two decisions on the *Practice of Claims* should be noted by the practitioner. In *Woodford v. Woodford*, 17 Law T. 250, where an administrator entitled to a moiety of a definite sum appropriated in respect of two thirteenth shares of a residue, and also entitled to a tenth part of the other moiety, filed a claim against the executor for payment, it was held that the persons entitled to the other shares were necessary parties; and in *Carnardine v. Wishtade*, 17 Law T. 251, service of a writ of summons upon a claim for foreclosure upon the wife of a person having an interest in the equity of redemption, and who was travelling in America, was deemed to be a good service on the husband, the wife being in possession and receipt of the rents of the property mortgaged.

The practice under the *Trustee Act* has also again come under consideration; and in *Es parte Threlfall*, 17 Law T. 251, where a testator had appointed a sole trustee who died intestate, the Court appointed two new trustees in his place without a reference, upon the production only of an affidavit of their fitness.

It seems that the rule of *set-off* in Equity is limited to cross demands which exist in the same rights. Therefore, in *Freeman v. Lomas*, 17 Law T. 252, where a bill had been filed for payment of part of a legacy, the plaintiffs being the assignees of the legatee, who had become bankrupt, the executor was not allowed to retain such unpaid legacy as a *set-off* against a debt due from the legatee to him in his private capacity, and not as executor. (*Freeman v. Lomas*, 17 Law T. 252.)

COMMON LAW.—In *Florence v. Lawson*, 17 Law T. 260, Lord CAMPBELL very properly refused to permit a judge to be called to prove facts at a trial which might have been proved by other witnesses.

### LAW REFORM.

EXTRACT OF A LETTER TO LORD DENMAN FROM LORD BROUGHAM.

(From the *Law Review*.)

[We are favoured with this extract for publication]:—

"Notwithstanding such disappointments, it is a very pleasing reflection that, in considering the legal history of this session, we have not near so much cause of condolence as of gratulation. My views are not by a great deal so gloomy as when I addressed you last autumn. Our impatience may be as great to see what is most wanted completely supplied; but it would be very unjust not to feel thankful for what we have gained, and cheerful as to our future prospects.

"The postponement of the Registry Bill is certainly a serious misfortune; but its passing through the Lords, after full scrutiny in the select committee, and in the face of a persevering opposition from the Chancellor, heading the small but zealous minority of the Real Property Commissioners (a), must be regarded as an indication of its future adoption. With the single exception I have men-

(a) Lord Langdale's Commission, which sat for several years. Besides conveyancers, Lord Beaumont, an able law reformer, was out.

tioned, the Government in both houses heartily supported this valuable measure; Lord Lansdowne in a very marked manner. They had announced it in the speech from the Throne, and they entrusted it to the learned, able, and most judicious advocacy of Lord Campbell, who, having great difficulties to contend with, left nothing undone to further its progress, and save it from the known perils attendant upon the close of the session. To those perils it has fallen a victim, like your great Bill in 1842—postponed to 1843. The Fabian tactics of our friend have prevailed over the honest resolution of his colleagues to pass the Bill. I heartily wish they had defeated him as we did his precursors—Lord Eldon, &c.—when, after losing the Reform Bill, we kept Parliament sitting till late in October, for the sole purpose of passing the Bankrupt Law Bill, now the subject of our friend's unsparing attack—an attack, too, made in the presence of the ministers of 1831, who had advised the King to congratulate the Parliament of that year upon the passing of that same Bill. But for this fatal delay, the country would now have been in possession of a system of registration as perfect as the unfortunate want of maps will allow—a want of which must be supplied if we would have anything like a good system of conveyancing.

"The same cause entailed upon the Government the loss, at least for the present, of another important measure—the Charity Trusts Bill; and here they had the support of their colleague, who ably opened and zealously pressed it forward. Had he brought it forward three, nay two months earlier, beyond all doubt it would have been easily passed.

"We were at one time apprehensive that another measure of great value might share the same fate; but it has happily escaped. I mean Lord Campbell's important Bill for improving criminal procedure, shortening and simplifying it in some material respects, giving such power to amend as may prevent the escape of guilt by purely technical errors (a great opprobrium of our practice), and facilitating the punishment of perjury. Lord Campbell deserves the thanks of the Profession, and of the community, for his manful perseverance; there cannot be a doubt that he had to struggle against no little weight of prejudice, in not the most obscure quarters of our legal body. Nor can we forget, in connection with this subject, the great benefit which the Bill secured from the examination of its details, first in the committee of our House, where we had the valuable assistance of Mr. Pitt Taylor (who, I believe, drew the Bill), and then in the committee of the Commons, presided over by the learning and sound judgment of Mr. Baines, a man whom to name is to honour.

"Lord Harrowby's Absconding Debtors Bill must be noted as curing an obvious defect in the laws of 1842 and 1843—curing it by the aid of the County Courts, which really seem fated to lend assistance in every branch of our jurisprudence, and, returning good for evil, to help us in proportion as certain heads of the law occupy themselves in running them down. But Lord Harrowby devotes his talents and influence to worthier objects, taking a most useful part in the amendment of the law—a part well becoming one who derives his honour and descent from a great legal dignitary.

"The Patent Law has, likewise, been much improved. The Bill which I presented would probably have been sufficient to remove the evils chiefly complained of; the Bill of the Government, which adopted it in great part, might also have sufficed. But both being referred to a select committee, the result was a third Bill, compounded of both, and with one or two useful additions. Mr. Webster was of the greatest service in this inquiry, and is entitled to the same thanks from the friends of improvement in this limited, though not unimportant, department of our jurisprudence, as Mr. Pitt Taylor in its other branches. I am, however, now assuming that the Bill is to pass; the period of the session, and the declared opinion of the Government against all patents for inventions, may very possibly cause its postponement.

"Of the Chancery Bill little needs be said, except that it is a very small step in the right direction, because it gives an additional judicial force both to the court and the appellate jurisdiction. But with respect to it, I will venture to affirm that, both within the Profession and without, both in Parliament and in the country, there prevails the same fixed opinion. 'This, if meant to be all, will never do. No structural change will meet the evil universally complained of. A functional change is absolutely necessary. The judges in Chancery, like the judges at Common Law, must work out their own decrees, and not send between two-thirds and three-fourths of their business to be done by the Masters. You must make more puisne judges in Chancery, and get rid of the Master's office entirely, those judges sitting now in courts, now in chambers, as do the other judges of the superior courts.' The abolition of the separation between proceedings in equity and at law—what is termed the fusion of the two—must come next; but the important change I have



adverted to is necessary at all events; it will both pave the way for the ultimate and complete improvement, and it will be as necessary when that consummation is brought about as it is in the present state of things.

"The examination of evidence in the committee on the Masters' Jurisdiction Bill threw a strong light upon the grievous imperfections of Chancery procedure, and their ruinous consequences to the suitor. In truth, a denial of justice was clearly proved to exist; and the lay peers who attended to the cases brought forward by the most eminent professional men, far from wondering at the assertion of the Incorporated Body of Solicitors, 'that under questions of 1,000l. no client can honestly be advised to sue' in Courts of Equity, felt that for ten times the amount (as one noble friend of mine said) they would not resort to what is whimsically enough termed the *relief* administered by those tribunals. No force of prejudice, no bias of professional interest, can long resist the conclusions to which this useful inquiry has led every thinking mind. The procedure must be prudently, but effectually, improved in its fundamental parts, if we would avoid the hazard of a wholesale change—nay, the entire subversion of the system. Although the period of the session, and the strenuous opposition I met with, compelled me to postpone the Masters' Bill, as well as two others, to which I will now advert, I yet regard the labours of that committee as an important step made towards a safe and complete Chancery amendment. I observe, indeed, that orders have been issued as to sales and biddings since the first part of our evidence denounced one of the grossest of the existing abuses. But that won't do; it won't reach the great bulk of those abuses; it won't supersede the necessity of that legislation which alone can afford the remedy, and which the present Master of the Rolls, entirely agreeing with his lamented predecessor, has, in his evidence, admitted to be required.

"The Bills for uniting *bankruptcy* with the County Court jurisdiction, and to giving for those Courts original, *equitable jurisdiction*—measures urged upon Parliament by numberless petitions both from professional men and suitors, were of necessity postponed. The session was too far advanced to give the least chance of their passing; but I cannot take blame for this delay. I had brought forward the former the very first day of the session; the latter some time before Easter. But we had been strenuously opposed by one member of the Government on the two other Bills, which I succeeded in carrying, with the utmost difficulty, though they had received the powerful support of the Chief Justice and the Vice-Chancellor. I therefore could not hope, at least for the present, to prevail against the same active opposition when deprived of all support. The state of my health, which had been broken by illness and by the fatigues of the session, would not have prevented me from making the attempt, at whatever hazard to myself, had even a chance of success remained. But the case of the Bills was hopeless.

"Nevertheless, the two which have been carried, in spite of all efforts to defeat them, are of the greatest importance (I trust they have been carried, for they have passed both Houses; but one can be certain of nothing in the face of such assiduous adversaries as we have to contend with). The County Courts have been materially improved, and their jurisdiction extended, by the one; while the other, enabling the parties to civil proceedings in all Courts to be examined as witnesses both for themselves and, when called, by their adversaries, is really such a happy change in our judicial system as one could hardly have hoped to witness, considering the short time during which the subject has been under the discussion of the profession and the community.

"The history of this measure is worth attending to, as bearing on the subject of law amendment generally, and showing that we must lay our account with the most signal improvements being gradually brought about. You were averse to this step when we pressed it upon you in 1842; (b) and you have lately said, in one of your invaluable letters, (c) that even for some years after your own Bill had come into operation, you continued to disapprove of this, which I certainly regard as a corollary to it. But then I am bound to admit that when the subject was first brought forward by me in February 1828, I had doubts myself; and though I stated the arguments against the exclusion of parties, and was quite clear against allowing any other interest to exclude a witness, yet I was hardly prepared then to go the full length at which we have now happily arrived. On the other hand, your Bill sweeps away the objection from conviction, which, in 1828, I inclined, erroneously, to retain; and, beyond all doubt, you were right; because, surely, if we admit an accomplice, who, in the face of the court, confesses his

guilt, so may we a witness whom some other court has convicted.

"The amendment in the law of evidence, in which we have now to rejoice, is, of all the changes that have taken place since 1828, the most important. The statement then made exposed somewhere about sixty glaring defects in our system, of which fifty-six or fifty-seven, I think, have since been removed, in whole or in greater part; but the most glaring of the whole were those which the establishment of local judicatures, and the Evidence Acts of 1843 and 1851, have—Heaven be praised!—made matter of history.

"It would be most ungrateful did I not commemorate the aid which, next to your own authoritative and most powerful—indeed, decisive interposition—enabled us to carry this last Bill. I mean, first of all, the assistance of our friend Pitt Taylor, who, as author of the last and ablest work on the law of evidence, was well calculated to assist in this important service; who drew my first Bill in 1850, and the one now passed, with some alterations which neither you nor I wholly approved, and who was of constant help during the long and severe struggle of its progress—above all, in sustaining my often failing hopes with a courage worthy of his grandfather (d), and the sanguine temper of his uncle (e). Next, the able and effectual support of the Chief Justice and the Vice-Chancellor in the House of Lords; and in the Commons of the Attorney-General, who so greatly distinguished himself. The Government, indeed, nobly did their duty, and were in no degree swayed by the unhappy prejudices of their Chancellor, any more than, I am confident, they will be by any efforts, in any quarter, to fulfil the late threats (if I rightly comprehend certain speeches) of re-enacting the penal code. A retrograde movement is no longer possible, were it desirable; and such men as the Lansdownes and the Russells (but one might enumerate the whole, or nearly the whole, Cabinet) never can desire it in any branch of the law.

"On one other matter I must still detain you, but not to renew my complaints of last year. The pledge then given that the *Criminal Law Digest* should be proceeded with, is still unredemmed. Thirteen months have elapsed, and nothing has been done. But I cannot shut my eyes to the difficulties of the Government during a great part of this time—difficulties arising from no fault of theirs, and most fit to be taken into our candid consideration. Let us hope that the recess will be occupied in furthering this great work of a Digest; and also that the other most important subject, to which I have so often, but especially on a late occasion, solicited the attention of the Legislature and the Government, will not escape their recollection—I mean the removing by far its greatest blot from our criminal procedure—the want of a *public prosecutor*; a defect which was so near being safely, gradually, but effectually supplied on the eve of the change of Government in 1834, when measures were concerted between the Great Seal and the Home Department for establishing such a functionary in the Central Criminal Court, as a beginning of what would immediately and easily have been extended over the whole country.

"On this subject there is, I believe, no difference of opinion between us. But I fear I have not quite the same concurrence as regards my plan of voluntary jurisdiction in all civil matters; and that you do not lament, as much as I have done, the rejection of the arbitration and reconciliation clauses in the County Courts Bill of this year—clauses which, in 1833, had been adopted with very little opposition. My firm belief is, that, facilitating the wide and voluntary termination of suits by those kinds of procedure, would be a blessing to the community, compared with which all our other reforms, whether of the equity or the common law courts, sink into insignificance. I positively think that such an arrangement as the Bill proposed, and the law as well as lay had rejected—that of giving the County Court judges full powers as *arbitrators*, and also as judges of *reconciliation*—would do more to prevent injustice and oppression, more to destroy professional chicanery and extortion, more to diffuse, through all society, the blessings of security and peace, than any scheme that ever was decreed for accelerating the progress of social improvement. I have now before me the official returns in Denmark for twenty years, ending 1846; and it appears from them that the average number of causes brought before the Reconciliation Courts was 25,500 yearly; that of these 17,600 were at once settled through the advice of the Court, voluntarily followed by the parties; that only 7,500 were left to the Courts of law, and only 2,400, or less than a tenth of the whole, brought to trial. But I do not rely on any statistics, how accurately soever given. I ask what must of necessity be the consequence of parties appearing before a respectable and wholly disinterested adviser, in the person of the local judge, appearing without any lawyer or attorney, and hearing the opinion of that judge on their own statements? What, but that all, or almost all, hopeless suits will be stopped, and all, or almost

all, groundless defences abandoned? Unless human nature is different in England and other countries, this must needs be. Our reason for approving of local courts, and of parties being made competent witnesses, rests mainly on the facilities thus given to honest plaintiffs and conscientious defendants—the obstruction thus offered to parties of an opposite character. Then, is not arbitration and reconciliation the carrying of this blessed principle to its fullest extent?

"I don't add any apology for the length of this letter, because I know how deeply you feel interested in its subject; and, indeed, in all that so nearly touches the happiness of our fellow-creatures, as the perfecting of the laws under which they live. It is very pleasing to reflect that numbers of our countrymen are either already experiencing, or likely before long to experience, the benefits of the improvements which have of late years been made. Such a feeling is recompense enough for any exertions we may have made (without either of us much consulting our physical strength); and it may be considered as a retainer for further service.

"Shall we be able to render these services effectually? My hopes are sanguine that we shall. Nothing can be more encouraging than the accounts of the manner in which the Commons received the Bills, especially the Evidence Bill; all agree in describing the 'enthusiasm for law amendment as at its height.' Such are the expressions of more than one of our friends. The progress which the cause has made within a few years is so great (bearing, indeed, some proportion to the intolerable pressure of the evils complained of), that we need not dread the efforts of its enemies, the extent of whose personal influence is happily not to be measured by the importance of their official station.

"Here, then, is ample ground of congratulation. Your letter, however, of Saturday (received as I am closing this) reminds me that it is not the only topic of felicitation at the present moment. You call upon me to interrupt law amendment, justly claiming my attention to the late most gratifying announcement of Lord Palmerston, confirming our private intelligence. I verily do hope that, in spite of the errors, the grievous errors, of our commercial legislation, over which, in consideration of other and great merits, let us draw a veil, we shall at length see the extinction of the infernal slave trade, and the final emancipation of the slave.

"As you have thus drawn me away from the amendment to the execution of the law, you must pardon me if, making a further digression, I close my congratulations with a less exciting but momentous topic—the humbler subjects of the law's dominion, and give you information which I know will gladden your heart, as it does mine. You may remember, that nearly a quarter of a century ago, with our lamented friend, Dr. Birkbeck, we experienced the difficulty of making the Mechanics' Institutes, which he had founded, available to the class of ordinary workmen and their families. Under the advice and with the aid of his worthy successor in these good works, Dr. Elliot, of Carlisle, this most important step has been taken, and I feel assured with success. The men who live by weekly wages have established reading rooms, under their own exclusive management. That this plan afforded the only means of keeping such institutions to their true object—the improvement of the humbler classes, we never doubted; indeed, we declared it, once and again, both at meetings and in publications. But at length the work is actually done, and it is delightful to see it flourish; for it must of necessity spread far and wide through the country, and produce the most blessed fruits.

"We thus have reason to be devoutly thankful for the auspicious condition of those sacred causes (not alien one to the other, but near of kin), to which we have been so long attached—the amendment of the law, the extirpation of slavery, and the education of the people.

"Brougham, 28th July, 1851."

#### THE ACT TO AMEND THE LAW OF EVIDENCE.

THIS may, without question, be regarded as the most important Act of the Session, and in its operation it will be found to be the greatest improvement that has been effected in the administration of justice within the present generation. Had this Act passed, and had such measures as are recommended by the Common Law Commissioners in their recent report been carried out some few years ago, we should have had no occasion for the sweeping legal reforms which have already taken place, and with which we are still further threatened, the public would have been satisfied with the increased facility to obtain speedy justice at a reasonable cost, and the Profession would not have been harassed by a period of transition from one state of things to another, always irksome from its uncertainty, and frequently permanently detrimental. But we do

(b) The whole discussion of Lord Denman's Bill took place in 1842, when it passed the Lords: it did not formally pass till 1843.

(c) See Art. VII. of the present number.

(d) Lord Chatham.

(e) Mr. Pitt.

not despair; this Act is a step, and a most important one, in the right path; and we feel convinced that the lawyers have only to show themselves desirous to remedy evils which are notorious and undeniable, and the public will find it to their interest to cease the hue and cry which has been raised. And moreover, when it is seen that justice can be obtained from tribunals such as the courts at Westminster, with but little more delay than is required to obtain the decision of the County Court judge, and at but a small increase of expense, it will be found that the public will rather prefer to have their differences decided under the superintendence of judges of such unimpeachable knowledge, whom the whole country regard with veneration and respect, than trust their interests to the equally well-meaning though less experienced judges of the new County Courts; and we do not doubt, that with some of the difficulties arising from the present system of pleading cleared away, the Superior Courts will again find as much business as they can attend to. Let us now see what are the alterations made by this Act, and what effect they are likely to produce. The first section repeals so much of Lord Deamman's Act as rendered incompetent as a witness "any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended either wholly or in part." This provision in Lord Denman's Act, although liberally construed by the Courts, has been one of the principal difficulties with which the Superior Courts have hitherto had to contend. In numerous cases the parties to the suit are the only persons able to give information on matters connected with the inquiry, and in almost every case they are the persons who, from their accurate knowledge of the whole transaction, can furnish the best information; and these are the persons whose testimony has been, up to the present time, rejected. The second section specifies the parties who shall be admissible as witnesses. They are, the parties to the suit, action, or other proceeding, and the persons in whose behalf such suit, action, or other proceeding may be brought or defended, who shall be competent and compellable to give evidence. Except that no person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, shall be competent or compellable to give evidence for or against himself. Nor shall any person be compellable to answer any question tending to criminate himself. And in any criminal proceeding the husband is not to be competent or compellable to give evidence for or against his wife, or the wife for or against her husband. This last exception has caused considerable discussion, the Bill, as originally passed by the House of Lords, declared that in "any proceeding, civil or criminal," the husband should not be competent or compellable to give evidence against his wife, or the wife against her husband. In this clause it will be seen, the House of Commons have introduced a very material alteration, notwithstanding the intimation from the Attorney-General that it might endanger the passing of the Bill by the House of Lords. We have heard and read many arguments against the admission of husband and wife as witnesses for or against each other under any circumstances; much has been said of the violation of domestic privacy and domestic confidence which such an enactment as that now under consideration would produce; for ourselves we think it was a prudent foresight—a farseeing knowledge of men and the influences by which they are governed, which suggested the distinction between civil and criminal proceedings, and without the admission of the husband's and wife's testimony, subject to the restriction referred to, this Act would have been, in our opinion, ineffective in its working, and in many respects injurious in its results. There are two other exceptions. The Act does not apply to proceedings instituted in consequence of adultery, or to any action for breach of promise of marriage. We can see no good reason for these two exceptions: the Courts might occasionally be much scandalised, and public decency shocked at disclosures which might be made by the examination of the parties in cases of adultery; but this objection will be found to be equally applicable to cases of seduction, which are not excepted, and might not the fear of so public an exposure operate as a further salutary

check to the commission of such offences? But no such argument as that above suggested is applicable to actions for breach of promise of marriage; the disclosures would not be more inconvenient than those already made by the production of letters and other evidence admissible in such cases.

The Act is not to repeal the provisions of the Wills Amendment Act.

By the 6th section the Common Law Courts are authorised to compel the inspection of documents, and, if necessary, the taking examined copies of the same in all cases in which a Court of Equity would grant discovery. It is to be observed that as this most useful provision is not extended to the County Courts, in all cases in which it is desirable to take advantage of it the action must be brought in one of the Superior Courts. The Act then contains provisions that foreign and colonial Acts of state, judgments, decrees, orders, &c. may be proved by certified copies, without proof of the seal or signature, or judicial character of the person signing the same. That apothecaries' certificates shall be admissible in evidence without proof of the seal. That documents admissible without proof of the seal or stamp or signature authenticating the same in England or Wales shall be equally admissible in Ireland. And those admissible without such proof in Ireland shall be admissible in England and Wales. And that all documents admissible without such proof in England, Wales, or Ireland shall be admissible in the colonies; and that registers of vessels and certificates of registry shall be admissible as *prima facie* evidence of their contents. The 13th section provides, that whenever it is necessary to prove the trial and conviction or acquittal of any person charged with an indictable offence, it shall not be necessary to produce the record, or a copy thereof, but a certificate under the hand of the clerk of the court shall be sufficient. By the 14th section, whenever any document is of such a public nature as to be admissible in evidence on production, examined or certified copies or extracts are made admissible, on proof that they are examined copies or extracts, or that they are certified so to be by the officer having the custody of the original, and such copies to be furnished on payment of a sum not exceeding four pence for a folio of ninety words. Certifying false documents is declared a misdemeanor punishable by imprisonment not exceeding eighteen months.

The 16th section authorises every Court, judge, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to receive and examine evidence, to administer oaths. The words of this section may at first appear to be very large, and likely to lead to irregularities, as not sufficiently supporting the solemn obligation of an oath; but we think, when it is considered how often justice has failed for want of some such power, the objections that have been expressed to this clause will be withdrawn. Within the last few months it was decided by the Court of Criminal Appeal, that an arbitrator appointed under the 77th section of the County Courts Act has no authority to administer an oath, because that statute did not expressly authorise him so to do: and it was held, that an indictment for perjury before such arbitrator, could not therefore be supported.

By the 17th section, any person forging the seal, stamp, or signature, of any document referred to in the Act, or knowingly tendering in evidence any such document with a false seal, is declared guilty of felony, and liable to be transported for seven years, or to be imprisoned for not more than three years or less than one year, with hard labour.

The Act is not to extend to Scotland. It is to come into operation on the first day of November next; so that all causes tried after that date, whether already commenced or hereafter to be brought, will be subject to its provisions.

#### LIBEL CASES UNDER LORD CAMPBELL'S ACT. (a)

(Concluded from page 18.)

If words charged to be libellous may, in their ordinary acceptance, and without the aid of extrinsic circumstances, be reasonably understood as derogatory to the character of the plaintiff, judgment cannot be arrested. So where the words used are in terms general, and the innuendoes apply them to the plaintiff, and the jury so find, the judgment cannot be arrested. Thus, a passage in a newspaper warning certain persons to avoid the traps

(a) By GEORGE HARRIS, esq. Barrister-at-Law.

laid for them by desperate adventurers—innuendo, meaning the plaintiff amongst others,—was, after verdict, held to be libellous. See as to this principle, *Le Fawn v. Malcolmson*, 1 H. of Lords Cas. 637. A declaration in libel, after an inducement, inserted before the first count, that the plaintiff was a barrister, and the editor and proprietor of a weekly publication called *The Medical Times*, &c. charged in the second count, that the defendant, in a certain publication, &c. published, &c. omitting the words "of and concerning the plaintiff as the editor of the said weekly publication." It then set out the libel, in which the following words were complained of as libellous: "A body which has disgusted the Government, and all other persons, not belonging to the Profession (thereby meaning the plaintiff as such barrister as aforesaid), and whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt"—(thereby meaning that the plaintiff was in the habit, as editor of the said weekly publication called *The Medical Times*, as aforesaid, of bringing the medical profession into disrepute and contempt). It was held on writ of error in the Ex. Ch. that the words themselves were actionable, the jury having found that they were derogatory to the plaintiff, and that the innuendo might be rejected as surplusage. (*Wakley v. Healey*, 18 L. J. 241, C.P.)

Where the alleged libel was a complaint made by the defendant of the incompetency of the plaintiff, a surveyor who had been sent to him for employment; and the innuendo charged that the defendant meant that the plaintiff was not a competent and skilful surveyor, it was held that evidence of the general competency and abilities of the plaintiff was admissible to shew malice. (*Brine v. Beazalgette*, 18 L.J. Ex. 348.)

In an action for libel, in order to prove that the defendant had published the libel, which was contained in a printed pamphlet, a witness was called, who stated in substance, that the defendant gave her a copy of the pamphlet; that she lent it several times to persons, expecting that they would return it to her; that the persons to whom she had lent it had returned her the same, or a copy, but that she could not swear it was the very same, though she had no reason to doubt it. It was held, that there was evidence for the jury that the pamphlet returned to the witness was the same given to her by the defendant. (*Fryer v. Gathercole*, 18 L.J. Ex. 389.)

A libel upon the plaintiff, amongst other imputations, contained charges of misconduct in relation to his office of Coroner for Middlesex, on an inquest at Hounslow, and concluded in these terms:—"There can be no court of justice unpolished which this 'libellous journalist' (meaning the plaintiff), this violent agitator and sham humanitarian, is allowed to disgrace with his presidentialship." The defendants, in justification of the words "libellous journalist," pleaded that the plaintiff, on the 29th of March, 1838, being the proprietor of a public journal, intending to injure one C. in his profession, published of him a false, scandalous, malicious, &c. libel, setting it out. The proof was, that in the year 1828 an action of libel had been brought by C. against the plaintiff, in respect of the said libel, published by the plaintiff as proprietor of the *Medical Times*, in which action 100*l.* damages had been recovered. It was held, that the words "libellous journalist" imputed to the plaintiff habitual libelling and moral misconduct, and that the question was, whether the libel on C. was a scandalous and malicious libel, and that the defendant ought to have produced other evidence than that of the record of that action for the purpose of proving that it was a scandalous and malicious libel. (*Wakley v. Cooke*, 19 L.J. 91, Ex.)

With regard to the interference of the Court to stay proceedings in an action of libel, seven actions having been brought against the defendant by the same plaintiff for different publications of the same libel, a rule was made absolute for staying proceedings in all but one, until that one was tried. (*Jones v. Pritchard*, 18 L.J. Q.B. 104.) In another case the plaintiff brought an action of slander against D. who justified. The cause was tried, the plaintiff nonsuited, and the defendant's costs taxed at 40*8*l.** The plaintiff then brought a second action (in form *pauperis*) for substantially the same slander as was complained of in the former action. The Court, on motion, stayed the proceedings in the second action till the costs of the first action should be paid. (*Hoare (a pauper) v. Dickson*; *Hoare (a pauper) v. Dickinson*, 18 L.J. C.P. 158.)

The case which follows has been recently decided

by the Court of Q. B. in Ireland. A. a married woman preferred before B. a justice of the peace, a charge against C. the curate of the parish, which amounted as well to a misdemeanor as to a breach of ecclesiastical discipline. B. did not take the information of A. but reduced her statement into the form of a voluntary declaration, which she thereupon made and signed, as under the 5 & 6 Wm. 4, c. 62. B. then inclosed the document in an envelope, and handed it over to A. for transmission to the rural dean of the diocese. B. acted thus at the request of the dean, in order that the document in question might be laid before an ecclesiastical tribunal. An action of libel having been brought by C. against B. and no notice of action having been given to B. pursuant to 12 & 13 Vict. c. 16 (Irish), it was held that however irregular these proceedings might have been, it was a question for the jury whether the defendant *bond fide* believed that he was acting within his jurisdiction as a magistrate, and that if they found in the affirmative the defendant was entitled to a month's notice of action. It was held also that, under the circumstances of the case, the acts of the defendant were privileged, and therefore protected, provided that the jury were of opinion that he acted *bond fide*, and without malice. (*Little (clerk) v. Lord Viscount Clements*, 3 Ir. Jur. 131, Q.B. Ireland.)

The case above referred to of *Wakley v. Cooke and Another* came under the consideration of the Courts in another form as regards the law of libel,—that of a criminal information. Previous to the commencement of the action in Michaelmas Term 1846, the plaintiff applied for and obtained a rule nisi for a criminal information against the defendants in the Court of Q. B. for publishing the same libel, which rule, after argument, was discharged in the following Hilary Term. A rule nisi was afterwards obtained to show cause why the first count of the declaration, which set out the libel at full length, with the innendoes, should not be struck out, on the ground of the proceedings for the criminal information in the Court of Q. B. It was held, however, that an application to the Court of Q. B. for a criminal information against a party for the publication of a libel, which application has been refused, is no bar to an action on the case in the other courts for the same ground of complaint. (*Wakley v. Cooke and Another*, 16 M. & W. 822; 16 L.J. Ex. 225.)

## THE MERCANTILE LAWYER.

*Marine Insurance* is a fertile source of litigation, and the questions growing out of it are often extremely difficult to be determined, it being impossible for any law to anticipate the infinite complication of circumstances to which it is to be applied. *Stainbank v. Fenning*, 17 Law T. 255, was another of these delicate cases. The master of a ship had borrowed money for repairs; he drew on the owner and consignee for the amount, and gave to the lender an instrument that purported to pledge the vessel, cargo, and freight, and agreed that if bills were refused acceptance or dishonoured the lenders might take possession and sell under process of the Admiralty Court, according to the maritime law of England. It was also thereby declared that the lender forbore any premium or maritime interest upon the risk of the advances, that the voyage was at the sole risk of the owner, and that the advances, with the premiums for insurance, were to be recoverable from the owner, whether the vessel arrived safely or not. It was held that the master was not authorised to pledge both the ship itself and the personal credit of the owner; that the payment of the advances not depending upon the safe arrival of the vessel, the Admiralty Courts had no power to enforce the sale, and therefore that the lenders had not an insurable interest in the vessel. The law on this subject is very clearly laid down in the judgment, thus—

"By the Roman Law, and still in those nations which have adopted the Civil Law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship, without a formal instrument of hypothecation; but by the law of England no such right can be acquired except by express agreement, and a master can only make such an agreement if he act within the scope of his authority. The right to raise money upon bottomry can only be justified by necessity. If a master in a foreign country wants money to repair or victual his vessel, or for other necessities, he must, in the first instance, endeavour to raise it upon the credit of his owners. If he can do so he

has no authority to hypothecate the vessel; but if he cannot otherwise obtain the money, then he may hypothecate the ship, not transferring the property in the ship, but giving the creditor a privilege or claim upon it to be carried into effect by legal process upon the termination of the voyage. As incident to this transaction, the lender may, if he think fit, insist upon maritime interest; but whether he do so or not, the advance is made upon the credit of the ship, and the owners are never personally responsible."

Another case in the same branch of the law is that of *Beldon v. Campbell*, 17 Law T. 257. It will be gathered from the preceding case that the master of a ship has authority to bind the owner for necessary repairs. It was here decided that he has also power to borrow money for that purpose, but only where a ready money payment is absolutely necessary, as for port dues, &c. When it is practicable, he is also bound, first, to communicate with the owner, and in no case can he bind the owner for money lent for the purpose of paying a debt already incurred.

A point has been decided on the construction of the 125th and 141st sections of the Bankruptcy Consolidation Acts. It was held by a majority of the Court that the bankrupt's own property passes by the adjudication under the 141st section, but that an order of the Court under the 125th section must be obtained before the right of property and possession can be divested. (*Heeslop v. Baker*, 17 Law T. 257.) And in *Es parte Clegg*, 17 Law T. 259, it was held that under the 230th section creditors, though resident in England, may vote by letter of attorney at a meeting of creditors.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

The Queen has been pleased to appoint Joseph Cuffe, esq. to be Registrar of the Supreme Court of the Island of Ceylon.

Lord Colville, of Culross, is chosen to represent the peerage of Scotland in the Parliament of the United Kingdom of Great Britain and Ireland, in the room of James Andrew John Lawrence Charles Viscount Strathallan, deceased.

The Right Hon. George Augustus Constantine Henry Phipps (commonly called the Earl of Mulgrave), and the Right Hon. Laurence Sullivan, have been by her Majesty's command sworn of her Majesty's most Honourable Privy Council, and took their respective places at the Board accordingly.

Mr. Arnold, the magistrate at Worship-street, will take the place of Mr. Burrell, in the Westminster court at Queen-square, and will be succeeded at Worship-street by Mr. D'Eyncourt, the newly-appointed magistrate of the police district.

Hugh Low and P. W. Boudier, esqrs. are appointed members of the council at Labuan. Capt. Knight, now superintendent of military prisons in Canada, is appointed superintendent of the convict prison at Portland, in succession to Capt. Whitty, promoted to be a member of the Board of Government Prisons in London.

Mr. Headlam, of the Chancery Bar, M.P. for Newcastle-upon-Tyne, will, we understand, be immediately added to the list of Queen's counsel.

## CORRESPONDENCE.

### ETIQUETTE.

TO THE EDITOR OF THE LAW TIMES.

SIR,—We shall be "judging at the gate" by and by. The spirit of reform strides most rapidly over the land,—his iron heel is on abuse which will be, as it deserves, crushed. Cheap law is not incompatible with good law; but when people find that the conveyancer delights in verbiage, the pleader in quibbles, and the Bar in etiquette (all of them indices of high fees and dear law), and that neither branch of the Profession has taken the initiative in any kind of amendment, is it at all surprising that common sense should step in and insist upon it?

You may possibly ask what the *etiquette* of the Bar has to do with it? Part of that etiquette prevents a Queen's counsel holding a brief without a junior. Etiquette, again, insists that on every appeal (however paltry) at Quarter Sessions two counsel at least must be employed on each side! Is this right? Is it endurable?

I am, Sir, yours, &c.

A COUNTRY ATTORNEY.

Worcester, Aug. 3, 1851.

TO THE EDITOR OF THE LAW TIMES.

SIR,—We live in an age when much is introduced to lessen the incomes of attorneys, and I think innovations that we can stay we ought to stay.

There can be no doubt attorneys are some of the best customers bankers have, and they should therefore restrain their clerks, who, in very many instances, perform what strictly belongs to attorneys, particularly testamentary matters.

I am of opinion this is a subject for discussion, and I am anxious to hear if my brethren approve of a meeting in London.

I am, Sir, yours, &c.

MATTHEW KENNETT.

Dover, August 6, 1851.

## LEGAL INTELLIGENCE.

### The Assizes.

#### OXFORD CIRCUIT.

MONMOUTH, August 7.—The commission was opened here yesterday by Mr. Baron Martin. The Crown Court was opened for business to-day at ten, and the Nisi Prius at twelve. In the latter court were four causes for trial, of which one was marked for a special jury—two of the others have engaged the attention of the court all day. The calendar contained the names of 50 prisoners. Of these 2 are charged with perjury, 3 with forgery, 5 with burglary and housebreaking, 2 with assault and robbery, 2 with murder, 9 with stabbing, cutting, and wounding, 1 with assaulting a constable, 1 with bigamy, 1 with rape, and the rest with larcenies and other cases commonly disposed of at sessions.

GLOUCESTER, Aug. 9.—The commission for this city was opened this evening, the judges being Baron Martin and Mr. Justice Erle. Business will commence on Monday; Mr. Justice Erle sitting at Nisi Prius, and Baron Martin in the Crown Court. The calendar is unusually light for a Gloucester assize, but there are two prisoners charged with murder; two with manslaughter; two with rape; and several with burglary, forgery, and highway robbery.

#### HOME CIRCUIT.

CROYDON, Aug. 8.—The commission for the county of Surrey was opened on Thursday, and this morning business was proceeded with in both courts at ten o'clock, Lord Chief Justice Jervis presiding on the Civil Side, and Mr. Baron Alderson in the Crown Court. There are eighty-one causes for trial, nine of which are special jury cases. A great many of the others are undefended, and the list, it is believed, will turn out very rotten. The gaol calendar only contains nine cases, and all the charges are of the most ordinary description.

#### WESTERN CIRCUIT.

BRIDGEWATER, Aug. 8.—Lord Campbell, in his charge to the grand jury, congratulated them upon the decrease observable in crime, the prisoners being fewer by 131 than in the preceding year.

BRISTOL, Aug. 14.—The Lord Chief Justice Campbell arrived in this city yesterday, for the purpose of holding the annual assize of Nisi Prius, and was received at the railway terminus by the High Sheriff, J. W. Daubeny, Esq., accompanied by the city officers, and the usual cavalcade. The cause list is a light one, containing entries of 21 cases, three of which have been set down for special juries. As far as I can learn there are few, if any, cases of public interest, the only two which promised any amusement to the gossips having been settled a few days since.

#### NORTHERN CIRCUIT.

CARLISLE, Tuesday, Aug. 5.—Mr. Justice Williams opened the commission here yesterday. The calendar contains the names of 21 prisoners, one of whom is charged with murder, four with manslaughter, two with burglary, one with shooting at with intent, &c. one with forgery, one with rape, two with highway robbery, and the rest with minor offences. The cause list contains an entry of seven cases, four of which are marked for special juries, and one or two of them are said to be very heavy and important cases.

APPLEBY, Aug. 8.—Mr. Baron Platt opened the commission here last night at half-past ten o'clock. His lordship and the Bar were entertained by the Earl of Lonsdale at Lowther Castle on their way from Carlisle. Mr. Justice Williams was detained at Carlisle by the heavy cause list there. This morning Mr. Baron Platt attended divine service at St. Lawrence Church. The calendar contains 6 cases, all larcenies, in which seven prisoners are implicated. Only two civil causes have been entered, one ejectment to recover the possession of a Wesleyan Chapel, and the other trespass respecting a right of way.

APPLEBY, Aug. 9.—Mr. Baron Platt arrived at this town late on Thursday night from Lowther Castle, where his lordship and the bar had been invited to dine by the Earl of Lonsdale, according to ancient custom. The commission was immediately

opened before his lordship on his arrival. Yesterday, having attended divine service, his lordship proceeded to court at 11 o'clock, and having charged the grand jury, began with the civil business. The calendar contained the names of seven prisoners, all charged with ordinary larcenies. There were two causes—an ejectment and a trespass to try a right of road.

**LIVERPOOL, Aug. 24.**—These assizes commenced yesterday afternoon, at four o'clock, in the Crown Court, before Mr. Bliss, Q.C. who had been deputed by their lordships, Mr. Baron Platt and Mr. Justice Williams. The court list contains the names of 192 prisoners. Of these, 7 are charged with murder, two persons being jointly charged in one of the cases, namely, James Waddington and his wife, for the murder of their step-daughter, at Manchester. The other murder cases are those of Thomas Threlfall, an ex-policeman of this town, for the murder of his wife, nineteen years ago, and Ann Shaw, for killing her infant child, at Ashton-under-Lyne; Elizabeth Swinnerton, for causing the death of her step-daughter by starvation and ill-usage; Mary Ann Powell (supposed to be insane), the wretched woman who so recently destroyed two of her children in this town, under the most distressing circumstances; and a man from Manchester, for the murder of an inmate of a house of ill-fame. None of these cases, however, except from the fact of the enormity of the offences charged, are likely to possess more than ordinary interest.

#### NORTH WALES CIRCUIT.

**CHESTER, Aug. 11.**—The business of the assizes for this county commenced this day at the Castle. The calendar contains the names of fifty criminals, of whom two are charged with murder, ten with highway robbery, two with rape, nine with burglary, one with arson, and the rest with various other offences. Mr. Justice Talford presides in the Crown Court, and Mr. Justice Wightman on the other side. The cause list is heavier than it has been for many years past. It contains twenty-one entries, of which four are special jury cases.

#### NOTICES OF NEW LAW BOOKS.

*Patentable Invention and Scientific Evidence, with an Introductory Preface.* By WILLIAM SPENCE. London: Stevens and Norton.

THE great alterations that have been made in the patent law will occasion a general demand for such a treatise as this, which is a learned essay on the nature of Scientific Evidence in its application to Patentable Inventions. It reviews all the cases in which this question has been raised, points out the defects in the existing system, and proposes some improvements, which will be well worthy of the attention of those to whom will be intrusted the investigation of applications for patents under the new regime.

*The Judges of England: with Sketches of their Lives, and Miscellaneous Notices connected with the Courts at Westminster. From the time of the Conquest.* By EDWARD FOSS. Vols. 3 and 4. Longman and Co.

THE two first volumes already published of this work, so interesting to the lawyer, contained, we cannot say the biographies, but the records of no less than 605 judges who flourished in eight reigns. As the period of legal memory commences we find that more has been preserved for the information of posterity, and accordingly the present volumes, which extend from the reign of Edward the First to that of Richard the Third, do not contain more than about 300 notices, very few of which are entitled to be termed biographies. But this is not the fault of Mr. Foss, but of his subject; and perhaps it is fortunate both for himself and his readers; for if Lord CAMPBELL could make so many pleasant volumes out of the Lives of the Lord Chancellors and Chief Justices, to what a library would Mr. Foss's work extend if, in addition to all that Lord CAMPBELL has given, he were to produce at equal length, the Lives of the Judges, both of the Courts of Chancery and of the Common Law.

The reader, therefore, must not be surprised if he finds Mr. Foss's volumes, so far as they have gone, rather a work for reference, and for perusal here and there, than for continuous reading. To lawyers it will be acceptable, as a valuable book of reference, full of various information upon the history of law, law courts, and lawyers, in which the author is profoundly versed, and which have been gathered by Mr. Foss with laborious industry, and the greater portion of which will be new to the reader. For this alone it should have a place in every legal library, apart from its worth as a history of the law, which, in fact it is. We regret that we cannot find space for many extracts from a work so

full of matter tempting to quotation, but with new statutes and reports pressing upon us, the arrears of the legal year, we must content ourselves with a single passage:—

Even in this reign we have clear evidence that common pleas still continued to be heard in the Exchequer. In 5 Edward I. the king addressed a writ to the barons of that court, prohibiting them from holding a certain plea between private parties then before them, or any other common pleas, contrary to the tenor of Magna Charta. This was repeated in the Statute of Rutland, 10 Edward I. 1282, whereby, after stating that pleas were taken in the Exchequer, which did not concern the king and the officers of that court, by which not only the king's pleas, but the causes of the people were unduly protracted and impeded, it is expressly enacted that no plea shall be holden there unless it specially concerns the king or the said officers. Again, in the Articuli super Cartas, 28 Edward I. 1300, a similar provision was introduced: and so difficult was it entirely to stop the practice, that the prohibition was renewed by a royal ordinance two years afterwards.

The court was generally held at Westminster, but some instances occur during this reign of its being held in other places. In Michaelmas, 8 Edward I. it sat at Shrewsbury; in 18 Edward I. it was ordered to be transferred to the hustings of London, and in the twenty-sixth year the king caused it to be removed to York, commanding the sheriff to fit up the castle hall with a square chequer-board, and seats for the treasurer, barons, and officers, with a bar for those who attend to plead there.

The barons of the Exchequer seem all to have been equal in rank, having no other distinction than that of seniority. The office of chief baron had not yet been introduced; although some authors so designate Adam de Stratton when he was disgraced and fined, in 18 Edward I.; and Dugdale inserts William de Carleton in his list, with that title, in 31 Edward I. Stratton, however, was only an officer, and not even a baron of the court; and the authority quoted by Dugdale in support of his assertion as to Carleton, so far from establishing it, contains no expression capable of such an interpretation, but grants precisely the same salary, forty marks per annum, to him and to Peter de Leicester, they being then the two senior barons.

The Issue Roll of 19 Edward I. contains an entry of some curious payments made to the usher of the Exchequer: from which we learn that the salary of that officer was 5d. a day; that three scribes had each the same salary; that the two chamberlains received 8d. a day, and the four tellers only 3d. a day.

A preliminary chapter to each reign describes the state and progress of the law, and usually includes many curious particulars relating to the customs of the Courts, the etiquette of the Profession, and other matters which have descended in form to the present time, but of which we have quite forgotten the meaning and the origin. Should an opportunity offer hereafter, perhaps we may present some of these to our readers.

*Bar Etiquette: with an analytical Account of the Alteration proposed by the Common Law Commissioner.* By JAMES STEPHEN, Esq. Barrister-at-Law.

WE cannot approve Mr. STEPHEN's proposal that the Bar should rescind its rule forbidding a brief to be taken without the intervention of an Attorney. It would lead inevitably to that which is most to be deprecated—the union of the functions of Advocate and Attorney, and the consequent injury of both, as is proved by the experience of all countries and of all courts in which the distinction is not observed. Mr. STEPHEN justifies it as a measure of self-defence. But we doubt if it be so. We question whether the Attorneys as a body are desirous of destroying the Bar; we believe that a majority of them would prefer to maintain the established arrangement, and to continue to act together, rather than to enter the lists as rivals. It is, therefore, only in the last extremity that we could bring ourselves to approve the pulling down of the barrier which has hitherto marked the boundaries of the duties of the two branches of the Profession, and the admission of the Bar to play the part of Attorneys. No good could come of it, and much harm must follow. The fair and reasonable course will be that which we have proposed, and which, we are happy to say, has met the decided approval of the most respectable attorneys in all parts of England, that some rules for their mutual regulation, adapted to the new circumstances in which they are placed, should be framed by the common consent of both, and which should be held as the rules of Professional Etiquette on both sides, to be

enforced by the same honourable feeling which now acts upon the Profession with more than the strength of a law.

Such an arrangement we hope to be the means of bringing about as soon as the Legal Year begins, and till then we trust that on neither side will anything be said or done to provoke rivalry or ill will. Let us remain as we are for the present, resolved, if it can be done, that the interests of all shall be protected, and the status of the whole Profession maintained. It must not commit suicide. By temperate and judicious conduct just now, in this crisis of its fate, we believe it may be made more flourishing than it has ever yet been.

#### BIRTHS, MARRIAGES, AND DEATHS.

##### BIRTHS.

**BRIGHT.**—On the 13th inst. at One Ash, Rochdale, the wife of John Bright, M.P. of a son.  
**FALKNER.**—On the 9th inst. at Lion-cottage, Son-hill, Bath, the wife of Francis Falkner, esq. of a daughter.  
**HARDCASTLE.**—On the 13th inst. at Brighton, the wife of Joseph Hardcastle, esq. barrister-at-law, of a son.  
**UNTHOFF.**—On the 12th inst. at Stonefall, near Knaresborough, the wife of Edward Unthoff, esq. of a son.

##### MARRIAGES.

**BAGOT,** the Hon. William, M.P. to the Hon. Lucie Agar Ellis, eldest daughter of the Lady Dover, on the 12th inst. at St. James's Church.  
**BEVAN,** Frederick Robert, esq. second son of Robert Bevan, of Bury St. Edmunds, esq. banker, to Eliza, younger daughter of the late Robert Emily Loft, of Troston Hall, esq. on the 7th inst. at Troston Church, Suffolk.  
**BROWN,** Charles, esq. M.A. late Scholar of Worcester College, Oxford, and of Lincoln's-inn, barrister-at-law, to Mary, fourth daughter of James Nicholson, esq. of Kingland, on the 12th inst. at the Church of the Holy Trinity, Tottenham.  
**FREELING,** Charles Rivers, esq. of Queen Anne-street, barrister-at-law, son of the late Sir Francis Freeling, bart. to Emma Amelia, eldest daughter of the Rev. Edward Leard, M.A. rector of Winterlow, on the 12th inst. at Winterlow, Wilts.

**GREVILLE,** Peniston Grosvenor, esq. of Lombard-street, solicitor, son of the late Rev. Joshua Greville, vicar of Duston, to Louisa, daughter of the late Arthur Greville, esq. and granddaughter of the late Rev. Robert Greville, rector of Wyaston, on the 12th inst. at St. John's, Holloway.

**STANFILL,** Charles Gibbons, of Eccles-street, Dublin, solicitor, youngest son of Thomas Stanfill, esq. of Tickhill, Yorkshire, to Margaret, youngest daughter of the late Captain Samuel Atkell, of the Hon. E. I. Co.'s Bombay Engineers, on the 12th inst. at the Church of St. Francis.

**TOWNLEY,** Charles Watson, esq. eldest son of R. Greaves Townley, esq. M.P. of Fulbourne, Cambridgeshire, to Georgiana, fourth daughter of M. D. D. Dalson, esq. of Hampton, Kent, on the 12th inst. at West Peckham, Kent.

**WILLIAMS,** Joshua, of Lincoln's-inn, and of Newington-hall, Stoke Newington, Middlesex, esq. barrister-at-law, to Martha, second daughter of the Rev. Cyprian Thompson, incumbent of Fawley, on the 12th inst. at Fawley, Staffordshire.

##### DEATHS.

**MORTLOCK,** Jane, wife of Henry Mortlock, solicitor, on the 8th inst. at Caxton, aged 54.  
**RUSHBROOK,** Frances, relict of the late Robert Rushbrooke, esq. of Rushbrooke-hall, Suffolk, and M.P. for the Western Division of that county, on the 8th inst. at Bury St. Edmunds.

**WARNER,** Frances, daughter of John Warner, esq. barrister-at-law, on the 6th inst. at Kaling, aged 3.

#### JOURNAL OF PROPERTY.

By Mr. MOORE, at the Auction Mart, on Thursday, August 14, 1851, at Twelve o'clock.

Two Leasehold Houses, Nos. 104 and 105, Vauxhall-walk, High-street, Vauxhall; let at 30s. each, tenants paying taxes; term 34 years; ground-rent, 4l. 10s. 6d. Sold—235l.

Four Cottages in Arbour-gardens, Stepney; let at 36l.; vendor paying rates; term, 27 years; ground-rent, 6l. —126l.

Three Leasehold Houses in Thomas-terrace, Bancroft-place, Stepney; rental, 63l.; tenants paying taxes; term, 55 years; ground-rent, 6l. In 3 lots—440l.

#### MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	215	215½	215½	215½	215½	215½
3½ Cent. Reduced Annuities	97½	97½	97½	97½	97½	97½
3½ Cent. Consols Annuities	96½	96½	96½	96½	96½	96½
Consols for Account	96½	96½	96½	96½	96½	96½
New 3½ Cent. Annuities	96½	96½	96½	96½	96½	96½
Long Annu. (exp. Jan. 5, 1860)	..	..	..	7	7	7
Do. 30 yrs. (exp. Oct. 10, 1859)	..	7½	..	..	..	..
Do. 30 yrs. (exp. Jan. 5, 1860)	..	..	..	..	..	..
India Stock	263	..	..	261	260½	..
India Bonds (1,000l.)	58	57	57	57	58	58
Do. do. (under 1,000l.)	..	57	57	57	58	58
South Sea Stock	..	..	..	..	..	..
Do. do. New Annuities	..	..	..	..	..	..
Exchequer Bills, 1,000l.	46½	46½	46½	46½	46½	46½
Do. do. 500l.	46½	46½	46½	46½	46½	46½
Do. do. Small	46½	46½	46½	46½	46½	46½
Do. Advertised	..	..	..	..	..	..

\* Premiums.



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## THE GAZETTES.

## Bankrupts.

Gazette, August 12.

CHERRY, SAMUEL, broker, Liverpool, Aug. 25 and Sept. 16, at eleven, Liverpool. Off. as Morgan. Sol. Norris, Liverpool. Petition, Aug. 11.

CLAY, EDWARD, linen draper, Eastry, Kent, Aug. 21, at half-past twelve, Sept. 25, at half-past eleven, Basinghall-st. Off. as Whitmore. Sol. Buchanan, Basinghall-st. Petition, Aug. 11.

JACKSON, RICHARD, organ builder, Liverpool, and Bolton-le-Moors, Lancashire, Aug. 27 and Sept. 18, at eleven, Liverpool. Off. as Cazenove. Sol. Dodge, Liverpool. Petition, Aug. 7.

MILLAR, FREDERICK, livery stable keeper, Hippodrome-stables, St. John's-wood, and Sheppard-st. May-fair, Aug. 21 and Sept. 25, at one, Basinghall-st. Off. as Cannan. Sol. Holmes, Fenchurch-st. Petition, Aug. 7.

MOTT, RICHARD, tailor, Graecchurch-st. Aug. 18, at half-past one, Sept. 25, at two, Basinghall-st. Off. as Cannan. Sols. Vincent and Gabriel, Inner Temple-lane. Petition, Aug. 11.

NEWTON, JOHN, sen. boat owner, Washington, Lincolnshire, Aug. 20 and Sept. 17, at half-past twelve, Kingston-upon-Hull. Off. as Carrick. Sols. Scott and Tahourdin, Lincoln's-inn-fields; Toynbee, Lincoln; and Stamp, Hull. Petition, Aug. 6.

PHILLIP, JOHN BIRNIE, CLAYTON, JOHN RICHARD, WYNNIE, AGAN EDWARD, and LUMSDEN, JOHN, builders, East-st. Manchester-square, Aug. 20, at half-past one, Sept. 20, at one, Basinghall-st. Off. as Stansfeld. Sols. Messrs. Linklater, Charlotte-row, Mansion-house. Petition, Aug. 8.

PIPER, THOMAS FOOT, wholesale stay maker, Laurence-lane and Bishopsgate-st. City; Victoria-road, Pimlico; and Landport, Hampshire, Aug. 18, at twelve, Sept. 18, at one, Basinghall-st. Off. as Bell. Sol. Cox, Pinners'-hall. Petition, Aug. 2.

POWELL, WILLIAM, builder, Jeffery's-st. Camden-town, Aug. 18, at twelve, Sept. 18, at half-past eleven, Basinghall-st. Off. as Cannan. Sols. Lawrence and Co. Old Jewry-chambers. Petition, Aug. 6.

RICHARDSON, THOMAS, cutler, Liverpool, Aug. 21 and Sept. 18, at eleven, Liverpool. Off. as Turner. Sol. Hime, Liverpool. Petition, Aug. 6.

SEYMOUR, RICHARD, grocer, Downham, Cambridgeshire, Aug. 23, at half-past one, Sept. 20, at half-past twelve, Basinghall-st. Off. as Graham. Sols. Trinder and Eyre, John-st. Bedford-row; and Archer, Ely, Cambridgeshire. Petition, July 31.

VEYERS, JOHN, woollen warehouseman, Ironmonger-lane, City, Aug. 18, at twelve, Sept. 18, at two, Basinghall-st. Off. as Johnson. Sol. Bloyd, Milk-st. Cheapside. Petition, July 31.

Gazette, Aug. 15.

BAIRD, WILLIAM, paperhanger, Liverpool, Aug. 27 and Sept. 16, at eleven, Liverpool. Com. Perry. Off. as Cazenove. Sol. Grocott, Liverpool. Petition, Aug. 12.

BRAIL, HENRY, bookseller and publisher, 2, Shoe-lane, Fleet-st. Aug. 22, at twelve, Sept. 27, at eleven, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Forster, 6, Crosby-sq. Petition, Aug. 8.

DAVEY, THOMAS, jun. builder, Halsted, Essex, Aug. 22, at two, Sept. 27, at one, Basinghall-st. Com. Fane; Off. as Cannan. Sol. Parker, 8, Gray's-inn-sq. and Chelmsford. Petition, Aug. 12.

DONOVAN, WILLIAM FREDERICK, poulterer and egg merchant, 267 and 292, Oxford-st. Aug. 21, at half-past one, Oct. 3, at eleven, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Smith and Page, 13, Duke-st. Manchester-square. Petition, Aug. 2.

FRENY, MANUS, and GARD, JOHN, woollendrapers, St. Martin's-lane, Aug. 29 and Sept. 27, at twelve, Basinghall-st. Com. Fane. Off. as Cannan. Sols. Reed, Langford, and Marsden, 59, Friday-st. Cheapside. Petition, Aug. 12.

NOCK, GEORGE, and WILLIAMS, JOHN, goldsmiths and jewellers, 18, Frith-st. Soho, Aug. 22, at ten, Oct. 3, at twelve, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Teague, 5, Crown-court, Cheapside. Petition, Aug. 9.

OLBY, CHRISTOPHER, ship and insurance broker, Newcastle-upon-Tyne, Aug. 26 and Oct. 7, at one, Newcastle-upon-Tyne. Com. Ellison. Off. as Wakley. Sol. Phillips, Newcastle-upon-Tyne. Petition, Aug. 5.

PAUL, JOHN, milliner and straw-bonnet dealer, 118, Oxford-st. Aug. 22, at half-past twelve, Sept. 27, at two, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Seaman, 12, Pancras-lane. Petition, Aug. 12.

SMALL, GEORGE, tailor, draper, and hatter, High-st. Folkestone, Kent, Aug. 23, at eleven, Sept. 20, at half-past one, Basinghall-st. Com. Fonblanque. Off. as Graham. Sols. Willoughby and Cox, 13, Clifford's-inn. Petition, Aug. 12.

## Dividends.

## BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

Bennett, H. corn dealer, first, 1s. 7d. Graham, London.—Cansdale, J. M. draper, first, 5s. 6d. Groom, London.—Carr, C. cotton manufacturer, third, 2d. and 125-256ths of a 1d. Lee, Manchester.—Chadwick, A. cotton spinner, first, 7s. 6d. Mackenzie, Manchester.—Gideon, D. clothier, first, 6s. Stansfeld, London.—Graham, J. upholder, second, 1s. 2d. Graham, London.—Gray, N. common brewer, first, 1s. 2d. Graham, London.—Horsfield, T. and J. coal dealers, 6s. 6d. Morgan, Liverpool.—Hunt, J. builder, second, 10d. Graham, London.—Leake, F. relievo leather manufacturer, first, 1s. 0d. Graham, London.—Lee, W. T. merchant, first, 10s. Hope, Leeds.—Perry, J. grocer, second, 2s. 9d. Groom, London.—Ryder, J. and E. drapers, first, 2 1/2d. Hope, Leeds.—Smith, R. corn merchant, second, 1 1/2d. Lee, Manchester.—Smith, S. grocer, final, 1s. 4d. and 11-16ths of a 1d. Mackenzie, Manchester.—Stahle Schmidt, H. G. merchant, first, 1s. 4d. Stansfeld, London.—Webb, J. straw plait dealer, first, 7 1/2d. Graham, London.—Wright, J. corn merchant, &c. second, 1s. 9d. Graham, London.—Wyrill, W. ironmonger, first, 2s. Hope, Leeds.

## INSOLVENT ESTATES.

Apply at the Provisional Assignee's Office, Portugal-street, Lincoln's-inn-fields, London, between the hours of eleven and three.

Colegate, J. coal merchant, 1s. 8 1/2d.—Crocker, J. linen draper, 2s. 6 1/2d.—Firth, W. linen draper, 1s. 1 1/2d.—Hadfield, J. cotton spinner, 2 1/2d.—Horn, T. C. G. schoolmaster, 5s. 3d.—Lambert, R. draper, 2s. 10d.—Ogden, W. cotton spinner, 2 1/2d.—Rabiah, G. clerk in General Post-office, 7 1/2d.—Sanders, W. A. plumber, &c. 1s. 2d.—Shacklock, J. plumber, 2s. 3 1/2d.

## Assignments for the Benefit of Creditors.

Gazette, Aug. 5.

Bilton, J. grocer, baker, and general dealer, Amble, Northumberland, June 5. Trusts: H. Henderson, grocer, Warkworth. Sol. J. Scalfie, Newcastle.—Dixon, W. chemist, druggist, and grocer, Darlington, Durham, July 15. Trusts: T. Oxendale, gent. Darlington, and W. Benington, merchant, Stockton-upon-Tees. Sols. J. B. Simpson, Richmond, and J. D. Janson, Stockton-upon-Tees.—Giddens, A. currier, Abingdon, Berkshire, July 28. Trusts: T. Darling, Oxford, and J. Cross, Abingdon, leathersellers. Sol. J. B. Sedgfield, Abingdon.—Redhead, J. hosier and laceman, Liverpool, July 17. Trusts: J. Naylor, laceman and hosier, Liverpool, and J. A. Walker, Scotch warehouseman, Manchester. Sols. Sale, Worthington, and Shipman, Manchester.—Walshaw, J. and Hill, G. coal merchants, Hope-wharf, Macclesfield-st. City-road-basin, July 21. Trust: T. Wood, coal merchant, Northumberland-wharf, Strand. Sols. F. Adams, Lincoln's-inn-fields, and T. Plews, Old Jewry-chambers.

Gazette, August 8.

Gorst, W. Scotland-road, Liverpool, July 21. Trust: M. Steffox, Hornby-st. Scotland-road, Liverpool. Sol. G. Saxon, Northwich.—Harrison, H. C. currier, Thorne, Yorkshire, July 19. Trusts: H. Harrison, brewer, Winterton; H. Casson, currier, Kingston-upon-Hull; and R. Nickols, farmer, Joppa, near Leeds. Sols. J. England and Son, Hull.—Jackson, J. corn miller, Green Mount-terrace, Holbeck, Leeds, July 15. Trusts: J. Jackson, corn miller, Oulton; and R. Kilvington, corn dealer, Leeds. Sol. C. Granger, Leeds.—Jepson, D. and W. and Ezart, W. glass bottle manufacturers, Castleford, Yorkshire, August 1. Trust: D. Leake, gent. Allerton Bywater. Sol. Coleman, Trustee.—Pay, J. grocer, Faversham, Kent, July 31. Trusts: W. Gibbs, gent. and M. Redman, builder, Faversham. Sol. J. Tassell, Faversham.—Pollitt, J. calenderer and packer, Manchester, July 31. Trusts: E. Ellam, coal dealer, and J. M. Little, plumber, Manchester. Sol. W. M. Atherton, Manchester.—Small, G. tailor, Folkestone, Kent, July 28. Trusts: J. Costeker, wholesale woollen-draper, Cornhill; and T. Golder, gent. Folkestone. Sols. H. Simpson, Wellington-st. Southwark; and R. B. M. Lingard, Folkestone.

## Partnerships Dissolved.

Gazette, August 5.

Broadhead, J. and Co. woollen-cloth manufacturers, Hepworth, Kirkburton, July 2.—Brown, T. and G. jun. curriers, Salisbury, April 26.—Cater, J. W. and Co. Liverpool, and Cater, J. W. Collet, and Co. London, merchants, as regards W. M. Collet, July 1.—Concill, Jones, and Marsden, brassfounders and copper-smiths, Liverpool, April 10, 1850.—Duthoit and Co. auctioneers, mine agents, and portable tent manufacturers, Finsbury-place south, July 15.—Gould, W. and Thornley, J. plumbers, glaziers, and gasfitters, Manchester, July 25.—Hammond, Brothers, and Co. cabinet makers, Chancery-lane, Dec. 31.—Hannant, C. H. and Barnard, J. grocers and general shopkeepers, Great Eppingham, May 27.—Debts paid by Hannant.—Hobdon, W. Niblett, P. and Allen, H. M. cloth workers, &c. Coleman-st. as regards Heaton, July 11. Debts paid by Niblett and Allen.—Hellyer and Son, ship and ornamental carvers, Blackwall, and Cosham, near Portsmouth, July 22. Debts paid by F. Hellyer.—Holmes and Thorns, plasterers and paper hangers, Wakefield, July 26. Debts paid by Holmes.—Newman, T. W. and H. J. tea dealers, Lawrence Pountney-lane, July 30.—Nicholls and Hunter, tailors and drapers, Jermyn-st. St. James's, July 31.—Parker and Stirling, hat manufacturers, Newcastle-upon-Tyne, July 31. Debts paid by Parker.—Payne, J. and Nall, J. engravers and ornamental printers, Leicester, August 4.—Phipps, J. L. and Co. merchants, New York and New Orleans, as regards Conway, June 30.—Phipps, Brothers, and Co. merchants, Rio de Janeiro, as regards Conway, June 30.—Pollon, Prommel, and Co. regarding Conway, June 30.—Prest, Morison, and Co. wharf, Paddington, August 1.—Prust, Morison, and Co. wharf chandlers, Liverpool, August 2. Debts paid by Morison.—Rowlands, J. jun. and Day, H. architects and surveyors, Worcester, July 12. Debts paid by Day.—Shepard and Perfect, stuff merchants, Halifax, August 1. Debts paid by Shepard.—Stott, Law, and Thompson, cotton spinners, Oldham, as regards Stott, July 30. Debts paid by Law and Thompson.—Tilston, Smith, and Co. general merchants, commission agents, and carriers, Liverpool and Manchester, also Chester, Shrewsbury, and Ellesmere, July 31. Debts paid by Smith.—Wright, J. and Goodwin, A. tobacco manufacturers, Barbican.

Gazette, Aug. 8.

Barker, R. H. and Co. worsted manufacturers, Thornes, near Wakefield, July 31. Debts paid by R. H. and J. Barker.—Cooper and Baxter, smiths and screw bolt manufacturers, Manchester, Aug. 4. Debts paid by Baxter.—Cross, S. and A. milliners, &c. Shrewsbury, July 11. Debts paid by A. Cross.—Griffiths and Cornish, linen-draper, Liverpool, Aug. 4. Debts paid by Cornish.—Hindley and Sutcliffe, cotton spinners, Dukinfield and West Mill, near Ashton-under-Lyne, Dec. 4.—Horne and Froggart, oil refiners, Manchester, Aug. 6. Debts paid by Froggart.—Marshall, J. and Co. ship-store and provision merchants, Liverpool, June 2. Debts paid by Marshall.—Leeds, Aug. 6. Debts paid by Marshall.—Martin, J. and Nott, F. clothiers, Marylebone-lane, Manchester-square, July 1. Debts paid by Nott.—Oates, W. and Wood, E. joiners and builders, Strangeways, Manchester, Aug. 21. Debts paid by Wood.—Ruddock, J. D. and E. cabinet makers and upholsterers, Reading, March 29. Debts paid by J. D. Ruddock.—Tiley and Ball, surgeons, Evenley and Hechfield, near Winchfield, Aug. 6.—Vickers, J. and Co. wine merchants, Trinity-square, Tower-hill, Aug. 6.—Yeare and Reine, saddlers, Pontpool, Aug. 1.

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## NEW PRACTICE OF THE COUNTY COURTS.

In the press, and to be published in a few days,  
**THE FOURTH EDITION OF COX'S LLOYD'S LAW AND PRACTICE OF THE COUNTY COURTS**, entirely revised and recast, so as to contain the new RULES OF PRACTICE, all the new law and all the cases decided to this time. By **W. COX and MORGAN LLOYD, Esqrs. Barristers-at-Law.**

Its contents are thus arranged:—

- Book I. *The Courts.*
  - Book II. *The Officers, their duties and powers.*
  - Book III. *The Sheriff's Court of London.*
  - Book IV. *The Jurisdiction in—1. Common Law Equity; 2. Insolvency; 3. Chancery; 4. Winding-up; 5. Friendly Societies.*
  - Book V. *Appeal to the Superior Courts—1. Inferior Courts; 2. Mandamus; 3. Habeas Corpus; 4. Certiorari.*
  - Book VI. *The Practice at Common Law, compared with the new rules and forms—1. The Plea Summons and Particulars; 2. The New Trial; 3. Execution; 4. Interest; 5. Arbitration; 6. Summons on Judgment; 7. Records; 10. Writ of Error; 11. by and against Executors and Administrators.*
  - Book VII. *Evidence in the County Courts.*
  - Book VIII. *Replevin.*
  - Book IX. *Recovery of Tenements.*
  - Book X. *Proceedings for Penalties.*
  - Book XI. *Suing in forma pauperis.*
  - Book XII. *Fees and Costs.*
  - Book XIII. *Confession of Debt.*
- An APPENDIX contains the Rules of Practice, Orders, and Statutes.
- LAW TIMES Office, 29, Essex-street.

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## To Readers and Correspondents.

"F. W. F." (Wimborne).—*Morally speaking (to use our correspondent's expression) we see no objection to his continuing to hold the office. But, taking into regard the difference in social position between the two occupations, the professional status being considerably higher than that of the other, we should recommend our correspondent entirely to devote his time and talents to his duties as a solicitor.*

"W. Houghton" (Gray's Inn).—*The letter shall have place in the County Courts Chronicle.*

"AN ATTORNEY" (York).—*We will endeavour to find room for the letter on Law Reform in our next; or, at all events, in an early number.*

## SCALE OF CHARGES FOR ADVERTISEMENTS.

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## THE LAW TIMES.

SATURDAY, AUGUST 23, 1851.

## UNION OF LAW AND EQUITY.

THE distinction that has been sought to be preserved in England between Law and Equity, will not be found, on examination, to have any foundation in the nature of things. It is, in truth, a distinction purely arbitrary—the consequence of an accident. Antiquarians, who will always find a reason for everything, and invent an origin if they cannot trace one, tell us that Equity was introduced for the purpose of mitigating the rigour of the Common Law, whose rules, being inflexible, were incapable of adaptation to complicated facts and certain relationships of persons and property. This is nothing more than a plausible theory which will not bear examination. The more probable history is, that the two systems had their origin in the conflicts between the monarch and the people; or, more properly speaking, the nobles, for the people were little regarded in those times. The Common Law was the code to which the subjects looked for protection against their kings, and the kings in their turn set up their Court of Chancery against the Common Law Courts. By degrees that which at first was an arbitrary encroachment, was reduced to a system, and with the progress of civilization the Court of Equity assumed to itself certain jurisdictions, and by successive Chancellors, that which once was the excuse of a despotic power, was formed into a structure of considerable symmetry, and no small amount of sagacity was exhibited in the adaptation of the means to the end. The Lawyers, who had learned, as the first lesson of their apprenticeship, that Equity and Law were in their very nature distinct, and that the perfection of human wisdom was embodied in the system of English jurisprudence, may be excused for receiving with surprise and incredulity the first suggestion that there was no solid foundation for the distinction they had been taught to venerate. The wonder is that in so short a time there should have been wrought so great a change; that already the

converts should outnumber the incredulous. For our own part we admit frankly that we were among the sceptics when the proposition was first made public; the prejudice of early training was too powerful; nor was it until we gave the subject some reading and reflection, that we were convinced that what we had taken for an axiom was only a fallacy, and that what we supposed to be conviction was only an unreasoning assent to a proposition we had never put to proof. It is our purpose now to endeavour to explain to our readers the views that have operated upon our own mind, in hope that it may be suggestive of some new thoughts to theirs.

What are the objects of all Civil Courts for the administration of justice? What are the purposes for which alone they can be resorted to?

They resolve themselves into three:—First, to restore a right; second, to redress a wrong; third, to protect person or property.

To one or more of these objects all suits reduce themselves. Now it is obvious that the two first are duties which in their very nature must be performed by every civil tribunal. Wherefore, then, should it be that, if both of these purposes must be performed by all of them in some cases, they should not be performed by all in every case? It is plain that there is no natural boundary of jurisdiction in such cases, and we shall presently see that there is no sufficient reason for an artificial one—but that, on the contrary, it is fraught with innumerable mischiefs.

But before we go into the consideration of these two duties of a court of justice, it will be as well to dismiss the third, namely, the protection of person and property.

It is necessary for this purpose to keep steadily in view the distinction between the ministerial and the judicial functions of a tribunal, for it is only by the mingling of these that all the evils of the Court of Chancery have come. To prevent a union so fraught with mischief, a line should be drawn by an arrangement which should leave no excuse for error. An entire severance of the functions should be effected. All ministerial acts should be done by a distinct Court, which might be denominated the Court of Trusts. If any question of law arises, it should be decided by the judicial tribunal; but as the judicial tribunal should never be permitted in any case to do any merely ministerial act, so the Court of Trusts should never perform a judicial duty, that is to say, it should not decide in a doubtful matter what the law is.

It will be seen, therefore, that the division we have made of the duties involved in the administration of civil justice does demand the establishment of two Courts having distinct functions, but very different indeed from the existing distinctions. Law and Equity, resolved into one code of law, would be judiciously determined by one tribunal; the ministerial duties of the management of persons and property not otherwise sufficiently provided for, will be the proper care of the other tribunals. In other words, all the Courts of Westminster Hall should be united for the purpose of expounding the law; and the Master's office should be raised into a Court for the purpose of doing all those ministerial duties which are not properly within the province of a Judge.

For the present, at least, we shall dismiss this third object of the administration of civil justice, only asking the reader to bear in mind the fact, that we have no design to transfer all the jurisdiction in Equity to the Common Law Courts, without providing for that which constitutes the greater portion of the business of the Equity Courts, and produces most the mischief that we believe to be insurable under the present system, whatever reforms may be introduced. We do purpose to return, under another name, with new powers and distinctly defined duties, a portion of the business of Equity as a distinct tribunal. But that will in no way militate against, but greatly facilitate, that for which we are contending—the fusion of Law and Equity into one system of jurisprudence.

## LETTERS TO LORD CAMPBELL.

BY THE EDITOR OF THE LAW TIMES.

MY LORD,—In the present crisis of the Profession, when its prosperity or its decay will depend upon the legislation of the next five years, I take the liberty thus publicly to address your lordship upon a subject which cannot be approached without anxiety by any person who feels any interest in maintaining the status of the Lawyers, upon which depend the purity and efficiency of the administration of

justice, the supply of competent judges, and the succession of skilful legislators and statesmen.

I address your lordship because, as the Chief Justice of England, you represent the Profession of which you are the honoured head; because you are known to be sincerely attached to the calling which you have so successfully pursued, and would not willingly see it go to decay; and also because you have proved yourself to be an earnest and large-minded reformer of the law, and therefore, having the confidence of the public on the one side, and of the Profession on the other, in your hands, both will be safe. It is known that you will not sacrifice the public good to the exclusive interests of the Profession, and that you will, with equal zeal, protect the Profession against the unjust and injurious invasions of those who are influenced more by feelings of personal hostility than by solemn convictions produced by knowledge and reflection.

My own title to ask some attention from your lordship in this matter arises from no personal claims, but from the office which has compelled me to intimate communication for nearly nine years with almost the entire body of the Profession in England and Wales, in Ireland, and in the colonies, and in the course of which, as the centre to which all have freely conveyed their opinions upon all subjects affecting the Law and the Lawyers, I have unavoidably gathered an extensive experience of the defects they have practically found and the improvements their experience has suggested.

The propositions, therefore, which I shall submit to the consideration of your lordship will owe whatever of worth may be found in them to the fact that they are not the schemes of any single mind, but the conclusions deduced from the aggregate body of practical Lawyers, with no other merit on my own part than that which may belong to the task of collecting, arranging, and putting them into formal and methodical shape, and clothing them with words. Here and there I have ventured to add a little or subtract a little in order to preserve the symmetry of the design, and sometimes I have supplied an hiatus which had chanced to escape the notice of others; but I beg your lordship not to underrate the true worth of these suggestions by reason of the source whence they are immediately issued, and not to treat them as they would, perhaps, deserve to be treated had they been the presumptuous propositions of the writer alone.

I have received, from those who ought to know, the most positive assurances that your lordship is fully conscious of the peril that threatens the Profession, that the subject already has engaged your thoughts, and that the anxiety is shared by all the judges. I am told that an alarm, not groundless nor unreasonable, has extended itself to many reflective persons high in office or occupying conspicuous places in the Legislature, who feel that more important interests than those of the Lawyers are involved in the prosperity or decline of the profession of the Law. My purpose in these letters is to submit to your lordship a systematic plan by which, as the Lawyers believe, the threatened mischief may be averted, the status of the Profession preserved, and the business of Westminster Hall restored to even more than its former abundance, and this not only without detriment, but with immense advantage to the public.

In order to propound the remedy, it is necessary to have a clear understanding of the disease that is to be cured. What is the complaint? That the business of the Common Law Courts is rapidly passing away from them. Wherefore is it so—whither has it gone? I will tell you, my lord, in the language of a country attorney in large practice.

"Formerly," thus he writes to the LAW TIMES, "a client would come to me and say, 'Mr. H. I want to bring an action against Farmer Jones,—what will it cost?' My answer was, 'I cannot tell you—it may not be 50*l.*—it may be 500*l.* I can give you a tolerably near guess at the expenses of a trial, but I cannot venture to say what may be the possible costs of the pleadings, new trials, bills of discovery, error, and appeal.' 'Well,' he would say, 'you must do your best, I cannot submit to be robbed.' But now when a client comes to me with the same question (as they always do) I am obliged in honesty to tell him that although I cannot anticipate the costs of the Superior Courts, I can inform him very nearly what will be the costs in the County Court, and how long it will be before he will obtain judgment. 'Well,' he says, 'bring the action in the County Court, then.' I tell him that he cannot recover more than 50*l.* in the County Court, and that if he sees there he must abandon



all his claim above 50*l.*; this he is almost always ready to do, even though his claim may be 100*l.* or more, and I have known as much as 200*l.* reduced to 50*l.* for the purpose of suing in the County Court, not only because it is cheaper, but still more because judgment is more speedy there. This is the cause of the decline of business in the Superior Courts, as I have found it within my own experience."

Another attorney, in large practice in London, and having considerable agency business, writes to me thus:—"You ask me what is my own experience as to the decline of business. Where I used to issue twenty writs I do not now issue more than one. My country clients inform me that the reason is, that they are compelled to bring their actions in the County Courts, partly because they are cheaper, but principally because they are more speedy, and they can go to trial in a few weeks. Of course, I do not like the County Courts; nor would I ever bring an action in them, if the Superior Courts would give me as quick a trial, even if it be a little more expensive; but I find, even in my own practice, that I am often obliged to go there. For instance, only yesterday, I reduced a debt of 115*l.* to 50*l.* in order to sue in the County Court. You will ask me why, with my known aversion to the County Court, I did this. Because the Superior Courts could not give me the same facility for trial. I had information that the defendant contemplated quitting England. If I brought my action in either of the Superior Courts, I could not go to trial till next March, when he would be far out of my reach. In the County Court I should be sure to go to trial in a month at furthest, so I sacrificed the greater portion of my claim in order to secure the remainder of it."

These, my lord, are two only out of many communications received from all parts of the country, and all assigning the same reasons for the decline of the business of the Superior Courts. The objections will be found to resolve themselves into three classes. 1st, The greater cost of the Superior Courts; 2nd, their uncertainty; 3rd, their infrequency of trial.

Of the greater cost of the Superior Courts, there is no dispute, but these do not consist of undue remuneration of professional services. They proceed mainly from the enormous fees of court, but partly from the prolixities of pleading and partly also from some regulations of the Bar, to which I shall have occasion to ask your lordship's particular attention hereafter, when I come to describe in detail the alterations required to meet our altered circumstances.

The uncertainty complained of arises from the rules of pleading, but yet more from the enormous abuse of new trials, which are usually moved solely for the purpose of delay, in hope that a rule *nisi* will suspend execution until the defendant can make arrangement to defraud the plaintiff of his verdict,—an abuse which can only be met by requiring that no new trial shall be granted until payment into court of the debt and costs, or security given by the party applying to set aside the verdict, that the other party shall not thereby lose the fruits of it.

The infrequency of trial is the last, but not the least, of the evils complained of in the Superior Courts; nor so long as eight months are interposed between the action brought and the hearing of it, can the decline of Westminster Hall be stayed. It is useless to facilitate pleadings unless trial be facilitated also.

These, my lord, are the primary causes of the revolution, which no person acquainted with the history and constitution of this country can contemplate without alarm. Having stated the mischief, I shall proceed in future letters to lay before your lordship, in detail, the remedies which, in the opinion of the Profession, as gathered from a great variety of sources, and especially among the most experienced members of both branches of it, are necessary to save the Superior Courts from decline and ultimate decay, and which, it is believed, will not only stay the disorder, but restore them to more than their former activity and vigour. For the present, I subscribe myself, with great respect,

Your lordship's obedient servant,

THE EDITOR OF THE LAW TIMES.

### PRACTICAL STATUTES.

THE volume of the *Practical Statutes* for 1851 will be ready in a few days. It will be a less one than the last, so unproductive has been the Session, and consequently its price will be

less. Several hints suggested by subscribers for its improvement have been adopted, and especially there will be a more copious index; some useful notes have been introduced, and we trust that the plan which has been so highly approved and extensively supported will find yet more friends, as experience makes its usefulness still more apparent to the Profession. As we have many new readers since last year's volume was issued, a short explanation of that plan may be convenient.

The *Practical Statutes* is an edition, for the use of the practitioner, of all the statutes of the Session which the English lawyer can ever need, by omitting the Scotch, Irish, and Colonial Statutes, and consequently so reducing the bulk and cost that the whole is comprised in a small volume, which can be carried easily in the pocket or the bag, and obtained at a very trifling price. To make it still more convenient, explanatory notes are added (as where sections of other statutes are referred to or embodied, they are given in a note to save the trouble of reference to the volume), and the whole is much more extensively indexed than the ordinary editions of the statutes at large. In this manner all the *Practical Statutes* of last year were sold for 7*s.* 6*d.* in cloth, and 9*s.* half-bound, and the volume for the present year will be still less in price. The volume for the last year may be had to complete sets. It is edited by WM. PATERSON, Esq. Barrister-at-Law. It will be regularly continued at the close of every Session.

### LAW OF EVIDENCE AMENDMENT ACT.

AN edition of this most important statute (which, it should be remembered, comes into operation with the commencement of Michaelmas Term), by EDWARD WILLIAM COX, Esq. Barrister-at-Law, will be ready on Monday. The Act is prefaced by an introduction; and to the several clauses are appended explanatory notes. A copious and accurate index adds completeness to the work. It is printed in two sizes (8vo. and 12mo.), so as to bind up with any work on Evidence or Practice which the purchaser may already possess.

### THE LEGISLATOR.

#### PARLIAMENTARY PAPERS.

**BANKRUPTCY.**—A return has been made to an order of the House of Lords, of the number of days in which the Commissioners of the Court of Bankruptcy, acting in London and in the country, have sat in their courts during the year, from the 1st of January to the 31st of December, 1850; and of the average number of hours of each day's sitting; and also a return of the number of adjudications of bankruptcy made in each court yearly, from the 11th of January, 1846, to 11th January, 1851. The number of adjudications made during these five years was 3,242—of which 832 were made in 1847-48, and 422 last year, being respectively the greatest and least numbers during the five years quoted. During the year 1850 the commissioners sat altogether 690 days, namely, Mr. Commissioner Evans, 116 days, and for 4 hours a day; Mr. Fonblanque, 137 days, for 5½ hours a day; Mr. Fane, 128 days, for 5 hours a day; Mr. Holroyd, 137 days, for 5 hours a day; Mr. Goulburn, 124 days, for 4½ hours a day; and Mr. Shepherd, 48 days, for 3 hours a day. With regard to Mr. Commissioner Shepherd, it is necessary to state that he was prevented by illness from sitting in his court during the year 1850, and resigned his appointment 25th April last. On each of the 48 days above mentioned, one of the other commissioners sat for Mr. Shepherd. For the Birmingham district two commissioners sat, one for 138 days, and the other for 178 days, during the year 1850; and the number of adjudications made, from the 11th January, 1846, to the 11th January, 1851, was 798, of which 203 were made in 1848-49, and 98 in 1850-51, being respectively the greatest and least numbers occurring during the five years. In Bristol the two commissioners sat, one for four hours a day during 182 days, and the other for four hours a day during 154 days, in 1850-51, during which time 51 adjudications were made. In the Exeter district 37 cases were adjudicated last year, and the commissioner, or

the registrar, sat every day in court for such time as the business before the Court required. In the Leeds district last year the commissioner sat during 211 days for three hours a day. The number of adjudications made last year was 38; in 1846-47 the number was 76. In the Manchester district the number of adjudications made since January, 1846, was 588, of which in 1847-48, the number was 162, and in 1850-51, only 67. The number of sittings held last year was, by one commissioner, 188, who sat from four to five hours a day, and by the other 191 sittings, averaging about four hours each. From the above statement it will be observed that the number of adjudications made last year was much smaller than in any year since 1846, and that the number of adjudications made in one of the five years since January, 1846, was double, or more than double the number made in 1850, with the exception of the London district, where the largest number of adjudications made since 1846 was 832, and the smallest number (1850) was 422.

**MAILS ON RAILWAYS.**—On Wednesday, a return to the House of Commons was printed of the lines and branch lines of railways upon which mails for the conveyance of letters were conveyed on the 1st of January last. The number of single miles travelled on that day was 17,246 and 4 furlongs.

**PUBLIC WORKS.**—On Wednesday some returns, extending to thirty-six folio pages, obtained by the Chancellor of the Exchequer, were printed by order of the House of Commons relative to loans for public works. It appears that the total amount contracted to be advanced by the Commissioners for Great Britain and Ireland was 516,950*l.* The amount advanced was 10,492,345*l.* The interest paid over was 2,446,545*l.* 4*s.* The principal repaid was 5,989,672*l.* 9*s.* 1*d.* and the principal unpaid was 3,279,437*l.* 14*s.* 11*d.* The total principal and interest paid into the Exchequer on account of loans advanced by the Commissioners of Public Works under the several Acts to the 5th of January last was 8,436,217*l.* 13*s.* 1*d.* From the first appointment of the commission in June 1817, to the 5th of January last, the estimated profit on advances for public works by the commissioners was 1,416,354*l.* 12*s.* 3*d.* from which 108,387*l.* 2*s.* 8*d.* had to be deducted for certain expenses, making the net profit 1,315,967*l.* 9*s.* 7*d.* The expenses of the board last year amounted to 3,489*l.* 4*s.* 7*d.* The amounts placed by various Acts of Parliament at the disposal of the Commissioners for Public Works to 5th of January last were 10,996,000*l.* of which 258,226*l.* 10*s.* 3*d.* remained unissued on the 5th of January last.

### Bills in Progress.

**REPRESENTATIVE PEERS FOR SCOTLAND.**—The new Act to regulate the elections of representative peers for Scotland has just been printed. It provides that a certificate from two peers of Scotland shall be held to be formal notice of the death of any representative peer. Instead of a proclamation for the election of a representative peer being issued twenty-five days before such election, ten days shall be sufficient. Peers of Scotland who vote by proxy may take the oath before Courts in Ireland and at other places. The titles of peerages in right of which no vote has been given for fifty years are not to be called at elections if the House of Lords shall so direct.

### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 188.)

CAP. XXXVI.

An Act to repeal the Duties payable on Dwelling-houses according to the Number of Windows or Lights, and to grant in lieu thereof other Duties on Inhabited Houses according to their annual Value. (July 24, 1851.)

48 Geo. 3, c. 55.—Whereas under and by virtue of an Act of the forty-eighth year of King George the Third, chapter fifty-five, certain duties are now payable in England, Wales, and Berwick-upon-Tweed and in Scotland respectively upon dwelling-houses, and are assessed and levied according to the number of windows or lights therein as set forth in the schedule marked (A.) to the said Act annexed; and it is expedient that in lieu thereof the duties on inhabited dwelling-houses set forth in the schedule to this Act annexed should be assessed and levied according to the annual value of such dwelling-house: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. Duties granted on inhabited houses as specified



in the schedule annexed, in lieu of duties herein-after repealed.—From and after the fifth day of April one thousand eight hundred and fifty-one, in England, Wales, and the town of Berwick-upon-Tweed, and from and after the term of Whitsunday one thousand eight hundred and fifty-one in Scotland, in lieu and instead of the said duties so payable as aforesaid, and which are hereinafter repealed, there shall be assessed, raised, levied, collected, and paid unto and for the use of her Majesty, her heirs and successors, upon inhabited dwelling-houses in and throughout Great Britain, the several duties set forth in the schedule to this Act annexed, payable according to the annual value of such dwelling-houses, which said schedule shall be deemed and taken to be part of this Act.

2. *Duties granted to be under care of Commissioners of Inland Revenue—Powers and provisions of former Acts to be in force; except as herein provided.*—The said duties shall be denominated and deemed to be duties of assessed taxes, and shall be under the care and management of the Commissioners of Inland Revenue for the time being; and all powers, provisions, rules, regulations, and directions, fines, forfeitures, pains, and penalties, now in force contained in or enacted by any Act or Acts relating to the duties of assessed taxes, and also all powers, provisions, rules, regulations, directions, and exemptions, fines, forfeitures, pains, and penalties, contained in or enacted by any such Act or Acts as aforesaid, with reference to the duties on inhabited dwelling-houses according to the value thereof, as set forth in the schedule marked B, annexed to the said Act of the forty-eighth year of King George the Third, and which were in force in regard to the said last-mentioned duties at the time of the repeal of such duties by an Act of the Session holden in the fourth and fifth years of King William the Fourth, chapter nineteen, except as hereinafter excepted, shall severally and respectively be and become in full force and effect with respect to the duties hereby granted, and shall be severally and respectively duly observed, applied, practised, and put in execution in the respective parts of Great Britain, for assessing, raising, levying, collecting, receiving, accounting for, and securing the said duties hereby granted, and otherwise in relation thereto, so far as the same are or shall be applicable, and are not repealed or superseded by and are consistent with the express provisions of this Act, as fully and effectually, to all intents and purposes, as if the same powers, provisions, rules, regulations, directions, and exemptions, fines, forfeitures, pains, and penalties, were particularly repeated and re-enacted in this Act with reference to the said duties hereby granted: excepting always out of this enactment any provisions for or in relation to compositions for the said duties set forth in the said schedule marked B, the exemption in case II. of exemptions contained in the same schedule, and all the provisions of an Act of the Session holden in the third and fourth years of King William the Fourth, chapter thirty-nine, and of an Act of the Session holden in the third and fourth years of her Majesty, chapter seven-teen.

3. *Market gardens and nursery grounds not to be included in valuation of houses.*—That no market garden or nursery ground occupied by a market gardener or nurseryman *bona fide* for the sale of the produce thereof, in the way of his trade or business, shall be included in the valuation of any dwelling-houses and premises in charging the duties made payable by this Act.

4. *Duties on windows and lights to cease on commencement of duties granted by this Act; except those uncollected and penalties, &c.*—The duties granted by the said Act of the forty-eighth year of King George the Third, and now payable in England, Wales, and Berwick-upon-Tweed, and in Scotland respectively, upon dwelling-houses, according to the number of windows or lights therein, as set forth in the Schedule marked (A.) to the Act annexed, shall, at and upon the respective periods appointed for the commencement of the duties granted by this Act, severally cease and determine; save and except as to any of the said duties hereby repealed, which, having been assessed or charged, shall not have been collected, levied, recovered, and accounted for, and also as to all arrears of any of the said duties, and all penalties and forfeitures incurred at or before such respective periods, all which said duties and arrears of duties, and penalties and forfeitures, shall respectively be collected, levied, recovered, paid, and accounted for as if this Act had not been passed.

5. *Persons to be liable to the same duty for armorial bearings as if chargeable to duties under 48 Geo. 3, c. 55.*—And whereas a certain rate of duty is now payable in respect of armorial bearings or ensigns used or worn by persons chargeable to the duties on houses, windows, or lights made payable by the said Act of the forty-eighth year of King George the Third: all persons who shall be chargeable to duty under this Act shall, in respect of armorial bearings or ensigns used or worn by them, be subject to the same rate of duty as they would

have been liable to if they had been chargeable to the said duties made payable by the said Act.

6. *Assessors already appointed to be assessors for the current year under this Act.*—And whereas assessors of the duties of assessed taxes have in many parishes and places been already appointed for the present year: the persons so appointed such assessors shall, without any further or other appointment or authority, become and be assessors of the duties granted by this Act for the said year in and for the same parishes and places respectively.

The SCHEDULE referred to; containing the duties by this Act made payable upon inhabited dwelling-houses in and throughout Great Britain, according to the annual value thereof; that is to say,

For every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards, by the year,—

Where any such dwelling house shall be occupied by any person in trade who shall expose to sale and sell any goods, wares, or merchandise in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement story thereof;

And also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine, or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk, or consumed shall not be such shop or warehouse as aforesaid;

And also where any such dwelling-house shall be a farmhouse occupied by a tenant or farm servant, and *bona fide* used for the purposes of husbandry only,

There shall be charged for every twenty shillings of such annual value of any such dwelling-house, the sum of sixpence;

And where any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence.

#### CAP. XXXVII.

An Act to continue certain Turnpike Acts in Great Britain. (July 24, 1851.)

This continues certain expiring Turnpike Acts to the 1st Nov. 1852, to enable the Committee of the House of Commons to whom such Bills are confided to make the necessary regulations under the new provisions required by the House to be adopted in all such statutes.

#### CAP. XXXVIII.

An Act to facilitate Arrangements for the Relief of Turnpike Trusts, and to make certain Provisions respecting Exemptions from Tolls. (July 24, 1851.)

We give this statute entire:—

Whereas it is expedient to facilitate arrangements with the creditors of turnpike trusts where the revenues are insufficient to keep down the interest on the debts charged thereon: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Trustees of insolvent turnpike trusts, with consent of two-thirds in value of the creditors, may apply for a provisional order for reduction of rate of interest, or extinguishment of arrears.*—Where the revenues of any turnpike road in England applicable to the payment of the interest upon the principal money for the time being charged or secured on the tolls or revenues of such road are insufficient for the payment in full of such interest, it shall be lawful for the trustees or commissioners of such road, at any general annual or other meeting, notice being given of such meeting twenty-one days at the least before holding the same, and of the purpose thereof (so far as the same relates to the powers of this Act), in some newspaper usually circulated in the county or counties in which such road is situate, to resolve that in case such consents as hereinafter mentioned of the mortgagees be obtained, an application be made to one of her Majesty's principal Secretaries of State for a provisional order to reduce the rate of interest on the mortgage debts charged or secured on the tolls or revenues of such road, to such amount as may be resolved on at such meeting, and for extinguishing in whole or in part the arrears of the interest on such debts, or for either of such purposes; and where any such resolution as aforesaid is made, such trustees or commissioners shall cause notice to be given, by advertisement or otherwise, of such resolution, with such information in relation to the matter of the proposed application, and the consents required by this Act, as such trustees or commis-

sioners may think fit; and in case it appear to such trustees or commissioners at any general, annual, or other meeting, that the persons entitled to two-thirds of the money charged or secured on the tolls or revenues of such road, and remaining unpaid, have signified in writing under their hands, their consent to the proposed application, it shall be lawful for such trustees or commissioners to make an application accordingly to one of her Majesty's principal Secretaries of State for a provisional order for such reduction as aforesaid of the rate of interest on the said debts, and for extinguishing in whole or in part the arrears of interest thereon, or for either of such purposes; and such application shall be signed by three or more of such trustees or commissioners, who shall therein certify that the consents required by this Act to such application have been given.

2. *Power to executors, &c. to consent.*—All executors, administrators, guardians, trustees, and all committees of the estates of idiots and lunatics, who, as such, are for the time being entitled to any money charged or secured on the tolls or revenues of any such road, may consent to any such application as aforesaid, as fully as if they respectively were so entitled in their own right, discharged of all trusts in respect thereof, and all executors, administrators, guardians, trustees, and committees so consenting are hereby severally indemnified for so doing.

3. *Secretary of State may make a provisional order in pursuance of the application, which order to be binding if confirmed by Parliament.*—It shall be lawful for such Secretary of State, if he think fit, after receipt of any such application as aforesaid, to make a provisional order under his hand in pursuance of such application; and such Secretary of State shall cause such provisional order to be published in such manner as he may think fit; and in case it be enacted by any Act of Parliament that such provisional order shall be confirmed and be absolute, such provisional order shall be as binding and of the like force and effect as if the provisions thereof had been expressly enacted by Parliament; and every such Act shall be deemed a public general Act.

4. *Construction of terms.*—The words "implement of husbandry," in section thirty-six of chapter one hundred and twenty-six of the statute of the third year of King George the Fourth, shall be deemed to include threshing machines; and the word "constable," in section one of chapter eighty-eight of the statute of the third and fourth years of her present Majesty, shall be deemed to include superintending constables appointed under the statute of the thirteenth and fourteenth years of her Majesty, chapter twenty.

#### CAP. XXXIX.

An Act to exempt Burgesses and Freemen in certain Cases from the Operation of an Act for the better assessing and collecting the Poor Rates and Highway Rates in respect of Small Tenements. (July 24, 1851.)

We give this statute entire.

1. 2 & 3 Wm. 4, c. 45, s. 32—s. 33—13 & 14 Vict. c. 99.—Whereas by section thirty-two of the Act of the Session of Parliament holden in the second and third years of King William the Fourth, chapter forty-five, it is provided, that every person who would have been entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough not included in the schedule marked (A.) to that Act annexed, either as a burgess or freeman, or, in the city of London, as a freeman and liveryman, if that Act had not been passed, should be entitled to vote in such election, provided such person should be duly registered according to the provisions therein-after contained; but that no person should be so registered in any year unless he should on the last day of July in that year be qualified in such manner as would entitle him then to vote if such day was the day of election, and that Act had not been passed: And whereas by section thirty-three of the said Act it is provided, that any person then having a right to vote in the election for any city or borough, except as therein mentioned, in virtue of any other qualification than as a burgess or freeman or as a freeman and liveryman, or in the case of a city or town being a county of itself as a freeholder or burgage tenant as therein-before mentioned, should retain such right of voting so long as he should be qualified as an elector according to the usage and custom of such city or borough, or any law then in force subject as in the said Act mentioned: and whereas it is expedient to amend the Act of the last session of Parliament, chapter ninety-nine, so far as it may affect the rights reserved by the said several sections of the said Act of the second and third years of King William the Fourth: be it enacted, therefore, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Right of voting reserved by recited provisions of 2 & 3 Wm. 4, c. 45, to persons then entitled not to be affected by the change of rating under 13 &*



14 Vict. c. 99.—Where any person to whom a right of voting was retained or reserved by the recited provisions of the said Act of the second and third years of King William the Fourth is or shall be the occupier of any such tenement as in the said Act of the last session of Parliament mentioned, and the owner of such tenement has been or shall be rated to the relief of the poor instead of the occupier thereof, and such owner shall have paid all money due on account of any rate or rates in respect of such tenement, or such occupier shall have tendered the amount thereof in the manner prescribed by such Act, such occupier shall be entitled, not only to the municipal privileges and franchises reserved to him by such Act, but also to all such right of voting at elections of a member or members to serve in Parliament for any city or borough, and all other rights and privileges, as such occupier would have been entitled to under the recited provisions of the said Act of the second and third years of King William the Fourth, and the other provisions of such Act, and any Acts amending the same, relating to the right of voting so retained or reserved, if such occupier had been himself rated in respect of such tenement, and had duly paid or tendered the rate or rates to which he was liable in consequence of such rating.

2. Construction of the words "tenement,"—That the word "tenement" in the said recited Act of the last Session of Parliament, shall be construed to mean any house, cottage, apartment, or building, and land in the same parish held with the same or any of them, but shall not include any other land or corporeal hereditament.

3. And "rates for the relief of the poor."—That the words "rates for the relief of the poor," in the said recited Act of last Session of Parliament, shall be construed to mean rates for the relief of the poor and for other purposes chargeable thereon according to law; and that the owners of any tenements who shall be liable to be rated in respect of such tenements to any such rate by virtue of the same Act shall also be liable to be rated to any rate or rates authorised to be assessed and levied by the second section of the Act of the Session of Parliament holden in the twelfth and thirteenth years of her present Majesty, chapter sixty-five.

CAP. XL.

An Act for Marriages in India.

(July 24, 1851.)

### THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

#### Summary.

Two statutes of great practical importance to Magistrates, and calculated, in our opinion, to work beneficially for the interests of the community, were passed at the close of the session, and appear in our last number, namely, "An Act to amend the Law relating to the Expenses of Prosecutions," and "An Act for further improving the Administration of Criminal Justice." On this occasion we limit our review to the former statute. The 14 & 15 Vict. c. 55 (17 Law T. 183) is entitled "An Act to amend the Law relating to the Expenses of Prosecutions, and to make further Provisions for the Apprehension and Trial of Offenders." Its main provisions are the following. In the first place it repeals so much of sec. 23 of 7 Geo. 4, c. 64, as provides that in cases of misdemeanour the power of ordering payment of expenses and compensation shall not extend to attendances before the examining magistrate; and in addition to the powers granted to the Courts, to order payment of costs and expenses in certain misdemeanours specified in the recited section of 7 Geo. 4, c. 64, the Courts are in future empowered in like manner to order costs and expenses in any of the misdemeanours herein-after specified, that is to say, in all cases of unlawfully and carnally knowing and abusing any girl above the age of ten years, and under twelve; unlawful abduction of any girl, being unmarried, under the age of sixteen, from the possession or against the will of her father or mother, or other person having lawful care of her; and in cases of conspiracy to charge anyone with a felony, or to indict any person for felony, or where any parties have conspired themselves to commit any felony. This, it will be obvious to any one practically acquainted with the hardships occasioned by the old state of things, will be found a most salutary exten-

sion of the power of the Courts, and is calculated materially to diminish the disinclination now too often shewn to prosecute offenders to conviction for the crimes above enumerated. Another and a very just enactment provides, that in future, in every case of assault brought before justices for summary decision, which they shall be of opinion forms a fit subject for a prosecution by indictment, the complainant and witnesses being bound over in recognizances to prosecute and give evidence at the Assizes or Sessions of the Peace, every such Court shall be authorised, at its discretion, to order payment of the costs and expenses of such prosecutor and witnesses so appearing, together with compensation for their trouble and loss of time, in the same manner as the Courts now do in cases of felony.

In the next place, the power given to the Quarter Sessions by 7 Geo. 4, c. 64, to make regulations as to costs and expenses is repealed, but the regulations now in force are to remain so until repealed, or until regulations relating to the matter of the same shall be made under the power of this new Act; and it is declared that henceforth it shall be lawful for one of the chief Secretaries of State to revoke any regulations made under the repealed provision of 7 Geo. 4, c. 64, and to make in substitution regulations as to the scale of payment of costs to be paid to prosecutors and witnesses, in obedience to any recognizance or subpoena, and to persons who may have been active in the apprehension of offenders, and also regulations as to the scale of payment according to which certificates may be granted by magistrates in respect of the expenses of any prosecutor or witness attending before such justices, and of any compensation for trouble or loss of time therein, in any case where any judge or Court is, under the 7 Geo. 4, c. 64, or any other Act, or this Act, empowered to order payment of such costs or compensation; but the magistrate's certificate is not to be conclusive. The courts are, however, to retain the unlimited discretionary power (which they now possess) to order payments or gratuities to any persons who may have shown extraordinary courage, skill, diligence, and exertion in or towards the apprehension of any offender. Powers are next given to Courts of Quarter Sessions to order payments to persons who have been active in the apprehension of persons charged with murder or any of the offences specified in 7 Geo. 4, c. 64, in the same manner and degree as judges are now authorised to order such payments under that statute. The next clauses are very important. They enact that it shall be lawful for justices at their General Quarter Sessions, notice being given at a preceding Sessions of the motion for that purpose, and for the council of any borough to recommend to one of the principal Secretaries of State that the clerks of the peace, the clerks of Special and Petty Sessions, and the clerks of justices of the peace within the several jurisdictions be paid by salary instead of fees and other payments; provided that, in fixing the salary of any such clerk, regard shall be had to the tenure of his office, and to his rights in respect thereof; but no clerk of the peace or other clerk appointed after the passing of this Act shall be entitled to any compensation on account of a reduction of his emoluments occasioned by this enactment, but no order is to be made in respect of such recommendation of the council or governing body of such borough, unless the justices of such borough certify their approval of it to the Secretary of State. In making such recommendation there may be reserved to such clerk of the peace or other clerk certain descriptions of business in which he may still continue to receive fees. The clerks so paid by fees are to account for them to the treasurer in aid of the county or borough rate-fund. Power is next given to justices to remit fees in their discretion. Then follow five clauses extending and altering the powers of justices in Lon-

don and Middlesex, and an important clause enacting that in certain counties of cities and towns prisoners may be committed and tried at the Assizes for the adjoining county. Justices are empowered by order made for that purpose to declare that any gaol or house of correction for such county is a fit prison for persons committed for trial at the Assizes for such county, and prisoners so committed shall be, without habeas corpus, removed by the gaoler to the common gaol of such county in order to be tried at the Assizes for such county, and while under such removal they are to be considered in proper legal custody. The provisions of 38 Geo. 3, c. 52, and 51 Geo. 3, c. 100, as to the execution of sentences and as to costs are extended to this Act; and schedule C, annexed thereto, defines the counties which shall be considered next adjoining the counties of cities and towns corporate in the first column specified of the same schedule. The Act is limited to England. Such are the leading features of this important Act. With the exception of remarking that the clauses for authorising the payment of clerks of the peace and justices' clerks by salary instead of fees is permissive and not directory, we will not further comment upon it at present. The Act will shortly be published in Mr. Paterson's edition of the "Practical Statutes of the Session," accompanied by ample notes and observations.

The only case of interest to magistrates, reported in our last number, is the ruling of a single judge at York. In the case of *Reg. v. Brumby*, 17 Law T. 261, it was held by WILLIAMS, J. that clover "is a cultivated root or plant used for the food of man or beast," within the 43rd section of 7 & 8 Geo. 4, c. 29, and therefore the subject of larceny.

**DIMINUTION OF PAUPERISM.**—A return to the House of Commons shews that on the 1st of July, 1850, there were 831,780 paupers in the receipt of relief, and on the 1st of July last 813,029, shewing a decrease of 18,691. Of able-bodied paupers the decrease in the same period was 7,900.

**EXCISE PROSECUTIONS.**—From a return issued, an account is given of seizures and prosecutions by the Excise of adulterated tea, tobacco, pepper, and coffee. In the year ending the 31st of January last, there were 1 seizure of tea and 1 prosecution, of tobacco there were 17 seizures and 13 prosecutions, of pepper 7 seizures and 23 prosecutions. No seizure or prosecution for adulterated coffee by the Excise in the same period.

**COMMON LODGING-HOUSES.**—An Act of Parliament took effect from Thursday se'night, when it received the Royal Assent, for the well-ordering of common lodging-houses. The preamble declares that it would tend greatly to the comfort and welfare of many of her Majesty's poorer subjects if provision were made for the well-ordering of common lodging-houses. Within the metropolitan police district the commissioners are to execute the Act, and local authorities in other places. Notice is to be given within three months to all common lodging-house keepers to register the places, and a register is to be kept of the number of lodgers authorised to be received therein. After one month of giving such notice, lodgers are not to be received in any common lodging-house until the same has been inspected and approved for that purpose, by some officer appointed on that behalf by the local authority, and been registered. Regulation may be made for such houses. Keepers of common lodging-houses are to give notice of fever, and at all times to be open to free inspection, and, when required, have the place thoroughly cleansed. Penalties are to be recovered for offending against the Act. The new law has operation throughout all parts of the United Kingdom, with the exception of the City of London or liberties, and except as to Scotland.

**TURNPIKE TRUSTS.**—It appears from a return ordered by the House of Commons to be printed, that 169,650*l.* has at various times been borrowed by the Public Works Loan Commissioners from the turnpike trusts in England and Wales. Of this sum, 55,232*l.* has been repaid, leaving 114,417*l.* unpaid on 5th January last, besides interest unpaid to the amount of 15,151*l.* In Scotland the amount of the loans was 63,270*l.* of which 6,525*l.* has been repaid, and 56,744*l.* is still due, besides 67,734*l.* of unpaid interest.

**POLICE CONSTABLES.**—A return ordered by order of the House of Commons to be printed shews that there are 22,000 police constables in England and Wales, &c.

2,695, and in 1850, 2,749 police constables, the expense of whose maintenance last year was 200,004*l.* being 156,744*l.* for pay and allowances, and 43,260*l.* for incidental expenses.

**THE LAW OF CHURCH-RATES.**—The committee of the House of Commons, appointed to consider the law of church-rates, and the difference of practice which exists in various parts of the country in the assessment and levy of such rates, report that they have examined the following witnesses, and have agreed to report their evidence to the House:—Mr. Offor, Mr. Courtauld, Mr. Pritchard, Mr. A. C. Veley, Rev. C. Burney, Mr. Apsley Pellatt, Mr. Hull Terrell, Dr. Lushington, Mr. Mellor, Mr. Flamank, Mr. Hodgkin, Rev. A. C. Wright, Mr. Baines, Mr. Barnes, Rev. R. Burgess, Mr. R. Newsome, Rev. W. Selwyn, Mr. J. Couch, Rev. F. Wade, Mr. J. Bass, Mr. W. H. Black, Mr. J. Manning, and Sir J. Dodson.

**CHARGEABLE LETTERS IN THE UNITED KINGDOM.**—The estimated number of letters, as appears from an official return, delivered as "chargeable," was last year 347,069,071.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

### Summary.

Two cases affecting railways were reported in our columns last week. In *Williams v. The Chester and Holyhead Railway Company*, 17 Law T. 269, it was held that a contract made by the secretary of a company, on behalf of the company, in which there have been a delivery and acceptance of part of the goods, and also part payment, is not binding upon them, unless authorised by the directors, or committee; and such contract should be by deed, under seal of the company, and signed by the directors, as required by the Act of Parliament. The following passage from the judgment is well worth repeating: "Persons dealing with these companies should always bear in mind that these companies are corporations, and essentially different from ordinary partnerships or firms for all purposes of contracts, with reference to evidence of giving the legal authority, and they should insist on their contracts being made by deed, under seal of the company, or signed by the directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such bodies on any other footing." The other case is that of *Bland v. Crowley*, 17 Law T. 267. An agreement was in that case made between the plaintiff and the defendants, provisional committee-men of a railway company, whereby the plaintiff covenanted to accede to the passing of the Bill for the formation of the company through Parliament, which he had previously opposed; and in consideration of such assent the defendants covenanted with the plaintiff, that in the event of the Bill passing the company should pay the plaintiff for such of his lands intersected by the line as might be required or severed, at a fixed price, such sum to include all damage to arise from severance, and also to pay the plaintiff 3,000*l.* as compensation for general damage done to his park, &c. The Bill passed, but the railway was abandoned. The plaintiff then brought his action of covenant to recover, amongst other things, the 3,000*l.* Two judges held, against POLLOCK, *dissentiente*, that the defendants were bound to pay the 3,000*l.* immediately after the passing of the Act, notwithstanding the railway was not constructed nor any damage done; one of the reasons, as given by PLATT, B. being, that by the recitals in the deed the sole object of the contract with the directors was to buy off plaintiff's opposition, and the object of the plaintiff being to secure the price for which he would abandon it.

### WINDING UP.

LAST week we gave in full the very important judgment delivered by the LORD CHANCELLOR and LORD CRANWORTH in the House of Lords, on the last day of the session, in *Cooper's* and in *Thomson's* cases. In a former

number (17 Law T. 237) we gave an outline of the proceedings on the argument, on reference by their lordships to the judges, and the opinion of the latter thereon. The formal judgment of the House of Lords in the matter carries it no further; it is simply an approval of the reasons stated for their opinion on the two cases by the common law judges. The point decided may, however, be here repeated: it is briefly as follows:—A person who has accepted shares in a railway company, whether he has paid the deposit on them or not, is neither responsible nor liable for the expenses incurred in the formation of such company. Some remarks on this decision will be found, *ante*, p. 177, in our notice of current law affecting joint-stock companies.

**NATIONAL LAND COMPANY.**—This company, the Act for dissolving which was passed by the House of Lords, has been referred to the Master in Chancery in rotation to be wound up.

**MADRID AND VALENCIA RAILWAY.**—The official manager announces that as soon as the Masters' offices reopen, steps will be taken towards the payment of a dividend to the shareholders out of the funds in hand, and the assets accruing from the compromise; but, in the meantime, it is understood that if the Master's decision is appealed against no proceeding of the kind can be legally taken.

### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

*Liverpool and Manchester Saw-mills and Timber Joint Stock Company.*—Further call of 20*l.* on each share on contributories, to be paid as follows:—5*l.* per share on or before the 10th September, 1851; 10th December, 1851; 10th March, 1852; and 10th June, 1852.—Senior.

## REAL PROPERTY LAWYER AND CONVEYANCER.

### Summary.

OUR report of the Court of Delegates in Ireland, presents last week another of those numerous cases under the Wills Act, where the question arose what was a due compliance with the statute as to signature at the foot or end of the will. In *Derinzy v. Turner*, 17 Law T. 271, it appeared that the will was written on two sides of a sheet of paper, and came down to about two inches from the bottom of the second page, which space was left blank; and then at the top of the third page, the attestation clause was written, beside which the signature of the testatrix was affixed, and immediately under the signatures of the witnesses. It was admitted that the testatrix was nearly blind, and required more room for signature than an ordinary person. The Court, very properly, we think, held that this was a due execution of the will within the provisions of the statute. It was supposed by the framers of the Wills Act that the strictness thereafter required in the execution of wills would obviate much litigation, and do as much as legislative enactment can accomplish to prevent fraud: no doubt the latter intention has been in a large degree fulfilled by it, but it is questionable whether the certainty thus secured is not more than counterbalanced by the hardships occasioned by the rigorous interpretation of the statute. We think we speak within bounds when we say, that the number of cases where parties have been compelled to take out letters of administration, *cum testamento annexo*, have more than doubled since the operation of the Wills Act. We are, however, glad to see the Courts, as in the instance now under review, disposed to put a more liberal interpretation on the clause affecting the execution of wills than at first they were inclined to.

## COUNTY COURTS.

### Summary.

A CASE relative to the appointment of assignees in insolvency by the judges of County Courts came before Mr. Commissioner PHILLIPS a few days ago, and is reported in our

last number, *Re Joseph Howe*, 17 Law T. 270. In that case the insolvent was heard in the County Court of Lancaster, and one Smith appointed assignee of his estate and effects; but the directions of the statute 10 & 11 Vict. c. 102, s. 10, requiring the judge to forward the papers containing the notification of the appointment and acceptance of the assignee to the Court-house of Insolvency in Lincoln's-inn-fields, had not been complied with. The learned Commissioner, on this state of proceedings, held that the notification of the appointment and acceptance not having been duly made to the head Court of Insolvency, pursuant to the directions of the statute, the Court would not take judicial notice that such appointment and acceptance had ever taken place, and would proceed to act upon an application by another party for the appointment of an assignee, as if there was no sub-assignee. As this is an omission to comply with a statutory direction which is very likely to be overlooked, it would be well to bear in mind this decision, and to note it in *Macrae's Practice of Insolvency*.

## SUPERIOR COURTS OF COMMON LAW.

### FIRST REPORT.

(Continued from page 161.)

Nor is this all; at present very many actions, as we have before observed, are undefended. A defendant pleads to obtain time; he pleads in the simplest manner, perhaps merely denying his handwriting to a bill sued on: when the time for trial comes he knows his signature can be proved, and that resistance is hopeless; he withdraws his defence, and the expense of a trial is saved to the parties; but if every answer were open to him, hundreds of actions thus settled would be tried, what are called watching briefs would be given, and plaintiffs would be occasionally defeated for want of proof, to the necessity of which attention had not been called. Should it be said that a man may now by pleading many pleas put a plaintiff to all this proof, and yet does not, the answer is, that when he pleads he is not desperate, the evil day is at a little distance; and the fact is, that since defendants have been compelled to specify their defence fewer causes than formerly are tried in which the defendant appears merely for the purpose of watching and detecting defects in his adversary's proof. We think this a consideration of much importance.

The former commissioners had in their extensive practice largely experienced the working of both the extended and the restricted use of pleading, and supported by the opinions of the most eminent men in the profession, decided in favour of the former. In that decision we entirely concur.

There is, however, a class of cases in which we think that pleadings may be dispensed with, viz. where the parties are agreed upon the question which they desire to have decided, and consent to raise it for the decision of the Court, without pleading.

With a view to facilitate parties who desire to raise questions so agreed between them to be decided without pleading, we propose an extension of the provisions of the recent Act, by which parties were enabled, after issue joined, to state facts in the form of a special case, by consent, for the opinion of the Court, and to agree that judgment might be entered for the plaintiff or defendant by confession or *nolle prosequi*. That statute has been extensively acted on, and found very beneficial. We think every facility should be afforded to persons who may desire to have a *bona fide* question of fact or law decided at the least possible expense, and propose to extend the provisions of that Act. It will be observed that the special case authorised by the statute can only be stated after issue joined, which necessarily entails expense in compelling the parties to plead to issue; this we propose to dispense with, and to allow the case to be stated after writ issued. The writ we propose to retain, as a security against any abuse of the privilege conceded by the Act. We propose that disputed questions of fact may, by consent, be stated for the determination of a jury without pleadings. The form of issue given in the second schedule of the Act passed in the ninth year of the present reign, to amend the laws concerning games and wagers, may be readily applied to such cases.

We also recommend that the form of the judgment, which by the Act first alluded to is limited to one description for the plaintiff and one for the defendant, may be moulded to meet the circumstances of each case; and we have suggested certain provisions as to the costs of such proceedings, and others enabling the parties to take the opinion of a Court of Error if they should so agree, which provisions appear at large in the suggestions annexed to this report.

We will now proceed to consider the principal objections made to the present practice of special pleading. They are, 1st, the vagueness and uncertainty which is allowed in some cases; 2nd, the fiction which is permitted in others; 3rd, undue length and prolixity; 4th, the requirement of unnecessary precision, accompanied by certain technical rules, the excessive rigour of which often leads to a defeat of justice; 5th, the power which a party now has of passing by an objection to his antagonist's pleading when the fault first occurs, and taking advantage of it afterwards when all the expense of the suit has been incurred, and the defect cannot be remedied.

Instances of uncertainty and vagueness are to be found, 1st, in the use of what are called the *indebitatus* counts, by which a party suing another for a debt alleges in his declaration that the defendant is indebted to him for goods sold and delivered, or for work and labour, or materials furnished, or money lent or paid to his use, or on an account stated, without further specifying the subject-matter of the transaction, or the circumstances under which the debt arose. No doubt this mode of declaring is inconsistent with the theory of pleading, and would be insufficient to attain the desired objects, were it not that practically the same result is effected by the plaintiff being compelled in such cases to deliver with his declaration the particulars of his demand, and to add still more detailed and precise particulars if a judge shall think right to order them. By these means a party sued obtains all the necessary information as to the plaintiff's demand, more especially as, in actions for debts, defendants, having generally had previous demands made upon them, and bills delivered, are pretty well aware of what the claim is. Practically, this mode of pleading, applied to the more simple class of cases, works satisfactorily, and we are not disposed to meddle with it.

A particular objection under this head may be raised to the count for money had and received, which form of statement may be adopted in very many cases where it is untrue in ordinary parlance that any money has ever been received to the plaintiff's use. Thus, a party having possession of the goods of another (for instance, a carrier), demands a sum of money, to which he is not entitled, as the condition for delivering them to their owner: the owner, in order to obtain his goods, pays the money under protest; he is allowed to recover it back in this form of proceeding, upon the legal intendment that the money was received by the defendant to his (the plaintiff's) use. So where there are several claimants of an office, and the plaintiff is really entitled to it, but the defendant has received some fees belonging to it, asserting his right to them and to the office, the plaintiff may recover the amount of such fees as money had and received to his use.

Here, again, it is obvious that the theory of special pleading, as to giving information to the parties, is departed from; and we have had some hesitation whether we should not recommend the disuse of this artificial mode of stating legal implications from the facts, in lieu of the facts themselves. But here, as in the former case, the right to particulars of the demand materially diminishes the objection; and there exists so much difference of opinion on this subject, and so strong an indisposition on the part of many members of the profession whose opinions are entitled to great weight, to relinquish the present form of pleading in cases of this nature, that we have not thought it right to propose an alteration.

Another instance of the same defect is to be found in the exemption of certain privileged defendants from the rules which compel a party who intends in his defence not to deny the plaintiff's facts, but to rely on some other matter of defence, to plead such matter specially.

Instances of the second head of defect, namely, fiction in pleading, occur in the actions of trover and detinue. In trover, which is an action to recover the value of goods to which the plaintiff is entitled, and which the defendant has converted to his own use, the declaration states a loss by the plaintiff, and a finding of them by the defendant, when, in fact, neither of these allegations is true, nor is the plaintiff required to prove them, nor the defendant permitted to disprove them. So also in detinue, which is an action to recover the goods in specie with damages for their wrongful detention, the action may be founded on a supposed bailment, even where none such has taken place. Another instance is to be found in what is called express colour, which will be described in a subsequent part of the Report. We think that these and all similar fictions ought to be got rid of.

The third main objection to which we have adverted is, undue length and prolixity of pleadings in many cases. The redundant and tautological modes of expression which disfigure legal pleadings, and the repetition of the same thing in different ways, are in great measure to be ascribed to the rigour with which pleadings are construed, which has introduced verbosity and length, from a desire to omit nothing, to be strictly precise, and to put everything in so many shapes that some one at least shall be

found to square with the facts. In some instances, however, undue length is the consequence of some rule of law; for example, if the plaintiff declares on a deed, and the defendant wishes to say there is something in the deed which affords an answer, by showing that its language does not admit of the construction put upon it by the plaintiff, he must state the whole deed, however long, though the question turns on twenty words. We shall propose, further on, some remedies for this defect.

We now come to the fourth head of objection,—the requirement of unnecessary precision,—which, we may in passing observe, gives rise in practice to the most serious complaints against the system of pleading.

To insure precision the following rules have been from the earliest period established: 1, that pleadings should be certain; 2, that they should not be argumentative; and, 3, that they should not be double or multifarious.

The rule compelling certainty required a minute statement of time, place, quantity, and other matters of detail and description.

Practically it was found impossible to tie parties to the proof of such statements, whence arose a sort of compromise, whereby the theoretic principle of pleading was preserved, while the go-by was given to it in practice. This was done by averring such statements under a videlicet, which gave an appearance of precision to the pleading, while it was held that the averment would be satisfied by proof of any other time, number, or quantity, as the case might be. The inconvenience which remained and still remains is, that if any omission in these respects appears upon the face of the pleading, the pleading is informal, and open to objection in point of law. Thus: if in an action on a bill of exchange the plaintiff were to omit a statement of the day on which it was made, his declaration would be open to special demurrer; but he may insert under a videlicet a statement that it was made on any day he thinks proper to insert, without being held to proof that it was in fact then made. So if the plaintiff were to sue for wrongfully taking away his household furniture, without stating what sort of articles, or their number, or their value, his declaration would be objectionable on special demurrer; but if he were to insert a description including every sort of article, and stating them to be of any assignable number, and of any value, however extravagant, this, while it made his declaration valid, would in no respect oblige the plaintiff to prove the number or value alleged. Thus parties are compelled to make allegations which are useless, but the omission of which may be fatal. Such a state of things is obviously most objectionable.

The rule against argumentativeness requires that the facts shall be stated or denied positively and directly, and not by way of argument or inference. Thus, if to a declaration alleging that the defendant was indebted for goods sold and delivered, he were to plead that a credit had been given to him which had not expired, his plea would be argumentative and bad; because the declaration means, in point of law, that the debt was payable at the time of action brought, and the defence set up by the plea would be an indirect and argumentative denial of the debt being so payable. So if to an action for work done the defendant were to plead that the work was only to be paid for if it effected a certain object which it had failed to do, the plea would be bad on a like ground. So in an action for slander, if the defendant were to say that he spoke the words, but not in the sense alleged, or that the statement was a privileged communication, either of these pleas would be bad, as involved in the more general form of denial of not guilty.

Another rule to which we have referred is the rule against duplicity. According to the ancient regulations of pleading, a party was forbidden to plead two grounds for the same cause of action or defence. Thus, a defendant could not at the same time plead that he had paid a debt, and that it was barred by the Statute of Limitations; neither could a plaintiff in answer to a plea of release reply by denying the release, and by further alleging that if executed it was procured by fraud. In like manner a party was prohibited from denying the pleading of the opposite party in point of fact, and its effect in point of law, but was obliged to take his choice between the two. The hardship of the rule with reference to matters of fact was partly removed by a statute passed in the reign of Queen Anne, for the amendment of the law, which provided that by leave of the Court a defendant should be at liberty to plead several pleas; but the enactment did not extend to any subsequent stage of the pleadings, so that where several facts are comprised in a plea, the plaintiff is, in many cases, restricted to the denial of some one of them, and is obliged to admit the rest although they may be untrue; and in no case can a plaintiff reply twofold matter of answer. The injustice of compelling a litigant to admit a considerable portion of the statement of his antagonist, when that statement may be untrue, or of admitting either the truth of the facts

stated or the legal effect of the statement, when both may be open to denial, requires no argument.

Moreover, though the statute permitted several pleas, it did not alter the rule that each plea should state a single defence only. The result is, that captious objections of duplicity are sometimes made to pleadings; and, in the endeavour to avoid such objections, it occasionally happens that a necessary statement or denial is omitted, and the pleading for want of it is insufficient.

At the time when the rules as to precision and certainty in pleading to which we have been referring were first introduced, they were calculated to produce considerable advantages, without the mischiefs which have since resulted from them.

Originally pleadings were verbal; the advocates or pleaders appeared in Court, and stated the cause of action or ground of defence in the presence of the Court. Any deviation from the rules was objected to at the time; the defect was at once amended, and the issue in fact or in law was evolved without further expense or delay; indeed, the proceedings, judging from the Year Books, had more the appearance of a school of disputation, than of real business. When, however, the transactions which led to lawsuits increased, and became more complicated, and the carrying on pleadings verbally or *ore tenes* was found impossible, the parties were obliged to put their respective statements into writing, but in a form, still preserved, which supposes that the parties are orally pleading in the presence of each other. Unfortunately, all the technical and formal rules, which were harmless so long as the pleadings were verbal and in the presence of the Court, thereby admitting of immediate and easy amendment, were applied to them under the altered practice; and we find that so early as the 32nd of Henry 8th, the Legislature interfered to remedy the mischiefs which had then arisen, by providing that certain defects of form, insufficient pleading, or *jeoffail*, should be aided after verdict. Other statutes were subsequently passed for a similar purpose; but their operation was limited to providing that certain technical objections should be cured by pleading over (as it is called), or after verdict; when particularised or pointed out by special demurrer, those objections are still allowed to prevail.

The result has been, that almost all these ancient technicalities have been preserved, and still exist. The reports abound in instances of objections of the most technical description, which have been held fatal on special demurrer, and the subtlety and ingenuity of pleaders are constantly exercised in raising points of a purely formal nature, more especially when it is desired to evade a substantial issue in fact.

In short, we may say, that the excessive precision required is scarcely practicable, except in pleadings of well-known character and daily occurrence, in which, former generations of suitors having paid costs for the settlement of the law, the pleadings have become easy and intelligible.

Previously to 1834, when the pleading rules of Hilary Term, 4th Wm. 4, were adopted, the inconvenience was certainly of less frequent occurrence than since those rules came into operation; for so long as in the three principal kind of actions, viz., *assumpsit*, debt on simple contract, and trespass on the case (which constitute a very large majority indeed of all the actions which are brought), it was competent for the defendant to raise almost all defences under the old plea of the general issue, the evil was not much felt, because the necessity of answering the declaration by specially pleading the defence seldom arose; but when the new rules compelled the use of special pleas in these actions, the technical and formal defects of the system, which previously had existed in some actions only, became extended to all, and the inconvenience was increased in proportion. Special demurrers for want of form, and for objections of a technical nature, were much increased. From the necessity of specially pleading all defences to actions in most general use, new pleas were introduced; and defendants who had no real defence availed themselves of the chance of a temporary success by pleading subtle and tricky pleas to invite special demurrers for the mere purpose of delay.

We have already pointed out the advantages which have been gained by the introduction of the new rules. The system of pleading, which had been imperfect from its partial application to particular actions, was made more uniform and consistent; and in all those cases in which issues of fact were raised, much expense has been spared by the questions in dispute being accurately defined, by the saving to the parties in consequence of facts being admitted on the record, and, in many instances where the question turned upon a point of law, by the much less expensive appeal to the Court in the first instance, without the intervention of a jury to try facts which were never disputed. But although a great gain in point of certainty and distinctness was thus introduced, it must be admitted that the opportunities for captious objections have increased. We hope to retain these advantages without the com-



comitant inconveniences, by the remedies which we are about to propose.

There remains to be noticed the fifth and last head of objection to the present practice of pleading, namely, the power which a party has on observing a defect in his adversary's pleading to pass it by till after trial, and afterwards to raise it if defeated on the trial; but as this proceeding cannot be resorted to until after the trial has taken place, it will be more convenient to dispose of it when we shall have arrived at that stage of the inquiry in a subsequent part of this report.

Before proceeding to point out the alterations which we think necessary, we must deal with a question which has been lately agitated, viz., whether pleadings, instead of being prepared by the parties themselves, should be settled, upon the verbal statements of the parties, by a public officer specially appointed for that purpose. Such a course would, in our opinion, be highly inconvenient.

The parties to a suit are now at liberty to state their own case in such manner, as they may consider most favourable to themselves, subject to the peril of their proceedings being objected to by their adversary, if wrong or irregular. It has been suggested, that a public officer should be appointed to act as a kind of assessor or moderator between the litigant parties, and settle and arrange the issues between them, whether of law or fact. We do not think it at all likely that such an officer would perform his duty better or more satisfactorily than the present private pleaders, who, being directly retained by their clients, are naturally actuated by more zeal and anxiety for their interest than a mere public officer would be. To ascertain and state the disputed point, whether of law or fact, is the aim and object desired, and surely this can as well be done by one party stating his case and the other answering it, as by a third person taking the statement and answer, and dealing with them as an assessor and moderator.

The preparation of the pleadings as at present (although they are a very important part of the suit) is not liable to objection on the ground of expense. The pleaders who usually draw them are most moderately paid for their skill and labour, their fees being generally proportioned to the length of the draft, which is no criterion of the amount of learning or trouble bestowed on it. The proposed plan would greatly increase the expense, not only to the suitor, but to the public. Several officers would be required, and, as the only persons fit would be men intimately acquainted with the law in all its branches, their salaries would necessarily be high. Each party to the suit would be obliged to lay his case before the officer, or instruct a pleader to draw the pleadings, and then refer them to the officer; and, as questions would constantly arise as to the form of the pleadings, the parties would frequently deem it necessary to attend before the officer with their pleaders or with counsel. Appeals would constantly be made to the Court from the decision of the officer by a party who might consider the issue in law or fact to be stated unfavourably for him. Upon the whole, we are of opinion that the old policy and principle of the common law, which leaves parties to act for themselves, should be maintained; and that the true reform will be, to do away with technical and formal requirements, and make the mode of objection to uncertainty, duplicity, or argumentativeness as direct and as little dilatory and expensive as possible, leaving the question of substantial right to the adjudication of the Court and jury according as the question to be decided shall be one of law or of fact.

We proceed to discuss the remedies which we have to propose for the defects which we have pointed out.

Upon reference to the statutes passed to remedy a too rigid adherence to forms, viz. 32 Hen. 8. c. 30; 18 Eliz. c. 14; 21 Jas. 1. c. 13; 16 & 17 Chas. 2. c. 8; 4 & 5 Ann. c. 16; 5 Geo. 1. c. 13, it will be found that a distinction is drawn between what is styled the "very right of the cause and the matter in law appearing on the pleadings" and "formal defects, imperfections, omissions, defaults in form, and lack of form."

We propose to give effect to this distinction, but by adopting a different course from that pursued by these statutes. The mode therein adopted was not to declare that such "formal defects, imperfections, omissions, defaults in form, and lack of form," as were therein referred to, should cease any longer to be of consequence or fatal; but, on the contrary, the necessity for the form was continued, by the statutes merely enacting that the defect should be specially expressed in the demurrer, and that after a further step was had in the cause no objection could be taken on account of it.

Now, what we propose is, that the necessity for the form be absolutely done away with, and that every declaration and subsequent pleading which shall clearly and distinctly state all such facts as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient, and that it shall not be necessary that the facts should be stated in any technical or formal language or manner, or that any technical or formal statements should be used;

and that judgment shall in all cases be given according "to the very right of the cause and the matter in law appearing on the pleadings;" and that no formal or technical defect, imperfection, or omission, default in form, or lack of form, shall invalidate the pleading. To give effect to which principle, we further propose that, except in the cases more particularly specified presently, no pleading shall be deemed insufficient for any defect upon which objection can now be taken on special demurrer only.

It will be seen that this at once gets rid of all those objections which can only be taken on special demurrer, and that every pleading will be judged of according to the very right of the cause and matter in law; and this well-understood distinction between what is good upon general demurrer, although bad on special, will afford to all persons engaged in the practice of the law a great and most convenient assistance in practically carrying into effect the new provisions; the more so, as the language of the enactment above suggested has already obtained a recognised interpretation.

We believe that this provision, simple as it seems, will go to the root of the evil complained of. It will at once put an end to all captious objections in respect of trivial slips, words left out, formal matter omitted, and other faults, which, although quite immaterial to the merits of the case, and of no prejudice to the opposite party, are, nevertheless, at present, ground of objection by special demurrer.

With a view effectually to purify the pleadings from fictions and needless averments, we propose that all statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial, the statement of losing and finding, and bailment in actions for goods or their value, the statement or acts of trespass having been committed with force and arms and against the peace of our lady the Queen, the statement of promises which need not be proved, as promises in *indebitatus* counts, and mutual promises to perform agreements, and the like statements, be omitted; and that where any clearly unnecessary statement is vexatiously made, it may be struck out by the Court or a judge, with or without costs.

While, however, we think it necessary to get rid of all requirements of a merely formal character, it must be obvious to every one that some rules are absolutely necessary for the attainment of what has been shewn to be the proper object of pleading. A power must exist of compelling parties to be clear and distinct in their statements, and there must be a remedy against ambiguity, whether intentional or not. So, also, a rambling pleading, mixing up several grounds of action or defence, and composed of different matters of fact and law, would be most objectionable. And it is matter of obvious convenience, in order to avoid prolixity, that the statement should be one of facts, and not of the evidence of facts; or, in other words, that proper provision should be made against uncertainty, duplicity, and argumentativeness, when they tend to embarrass the opposite party in the conduct of his case.

A mode has been suggested for providing against these objections; viz., that no special demurrer shall be permitted until the objecting party shall have given notice to his opponent of the specific objection, and required him to amend his pleading, which he should be at liberty to do without payment of costs.

The objection to this mode of remedy is, that a question would almost always arise, whether the pleading objected to was sufficiently amended or not. We are satisfied that a provision of this kind would only lead to an application to the Court or a judge at a later period than that at which we propose to have it made; and as to the amendment without costs, the notice of objection would of necessity lead to costs; besides, defendants would continually delay proceedings by unfair pleading if they were at liberty to amend them as a matter of right.

The plan which we propose is this: that where a party objects that a pleading is, by reason of duplicity, argumentativeness, or uncertainty, defective in a particular calculated to embarrass or mislead, he shall take out a summons before a judge, in which the defect of which he complains shall be specified. Upon the hearing of the summons, if the judge is of opinion that the pleading is sufficient in the particular complained of, his decision shall be final; if he is of opinion that the pleading ought to be amended, he shall so order. In the event of the party pleading refusing to amend, his opponent shall be at liberty to demur, stating as the ground of demurrer the defect of which he complained in the summons; and if the Court shall be of the same opinion as the judge, they shall be at liberty to give judgment against the party pleading, or give leave to amend on such terms as they think fit to impose, and upon such judgment no error shall lie in respect of any formal objection. This mode of remedy is much preferable to that by special demurrer; it has for its direct object that which should be the object in such a case, the amendment of the defect complained of. To hold that a pleading is bad, because more or less obscure, seems unreasonable, unless

the party pleading will not amend, and clear up the obscurity when it is pointed out to him. The application to a single judge by summons is attended with very trifling expense, and we hope will at a future time be still less expensive. The judgment of the judge will not be final as to the result of the cause. If he decides against the party complaining, he only compels him to answer the pleading as it stands. If he decides against the party pleading, his decision is not final, if the party thinks fit to refuse to amend. In truth, we believe the actual appearance before the judge will seldom take place; at least in cases where the parties mean fairly. There will be no such temptation on account of costs as arises upon a special demurrer, to induce a party to take out such a summons, unless he feels himself in real difficulty; and if there be such a difficulty, we believe that in nineteen cases out of twenty an objection, when pointed out by a summons, instead of a special demurrer, will be at once amended.

In order to confirm the jurisdiction now exercised by the judges over tricky pleadings, and to extend it to the case of colourable amendments, we further propose that the Court or a judge shall have power in all cases to set aside pleadings clearly frivolous or vexatious, or colourably amended in pretended compliance with a judge's order to amend.

The result of the alteration which we thus propose is, that objections in point of law will hereafter be confined to matters of substance, instead of being raised on mere matters of form and subtle technicalities.

The privilege which under various statutes landlords, justices of the peace, constables, and others, have of pleading the general issue, and giving the special matter in evidence, is (as we have before observed) justly open to the charge of introducing vagueness and uncertainty into the proceedings. The same reasons which render it just and convenient that a plaintiff should have notice of the ground of defence on which the defendant intends to rely, apply equally to actions against defendants who at present are thus privileged; and we see no reason why particular classes of defendants should be exempt from furnishing such information, or why there should be privileged classes in a Court of justice. Besides, one reason for allowing such a privilege, viz. the difficulty of placing special defences on the record, will, we trust, be obviated by what we have already proposed. We, therefore, recommend, that all statutory enactments allowing parties to plead the general issue or other general plea, and to give special matter in evidence under such general plea, be repealed.

Under the head of fictions in pleading we think it right expressly to provide by name that what is called express colour be abolished.

It is a rule that pleadings must not be argumentative. This has given rise to a form of pleading which is called express colour. Thus, if to a declaration stating that the plaintiff is possessed of a house, the defendant should plead, stating that the house was his, the plea would be bad, upon the ground that it is an argumentative and indirect denial of the statement that the house is in the possession of the plaintiff; but if the defendant were to state and shew that he had a good title to the house, and admit the plaintiff's possession in fact, but surmise that the plaintiff was in possession by some bad title, the plea would be good, because it would give colour to the plaintiff's alleged possession. The surmise might be entirely false, but the plaintiff could not deny it, as if he did he would be met by the answer, that it was immaterial whether or not that was the title upon which he relied, for if the defendant have the title alleged, it does not signify whether the plaintiff's pretended title was correctly stated or not. We think that such a proceeding, however ingenious, is too subtle, and ought to be abolished, and we recommend its abolition accordingly.

Under the same head of fiction, besides the untrue statements in trover and detinue which we have already pointed out, fall the various fictitious proceedings in the action of ejectment. We recommend the abolition of those fictions, and the substitution of a simple and intelligible mode of procedure; but by reason of the great importance of the action of ejectment, and the difference between the proceedings in it and other actions, it will be treated of separately in a subsequent part of our Report.

To prevent needless length, we propose to do away with proferet and oyer. At present, generally speaking, if a plaintiff sue on a deed to which he is a party and which is in his possession, he must make proferet of it, that is, offer to produce it in Court; and his opponent, if he wishes to bring any part of the deed before the Court for the purpose of pleading, must crave oyer, or pray to have it read. The whole deed, however long and unnecessary, is then set forth, and becomes part of the pleading of the person who sues upon it. In the case of writings not under seal, no proferet is required. There can be no good reason for placing them on a different footing, for there is no more need to set forth a writing under seal than a writing not under seal; there is as much reason for giving inspection and

copy of one as of the other. Whether a party be entitled to such inspection in Courts of Common Law is always a question of much doubt; and, except in policy causes, these Courts exercise a very uncertain jurisdiction on the subject. We think that wherever inspection of any document can be had by a bill of discovery, it should be obtainable in any Court of Common Law where the suit is pending, and we have recommended that provision should be made to that effect.

With a view at once to curtail unnecessary prolixity, and to remove a temptation which at present exists to raise unjust difficulties by denying facts, which according to the present vicious practice are apparently denied, and so put in issue, simply because they are expressly asserted, we think that where the right of a party pleading depends upon the performance of conditions precedent, he ought to be allowed to aver performance of such conditions generally. This probably would be one of the consequences of the abolition of the special demurrer; but we think it had better be substantively enacted. We do not, however, propose that the opposite party shall be at liberty to traverse the averment generally, but that he shall be required to specify what conditions precedent he insists have not been performed. We think that, practically, this would have a tendency to cause many actions to be defended on their merits alone. At present a defendant is tempted to deny every allegation of performance contained in the declaration; but in the altered mode of pleading he would, in all probability, confine himself to the denial of the performance of some condition which he really believes has not been performed.

(To be continued.)

## THE LAWYER.

### Summary.

**EQUITY PRACTICE.**—A case in the Law of Evidence of some interest as involving the matter of professional confidence between Solicitor and client, was decided by Vice-Chancellor KNIGHT BRUCE last week. We allude to *Lodge v. Prichard*, 17 Law T. 263. In that case plaintiff's residuary legatee filed his bill against the defendants, as executors, for the usual accounts, and prayed that the purchase by them of certain shares in a ship which had formed part of the testator's estate should be set aside. The defence to the special relief so prayed was, that the residuary legatees, by themselves unable to sell the shares, had caused them to be valued, and requested the executors to become purchasers. This they declined, on the ground that they would not be justified in equity in making such a purchase from the *cestui que trust*. The legatees therefore, to obviate this objection, sent their solicitor to the executors with a document wherein they expressed their willingness to sell their interest in the shares for 1,200l. "to any person or persons." To prove this defence the solicitor who conducted the negotiation was examined, and the document in question was set out in his evidence. The Vice-Chancellor, however, ruled that "the document was so associated, blended, and united with professional confidence existing between the solicitor and his employer,—it was so infected with professional confidence,—that he could not cull and select any part of it. The whole was affected by the original confidence. This is a point which it would be well to note in *Pulling's Law of Attorneys*, and in Phillips or Taylor, or any other work on Evidence which may be in the library. The other point reported last week, and requiring notice here, is, whether a trust in a will to keep up policies of assurance on lives is not void as being an accumulation within the Thelluson Act. In the case *Bassil v. Lister*, 17 Law T. 563, the Vice-Chancellor held it was not.

**COMMON LAW.**—Some remarks on an interesting case last week reported on the Law of Contracts (*Sievwright v. Archibald*, 17 Law T. 264) will be found in the Mercantile Lawyer; and a case in the Exchequer (*Bland v. Crowley*) is reviewed in the Joint-Stock Companies Law Journal. Two cases of interest, decided at Nisi Prius, are reported in last number. The first is *Hellaby v. Weaver*, 17

Law T. 271; the question there was whether the defendant was a common carrier. He had been accustomed to collect goods in Worcester, and send them by railway to their destination, sometimes receiving the whole costs of carriage, at others only the charge for conveyance to the station. In the case before the Court the defendant received goods for transmission to Exeter, and received the charge for conveying them the entire distance. Lord Campbell, C.J. ruled that the defendant was a common carrier.

The Law of Evidence Act was so fully reviewed in a separate article last week, that it were needless to state the purpose and effect of the various clauses here. (*Vide* 17 Law T. 191).

Subjoined we give a report of the proceedings at the monthly meeting of the managing committee of the Metropolitan and Provincial Law Association.

## THE MERCANTILE LAWYER.

THE case of *Sievwright v. Archibald*, reported in our last number (17 Law T. 264), contains some extremely valuable information on the law of mercantile contracts. In that case, a broker having authority to negotiate a contract between two parties for the sale of iron, sent a sold note to the seller, in which the iron was described as *Dunlop's Pig Iron*. It appeared that Dunlop's was a description of Scotch iron, and that the contract which the defendant had authority to negotiate was for the sale and purchase of *Dunlop's Pig Iron*. The defendant had refused to receive the iron, and the action was brought for such refusal. There was evidence of a general admission by the defendant of his liability for a breach of some contract to purchase iron. There was no entry of the contract in the broker's book signed by the broker or by either party, and it was held (Erle, J. *dissentiente*), that there was no binding contract between the parties, either in the terms of the bought or of the sold note, the variance between them being fatal, and that there was nothing in the admission of the defendant to warrant the jury in finding that the defendant had ratified a contract in the terms of either the bought or the sold note.

The Lord Chief Justice, at the conclusion of his judgment, expressed a wish that the decision of the Court might be reviewed by a Court of Error. It becomes, therefore, the more necessary to look into the reasonings of the learned judges before assuming that the decision of the majority settles the question at issue, which, as it affects so large a class of commercial contracts, is one of great importance. This question, as Mr. Justice PATTERSON expressed it, was simply whether there had been any written note or memorandum of the contract declared on, and signed by the party to be charged, within the meaning of the Statute of Frauds.

Mr. Justice ERLE, it will be seen, elaborately reviews the whole of the cases relating to contracts made through the intervention of brokers. The form of the instruments used in such cases, he observes, "is strong to show that they are not intended to constitute a contract in writing; but to give information from the agent to the principal of that which has been done on his behalf, and the buyer is informed of his purchase, and the seller of his sale;" and his lordship continues, "no person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at various times in various forms, neither party having seen both instruments—such a process is contrary to the nature of contracting, of which the essence is interchange and consent at a certain and the same time. The governing principle in respect of contracts is to give effect to the intention of the parties, and where the intention to contract is clear, it seems contrary to that principle to defeat it because bought and sold notes have been delivered which disagree."

Mr. Justice PATTERSON, however, meets this reasoning by the fact that it is not the contract itself which the statute requires to be in writing, but some note or memorandum thereof, signed by the party to be charged or his agent. "In this case," he observes, "the contract was made by a broker acting for both parties, but such contract was not in writing, signed by him or them. If there be any writing to satisfy the statute, it must be some subsequent memorandum in writing signed by the defendant or his agent. There are

subsequent memoranda in writing, signed by the broker, namely, the bought and sold notes,—which of these, if either, is the memorandum in writing signed by the defendant or his agent? . . . If this were *res integra*, I am strongly inclined to say I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds; but I consider that point to be too well settled to admit of any discussion; yet there is no case in which they differed where the Court has upheld a contract, plainly shewing that the two together have been considered the memorandum binding both parties. . . . The question is not whether either of the notes corresponds with the contract, originally made by word of mouth, but whether either of the notes made separately *per se* be a signed memorandum, and binding upon either party."

LORD CAMPBELL, C.J. adopting the reasoning of PATTERSON, J. observes, "where there has been entry of the contract by the broker in his book, signed by him, I should hold, without hesitation, notwithstanding some dicta or supposed ruling of Lord TENTERDEN in *Thornton v. Miles* to the contrary, that the entry is the binding contract between the parties, and that the mistake made by him in sending a copy of it in the shape of a bought and sold note, would not affect its validity. . . . The broker, to save himself trouble, now omits to enter or sign any contract in the book, and still sends bought and sold notes as before. If these agree, they are held to constitute a binding contract. If there be any material variance between them, they are both nullities and there is no binding contract."

There are some observations in Lord CAMPBELL's judgment, on the extreme inconvenience occasioned by the systematic carelessness of City brokers, which might do much good if properly attended to by the Corporation of London, who, by ancient custom conferred by Act of Parliament, have the governance and regulation of brokers within the City. The remuneration to City brokers is far more liberal than that ordinarily awarded to lawyers and other classes of superior education, and it is rather remarkable what a number of disputes are occasioned by their neglect. In many trades a slight misdescription of the article sold is of moment, as may be gathered from the recent case of *Lewis v. Bird*, 16 Law T. 324, and the decision in the present case is calculated to produce good in compelling in commercial dealings that accuracy and particularity which it is the peculiar province of lawyers to inculcate.

## NOTES ON RECENT CASES.

**Statute of Limitations.**—Evidence of plaintiff to shew that the action was brought within six years from the time of the accruing of the cause of action. (*Walker v. Collick*, 4 Ex. 171; *Pritchard v. Bagshawe*, 17 Law T. 199; 20 L. J. 161, C. P.)

This is a very practical subject, and considerable difficulty has arisen upon it since the Uniformity of Process Act (2 Wm. 4, c. 39), which has not yet been entirely removed by judicial decision. The latest case, *Pritchard v. Bagshawe*, in the Common Pleas, has decided in conformity with *Walker v. Collick*, in the Court of Exchequer, that in order to bar the Statute of Limitations in cases where a writ of summons has been issued, but not served within the six years, the second or subsequent writ of summons must, at the time a copy of it is served, contain the indorsement required by the 2 Wm. 4, c. 39, s. 10, and that the roll and the writs themselves, although containing such requisite indorsements, are not evidence of such indorsements having been made at that time.

Two points were left undecided; the Court of Common Pleas expressly refrain from giving any opinion (1) as to the time when the indorsements are to be made on the intermediate writs between the first writ of summons issued and the last a copy of which is served, and (2) upon the most important point in a practical view, whether these indorsements in the case of nonailable process, can be made by any other person than the plaintiff or his attorney.

The whole question arises upon section 10 of the 2 Wm. 4, c. 39 (the Uniformity of Process Act), which we propose to consider in the first place, and afterwards the judicial interpretation of it in the decided cases.

The following are the words of section 10:—

That no writ issued by authority of this Act shall

be in force for more than four calendar months from the day of the date thereof including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries* as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ and every writ (if any), issued in continuation of a preceding writ, shall be returned, *non est inventus*, and entered of record within one calendar month next after the expiration thereof; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum, indorsed thereon or subscribed thereto, specifying the day of the date of the first writ and return, to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be.

Some doubt has been expressed as to the accuracy of the words, "and return," in the latter part of this section. In *Williams v. Williams*, 10 M. & W. 178, it was decided that the section means that the indorsement shall specify not only the date of the first writ, but also that of the return, on the assumption that the word was "and;" but in *Hunter v. Caldwell*, 10 Q.B. 79, where *Williams v. Williams* was cited, and the Court took time to consider its judgment, Lord Deunman, C.J. in the judgment said, "this word should probably be 'such,' alluding to the word 'and' in the above passage. In the 6th and 7th sections of Archbold's Practice, there is this note:—'In the printed copy of the Act, instead of the word 'such,' the conjunction 'and' is improperly inserted.' But in the eighth edition this note has been omitted, and the reading adopted in *Williams v. Williams* substituted.

The writ of summons as the process for the commencement of personal actions, was originated by the Uniformity Process Act; and sec. 10 enacts, that no such writ shall be in force for more than four calendar months, that is, no such writ shall be executed after that period from its date. But an exception has been made in cases where service of a writ of summons has been made after that period by consent; and in such the Courts have refused to set aside the service. (*Pearce v. Swain*, 7 M. & W. 543; *Coates v. Sandy*, 2 Sc. N. R. 535.)

The following is a singular absurdity in the language of this section. "No first writ shall be available, &c. unless the defendant shall be arrested thereon, or served therewith, &c. or unless such writ (i. e. such first writ) and every writ issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof," &c. If this is literally construed, the last writ, as well as all the intermediate ones, is to be returned *non est inventus*, and entered of record, though the last writ may have been served on the defendant. There can be no doubt that the last writ is a writ issued in continuation of a preceding writ, and that it cannot be in force for more than four calendar months. Service of the writ may or may not have been duly effected, but still the writ itself expires; in the case of service its force is spent *ipso facto*, and in the case of non-service it expires at the end of the four months by virtue of the first clause of this section.

Soon after the passing of the Uniformity of Process Act it was decided that a writ of summons issued under section 10, to bar the operation of the Statute of Limitations, might be returned *non est inventus*, without any attempt to serve it—having been made. (*Williams v. Roberts*, 1 C. M. & R. 676.) The *alias* and *pluries* writs must contain a memorandum of the date, not only of the first writ, but also of the return. (*Williams v. Williams*, 10 M. & W. 174.) This point proceeds directly on the disputed words "and return," above alluded to. It was contended on the one side that the word "return" referred to the subsequent clause, and on the other, that it belonged to the preceding one, and that the memorandum was to contain the dates both of the first writ and its return; and upon a suggestion from the Court that the latter was the proper construction, the plaintiff had leave to amend. This view was adopted in *Walker v. Collick*, and Platt, B. said, "The statute requires an indorsement, and here it does not appear that

any was made either by the sheriff, or the plaintiff, or his attorney."

The next consideration is, when the memorandum ought to be made. It has been decided that the memorandum must be on the last *pluries* writ at the time of service (*Medlicott v. Hunter*, 5 Ex. 34; 19 L. J. 191, Ex. S. C.); and that the memorandum so indorsed, even though erroneous, cannot be amended according to the fact. The words are, unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month, &c. and shall contain a memorandum specifying the dates. In *Medlicott v. Hunter*, the Court said "We cannot alter an indorsement, because the indorsement, by the terms of the statute, must be on the writ at the time it was served; and we cannot, therefore, although to save the Statute of Limitations, afterwards make that indorsement." The same view of the subject was taken in *Pritchard v. Bagshawe*. As the intermediate writs are not served, the above decisions are not applicable to them. Those decisions do not determine the precise time when the indorsements are to be made, but only that they must be on the writ at the time of service; so in like manner it is safe to say that the indorsements must be on the intermediate writs before they are returned and entered of record. By Reg. 10, M. T. 3 Wm. 4, one of the rules made by virtue of the Uniformity of Process Act, s. 14, "for the effectual execution of that Act, and of the intention and object thereof," it is ordered that if the plaintiff or his attorney shall omit to insert in or indorse on any writ, or copy thereof, any of the matters required by the said Act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void; but it may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any judge."

If, then, the writ is not void for the omission of these indorsements, and if it may be set aside on that ground for irregularity, in what cases will the Courts allow the defect to be amended? An application to amend is generally made to the discretion of the Courts, and at one period the Courts were very liberal in allowing amendments in order to prevent the operation of the Statute of Limitations. The later cases, however, bear considerably the other way, and *Medlicott v. Hunter* is an instance where the Court refused to allow the plaintiff to amend and alter the indorsement on the last *pluries* writ from the 21st August, 1846, to the 20th August, 1846, though the mistake seemed to have been the result of carelessness only. A motion to alter the date of the first writ and to make corresponding alterations in the subsequent writs was refused in *Campbell v. Smart*, 5 C. B. 196, the object being to gain two more days so as to authorise the issuing of a third writ, which was not applied for until a day too late. It was alleged that the first writ would have been in time had it issued on the day to which it was proposed to alter the date, and that unless the amendment was allowed the plaintiff would be barred of his claim by the Statute of Limitations. *Campbell v. Smart* was, in truth, not the case of an amendment; there was no mistake in the dates of any of the proceedings, but the party by his own *laches* had allowed the Statute of Limitations to take effect; but in *Medlicott v. Hunter* it was otherwise. Two grounds were urged against allowing the amendment in the latter case that deserve attention; first, that the proper indorsement should have been on the last *pluries* writ at the time of service, the effect of an erroneous indorsement being to lead the defendant to suppose that the operation of the Statute of Limitations had not been barred, and to induce him to defend the action on that plea; and a second ground was stated by Parke, B. "that in *Culverwell v. Nugee*, 15 M. & W. 559, the decision was given with reference to matters amendable as misprisions of the officer." In the report of *Culverwell v. Nugee*, it does not appear whether there was any indorsement on the writs at all, the terms of the rule applied for only are given; and, therefore, whether the case was one of amending any indorsements that existed, or of indorsing the writs then for the first time; or if it was the amendment of existing indorsements, whether the mistake was the act of an officer of the court or of any other party, it is impossible to collect. The misprision of an officer of the court does not appear to comprehend the mistake of the party or his attorney (*Green v. Miller*, 2 B. & Ad. 781); but the Reg. 10 M. T. 3 Wm. 4, provides that the omission by the plaintiff or his attorney to insert in

or indorse on any writ, any of the matters required by the Uniformity of Process Act, shall not render the writs void. The judgment of Alderson, B. in *Culverwell v. Nugee*, proceeds on a broad and liberal view: "Soon after the passing of the Uniformity of Process Act, the Courts held that they had no power to amend writs under that statute: but the evil of refusing an amendment in the case of the Statute of Limitations, convinced us that we had come to an improvident resolution, and we found it necessary to retrace our steps. We amend, therefore, in certain cases, where we can see from our own records what is the amendment that ought to be made."

The date of the Writ of Summons, as stated in the Nisi Prius Record, has been held to be conclusive, and if a wrong date is inserted, the Court will set aside the trial, and order the record to be amended at the plaintiff's costs. (*Whipple v. Manley*, 1 M. & W. 432; *Pratt v. Hawkins*, 15 M. & W. 399.) But the record does not prevent the defendant from shewing, by the production of the writ, that it has not been served, and has been returned *non est inventus*, and, therefore, is not the commencement of the action. (*Pritchard v. Bagshawe*.)

If the issue roll only states the date of the original writ of summons, the defendant may apply to amend the date, by altering it to that of the *alias* or *pluries* writ with which he may have been served, unless the plaintiff amends the issue by stating the successive writs, to connect the original writ with that served upon the defendant. And so, if the issue omits the indorsements on the intermediate writs, the defendant may apply to compel the plaintiff to set them out, or, if any of these matters are not stated according to the truth, the plaintiff may be compelled to amend.

If the writ issued within six years after the cause of action accrued has not been duly continued, the proper plea to put that in issue, is the general plea of the Statute of Limitations. (*Higgs v. Mortimer*, 1 Ex. 711; *Pratt v. Hawkins*, 15 M. & W. 399.) And upon this issue the plaintiff must shew by extrinsic evidence, that the writs were issued and properly indorsed and returned, as required by the Uniformity of Process Act; and the roll is no evidence of these facts. (*Walker v. Collick* and *Pritchard v. Bagshawe*.) For the first writ of summons only bars the operation of the Statute of Limitations, provided it has been properly continued by successive writs down to the last, and the statute requires every writ to be returned and entered of record, within one month after its expiration, and every writ issued in continuation of a preceding writ, to be issued within one month after the expiration of the preceding writ, and to contain the *alias* indorsements. The roll at the most is only evidence of the contents of the writs at the time of the enrolment; and the production of the writs does not shew when the contents therein stated were written.

Whether the indorsements are to be made by the plaintiff or his attorney, in the case of nonbailable process, upon which the Court, in *Pritchard v. Bagshawe*, said that the language of the statute was somewhat obscure, depends on the reading of the last clause, already alluded to, whether the word should be *such* or *and*. In *Walker v. Collick*, the Court seem to have read it as "and," and to have been of opinion that the indorsements should be made by the plaintiff or his attorney, and this reading was also adopted in *Williams v. Williams*, 10 M. & W. 178. J. T.

## PROMOTIONS, APPOINTMENTS, ETC.

[Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.]

BUCKINGHAM PALACE, Aug. 7.—The Queen was this day pleased to confer the honour of knighthood upon John Hindmarsh, esq. captain in the Royal Navy, Knight of the Royal Hanoverian Guelphic Order, and Lieutenant-governor of Heligoland.

Mr. Edward Lawes is appointed Chairman of the Commissioners of Sewers, under the late Act for renewing the commission for another year.

Mr. William Aysford Sanford is appointed Colonial Secretary for Western Australia, in the room of Mr. Thomas Falconer, resigned.

Captain Knight, superintendent of military prisons in Canada, is now appointed superintendent of the convict prison at Portland, in succession to Captain Whitty, promoted to be a member of the board of government prisons in London.

## COURT PAPERS.

**VACATION MASTER IN CHANCERY.**—The newly-appointed Master in Chancery, Humphry, undertakes the duties of Vacation Master during the recess, which terminates, so far as these offices are concerned, on the 26th of October.

## PROCEEDINGS OF LAW SOCIETIES.

## METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.

THE Managing Committee held their usual monthly meeting on Wednesday, the 6th inst., Mr. E. W. Field in the chair.

The Secretary reported the position of the various Bills before Parliament for the amendment of the law.

It was referred to the Conveyancing Committee, to consider whether or no it would be expedient to prepare a draft Bill for a general registration; and the secretary was instructed to ascertain the views of the Council of the Incorporated Society upon the subject.

It was reported from the Equity Committee, that they had, with the assistance of Mr. Mullings, suggested some amendments in the County Courts further Extension Bill; particularly one, extending the provisions of the audience clause, so as to include, not only suits, but all proceedings in the courts; and that these amendments had been adopted and introduced into the Bill by the Solicitor-General.

It was referred to the Equity Committee to consider the expediency of preparing draft orders to carry out the objects of the Bill; and, if the Committee should see fit, to prepare such orders accordingly.

A letter was read from a member, communicating the opinion of counsel upon the right of Notaries to practise as Conveyancers; which precisely agreed with the opinion which had been communicated to the members by the secretary.

A letter was read from Mr. R. Maugham, stating that the Council of the Incorporated Society concurred with the Committee in the expediency of an application to the judges for a rule compelling attorneys applying for leave to renew their certificates, to serve the summons upon the Registrar of Attorneys, instead of, as now, applying *ex parte*; and that they had submitted the proposed amendment to the judges accordingly.

A case of malpractice was further considered.

Letters were read from members, requesting the opinion of the Committee upon doubtful points of professional duty. The points were discussed, and the secretary was instructed to communicate the opinion expressed.

The secretary was instructed, during the long vacation, to visit Lincolnshire and the Midland Counties; and to hold meetings of the local members of the Profession in the principal towns, in order to explain the objects and operation of the Association, and its claims to more extended support.

8, Bedford-row.

WM. SHARN, Sec.

—Legal Observer.

## CORRESPONDENCE.

## RECENT CASE—TARLTON v. LIDDELL.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In a recent number of your valuable journal is reported a case of *Tarlton v. Liddell*, sent by one of the Vice-Chancellors for the opinion of the Court of Q.B. with the opinion of that Court thereon. The facts of that case are few, and must be fresh in the recollection of your readers; any recapitulation of them is therefore needless, but, with your permission, I would venture to submit the following remarks on the case and opinion. The lawyers of 1821 (it should seem) treated, not only the release of 1815 leading the uses of the recovery of that year, but the bargain and sale of 1815 (a distinct deed), to make the tenant to the *præcipe* in that recovery, as altogether void; a view which, of course, involved the destruction of the recovery itself, so far as it affected the estate tail and remainders thereon, for want of a tenant to the *præcipe*; and they accordingly had another recovery regularly suffered in 1821, the uses of which were limited to the father's assignees during his life, with remainder to the son in fee, who afterwards purchased and took a conveyance of his father's life estate from the assignees, which it seems then to have been thought had put all right; the son, afterwards, in 1849, selling to the defendant in this case. This view was consistent, intelligible, and it may be thought the correct one. However, the Court of Q.B. took a different view of the case. They treated the bargain and sale of 1815 to make the tenant to the *præcipe*

as not fraudulent and void, and the recovery of that year as effectual for its intended object of barring the son's estate tail and the remainders thereon; and they accordingly proceeded to hold, either that the release of 1815 binding the uses of that recovery was altogether void, in which case the use of the remainder in fee would result to the son; or that, if not void altogether, the limitation of uses contained in it was a voluntary settlement, which, by having reduced the son to a life estate, prevented the recovery of 1821 from being of any effect, but which, notwithstanding the son's intervening marriage, of which the ruit was a child, the plaintiff, claiming under one of the limitations of that settlement, was fraudulent and void as against the purchaser in 1849 from the son, between whom and the plaintiff lay the contest. Now, with reference to this view of the Court of Q. B. I beg to remark, that if the fraud of the father "tainted the whole transaction," and on this ground rendered the release of 1815 totally void, how came it to pass that the bargain and sale of 1815, the first step in that transaction, escaped the infection? The issue at law directed by the Court of Chancery (says the report) was, to try whether the deeds of recovery were fraudulent and void in law, as against the father's creditors; and (it adds) the jury found that they were fraudulent and void; and, after this finding, the Court of Chancery decreed that the deeds of recovery were fraudulent and void, &c.; and even the Q. B. according to the report, expressed itself to be "clearly of opinion that the proceedings in Chancery were quite right." But if this bargain and sale, the foundation of the whole, failed, down with it went the recovery, so far as respects its efficacy to bar the son's estate tail and the remainders over, for want of a proper tenant to the *præcipe*; and had it not been for the subsequent recovery of 1821, which, on the hypothesis that the release of 1815 was totally void, was a perfectly valid recovery in all respects, there would seem to have been no answer to the plaintiff's title. Then (to take the other horn of the dilemma), if the release of 1815, so far as it dealt with the estate which moved from the son, was not affected by the fraud of the father, the conclusion of the Court of Q. B. that, notwithstanding the son's marriage and the claimant's birth had intervened between the making of this settlement and the sale to the purchaser, the settlement still continued to be, as when first made, impeachable, and in fact was avoided (under the 27 Eliz.) by the settler's sale, and conveyance to a purchaser, is directly in the teeth of all the authorities. See *Producers v. Langham*, 1 Sid. 123 (a case which, according to Lord Kenyon, 1 East, 95, "is a leading authority;" and according to Lord Eldon, 9 Ves. 193, "has long been considered good law"); see also *Kirk v. Clark*, Pr. Ch. 275; *Brown v. Carter*, 5 Ves. 862, 877; *George v. Millbank*, 9 Ves. 190; and (according to Lord Alvanley's view, 5 Ves. 878, of that case) *Roe v. Mytton*, 2 Wils. 356. The Court cannot have intended *sub-silento* to overrule these, for it professes to be acting in accordance with the authorities. Thus Lord Campbell, delivering the opinion of the Court, says, "undoubtedly, if J. C. Tarlton (the son in the above statement) had been seized in fee in 1815, and had made a voluntary deed settling his estate upon himself for life, with remainder to his first and other sons in tail, though he afterwards married and had a son, the now plaintiff, he might, in 1849, have sold and conveyed the lands to the defendant, a *bond fide* purchaser, as to whom, by all the authorities, the settlement of 1815 would have been void under the 27 Eliz. c. 4;" and accordingly the only doubt the Court seemed to feel was, whether, if the uses declared of the recovery were laid out of the question as being void against the purchaser, the settlor would have the fee to convey to the purchaser,—a point, it might have been thought, sufficiently clear, after the cases of *Tanner v. Radford*, 6 Sim. 21; and the one cited of *Doe v. Rolfe*, 8 Ad. & E. 650; and see 1 Hayes Com. 184, note e, 5th edit.

A strong reason for holding that all the deeds of 1815 were totally void, and so both father and son remitted to their original estates, is, that it was not the intention of either party that the fee in remainder expectant on the life estates of the father and mother should be placed at the disposal of the son; yet this is the consequence of holding the bargain and sale to be good, and the release either to be totally void, or (what it was not as originally framed) a voluntary settlement, and as such, independently of the subsequent accident of marriage, destructible by sale to a purchaser.

I am, Sir, yours, &c.

A CONVEYANCING BARRISTER.

Inner Temple, 16th July, 1851.

## INFRINGEMENT OF THE PRIVILEGES OF THE PROFESSION.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Now that the Profession is attacked on every side, deprived of many of its sources of emolument, the income of its members materially diminished, and its very existence as a profession

placed in jeopardy, it behoves us in our turn to show fight, and, by using such means as the laws have placed at our disposal, to protect our interests to the utmost of our power, and repel the encroachments which are daily made on our provinces and pockets.

I beg, therefore, to bring to the notice of yourself, as having our interests at heart, and to call upon my professional brethren to unite in checking as far as possible the practices of persons who, having in their capacities of auctioneers, surveyors, or agents, gained a footing in their employers' confidence, and to a certain extent obtained the management of their affairs, transact for them business and make charges, the former of which should in right and justice be transacted by a professional man, and the latter go into his pocket.

Several instances have recently come under my notice, in which these pseudo-lawyers have regularly transacted the business of loans, preparing common securities, as bonds, memoranda of deposit, &c. charging a commission for their trouble, not to mention the preparation of wills, notices, conditions of sale, and in one instance, to my certain knowledge, an *abstract of title*; all which should be, properly, done by a qualified man. Surely the Profession has some mode of staying these malpractices, and punishing these harpies, who, not content with their legitimate profits, seek to wrest from the hands of the professional man, who has spent his time and capital in qualifying himself for his profession, all the business in which it is not imperatively necessary to employ him.

I am, Sir, yours, &c.

ATTORNEY.

[We have always exposed proceedings such as our correspondent complains of, whenever properly authenticated information has been forwarded to us, and shall continue to do so.—Ed. L. T.]

## TURNPIKE TRUSTS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I beg to call the attention of your correspondent at Swindon to sec. 4 of 14 & 15 Vict. c. 33, intitled "An Act to facilitate Arrangements for the Relief of Turnpike Trusts, and to make certain Provisions respecting Exemptions from Toll."

It is intended by this section to exempt threshing-machines from toll, by declaring that the words "implements of husbandry," in 3 Geo. 4, c. 126, s. 36, shall be deemed to include such machines. Sec. 36, however, contains no such words; the object of sec. 4 of the recent Act is therefore defeated. The words are in sec. 32.

Aug. 20, 1851.

## LAW OF PATENTS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In your notice of my work on "Patentable Invention and Scientific Evidence," in your last Saturday's number, there is an allusion to certain changes said to have been recently made in the Law of Patents.

Now, my object at present is to state that the Bill embodying the contemplated changes did not get through parliament, and that the subject stands over for consideration next session.

I am glad to find that my book has been understood as referring to the permanent questions of patent law rather than to the temporary points of practice which are likely to undergo change.

I am, Sir, yours, &c.

WILLIAM SPENCER.

50, Chancery-lane, Aug. 21, 1851.

## LAW OF EVIDENCE—INSPECTION OF BOOKS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I beg to call your attention to a defect in the 14 & 15 Vict. c. 99, the Act to amend the Law of Evidence, in not applying the 6th section to books as well as documents. This is an omission which will deprive the Act of a great part of the benefit it would otherwise have afforded.

I have a case in hand in which, if I could get an inspection of the plaintiff's books, I could expose a most fraudulent claim.

The remedy by bill of discovery is too expensive to be useful, unless in cases where the solicitor would be justified in advising his client to incur the burden of such expense. I am, Sir, yours, &c.

A SOLICITOR.

## LEGAL INTELLIGENCE.

VICE-CHANCELLORS' COURTS, Friday, Aug. 8 (Before Sir J. K. Bruce).—**BUSINESS OF THE COURT.**—His Honour, on coming into court, addressed Mr. Swanston, and inquired whether it was his opinion and the opinion of the Bar generally, whether, as the first day of Michaelmas Term and the first day of Easter Term were short days, it would not be better not to take motions for which notice had been given for these



days. What his Honour would suggest would be, that instead of motions, the Court should take a paper of short causes and unopposed petitions. The effect of this would be to save a great deal of expense to those persons who, having given notices of motion, could not bring their motions on by reason of the shortness of time the Court would sit on those two days.—Mr. Swanston said he considered that this would be a good arrangement, and perhaps the Court would fix the second day of those Terms for the motions referred to.—His Honour remarked that there was a regular day for the Seal, and that was usually on each Thursday in Term.—Mr. James Parker, Mr. Wigram, Mr. Bacon, Mr. Malins, and Mr. Daniel expressed their opinions that the arrangement would be beneficial as saving much expense.—His Honour then said he should make a direction that in this branch of the Court short causes and unopposed petitions would be taken on the first day of next Michaelmas Term.

**THE ROLLS COURT.**—The *Globe* says that since Sir John Romilly took his seat on the Rolls Court, on the 15th of April last, he has cleared off every portion of the business of the court. He has disposed of 90 causes and rehearings, 101 further directions, pleas, demurrers, and exceptions, 25 claims, 3 special cases, 160 petitions, besides short causes and consent petitions. Judgment has been given in every instance with a single exception, in which it was thought that by delaying a decision the parties may be brought to an amicable arrangement.

**THE COMBINATION LAWS.**—A meeting was held at the Railway Inn, Deansgate, Manchester, on Tuesday evening, composed of delegates from the various trades, to take into consideration what steps should be taken in reference to Mr. Justice Erle's law, as laid down at the recent Stafford Assizes, affecting trades union combinations. The meeting was attended by from 20 to 30 delegates. A workman, named White, presided. A delegate from London, named Burgess, opened the business, and expressed his opinion that the tinplate-workers of Wolverhampton, whose case was tried at Stafford, were greatly wronged by the decision in their case. He stated that Mr. Perry, the manufacturer, who brought the prosecution, had been guilty of the most arbitrary conduct, and that what the workmen had done was called for in defence of their rights. Mr. Roberts (called the People's Attorney-General), who has had the conduct of the case at Stafford on behalf of the workmen, was the next speaker, and, having been called upon to state what would be the probable expense of an appeal to the Superior Courts, spoke at some length. He said they were proposing to go to the Court of Queen's Bench to establish Baron Rolfe's law in contradistinction to Justice Erle's. He said Baron Rolfe, at Lancaster, in the "*Queen v. Feargus O'Connor and Others*," and again at Liverpool, in the case of "*Selsby v. Jones and Potts*," had laid it down that men might combine to persuade others not to work for a particular master; whereas Mr. Justice Erle, at Stafford, had held, on the contrary, that to combine at all for such a purpose was illegal. In the proceedings at Stafford about 1,400l. had been expended in defending the workmen, the greater part of which money had had to be found by the lawyers themselves, and, if they were to carry the case to the Queen's Bench, he would like to have the best counsel he could procure to argue the case. Now Sir Alexander Cockburn, the Attorney-General, had declared his own conviction to be with the workmen in this case, and for that reason he would like to secure that learned gentleman's services. But money would be wanted, and he estimated the cost of further proceedings at 2,000l. He expressed a strong conviction that the appeal would be successful. A series of resolutions, expressing an opinion that the Wolverhampton workmen's case ought to be taken up by the trades generally, and in favour of steps to give practical effect to the opinion, by means of subscriptions to raise the required amount of money, were passed before the meeting separated.

**CENTRAL CRIMINAL COURT.**—The August session of the Central Criminal Court commenced on Monday at the Old Bailey, with a heavy calendar of prisoners for trial, the number of committals up to Saturday night having reached 200. There are several serious cases in the calendar, the most serious being those of Andrew M'Lean, who is indicted for attempting to murder his wife by hanging her; two boys, who are charged under Lord Campbell's Act with feloniously placing stones on the Eastern Counties Railway, with intent to upset a train, for which offence the Court is empowered to pass the severe sentence of transportation for life; and that of the Rev. Alexander Gordon Bishop, who is charged with having made a false declaration before a magistrate in reference to some pawnbroker's duplicates. There is one case of shooting at the person, one of attempted suicide, and several of manslaughter, stabbing with intent to murder, and forgery. The egg-throwing case is expected to come on. Mr. Dimsdale's solicitor having applied last week at Lambeth Police-court for copies of the depositions; and that in which Lord Ranelagh pro-

secutes some officers of the Greenwich Railway for assault, will, it is expected be disposed of. The judges on the *rola* are Mr. Justice Coleridge, Mr. Justice Wightman, and Mr. Justice Erle. The session, in all probability, will last more than a week.

**INLAND BONDING.**—On Friday a general order communicated to all the outports a Treasury warrant, under the Act which constituted "Manchester a warehousing borough," that the Manchester corporation have given the notice stipulated therein, that after the 20th of August inst. their liability for the costs of the Manchester Custom-house will cease and determine; and, therefore, the Treasury order that, after the 20th inst. no goods shall be deposited, without payment of duty, in any bonded warehouse in Manchester. Another general order notifies that, on or before the 20th of August, 1852, all goods now in bond, in Manchester, must either be duty paid, or removed to some other bonding place.

The Law Amendment Society of Glasgow have appointed a committee to consider the best mode of beginning the preparation of a report on a general scheme of amalgamation of English and Scotch law.

**NEW CONVICT DEPOT.**—Spike Island depot being overcrowded with convicts, and the jails being seriously incommoded by this class of prisoners, inspections have been made of the several government islands around the coast with the view to their adaptation for the safe custody of convicts. It was at first thought that Whiddy Island in Bantry Bay would have been made a convict depot, but the intention, for some reason unexplained, was abandoned. Bere Island, at the entrance of Bantry Harbour, was the next place taken into consideration, but that was reported as unsuitable. Scatterly Island, in the Shannon, was the next place, and it is believed that it has been determined to make it a convict depot.—*Cork Constitution.*

## BIRTHS, MARRIAGES, AND DEATHS.

### MARRIAGES.

CHADWICK, John, esq. of Stameen, in the county of Meath, to Agnes Maria, eldest daughter of Thomas Swarbrick, esq. of Sowerby, Yorkshire, by the Rev. James Chadwick, on the 19th inst. at North Kilvington.

LEBETON, Sanderson, esq. magistrate for the county of Northumberland, to Elizabeth, second daughter of the late Philip Le Vasseur dit Durell, esq. of St. Helier's, Jersey, and widow of the late C. F. Sweeney, esq. of Killyrenal, Tipperary, Ireland, on the 18th inst. at Faversham, Kent.

BRINE, Lieut. George Augustus, R.N. second son of James Brine, esq. of Grosvenor-place, Bath, to Ninette, daughter of Charles Purton Cooper, esq. of 13, Grove-end-road, and Lincoln's-inn, Q.C. on the 14th inst. at St. James's Church, Westbourne-terrace.

KIRBY, Thomas William, esq. of the East-India House, to Mary, second daughter of Thomas Baddeley, esq. solicitor, on the 16th inst. at St. Dunstan's, Stepney.

EDMONDS, Thomas Hunt, esq. solicitor, Totnes, to Eleanor Mudge, daughter of Philip Michelmore, esq. of Painsford, Ashprington, on the 15th inst. at Ashprington, Devonshire.

PAGAN, G. H. rector of King's Weston, Somerset, second son of the late Col. G. H. Pagan, Adjutant-General of the Bengal Army, to Rose, fourth daughter of the late Sir Harding Giffard, Chief Justice, Ceylon, on the 20th inst. at Weybridge.

POLSON, Edwin, esq. a member of the bar, and one of the stipendiary magistrates of the Island of St. Vincent, to Mary, only surviving daughter of the late James Jones, esq. M.D. of the same island, on the 24th ult. at Kingstown Church, in the Island of St. Vincent.

THOMAS, William Joseph, esq. solicitor, Hay, South Wales, to Miss Winckworth, 11, St. Peter's-square, on the 19th inst. at St. Paul's, Hammer-smith.

WOOD, Richard, esq. solicitor, of John-street, Bedford-row, London, second son of John Wood, esq. of York, to Mary Jane, eldest daughter of W. F. Holroyde, esq. Heath Road, Halifax, on the 14th inst. at the Parish Church, Halifax, by the Rev. J. H. Gooch, M.A.

YATMAN, William Hamilton, esq. of Hyde-park-street, to Elizabeth Tower, second surviving daughter of the Rev. G. T. Petyman, chancellor of Lincoln, &c. grand-daughter of the late Lord Bishop of Winchester, on the 14th inst. at St. George's Church, Hanover-square.

### DEATHS.

HINE, Elizabeth, wife of James Hine, esq. solicitor, on the 19th inst. in Heathcote-street, Mecklenburgh-square, aged 70.

MOORE, Anne, relict of Launcelet Charles Moore, esq. solicitor, formerly of Tewkesbury, on the 17th inst. at Gloucester-road, Tewkesbury, aged 61.

## JOURNAL OF PROPERTY.

### Public Sales.

By Messrs. WALTERS, LOVING, and SOX, at Garraway's.

The lease and goodwill of the Magpie and Stump public house and wine-vaults, Newgate-street, City, with a booking business attached, held from the City of London for 21 years, from Midsummer 1843, at 130l. per annum—1,500l.

Lease and goodwill of wine-vaults, called the Spread Eagle, at the corner of Woodstock-street, Oxford-street, held for five years unexpired at 100l. from which a shop adjoining is let off at 90l. per annum—310l.

Lease, goodwill, and possession, of the Green Man public house and wine-vaults, at the corner of Bell-street,

Edgeware-road, with yard and premises adjoining. The whole property is held for 13 years unexpired at 90l. per annum, and the yard and premises are let off for 142l. 18s. thus leaving an improved rent of 62l. 18s. and the public house rent free—3,500l.

A beer-house and booking-office, called the City Arms and Cross Keys, 16, Gracechurch-street, held for 31 years from 1845, at 100l. per annum—780l.

By Mr. DOWD, at the Mart.

Freehold Waterside premises, near Cremorne-house, Chelsea, comprising three cottages, boat builder's yard, and premises, let till Christmas next, at 35l. per annum—1,000l.

By Messrs. BLAKE, at Garraway's.

A freehold estate, known as Leslie Lodge, Croydon, comprising a villa residence, with grounds and paddocks, amounting to 34 acres, free of land-tax and tithes; also two plots of ground, about one acre in extent, held on lease, for 14l. per annum—2,400l.

A plot of freehold paddock land, adjoining the preceding, containing 3 roods and 6 perches, with building frontages—415l.

A dwelling-house of two stories, near the preceding, held for 1,000 years from 1821, free from rent—320l.

A freehold building plot, with frontage of 230 feet—180l.

Leasehold house, High-street, Sydenham, let for 31l. 11s. 6d. per annum, held for 51 years unexpired, at 6l. 15s.—220l.

By Mr. ROWS, at the Mart.

A piece of freehold pasture land in the Abbey Marsh, West Ham Level, containing 4 acres and 33 perches, let to a yearly tenant at 10l. per annum—493l.

Another piece of pasture land, near the preceding, and approximating upon Canning Town, comprising 7 acres, of which 4½ are freehold and 2½ copyhold, let for 20l. per annum—546l.

The beneficial lease of the house 37, Great Russell-street, Bloomsbury, with possession, held for 14 years, at 66l. 110 guineas.

A 100l. share in the Polytechnic Institution, 95l. paid—82 guineas.

Five 100l. shares, all paid, in the Thames Plate Glass Company—70 and 75 guineas each.

By Mr. MARSH, at the Mart.

Freehold shop and business premises, 5, Clare-court, Clare Market, let at a rental of 50l. per annum—500l.

Three leasehold houses, 7, 8, and 12, William-street, Park-road, Holloway, let for 96l. per annum, held for 94 years at 16l.—780l.

A leasehold house, 50, Richmond-road, Islington, let at 38l. per annum, held for 90 years at 8l.—400l.

## MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock .....	215½	215½	215½	215½	215½	215½
3 ¼ Cent. Reduced Annuities .....	97½	97	97	97	97	97½
3 ¼ Cent. Consols Annuities .....	96½	96½	96½	96½	96½	96½
Consols for Account .....	96½	96½	96½	96½	96½	96½
New 3 ¼ Cent. Annuities .....	129½	93½	93½	93½	93½	93½
Long Annu. (exp. Jan. 5, 1850) .....	7½	7½	7½	7½	7½	7½
Do. 30 yrs. (exp. Oct. 10, 1859) .....	..	..	..	7	..	..
Do. 30 yrs. (exp. Jan. 5, 1860) .....	..	..	..	..	..	..
India Stock .....	262	..	262	..	230	..
India Bonds (1,000l.) .....	58	54	..	..	54	..
Do. do. (under 1,000l.) .....	57	54	56	57	..	..
South Sea Stock .....	..	..	107½	..	..	..
Do. do. New Annuities .....	..	..	..	..	..	..
Exchequer Bills, 1,000l. .....	46*	44*	44*	44*	45*	46*
Do. do. 500l. .....	46*	44*	44*	47*	..	46*
Do. do. Small .....	49*	44*	44*	47*	44*	49*
Do. Advertised .....	..	..	..	..	..	..

\* Premium.

## THE GAZETTES.

### Bankrupts.

Gazette, August 10.

BARKER, JOHN, cheesemonger, Elmowth-st. and Pleasant-row, Clerkenwell, Sept. 6, at one, and Oct. 3, at two, Basinghall-st. Off. as Whitmore. Sol. Murray, London-st. Fenchurch-st. Petition, Aug. 15.

BAYNAM, FREDERICK, grocer, High-st. Hounslow, Aug. 23, at half-past eleven, and Oct. 3, at one, Basinghall-st. Off. as Cannan. Sols. Church and Son, Bedford-row. Petition, Aug. 14.

KRAUSE, ADOLPHUS, sharebroker, Manchester, Sept. 2 and 23, at twelve, Manchester. Off. as Pott. Sol. Bennett, Manchester. Petition, Aug. 14.

LINDSEY, BENJAMIN, draper, Market Deeping, Lincolnshire, Aug. 29 and Sept. 26, at ten, Nottingham. Off. as Bittleston. Sols. Jones, Size-lane, City; and Motteram and Co. Birmingham. Petition, Aug. 2.

SMITH, WILLIAM, engineer, Princes-st. Leicester-square, Sept. 2, at half-past twelve, and Oct. 7, at twelve, Basinghall-st. Off. as Edwards. Sol. Holmer, Bridge-st. Southwark. Petition, Aug. 7.

Gazette, August 23.

BENNING, WILLIAM, law bookseller and publisher, Fleet-st. Sept. 4 and Oct. 10, at two, Basinghall-st. Com. Fane. Off. as Whitmore. Sol. Milne, Temple. Petition, Aug. 20.

CRAWFORD, JOSEPH, tavern and beer-shop keeper, "Primrose Tavern," Chalk Farm, Aug. 30, at twelve, and Oct. 4, at half-past eleven, Basinghall-st. Com. Goulburn. Off. as Pennell. Sol. Wetherfield, 23, Gresham-st. Petition, Aug. 16.

DEERY, HENRY WILLIAM, builder, Wolverhampton, Sept. 2 and 30, at half-past eleven, Birmingham. Com. Daniell. Off. as Whitmore. Sol. Hayes, Wolverhampton. Petition, Aug. 18.

DICKINSON, JOHN, Walsall, Staffordshire, Sept. 1 and 22, at ten, Birmingham. Com. Balguy. Off. as Whitmore. Sol. Wilkinson. Petition, Aug. 21.

DICKINSON, EDWARD, corn and provision merchant, Wolverhampton, Sept. 2 and 30, at half-past eleven, Birmingham. Com. Daniell. Off. as Valpy. Sol. Hayes, Wolverhampton. Petition, Aug. 20.

**HALLSTON, THOMAS**, grocer, Wheelock, Cheshire, Sept. 1 and Oct. 2, at eleven, Liverpool. Com. Stevenson. Off. as Turner. Sols. Skerratt and Remer, Sandbach; J. Yates, jun. Liverpool. Petition, Aug. 20.

**HODGSON, WILLIAM**, watchmaker, Lancaster, Sept. 2 and 23, at twelve, Manchester. Off. as Fraser. Sol. Robinson, Lancaster. Petition, Aug. 11.

**MIDDLEWOOD, RALPH**, and **FOSTER, ALLEN**, linen drapers and silk mercers, Leeds, Sept. 4, at one, Oct. 10, at eleven, Basinghall-st. Com. Fane. Off. as Cannan. Sol. T. Parker, 18, St. Paul's-church-yard. Petition, Aug. 14.

**NICOL, JOHN**, broker and commission agent, Kingston-upon-Hull, Sept. 3 and Oct. 1, at half-past twelve, Kingston-upon-Hull. Com. West. Off. as Carrick. Sols. Dodge, Liverpool; Shackles and Son, Hull. Petition, July 31.

**PERESS, WALTER**, licensed victualler, "Green Man," Covent-garden-market, Sept. 4, at half-past twelve, and Oct. 10, at twelve, Basinghall-st. Com. Fane. Off. as Cannan. Sols. Taylor and Collinson, 28, Great James-st. Bedford-row. Petition, Aug. 12.

**WILDS, JAMES**, builder, Salford, Lancashire, Sept. 5 and 26, at eleven, Manchester. Off. as Fraser. Sol. Dear-den, Pall-mall, Manchester. Petition, Aug. 15.

**WILLS, CHARLES VESLEY**, dealer in lamps and camphine, Exeter, Sept. 4 and Oct. 2, at one, Exeter. Com. Bere. Off. as Hirtzel. Sols. Head and Venn, Exeter. Petition, Aug. 18.

## BANKRUPTCIES ANNULLED.

Gazette, Aug. 16.

**Moore, R.** commission agent and beer retailer, Sportsman beer-house, Sun Tavern-fields, Saint George's in the East, and 1, Aschurch-villas, New-road, Hammermith, Aug. 13.

## Dividends.

## BANKRUPT STATES.

*Official Assignees are given, to whom apply for the Dividends.*

**Alexander and Co.** merchants, fourth, 3 annas company 100 sicca rupees. Whitmore, London.—*Alport*, T. W. ironmonger, first, 10d. Hutton, Bristol.—*Barker*, F. D. banker, final, 4d. Graham, London.—*Chittenden*, W. draper, second, 2s. 1d. Whitmore, London.—*Couch*, W. pianoforte maker, first, 5d. Whitmore, London.—*Dale*, W. boot maker, second and final, 0d. Stansfeld, London.—*Dimsdale*, T. I. corn factor, final, 0d. Stansfeld, London.—*Dixon*, J. tea dealer, first, 2s. 8d. Bird, Liverpool.—*D'Oyley*, R. scrivener, second, 1s. 3d. Hutton, Bristol.—*Gatrell*, J. upholsterer, second, 11d. Whitmore, London.—*Gordon*, W. Berlin wool dealer, first, 3s. 9d. Hutton, Bristol.—*Graham*, C. hosier, first, 6d. Whitmore, London.—*Howard*, J. P. maltster, second, 0d. Stansfeld, London.—*Hunt*, J. silk manufacturer, first, 1s. 1d. Pott, Manchester.—*Keevil*, J. jun. draper, third, 6d. Hutton, Bristol.—*Kemp*, J. F. grocer, second, 2d. Graham, London.—*King*, J. coach builder, second, 1s. 5d. Whitmore, London.—*Langwith*, R. builder, first, 2s. Groom, London.—*Lea*, G. coal merchant, first, 1s. Graham, London.—*Le Bontillier*, D. draper, second, 3d. Stansfeld, London.—*Mackey and Holt*, merchants, third, 9-18th of a lb. Graham, London.—*Marshall*, J. coal merchant, first, 2s. Whitmore, London.—*Oldfield*, J. P. commission merchant, first, 6d. Bird, Liverpool.—*Ridley*, E. linen draper, second, 2d. Whitmore, London.—*Robertson*, Milligan, and *Dalzell*, merchants, 5th, 0d. Whitmore, London.—*Walley and Harkrick*, linen drapers, third, 1d. Stansfeld, London.—*Warwick and Clagett*, merchants, fourth, 11d. Whitmore, London.—*Whalley*, J. T. lighterman, first, 7d. Stansfeld, London.—*Williams*, W. draper, final, 0d. Stansfeld, London.

## INSOLVENT ESTATES.

**Cockerell, J. P.** lieutenant R.N. 3s. 5d. Apply to Mr. J. Symons, Devonport.—*Topham*, G. grocer, 3s. 5d. Apply to M. Jessop, esq. solicitor, Alfreton.

## Assignments for the Benefit of Creditors.

Gazette, Aug. 12.

**Broomhead, J.** plumber and glazier, Bakewell, Derbyshire, July 22. Trusts: T. H. Armstrong, glass and lead merchant, Chorlton-on-Medlock, and B. Thompson, butcher, Bakewell. Sol. J. Taylor, Bakewell.—*Crockett*, W. dec. wine and spirit merchant, Leamington Priors, Warwickshire, July 7. Trust: E. Thorton, painter and glazier, Leamington Priors. Sol. A. T. Forder, Leamington Priors.—*Hughes*, C. grocer and draper, Holywell, Flintshire, July 16. Trusts: J. Jones, wholesale grocer, Liverpool, and J. E. Jones, provision dealer, Holywell. Sol. R. Smedley, Holywell.—*Raymond*, E. M. chemist and druggist, Smith-st. Warwick, July 14. Trust: J. Daily, soda water manufacturer, Warwick. Sol. A. T. Forder, Leamington Priors.—*Saunders*, S. jun. linen draper, Mile-end-road, July 17. Trust: J. Bradbury, Aldermanbury, and H. Atkinson, Wood-st. warehousemen. Sols. Hardwick, Davidson, and Bradbury, Weavers'-hall, Basinghall-st.—*Turton*, G. mason and builder, Maseborough, Rotherham, July 28. Trust: J. Smith, gentleman, Maseborough. Sols. Hoyle and Marsh, Rotherham.—*Welch*, J. colour manufacturer, Love-lane, Bankside, July 18. Trusts: W. Wilson, colour merchant, Bread-st. Cheap-side, T. Reid, merchant, Three Cranes-lane, Upper Thames-st. and H. Hobbs, manufacturing chemist, Gravel-lane, Southwark. Sol. C. F. Lord, Clifford's-inn.

Gazette, Aug. 15.

**Commings**, S. tea dealer, Pleasant-place, King's-cross, July 16. Trusts: G. Mantou, tea dealer, Eastcheap; and C. Teede, wholesale grocer, Warner's-yard, Mincing-lane. Sols. J. and J. H. Linklater, Charlotte-row, Mansion-house.—*Green*, S. J. auctioneer, Hart-st. Bloomsbury-square, July 16. Trusts: P. Broad, auctioneer, Tavistock-st. Covent-garden; and W. Snodin, tallow melter, Elm-st. Gray's-inn-road. Sols. J. and J. H. Linklater, Charlotte-row, Mansion-house.—*Milan*, A. stationer, Bridge-place, Paddington, Aug. 7. Trust: J. W. Cripps, wholesale stationer, Skinner-st. Snow-hill. Sol. B. Smith, Basinghall-st.—*Pect*, S. cork cutter, Edith-st. Hackney-road, July 25. Trust: J. L. Bucknall, cork merchant, Crutched-friars. Sols. J. and C. Robinson, Queen-st. place.—*Wilson*, H. builder, Scarborough, Yorkshire, Aug. 4. Trusts: W. Thomas, merchant, Hull; and T. Brewster, farmer, Scarborough. Sol. J. J. P. Moody, Scarborough,

## Partnerships Dissolved.

Gazette, Aug. 12.

**Bealey, Jones, and Co.** cloth merchants and commission agents, Manchester, July 16. Debts paid by Bealey.—*Burdett*, H. F. and *Jones*, J. F. surgeons and apothecaries, Birmingham, Aug. 1.—*Butterfield, Sugden, Hartley, and Co. woolstaplers and topmakers, Bradford, July 17.—*Danies, Brothers*, drapers, Chester, July 30. Debts paid by T. Davies.—*Elder*, C. and *Jardison*, C. hotel keepers, Osborne's Hotel, Adelphi, Aug. 7.—*Gladstone and Pilkington*, galvanised iron manufacturers, Liverpool and Pontefract, near Rhushon, July 19.—*Heath*, W. and T. C. opticians and nautical instrument makers, Devonport, Aug. 8. Debts paid by W. Heath.—*Hill*, T. F. and *Mallatien*, J. cotton waste dealers, Rochdale, Dec. 31.—*Hollister*, F. and S. corset makers and baby linen vendors, Cheltenham, Aug. 7.—*Jew and Waring*, booksellers, stationers, and printers, Gloucester, June 24. Debts paid by Waring.—*Lawrence*, J. and Co. coal masters and brickmakers, Darlaston-green, Darlaston, July 31. Debts paid by Rawlins and Rowley, solicitors, Birmingham.—*Leach and England*, worsted manufacturers and machine makers, Bingley, Aug. 1. Debts paid by Leach.—*Moon and Co.* Maranham, Brazil, as regards Vionee, Dec. 31.—*Padmore and Bedwell*, linen drapers and haberdashers, Rhyde, Isle of Wight, Aug. 6. Debts paid by Padmore and Lane.—*Parr*, W. and J. joiners and builders, Litherland, Aug. 9. Debts paid by W. Parr.—*Rosenberg*, H. H. and Co. wholesale and retail cigar and tobacco manufacturers, Manchester, Aug. 7. Debts paid by H. H. Rosenberg.—*Rose and Scarratt*, cement and plaster of paris manufacturers, Tranmere and Liverpool, Aug. 9.—*Smith*, J. and *Matthews*, F. W. B. drapers and silk mercers, Birmingham, Aug. 11. *Steel, Brothers*, and *Steel* and Co. boot and shoe makers, Leeds, Aug. 9.—*Squire* and Co. engineers and patent agents, Barge-yard, and elsewhere, Aug. 8. Debts paid by Dewrance.—*Wardman, Norton*, and Co. button and trimming dealers, Gresham-st. Aug. 8.—*Wilding*, M. H. and *Thomas*, M. china, earthenware, and general dealers, Shrewsbury, March 25.*

Gazette, Aug. 15.

**Allan, Son, and Co.** drapers and silk mercers, St. Paul's Church-yard, Aug. 13.—*Atkins*, E. J. and E. proprietors of the Liverpool Zoological Gardens, April 8.—*Barnes*, T. and *Field*, T. merchants, Narrow-st. Limehouse, July 7.—*Chambers*, J. and C. boot and shoe manufacturers, Kidderminster, Aug. 11.—*Cole and Scott*, attorneys, Farnival's-inn, Holborn, and Notting-hill, Aug. 14.—*Crouch*, J. and *Strong*, W. builders, Wimbledon, July 2.—*Daunt, Brothers*, iron merchants, Liverpool and Manchester, June 1. Debts paid by W. H. Daunt.—*Darson*, H. and *Maddock*, W. ship chandlers and sail makers, Liverpool, Aug. 11. Debts paid by Dawson.—*Ford*, W. and S. millers, Bank Steam Mills, Chester, July 21. Debts paid by W. Ford.—*Gordon* and *Mason*, chemists and druggists, Weston-super-Mare, Aug. 11.—*Greening*, N. and *Sons*, wire workers and drawers, Warrington, Aug. 1.—*Harting*, R. P. Pullin, E. and *Bishop*, A. T. Guildhall-chambers, Basinghall-st. as regards Bishop, Aug. 6.—*Healing and Lyon*, pawnbrokers, Liverpool, July 31.—*Hemmings*, R. and *Sons*, needle and fish hook manufacturers, Redditch, June 30. Debts paid by R. Hemmings.—*Henderson and Co.* upholsterers, Newcastle, July 10. Debts paid by Henderson.—*Hobday*, J. R. and *Claxton*, J. Millbank, Aug. 8.—*Humphreys*, R. and J. lively-stable keepers and farmers, Cheltenham, Aug. 13.—*Humphreys and Griffiths*, contractors, Liverpool, Aug. 13.—*Jolliffe*, J. W. H. and A. victuallers, Penton-st. Pentonville, Aug. 13.—*Larken*, E. R. Dawson, G. Toynebe, R. Heymann, L. and *Holyoake*, G. J. newspaper proprietors, Crane-st. as regards Toynebe and Heymann, June 25.—*Leach*, R. and J. attorneys, Martock, June 24.—*Orford*, C. W. and *Male*, D. architects, Birmingham, July 25. Debts paid by Orford.—*Reid*, T. and Co. woollen cloth merchants, drapers, hatters, and hosiers, Rochdale, Aug. 14. Debts paid by T. Reid.—*Richardson*, Watson, and Co. New York and Philadelphia, and *Watson*, W. and Co. Manchester, June 30.—*Rose*, H. and *Huggins*, T. F. Strouds-vale, Islington, Aug. 2.—*Shottin and Taylor*, curriers, Salford, July 10.—*Skodard*, E. Simonds, E. W. and *Hammond*, J. S. ironmongers, Ashford, Aug. 13. Debts paid by Skodard and Simonds.—*Tustin*, G. and *Shell*, J. ginger-beer manufacturers and carmen, Great St. Andrew-st.—*Wright, Brothers*, late *Benley and Co.* wholesale perfumers and fine soap manufacturers, High Holborn, Aug. 14. Debts paid by W. H. Wright.

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To Readers and Correspondents.

"N.B."—We have forwarded the communication to our contributor. The letter shall have place next week.

"LX." should apply for information upon the point to the Law Institution.

"L.H."—Let our correspondent read in the first place *Stephen's Commentaries*; and this done, he may ask again. Whatever form the ultimate changes may give to the practice of the law, a student cannot do wrong in taking the historical and elementary parts of his profession from such a source.

"A SUBSCRIBER TO THE PRACTICAL STATUTES."—Your suggestion shall have attention in the preparation of the next volume.

ERRATUM.—In our report of Mr. Commissioner Law's judgment in *Re E. Gooding*, from the Insolvent Debtor's Court last week, p. 278, line 5 from the bottom, for the words "referred into" read "ripened into."

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THE LAW TIMES.

SATURDAY, AUGUST 30, 1851.

ETIQUETTE OF THE BAR.

THE discussion which has within the last few months arisen as to the supposed operation of professional etiquette in preventing Barristers regularly attending the County Courts, has at length attracted the serious attention of the leaders of the Profession. It will be seen by a recent announcement in the daily papers, that at the "Grand Court" of the Northern Circuit, on the 18th August, a proposition was made, and carried by a large majority, that there was no rule of professional etiquette to prevent a barrister holding a brief in a County Court without a special fee; but that, on the contrary, any Barrister might accept and hold a brief in any of those courts with a fee of one guinea, if he thought fit to do so. It was further resolved at the same "Grand Court," that it was quite in accordance with the etiquette of the Profession for Barristers to attend and to sit in the County Courts, and to form a bar there, if they thought fit to do so.

We hail these resolutions of the Northern Circuit Grand Court with satisfaction: we believe they cannot fail to meet with the approbation of the majority of the Profession in both branches; and there cannot be much doubt that the public also will have reason to approve them. The personal annoyance for some time past complained of, not only by professional men, but merchants, traders, and almost every class of persons, in attending to cases in the County Courts, has demanded some regulation on the part of the Profession,

by which the conduct of defended cases in these tribunals may be accompanied at least with as little inconvenience to all parties as in the Courts at Westminster Hall; securing to the suitor the choice of the most experienced and skilful advocate at a reasonable cost; avoiding the injustice of surprise or unequal contests; removing a very unwise restriction on the Westminster Hall Bar; and saving to the Solicitor in general practice the alternative of either neglecting for a whole day important vocations to play the Advocate himself for half an hour, or surrendering to a member of the class at present frequenting the County Courts as *Attorney Advocates*, the case, the circumstances, or the confidence of any client who may be plaintiff or defendant in a County Court.

There may possibly be Barristers who think it redounds to their honour, whilst they travel a hundred miles in order to attend with a guinea brief at Assizes or Sessions, to refuse to go half a mile to attend a County Court, without putting the suitor to the expense of a special retainer, and who having that feeling themselves, may wish to inculcate on the minds of the Junior Bar generally, that it is *infra dig.* to do otherwise. The abolition of the old restriction may also be objected to by that small section of the other branch of the Profession whose practice consists, not in acting within the honourable and comprehensive province which legitimately belongs to the Solicitor and Attorney, but in devoting their whole attention to the conduct of such small debt cases as the existing system prevents Barristers being engaged in. Moreover, it may happen that County Court judges, disliking too much exertion, or conscious of want of temper, of learning, or of ability (if by chance any such there be), may lament a change by which the constant presence of a well-educated, high-minded, and vigilant Bar may restrain imperiousness, detect and expose ignorance, and compel them to emulate the industry of the Queen's judges at Westminster.

The prejudices, the selfish objections, or the sinister forebodings of such persons must not, however, be suffered to weigh against the general good. A step has been taken in the right direction, and unless we very much mistake the general feeling of the Profession, a very short time will elapse before the foolish internecine contests which, in print, at least, have taken place between the Bar and the Attorneys will yield to that harmonious adjustment emblematic of returning prosperity, when men and things find their right places, and all sedulously devote themselves to their legitimate vocations.

LETTERS TO LORD CAMPBELL.

BY THE EDITOR OF THE LAW TIMES.

SECOND LETTER.

MY LORD,—In my last letter I sought to present to your lordship a classified summary of the defects which, in the course of my editorial intercourse with the Profession, I have found to be those to which they attribute the decline of the business of the Superior Courts of Common Law. They might be yet farther reduced in description to three words:—First, *Cost*; second, *Uncertainty*; third, *Delay*. Remove these, and the Superior Courts will recover more than they have lost. I now proceed to detail the particular evils, and describe the remedies that have been suggested.

I. As to *Cost*. The outcry which has been raised against the Cost of Justice in the Superior Courts is mainly attributable to the establishment of the County Courts, which have induced comparisons by no means favourable to the former, and largely increased the reluctance, which has been growing for many years past, to adopt so expensive and uncertain a method of settling a dispute. If we find the public deserting us, we may be sure that we have not adapted ourselves to their changed wants—that we have not kept pace with the progress of society. It may be that, in fact, our procedure is the perfection of wisdom, and that altera-

tion may mar, but cannot mend it. If the public have reasons for preferring less wisdom than we offer them—if they think that even justice can be too dearly purchased—it will be our duty, as Lawyers, to bend to the fashion of the time, and concede our own opinions in deference to their desires.

Now, my lord, the question is, how much can we concede in this matter of cost? and I think I shall be able to satisfy your lordship that we can yield a great deal and be none the worse for it ourselves even as a matter of profit.

Beginning with the first step in an action, why should we not learn a lesson from the County Courts, and let the summons state the cause of action and particulars of demand? Why should there be two processes, with the expense of two services, when one will suffice? I beg, therefore, to suggest to your lordship that a step should be taken beyond the timid recommendations of the Commissioners, and that an action should be commenced, as in the County Courts, by an entry of a plaintiff which should contain a statement of the demand, with particulars, and that a copy of this should be served with the writ of summons, abolishing the present declaration as a distinct process. As the plaintiff will, of course, be bound by his own statement, it will be his interest to make it sufficiently clear and positive, and the defendant will have the further security against surprise in the power vested in the Court to order further particulars, if those given are shewn to be insufficient, with the added power of giving costs to the party who may be put to the cost of such application through any unfairness of his opponent in the statement of his case.

The signature of counsel to pleadings, and the employment of counsel for all rules and matters, that are of course, must be abolished. There is no help for it, however severely it may affect us.

In the statement of the case, the plaintiff should be strictly limited to a plain narrative of the facts, without exaggeration, in the fewest words, and with no fancy claim for damages, as now, but only for so much as he really demands. This would be effectually secured by holding him responsible for the entire contents of the claim, permitting proof of nothing that is not there stated, and mulcting him in costs for whatever is stated but not proved. As it is of very great importance to prevent exorbitant demands for damages, either in the hope of judgment by default, or to prejudice a jury, I venture to recommend to your lordship a new, but very simple practice, namely, to permit a defendant to object to the amount of damages claimed, either with or without a general defence to the action, so that if he succeeds on this issue, and less damages are awarded than were claimed, the plaintiff shall pay the costs thus occasioned. This would be more efficient than the practice of paying money into Court, for it would be applicable in many cases where the latter is impracticable.

If the defendant does not enter an appearance, and give notice of the nature of his defence within a fixed period, judgment should in all cases go by default for the amount of damages claimed. The writ of inquiry, as a source of delay and cost, should be abolished; but to prevent surprise, a power should be vested in a Judge in Chambers, upon good cause shewn, to suspend execution, and either to permit a trial upon the merits or to order an assessment of damages. Without such a protection defendants might be subjected to ruinous results through accident, surprise, or craft.

The defence, like the complaint, should be in writing, in plain language, limited in like manner, and either a simple denial, which should put the plaintiff to proof of his whole statement, or denial of any part of it, or by an avoidance; but he should not be allowed to put in contradictory defences. All the pleadings ought to be true, or at least the parties should believe them to be true. The statement should limit the defendant in his defence, so that, if he omits anything, it shall be at his own peril. One copy of the statement of defence should be filed in the Court and another be served upon the plaintiff or his attorney.

There is much in a name. The consequences of an ill name are proverbial. The word *demurrer* is in that predicament. It would be wise to abolish the name, although the thing is indispensable. There must be some method by which a defendant may say, "Granting the plaintiff's statement to be true, he has no legal claim against me;" and the plaintiff must be enabled to say, in like manner, to the defendant, "That is no defence in law," and upon the question of law so raised to have the judgment of the Court without the cost of a trial. Cal

it then "a case," and let it consist of a copy of the pleadings, and upon that let the argument be taken. This change of name will meet the prejudice which exists against demurrers, because of their absurd use in objections arising out of form alone.

The replication should be regulated by the same principles, and beyond that stage no *pleading* should be permitted. If either party has misinformed the other, he will justly suffer for it in failure at the trial to substantiate his written case and consequent defeat.

The cause being now ready for trial, the procedure to be examined with a view to curtailment of costs, is the trial itself. The first manifest improvement that offers itself, is to make a *jury optional*, and not compulsory. Let either party demand a jury, but if both prefer to be tried by the Judge alone, no reason can be assigned why they should not be permitted to do so. The County Courts have unequivocally shewn what is the real admiration entertained by suitors for trial by jury, and it is not probable that they would be less ready to intrust themselves to such Judges as your lordship.

The great improvement which has been effected in the Law of Evidence by the Act of last Session has already removed the largest source of costs of trial which resulted from the exclusion of the parties from the witness-box, often compelling the attendance of a host of witnesses to prove by indirect testimony some fact which one party could have proved in a moment, and which the other would not have denied.

But, my lord, this does not accomplish *all* that might be done to abbreviate the cost of trial. One great source of expense is the uncertainty of the time at which the cause will come on. In London there is a partial attempt to remedy this evil, at country Assizes there is none. The consequence is, that enormous expenses are often incurred in keeping a body of witnesses from day to day watching for the cause to be called on. Regulations might be made to prevent this. For instance, instead of taking causes in the order in which they are entered, let the entry and notice of trial be simultaneous, on some day *before* the sittings or Assizes. Then let the order of trial be determined by ballot, allotting a small number only to each day, and not adding, as now in London, a supplementary list to meet the possible case of the list for the day being exhausted. In town, if the list goes off, let the fortunate judge enjoy his holiday; it is better that one man should be idle for a few hours than that fifty other men should be detained from their work, or half a dozen suitors put to ruinous costs. So, in the country, let the causes be entered some days before the Assizes, distributed by ballot over the allotted period, and taken only on the days appointed. If, as it would sometimes happen, one cause should occupy the day to the exclusion of the rest, do not disturb the entire chain, but let those who were so unlucky as to be thrown over the day be placed at the end of the list (for which allowance of blank days should be made in the allotment), and thus, instead of all suffering, as now they do, by the interference of a tedious predecessor, the inconvenience will be limited to a few. Probably ingenuity will suggest some better plan even than this for abating, if not curing, one of the greatest vexations and most prolific source of expense to which suitors are subjected.

Lastly, my lord, unless notice of intention to move for a new trial be given within a short period, say four days after trial, and security given for the verdict and costs, in the manner which I shall hereafter suggest as necessary to prevent abuses, execution should issue on the application of the party entitled to it.

Thus I have shewn how procedure may be abbreviated, with a great curtailment of expense, and without any sacrifice of substantial justice.

But there is one cause of costs in an action which must be wholly swept away, before any perceptible improvement can be accomplished. The *fees of court* must be abolished. They are the most formidable obstacle to the diminution of costs. They are of incalculable injury to the Profession, for they go to the account of the Lawyer's bill, and the Attorney, not the real offenders, bears the brunt of the client's wrath. Your lordship knows how considerable a portion of the entire bill of costs in an action at law consists of court fees, which the Attorney or agent is compelled to pay out of his pocket for months, sometimes for years, before he is repaid: how small, apart from these, is the actual reward of the Attorney for his skill, anxiety, and

responsibility; and I believe that if it were not for those burthensome fees, the public would not be dissatisfied with the actual gains of the Lawyer. Without the abolition of the fee system, or at least the substitution of a fixed fee-fund fee, whose amount may be readily calculated before an action is commenced, all other reform will fail to reconcile the public to the courts which they still venerate, which they have parted from with regret, and to which they will return with pleasure, when adapted to their new wants.

Thus, my lord, I have shewn, without going into every minute detail, how the costs of an action may be abbreviated, so as to satisfy the not unjust demands of the public, and how thus Westminster Hall may be in one respect enabled to compete successfully with the County Courts, without curtailment of the remuneration for professional services actually rendered, and which, upon careful investigation of the items, will not be found to be overpaid. How the other classes of objections may be removed I will endeavour to shew in my next letter.—I have the honour to be, my lord,

Your lordship's faithful servant,

THE EDITOR OF THE LAW TIMES.

## THE LEGISLATOR.

### Imperial Parliament.

At the Court at Osborne-house, Isle of Wight, the 25th day of August, 1851, present, the Queen's most excellent Majesty in council, it is this day ordered by her Majesty in council, that the Parliament, which stands prorogued to Thursday, the 4th day of September next, be further prorogued to Tuesday, the 4th day of November next.

### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 200.)

#### CAP. XLI.

An Act to regulate the Salaries of the Chief Justice of the Court of Queen's Bench and the Chief Justice of the Court of Common Pleas.

(August 1, 1851.)

We give this statute entire.

2 & 3 Wm. 4, c. 116—*Salaries of Chief Justices of Queen's Bench and Common Pleas.*—Whereas by an Act of the session holden in the second and third years of King William the Fourth, chapter one hundred and sixteen, the annual salary to be granted to the Chief Justice of the Court of Queen's Bench at Westminster is fixed at the sum of ten thousand pounds, and the annual salary to be granted to the Chief Justice of the Common Pleas at Westminster at the sum of eight thousand pounds: and whereas from the death of the Right Hon. Charles Lord Tenterden the salary of eight thousand pounds has been granted to and accepted by the Chief Justice for the time being of the said Court of Queen's Bench instead of the said salary of ten thousand pounds: and whereas the salary of seven thousand pounds has been granted to and accepted by the present Chief Justice of the said Court of Common Pleas instead of the salary of eight thousand pounds fixed by the said Act: and whereas it is expedient that the salaries of the said offices of Chief Justice of the said Court of Queen's Bench and Chief Justice of the said Court of Common Pleas should be regulated as hereinafter mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the salary payable to the Chief Justice of the Court of Queen's Bench at Westminster shall be (and shall as from the time of the death of the said Charles Lord Tenterden be deemed to have been) reduced to the yearly sum of eight thousand pounds, and the salary payable to the Chief Justice of the Court of Common Pleas at Westminster shall be (and shall as from the time of the resignation of such office by the Right Honourable Thomas Lord Truro be deemed to have been) reduced to the yearly sum of seven thousand pounds, such salaries respectively to be subject to the provisions of the said Act of the second and third years of King William the Fourth concerning the salaries granted under the authority of that Act.

#### CAP. XLII.

An Act to make better Provision for the management of the Woods, Forests, and Land Revenues, of the Crown, and for the direction of Public Works and Buildings. (August 1, 1851.)

#### CAP. XLIII.

An Act for disafforesting the Forest of Hainault in the County of Essex. (August 1, 1851.)

#### CAP. XLIV.

An Act to continue certain Acts for regulating Turnpike Roads in Ireland. (August 1, 1851.)

#### CAP. XLV.

An Act to continue an Act of the 5th & 6th years of her present Majesty for amending the Law relative to Private Lunatic Asylums in Ireland. (August 1, 1851.)

#### CAP. XLVI.

An Act to amend two several Acts of her Majesty's reign, enabling the Commissioners of her Majesty's Woods to purchase Lands for and to form Victoria-Park, and to indemnify the Trustees of Copyhold Lands held on trust for her Majesty. (August 1, 1851.)

#### CAP. XLVII.

An Act to continue the Exemption of Inhabitants from Liability to be rated as such in respect of Stock in Trade, or other Property to the Relief of the Poor. (August 1, 1851.)

#### CAP. XLVIII.

An Act to continue an Act of the 2nd & 3rd years of her present Majesty to extend and render more effectual for Five Years an Act passed in the 4th year of his late Majesty King George the Fourth, to amend an Act passed in the 50th year of his Majesty King George the Third, for preventing the administering and taking of unlawful Oaths in Ireland, as the same is amended by an Act of the 11th & 12th years of her Majesty's reign. (August 1, 1851.)

#### CAP. XLIX.

An Act to repeal an Act of the Eleventh and Twelfth Years of her present Majesty, for making preliminary Inquiries in certain Cases of Applications for Local Acts, and to make other provisions in lieu thereof. [August 1, 1851.] We give this statute entire.

11 & 12 Vict. c. 129.—Whereas an Act was passed in the session of Parliament holden in the eleventh and twelfth years of the reign of her present Majesty, chapter one hundred and twenty-nine: and whereas it is expedient to repeal the said Act, and to make other provisions in lieu thereof: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, 1. *Recited Act repealed.*—That in respect of all future applications to Parliament for local Acts the said recited Act shall be and the same is hereby repealed.

2. *Where works proposed on tidal Lands, Admiralty may require Statements, &c.*—Whenever application shall be made to Parliament for a Bill whereby power is sought to construct any works on the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, or to construct any bridge, viaduct, or other work across any creek, bay, arm of the sea, or navigable river, or to construct any work affecting the navigation of any harbour, port, tidal water, or navigable river, it shall be lawful for the Lord High Admiral, or for the Lords Commissioners for executing the office of Lord High Admiral, to require the promoters of such Bill to deposit at the office of the Admiralty, in addition to the plans, sections, or other documents which may have been deposited at such office in compliance with the Standing Orders of either House of Parliament, all such statements and other documents as the said Lord High Admiral or Lords Commissioners shall deem necessary to explain the objects of the intended application to Parliament, and the proposed interference with such tidal lands or navigation, as the case may be.

3. *Admiralty may appoint inspectors.*—It shall be lawful for the said Lord High Admiral or Lords Commissioners, if they shall consider the same necessary or expedient, but not otherwise, to appoint a competent person or persons to be an inspector or inspectors, for the purpose of inquiring, in such manner and at such time and place as they shall direct, into all such matters as they shall deem necessary to enable them to report to Parliament their opinion upon every such Bill touching the jurisdiction or authority of the Lord High Admiral.

4. *Inspectors may summon witnesses and examine them upon oath.*—For the purposes of such inquiry the said inspector or inspectors may, by summons under his or their hands, summon before him or them any person having the custody of any map, survey, or book made or kept in pursuance of any Act of Parliament, to produce such map, survey, or book for his or their inspection, and the said inspector or inspectors may summon, in manner aforesaid, any other person whose evidence shall, in the judgment of the said inspector or inspectors, be material to his or their inquiries, and pay or allow to every



such person so summoned by him or them the reasonable charges of his attendance; and the said inspector or inspectors shall also have power to administer an oath to all persons who may be examined by him or them touching the premises.

**5. Penalty for non-attendance, or refusing to answer questions.**—Any person being summoned by such inspector or inspectors, who, after the delivery to him of such summons as aforesaid, or of a copy thereof, shall wilfully neglect or refuse to attend in pursuance of such summons, or to produce such maps, surveys, books, or other documents as he may be required to produce under the provisions hereinbefore contained, or to answer upon oath or otherwise such questions as may be put to him by such inspector or inspectors under the powers herein contained, shall be liable to forfeit and pay a penalty not exceeding five pounds, which may be recovered before any two or more justices having jurisdiction within the town, district, or place wherein such inquiry shall be held; and on conviction of the offender, and in default of payment of any such penalty, such justices shall be empowered and required to cause the same to be levied by distress and sale of the goods and chattels of the offender, by warrant under their hands and seals; and such penalty shall be paid to the treasurer of the county within which such conviction shall take place in aid of the county rate; provided that no person, other than the promoters of the proposed Act, or their agents, shall be required to attend in obedience to any summons, unless the reasonable charges of his attendance be paid or tendered to him, nor to travel in obedience thereto more than ten miles from his usual place of abode.

**6. Admiralty may take security for payment of expenses of inquiry.**—Before instituting any such inquiry the said Lord High Admiral or Lords Commissioners may, if they think fit, require and take such security for the payment of the whole or any part of the costs, charges, and expenses to be incurred by them in respect of such inquiry (including the remuneration of the inspectors) as to them shall seem fit; and whenever any such security is given, the costs, charges, and expenses in respect whereof it is given shall, to such amount as shall be certified by the said Lord High Admiral or Lords Commissioners (not exceeding the extent or amount of such security), be a debt due to her Majesty from the person or persons respectively by whom the same is entered into.

**7. Petitioners for private Bill to be deemed the promoters.**—The persons whose names shall be subscribed to the petition for any private Bill shall be deemed to be promoters of such Bill for all the purposes of this Act, notwithstanding the persons subscribing such petition shall have signed for or on behalf of any other party.

**8. Form of citing the Act.**—In citing this Act in other Acts of Parliament, and in legal and other instruments, it shall be sufficient to use the expression "The Preliminary Inquiries Act, 1851."

CAP. L.

An Act to amend the Public Health Act, and an Act of the Third and Fourth Years of King William the Fourth, in respect of the Assessment of Tithe and Tithe Rentcharges for certain Rates. (August 1, 1851.)

**3 & 4 Wm. 4, c. 90.—11 & 12 Vict. c. 63.—Tithes and tithe rentcharges, &c. to be assessed as land.**—Whereas by an Act passed in the session of Parliament of the third and fourth year of his late Majesty King William the Fourth, intituled "An Act to repeal an Act of the eleventh year of his late Majesty King George the Fourth, for the lighting and watching of parishes in England and Wales, and to make other provisions in lieu thereof, it is provided, that in levying any rate necessary for the purposes of the said Act, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of said Act: and whereas by an Act passed in the session of Parliament of the eleventh and twelfth year of the reign of her present Majesty, intituled, "An Act for promoting the Public Health," it is, among other things, provided, for the purposes of the said last-mentioned Act, that the occupier of any land used as arable, meadow, or pasture ground only shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof: and whereas it is just that tithes, tithe rentcharges, and other like payments issuing out of land should be assessed for the purposes of the said Acts in the same proportion of their net annual value as such land itself: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that tithes, tithe rentcharges, moduses, compositions real, and other payments in lieu of tithe, shall be assessed under the firstly-recited Act as and in the same proportion of their annual value as land, and under the secondly-recited Act as and in the same proportion of their annual value as land used as arable, meadow, or pasture ground only.

CAP. LI.

An Act to authorise, for a further Period, the Application of Money for the purposes of Loans for carrying on Public Works in Ireland. (Aug. 1, 1851.)

CAP. LII.

An Act to facilitate the more speedy Arrest of absconding Debtors. (Aug. 1, 1851.)

We give this statute entire.

Whereas the laws now in force for the arrest of debtors absconding from England are insufficient and inadequate for that purpose, by reason of the delay which is occasioned in obtaining the necessary process: and whereas frauds are perpetrated upon creditors residing at a distance from London by debtors embarking for distant countries from various towns and seaports in England: and whereas it is expedient to provide a more expeditious and efficacious mode of obtaining process for the arrest of debtors about to quit England in all cases where such debtors are now liable by law to be arrested: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1. Authority to Commissioners of Bankruptcy and judges of County Courts to grant warrants for the arrest of absconding debtors.**—Writ of *capias* to issue thereupon.—That from and after the passing of this Act it shall be lawful for any commissioner of the Court of Bankruptcy acting for any district in the country, or the judge of any district County Court, except the County Court Judges, acting in the counties of Middlesex and Surrey, on application by or on behalf of any creditor, upon due proof by affidavit, intituled in one of her Majesty's Superior Courts of Common Law, of the creditor applying, or of some other person, or by solemn affirmation in cases in which solemn affirmation is allowed by law, to the satisfaction of such commissioner or judge, that a debt of twenty pounds or upwards is owing to such creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit England with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the Courts of Law in England so long that thereby the said creditor will or may be delayed in the recovery of the said debt, to grant a warrant, such warrant being in the form and endorsed in the manner specified in the schedule A to this Act annexed, or to the like effect, to the messenger of the said Court of Bankruptcy, or to the high bailiff of the said County Court, whereby the said messenger or high bailiff shall have authority, at any time within seven days after the date of the said warrant, including the day of such date, to arrest the person or persons named in such warrant, and him or them safely keep until he or they shall have given bail to such messenger or high bailiff, or made deposit with him, according to the practice observed in the superior courts of law, or until he shall have paid the debt and costs endorsed on the said warrant, or be otherwise discharged from arrest under such warrant by due course of law, and that such warrant shall bear date the day of the issuing thereof, and may be executed in any part of England, and that a copy of such warrant or warrants shall at the time of the arrest be served upon the party arrested: Provided always, that every creditor who shall cause such warrant to issue shall forthwith cause to be issued a writ of *capias*, and also, in cases where no action shall be pending, shall, before the issuing of such writ of *capias*, cause a writ of summons to be issued out of some one of the superior courts of law against such debtor or debtors, and that upon such *capias* all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such commissioner or judge, and such debtor or debtors shall, if in custody, be served with such writ of *capias*, within seven days from the date of such warrant, including the day of such date; and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of *capias*, and all proceedings shall be had upon such writ of *capias* as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of *capias*, and according to the practice now observed in the said superior courts of law.

**2. Before whom affidavits to be sworn.**—The affidavit or affirmation required by this Act may be sworn or made before such commissioner or judge, or before any person having authority to administer oaths in any of the courts of law aforesaid.

**3. Warrants to be auxiliary to such writ of *capias*.**—The warrant or warrants which shall be issued by virtue of this Act shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever, as a protection to the person on whose behalf such warrant shall have issued, unless such writ of *capias* shall be issued and served in manner aforesaid.

**4. Time and place of arrest of debtor to be endorsed upon warrant, and upon production *sheriffs* to receive and detain such debtor.**—The person to whom the warrant hereby authorised to be issued shall be directed shall, immediately on the same being executed, endorse a certificate thereupon of the time and place where the debtor was arrested; and the production of such warrant and certificate to the sheriff of the county where such warrants shall have issued, or to the keeper of the gaol of such county, shall be a sufficient authority to such sheriff or keeper to detain such debtor or debtors until he or they shall be discharged by due course of law.

**5. Persons arrested entitled to discharge in certain cases.**—It shall be lawful for any person arrested upon any such warrant forthwith before the issuing of the said writ of *capias* to pay the debt and costs which shall be endorsed on such warrant to the said messenger or high bailiff as aforesaid, or to enter into a bail bond to such messenger or high bailiff, with two sufficient sureties, for the amount which shall be endorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum endorsed on such warrant, together with ten pounds for costs, and thereupon he shall be entitled to be discharged from custody, and such messenger or high bailiff, hereby authorised to discharge such person accordingly.

**6. Effect of writs of *capias* on previous proceedings.**—As soon as the person so arrested as aforesaid has been taken into custody, or detained, under the writ of *capias* hereinbefore mentioned, the force and effect of the said warrant so granted as aforesaid shall immediately cease and determine, and the said sheriff shall hold the said person under or by virtue of the said writ of *capias*, in like manner as if the said person had been first arrested under and by virtue of the same, or in case the person so arrested shall have made deposit with the said messenger or high bailiff as aforesaid, or entered into such bail bond as aforesaid, then, upon delivery to the messenger or high bailiff respectively by whom such person was arrested of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said messenger or high bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail bond as aforesaid, and the said sheriff shall then hold the said deposit or bail bond, and shall be entitled to enforce the said bail bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made, or bail bond entered into with the said sheriff; provided always, that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant: Provided also, that if no writ of *capias* be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made with, or bail bond given to, the said messenger or high bailiff, then the said deposit shall be returned, and the said bail bond be given up to be cancelled.

**7. Indorsement on warrant.**—Such warrant shall be indorsed with the amount of debt and costs claimed by the plaintiff in such manner as writs of *capias* are now directed to be endorsed, and on payment of the amount so indorsed all proceedings shall be stayed, and the person so arrested be discharged from custody, and he shall be at liberty afterwards to tax the costs so indorsed as if he had been arrested under a writ of *capias*.

**8. Persons arrested may apply to a commissioner of bankrupt, a judge, or the court named in the warrant, for their discharge.**—It shall be lawful for any person for whose arrest a warrant shall have been granted to make application, either before or after arrest shall have been made by virtue of the said warrant, and before a writ of *capias* shall have been issued as aforesaid to any commissioner of bankrupt, or County Court judge as aforesaid, or to any judge of the said Superior Courts, or to the court mentioned in the affidavit of debt or warrant for the arrest, for a summons or rule calling upon the creditor who shall have obtained such warrant to shew cause why the warrant should not be set aside and vacated, if such application shall be made before arrest, or why the debtor should not be discharged out of custody, if the application should be made after arrest, and that it shall be lawful for such commissioner or judge or court to make absolute or discharge such summons or rule, and direct the costs of the application to be paid by either party, or to make such other order therein as to

such commissioner, judge, or court, shall seem fit; provided that any such order made by a judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order.

9. *Officer responsible for the due execution of warrant.*—The officer to whom such warrant shall be directed or addressed as aforesaid shall be subject to the jurisdiction of the Court in which the action shall be brought, or of any judge thereof, and shall be responsible to such Court or judge, and to the person at whose suit such warrant shall issue, for the due execution of the said warrant, in the same manner exactly as sheriffs are now responsible for the due execution of all writs of *capias* directed or addressed to them, and shall be entitled to the same protection as sheriffs now are entitled to on executing such writs.

10. *Costs of such warrant to be costs in the cause, except as herein provided to the contrary.*—The costs of and attending the warrant hereby authorised to be issued, and the arrest thereon, shall be deemed to be costs in the cause: Provided always, that no such costs shall be allowed to a plaintiff unless the Court or the proper officer thereof is satisfied, by affidavit or otherwise, that the plaintiff had good reason to believe that he would probably have failed in causing the defendant to be arrested if he had proceeded in the first instance by application to a judge of one of the Superior Courts for a writ of *capias*, without first applying to a judge of a County Court, or a commissioner of the Court of Bankruptcy, as the case may be, under the provisions of this Act.

11. *Fees to be taken in respect of warrant to be issued.*—The fees mentioned in Schedule B. to this Act annexed shall be paid to the parties in the said schedule named, and that no other fees shall be allowed or taken in respect of the warrant to be issued by virtue of this Act, and that the costs of the writs of *capias* and summonses shall be the same as if this Act had not passed; and the said fees shall be deemed subject to be regulated, varied, increased, or lessened, either by one of her Majesty's principal Secretaries of State, with the consent of the Commissioners of her Majesty's Treasury, as regards such fees as are receivable by any officer of the County Court, or by the Lord Chancellor, with the like consent as regards such fees as are receivable by any officer of the Court of Bankruptcy; and a table of such fees as are hereby receivable by any officer of either Court respectively shall be put up in some conspicuous place in the County Court and the Bankruptcy Court respectively.

12. *Short title of Act.*—In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Absconding Debtors Arrest Act, 1851."

#### SCHEDULE A.

##### *The Absconding Debtors Arrest Act, 1851.*

Whereas A. B. [the creditor] hath this day proved upon oath [or solemn affirmation, as the case may be,] to my satisfaction that C. D. [the debtor] is indebted to the said A. B. in the sum of £ , and that there is probable cause for believing that the said C. D., unless he be forthwith apprehended, is about to quit England with such intent as is mentioned in the Absconding Debtors Arrest Act, 1851. These are to desire and authorize you, that you take the said C. D. wheresoever he may be found, and him safely keep until he shall have given you bail, or made deposit with you according to law in an action ["on promises," or "of debt," or "covenant," as the cause of action may be,] at the suit of A. B., or until the said C. D. shall have paid the debt and costs endorsed on this warrant, or shall by other lawful means be discharged from your custody. I do further command you to whom this warrant is directed, that on execution hereof you do deliver a copy hereof to the said C. D. And I hereby require the said C. D. to take notice that application will be made forthwith to the Court of [Queen's Bench, or Common Pleas, or Exchequer, or Common Pleas at Lancaster, or Pleas at Durham, as the case may be,] for a writ of *capias* to be issued against the said C. D., and a copy of such writ if obtained will be served upon the said C. D., if still in custody, within seven days from the date of this warrant, including the day of such date. And I do further command you to whom this warrant is directed, that immediately after the execution hereof you do certify by endorsement hereon the time and place when and where you shall have executed the same. Dated the day of A.D.

This warrant is to be executed within days from the date hereof, including the day of such date, and not afterwards.

#### (Endorsement.)

This warrant was issued by of attorney for the within-named

#### A Warning to the Defendant.

Within seven days from the day of the date of this warrant, including the day of such date, you will be served with a writ of *capias*, and thereafter you

will be considered as arrested by virtue of such writ of *capias*, and all proceedings will be had upon the said writ of *capias* as if this warrant had not issued, or you may be discharged forthwith on depositing in the hands of the officer to whom this warrant is directed the sum of and ten pounds for costs, or on payment to such officer of the debt and costs endorsed on this warrant, or on entering into a bail bond to such officer, with two sufficient sureties, for the amount endorsed on this warrant.

The plaintiff claims for debt and

Bail for the sum of by order of

[the party issuing the warrant].

#### SCHEDULE B.

##### Fees.

To the attorney, for preparing the affidavit of debt, and shewing that the debtor is about to abscond, and oath...	£0 10 0
To the same, for attending to issue the warrant.....	0 6 8
To the clerk of the County Court on the issuing of a warrant.....	0 5 0
To the party executing the warrant, for the caption.....	1 1 0
To the same, for every mile from the place where the warrant shall be issued to the place where it shall be executed, a further sum of.....	0 0 6
To the same, for every mile from the place where the debtor shall be arrested to the gaol where he shall be lodged, the further sum of.....	0 1 0

## THE MAGISTRATE,

AND PAROCHIAL AND MUNICIPAL LAWYER.

#### Summary.

NEXT after the Act to amend the Law of Evidence, the most important statute affecting proceedings in our courts of law passed last session was Lord CAMPBELL'S Act for further improving the administration of criminal justice, 14 & 15 Vict. c. 100, which we gave in *extenso*, 17 Law T. 186. That the changes which this statute works were greatly needed, the experience of every one attending our Criminal Courts must have afforded a well-founded conviction. It is a practical movement in accordance with the philosophical disposition of late years manifested, to sweep away all cumbersome and useless forms and technicalities, and to simplify proceedings as far as is consistent with certainty and distinctness. The purpose of the Act is well recited in the preamble, which states, that inasmuch as offenders frequently escape conviction by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and as such technical strictness may be relaxed in many instances so as to insure the punishment of the guilty without depriving the accused of any just means of defence; and as a failure of justice often takes place on the trial of felonies and misdemeanours, owing to variances in the indictment, and the proof of names, dates, matters, and circumstances not material to the merits, and by the misstatement of which the person on trial cannot be prejudiced in his defence; it is therefore enacted, that from the coming of this Act into operation on the 1st of September next, whenever, on the trial of an indictment for felony or misdemeanour, there shall appear any variance between the indictment and the evidence offered in proof thereof in the name of any county, city, town, or parish; or in the name or description of any person or persons; or in the name or description of any matter or thing; or in the ownership of any property named or described therein, it shall be lawful to the Court, if it consider such variance not material to the merits, and that the defendant cannot be prejudiced thereby, to amend the same; and the Court may either proceed with or postpone the trial, to be heard before the same or another jury; and after such amendments, verdicts and judgments are to be valid as if the indictment had been originally in the amended form. In future, in any indictment for murder or manslaughter, the manner in which, or the means by which,

the death of the deceased was caused, need not be set forth; nor will it be necessary in cases of forgery, uttering, stealing, embezzling, destroying, concealing, or obtaining by false pretences any instrument to prove that the intention was to defraud any particular person, but it shall be sufficient to prove the defendant did the act charged with an intention to defraud. A party indicted for felony or misdemeanour may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only. The 11th section of 7 Wm. 4, and 1 Vict. c. 85, are then repealed, and in lieu thereof there are the following enactments. On the trial of an indictment for robbery, the jury may convict of an assault with intent to rob. A very important and useful clause then enacts that a person who is tried for a misdemeanour, is not to be acquitted if the case turns out to be felony, unless the Court should so direct. Many miscarriages of justice will be prevented by this valuable clause. So a person indicted for embezzlement as a clerk is not to be acquitted if the offence turn out to be larceny, and vice versa. Persons indicted for jointly receiving, if it turn out they received separately, may be convicted; and in the absence of the principal felon, separate accessories and receivers may be included in the same indictment. These larcenies from the same person within six months may be included in the same indictment. Where a single taking is charged, whilst the taking was at several times, the prosecutor shall not be required to elect on which taking he will proceed, unless it appear there were more than three takings, or more than six months between the first and last. Coin and bank notes may in future be described simply as money. Then follow some clauses of importance, extending certain provisions of 23 Geo. 2, c. 11, and 31 Geo. 3, c. 1, enacting that Judges of the Superior Courts, Justices of the Peace, Commissioners of Bankruptcy and Insolvency, Judges of County Courts, Sheriffs in the Courts, may hereafter direct persons guilty of perjury to be prosecuted, and may order them to be committed until bail found. And on trials for perjury or subornation, a certificate of the trial of the indictment on which the perjury was committed shall be sufficient evidence of such trial. Formal objections in future are to be taken before the jury are sworn. Such is an outline of this Statute, calculated, as it is, to effect great and salutary changes in the practice at criminal trials. As the Act comes into operation immediately, and the Sessions are not far distant, an endeavour will be made to hasten the completion of the volume of Practical Statutes of the Session, in which it will, of course, be included, so as to meet the wants of the Profession.

We give below the Practical Suggestions of the Committee on the Law of Settlement, as they appear at the conclusion of the report.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

#### Summary.

ONLY one case of interest to Joint-Stock Companies has appeared since our last weekly review, and that is a railway case—The *Shrewsbury and Chester Railway Company v. The Shrewsbury and Birmingham Railway Company*, 17 Law T. 275. It appeared that the Shrewsbury and Chester Railway Company had entered into a contract with the Shrewsbury and Birmingham Railway Company as to a certain mode of working their line of railway; but the latter company asserted that the contract was void, and proposed to enter into an agreement with another railway company, in which event the contract, if not invalid and terminated, would be vitiated. The Court

on application to restrain the Shrewsbury and Birmingham Railway from holding a meeting to sanction such agreement, refused to interfere, on the ground that the conflict between the convenience and inconvenience, on the one side or the other, preponderated in favour of the party who had the legal right to enter into the contract. Lord CRANWORTH, however, in giving judgment, said, "My decision in refusing this injunction does not at all prejudice the question whether, if this proposed agreement or any similar agreement should be entered into, the plaintiffs may not be entitled to an injunction restraining the defendants, or rather in that case restraining the North-Western Railway Company, from so acting under the agreement as to exclude the plaintiffs from the Shrewsbury and Birmingham line, or from conducting the through traffic according to the terms of that contract."

#### WINDING UP.

THE business of winding up in the Master's office at this early period of the vacation appears at a stand-still, no intelligence having reached us.

#### PETITIONS, ORDERS, MEETINGS, APPOINTMENTS, CALLS, &c.

[Announced, issued, and made, during the past week.]

Re "An Act to dissolve the National Land Company, and to dispose of the Lands and Property belonging to the Company, and to wind up the undertaking."—Creditors to come in and prove their debts. To appoint an official manager on the 4th September next.—Humphry.

#### REAL PROPERTY LAWYER AND CONVEYANCER.

##### Summary.

AN interesting case, in the practice of sales of real property, came recently before Vice-Chancellor TURNER, and is reported in our last number, *Leslie v. Thompson*, 17 Law T. 277. In that case the plaintiff was the vendor, and the defendant the purchaser, of a landed estate, sold by auction. The property was sold under certain particulars, and one of the conditions of sale was the usual one, "that if any mistake or error shall appear in the description of the property, or any error whatever in the annexed particulars, such mistake or error shall not annul the sale; but, except where otherwise provided for by these conditions, a compensation or equivalent shall be given or taken as the case may require, to be settled by two referees or an umpire, to be nominated by them," &c. Out of four lots bought by the defendant one was found to be much more than the quantity set forth in the particulars, and the three others to contain some acres less. On the question of the vendor's title to compensation being raised by a special case, the Court held, that the purchaser must make compensation for the extra quantity in the one lot, and was entitled to compensation for deficiency in the other three lots. Another point incidentally raised (which it would be advisable to note in *Hughes's Practice of Sales of Real Property*) was, whether in a case where, beyond the description of the lands, &c., there is a general statement of the total acreage, with the qualification "more or less," the presumption of an intention to sell the property in a lump is not negatived? The Court here held that it was.

A "charity case," of peculiar interest at this time, when the disposition to correct abuses in public charities and the misdirection of funds from the purposes to which the testator or settlor devoted them, is that of *The Attorney-General v. The Mayor of Southmolton*, 17 Law T. 274. There the founder of a school, by his will reciting the foundation of the school and the conveyance to trustees, devised his freehold property, with a specified exception, to the corporation of S. on certain conditions, amongst which were the payment to the school of 40*l.* of which 25*l.* were for the

master, 5*l.* for the trustees, 7*l.* for repairs of school-house, &c. The income of the property so devised to the corporation of S. having increased to a much larger amount than was required for the payment of all the sums so directed to be paid, the corporation had been in the habit of paying no greater amount to the school and its purposes, but applied the surplus to their own use. The Court, however, held that all the objects of the charity ought to share in the surplus, in the same proportion to the whole surplus as the respective sums to be paid to each bears to the others.

In *Emery v. Bond*, 17 Law T. 275, Vice-Chancellor KNIGHT BRUCE held, on the construction of a peculiar clause in a will, that annuities given by a will out of the interest, dividends, or proceeds of the testator's estate, were chargeable upon the corpus of the estate.

#### COUNTY COURTS.

##### Summary.

A CASE of some interest in the law of Insolvency was recently decided by Mr. Commissioner LAW. (*Re E. Gooding*, 17 Law T. 278.) The question there was, whether the discharge of a debtor in execution by the plaintiff operates as a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend made under a creditor's petition, filed previous to the discharge, and under which no schedule had been filed. The Court held that the discharge of the debtor before adjudication operated as satisfaction of the debt, but otherwise after adjudication. The judgment in this case is lucid and full, and will well repay perusal. "In the present case," said the learned Commissioner, "the plaintiff knowingly substituted one state of things for another as affects himself. He discharged the judgment debt, taking a fresh written promise having its own dimensions. On this the insolvent remains liable. The plaintiff has the benefit of it; it was by his own act—the liberation of the debtor—that he got that benefit. That act made adjudication impossible. If there had been adjudication, a new promise would not have availed for that debt. The claim would have remained cognizable in this court, and in this court only. The plaintiff has made his election; he has discharged the debt which otherwise he would have been competent to prove, and he has acquired a new right on which there can be no proof." This case should be noted in *Macrae's Practice of Insolvency*.

##### CASE OF MR. RAMSHAY.

JUDGMENT has at length been given by the Chancellor of the Duchy Lancaster in the case of Mr. RAMSHAY, the judge of the County Court of Liverpool, against whom, it will be remembered, a charge of intemperate and indecorous conduct to the parties practising before him, had been preferred. The complaint was limited to infirmity of temper, not the slightest ground appearing for impeachment of corruption or incapacity. It was admitted that the learned judge had for some time suffered from ill-health, which might render him more irritable than otherwise he would have been. After a protracted and patient trial, judgment has been given in his favour, so far at least as goes retention in office—the language of the Chancellor being, that "he does not feel called upon to remove Mr. RAMSHAY from his office." We sincerely hope that this painful inquiry, now that it has terminated in a solemn judicial decision, will be forgotten, and a kindly feeling will be cultivated for the future, by both sides. We give below the official answer to the memorial, and a report of the learned judge's address on resuming his seat.

#### COUNTY COURT OF MIDDLESEX.

Reported by DAVID CATO MACRAE, Esq. of the Inner Temple, Barrister-at-law.

##### Brompton.

(Before ANDREW AMOS, Esq.)

RUSSELL v. SMITH.

*Discharge under the Insolvent Debtors' Act—Premiums upon policy of assurance deposited as security for the payment of a debt inserted in the schedule subsequently becoming due.*

*Defendant being indebted to plaintiff assigned to him, by deed of mortgage, three policies of assurance on defendant's life, and covenanted to pay the annual premiums, and if he did not, and plaintiff paid them, to repay plaintiff. Defendant afterwards became insolvent, and was discharged under the Insolvent Debtors Act. A premium accrued due after the discharge, and being unpaid by the defendant, and plaintiff having paid it, and not been repaid:*

*Held, that defendant was not discharged from liability for these breaches of covenant by his discharge from the original debt under the statute 1 & 2 Vict. c. 110.*

This was a plaint to recover a sum of 4*l.* 13*s.* 6*d.* exclusive of 8*s.* 8*d.* cost of summons, &c. being the amount of an annual premium becoming due upon three policies of assurance deposited with the plaintiff as a collateral security for the payment of a debt then due by the defendant, and which he had covenanted to pay, but not having paid them, the plaintiff had, and he now brought this action upon the defendant's covenant to repay him.

Mr. Lord (of the firm of Willoughby and Cox), appeared for the plaintiff, and Macrae for the defendant.

The facts of the case are shortly these. The defendant, Mr. Henry Valentine Smith, being indebted to the plaintiff, deposited with him three policies of assurance, effected upon his own life, in the Commercial and General Life Office, Chesapeake, as a security, and subsequently, further sums having been advanced, by way of better security he executed a mortgage of these shares, in which, after reciting that H. V. Smith was entitled to the policies of assurance under the annual premiums mentioned, and that H. V. Smith was indebted to Thomas Russell in the sum of 180*l.* for moneys advanced, and that H. V. Smith had agreed to secure the repayment of this debt, the defendant, Mr. Smith, covenanted to pay the debt with the interest growing due, and until that was paid that he would pay, or cause to be paid, the annual premiums upon the policies assigned, and if he did not, then Mr. Russell was to pay the premiums, and the mortgagor, Mr. Smith, covenanted to repay the same to the mortgagee (*Davidson's Martin*, vol. 3, p. 614). After the execution of this deed, the defendant became insolvent, and upon petitioning the Court for relief, entered both the original debt and the security given in the schedule.

The defendant was duly discharged under the Act (1 & 2 Vict. c. 110) on the 4th of July, 1850, and subsequently the premiums upon the policies becoming due, insolvent being advised by his attorneys, Messrs. Atkinson, of Carey-street, Lincoln's-inn-fields, that as he was discharged from the original debt, he was not liable on the security, declined to pay them. The premiums were then paid by the plaintiff, and he now brought his action to recover this amount, in pursuance of the terms of the covenant. The question for the Court to determine was, whether the insolvency which discharged the original debt also discharged the payments defendant had covenanted to make upon the security.

Lord relied upon *Bennett v. Burton*, 12 A. & E. 657; 4 P. & D. 313; 4 Jur. 1065, Q.B.; *Fletcher v. Turk*, 13 L. J. N.S. 43, Q.B.; *Lloyd v. Peall*, 3 B. & A.; *Wilmer v. White*, 1 Bing. 291; *La Crosse v. Gillman*, 1 Price; *Toppin v. Field*, 4 Q. B. 386, &c. These cases were all precisely in point, as would be seen upon referring to them.

Macrae, for the defendant, said that the question involved in this case was one of great importance, both to the defendant personally, and to the community at large. Upon the decision of the Court would depend the liability of the former to annual payments for his whole life, and the question, as regarded the community was in effect whether the insolvency laws should become a dead letter, for if the defendant was liable, the plaintiff, by taking this security, would completely evade the insolvency laws, obtain a preference for himself, and secure the payment of his debt in defiance of their provisions. The defendant at the same time would be constantly exposed to periodical suits on account of this debt and periodical insolvencies or embarrasments on account of debts from which it was the very object of the Legislature to relieve a prisoner when it enacted this code of laws for his relief. He had carefully looked into the Act of Parliament, and also into the cases, but must confess that none of those bearing decisively upon this point not even the reasons given by the learned judges

were convincing to his mind. He would first direct his Honour's attention to the various provisions in the Act bearing upon this point, then state the points he relied upon, and lastly make such comments upon the cases relied upon as seemed desirable. His Honour would see, from the provisions of the Act, that it was clearly the intention of the Legislature, in return for vesting the whole of a prisoner's estate for the benefit of his creditors, to relieve him from all pecuniary liabilities subsisting at the date of the insolvency. The various provisions of the Act to which it was necessary to direct the attention of the Court were these:—A debtor being in custody for debt, "shall pray to have future liberty of his person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of filing his petition." 1 & 2 Vict. c. 110, s. 35. And then "it shall be lawful for the said Court to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of this Act . . . as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable." 1 & 2 Vict. c. 110, s. 75. "And be it enacted, that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever." 1 & 2 Vict. c. 110, s. 80. And in respect of any security, "no writ of *f. fa.* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this Act; and that if any suit or action shall be brought, or any *scire facias* be issued, against any such person, &c. for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognisance acknowledged by such person for the same, except as aforesaid, it shall be lawful for such person to plead generally that such person was duly discharged according to this Act by the order of adjudication made in that behalf, and that such order remains in force," &c. 1 & 2 Vict. c. 110, s. 91. The mode of proceeding for the payment of scheduled debts is pointed out in 1 & 2 Vict. c. 110, s. 87. "And be it enacted, that before any such adjudication shall be made with respect to any such prisoner, the said Court or commissioner or justices shall require such prisoner to execute a warrant of attorney to authorise the entering up of a judgment against such prisoner in some one of the Superior Courts at Westminster, in the name of the assignee or assignees of such prisoner, or of such provisional assignee, if no other assignee shall have been appointed and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner so sworn to as aforesaid to be due or claimed to be due from such prisoner, or so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied; and the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognisance; and if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment, for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such prisoner according to the mode hereinbefore directed in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said Court shall think fit to award." Now these were the provisions of the Act bearing upon this subject; and upon considering them it was impossible not to see that it was the intention of the Legislature to free an insolvent, not merely from all subsisting debts, but from all liability on securities held for these debts. The insolvency laws were intended to withdraw the insolvent and his affairs, so far as regarded pecuniary liability, from the general law of debtor and creditor, and to place him and his affairs under the special provisions of the statute, and these provisions denied the right of suit to any individual creditor in respect of any subsisting debt, and upon "any sum of money pay-

able by virtue of any bond, covenant, or other securities of any nature whatsoever" (s. 80), and were intended to protect the debtor in the undisturbed enjoyment of his future acquired property in respect of these debts until he should have acquired such a degree of the means of subsistence as to be in a state of solvency, and have a surplus (1 & 2 Vict. c. 100, s. 89) to spare, upon which event, and not till then, the Legislature authorised the appropriation of any of his future acquired property in payment of his past debts. The policy and intention of the law, both as regarded the creditors and the insolvent, was clear. He was fully borne out in this by the declaration of Mr. Commissioner Law, probably the highest living authority on this subject, who had materially aided Lord Eldon in perfecting the provisions of the previously defective statutes. In regard to their policy as regarded the insolvent, that learned commissioner observed, in his judgment in *Hance's case*, "Can any man study the Insolvent Acts, from that of 1813 to the present day, and not discern the policy of these laws? It is that a man shall be able to earn himself a livelihood not harassed for his debts; that his struggle for subsistence shall not be frustrated by the invasion of his means of subsistence; that his past debts shall only be a charge on the contingency of a clear surplus estate." (*Re Hance*, 1 Cox & Macrae's Insol. Cases, 127.) That to hold the defendant liable would be contrary to the policy of the law as regarded the creditors also would be seen by reading the 87th and 91st sections, which rendered void "new securities," placed all creditors in respect of the payment of their debts upon the same footing, forbidding all suit except upon the judgment entered up under the provisions of the Act for the benefit of all the creditors collectively, and deferring even that mode of payment until it should appear to the satisfaction of the Court that the debtor had not only the means of payment but a surplus. If the plaintiff succeeded in this case, he would obtain a preference over all the other creditors, which it had been the fundamental object of both the Bankruptcy and Insolvency Laws from their commencement to prevent. To show how careful the Courts had been to prevent these undue and unfair preferences, he would direct his Honour's attention to some few of the cases:—*C. P. Hilary Term*, 10 Geo. 3, 1770, *Linton, assignee of a bankrupt, v. Bartlett*. The Court said, that "all the laws concerning bankrupts, proceed upon equality, and say that all the creditors shall come in *pari passu*. There is no case wherever such a preference was allowed. The same spirit of equality ought to warm the courts of justice which warmed the Legislature when they made the Bankrupt Laws, and if we should let this deed stand, we should tear up the whole Bankrupt Laws by the roots; it is a bill of sale made by a trader at a time when he was insolvent, and (plainly) had an act of bankruptcy in contemplation. It is partial and unjust to the other creditors.—Judgment for the plaintiff that the deed is bad." (*Wilson*, 49.) In *Phillips v. Hunter*, in error, it was laid down by the judges that "the great principle of the Bankrupt Laws is justice founded upon equality. No creditor shall be permitted to acquire an undue preference, and by so doing prevent an equal distribution amongst all the creditors. . . . Equal distribution is the policy of the Bankrupt Laws." (2 H. B. 403.) In *re Wetherell*, 11 Law T. 373, Mr. Commissioner Law said—"The general policy of the Act is that all property should be made available for the creditors generally, rather than for one in particular." In *Smith v. Wetherell*, 10 Law T. 229, Lord Denman, in delivering judgment for Mr. Justice Patteson in the Bail Court, says—"The argument which weighs with my brother Patteson is this, that the main scope and object of the Act (1 & 2 Vict. c. 110) is to divide the insolvent's property rateably among his creditors, and this object is best effected by such a construction of the 55th and other sections as would not give the opportunity for any particular creditor to interfere and obtain a preference over the others." Having directed his Honour's attention to the special provisions of the Act, and their equitable construction as to policy and intention, as laid down by the highest authorities, he would now state the points upon which he relied, considering first the proper construction of the language of the several clauses intended to protect the debtor, and then at the peculiar provision of the statute with respect to future acquired property, with which the right of individual suit, and the consequent individual appropriation of future property, came in direct contact. The prisoner first prayed for liberty against the "demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be, or claim to be, creditors" (s. 35.) The adjudication clause then rendered it lawful for the Court to adjudge such prisoner entitled to the benefit of the Act, as to "the several debts and sums of money due or claimed to be due at the time of making such vesting order, as aforesaid, from such prisoner to the several persons named in his

schedule as creditors, or claiming to be creditors, for the same respectively, and which were not then payable" (s. 75). A limited or a larger construction could be given to these words. The word "debt" was defined to be "a demand for a sum certain;" (a) "a sum of money due by certain and express agreement, as a bill of exchange or a promissory note;" and although strictly speaking this premium at the date of the vesting order was not an existing debt that could be claimed as then due, yet it was cast about for an equitable principle of interpretation, it would be clearly this: that a prisoner should be protected in respect of existing pecuniary liabilities to the extent to which his property vested. If a prisoner had a title to property, reversionary, contingent, or otherwise, at the date of the vesting order, that property, if ever it came to him, belonged to his creditors named in the schedule; so, also, if he was under pecuniary liabilities, contingent, reversionary, or otherwise, at the date of the vesting order, if these liabilities ripened into debts, he should be protected in respect of them. The principle of equity was that a debtor should be protected from the demands of the creditors, to the extent to which his property vested for the creditors. He therefore submitted that the Court should adopt the larger construction of the words, "debts and sums of money due or claimed to be due." The next section to which he had directed the attention of the Court, was the 80th. That was certainly very strong. It extended the protection of the statute "to any sum of money payable at any future time by virtue of any bond, covenant, or other securities of any nature whatsoever." Strictly speaking, this premium was not "a sum of money payable at any future time," at the date of the vesting order, "by virtue of this security." It was not certain that it ever would become payable; but looking at the language of the 87th section, which forbade the payment of the original debt, the Court was bound to construe it as if certainly payable and grant its protection accordingly. But so anxious had the Legislature been to afford effective protection to the debtor, that in the 91st section it made void "any new contract or security" for the payment of the scheduled debts. If these policies were given as securities for the payment of the original debt after the discharge, there could be no doubt that the debtor would be protected from all payments in respect of them, and he could not see why the same principle should not be applied to this security, although given before the insolvency. He relied upon the language of these sections, but chiefly and mainly he relied upon the fact that this deed, upon one of the covenants of which the plaintiff sought to recover, was a contract between two private parties, to secure the payment of a scheduled debt by other means than those pointed out by the Legislature in the 87th section. It was a contract to give the plaintiff a right of suit in respect of the non-payment of a scheduled debt. Upon the insolvency occurring, that became an illegal purpose. The statute forbade individual suit, and exposed process under the control of the Court on behalf of all creditors collectively. This deed had the effect of giving an undue preference to the plaintiff, and by giving him the right of suit upon non-payment of his debt, it to that extent gave him power over future acquired property of the insolvent, which no other creditor had, and which it was contrary to the intention of the Legislature, and the policy of the Act, that he should have. The Court, he submitted, was bound to enforce the provisions of an Act of Parliament, in preference to the contracts of private persons. (b) Upon principles of equity as between parties to this action, the plaintiff had not a shadow of a right to enforce this demand. The consideration upon his part was the forbearance of suit in respect of the original debt. The statute now stood in, and declared that he should have no right of individual suit in respect of that debt; therefore the consideration on his part being taken away, and there being no new consideration given, it was manifestly unjust that the defendant should be called upon to fulfil his share of the contract. The defendant was forbidden to pay the original debt by the statute, and the plaintiff was for-

(a) Wherever a legal liability devolves upon a party to pay a determinate sum of money to another (either in consequence of an express promise or an implied obligation) the law denominates such liability a debt." (3 H. Com. 465.)

"In general, whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other," a debt is then said to exist between the parties. (Stephen's Com. vol. ii. p. 194.)

"The legal signification of debt is a sum of money due by certain and express agreement as by a bond for a determinate sum, a bill of exchange, or a promissory note, or a rent reserved on a lease where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." (See *Tormes de la Loy*, 108; and in *Holthouse's Law Dic.* p. 130, title "Debt," 1848.)

(b) All deeds are liable to be impeached if founded on immoral or illegal consideration, or if obtained by fraud. (1 Stephen's Com. 463.)

Any contract is invalid in law that can be impeached on the ground of dishonesty, or as being opposed to public policy. (Broome's Legal Maxims, 676.)



bidden to sue for it. The very basis of the contract being taken away by the Legislature itself, how then could the other parts of it be enforced? He called upon the Court to set aside the whole deed, and relied upon *Jackson v. Davidson*, 4 B. & Ald. 691. An insolvent debtor having petitioned the Insolvent Court to be discharged under the Act, a creditor gave notice of his intention to oppose him on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days of his discharge, a warrant of attorney for the debt, and in the meantime to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivering up of the note. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the Legislature intended to be distributed amongst all the creditors. Bayley, J.—This warrant of attorney if supported would interfere materially with the policy of the Act, by taking from the body of the creditors a portion of those funds which the Legislature meant to be distributed amongst all, and by defeating the effect of the judgment entered up by order of the Insolvent Court. Holroyd, J.—I am of the same opinion. This warrant of attorney was founded upon an agreement which is in direct opposition to the policy of this Act of Parliament. The object of the Act was, that the person of the debtor should be free with respect to all those debts from which he had been discharged, and that his future effects only should be liable in the mode there pointed out. Best, J.—The future effects of the insolvent are, by the provisions of this Act, directed to be divided rateably amongst the creditors until their debts are wholly paid. By enforcing such a security we should enable the plaintiff to deprive his co-creditors of some portion of that fund which the Legislature intended to be rateably divided amongst all.—Rule absolute for setting aside the warrant of attorney, and the judgment entered up thereon. The Courts had again and again recognised this principle of supporting the insolvent law in opposition to private deeds. In *Rogers v. Kingston*, 2 Bing. 441, the defendant was a discharged insolvent, and a creditor withdrew opposition after receiving a promissory note for the amount of his debt. The insolvent was arrested for the non-payment of this after his discharge, but settled the action by giving a warrant of attorney, in which his brother joined, to confess judgment for the amount of the debt and costs and interest, to be paid by instalments. The Court, on motion, set aside this warrant of attorney, after the payment of the first instalment, upon the ground that the whole transaction was contrary to the policy of the Insolvent Debtors Act. Best, C. J. says, "The party who has obtained this warrant of attorney places himself by the sale of his forbearance in the situation of a new creditor, and in a better position than he is entitled to claim." Park, J. says, "The argument which has been used in support of this warrant of attorney is in opposition to all the cases which have been decided, from that of *Jackson v. Duchaire*, 3 T. R. 551, downwards. The general principle of all these cases is, that one creditor shall not be permitted to obtain an advantage at the expense of the others, but the case turns on the 25th section of the Insolvent Debtors Act, which gives the commissioners power to issue execution against an insolvent's subsequently acquired effects, and divide them rateably among the creditors; but as the plaintiff's name was not inserted in the schedule, he might sue out execution without application to the commissioners, and thereby gain an advantage over the rest of the creditors. The 26th section of the Act provides that an insolvent shall not be arrested for a debt due to a former creditor, and if the plaintiff's name had been inserted in the schedule, the insolvent's person would have been safe. This the plaintiff prevents by taking a promissory note contrary to the policy of the Act. The case in the K. B. proceeds on the true ground, and is in point for the defendant." Burrough and Gaslee, JJ. concurring. Rule absolute. The observations he had made applied in some respects to the cases in bankruptcy relied upon by the plaintiff, and in other respects they did not; but in none of these cases had counsel attacked the ground of the consideration for the security, as being contrary to the policy of the insolvent law, and in direct collision with the machinery provided by the Act for the payment of the debt, and perhaps they could not, for there was no such machinery provided in bankruptcy as in insolvency, and a written promise might renew the debt. With respect to the decisions relied upon in insolvency, the case of *Benet v. Burton* was in point; but looking at the reason assigned by the Court for giving the verdict for the plaintiff, it was not convincing to his mind. Lord Denman said the Insolvent Debtors Act did not ex-

tinguish the debt, it only barred the remedy. But it did not occur to the Court, nor was it suggested by counsel, that the Act does extinguish the debt for some purposes; and it is only by holding to this principle that the greatest absurdities are prevented in administering the law of insolvency. "The debt," says Mr. Commissioner Law, in *Re Hance*, "we know is not extinguished for all intents and purposes, but the power of proceeding for the recovery of it is extinguished, excepting upon the judgment in the several ways prescribed by the statute;" and again, "There can be no suit except upon the judgment, therefore no suit whatever by individuals for suit upon the judgment is on behalf of all together." The Court of Q. B. admitted that, if the debt was extinguished, the action could not be maintained. The debt is extinguished for all purposes of individual suit. This was an individual suit, and, taking the reasoning of the Court, upon its own showing the verdict ought to have been for the defendant, but most of the principles to which he had alluded were never brought under the notice of the Superior Courts, and were mentioned to his Honour for the first time. He, therefore, trusted they would receive full consideration. This class of cases should be decided upon the equitable principles which governed the administration of law in the special systems to which an insolvent and his affairs became subject. When they were withdrawn by bankruptcy or insolvency from the general law of debtor and creditor. If it became generally known that a man could always secure the repayment of money advanced, and harass his debtor for life, in defiance of the insolvency laws enacted by the Legislature for the debtor's protection, the consequences would be most serious. If a poor debtor had a hundred creditors in his schedule for sums between 50l. or 150l. all secured in this way, there would be nothing for him but periodical insolvencies or perpetual imprisonment, and the insolvency laws would in effect become a dead letter. This was a most serious result in a commercial country, and such would be the result if this became generally known to be law. He looked with anxiety as to the result, particularly as there was no mode of bringing the principles he had advocated under the review of the Courts at Westminster, to which they had certainly never yet been presented. He trusted, as there was no appeal, his Honour would do substantial justice, according to the intentions of the Legislature.

His Honour intimated that he would take time for consideration.

*Curr. adv. vult.*

*Judgment for the plaintiff.*

NOTE.—Attention has been called to the facts of this case in the *Times*, the *Morning Advertiser*, and other journals. The latter journal presumes in their article, that, as there was counsel in the case, it was rightly decided. However that may be, the argument is fully given, for the consideration of the Profession. It is clear, that the Statute of Limitations, as well as the Insolvency codes, may also be evaded by this plan of taking a security for the annual payment of a policy, upon making a loan or loans of money.—REPORTER.

#### LIVERPOOL COUNTY COURT.

CASE OF MR. RAMSHAY.

THE Earl of Carlisle's decision in this case has been communicated to the Liverpool Guardian Society in the following letter:—

"Duchy of Lancaster Office, London,  
Aug. 20, 1851.

"SIR,—I am desired by the Chancellor of the Duchy of Lancaster to acquaint you that, having heard and very deliberately considered the evidence produced in support of the memorial presented to him, and the evidence on the part of Mr. Ramshay, he does not feel himself called upon to remove that gentleman from his office.—I am, Sir, your very obedient servant,

"F. DAWES DANVERS.  
"John Smith, esq. President of the  
Liverpool Guardian Society."

MR. RAMSHAY presided at the sitting on Monday, for the first time since the decision of the Earl of Carlisle in favour of his fitness for the office. Business was appointed to commence at nine o'clock, and as 150 cases were fixed for hearing, a large number of persons were then in attendance, and as the time advanced the number of persons in waiting increased. Mr. Ramshay, however, did not make his appearance till a little before one o'clock.

HIS HONOUR, on taking his seat, said, before commencing the business he would make a few observations on circumstances which had occurred since he last sat there; but he made these remarks often in so utterly inaudible a tone, that it was quite impossible at times to hear one-half of his sentences. He was understood to say, in commencement, that attempts had been made to remove him from his office whilst labouring under the distressing and dangerous illness by which he had been so long afflicted. He had, however, been able to defeat the machinations of certain ill-disposed and unscrupu-

lous persons who had endeavoured to cover him with disgrace and dishonour. Those accusations, however, had recoiled upon themselves, and they now stood convicted before the world of having attempted to defame, to disgrace, and to ruin an honourable and independent man—one who had never injured any one, and had cared only for the faithful and independent discharge of the onerous duties imposed upon him. From the moment of his appointment he had been the object of their unceasing calumny and misrepresentations. He had not thought it consistent with his position there to notice this matter until now; but his forbearance had been misconstrued, and they had at length had the audacity to carry their slanders elsewhere. Their want of success there was not owing to any want of exertion on their part, or to the want of bitter materials, or the assistance of dishonest servants and fraudulent agents. Such conduct could be no longer tolerated; and those men must be brought before another tribunal and there taught to respect its judgments, and that they were not to lay their ill and treacherous hands on the administration of justice. It might be that this conduct had arisen from his not being the nominee or creature of their own, and that he was unwilling to prostitute the administration of justice to their interests. He was not the first judge who had been thus assailed; but his predecessor also had been the subject of the unceasing persecution of those men, and there was but too much reason to fear that his premature and lamentable death was the result of their conduct. For that predecessor, for himself, and for the due administration of justice, he was happy to say those men had been doomed to defeat, and they must be made an example of for the future. They had attacked him in the hour of sickness and infirmity, from a feeling, perhaps, that he should stand alone in his defence. But though they might have opposed him on certain topics, men of discernment and education were not to be thus blinded; and to their honour they had crowded round him to rescue their judge from an attack as unjustifiable as it was disgraceful. To those gentlemen, and also to the general body of the town, he begged to return his grateful thanks for the general courtesy and kindness which he had received at their hands, and they might rely upon it he should continue fearlessly and independently to discharge his duties, to do justice, to love mercy, and to walk humbly before God. His Honour appeared to be deeply affected while making the above remarks, and was frequently unable to proceed, or only did so in so low a tone that no person in court could hear distinctly all his observations. The trial of cases was then proceeded with as usual.—*Chronicle.*

#### SUPERIOR COURTS OF COMMON LAW.

##### FIRST REPORT.

(Continued from page 204.)

As to pleas in denial of the matters alleged in the declaration or statement of the plaintiff, we think that the defendant ought to be at liberty to use the general issue where now applicable, or, if he prefers it, to traverse one or more material allegations separately. This would lead to conciseness, and to a diminution of expense, as it sometimes happens that the general issue denies several facts when a portion of them only is in dispute.

We propose, also, that the plaintiff shall, in all cases be at liberty to traverse the averments in the plea by a general denial, but shall also retain the right to single out and deny one or more.

We also propose that the same rule should apply to traverses of the replication, rejoinder, and all subsequent proceedings.

In order, however, to protect the parties against the costs of proof of facts unjustly put in issue by a general traverse, we think that either party ought to be entitled to require a finding by the jury as to the truth of the several allegations put in issue, and that costs ought to be awarded accordingly, as though the findings had been on different issues.

With the same view of preventing needless prolixity, we recommend the abolition of the form of pleading known as the special traverse.

The origin and object of the special traverse is explained by Mr. Sergeant Stephen in his "Treatise on the Principles of Pleading in Civil Actions" (p. 191), and it is described by him as a barbarous formula, and a relic of the subtle genius of the ancient pleaders. It has been discountenanced by the Courts, and is disapproved of by Mr. Sergeant Williams, in the first edition of his Notes on Saunders's Reports.

The principal use of this form of pleading is to evade the objection of argumentativeness when a qualified denial only of an allegation is necessary or advisable, and to raise a question of law upon the record which might otherwise have been involved in an issue of fact.

The form of the special traverse comprises, first, an inducement or statement of new matter, which must be an indirect denial of the fact intended to be traversed; and, secondly, the conclusion or traverse, which is in these words, "without this, that," &c.

(denying directly the fact intended to be disputed). If the inducement stood alone, the plea would be open to objection for argumentativeness, because it only shews by inference or indirectly that the allegation intended to be denied could not be true; the direct or special traverse, therefore, is added, to avoid such an objection.

The rules which govern the form and application of the special traverse are so technical and artificial as to perplex the practitioner; for instance, the inducement must not be a direct denial, but it must be a sufficient indirect one, and it must not be in confession or avoidance. The rules also as to when the inducement may or may not be traversed, and how the pleading may be answered by the opposite party, are extremely difficult and abstruse. It appears to us, that if our other recommendations as to pleading were adopted, all the advantages (if there be any) which attach to the substance of the special traverse may be attained without the necessity of adhering to the form.

New assignments also are at present too often abused so as unnecessarily to lengthen the proceedings. The necessity for them arises in two ways; first, where the plaintiff complains of one of several trespasses in a form so general that it is applicable to any of them, and a trespass in respect of which the action is not brought is either by mistake or design justified by the defendant; secondly, where the defendant pleads a justification of the trespass complained of, but the plaintiff maintains that there has been an excess beyond what the circumstances justify; for instance, when the defendant justifies committing an assault in self-defence, and the plaintiff means to rely on a violent beating beyond what mere self-defence required. With respect to the first, it is possible that the defendant may have been misled by the form of the complaint, and so long as this is the case he cannot be prevented from pleading an answer to any trespass which corresponds with the plaintiff's description, and which the defendant may in fact have committed. With respect to the second, the defendant must be at liberty to answer the plaintiff's *prima facie* case, and cannot justly be held to surmise and answer a complaint of excess in the exercise of his legal right, to which excess his attention has not as yet been directed by the form of the complaint. In each case it becomes necessary for the plaintiff to assert, in answer to the plea, the other trespass or the excess of which he complains, and the defendant must have an opportunity of answering that assertion. This seems capable of being effected by short and simple statements. But in practice instances have occurred of great and unnecessary prolixity and length of pleading in consequence of new assignments. For instance, to an action of trespass the defendant pleaded four defences: 1st, a right of way; 2nd, a right of common; 3rd, a right to take wood for repairing his house; and, 4th, a right to take wood for his fire. The plaintiff new assigned as to each plea that he brought his action for trespasses different from those justified in that plea; the defendant thereupon pleaded to each new assignment the three defences other than that contained in the plea to which there was the new assignment, and so the pleadings went on until each plea was repeated four times over in almost the same identical form of words. There is no real necessity for this. A defendant need never repeat a plea, nor need a plaintiff new assign separately to each plea. Suppose a defendant, in answer to an alleged trespass, asserts,—1st, a right of way; and, 2nd, a right of common; if he pleads both, and the plaintiff complains of something not justified by either or both, he ought to say so, and not say separately to each plea that he complains of something not justified thereby. We recommend, therefore, that, whatever number of pleas a defendant may plead to the same cause of action, there shall be but one new assignment, which shall state that the plaintiff proceeds for causes of action different from or beyond all those justified, and the defendant shall not be at liberty to plead to the causes of action newly assigned any justification which he has already pleaded. The consequence will be, that if the defendant pleads but one defence at first, and the plaintiff new assigns, the defendant may then plead his next defence, and so on, putting each defence once, and once only, on the record; but if the defendant plead all his defences in the first instance, which is the usual course, the plaintiff will new assign once for all, and the defendant will of necessity be driven to deny the causes of action newly assigned, or pay money into court, or suffer judgment by default.

If the description given in the declaration were so precise as to prevent any possibility of the defendant's mistaking or pretending to mistake the cause of action, no necessity for a new assignment would arise. For example, if a plaintiff were to state that the defendant trespassed on his close called Blackacre, in the parish of A. a plea justifying under a right of way which only existed in Whitesacre, or any place not answering to the description in the declaration, could not apply to this declaration, and there-

fore might be denied without a new assignment; but if the declaration did not describe the close so as to shew it could not be the place over which the defendant has the right of way, the plaintiff would be driven to a new assignment. A similar remark applies to the defendant's pleas. If they are so precisely defined as to shew the exact extent and nature of the cause of action intended to be answered, the plaintiff would not be obliged to resort to this form of pleading.

With this view we have proposed that the defendant in any action for a trespass to person or property shall be entitled to particulars identifying the cause of action for which the plaintiff is proceeding, and the plaintiff to particulars of any justification pleaded by the defendant; and that a judge may order plans of the *locus in quo* to be exchanged between the parties. The information thus obtained will, we believe, in the great majority of cases render a new assignment unnecessary.

We should certainly have recommended the abolition of this mode of pleading, but that we felt the same difficulty which occurred to the former Commissioners in attempting to do so, as some cases might be suggested where injustice would be done, even where particulars are given, if the plaintiff were prevented from new assigning; as when the whole case turns upon the manner of doing any particular act, the degree of force used, or the precise limit of a right. It would sometimes be inconvenient, if not impossible, for the plaintiff to complain of the excess only, for two reasons; first, because it would be unreasonable to require a plaintiff to assume that the defendant intends to plead any particular plea of justification, as, for instance, to state that the defendant had a right of way over his close, but that defendant trespassed in other parts of the close, inasmuch as the defendant might never intend to claim the right at all; secondly, it might happen that the plaintiff fairly wishes to contend that the defendant had not the right to do the act, and if he had that he exceeded his authority. Thus, he might deny the plaintiff's right to arrest and imprison him, and also contend that, admitting the right, the defendant was guilty of unnecessary violence when arresting him, and imprisoned him for too long a period. We trust, however, that the restriction which we have proposed to this description of pleading, and the more extended right of obtaining particulars, will effectually do away with the present abuse.

We have next, with the view at once of shortening the pleadings and getting rid of a source of objections purely technical, to propose an alteration in the mode of stating the cause of action in cases of libel and slander.

Where the libel or slander states in direct terms that which without any explanation is by law the ground of an action, the difficulty does not arise; but when, as is more frequently the case, particularly in libel, the expressions used are only slanderous, or actionable in connection with other precedent facts, it is necessary to introduce such facts in the declaration, and to shew that the expressions complained of were used in reference to the previous allegations, so that the meaning imputed by the plaintiff to the expressions may not only be explained but appear to be warranted. The meaning so assigned in the declaration by averment of the meaning or application of the words, which is called, in pleading language, the *innuendo*, cannot, according to the present rule, enlarge the sense of the words used, the office of the *innuendo* being only to explain them with reference to the other averments in the declaration.

The technical mode of effecting this is, first, to state the facts in reference to which the publication is actionable; secondly, to shew that the words or libel were published of and concerning such facts; thirdly, to connect the words or libel with such previous facts by means of proper *innuendoes*, thus importing into the words a slanderous or actionable quality.

It may not appear at first sight difficult to comply with these requirements; but the contrary is the fact: numerous instances might be given where the judgment has been arrested or reversed because the *innuendo*, or meaning ascribed to the words used, which is the essence of the cause of complaint, has not been, in the opinion of the Court, supported by the prefatory statements, although the jury must have found that the meaning alleged was intended by the defendant.

In a very modern volume of the Reports of the Court of Q. B. three consecutive cases on this subject occur, which occupy no less than forty pages, and must have consumed a considerable portion of time in discussion, in one of which the judgment was arrested, and in the other two the plaintiff succeeded. In the same year a similar point was discussed at great length in the House of Lords on a writ of error from the Court of Ex. Ch. in Ireland.

In the case of *Alexander v. Angle*, the introductory averment was, that the plaintiff was a livery-stable keeper, and that one T. P. had become bankrupt, and the plaintiff was about to prove a debt justly due to him under the commission of bankrupt.

The words complained of were, "You (meaning the plaintiff) are a regular prover under bankruptcies." The *innuendo* was, that the plaintiff was accustomed to prove fictitious debts under commissions of bankrupt. This was held to be bad, because the *innuendo* was not warranted by the inducement; but if the inducement had been, that a conversation had taken place with respect to the proof of fictitious debts, the Court admitted that the declaration might have been good.

So, in the case of *Hawkes v. Hawkey*, the plaintiff stated he had put in an answer on oath to a bill filed in the Court of Exchequer, and that defendant said he was forsworn, meaning, he had perjured himself in his aforesaid answer: the judgment was arrested, the *innuendo* being too large, because the plaintiff had not stated that the words were spoken in reference to the answer.

It may be said that a good cause of action should in all cases appear on the face of the declaration. This we admit. We do not propose to interfere upon this rule; we only suggest a less technical and difficult method of stating the cause of action.

The substance of our recommendation is, that it shall be sufficient to state in what particular defamatory sense the words were used, and if the plaintiff prove to the satisfaction of the jury that they were used in that defamatory sense, which the defendant may deny under the general issue, no objection shall be allowed by reason that the words do not appear by independent statements to bear that meaning; provided, of course, that the sense imputed to them be actionable.

The real meaning of the expressions, and the defamatory nature of them, are of the essence of the cause of action. Both will appear on the record. If it should happen that the particular sense alleged does not amount to a cause of action, the defect may still be taken advantage of. The statement now required, of the train of circumstances in connection with the slander, to shew the meaning imputed to it, appears to us to be unnecessarily prolix, and more calculated to impede than to advance justice, by imposing difficulties of a technical nature.

The next class of our suggestions is intended to correct the too rigid operation of the rules against duplicity.

In order to remedy a great inconvenience which has been experienced in practice from the extreme strictness of the 6th and 7th of the pleading rules of 1834, by which plaintiffs and defendants respectively are confined to but one statement of their cause of action or defence, however complicated may be the facts out of which it arises, or doubtful the construction to be placed upon them, we recommend that a discretion be given to the judge, to whom application may be made for the purpose of striking out counts or pleas pleaded in violation of those rules, to allow several counts or pleas, although there be only one subject-matter of complaint or defence, if he thinks fit; and that the provision in those rules as to counts be altered; and we also think that, in order to save the expense of two applications, all objections to pleading several pleas, on the ground that they are founded on the same subject-matter, should be disposed of upon the summons to plead several matters.

With a view to remedy the injustice which we have pointed out as arising from the rule which confines parties in the later stages of pleading to a single answer, we propose that liberty should be given to reply, rejoin, &c. several matters, by leave of the Court.

Further, with a view at the same time to enable persons to defend themselves against groundless claims or to repel insufficient defences, both in point of fact and law, and to have all objections brought forward at the earliest stage, whilst amendment is easy and comparatively inexpensive, we propose that either party shall, by leave of a judge, be at liberty to plead and demur to the same pleading at the same time. It has indeed been suggested that this should be allowed as a matter of right. We are, however, apprehensive that unless placed under the control of the Court the power of demurring and pleading simultaneously might be resorted to for delay. A question has also been made as to the order in which the issues of law and fact should be disposed of. In ordinary cases we see no reason why they should not go on concurrently; but we think no special provision necessary for this purpose, and that the matter may remain as at present in the discretion of the parties, subject, under special circumstances rendering it expedient to dispose first of the issues in law, to the interference of the Court, which however is rarely found necessary.

Whilst we would allow the utmost latitude to the parties in placing upon the record all the grounds upon which they can fairly rest their claim or defence, on the other hand it is obvious that some limit should be put upon the liberty to plead or reply several matters, whether of fact or law. The statute 4 & 5 Ann. c. 16, s. 4, which admitted several pleas to be pleaded, clearly intended that the Court should exercise some discretion in giving leave to plead them. We do not propose to interfere with the dis-

cretionary jurisdiction which the judges now possess in this respect, but to extend it to the cases which will arise under the practice above suggested.

Connected with the subject of pleading, is that of forms of action and their joinder. We have postponed until now the consideration of this subject, because it will presently appear that the question of the maintenance of these forms will be materially affected by the alterations which we have already suggested in the language of pleading.

It is admitted that serious inconvenience arises from the stringency of the existing rules respecting forms of action, both with respect to the misjoinder of forms of action, and their misapplication to the particular case.

A mistake as to the form of action may be of much more serious consequence than the defects in pleading which we have been hitherto discussing, as it is not always cured by pleading over (as errors in form, strictly so called, are), or even after verdict; but the objection may be raised on general demurrer, or, after verdict, by motion in arrest of judgment, or by writ of error, although it may be quite beside the real merits of the case.

A few instances, not unfrequently occurring in practice, will be sufficient to explain the nature of the inconvenience complained of.

The forms of action most frequently in use are *assumpsit*, debt, covenant, *detinue*, trespass, and case.

The first three are applicable to claims founded on contracts; thus,

*Assumpsit* lies to recover damages, whether liquidated or unliquidated, for the breach of a contract not under seal:

Debt lies to recover a certain sum, or capable of being reduced to certainty by calculation, payable in respect of a direct and immediate liability by a debtor to a creditor:

Covenant to recover damages for the breach of a covenant under seal:

*Detinue* lies when goods or specific moneys are unlawfully detained:

Trespass lies for direct injuries to person or property.

Case is far more extensive than any other form of action, and is applicable as a remedy for what are called consequential injuries, that is, injuries supposed to arise indirectly and consequentially from the act complained of,—as slander, whereby the plaintiff's character is injured; negligent driving, whereby the plaintiff is run over and hurt; and the like. A familiar illustration of the difference between trespass and case may be stated:—Suppose a person throws a log of wood on a highway, and, by the act of throwing, another person is injured, the remedy in such case is trespass. But if the log reaches the ground, and remains there, and a person falls over it, and is injured, the remedy is case, as the injury is not immediately consequent on the act. So, if the defendant drive his carriage against that of another, the remedy may be trespass; but if the defendant's servant be driving, the remedy is case. One form of the action on the case is trover, which is a remedy for the wrongful conversion of goods. Case is said to be the remedy for all actionable matters of complaint to which the other forms of action do not apply.

Now, it is a rule that no two of these forms can be joined in one action, except that debt may be joined with *detinue*, and case with trover, which is one of the varieties of that form of action. Thus, if a man has a claim against his tenant for breach of a covenant to repair contained in a lease under seal, and a further claim against the same tenant for non-repair of another house let by lease or agreement not under seal, he must bring two actions, one of covenant and the other of *assumpsit*, to enforce those claims. If he has a further claim for a trespass to a third house which the same person has occupied under the pretence of its being let to him, a third action must be brought; and a fourth action would have to be brought if the defendant had done a permanent injury to premises let by the plaintiff to a third person.

We need not multiply instances. It is unreasonable that a plaintiff should be compelled to bring two actions when the different causes of complaint may, without inconvenience, be combined in one proceeding, as when he has one claim on a bond and another on a bill of exchange, or seeks redress for slander and assault against the same person.

The former commissioners suggested a partial remedy, namely, that a misjoinder of forms of action should be ground of special demurrer only, and that a mistake in the form of action itself, when brought in trespass or case, should be amendable at the trial. We think that this proposition does not go far enough; and after mature deliberation we are satisfied that no reform in pleading will be complete unless the present state of the law as to forms of action be altered.

One of the arguments in favour of the present system is, that the rule as to the not joining different forms of action prevents incongruous and dissimilar causes of action from being inconveniently mixed to-

ther in the same suit. But this is without foundation. Causes the most dissimilar may, as the law now stands, be joined. The plaintiff may join in one action a claim on a promissory note, on a breach of promise of marriage, and a complaint of negligence against an attorney; in a second he may join a claim for criminal conversation with trespass to his person, his land, or his goods; in a third he may sue for the seduction of his daughter, infringing his patent, and for negligently driving over and slandering him; because in all these cases the form of action is the same. The joining of incongruous causes of action therefore may now occur. We believe it is impossible to lay down general rules by which it could be prevented without great mischief; and that plaintiffs may be safely trusted in this matter. A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may divert attention to a question of whether he is entitled to the price of the goods sold, or other incongruous matters.

We propose to abolish the existing rule, and to allow a plaintiff to join in one and the same action all his causes of complaint. But, to prevent any inconvenience which in any particular case might ensue from a joint trial of several causes of action, we propose that the Court or a judge shall have power to prevent the trial of different causes of action together, if such trial would, in their judgment, be inexpedient, and in such cases may direct separate trials.

The suggestions above made, however, should not apply to the action to try the title to land, that action being a proceeding in rem, not directed to any person in particular, but which all persons interested may defend. That proceeding will, by reason of its great importance, and the difference between the proceedings in it and other actions, be treated of separately in a subsequent part of the Report.

(To be continued.)

## THE LAWYER.

### SUMMARY.

**EQUITY PRACTICE.**—A case in the Rolls Court, between solicitors, where the question was whether the terms of an agreement entered into between them for the carrying on a suit were that the defendants should conduct it at the usual charges between principal and agent, is reported in our last number. (*Foley v. Smith*, 17 Law T. 273.) In that case F. a solicitor, executor of, and entitled to residue under, a will, induced one of the legatees to institute a suit against him for administration; and S. another solicitor, was employed in the cause as solicitor, on the terms contained in a letter, the material part of which ran as follows:—"We beg for your satisfaction to state that we consider we act as your agents in this or any other suit, action, or matter in which we may be concerned for you, either personally or otherwise, and that our charges in respect of the said suit, action, or matter in which we may be so employed by you, will therefore be on the usual footing of agent and principal." F. at the time the letter was written had not taken out his certificate for the year, and was uncertificated through a portion of the time when the suit was going on. The Court held that the latter amounted to an agreement by S. to carry on the suit for F. as his solicitor on the ordinary terms of principal and agent, and that it made no difference whether S. supposed F. to be a certificated solicitor at the time the letter was written, and that the same construction must be put upon the letter, as if S. had known that F. was without a certificate. But the most novel point, and that most worthy of record in this case, is the *dictum* of the judge that such an agreement as this might have been made with a lay client, and if so made it would be legal; and although F. was not a client at the time the contract was made, and though it was made under the idea that he was a solicitor, it ought not to receive a different construction from what it would receive if F. had been a client merely, because it was not known he was uncertificated. This case abounds with points. Upon the question of taxation, it was held that the agreement constituted such a contract as precluded taxation on a common taxing order, and the plaintiff must, therefore, file a bill to obtain the benefit of taxation.

A point of privilege was decided in the Insolvent Court in *Re Thomas Fuller*, 17 Law T. 279, where an insolvent came up for bail, and the clerk of the creditor's attorney appeared to oppose. The Court held that opposition by an attorney's clerk could not be allowed.

**COMMON LAW.**—A question under Lord DEN-

C.J. at Maidstone Assizes, in the case of *Wightwick v. Woodhams*, 17 Law T. 261. It was there held, that the word, "action," in the proviso to sec. 1 of that statute, extends to a feigned issue. But this case is of short-lived interest, as the Law of Evidence Amendment Act, which comes into force on the 1st of November, repeals this proviso; and the value of the case is still further lessened by the fact, that no clause is introduced into the new Law of Evidence Act like the third section of Lord DENMAN's Act, which declares its provisions were not to apply to any such action or proceeding brought or commenced before the passing of that Act. The consequence of this is (as stated by Mr. Cox in his edition of the Law of Evidence Amendment Act), that all actions, suits, or proceedings tried after the 1st of November, 1851, whether commenced before or after the passing of the latter Act, will be subject to its provisions.

## EQUITY OF REDEMPTION-MORTGAGE.

TO THE EDITOR OF THE LAW TIMES.

SIR,—As a constant reader of and subscriber to your valuable journal, may I beg the favour of you to insert the following query on a point in practice in your next, and I shall feel greatly obliged if any of your correspondents will answer the same.

A. being a copyholder in fee surrenders conditionally to B. and his heirs by way of mortgage for securing a principal sum and interest, but the surrender contains no power of sale. The mortgagee dies without paying off the mortgage-money, and devises the mortgaged premises to his widow for life, but who has not the means of paying the fine and fees on her admission, in consequence of which the lord seizes the property for want of a tenant, and re-grants the premises to the heir of the deceased mortgagee, who is also entitled under the mortgagee's will to the mortgage-money. Is the equity of redemption in the mortgaged premises, under the circumstances, barred so as to enable the tenant now on the rolls under the lord's re-grant, to sell the property discharged of such equity of redemption? August 26th, 1851. C. D. H.

## THE LAW AND THE LAWYERS.

(From the Morning Chronicle.)

IN a former article on the Law Reforms which have been effected during the past Session, we sufficiently shewed our very high appreciation of their value. Yet it is impossible to forget that, as we then remarked, we owe the measures referred to almost entirely either to a strong pressure from without, or to the energy and public spirit of private members of the Legislature. The official leaders of Parliamentary deliberation have established no claim either on our gratitude for the past, or on our confidence for the future. Of the important improvements which have been recently made in various departments of our jurisprudence, very few can be said to be, in any sense of the term, Government measures—some encountered an obstinate and bitter official resistance—and not one was the spontaneous and unforced result of Ministerial zeal. Thus far, there is nothing whatever to shew that the responsible advisers of the Crown participate in the public conviction of the necessity of fundamental reforms in the law—least of all, that they are prepared to give effect to it in practical legislation. Nor, indeed, are we sure—looking at the isolated and fragmentary character of the improvements which have been effected—that the spirit of Law Reform has yet attained to such a height even in the House of Commons, as to offer an immediate prospect of those comprehensive and searching amendments which will alone satisfy the country.

There is, no doubt, a loud call for change, both within and without the House, but an effective demand is still wanting. The task to be accomplished is laborious, and in one sense difficult; yet, if it were seriously attempted, success would be by no means doubtful. When some novel undertaking is proposed to an engineer, he seldom discusses the practicability of effecting it. Impossibilities he scarcely recognises, and a difficulty is to him but a question of expense. If a minister could be found thus confident and resolute, the simplification and reorganisation of the whole body of our jurisprudence would be as certain of completion as a railway bridge or a tunnel. The community in general, deeply and justly impressed with the iniquitous operation of the procedure in the Superior Courts, naturally welcome and applaud that abolition of technicalities which results from the establishment of the numerous tribunals that have drawn to themselves nearly all the litigation of the country. The remedy was, no doubt, better than the continuance of the evil; but it is a spectacle at once melancholy and ludicrous, to see a legislature pride itself on devising means of escape from the influence of an institution which it nevertheless continues to sanction. If parliaments and

cabinets consider the law a nuisance, they ought, for the sake of common sense as well as of economy, to suppress Westminster Hall with its fifteen judges. With Tribunals of Commerce proposed on the one side, and local courts constantly extending their jurisdiction on the other, the ermine seems not unlikely to become the badge of a sinecure. No other civilised country has calmly acquiesced in the admission that its chief judicial functionaries were incapable of dealing either with the large interests involved in commercial disputes, or with the contested questions which arise from the transactions of daily life. Too dear for small litigants, and too uncertain for those who have much at stake, English jurisprudence is yet regarded, both by its friends and its enemies, as an immutable law of nature. Yet surely a code developing sound principles, and simple because scientific, might be administered with economy and approximate certainty, without sacrificing the skill and experience of trained lawyers at the Bar and on the Bench. The office of dispensing justice, like all other social functions can only be discharged effectually by those who understand the business. When science degenerates into pedantry and artificial complication, those who have in vain asked its aid will have recourse to unassisted common sense and the "rule of thumb." Nevertheless there is a scientific principle corresponding to every practical operation; and jurisprudence forms no exception to the rule. Chemistry is not a chimera because the Lapatans applied it to the extraction of sunbeams from cucumbers. Those imputations of a dislike to the simplification of the law which have been thrown on the profession have certainly not been without foundation; but the decline of business has compelled lawyers to open their eyes to the urgent necessity of improving their machinery. A statesman only is wanting to organise the work, and to insist on its effectual completion. All parties may, to some extent, share the blame of having neglected it; but the responsibility mainly rests on those who have so long held office without doing anything large or effectual.

The addition to the number of Equity Judges which has been sanctioned by Parliament will no doubt afford immediate relief to suitors; and it is possible that, among so considerable a body of learned and able functionaries, some at least will have sufficient energy to propose and carry out beneficial changes in the practice of the Court of Chancery. A time like the present, when every legal and judicial arrangement appears to be in a provisional state, may offer encouragement to active minds to employ themselves in devising alterations which may conduce to the public advantage. Yet the circumstances under which the new system has been introduced afford a striking illustration of the careless and disjointed method in which legal reforms are carried on. The Chancery Commission is still sitting, and it is more than probable that it will recommend the adoption of many changes in the present practice. It is believed that the report will be especially stringent with respect to the system administered in the Masters' offices. Until it is known whether the present ancillary jurisdictions will be retained, it is impossible to estimate the amount of labour which may fall on the superior judges; nor would any prudent legislator have organised a corps of functionaries at the very moment when he was engaged in an inquiry into their proper duties. There is every reason to expect that the whole judicial staff will require to be again remodelled in a year or two. The system of equity is reasonable in its principles, and is comparatively free from technicality; but all its merits are outweighed by inordinate cumbersomeness, delay, and expense. The Common-Law Courts have a machinery for ascertaining facts which will, perhaps, now that the last formal objections to evidence are removed, approach nearly to perfection. Unfortunately, however, their immutable rules interfere with a full inquiry into the substantial justice of a case. On the other hand, the Chancellor and his subordinates, though willing to adjudicate on the rights of parties, preclude themselves from the obvious means of ascertaining what those rights are. Bills, and answers, and depositions, and references to the Master make truth almost as uncertain as it is costly. The practice of sending cases to the Common-Law Courts, and of ordering issues to be tried by juries, has fortunately become rarer under the present judicial administration; but some time will probably elapse before a Vice-Chancellor finds himself capable of hearing witnesses in open court, when the affidavits are insufficient to elucidate the truth. It must be admitted that some change for the better has been effected within the last two years, especially by Sir George Turner's Act, which, as his colleague lately remarked, was advantageously distinguished by the circumstance that its framer understood the subject. Additional benefits may be expected to result from the labours of the Chancery Commission; yet there is an immense waste of labour in patching and pruning, when it would be easier to begin from the beginning. No alterations of practice or process can give certainty to a legal system, so

long as the practitioner and the judge have in every case to form an induction from the decisions scattered through two hundred volumes of reports. A code, or a series of codes, ought to be the basis of all improvement. When the task shall be at last undertaken, it will be found that as much labour and skill have been spent on makeshifts and substitutes as would have sufficed for the completion of the work.

The Courts of Common Law are far more injuriously hampered than those of Equity by the remnants of obsolete systems. The present Chief Justice of the Common Pleas has done much for the relief of suitors by discountenancing frivolous and technical sophistry, and especially by checking the facility with which new trials had been granted. The new law of evidence will doubtless tend still further to diminish the number of instances in which a failure of justice arises from formal objections. But the Courts are still cramped by the system of special pleading, and incumbered with the unavoidable assistance of juries. Few lawyers, and still fewer laymen, are aware how much of existing legal technicality has been produced by the contrary defects exhibited by the twelve men in the box. The judges have found this instrument so clumsy and unmanageable that they have devised innumerable contrivances for limiting or avoiding its operation. Three fourths of the new trials that are granted are moved for on the ground that some fallacy or irregularity has been introduced into the proceedings, and that the jury must necessarily have been misled by it; but a judge, under similar circumstances, might be capable of explaining that his decision had not been founded exclusively on the objectionable element in the case. Whilst County Court judges habitually decide without the aid of a jury, it seems strange that the high functionaries of Westminster Hall cannot be trusted to give a verdict on a bill of exchange, or on a dispute between a sheriff's officer and an assignee. It would be easy and safe to try the experiment, by submitting a certain class of cases to judges sitting alone; and a short experience would shew whether it was expedient to continue, to withdraw, or to extend the practice.

In the Common Law, as well as in Equity—and even more urgently—a code is wanted to make jurisprudence intelligible and certain. The reports which at present contain the law are voluminous and conflicting; and Acts of Parliament seldom have an ascertained meaning. The measure of 1850, for shortening the language of statutes, is perhaps the most flagrantly foolish specimen of modern legislative grammar and logic; but, although apparently intended as a mere model of absurdity for exhibition, its faults of confusion and uncertainty are alike in kind to those of statutes which involve the fortunes of large portions of the community. The Winding-up Act, so unfortunately carried by Lord Cottenham, has already plunged several families in ruin; and, even in the most favourable cases, it has seldom been put in operation at a cost of less than two-fifths of the property dealt with. Nevertheless, after an experience of two or three years, its meaning still remains in doubt. On Friday last, the final sitting of the House of Lords was occupied by a judgment on one appeal arising out of the construction of that Act, and the law lords declared themselves unable to solve a second difficulty without the assistance of the judges. In other words, the House of Lords and the judges will eventually make the law, three years after Parliament passed the Act, which has ever since been the subject of litigation. When the House of Commons next finds itself in a crisis of the law reforming fever, it is to be hoped that some authoritative voice may remind it that no improvement in judicature or practice can be really effective, until there is sound and systematic law to administer.

## PROMOTIONS, APPOINTMENTS, ETC.

(Clerks of the Peace for Counties, Cities, and Boroughs will oblige by regularly forwarding the names and addresses of all new Magistrates who may qualify.)

The Queen has been pleased to approve of Mr. Cornelius M'Caullay as Consul at Belfast for the United States of America.

Alfred Reade, esq. is appointed President of the Virgin Islands, and Senior Member of Council, in the room of Sir John M'Gregor, deceased.

Mr. John J. Eadale is appointed Provost-Marshal of the Island of Nevis.

Mr. Nicholas Esterhazy Stephen Armitage Hamilton is appointed to a clerkship in the State Paper Office, vacant by the death of M. F. Kuczynski.—*Observer.*

## COURT PAPERS.

**SITTINGS OF THE INSOLVENT DEBTORS COURT.**—On Thursday next the Insolvent Debtors Court will sit for bail cases and motions. By this timely notice parties may prepare their applications, and

save themselves an imprisonment of some weeks. Mr. Commissioner Phillips will preside.

**REGISTRATION OF VOTERS FOR THE CITY.**—Mr. T. Y. M'Christie, the revising barrister for the city of London, has appointed Monday, the 2nd of September, as the day on which he will this year commence the important duty of revising the various lists of voters for members to serve in Parliament for the city.

## CORRESPONDENCE.

### THE REPORT OF THE COMMON LAW COMMISSIONERS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—By p. 12 & 14 of the Appendix "A." it appears that a plaintiff, having served a summons specially indorsed with particulars of his claim, is to be at liberty to sign judgment in case of non-appearance; but execution is not to be issued till after eight days from the last day of appearance. The special indorsement on the writ is thus treated as equivalent to a declaration; and the defendant, by not appearing, is to allow judgment to go by default. Why should the plaintiff not be at liberty to issue execution immediately on the judgment?

It would seem, although it is not distinctly stated, that the defendant, if he appear to such writ so indorsed, has eight days to plead; and on a declaration, after a writ indorsed with the particulars now required, the defendant is to have the same time for pleading. This, instead of accelerating, will retard the proceedings in town causes. The defendant is to have ten days' notice of trial, whenever the same may be, or in whatever place he may reside.

An execution on a judgment by default for want of a plea in an action of debt in a town cause, where the defendant does not reside beyond a certain distance, may now be obtained on the thirteenth day after the service of the writ. According to the proposed practice it will not be issued till the seventeenth day, when the proceedings are by summons specially indorsed, nor until the seventeenth day, if obtained after writ and declaration. Again, the notice of trial being now eight days, it is proposed to make it ten days. If the defendant pleads, the plaintiff will not be able to try his case till the 26th day after the service of the writ, whereas, according to the present practice, he may try the cause on the twentieth day after such service.

If the Superior Courts are to compete with the County Courts it is not expedient to render the proceedings more dilatory than at present.

I am, Sir, yours, &c.  
J. W. H.

July 23, 1851.

### THE SWANSEA DOCK COMPANY v. LEVIN.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In your number of the 16th instant, at page 189, you state that a call had been "successfully fought and the demand defeated," and you refer to the above case as that in which this result had happened.

I beg, however, to inform you that the demand in the present instance has not been defeated, but that, on the contrary, the call has been sustained and judgment given in favour of the Swansea Dock Company, with the addition of a very serious amount of costs, to be paid by the defendant (Mr. Levin), and which costs amount to about ten times the amount of the call.—I am, Sir, &c.

J. TREV. JENKIN, Plaintiff's Attorney.

Swansea, August 26, 1851.

[We willingly give place to this correction of a mistake, into which we were inadvertently led by the peculiar allocation of words in the judgment.—*Ed. LAW T.*]

## LAW REFORM.

TO THE EDITOR OF THE LAW TIMES.

SIR,—In your last number you congratulate your readers on the passing of the Law of Evidence Act, and suggest, as the Superior Courts can now compel the production and inspection of documents not the same as in a Court of Equity, which power is not extended to the County Courts, the public will prefer to have their differences decided by the judges of the Westminster Courts.

Now, my observations lead me to think, that the public will give no such preference unless and until—first, the present system of pleading is effectually put an end to; secondly, the original summons, and any required appearance or plea, be taken out and filed in local offices, say the County Court offices; and, thirdly, a certain number of the judges should be made to itinerate throughout the year over England, to try all such cases, so as to be once, at least, every three months in every county in England, and this must be without any reference to term time or vacation. These may be great changes, but the times must be met, and common sense be allowed more sway in law reform than has hitherto been accorded.



If a tradesman at York or Leeds wants to sue a debtor for 80l. why should he be compelled to send 200 miles for a bit of parchment to enable him to commence such suit? Such a system will not now satisfy either the lawyers or the public, and both are right. All that the itinerant judges would be called on to do would be to try the cases, which would be originated and matured for trial in the country, and such judges should not travel with a mass of retainers, who do little else but swallow fees; the county clerk might attend such judges, as by the plan suggested the proceedings would originate and be matured in his office. I have admired your go-ahead sentiments as a law reformer, but you cannot forget your Westminster Hall predilections.

Allow your readers to reflect on these hints, by inserting them in the *LAW TIMES*; they are not made by an enemy to the legal profession, but from  
AN ATTORNEY.

York, August 21, 1851.

## LAW REFORM.

### TO THE EDITOR OF THE LAW TIMES.

SIR,—I have never been able to see the advantage of a plaintiff being obliged to have recourse to two separate documents and services before he can require an answer from the defendant; I mean, of course, writ and declaration. Why should not the writ contain short particulars of the plaintiff's claim, and unless he pleads thereto in due time, let judgment go by default? What reason can there be for the plaintiff to be at double expense, trouble, and length of time, before he can in any case (notwithstanding its being undefended) obtain a judgment.

I think that if the above was carried out in the intended amendments, it would be a great advantage to the parties suing, and at least would allow them to get a judgment within less than three weeks, which is about the time generally required now.

The same service as now required for a writ would suffice, and the time within which a party has now merely to appear would be amply sufficient for him to put in his plea.

This would also give parties eight days more within which they might commence an action and get it to trial.

I am not aware whether the above suggestion has been thrown out previously: if not, probably you may think it deserving of insertion in your paper, and it will thereby come before the powers who have the reforms in hand.

PROGRESSUS.

## LEGAL INTELLIGENCE.

**LORDS JUSTICES OF APPEAL.**—The Profession is naturally curious to know who will be the two Lords Justices of Appeal in the Court of Chancery. The *Cardiff and Merthyr Guardian* of the 16th instant states, as to one of them, that "the Right Honourable the Vice-Chancellor Knight Bruce has been promoted, to the gratification of lawyers of every party and all politics, to the new office of Lord Justice of the Court of Appeal." This announcement has not yet appeared in the London papers. The appointment would no doubt be a popular one. His Honour "has won golden opinions of all ranks of men." It will be recollected that the Conservative ministry appointed Mr. Justice Erie, with the universal approbation of all parties, and already the Whig Government have followed the example by selecting Vice-Chancellor Sir Geo. Turner. Another promotion from the same ranks would shew that political connexion is hereafter not to be regarded in choosing the fittest man for judicial office. This would be "a consummation devoutly to be wished." We have reason to believe that this renowned appointment of Vice-Chancellor Knight Bruce is correct; and we understand that Lord Cranworth will be the other Lord Justice of Appeal.

—*Legal Observer.*

**ETIQUETTE OF THE METROPOLITAN BAR.**—A proposition has been submitted to the members of the bar practising in the criminal courts of the metropolis, by Mr. Briarly, the object of which is to put an end to the system of fraud and plunder upon the poor, carried on by what are termed "touters," a class of persons who skulk about the police and criminal courts, fleeing the friends of prisoners charged with offences, under the pretence of being able to procure and render professional aid. Mr. Briarly, in a circular, says the only knowledge these persons have of the law is what they have learned by personal experience. He proposes that a court should be formed of the members of the bar, whose duty should be, under a code of regulations, to try all members of the bar who might be found holding a brief, or acting in any way for any of these touters. The jurisdiction of the court is not to extend to those heavy offences against practice of the law, and against moral duty, which are inquired into by the governing bodies of the Inns of court, and upon proof of which the profession is purged of the offender. The extreme penalty to be inflicted by the proposed court is the expulsion of any member,

and the refusal of the whole bar to hold a brief either with or for any such offender in any civil or criminal court. Courts of this description are formed on every circuit, and Mr. Briarly urges that such a court in the metropolis would purify the practice of the bar. It is to be seen what effect this proposition will produce.—*Observer.*

**SAFETY VALVES IN STEAM-BOATS.**—The following important provision appears in the late Act of Parliament on steam navigation: "After the 31st of March, 1852, it shall not be lawful for any steam-boat, of which surveys are required, to go to sea, or to steam upon the rivers of the United Kingdom, without having a safety-valve upon each boiler, free from the care of the engineer, and out of his control and interference, and such safety-valve shall be deemed to be a necessary part of the machinery, upon the sufficiency of which the engineer surveyor is to report."

**THE CASE OF THE BARON DE BODE.**—The construction put upon the Act of Parliament 59 Geo. 3, c. 31, by the judges, having precluded the House of Lords from hearing the case on its merits, has excited the attention of several distinguished members of the Legislature, and the matter is likely to become the subject of Parliamentary inquiry next session, when Lord Lyndhurst will take it up. In such hands substantial justice cannot fail to be attained.

**NEW CUSTOMS ACT.**—In the New Customs Act, which received the Royal assent on the 7th inst. by which the duties on coffee and timber were regulated from the 15th of April, there is a provision empowering the Treasury to regulate the mode of account between the Receiver-General of the Customs and the Bank of England.

**THE STEAM NAVIGATION AND PASSENGERS ACTS.**—The Commissioners of Customs have issued directions to the collectors and comptrollers at the several ports of the United Kingdom to prepare and transmit to the Comptroller-General a return of expenses incurred at their respective ports under the Steam Navigation Acts, 9 & 10 Vict. c. 100, and 11 & 12 Vict. c. 81; and the Passengers Acts, 12 & 13 Vict. c. 33, and 14 Vict. c. 1.

## NOTICES OF NEW LAW BOOKS.

*An Act to amend the Law of Evidence, with Notes, Introduction, and Index.* By EDWARD W. COX, Esq. Barrister-at-Law.

THIS edition of an Act by which, as Mr. COX in the dedication of his work to Lord BROUGHAM justly remarks, the greatest improvement of modern times has been effected in the administration of justice, appearing thus early, will be welcomed as a serviceable assistance to the Profession, whose duty it is thoroughly to acquaint themselves with the scope and operation of its enactments. In a concisely and neatly written introduction, the author draws a forcible picture of the inconveniences, absurdities, and miscarriages of justice which continually arose under the old law, traces the course of improvement under Lord DENMAN's Act—which he styles "the most useful of the many useful measures for which the country is indebted to that liberal and enlightened Chief Justice" (at the same time pointing out its insufficiency and the anomalies which arose under it)—down to the admissions of the parties on the record, the recognition by the Legislature of the success of that measure in the County Courts, and the embodiment of its principle in the statute now before us. A lucidly-written outline of the Act is prefixed to the statute. Copious practical notes are appended to the several sections of the Act, and so much of Lord DENMAN's Act as remains unrepealed is also given.

We give a single example, which is all our space will allow.

6. Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of Common Law at Westminster or Dublin, or the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the county of Durham, such Court, and each of the judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid to the said Court or judge. (a)

(a) It will be observed that this most useful provision is not extended to the County Courts, so that in all cases in which it is desirable to take advantage of it, the action must be brought in one of the Superior Courts. This is the clause which was spoken of with so much approval in

A copious index makes the work complete. This edition is very neatly got up, and we observe it is printed in two sizes, 12mo. and 8vo. so as to bind up with any work on evidence which the practitioner may possess. We cordially recommend it to our readers.

## BIRTHS, MARRIAGES, AND DEATHS.

### MARRIAGES.

BAUMGARTNER, E. J. of the Middle Temple, to Catharine, youngest daughter of the late W. Taylor, esq. of Histon, Cambridgeshire, on the 26th instant, at St. Luke's, Chelsea.

BEDDON, Mr. H. C. solicitor, of Hereford, to Miss Catherine Poole, of Bewdley, on the 26th inst. at Bibbesford.

BRATTWATTS, Joseph Bevan, of New-square, Lincoln's-inn, barrister-at-law, to Martha Gillett, daughter of Joseph Ashby Gillett, of Banbury, banker, on the 27th inst. at the Friends' Meeting-house, Banbury.

HENFREY, Arthur, Esq. F.L.S. &c. to Elizabeth Anne, eldest daughter of the late Hon. James Henry, first English President of Demerara, and Supreme Judge of the Ionian Islands, &c. on the 26th inst. at Tonbridge, Kent.

HUTCHINSON, Alexander, esq. W.S. solicitor, Cape Town, to Elisabeth, daughter of the late Rev. James Watt, Grammar School, Aberdeen, on the 19th of June, at Trinity Church, Cape Town.

JAMIESON, William, esq. writer, Airdrie, to Marion, daughter of William McGillivray, esq. LL.D. Professor of Natural History, Marischal College, Aberdeen, on the 20th inst. at Aberdeen.

JOHNSON, Robert, esq. writer, Edinburgh, to Anne, third daughter of the late Henry Rankine, esq. Leith, on the 31st inst. at Edinburgh.

WILSON, William, esq. M.D. Florence, to Jeannette Elisabeth Wood, eldest daughter of Lord Wood, one of the Judges of the Court of Session in Scotland, on the 31st inst. at Edinburgh.

### DEATHS.

CAINES, R. P. Esq. many years one of the coroners for Somersetshire, at Langport, aged 84.

HICKSON, Robert, esq. J.P. of Ballintaggut, Dingle, county of Kerry, on the 18th inst. aged 36.

HOLT, Thomas Lyttleton, esq. of 70, Guildford-street, Russell-square, London, and Edmondstown, in the county of Louth, Ireland, one of her Majesty's Justices of the Peace for the county of Middlesex, on the 26th inst. at Edgeware, aged 75.

LOWE, Robert, jun. esq. Barrister-at-law, at the residence of his father, Robert Long, esq. Pembroke-road, Dublin, on the 23rd inst. aged 30.

MOORE, George, esq. formerly Master in Equity at Calcutta, at Hill-house, Newbury, Berkshire, on the 20th inst. aged 73.

NICHOLSON, Peter, esq. one of the oldest and most respectable members of the legal profession, he had been in practice at Warrington for half a century, on the 26th inst. at his residence, Thelwall-hall, near Warrington, aged 73.

PERROTT, Edward Thomas, esq. a magistrate of the borough, and formerly of Crocombe-house, Worcester-shire, on the 33rd inst. at his residence, Stratford-on-Avon, aged 40.

RANSAY, John, esq. writer, of Alloo, and procurator fiscal for the county of Clackmannan, at Liverpool, on the 19th inst. aged 54.

WAT, Henry George, esq. solicitor, leaving a widow and large family to lament their loss, and universally respected and regretted, on the 31st inst. at his residence, St. Thomas-street, Portsmouth, aged 60.

## JOURNAL OF PROPERTY.

### Public Sales.

By Messrs. RUSHWORTH and JARVIS, at Garroway's. A freehold estate, known as Lion's Down, in the parishes of East Barnet and Chipping Barnet, on the line of the Great Northern Railway, 8½ miles from London, and formerly the residence of John Cattley, esq. The land-tax on the whole nearly nominal, and tithes commuted.

Lot 1.—The mansion of Lion's Down, with attached and detached offices, stabling, pleasure-grounds, gardens, farm-yard and buildings, and 66 acres of meadow land—2,900l.

Lot 2.—Eleven enclosures of land, comprising 83a. 3r. 36p. lying on the north side of the New-road leading from the railway station to the town of Barnet, with frontage eligible for building—8,600l.

Lot 3.—Several enclosures of land on the east and west side of the New-road leading to East Barnet, containing 60a. 1r. 34p.—6,000l.

Lot 4.—One undivided moiety of three freehold inclosures of meadow land, adjoining Lot 1, and containing 2½ acres, let on lease for 33l. 8s. per annum—1,000l.

By Mr. LUTCHFIELD, at Garroway's. The Royal Hotel, Slough, Bucks, with the tap, stabling, coach-houses, &c. let on lease to Mr. Dotesio for 350l. per

the House of Commons, as being the beginning of that which must ere long be effected—the fusion, as it is termed, of equity and law.

As the Act gives to the Court power to compel the production of documents "in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill or by any other proceeding in a Court of Equity," it may be convenient briefly to state what are the cases in which a Court of Equity will allow a discovery.

Mr. Smith, in his work on the Practice of the Court of Chancery, says: "The species of bill usually distinguished by this title (Bill of Discovery) is a bill for the Discovery of Facts relating to the Knowledge of the Defendant, or of Deeds or Writings, or other things in his custody or power." "This bill is commonly used in aid of the jurisdiction of some other court, as to enable the plaintiff to prosecute or defend an action at law, or any proceeding of a civil nature, before a jurisdiction which cannot compel a discovery upon oath." (1 Smith's Ch. Pract. p. 641.)



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To Readers and Correspondents.

- "N. S."—Our contributor being from town, we forwarded the communication to him, and have not yet received his answer, but no doubt we shall be enabled to give place to the letter next week.
- "ONE, &c."—If our correspondent will refer to our number for 23rd August last, he will find we gave an answer to his friend on the point.
- We have received a letter on the subject of the Bar and the Attorneys, unaccompanied by a name or reference. If our correspondent will forward his name, the communication he has sent shall have place.
- "AN ARTICLED CLERK."—We should willingly have given place to the letter, but our correspondent has been forestalled in his suggestion, similar proposals having been forwarded to and published in this journal.
- "INQUIRY" (Manchester).—The best book on Corporations, and the one we recommend to our correspondent, is *Grants*.

SCALE OF CHARGES FOR ADVERTISEMENTS.

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Advertisements from the Country should be accompanied with an order upon the Agent in Town, or a Post-office order (payable at 180, Strand) for the amount.

Advertisements ordered for the first page are charged one-half more. If not so ordered, they will take the chance of position.

We cannot undertake to return rejected communications. Whatever is intended for insertion must be authenticated by the name and address of the writer; not necessarily for publication, but as a guarantee of his good faith. No notice can be taken of anonymous communications.

THE LAW TIMES.

SATURDAY, SEPTEMBER 6, 1851.

THE NEW APPOINTMENTS.

THE rumour which we reported in our last number as to the appointment of VICE-CHANCELLOR KNIGHT BRUCE and Lord CRANWORTH to be judges of the new Court of Appeal, has been in the interim reduced to certainty by official announcement. It is also stated that the former gentleman is at an early day to be elevated to the peerage. This will be a further honour to which his pre-eminent merits justly entitle him. We sincerely congratulate the country on these appointments. Our warmest acknowledgments are at the same time due to the Ministry for the selection they have made—a selection in which, happily, they have shewn that the chief consideration they entertained in this matter was a desire to appoint the most efficient men, irrespective of party politics. The ranks of the Bench and the Bar do not afford a preferable choice. The feeling of security with which both the public and the Profession will rely upon the judgments of the High Court, as being equally sound and maturely weighed, forms one of the most assuring and welcome grounds of congratulation on these appointments.

The seats vacated by these learned judges will be respectively filled by the Solicitor-General, Sir WILLIAM PAGE WOOD, and Mr. JAMES PARKER, whose appointment will no doubt also be received with general satisfaction. Who is to be the new Solicitor-General

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remains to be seen. Two gentlemen are already named as having strong claims and a nearly equal chance. For ourselves, we express no opinion upon the merits or prospects of either.

THE ATTORNEYS' TAX.

EVENTS have in no way changed the opinion which we originally submitted to our readers, that it would be more prudent for us, in the first place, to ask for an equitable commutation of this tax, instead of insisting on its total repeal. We are of those who think that true wisdom consists in getting as large an instalment of justice as we can, but taking all we can get; and that it is foolishness to say we will have all or nothing. If three years ago our recommendation had been acted upon, we might then have obtained a great relief from the burden. We have seen some victories, it is true, but they have been barren ones; and we much fear, in despite of Lord ROBERT GROSVENOR's hopes, they are yet very far from fruition. Amid the excitement of a new Reform Bill the cause of the attorneys is likely to be forgotten. We owe much of the success we have achieved to a peculiar combination of parties, which in coming changes may not again occur.

Our proposition was, that we should, in the first instance, ask for an equitable commutation of the tax, by a reduction in its amount and a readjustment of it, so that it should fall more equally. A greater grievance even than the tax itself is, that a practitioner with a thousand a year pays no more than he who has only 200*l.* a year. This inequality we would adjust by levying the tax, with some regard for justice, in proportion to the profit of each man's profession; and as the best mode of ascertaining this, to charge it as an addition to the income-tax. Thus all who made less than 150*l.* a year would be exempted, and all above that sum would pay in precise proportion to their profits. This would be an immense relief to those who most require it, and the burden would not fall so heavily where the advantage was equivalent. Even if this should have the effect of delaying for a time the total repeal (which we fear is yet very far off), it will be a vast improvement, and it must not be forgotten that the tax is to some extent our protection against those who would have free trade in law, by abolishing what they call the monopoly of the attorneys. We ask our readers to think of this.

THE ADVOCATE:

HIS TRAINING, PRACTICE, RIGHTS, AND DUTIES. (a)

FIFTY-THIRD ARTICLE.

CROSS-EXAMINATION (continued).

TAKING, then, this maxim for your guidance that, whatever sophistry may suggest to the contrary, you have no right to attempt to discredit a witness by perplexing him into contradictions, unless you entertain the strongest suspicion that he is not telling the truth or the whole truth, let us now proceed to consider what kind of contradiction is requisite to such a conclusion, for upon this there is evidently much misunderstanding among inexperienced Advocates.

Remember that your object is to convince the judge and jury that the witness is unworthy of credit. In answer to the questions of his own counsel in the examination-in-chief, he has told an apparently straightforward and consistent story. He could scarcely do otherwise. He had previously made his statement to the attorney; it had been taken down and read to him, perhaps more than once; he has had leisure to supply whatever was defective, or to clear up whatever was obscure. His cautious counsel has also employed his ingenuity in the avoidance of any questions that might mar the complete-

(a) By EDWARD W. COX, Esq. Barrister-at-Law.

ness of the narrative. If you reasonably suspect that the story is forged, or coloured, or only partially told, it will be your duty to discover and display its defects. If you believe it to be a falsehood or a misrepresentation, it will be your endeavour to make him contradict himself; if you believe that there is a *suppression veri*, your ingenuity will be exerted to extract the truth that had been withheld.

Beware that you fall not into the fault, only too common with the inexperienced, of seizing with eager triumph upon small and unimportant discrepancies. Every man's experience teaches him that there are few who can tell the same story twice in precisely the same way, but they will add or omit something, and even vary in the description of minute particulars. Indeed, so well known is this, that a *verbatim* recital of the same tale by a witness is usually taken as a satisfactory proof that he is repeating a lesson he has learned, and not narrating facts he has seen. To be of any value to you for the purpose of discrediting his testimony, the contradiction must be on some material particular, or some incidents connected with it which, according to common experience, a man is not likely to have observed so slightly that in the course of ten minutes he would give two different descriptions of it. In this, as in all matters of an Advocate's duty, remember that you are dealing with a jury composed of men of common sense and experience in life, who cannot understand refined distinctions, and have no respect for petty artifices and small triumphs over a witness's self-possession or memory, and that you will not win their verdict unless by your cross-examination you shew that the witness is not puzzled, but lying. Yet how often may this error be seen in our courts, and verdicts lost by the very cunning that was pluming itself upon its ingenuity.

Among the practices to be avoided is that of too frequent admonition to a witness to speak the truth. This is a prevailing fault of inexperience, and often, it must be confessed, the refuge of conscious incapacity. When a young Advocate wants to appear to say something, but does not exactly know what to say, he is very apt to assume an aspect of profound wisdom, and with an air of importance, and in a tone intended to be solemn, to remind the witness that he is upon his oath. The continual repetition of such sentences as,—"Now, Sir, upon your oath," "Upon your solemn oath," and many others familiar to those who visit a court of justice, is not only in bad taste, but it is positively injurious; for the effect of a solemn adjuration to a lying witness to speak the truth, by reminding him of the oath he has taken, is altogether lost if he is employed on every petty occasion, instead of being reserved for great ones, when it is likely to be doubly effective from its very rarity.

Sometimes a witness will stubbornly refuse to answer your question. In such a case do not press him too hard. Urge him sufficiently to satisfy the jury that he is withholding something which he knows, because he supposes it will be injurious to the party he espouses, and then let him go. You will be entitled to use his refusal as a tacit admission of the fact you had sought to elicit, and in this form it may be more serviceable to you even than his answer would have been; for that answer might have been injurious or but partially useful to you, whereas his refusal to answer may be fairly urged as an admission of the fact in the very form in which you had put the question, and which was of course so worded that the answer to it would convey the information it was designed to obtain.

When a witness upon his examination-in-chief anticipates the counsel, and instead of waiting to be questioned, or after two or three questions have been put to him, proceeds to tell his whole story, and, as is often seen, will go on in spite of every effort made to stop him, you should observe him closely to ascertain from his manner whether he is telling the

truth, or merely repeating a lesson learned by heart. It is wrong to suppose, as some do, that when a witness thus dispenses with counsel, and pours out his whole story in a continuous stream, he is therefore always lying. It is not so. There are many minds in which the association of ideas is so fragile that if the thread is once snapped they cannot, without great difficulty, take it up again at the place where it was broken; they must begin at the beginning, and go right through every incident, as it occurred, however trivial or irrelevant to the main story, and being conscious of this defect, and once set a-going, they have an irresistible impulse to proceed without pause until they have delivered themselves of all they have to say. Such a witness, it is obvious, is not only not to be discredited, but his testimony is really of more worth than that of a more passive witness, because the very structure of mind that prevents him from taking up the thread of a story at any point, and the memory that can only be revived by the recalling of every circumstance in the precise order of its occurrence, forbids the introduction of fictions, which would necessarily destroy the entire chain, and plunge the mind into chaos.

Your care will be to distinguish between the witness who from this cause runs through his story and the witness who does so because he is repeating a lesson learned by rote. Close observation will enable you to discover a difference in the look, the tone, the manner, and the language. When relating what he has seen, there is always an aspect of intelligence, even in the dulllest, the eye kindles, the face brightens, the expression changes with the incidents narrated. Still more does the tone of the voice reveal the speaker's truth. Its changes are dramatic; it varies with every emotion that flashes across the mind, awakened by the recalling of the incidents described. The manner is usually eager and energetic, and in strict accordance with the tones, the aspect, and the theme. And if even these signs should be wanting, you must not, therefore, decide against the veracity of the witness until you have considered his *language*. If he is honest, his language will always be such as is consistent with his condition of life—appropriate to age, sex, education, and calling. Moreover, it will exhibit the aptness to the subject, without reference to structure of sentences which always distinguishes extempore narrative. If these characteristics, or either of them, be present, you may safely assume that the witness is telling the truth, but that he is only able to do so after his own fashion of a continuous story, and cannot recall it by scraps under interrogation.

If, on the other hand, he is repeating by rote a lesson which he has committed to memory, you will find wanting in him all or most of the signs of truth above described. He stands quite still, excepting, it may be, an uneasy motion of the hands or feet. His face has no expression. His eyes are fixed, not upon the counsel, the judge, or the jury, but upon the wall, or more commonly turned upwards, with a sort of vacant stare. His voice is monotonous, and expresses no emotion. His delivery is very rapid, unless when seized by a sudden forgetfulness, when he makes a full stop, or after stumbling a little tries back again in hope to regain the lost word or thought. His language, also, is almost always inappropriate to his position, for in such case it would seldom be his own composition that he has learned, but something which another has put into words, and which words would not be those of the pupil, but of the master. A single expression will often suffice to betray to you this sort of taught testimony, when it is one which you know that such a person as the witness would not have used, and perhaps there is no test so difficult to evade, and so conclusive where it prevails, as this of language. The reason is plain. A witness learns

his lesson thus. He tells what he knows to the Attorney or his clerk. If they be of the unscrupulous class, which has happily become so rare, the witness is informed that his evidence is of no use, but that if he had known so and so he would have been taken to the Assizes. The hint suffices. The memory is racked again, and the testimony desired is there found. It is taken down in writing. His entire story is put into formal shape; it is read over to him again and again, until he has it almost by heart. He learns not merely the facts he is to prove, but the very words in which those facts are narrated in the brief, and he repeats them as he has learned them.

Having thus satisfied yourself of the facts, you may in your cross-examination avail yourself of it to discredit the witness with the jury; but unless so satisfied you ought not so to attack him.

Your attack may be most successfully conducted thus. Without previous questioning come at once to the point, and ask him to repeat the account of the transaction. He will do so in almost the self-same words, with the same aspect and manner, and in the same tone, differing palpably from his bearing and tone and language before and after the episode. So certain is this test, that if it fails you may fairly give to the witness the benefit of the doubt, and say that, whatever other objections may be offered to his testimony, it is not a story learned and repeated by rote.

#### LETTERS TO LORD CAMPBELL.

BY THE EDITOR OF THE LAW TIMES.

##### THIRD LETTER.

MY LORD,—I will now ask your lordship's attention to those defects in the administration of justice by the Superior Courts of Common Law which may be comprised under the general title of *uncertainty*; and although some of these belong also to the other objections of *cost* and *delay*, it will be more convenient to notice them here, even at the risk of repetition.

But first let me explain what I mean by *uncertainty*. I trust that I shall not be supposed to employ this term in the sense in which it is used by the inconsiderate, who complain that the result of a lawsuit is uncertain, forgetting that in every case there must be two parties, both of whom think themselves right, yet one of whom must be wrong, and that the very purpose of the suit is to determine the doubt. I do not mean the uncertainty of evidence, or of the opinion of a jury, or of the construction of the law by the judges, for all these are inseparable from litigation, and must exist in the most perfect tribunal which human wisdom could devise. The uncertainty of which I complain is that which attends a lawsuit apart from its merits, the product of a procedure designed, with the best intentions, to facilitate justice, but by its very refinement of artifice to this end making more injustice than it prevented. Every lawyer well knows that it is not enough [to have the merits, on his side,—that the chances of success are to be calculated, if at all, by many other considerations. Technicalities surround him with pitfalls, into which the best case is as likely to tumble as the worst. Difficulties in the service of process, perplexities in the form of action, in the pleadings, at the trial, and the still more formidable obstacle of new trial, and the other forms by which even after judgment dishonesty can continue to defeat its opponent, are to be estimated by the prudent lawyer before he can honestly advise a client to carry the best case into court; while on the other hand they encourage resistance even by those who have no case at all. I will now endeavour to specify the principal sources of *uncertainty*, and suggest the remedies for them.

The first consists in the unnecessary difficulties thrown in the way of *service of process*. It is required to be *personal*. Hence costs, difficulties, and delays. Why should it be so? Why should we not adopt the general rule of service, and in all cases let it suffice that a copy be left at the last known place of abode, with some person there, verifying the fact by affidavit? Personal service is not required in the County Courts, and no mischief has in practice resulted from the absence of it, and already fifty times as many processes have been served there as during the same period have issued from the Superior Courts. Let us not be too proud

to profit by the experience of the new Courts, nor hesitate to adopt whatever they have tried and found to succeed. With the plaintiff and defence, require either the name of an attorney or the residence of the party to be entered, and thenceforth let all processes be served on such attorney, or addressed by post to the residence so named.

Abolish all dilatory pleas. They are not necessary. If the action is brought by or against the wrong party, he who so errs will suffer for it in defeat at the trial. Properly there can be but two answers to a claim, that the plaintiff is not entitled to it *in fact* or *in law*. In the County Courts certain defences, as infancy and insolvency, are required to be specially pleaded. This should be retained in the Superior Courts, because it is *what* is really a new issue, that is to say, a new question is proposed for trial; but such special defences should never be allowed to be joined with others denying the demand. The defendant ought to know his own case, and should make his choice, but he should not be allowed to say at once, "I never had the goods," and "I was an infant when I had them."

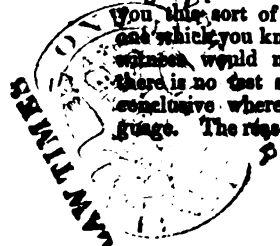
In my last letter I stated reasons that suggest the propriety of altering the term *demurrer* into one which is less obnoxious to ignorant hostility. But I employ it now because it will more readily convey my meaning to your lordship. Only one form of demurrer should be allowed, namely, the *which* shall say that the plaintiff's or defendant's case as stated is not sufficient *in law* to support the demand or defence. No objections to form should be permitted in *any* case. Thus the merits, by which I mean the very right of a case, as a question of law or a question of fact, will always be put in issue; each party staking his case upon his own statement of it, and enduring the penalty of his own error if he states it wrongly.

I am aware, my lord, that many prudent and profound lawyers are of opinion that this kind of pleading is impracticable, for they say that parties will make rambling and impertinent statements, which will prevent the Court from trying the issue intended to be raised. The obstacle to this, I think, be found in the fear of costs which must attend the failure to prove anything stated, or the statement of anything not pertinent to the question. It is asked also how duplicity is to be prevented. Thus. As the plaintiff can claim but one amount of damages in one action, he will, if he states more than one cause of action, be put to his election in respect of which of those causes he claims. The defendant may obtain this before trial by demand of particulars, or at the trial, by calling upon the judge to put him to his election, and to pay the costs incurred by the other party in preparing for the trial of the abandoned claims.

But again, my lord, we have the experience of the County Courts to show that in practice no such difficulties arise, and that from the very loosest pleading the Court is able, in almost every instance, to ascertain what is the real question at issue between the parties, and to determine it.

And when either party has been so misinformed, by the pleading of the other, that he was unable to make due preparation to meet the case, the power of adjournment, liberally exercised by the judge, has punished the wrong-doer by imposing upon him the costs of the day. The fear of costs will in all cases, be found a more effectual check upon abuses in pleading, than any rules, however stringent; and it may be safely left to the common sense of a judge acting under the vigilant eye of a Bar, to determine when unfairness or negligence of one party has wronged the other, and to punish it by imposing the costs consequent upon such error.

Having thus removed the pitfalls that beset the suitor's path through the perplexities of pleading, and so far destroyed the uncertainty which attends the progress of a suit up to the time of trial, it will be necessary only to advert to that which has been already considered in the question of costs—the delay that frequently occurs on the trial itself, and the consequent inconvenience of the suitors in keeping all their witnesses in waiting. I have already suggested a remedy for this grievous mischief, which has brought more discredit upon the administration of justice than any other, because it has been really the most vexatious. To the Profession it has been an unqualified injury, for, while gaining nothing by the delays, on them has all the odium fallen, and the cost of witnesses kept in waiting, which usually constitutes the largest item in the bill of the attorney, is charged by the angry client to the account of the lawyer, who is not only innocent, but profits nothing by it. As I have already observed some





than once, but which I cannot repeat too often, the attorney's profits are the *least part* of a bill of costs. Of them there would be no complaint, if it were not for the fees and payments with which they are improperly mingled. Sweep away these latter, or reduce them materially, and we should hear no more of extortion by the lawyers. My lord, it is *the law* and not *the lawyer* that is the real extortioner.

When a trial has once commenced, it is almost unobjectionable, or at least it *will* be so when that wise Act for amending the Law of Evidence, which had the cordial and valuable support of your lordship, shall come into operation on the 1st of November next. The manner of trial in an English Court of Justice is, perhaps, as nearly perfect as any human institution can be. To admiration of *that* must we ascribe the veneration which, by a not unnatural process, was extended to the law and its procedure, and which, even so lately as my own youth, when I took my seat in an Attorney's office as an articulated clerk, was gravely presented to me by my master as the perfection of wisdom. There is, indeed, the uncertainty of evidence, of opinion in doubtful questions of fact or of law; but these are inseparable from a tribunal, and by no art can ever be removed or materially lessened.

But after trial there commences a new reign of uncertainty, more terrible than any that has preceded it. The battle is never won; the victor is never safe; a verdict is not conclusive; at that point which ought, save on rare occasions, to be a settlement of the dispute, a new strife is permitted to begin, which may not only be as tedious as the first, but more costly. This it is that beyond all other of the uncertainties of the law "maketh the heart sick," and has stirred up the hatred of the people against the Courts of Westminster. I pray your lordship's particular attention to this subject, for it is one by which, as I learn from all quarters, more evil feeling has been created than by all the other defects of the law combined. The abuse to which I allude is that of *new trial*, and as it will require some consideration I will not enter upon it at present, but reserve it for my next letter.

I have the honour to be, my lord,

Your lordship's very faithful servant,  
THE EDITOR OF THE LAW TIMES.

## THE LEGISLATOR.

### Imperial Parliament.

THURSDAY being the day to which Parliament was prorogued by the Queen at the end of last session, the ceremony of the further prorogation took place in the House of Lords at half-past three o'clock. The Lords Commissioners were the Lord Chancellor, the Archbishop of Canterbury, and the Duke of Devonshire, who occupied a bench in front of the throne. Upon the Commissioners taking their seats the Lord Chancellor directed Mr. Fulman, Deputy-Usher of the Black Rod, to desire the attendance of the House of Commons to hear the Royal commission read. Mr. Fulman shortly returned, accompanied by Sir Denis Le Marchant, clerk to the House, who represented the Lower House on this occasion, no member of the Commons being in attendance. Mr. Shaw Lefevre, the Deputy Clerk of Parliament, read the Royal Commission, further proroguing Parliament to Tuesday, the 4th of November. After the reading of the commission the Lord Chancellor said, that in obedience to her Majesty's commands, and in virtue of the commission now read, the Lords Commissioners did, in her Majesty's name, prorogue the Parliament to Tuesday, the 4th of November, to be then and there holden. The Commissioners then withdrew, and the proceedings terminated.

### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 212.)

### CAP. LIII.

An Act to consolidate and continue the Copyhold and Inclosure Commissions, and to provide for the Completion of Proceedings under the Tithe Commutation Acts. (Aug. 1, 1851.)

We give this statute entire.

6 & 7 Wm. 4, c. 71—4 & 5 Vict. c. 35—8 & 9 Vict. c. 118—9 & 10 Vict. c. 101.—Whereas the appointments of the Tithe Commissioners for England and Wales, and the other appointments and powers of appointment under the Act of the session holden in the sixth and seventh years of King Wil-

liam the Fourth, chapter seventy-one, and the Acts continuing and amending the same, will expire at the end of the present session of Parliament; but certain proceedings for the commutation of tithes under the said Acts have not been completed, and other powers and duties under such Acts have not been fully executed and performed: And whereas by the Act of the session holden in the fourth and fifth years of her Majesty, chapter thirty-five, the said Tithe Commissioners for the time being were appointed to be "the Copyhold Commissioner" for carrying that Act into execution, and should the same not be fully carried into effect before the duties of the said Tithe Commissioners should cease, one of her Majesty's principal Secretaries of State was empowered to appoint any number of fit persons, not exceeding three, to be such Copyhold Commissioners; And whereas by the Act of the session holden in the eighth and ninth years of her Majesty, chapter one hundred and eighteen, provision was made for the appointment of two persons, who, with the First Commissioner of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, were to be the Commissioners for carrying that Act into execution, and were to be styled "The Inclosure Commissioners for England and Wales;" and whereas the said Acts relating to the said Copyhold and Inclosure Commissioners have been amended by other Acts: And whereas under an Act of the session holden in the ninth and tenth years of her Majesty, chapter one hundred and one, and other Acts relating to the drainage of lands in Great Britain, certain powers and duties are vested in the said Inclosure Commissioners in relation to such drainage: And whereas the appointments and powers of appointment of the said Copyhold Commissioners and Inclosure Commissioners, and of their assistant commissioners, secretaries, and other officers, will expire at the end of the present session of Parliament: And whereas it is expedient to continue for the period hereinafter mentioned, and subject as herein provided, the powers of appointment contained in the said Act of the fourth and fifth years of her Majesty, and to transfer to the commissioners to be appointed thereunder the duties and powers of the said Inclosure Commissioners, and to provide for the completion of the proceedings for the commutation of tithes which have not been completed, and for the exercise and performance of such of the powers and duties of the said Tithe Commissioners as remain to be exercised or performed: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. So much of 4 & 5 Vict. c. 35, as authorises the appointment of commissioners, &c. continued for two years.—Salary of a commissioner not to exceed 1,500*l*.—So much of the said Act of the fourth and fifth years of her Majesty as authorises the appointment of commissioners and other officers as therein mentioned shall be continued for two years next after the day of the passing of this Act, and thenceforth until the end of the then next session of Parliament; and the powers of appointment so continued shall be construed as authorising such appointments as aforesaid, for all the purposes of this Act: Provided always, that the salary of any commissioner to be appointed under the power hereby continued shall not exceed fifteen hundred pounds.

2. Commissioners to come in the place of Copyhold and Inclosure Commissioners, and to complete proceedings under tithe Acts, and to exercise all other powers now vested in Copyhold, &c. Commissioners.—The commissioners to be appointed as aforesaid shall be commissioners for executing the said Acts of the fourth and fifth and the eighth and ninth years of her Majesty, and the Acts amending, explaining, and extending the same, and the Acts relating to the drainage of lands in Great Britain, in the place of the said Copyhold Commissioners and Inclosure Commissioners respectively, and all the powers and duties of the said Tithe Commissioners which at the end of the present session of Parliament are not fully exercised and performed shall by virtue of this Act be transferred to and become vested in the commissioners appointed under this Act, and where under any Act of Parliament any powers or duties are or may be vested in or to be performed by the said Copyhold Commissioners, Inclosure Commissioners, or Tithe Commissioners, or any or either of such commissioners, all such powers and duties shall be vested in and performed by the said commissioners to be appointed as aforesaid; and the commissioners appointed under this Act shall, in all proceedings in the exercise and performance of the powers and duties to be exercised and performed by them under this Act, in the place of the said Copyhold Commissioners, Inclosure Commissioners, or Tithe Commissioners, adopt and use the style and seal of the commissioners in whose place they come under this Act in respect of such powers and duties.

3. As to continuance of secretary and officers.—It shall be lawful for the commissioners of her Majesty's Treasury to direct that such of the secre-

taries, assistant secretaries, clerks, and officers employed under the said Tithe Commissioners, Copyhold Commissioners, and Inclosure Commissioners respectively as the said commissioners of the Treasury shall think necessary, be continued so long as such commissioners may think fit, under and for the purposes of this Act; and all such officers may be removed as if they had been appointed under the powers hereby continued; and no assistant commissioner, secretary, or other officer shall be appointed by the commissioners appointed under this Act without the consent of the said commissioners of her Majesty's Treasury.

4. Appointments and powers of assistant commissioners continued.—All appointments and powers of assistant commissioners under the said Acts, or any of them which may be in force immediately before the end of the present session of Parliament, shall respectively continue in force until revoked by the commissioners appointed under this Act, subject nevertheless to the provision next hereinafter contained.

5. Appointments under this Act limited to two years.—No commissioner or assistant commissioner, secretary, or other officer or person appointed or continued under this Act, shall hold his office for a longer period than two years next after the day of the passing of this Act, and thenceforth until the end of the then next session of Parliament; and after the expiration of the said period of two years and of the then next session of Parliament so much of this Act as authorises any such appointment shall cease.

6. Provisions applicable to Copyhold, &c. Commissioners applicable to this Act.—Save as herein provided all provisions of any acts applicable to the said Copyhold Commissioners, Inclosure Commissioners, and Tithe Commissioners respectively, shall be applicable in like manner to the commissioners under this Act.

7. Powers of assistant commissioners appointed by Tithe, Copyhold, or Inclosure Commissioners vested in assistant commissioners appointed or continued under this Act.—Where, under the said Acts of the sixth and seventh years of King William the Fourth, and the fourth and fifth and the eighth and ninth years of her Majesty, and the Acts amending, explaining, and extending the same respectively, or any of such Acts, or any other Acts of Parliament, powers and duties are vested in, or to be performed by, an assistant-commissioner appointed by or under the said Tithe Commissioners, Copyhold Commissioners, or Inclosure Commissioners, such powers and duties shall and may be exercised and performed by an assistant commissioner appointed or continued under this Act; and all provisions having reference to any assistant commissioner appointed by the said Tithe Commissioners, Copyhold Commissioners, or Inclosure Commissioners, shall be construed as having reference to an assistant commissioner appointed or continued under this Act.

8. Matters commenced by Tithe Commissioners, &c. to be completed by commissioners under this Act.—All acts, matters, and things commenced by or under the authority of the said Copyhold Commissioners, Inclosure Commissioners, or Tithe Commissioners shall and may be carried on and completed by or under the authority of the said commissioners appointed under this Act; and such commissioners, for the purpose of prosecuting or defending, and carrying on all actions, suits, or proceedings pending at the time of the first appointment of commissioners under this Act, shall come into the place of such Copyhold Commissioners, Inclosure Commissioners, or Tithe Commissioners respectively.

9. Extending powers of third-recited Act to authorise reservation of easements for working mines.—And whereas it is expedient that the powers of the said Act of the eighth and ninth years of her Majesty, and the Acts amending the same, should be extended to authorise the reservation of easements for working mines of the lord of a manor (whose consent may be required to an inclosure), although such mines may not be under the lands to be inclosed: Be it therefore enacted, that in the provisional order of the commissioners concerning the inclosure under the provisions of the said Acts of any waste lands of any manor it shall be lawful for the commissioners to require, and in their provisional order to specify, as one of the terms and conditions of such inclosure, the reservation to the lord of the manor, his heirs, successors, and assigns, of rights of way and other easements over the lands intended to be inclosed, for working and carrying away any mines, minerals, stone, and other substrata the property of the lord of the manor, not under the lands proposed to be inclosed, and whether within the manor or not within the manor, and also for working and carrying away any mines, minerals, stone, and other substrata which may be intended to be reserved to or remain the property of the lord of the manor under the lands proposed to be inclosed, or for any of the purposes aforesaid; and in case it shall have been so declared in such provisional order, then the valuer shall and may reserve

and sward to the lord of the manor, his heirs, successors, and assigns, such liberty to construct railways, waggon-ways, and roads, and such rights of way and other easements over the lands intended to be inclosed, for working and carrying away any such mines, minerals, stone, or other substrata, the property of the lord of the manor as aforesaid, as by the valuer, with the approbation of the commissioners, shall be thought reasonable, and as shall not be inconsistent with the terms of such provisional order; subject to such provisions for compensation for damage to be done to the surface in the exercise and enjoyment of such rights and easements as to the valuer, with such approbation as aforesaid, shall be thought reasonable.

## CAP. LIV.

An Act to authorise the Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners. (August 1, 1851.)

8 & 9 Vict. c. 118.—*Inclosures mentioned in schedule may be proceeded with.*—Whereas the Inclosure Commissioners for England and Wales have, in pursuance of an Act passed in the ninth year of the reign of her present Majesty, intituled "An Act to facilitate the Inclosure and Improvement of Commons and Lands held in Common, the Exchange of Lands, and the Division of intermixed Lands, to provide Remedies for defective or incomplete Executions, and for the Non-execution of the Powers of General and Local Inclosure Acts, and to provide for the Revival of such Powers in certain Cases," issued their provisional orders for and concerning the proposed inclosures mentioned in the schedule to this Act, and the requisite consents have been duly given: And whereas the said commissioners have by a special report certified their opinion that such inclosures would be expedient; but the same cannot be proceeded with without the previous authority of Parliament: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said several proposed inclosures mentioned in the schedule to this Act be proceeded with.

2. *Short title.*—That in citing this Act in other Acts of Parliament and in legal Instruments it shall be sufficient to use the expression "The Second Annual Inclosure Act, 1851."

## THE SCHEDULE TO WHICH THIS ACT REFERS.

Inclosure.	County.	Date of Provisional Order.
Hadleigh Common.	Essex .....	14th Feb. 1851.
Hainworth and Lees	York .....	6th Feb. 1851.
East Anstey .....	Devon .....	20th March, 1851.
Pitfold Manor .....	Surrey .....	14th March, 1851.
Letton-common and The Fleete .....	Hereford .....	24th April, 1851.
Skidbrooke - cum - Saltfleet .....	Lincoln .....	14th March, 1851.
South Somercotes .....	Lincoln .....	20th March, 1851.
Rudgwick .....	Sussex .....	14th March, 1851.
Bentley .....	Southampton .....	13th Nov. 1850.
Westhall .....	Suffolk .....	22nd May, 1851.
Aylesford .....	Kent .....	24th April, 1851.
Edgware .....	Middlesex .....	14th March, 1851.

## CAP. LV.

See page 183, ante.

## CAP. LVI.

An Act to sanction the Service by Post of Notices relative to the Proceedings of certain Charitable Institutions, and to make further Provision as to the service of such Notices in future. (Aug. 1, 1851.)

Whereas great inconvenience has been occasioned, and may be occasioned, to incorporated and other charitable institutions in England, by reason of courts, boards, and meetings of governors, members, or subscribers, and elections of presidents, patrons, treasurers, hospitaliers, masters, physicians, surgeons, and other officers of or to, and recipients of the benefits conferred by, such institutions respectively, having from time to time taken place, of which the notices or some of them have been issued through the post, by the extreme difficulty of proving the service of such notices, and by the want of sufficient provisions in the charters, statutes, laws, or rules of such institutions as to the service of notices, thereby required to be given: and whereas it is expedient immediately to provide a remedy for the inconvenience and defects before mentioned: be it therefore declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. *Courts, &c. already held and not avoided, &c. to be considered as having taken place after proper notices served.*—That every such court, board, or meeting, the acts whereof have not already been

avoided or annulled by some Court of Law or Equity, nor are now the subject of some action, suit, or other proceeding for the avoidance or annulling thereof now pending in some Court of Law or Equity, nor have been avoided or annulled by some subsequent regular court, board, or meeting (as the case may be) of any such institution as aforesaid, and every such election as aforesaid which hath not already been avoided or annulled nor brought into litigation as aforesaid, nor avoided or annulled by some subsequent regular election to the same office or benefit, shall be considered to have taken place respectively after sufficient notice duly served on all persons who ought to have had notice thereof.

2. *After passing of this Act all notices may be sent by post, &c.*—That from and after the passing of this Act all notices to the governors or members of or subscribers to any present or future charitable institution in England, whether incorporated or not, which by the charter, statutes, laws, or rules (as the case may be) of such institution for the time being are or shall be required to be given, may be served by the same being transmitted through the post, directed according to the address given in the list of the governors or members of or subscribers to such institution for the time being in use at the chief establishment thereof, in such time as to admit of their delivery, in the due course of delivery by post, at or before such period (if any) as is or shall be prescribed by the charter, statutes, laws, or rules (as the case may be) for the time being of such institution for the giving of such notices; and in proving such service, it shall be sufficient to prove that such notice was so directed as aforesaid, and put into a general post-office in such time as aforesaid; but so nevertheless that nothing in this Act contained shall be held to render invalid any personal service of any notice, or to render necessary to the effectual service of any notice any further act, matter, or thing than would have been required for the service thereof by the charter, statutes, laws, or rules for the time being of the institution which the same shall concern if this Act had not passed; and that no notice of any intended court, board, meeting, or election shall be required to be served, either by post or otherwise, on any governor or member of, or subscriber to, any such institution who shall not for the time being be within the United Kingdom, anything in any such charter, statutes, laws, or rules to the contrary notwithstanding.

## CAP. LVII.

An Act to consolidate and amend the Laws relating to Civil Bills and the Courts of Quarter Sessions in Ireland, and to transfer to the Assistant Barristers certain Jurisdiction as to Insolvent Debtors. (Aug. 1, 1851.)

## CAP. LVIII.

An Act to defray the charge of the Pay, Clothing, and contingent and other Expenses of the disembodied Militia in Great Britain and Ireland, to grant Allowances in certain cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant-Surgeons, Surgeon's-Mates, and Serjeant-Majors of the Militia, and to authorise the Employment of Non-commissioned Officers. (Aug. 1, 1851.)

## CAP. LIX.

An Act to continue certain of the Allowances of the Duty of Excise on Soap used in Manufactures. (Aug. 1, 1851.)

## CAP. LX.

An Act to prevent the Assumption of certain Ecclesiastical Titles in respect of Places in the United Kingdom. (Aug. 1, 1851.)

We give this statute entire:—

10 Geo. 4, c. 7, s. 24.—Whereas divers of her Majesty's Roman Catholic subjects have assumed to themselves the titles of archbishop and bishops of a pretended province, and of pretended sees or dioceses, within the United Kingdom, under colour of an alleged authority given to them for that purpose by certain briefs, rescripts, or letters apostolical from the See of Rome, and particularly by a certain brief, rescript, or letters apostolical purporting to have been given at Rome on the twenty-ninth of September, one thousand eight hundred and fifty: and whereas by the Act of the tenth year of King George the Fourth, chapter seven, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, were by the respective Acts of Union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably, and that the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, as well in England as in Ireland, had been settled and established by law, it was enacted, that if any person after the commencement of that Act, other than the person thereunto authorised by law, should assume or use the name, style, or title of archbishop of any province, bishop

of any bishopric, or dean of any deanery, in England or Ireland, he should for every such offence forfeit and pay the sum of one hundred pounds: and whereas it may be doubted whether the said enactment extends to the assumption of the title of archbishop or bishop of a pretended province or diocese, or archbishop or bishop of a city, place, or territory, or dean of any pretended deanery in England or Ireland, not being the see, province, or diocese of any archbishop or bishop, or deanery of any dean recognised by law; but the attempt to establish, under colour of authority from the See of Rome, or otherwise, such pretended sees, provinces, dioceses, or deaneries, is illegal and void: and whereas it is expedient to prohibit the assumption of such titles in respect of any places within the United Kingdom: be it therefore declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That—

1. *Briefs, rescripts, or letters apostolical declared unlawful and void.*—All such briefs, rescripts, or letters apostolical, and all and every the jurisdiction, authority, pre-eminence, or title conferred or pretended to be conferred thereby, are and shall be and be deemed unlawful and void.

2. *Persons procuring, publishing, or putting in use any such brief, &c. for constituting archbishops, bishops, &c. of pretended provinces, sees, or dioceses, liable to a penalty of 100*l.* for every offence. Recovery of penalties.*—And be it enacted, That if, after the passing of this Act, any person shall obtain or cause to be procured from the bishop or see of Rome, or shall publish or put in use within any part of the United Kingdom, any such bull, brief, rescript, or letters apostolical, or any other instrument or writing, for the purpose of constituting such archbishops or bishops of such pretended provinces, sees, or dioceses within the United Kingdom, or if any person, other than a person thereunto authorized by law in respect of an archbishopric, bishopric, or deanery of the United Church of England and Ireland, assume or use the name, style, or title, of archbishop, bishop, or dean of any city, town, or place, or of any territory or district (under any designation or description whatsoever), in the United Kingdom, whether such city, town, or place, or such territory or district, be or be not the see or the province, or co-extensive with the province, of any archbishop, or the see or the diocese, or co-extensive with the diocese, of any bishop, or the seat or place of the church of any dean, or co-extensive with any deanery, of the said United Church, the person so offending shall for every such offence forfeit and pay the sum of one hundred pounds, to be recovered as penalties imposed by the recited Act may be recovered under the provisions thereof, or by action of debt at the suit of any person in one of her Majesty's superior courts of law, with the consent of her Majesty's attorney-general in England and Ireland, or her Majesty's advocate in Scotland, as the case may be.

3. *Act not to extend to bishops of the Protestant Episcopal Church in Scotland.*—This Act shall not extend or apply to the assumption or use by any bishop of the Protestant Episcopal Church in Scotland exercising episcopal functions within some district or place in Scotland of any name, style, or title in respect of such district or place; but nothing herein contained shall be taken to give any rights to any such bishop to assume or use any name, style, or title which he is not now by law entitled to assume or use.

4. *Nothing to effect provisions of 7 & 8 Vict. c. 97.*—That nothing herein contained shall be construed to annul, repeal, or in any manner affect any provision contained in an Act passed in the eighth year of the reign of her present Majesty, intituled "An Act for the more effectual Application of Charitable Donations and Bequests in Ireland."

## CAP. LXI.

An Act for providing a Metropolitan Market, and Conveniences connected therewith, in lieu of the Cattle Market at Smithfield. (Aug. 1, 1851.)

## PARLIAMENTARY PAPERS.

ECCLIASTICAL COMMISSION.—A Parliamentary return has just been issued, which was obtained by the Marquis of Blandford respecting the property of the Ecclesiastical Commission. It appears that the property, consisting of land and houses in possession of the Ecclesiastical Commissioners, whether by leases of lease or by purchase, to the end of the year 1849, was 3,284*l.* 2*s.* 3*d.* The rent received by the commissioners amounted to 7,199*l.* 1*s.* 10*d.* Of property belonging to preferments, the interest on which has been commuted, and which on the expiration of certain leases, will come into the possession of the Ecclesiastical Commissioners, the average is 16,787*l.* 2*s.* The estimated net annual value of land and houses is 23,920*l.* 1*s.* and in title rent-charges, 13,750*l.* 6*s.* 10*d.* A similar return is given

in the same document of all property belonging to vacated preferments, and now transferred to the commissioners, held on leases for lives or terms of years. The average is set forth at 40,246*l.* 1*s.* 29*d.* The estimated net annual value in land and houses, 73,242*l.* 13*s.* 3*d.* and the annual rent-charges 41,842*l.* 12*s.*

**SUSPENDED CANONRIES.**—From a parliamentary paper just issued it appears that since the passing of the 3 & 4 Vict. c. 113, there have been fifty-nine canonries suspended, and the amount of corporate revenues which has been paid by each cathedral and collegiate church to the Ecclesiastical Commissioners was 190,407*l.* 8*s.* 1*d.*

**IMPORTATION OF COTTON WOOL.**—According to a return to Parliament just printed, the cotton wool imported into the United Kingdom in 1848 numbered 713,020,161 lb.; in 1849, 755,469,012 lb.; and in 1850, 663,576,861 lb.

**SEWERS.**—According to a return of rates made by the Commissioners of Sewers, it appears that the total rateable annual value of the districts in 1849, was 8,077,591*l.*; and that in 1850 it had risen to 8,791,957*l.* whilst the cost of management per annum was, in the former year, 20,005*l.* 7*s.* 6*d.* and in the latter, 23,465*l.* 18*s.* 7*d.*

**PUBLIC COMMITTEES.**—According to a return issued on Tuesday, the number of public committees appointed in the session just expired was 43, and the total number of their sittings was 478.

## PROCEEDINGS IN PARLIAMENT AFFECTING THE LAW, WHICH STAND FOR NEXT SESSION.

### NOTICES OF MOTIONS.

**MR. AGLIONBY.**—Leave to bring in the Bill agreed upon and reported by the Select Committee of this House, for the "Compulsory Emancipation of Copyholds."

**MR. AGLIONBY.**—Bill to empower Magistrates in Petty Sessions to take the Pleas of Persons charged before them with Larceny, and to transmit the Pleas, together with the Depositions, to the next Court of Assize or Quarter Sessions.

**MR. ANSTEE.**—Bill for causing Nominations of Persons for the Commission of the Peace to be made by election or presentation of their Vicinages, and for qualifying such Persons to receive her Majesty's Assignments to such Commission.

**MR. SHARMAN CRAWFORD.**—Bill to amend the Law of Landlord and Tenant in Ireland.

**MR. HEADLAM.**—That the present Stamp Duties imposed upon Receipts ought to be remitted.

**MR. MULLINGS.**—Bill to amend the Stamp Duties Act passed in the last Session of Parliament, so far as relates to the Denoting Stamp required on Duplicates of Deeds, and the *ad valorem* Duty on Assignments of Judgments in Ireland.

**MR. MULLINGS.**—Bill to make Policies of Assurance assignable at Law, and to make other Provisions in respect thereof.

**MR. MULLINGS.**—Bill for further remedying a Defect in the Titles of Lands purchased for charitable Purposes, and for obviating Difficulties as to copyhold or customary Lands conveyed for such Purposes.

**MR. ROCHE.**—Bill to reform the Grand Jury Law of Ireland.

**MR. ROCHE.**—Bill to alter and amend the Irish Poor Law.

**MR. ROCHE.**—Bill to amend the Law relating to Fairs and Markets in Ireland, and to regulate the Sale of all agricultural Produce in Cities, Towns, and Counties in Ireland.

**MR. ROCHE.**—To move a Resolution, That on one day in the week, Irish Bills shall have precedence of all other business.

**Colonel Silbert.**—Repeal of the Duties on Fire Insurance.

**MR. JOHN BENJAMIN SMITH.**—Bill to enable Forty-Shilling Freeholders to vote at Elections for Shires in Scotland.

**MR. VERNON SMITH.**—To move, That this House will resolve itself into a Committee, to consider the Oaths taken by Members of Parliament, with the view of abolishing all Oaths except the Oath of Allegiance.

**MR. SOTHERON.**—Bill to render perpetual the Act 13 & 14 Vict. c. 115, relating to Friendly Societies.

**LORD ROBERT GROSVENOR.**—Bill to repeal the Annual Certificate Duty payable by Attorneys, Solicitors, Proctors, Writers to the Signet and Notaries.

**THE THREE ESTATES OF THE REALM.**—Some, even educated persons of this day, if asked which are the three estates of the realm, will reply, the Queen, Lords, and Commons. That the three estates do not include the Queen, and are therefore the Lords, the Clergy in Convocation, and the Commons, is obvious from the title of the "Form of Prayer with Thanksgiving to be used yearly upon the 5th day of November, for the happy deliverance of King James I. and the Three Estates of England from the most traitorous," &c.; and also from the following passage of the Communion Collect for Gunpowder

Treason: "Eternal God and our most mighty Protector, we Thy unworthy servants do humbly present ourselves before Thy Majesty, acknowledging Thy power, wisdom, and goodness, in preserving the King, and the three estates of the realm of England assembled in Parliament, from the destruction this day intended against them."—*Notes and Queries.*

**SITTINGS OF THE HOUSE OF COMMONS.**—A return has been printed of the number of days on which the House of Commons sat in the session of 1851; stating the total number of hours occupied in the sittings of the House and the average time, and also shewing the number of hours on which the House sat each day, and the number of hours after midnight. From the return it appears that the House sat on 120 days, for 921 hours 2 minutes, 86 hours of which were after midnight. The average time of each sitting was 7 hours 46 minutes 30 seconds. The longest sitting was 14½ hours on the 24th July, and the shortest on Saturday, the 29th of March, when it sat for a quarter of an hour only. The number of entries in the votes was 7,947.

**ACTS OF PARLIAMENT.**—There were only 106 Public Acts passed in the late session, being the smallest number passed for some years. At the commencement of the session an Act to shorten such matters took effect, and the phraseology of the statutes is different from those passed in the preceding year.

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

### Summary.

It has long been held that Water and Gas Companies are liable to be assessed to the relief of the poor in respect of the land through which their pipes are laid; and in the case of *The Chelsea Water-works Company v. Bowley*, 17 Law T. 284, the question was raised, whether they were not also subject to the land-tax. The case originally came before the Court of Q.B. in the form of an action for trespass, and by consent a special case was stated for the opinion of the Court. For the defendant it was contended that, inasmuch, as it had been ruled in many cases, that these companies were liable to poor-rate upon their pipes, they were also liable to the land-tax, for there is no distinction in principle between the mode in which the poor-rate and that in which the land-tax is imposed, and that clearly theirs was a holding of land or hereditaments within 38 Geo. 3. c. 5. s. 4. On the other side it was contended that there was no such analogy between rateability to the relief of the poor, and liability to the land-tax. The Court held that "the water-works were not liable to be assessed towards the payment of the land-tax." The reason given in the written judgment was, that the occupation by the water-works was in the nature of an easement, and not of land. "The right in question," said the Court, "when exercised, appears to us to be in the nature of an easement, and not in the nature of the possession or occupation of land or hereditaments. The right is to convey water through the land of another, whether upon the surface of the ground or in covered drains or pipes is immaterial. This is a mere power to carry the pipes in the land, and cannot be considered as land or hereditaments. The Land-tax Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant as property the land-tax of which might be redeemed. The company are not owners of the land where the pipes lie, nor are they the tenants of the land, and there is no rent from which they could deduct the amount of the assessment when paid." The Court then endeavours to obviate a consequence likely to flow from this decision, and which we think will naturally follow it,—the litigation of the question whether these companies are properly rated to the relief of the poor? "The cases," said the Court, "touching the assessment of companies to the relief of the poor, in respect of pipes for the conveyance of water or gas, as occupiers of land, have been much relied on, and they appear closely in point; but we by no means feel ourselves at liberty to overrule those cases, or

to express a doubt whether they were rightly decided. Land, like the word *inhabitant*, which likewise occurs in 43 Eliz. c. 2, has various meanings, and may, in that statute, which was passed for making a charge upon the occupier, mean the ground on which the chattel is deposited in the exercise of an easement, although in other Acts of Parliament it means a legal interest in the soil. This is the meaning which we think it has in the Land-tax Acts."

We transfer to our columns the subjoined useful letter, addressed to the editor of *The Morning Chronicle*, by a gentleman who has evidently had opportunities for observing the inconveniences arising from the want he deprecates:—

### PRISONS FOR CRIMINAL LUNATICS.

SIR,—I wish you would call the attention of the public to the neglect of the Government in not providing a separate place of confinement for lunatics, and persons supposed to be lunatics, who are detained for the purposes of justice. Such a prison has been established in Ireland, and the urgent necessity of providing one here has been repeatedly pressed on the Government by the Commissioners in Lunacy, and the managers of the Lancashire and other asylums. But while the Government and the House of Commons have wasted their time on legislation, trifling if it be not tyrannical, they have none, it would seem, for matters that are not pressed on public attention by urgent and influential agitators. There may possibly be objections, from the time it would take, to that reform of the law of lunacy which is called for, and which is recommended by the commissioners; but I am at a loss to see the difficulty in obtaining a grant of the House of Commons for establishing a prison for the due custody of a class of persons who are already a heavy charge on the country in another way. It implies no real increase of expense beyond the outlay for building, and it could not long occupy the time of the House of Commons. Only let those who have the public charge of lunatics, and who therefore feel the evil, knock loudly at the door of the Home-office, and a willing assent will be yielded to Lord Shaftesbury, when he brings the matter before the next session of Parliament.

The commissioners state as follows in their report for 1850, pages 16, 17:—

"We entertain the same opinions which we expressed in our last report relative to the class of insane patients termed state or criminal lunatics; for although the arrangement to which we referred last year with the proprietor of Fisherton House, near Salisbury, for receiving harmless criminal lunatics has been carried out, the small number so received gives very inadequate relief to the asylums in which (exclusive of more than 100 criminal patients in Bethlem Hospital), 264 of such patients were confined on the 1st of January last.

"Your lordship is aware that the construction of lunatic asylums is so essentially different from that of prisons, that an effectual security against the escape of criminals cannot be provided without restricting the liberty of other patients with whom they are necessarily associated, and materially interfering with that treatment and general arrangement which ought to be adopted for their benefit. Criminal patients have therefore escaped, and must continue to escape from asylums and houses licensed for the reception of the insane. As an instance of this, we may mention the fact which was brought by us specially under the notice of Secretary Sir G. Grey, that a most active and cunning criminal patient escaped for the fifth time from Hoxton-house, in February last. [He has since escaped a sixth time; his name is Henry Adams.]

"Our objection applies especially to such lunatics as have been charged with the more heinous offences; and it has been frequently brought under our notice by the friends and relatives of patients, and also the patients themselves, when conscious of their being associated with criminal lunatics, have considered such association as a great and unnecessary aggravation of their calamity."

There was held in London on the 17th of July a meeting of the "Association of Medical Officers of Hospitals for the Insane." You have been a little disposed to quiz lately the annual meetings for objects of all imaginable kinds that are now held, and certainly some of them are odd enough. But the periodical meetings of those who have a common want or a common interest are a necessary and most useful consequence of our present state of social freedom; and whether they merely become acquainted with each other and amuse themselves, or help forward a great cause, or strengthen the foundation and extend the knowledge of some science, or make themselves ridiculous, we may tolerate the absurdity for the much greater amount of substantial good that is obtained.

The meeting then comprised many gentlemen who have devoted themselves to the care of public asylums in the central and southern parts of England, and one even from Belfast. The principal business was this very question of the treatment of criminal lunatics, and they agreed to petition the Government "for the establishment of an institution apart from Bethlem, exclusively for the reception of persons acquitted of crime on the plea of insanity." The unfortunate, desolate, and unhappy condition of the criminal lunatics was feelingly dwelt on by all the speakers, and it appeared to be the unanimous opinion of the association that sufficient attention had not been paid to their state. It was thought that great good would result from the separation of the criminal from the other lunatics confined in Bethlem and other public asylums.

They also suggested amendments in the laws relating to county asylums, which I hope they will take means to make public, and Dr. Winslow and four others were appointed a committee to report on this matter, in all its branches, including the law of the property of lunatics. In all this they are but seconding the commissioners, who have expressed their wish, and appear to have devised plans, for similar improvements in the law.

Those whose experience justifies their doing so, may, I apprehend, suggest modes for the classification and separate detention of different classes of lunatics, from which their more sure recovery or greater comfort may be secured. I will not attempt to trespass on this extensive and somewhat delicate ground. And on the point which I have brought before you I will merely venture to point out, in addition to the remarks I have quoted, that it is important to keep clear the distinction between a *prison* and an *asylum*—between a place of confinement and disgrace, and one where these things ought to be studiously avoided—in order that the poor man may, by a system of relief and comfort, be aided to bring the better feelings of his nature to bear on that mental disease which has for a time incapacitated him from society and his usual work. The commissioners, in the passage of their report which I have quoted, have glanced at the importance of giving as much liberty as possible to patients. It is plain that a system of trust and confidence, which is so salutary to strengthen the feeling of responsibility and moral rectitude in those who are recovering, must be interfered with when the restraint necessary for criminals is used. The discontent arising from confinement is also obvious and most prejudicial. Among those whom one calls, for the sake of convenience, but incorrectly, criminal lunatics, there are—besides those who, having no control over their own actions, would by every one be considered innocent—many others who committed crime while temporarily insane, or who simulated madness. I suppose there is no question but that all these persons—when the acts they have committed would, if done by sane persons, have been murder or any other of the more heinous crimes—ought to be confined for life. Consider, then, the feelings of the man during his lucid intervals, or of him who knows he has never been insane at all—but who each of them know that they will never be let out, and have free scope to employ all the energy that villany and despair can give them, to the prejudice of their companions in a county asylum. And the latter are naturally led to expect, from seeing sane persons in confinement along with them, that their own imprisonment may be unduly prolonged; and a feeling must occasionally force itself on their minds, that if they ever get out and commit crimes, even the most heinous, their punishment cannot be worse than what they are then enduring. Many think that the law of acquittal on account of lunacy is, in its present state, most injurious to society. It is not my business to offer any opinion on that; but every one must agree with me that a system which familiarizes every pauper lunatic in the country with the idea of the boundless privilege of doing wrong, which he seems to enjoy under that law, ought at once to be abolished, and this can only be effected by the separate confinement of these very different classes of men.

I remain, Sir, your obedient servant,  
Kingsweston, Aug. 19. F. H. DICKINSON.

The following buildings are certified as places duly registered for solemnizing marriages, pursuant to the Act of the 6 & 7 Wm. 4, c. 85:—The Wesleyan Chapel, Southampton: W. H. Mackey, superintendent registrar; the Bethel Chapel, Bingley, Yorkshire: G. Spencer, superintendent registrar; the Primitive Methodist Chapel, Frogmore Ward, Chepping Wycombe, Buckinghamshire: C. Harman, superintendent registrar.

The Town Council of Glasgow have adopted a report recommending one uniform rate of assessment for the relief of the poor throughout Scotland, or in other words, to make the entire country into one parish.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

### Summary.

THE reports of the several Courts have afforded no point for review since our last number. We give below the scanty intelligence on Winding up which has been available during the week.

**NATIONAL LAND COMPANY DISSOLVING.**—Creditors under the order in Chancery for winding up this company are to come in and prove their debts. The Master in Chancery to whom, under the late Act of Parliament, the affairs of this company have been referred by the Court of Chancery to be wound up under the Winding-up Act, will forthwith proceed to appoint an official manager or managers. There are several applications for the office. Under the Act, parties may come and prove, and those who reside in the country need not come to London. The assets are to be applied, in the first instance, to the expenses of obtaining the Act; then, in the payment of the debts contracted by Feargus O'Connor, on account of the scheme, and the surplus to be divided among the subscribers—those who have embarked in the affair.

## REAL PROPERTY LAWYER AND CONVEYANCER.

### Summary.

THE *Nisi Prius* case of *Doe dem. Hyde v. Corporation of Manchester*, reported in our last number, 17 Law T. 288, deserves attention, not so much on account of any new principle of law which it involves, as for the practical lesson it affords of danger of a loose description of the *parcels* in documents relating to real property.

The Corporation of Manchester requiring for the purpose of their waterworks, amongst other property, certain adjacent plots of land belonging respectively to Mr. Hyde and the Duke of Norfolk, and having compulsory powers by Act of Parliament, sent their surveyor to measure the land required. By a mistake made in consequence of a dispute between the Duke and Mr. Hyde as to boundaries, a small quantity, less than an acre, within the boundaries of Mr. Hyde's land, was dealt with throughout as the land of the Duke of Norfolk. The notice to treat served on Mr. Hyde had annexed to it a plan in which Mr. Hyde's land was coloured red, and described as containing 21 a. 2 r. the land bounding it on the south being coloured green, and described as the land of the Duke of Norfolk. Mr. Hyde claimed also a small portion of the land coloured green in the map, and the defendants not being able to agree with him as to the amount of compensation, arbitrators were appointed and an umpire chosen, who, having heard the whole case, awarded compensation not only for the 21 a. 2 r. coloured red in the plan annexed to the notice to treat, but for the whole quantity laid claim to by Mr. Hyde. The defendants had thus, it would seem, paid the price of the disputed strip of ground twice over, it being also included in the Duke of Norfolk's claim. Mr. Hyde still refusing to execute a conveyance of the property required, the defendants proceeded under the Lands Clauses Act, by depositing the purchase-money and executing the deed-poll prescribed by sec. 77 of that Act, in order to obtain the legal estate in Mr. Hyde's land, and thereupon they took possession both of the 21 a. 2 r. and the disputed strip of land.

Under these circumstances it will be seen that after considerable previous litigation, an ejectment was brought by Mr. Hyde to recover possession of the disputed strip of land, and Mr. Justice WIGHTMAN left it to the jury to determine, first, whether Mr. Hyde had proved his title to the disputed strip of land; and, secondly, whether he had received compensation for it from the defendants, as in the latter case the defendants would be entitled to a verdict, the 8 Vict. c. 18, s. 77 giving them a good title. The jury returned a verdict for the plaintiff on both points!

It is unnecessary to speculate on the grounds on which the verdict of the jury was founded, we have only to deal with the law laid down by the learned judge. All the authorities agree that a conveyance describing land by its recognised name, or by particular boundaries, will pass all the lands of the conveying party that come within that description, though exceeding the number of acres specified in the conveyance. It has never, that we are aware of, been decided that if, for the verbal description in the body of the conveyance, a reference to a

plan be substituted, the same consequence would ensue in case of the acreage being inaccurately specified. We conceive, however, if, for the description in the grant, referred to in *Shepherd's Touchstone*, a plan were annexed instead, which contained *prima facie* a proper description of the land, but erroneously stated the number of acres, that the whole land would pass. *(See note to report p. 288)*

## COUNTY COURTS.

### Summary.

A CASE which finally settles a long doubtful point, and one on which the opinion of the Bar was almost equally divided, was lately decided in the Exchequer Chamber in error from the Exchequer, and is reported in our last number. We allude to *Owens v. Breese*, 17 Law T. 285. In that case a writ of trial had been issued under an order made by Mr. Justice WIGHTMAN, directed "to the judge of the County Court of New Town, Montgomeryshire, commanding him to summon a jury to try the issue joined in the said case; and that the said sheriff return such writ, &c." The cause was tried by the judge of the said County Court and a jury of twelve; verdict for the plaintiff. Subsequently and within due time a rule was obtained in the Exchequer to set aside the order and all subsequent proceedings, on the ground that a judge of a Superior Court had no power, under 3 & 4 Wm. 4, c. 42, s. 17, to direct a writ of trial to a judge of a County Court, appointed under 9 & 10 Vict. c. 95. That rule was discharged, and the defendant brought his writ of error. The case was elaborately and ably argued, and eventually the ruling of the Court below was reversed. The judgment delivered by PATTERSON, J. states the grounds upon which the Court of Error decided in a very lucid and pointed manner. It is provided by 3 & 4 Wm. 4, c. 42, s. 17, that in any action in any of the Superior Courts for a demand under 20*l.* the Court or a judge may order that the issue joined be tried before the sheriff of the county, or any judge of any Court of Record for the recovery of debt in such county. And by sec. 3. of the County Courts Act it is enacted, that every count holden under that Act shall be a Court of Record. The question thus arising whether a judge of a Superior Court can direct a writ of trial to a judge of a County Court; or, in other words, whether a County Court is such a Court of Record as will answer to the directions in the 3 & 4 Wm. 4, c. 42? PATTERSON, J. said,—"I am inclined to think that the 3 & 4 Wm. 4, c. 42, is applicable to Courts of Record whose proceedings are conducted according to the Common Law. Then, are these new County Courts such Courts of Record? If they are, and a writ of trial can be sent to them, the proceedings must be conducted, not according to the County Courts Act, but in compliance with the general rules of law which govern the Court whence the writ issues. But the County Court Act has, in fact, extended the jurisdiction of Courts of Request, and the courts established under it are of a similar nature; they do not proceed according to the Common Law, but their proceedings are limited, directed, and controlled by the statute under which they were established, and they are not, therefore, such courts as were contemplated by the Legislature in 3 & 4 Wm. 4, c. 42." The effect of this decision will be to preserve the Sheriffs' Court in the state of languid vitality to which, since the passing of the County Courts Act, they have been reduced. It is well, however, that the question has thus been set definitively at rest, and upon grounds which cannot reasonably be expected to.

## FROM COUNTY COURT.

Wednesday, Aug. 20.

WITCOMBE v. MORTEN and ANOTHER.  
At the conclusion of one of the causes, the judge said that his attention had been drawn to a report,



published in *The Times*, of the 7th inst., of the trial, at the Lewes Assizes, before the Lord Chief Justice of the Court of C. P., of John Isaacs, and another of the Frimley gang of burglars, and which closed with the following statement:—"It appeared by an affidavit that was put in, that upon the apprehension of the prisoner Isaacs, at Frome in Somersetshire, the officer (Morten) had searched certain premises, when a valuable ring, part of the produce of a burglary, at Uckfield, was discovered; and an action for trespass had been brought against him in the County Court for the district, and the judge had awarded 10*l.* damages against him and the costs. He had incurred great expense in tracing the prisoners, and the learned counsel said he trusted that, under the circumstances, the Court would order him to be repaid the amount." The Chief Justice said, it appeared a very extraordinary judgment of the County Court judge, in a case where stolen property appeared to have been actually found, but he had no power to make an order for the payment of the money. He should, however, allow the officer the travelling expenses he had incurred, and also order him a reward of 20*l.* for the zeal he had displayed in detecting the prisoners. His Honour then said, that, as far as he was personally concerned, he should have allowed the matter to pass without comment, but that it was not for the advantage of the public, that the administration of justice, in any court, should be brought into disrepute by *ex parte* statements of interested parties, irregularly made, without notice to the persons affected by them, and in their absence. Referring to Morten's affidavit, as set forth in the report, he found it deposed that he had searched certain premises where the ring was discovered, that an action for trespass had been brought against him in the County Court for the district, and the judge had awarded 10*l.* damages against him, and the costs. Even had the facts been stated correctly, it would be difficult to understand upon what principle an application could be made to a judge presiding on the trial of prisoners at a county assizes, for an order that a defendant, against whom judgment had passed in due course of law in a court of competent jurisdiction, should be repaid the amount of damages and costs awarded against him. But the affidavit, as described, grossly misrepresented the case; and was false, both in its express statements, and by the suppression of material facts. His Honour then stated that the judge of the County Court did not award the damages and costs, that the trial was by a jury, that the amount awarded by the verdict was not 10*l.* but 6*l.* and that the judgment for that amount and costs followed of course,—that instead of the stolen property being discovered upon a search by Morten, the ring was found by plaintiff's servant in a carriage which had been lent by plaintiff to bring Isaacs to Frome; that the servant took it to plaintiff, who immediately went with it to the constable, who had hired the carriage and brought Isaacs to Frome; that such constable being out of town, plaintiff immediately went to another constable, and with him to the magistrate's office, that in the absence of a magistrate and of the magistrate's clerk, plaintiff was desired by the managing clerk in the office, and by an experienced peace-officer, to take care of the property until he could deliver it to some person duly authorised to receive it; that Morten, being informed of the circumstances, saw him, and demanded the property: the plaintiff told him what he had been advised to do, and offered to accompany him to a magistrate, which Morten refused, and insisted upon having the ring given up; that he afterwards obtained a search-warrant granted upon his own oath, that "he had reason to suspect, and did suspect, that stolen property was concealed in the house of the plaintiff," thus charging the plaintiff with the felonious possession and concealment of stolen property, a charge which he knew to be untrue. At half-past nine on Sunday night, Morten and the other defendant came to the house of plaintiff (whose wife was then confined to her bed by illness), and again demanded the property, stating that he had a search-warrant, and that he would either have the things or take the plaintiff into custody. The plaintiff requested to see his authority, and the warrant was produced and read. The plaintiff remonstrated upon being thus treated like a felon, although Morten knew that he had given immediate information, and had offered to go with him to a magistrate; that Morten thereupon ordered his assistant to proceed with the search, and he went into another room for the purpose. The plaintiff's servant (who had found the ring) then interfered, and advised him to give it up, which, under apprehension of violence, and on account of his wife's state of health, he accordingly did. Such being the case for the plaintiff; the defence set up was, that although a warrant had been obtained, and was produced and read, and although Morten and his assistants entered the plaintiff's house between nine and ten on Sunday night, and demanded the goods, yet that neither the entry nor demand was by virtue or under colour of the warrant. That, on the contrary, he only threatened to put the warrant into execution on the following morning,

and that the property was given up, not under threat or compulsion, but voluntarily. His Honour then stated, that after reading his notes of the evidence, he told the jury that if they believed the entry to have been with the free will and consent of the plaintiff, that there had been no search and no threat or compulsion, and that the property had been given up voluntarily, then the verdict must be for the defendants. That if they thought the entire proceedings of the defendants on the Sunday night to have been compulsory, then they must consider whether these acts were justifiable and legal. The entry was made and the property obtained under colour of the search-warrant or not. If under the warrant, the whole proceeding was clearly illegal. If the defendants entered, or continued in, or searched the dwelling-house of the plaintiff against his will, and obtained the property by means of threats or compulsion, though not under colour of executing the search-warrant, they were equally trespassers. Either way the plaintiff would be entitled to verdict. That in assessing the damages the jury would not, however, overlook the nature of the duty in which defendants were engaged, the importance and urgency of which, and the promptitude and despatch which it required on the part of the officers employed, they would probably be disposed to regard as in some degree excusing conduct which could not be justified, and for which the plaintiff was clearly entitled to compensation. His Honour concluded by observing that the affidavit, which misrepresented the proceedings of the Court, and for the second time held up an innocent man to the public as a felonious receiver of stolen goods, had been set forth in a journal proverbial for the accuracy of its reports, and universally read, and that he thought it therefore incumbent on him, on the first occasion of again sitting in the Court whose proceedings had been thus called in question, publicly to correct the misstatements which (according to the report) had called forth expressions of surprise and censure which would never have fallen from the learned Chief Justice had the facts been brought under his lordship's cognizance with any regard to accuracy and truth.

#### SUPERIOR COURTS OF COMMON LAW.

##### FIRST REPORT.

(Continued from page 217.)

We pass on to the important question of whether forms of action should still be retained. It may be difficult to define what is meant by a form of action. Practically, however, it may be said to be the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress. By the established practice of pleading, peculiar forms of expression characteristic of each action have been appropriated thereto, many of which are of a purely formal nature, and are wholly independent of the merits of the cause of action. Thus, as an instance, in those cases in which, as we have already pointed out, trespass is the appropriate remedy, the plaintiff's declaration must state that the act complained of was done with force and arms, and against the peace, although the trespass may have been unaccompanied by violence; these allegations being unnecessary in case. Yet the distinction between the injuries to which these forms of action are respectively appropriate is, as we have already shewn, often of a very shadowy nature, and the ground of complaint must in each case be set forth with sufficient distinctness and particularity, independently of these technical forms. So in *assumpsit* and debt, which forms of action are in many cases equally available, particular forms of expression are necessary in each action, any departure or deviation from which would make the declaration bad. So in an action of *assumpsit* founded upon a bill of exchange or promissory note against an indorser, not only the bill and note and the indorsement, but also a promise to pay, must be expressly stated. No such promise need, however, be proved, though the omission to state it would be ground of objection.

The necessity of adhering to these forms sometimes subjects declarations to objections on special demurrer, and has led to plaintiffs being defeated after establishing a good cause of action, on the ground that the form of action has been mistaken. It remains to be considered whether any countervailing advantage results from maintaining these forms. We think not. It appears to us that if the facts which constitute the cause of action be sufficiently set forth in the declaration, all the legitimate purposes of pleading are thereby accomplished, and that to incur the pleading with formal requirements, which afford no additional information, but which open a door to technical and captious objections, is not only useless but mischievous. We feel ourselves, however, bound to state, that much difference of opinion exists in the Legal Profession on this head.

The principal objection that has been urged against any alteration in this respect is, that by abolishing forms of action, causes of action would become less

clearly defined. It is said that in order to ascertain whether a party has a good cause of action the test may be applied of what form of action would be applicable to the case, and that if the facts can be moulded into any form of action, the conclusion may be drawn that there is a good cause of action. This, however, appears to us to be an unscientific method of arriving at the conclusion, which is thus attained by determining not what is or what is not actionable, but whether the facts of the case can be moulded so as to be assimilated to some precedent in the pleader's office. Besides, as it is laid down that where there is a cause of action, and no other form is applicable, an action on the case will lie, it seems difficult to see how in any case the question whether some action is maintainable can be determined merely by referring to existing forms.

No merit of distinctness as to causes of action can be attributed to the present forms; for we find that in many instances where the cause of action is essentially founded on contract, the declaration can be framed in tort for a breach of duty, instead of *assumpsit* on the contract—as in actions against carriers and other bailees. So also some causes of action founded on tort may be converted into contract by waiving the tort and relying on an implied promise that the defendant would do that which by law he was bound to do.

It is manifest, therefore, that as the question, whether there is a cause of action or not, must depend upon the facts and not upon the form adopted, the decision of a cause on the merits is not helped by means of these forms of action.

As far as pleading is concerned, it may be doubted whether, if our other suggestions are adopted, such a thing as a form of action will be left. The following are our reasons for thinking that practically there will not. At present the form of action appears in the writ. We have proposed, we think for undeniable reasons, that it shall be omitted therefrom. We have shewn that its insertion in the writ has no operation, except to give rise to the question whether the declaration corresponds with the writ. If it does not, the defendant may complain of an irregularity within a limited time, and the proceedings will be set aside. But if the plaintiff escapes this difficulty, it matters not what the writ was, nor what the declaration, as the name of the form of action used in the writ never again appears in the proceedings. The stage at which it next becomes material to consider what is the form of action, appears from the consequences which we have pointed out of omitting from the declaration certain formal expressions, according as the action is in one form or another. In proposing that formal objections shall no longer be allowed, and that every declaration shall be sufficient which shall distinctly state the facts that constitute the cause of action, we in effect abolish the second occasion of objecting to a mistake in the form of action. The third way in which this question may arise is from the joinder of causes of action. We have shewn that there are some which may not be joined, because they are of different forms. In proposing that this should be altered, we propose the abolition of the last occasion on which the question can arise.

It is obvious, therefore, that if our other recommendations be adopted, forms of action will exist in name only, and as their general effect appears to us to be mischievous, we recommend their abolition. We recommend not only that merely formal expressions shall be unnecessary, but that they shall be disused. This will have several good results; it will get rid of formal and captious objections; it will shorten pleadings, free them of their verbiage, and make them more intelligible by being more like the language of every-day use. We do not propose to abolish any particular mode of declaring, or of stating the substance of a case. Provided the unnecessary statements be omitted, the substance of the cause of action will alone remain. Take, for instance, a count in trover. The statement of the loss of the goods by the plaintiff, the finding by the defendant, and the intent of the defendant to defraud, might be dispensed with, and the real cause of action, namely, the conversion of the plaintiff's goods to the defendant's use, might be stated in a few words, as it is now. We object to forms (and more particularly forms incumbered with technicalities) being obligatory; but we approve of the adoption of precedents, concisely stating the matters of fact relied on, when they meet the particular case.

It has been frequently stated that causes of action and defence must necessarily be classified, as many, although varying in the particular circumstances, are substantially similar in character. There seems to us no reason why this should not be so under the system we propose; the only difference will be, that the classification will be the natural result of the similarity of the facts, instead of being artificial and technical.

As forms of action are mentioned in various statutes, as for instance, the Statute of Limitations, statutes relating to costs, and statutes giving actions, and also in many rules of Court, it will be necessary

to make provision for the application of those statutes and rules to the causes of action described therein by reference to the forms in which they must at present be expressed; this can easily be done. Similar provision must be made for legal documents, such as warrants of attorney, which are framed with reference to the existing forms of action.

In order to illustrate the effect of our recommendations upon the form of pleadings, we give in the Appendix a set of forms, free from fictitious and unnecessary statements.

Having thus concluded our suggestions as to the general principles of pleading, we now resume the consideration of the ordinary steps in a cause, the next of which in order after the appearance of the defendant, is the delivery or filing by the plaintiff of the statement of his cause of action, or, as it is technically called, the "declaration."

The writ calls upon the defendant to appear to answer the complaint; the declaration tells him what the complaint is. It has occurred to many that it would be desirable to combine these two proceedings, and make the writ and declaration one document; by doing which time would certainly be saved, and, as some think, expense. If the subject matter of every action were really contested between the parties, and the real nature of the claim unknown to the defendant, we should probably have recommended a combination of the writ and declaration; but with a view to determine our opinion on this point we have procured much valuable information, the substance of which we now proceed to state.

We obtained from the Masters of the Courts of Queen's Bench, Common Pleas, and Exchequer, returns of the number of writs of summons issued and of appearances entered during the years 1846, 1847, 1848, and 1849.

The number of writs of summons indicates the number of actions commenced, and the number of appearances indicates the number of cases which have not been settled within eight days after service of the writ.

These returns show that in the year 1846 the three Courts issued 129,499 writs, whilst the appearances entered only amounted to 65,335; a little more than one half.

Nearly the same average applies to the whole period; the total number of writs issued in the three courts for the four years being 403,313, and the appearances entered 212,777.

These returns include alias and pluries writs in the same suit, so that some deduction should be made from the total number of writs; but by a return from the Court of Exchequer we find that the alias and pluries writs issued in 1849 were only 886 out of 19,692—about four and a half per cent. on the whole; and as a deduction from the appearances should also be made for instances where more than one appearance is entered in the same suit by different defendants (the precise number of which cannot be ascertained), the average on the whole would probably be about the same.

It appears, therefore, that in very nearly one-half of those suits the writ itself was effective in the period of eight days (being the time limited for appearance) to cause a settlement. The probability is, that those writs to which no appearance was entered were issued to recover debts clearly due, and which the debtors paid or arranged at once to avoid further expense.

The number of rules to plead indicates the number of cases in which declarations have been delivered, and in which the plaintiffs have taken the step to force the defendants to plead or submit to judgment against them.

The number of these rules in the three Courts for the year 1846 was 48,092; being a falling off from the number of appearances, which were 65,335, of more than one-fourth.

For the whole period of the four years the returns show the appearances to have been 212,777, and the rules to plead 156,629; the difference being 56,148, which is the same average of rather above one-fourth.

It appears, therefore, that one-half of the cases in which writs are issued begin and end with the first step, the writ of summons; and that before the time for pleading has expired, which varies from twelve to sixteen days, more than one-fourth of the actions in which appearances had been entered are settled; the probability is, that all of these are also for clear and undisputed demands.

The two next instances given in the returns, viz. pleading-fees and records passed, indicate the number of issues joined and of *nisi prius* records passed. No important conclusion can be drawn from these; but the number of judgments, including those on verdicts, on writs of trial, on inquiries, and judgments of *non-pros.* and *non-suit*, indicates the actual number of defended cases, and includes all those which are tried and determined against the defendant, or withdrawn by the plaintiff under compulsion of the defendant. The number of all these judgments together in 1846 was 3,425. Comparing these with the—

Writs.....	129,499
Appearances.....	65,335
Rules to plead.....	48,092

we find that less than three per cent. on the suits commenced, little more than five per cent. on the suits which have not been settled within eight days from their commencement, and little more than seven per cent. on the suits which have arrived at a declaration, are defended, or abandoned by the plaintiff under adverse proceedings by the defendant.

During the period of the four years these judgments were 11,946. Comparing these with—

The writs.....	403,313
Appearances.....	212,777
Rules to plead.....	156,629

we find a very similar result, viz. that about three per cent. on the suits commenced, five and a half per cent. on the suits not settled within eight days from the commencement, and about eight per cent. only on those in which there has been a declaration, are defended.

A considerable portion of the causes which go to trial are in fact undefended. We have obtained a return from the marshals and associates of the Courts of Common Pleas and Exchequer, (a) which shows that out of 757 causes tried in the year 1849, as many as 249 were undefended, a proportion of one-third of the whole. And we have no doubt that not two per cent. of the writs actually issued are in respect of really litigated or contested cases, and that upwards of ninety-eight per cent. are in respect of well-known and admitted demands, and of some few claims not prosecuted by the plaintiff to judgment.

It is obvious, upon the above facts, that it is of the highest importance that the process and practice of proceedings in causes which, popularly speaking, do not come into court at all, should be of the most simple character, and of the least possible expense to the parties.

We start, therefore, with the fact, as ascertained from the returns referred to, that in the vast majority of actions commenced there is no disputed question between the parties, either of law or fact. The defendant perfectly well knows what the claim is, and requires no information on the subject, and the writ merely operates to compel immediate payment from a necessitous or backward debtor of a known and admitted debt. Now, as the object of the declaration is to give information to the defendant, and as, to do so with effect, some particularity and precision must be required, it seems to us that the combination of the writ and declaration together would lead to greater expense than is at present incurred. It would render a declaration necessary in every case; whilst, as we have seen, in one-half of the actions actually commenced no declaration is prepared or required. We are certain that it would lead to the employment of counsel in actions in which they are not now consulted at all. This would cause a very great increase of expense; and, considering also how important it is that a creditor should not be delayed when his debtor is either about to leave the country, or to assign over his property, or is attempting to evade service, we think that the first or initiatory step in a suit should be attainable at a moment's preparation, and be in a form so simple that a mistake or error can hardly occur. We therefore recommend that the two proceedings shall continue distinct; and we think that a provision which we are about to propose will practically effect the benefit contemplated by those who advocate the combination without the accompanying evil.

The practice which we suggest is, that whenever the cause is defended (which is evidenced by the appearance) there should be a declaration, or, in other words, a legal statement of the claim; but when the defendant does not appear, and has neither the power nor intention to defend the action (which is the case, as we have shewn, in a great majority of instances), we think that in all actions for liquidated demands, if there be indorsed on the back of the writ a substantial particular of the plaintiff's claim, the declaration may be safely dispensed with altogether. This alteration would be of advantage in various ways. The defendant who does not mean to oppose or defend the action frequently shifts his place of residence for the purpose of obstruction and delay. This sometimes causes very considerable delay, expense, and trouble to a plaintiff in preparing the declaration and the notice of declaration, and in serving such notice, and, when a rule to compute is necessary, in drawing up and serving the rule to shew cause and the rule absolute. Even if a defendant wishes to stay proceedings without further expense, on the writ being served, mere acquiescence in the proceeding against him will not effect his object; he is obliged to sign a *cognovit*, or give a consent to a judge's order for payment; and in either case the costs of appearance, declaration, and

(a) No separate account of defended and undefended causes was kept by the marshals of the Queen's Bench in the year 1849.

other matters wholly needless are incurred. According to our recommendation, a plaintiff will be compelled to take but one step, viz. serve the writ; the defendant need take none; and the judgment which the plaintiff seeks, and the defendant does not dispute, will be obtained at a very trifling expense. It may be urged that if the defendant is only to have one notice a greater opportunity for fraud and mistake is given. This is true; but we are satisfied that on the whole defendants will be benefited by the alteration. They will have the particulars of the claim eight days sooner than at present, and consequently a longer time to prepare their defence. These particulars need not now be given with the writ, but when served with the writ, as we propose, they would be served personally, and an affidavit of that service would be necessary before the plaintiff could proceed. Execution would not issue a day sooner, and a large amount of costs would be saved. Without shutting our eyes to the possibility of frauds being committed, and of there being practitioners who might resort to them, we know that in practice there are very few simply fictitious cases of pretended service of writs, and we believe that where persons are willing to commit a fraud of this character (which it must be remembered involves perjury, with all its risks and penalties), they will be as ready to commit it in respect of two documents as of one. As to the chances of mistake, plaintiffs are very careful in this respect. When proceedings are set aside expenses are incurred, and the application for the purpose creates delay. The expense of an undefended action in debt on a bill of exchange or promissory note at present amounts to from seven to nine pounds. That of an undefended action in *assumpsit* for a similar cause of action amounts to from twelve to fifteen pounds. If the above proposals be adopted, it will probably not exceed one-half of the lowest sum, or about from 4*l.* to 5*l.* at the utmost; and when it is considered how many undefended actions there are in the three courts annually, the great importance of such a reduction of expense becomes at once apparent.

We therefore propose that in all cases where the claim is for a debt, or substantially for a liquidated demand in money, with or without interest, as, for example, on a bill of exchange, promissory note, cheque, bond, or covenant under seal, or on a statute, or for any simple contract debt, or on a guarantee when the claim against the principal is in respect of a debt, the plaintiff may indorse upon the writ a particular of his claim in the form or to the effect shown in the Appendix B. (No. 4), and if he shall have done so, shall, in case of non-appearance of the defendant, be at liberty to sign final judgment, on which no error shall lie; and that there shall be a fixed sum for costs, for which judgment may also be signed, the plaintiff being at liberty to claim further costs, subject to taxation. This will save much trouble and expense; and as one great object which we expect to effect by the alteration will be the saving of expense to defendants, we think that execution should not issue until the expiration of eight days after the time for appearance, so that there may be no temptation for them to appear in actions which would not otherwise be defended, to obtain the delay of the time allowed for pleading.

By the present practice it is necessary, in actions for liquidated debts, that there should be indorsed upon the writ of summons the amount of debt and costs claimed by the plaintiff, together with notice that, on payment of debt and costs within four days, proceedings will be stayed. It is also necessary that the writ should be indorsed with the name and place of abode of the plaintiff when no attorney is employed, and in other cases with that of the attorney or agent by whom the writ is sued out. We think the practice in these respects advantageous, and propose that the present indorsements shall remain, except where the plaintiff makes the more special indorsement to which we have above referred, in which case it shall not be necessary to make the indorsement now required of debt and costs. The present indorsements are compulsory on the plaintiff, and are for the benefit of the defendant; and as we propose merely to permit, and not to compel, the more special indorsement, it is not necessary to provide for the continuance of the present indorsement as to debt and costs where the special one is not adopted.

We think that in all cases there should be indorsed on the declaration the demand of the plea; and that if no plea be delivered, and the cause of action be such as either was or might have been specially indorsed upon the writ, the judgment should be the final, with a fixed sum for costs, unless the plaintiff claims more, in which case the costs must be taxed. We also think that if the special indorsement be not made in cases where it might have been, the plaintiff, who by such omission renders a declaration necessary, should be entitled to no greater costs than if he had made the indorsement and signed judgment on non-appearance.

Next, as to the pleading of the defendant, we propose that there should be one uniform time for the

defendant to plead, viz., eight days. The present practice of allowing four days only in town cases is inconveniently short in defended actions, and consequently the expense is increased by repeated summonses for time. When the period is thus extended orders for time will doubtless not be made so much of course as at present.

We recommend the abolition of the rule to plead. It is inconceivable how this vexatious practice can have subsisted so long. It is a mere trap for plaintiffs. It is an idle memorandum made by the plaintiff, of which the defendant has no notice, and for which he never inquires except with a view to complain of an irregularity. It is no guarantee that the demand of a plea has ever been made, as the demand must be served, and the rule need not.

The notice to plead is at present in general incorporated with the demand of plea, but we think that nothing more is necessary than the demand of the plea. We likewise think that all rules to plead subsequent pleadings should be abolished, and that their delivery ought to be enforced by a four days' demand, non-compliance with which should entitle the party demanding to sign judgment.

The application for leave to plead several matters is at present attended with considerable expense, which in many cases is thrown away, inasmuch as it is a matter of course to grant such leave in numerous cases of ordinary occurrences, and if the form of a summons or rule were not required by the practice, the parties would probably agree as to the plea to be allowed. The rule to plead several matters, which is drawn up as of course in certain cases specified in the 13th rule of Court of Trinity Term, 1 Wm. 4, and in others, is under the same rule obtained on the production of a judge's order allowing the plea to be pleaded, is rendered necessary at present by the language of the statute of the fourth of Queen Anne, chapter sixteen, which contemplated that the leave of the Court should be given, but it is of no use whatsoever. In order to simplify the proceedings in this respect, and to diminish their expense, we propose that no leave to plead several matters shall be necessary where the opposite party indorses a consent on an abstract of the plea; that the rule to plead several matters shall be abolished, and that a judge's order for that purpose shall suffice in all cases where a judge's order is necessary; that all objections to the pleading of several pleas, on the ground that they are founded on the same subject matter, shall be disposed of upon the summons to plead several matters; and that leave to plead several matters shall not be necessary in cases where the rule to plead several matters is now obtained as of course, or in the case of such ordinary pleas as payment, accord and satisfaction, release, not guilty, denial that the close is the plaintiff's, leave and licence, and *non assensu demerens*, which are usually allowed by the judge as of course.

Certain pleas and other pleadings at present require the signature of counsel. This is wholly useless, and merely adds to the expense of the proceedings; we therefore suggest that the signature of counsel should no longer be required to any plea or other pleading.

If the defendant does not plead, the plaintiff is entitled to sign judgment.

In actions of debt (except in some few cases, as for treble value for not setting out tithes, or where the debt is made payable in foreign money), the judgment is final for the debt claimed in the declaration, and execution may at once issue, upon which it is the plaintiff's duty to indorse the real amount of the debt to be levied; and this practice is found to work well. At first sight, indeed, one would imagine that the circumstance of a plaintiff being permitted to issue execution for an amount to be arbitrarily fixed by himself would lead to abuse and oppression; but nothing of the kind occurs in practice, for the consequences of suing out execution for more than is really due are so much to be avoided that the greatest possible care is taken to confine the claim to the true amount of the debt.

In every form of action, except debt, an interlocutory judgment only is signed, and the amount to which the plaintiff is entitled is ascertained by the verdict of a jury on a writ of inquiry, or by a rule to compute, the latter of which is allowed only in certain cases of demands liquidated by a written contract, and is in substance an order of the Court that it be referred to the Master, to ascertain the amount to be recovered by the final judgment. It is an expensive proceeding, purely formal, involving affidavits, briefs to counsel, and other costs, and it is seldom or never mentioned to the Court.

The costs of an undefended action on a bill of exchange or promissory note in *assumpsit*, in which the rule to compute is necessary, are from twelve to fifteen pounds; in debt, in which the rule is unnecessary, from seven to nine pounds. In the majority of these cases the action of debt is maintainable, though not always resorted to. The same remark applies with equal force where the action of covenant is adopted, instead of debt, to recover a sum certain, with interest, secured by deed.

The rule to compute, therefore, appears to us useless and injurious, and we recommend its abolition.

In other cases of liquidated demands, if the action of debt be resorted to, final judgment may be signed, as before stated, for want of a plea, and execution at once issued; but if covenant or *assumpsit* be resorted to, and the rule to compute be inapplicable to the case, interlocutory judgment must be signed, and a jury summoned, under a writ of inquiry, to assess the amount of damages, which in the great majority of cases really is not and never had been in dispute. The costs incurred by this step amount to nearly 20*l.*; and as there is no substantial difference between the action of debt and those of covenant and *assumpsit* where a liquidated amount is sought to be recovered, we propose that in all actions for such demands the judgment shall be final.

(To be continued.)

## THE LAWYER.

### SUMMARY.

It will be remembered that prior to the passing of the 1 & 2 Vict. c. 110, a debtor might be taken on a writ of *capias* by the simple filing of an affidavit of debt if the creditor believed he was about to quit the country. The writ issued as a matter of course, and the facility with which arrests were in this manner obtained led, no doubt, to numerous cases of abuse by the creditor and of hardship upon the debtor. To remedy this a provision was made in the above statute, which limited the power of holding to bail to cases which were brought before a judge of a Superior Court, who had a discretion to order an arrest. But it was found in practice that this provision, which had been generously made in favour of the subject, was open to abuse by fraudulent debtors, who, during the interval which must necessarily elapse before the writ could be obtained, had opportunity to make away with their property, and pass beyond the jurisdiction of the courts. With the view of obviating as far as may be this mischief the Legislature passed last session "An Act to facilitate the more speedy Arrest of Absconding Debtors" (14 & 15 Vict. c. 52), which we inserted in our Journal entire last week. By that useful statute authority is given to Commissioners of Bankruptcy and to the Judges of any district County Court, except the County Court Judges acting in the counties of Middlesex and Surrey, on application by a creditor, and due proof by affidavit that a debt of 20*l.* or upwards is owing to such creditor, and that there is probable cause for believing that the debtor is about to quit the kingdom, to grant a warrant to the messenger of the Court of Bankruptcy or the High Bailiff of the said County Court, to arrest the said debtor, and him safely keep until he has given bail or deposited the debt and costs of the warrant; provided that every creditor so acting, and in cases where no action is pending, shall cause a writ of *capias* to issue, and before the issuing of the writ shall cause a writ of summons to be issued against such debtor, and such *capias*, if he be already in custody under the warrant, shall be served on him within seven days from the date of the warrant. These warrants are to be auxiliary to the processes now in use, and of no effect whatever as a protection to the person on whose behalf they are issued, unless a writ of *capias* be issued and served as directed by this Act. The time and place of the debtor's arrest are to be indorsed on the warrant, and upon its production the sheriffs are to receive and retain such debtor. As soon as the person arrested under the warrant is taken into custody by the *capias*, the warrant is to expire. Any person for whose arrest a warrant has been granted, may, either before or after arrest under the warrant, and before the *capias* shall have issued, apply to any Commissioner of Bankruptcy, County Court Judge, or Judge of Superior Court, for a rule calling on the creditor to shew cause why the warrant should not be set aside if application be made before arrest, or why the debtor should not be dis-

charged out of custody if made after arrest; and such Commissioner or Judge may make absolute or discharge such rule, and make such order as to costs as to him shall seem fit. A form of warrant for apprehension, and a warning to defendant, and a table of fees, are given in schedules annexed to the Act. Such are the leading provisions of this Act. That it will be found extremely serviceable in counteracting the designs of fraudulent debtors cannot be doubted. Its distinctive feature is the extension of power already possessed by the judges of the Superior Courts to local judges, by which the delay which has operated so unfavourably to the interest of creditors is in a great degree avoided.

**EQUITY PRACTICE.**—Two points of practice worthy of note are reported in our last. In *Rackham v. Cooper*, 17 Law T. 282, it was ruled that where, on the calling on of a claim for hearing, the plaintiff does not appear, the defendant is not entitled to the dismissal of the claim with costs, without producing, before the rising of the Court, an affidavit of service of the writ of summons. In the other case it was held that a petition by infants for the appointment of a guardian must be presented by their next friend. (*Re Russell's Estate*, 17 Law T. 282.)

### NEW YORK CODE.

We invite attention to a letter addressed to us by Mr. J. F. HAM, accompanying the copy of a set of pleadings in an action on a bond now pending in the Supreme Court, county Jefferson, state of New York. It will be seen that the claim and answer cannot claim the merit of brevity over our system of pleading; whilst there is in the forms less clearness and certainty than in those in use in our own courts. The plea of *Non est factum* which we use, is something shorter than the form here employed.

At this time, when a large and influential body of the Profession are disposed to belaud the New York Code, and to hold it up as a model for the change in our system of pleading, which is now inevitable, this example of stating an issue under the New York Code will be sought with curiosity, and read with interest. The Profession is indebted to Mr. HAM for his obliging enclosure, and we have pleasure in making our acknowledgments for his kindness in this matter.

SIR.—Observing by the speeches in Parliament and the proceedings and reports of the Common Law Commissioners in England, that considerable interest is taken in England in the workings of the revised Code of Procedure (as it is called) of the State of New York, combining the practice of law and equity together,—I have, at some little trouble, procured a copy of the pleadings (which I inclose) in a case now in progress, in a county in the state of New York, adjoining this province.

The action is brought on a bond (a copy of which is attached to the pleadings and herewith inclosed), in which the cause of action and the facts are succinctly set forth for the purpose of understanding the case.

The action was commenced about the 7th of February last, and I am informed that all due diligence has been used to get the case down to trial, but that under the provisions in their code of applying for and obtaining leave to amend their pleadings, in a manner similar to that recommended by the Common Law Commissioners in England, a final answer to the complaint could not be obtained until the 26th of July last.

The New York code looks very fine in theory, but I am told works very differently in practice; so much so, that within the last few weeks the Legislature of the State of New York have passed a law revising the revised code. I have not as yet been able to procure a copy of the alterations, but am informed that they are very extensive and important.

I have inclosed these documents to you, knowing the influence you possess in the Profession, with the expectation that you will make such use of them, in guiding the Law Societies, Common Law and Equity Commissioners, and the Legislature, in adopting a new code of practice in England, which now seems inevitable, and which, as soon as adopted in England, will be adopted in this country also, as your mature experience and sound judgment may suggest.

I am, Sir, yours, &c.

J. F. HAM,  
Chief Clerk in the office of the Hon. John O. Macdonald, M.P. for Kingston, Solicitor to the Commercial Bank, and to the Trust and Loan Company of Upper Canada.

Kingston, Canada, August 16, 1851.

**SUPREME COURT, COUNTY OF JEFFERSON**  
(State of New York).

**JAMES ALLEN against ISABELLA ADAMSON.**  
*Amended complaint.*

James Allen, plaintiff, complains of Isabella Adamson, defendant, and says, that on the 13th day of June, in the year 1833, at Kingston, in Upper Canada, then so called, the defendant, then being a single woman, by name Isabella Hope, and who was afterwards married to and became the wife of William Adamson, then of Fredericksburg, in Upper Canada aforesaid, made and executed under her hand and seal, by the name of Isabella Hope, and delivered to the said plaintiff, her penal bond in the penalty of one thousand pounds currency of the province of Canada, whereby she acknowledged herself to be held and firmly bound to the said James Allen in said penal sum to be paid to him, his executors, administrators, or assigns, to which payment to be made she bound herself firmly by said bond bearing date aforesaid, to which the following recital and conditions were annexed, viz. :—

"Whereas there is a purpose of marriage between William Adamson, of the township of Fredericksburg, surgeon, and the said Isabella Hope; and whereas the said William Adamson is a retired surgeon in the Bengal Establishment, and for several years past has been a contributor to the Bengal Military Widows' Fund, by means whereof, in the event of his death, his widow will be entitled to receive an annuity during her widowhood amounting to about two hundred and forty pounds, arising from the said Bengal Military Widows' Fund, and the pension usually allotted to the widow of an officer of the East-India Company. And whereas, in consideration of the benefit and advantage arising to the said Isabella Hope from the proposed marriage, the said William Adamson had made it a condition precedent on the marriage-contract or agreement between them, that the said Isabella Hope should by her bond or obligation assure to Augustus Henry Adamson, son of the said William Adamson, and Laura Julia Adamson, daughter of the said William Adamson, each, the yearly sum of fifty pounds, so long as she, the said Isabella Hope, may continue the widow of him, the said William Adamson, in case she survives him, the said William Adamson; and in the event of the death of either or both of the said children of said William Adamson, then the said Isabella Hope, in the event of her widowhood as aforesaid, and during the continuance of the same, to assure to the executors or administrators of the said children respectively, the said yearly sum of fifty pounds each; and whereas the said James Allen hath been nominated and appointed to act as trustee for said children, and to guard and protect their interests in the premises, and to receive the said bond or obligation from said Isabella Hope in his own name, but the moneys secured by the same to be applied by him for the use and benefit of said children and of their respective executors or administrators. Now, the condition of this obligation is such, that if the said Isabella Hope, her heirs, executors, or administrators do and shall yearly and every year from and after the death of him, the said William Adamson, and as long as she remains his widow, pay or cause to be paid to him, the said James Allen, his executors, administrators, or certain attorney, the sum of one hundred pounds of lawful money of Canada, without abatement, delay, deduction, defalcation whatsoever, then this obligation to be void and of no force or effect whatsoever; otherwise to be and remain in full force and virtue.

The plaintiff further complaining saith, that the said Isabella was married to and became the wife of the said William Adamson after the execution of said bond, and after said marriage, and on or about the 2nd day of February, in the year 1846, the said William died, leaving the said defendant his widow; and that she hath been ever since his death, and still is, such widow; but has not paid to the plaintiff the said one hundred pounds, which is equal to four hundred dollars in each, every, or any year after the death of said William Adamson, or any part thereof, but has neglected and refused to pay the same; wherefore, the plaintiff demands judgment against the defendant for the sum of two thousand dollars, and the interest on the amount from the time the payments respectively became due, besides the costs of the action.

CLARKE and CALVIN,  
*Copy of Defendant's Answer.*

**JAMES ALLEN v. ISABELLA ADAMSON.**

And the said Isabella Adamson comes and for answer to said plaintiff's amended complaint, on information and belief, denies that on the 13th day of June, 1833, at Kingston, in Upper Canada, the defendant, then a single woman, made and executed under her hand and seal, by the name of Isabella Hope, and delivered the same to said plaintiff her penal bond, in the penalty of one thousand pounds currency of the province of Upper Canada, in manner and form and for the purposes stated and set forth in said complaint; and defendant denies, on

information and belief, that there was any condition annexed, as is untruly stated in said complaint.

And said defendant denies, on information and belief, that she became the wife of William Adamson after the execution of such bond, or that the said William Adamson died in February 1846, or that she has not had the sum of money mentioned and set forth in said complaint in manner and form as is therein untruly stated.

And the defendant denies that there is any sum whatever due to said plaintiff as stated in said complaint. And said defendant, for a further and distinct defence to this action, says, on information and belief, that the said pretended bond and obligation set up in said complaint is not her deed. And said defendant, for a further defence, on information and belief, states that the said pretended bond (if made at all) was made upon and for the sole consideration that she should receive at and after the death of said William Adamson, a widow's pension from the Bengal Military Widows' Fund, the pension actually allotted to the widow of an officer in the service of the East India Company, which, in case of her intermarriage and her survivorship, was represented, she would be entitled to and would be received by her during her widowhood, whereas in truth and in fact the said Isabella was not, by reason of such intermarriage and survivorship, nor is now a pensioner upon said fund or any other fund whatever from and after the death of said William Adamson, and is not entitled to and hath not received a farthing from said fund or any other fund pertaining or in anywise belonging thereto, by means whereof the defendant avers that said recital in said bond, being facts obtained by said William Adamson, are and were untrue and unfounded in fact, wherefore defendant saith that by reason thereof the consideration of said pretended bond wholly and totally failed, and the defendant will, on the trial of this cause, claim for this reason to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

And said defendant further answering said amended complaint, and for a further distinct defence to this action, states that by the recital of said pretended bond, it is recited and set forth and so pretended and represented by said Adamson at the time of the pretended execution thereof, that the said William Adamson, for several years previous thereto, had been a contributor to the Bengal Military Widows' Fund, by means of which, in the event of his death, his widow would be entitled to receive an annuity during her widowhood amounting to about two hundred and forty pounds, arising from said Bengal Military Widows' Fund, and the pension commonly allotted to the widow of an officer in the service of the East-India Company, and in consideration of the benefit and advantage accruing to the said Isabella Hope from the proposed marriage as represented by said Adamson, and recited in said pretended bond, the said pretended bond or obligation was made, executed, and delivered, and upon none other, and for the purpose of diverting said fund to the children of said William Adamson after his death, which defendant might receive from said fund the said bond was made to the plaintiff, whereas in truth and in fact the said William Adamson had not made, and did not continue to make, the contribution required in order to secure to his widow such pension, and the defendant wholly lost, and was and is deprived of the benefit thereof, by means whereof such consideration for the said bond has wholly failed.

And said defendant, for a further, separate, and distinct defence to said action, states, that according to the bye-laws, rules, and regulations of said Bengal Military Widows' Fund, all persons who are members thereof, and wish to enable their widows to receive the benefit arising therefrom, shall pay into such fund a yearly sum during the lifetime of said officer, a contribution thereto to entitle the widow of such person to the benefit thereof.

That it was, at the time of the execution of said pretended bond, falsely represented by said William Adamson that he had paid, or caused to be paid, a yearly sum or contribution to said fund as required, and in pursuance of the rules and regulations of said Bengal Military Widows' Fund for many years previous thereto, and would continue to pay the same, and that in case of their intermarriage, and his death and her survivorship, she would be entitled to the annuity of two hundred and forty pounds per annum during her widowhood by reason of being his widow. That the plaintiff and son-in-law of the said William Adamson, at the time of making and executing said pretended bond, fully understood the condition and consideration upon which the same was made, and that the said defendant, relying on those representations, made the said pretended bond, and delivered it to him the said plaintiff upon the consideration, which, defendant avers, formed a condition precedent in the marriage-contract mentioned in said bond, and upon the consideration and condition that the said William Adamson, then being a contributor to said fund, should continue to pay, after the intermarriage, a yearly sum to said fund as contributor thereto, to entitle the said defendant to the benefit thereof, as

recited in said pretended bond, and for no other purpose, and for no other consideration. That the said benefit or advantage from said fund, in consequence of such intermarriage, depended upon a contingency beyond the power or control of said defendant, to wit, that the said William Adamson should continue himself to be a contributor to said fund, and should at all times, during his lifetime, pay, or cause to be paid, a certain yearly amount as contributor thereto, to entitle the widow of said William Adamson to the benefit of said fund, and enable her to recover the amount mentioned and recited in said bond. That the said William Adamson was not a contributor to said fund for many years previous to the time of such intermarriage of said defendant with him, nor did he at any time, after such alleged intermarriage, pay, or cause to be paid, any part or portion of said yearly contribution, required by the rules and regulations of said Bengal Military Society, for which reason the consideration thereof wholly and totally failed. And the defendant avers, and will insist at the trial of this cause, that by means of those several premises the said bond or obligation is fraudulent and void, and that the said recited bond upon said William Adamson's representations are and were untrue and unfounded in fact, and therefore said bond was and is null and void. That said defendant, in consequence of the omission of said William Adamson to contribute to such fund, did lose and lost all benefit and advantage arising therefrom (if any), or from any other fund, or from any other source pertaining thereto. That she has not at any time, either directly or indirectly, received anything from said fund, or from any other source mentioned in said bond, although she has duly applied for the same, for which reason the defendant will claim to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

G. C. SHIRMAN,

Defendant's Attorney, Watertown, N. Y.  
Jefferson, Isabella Adamson, the above-County, N.Y.; named defendant, being duly sworn, says, that she has read or heard read the foregoing answer, and knows the contents thereof, and that the same is true of her own knowledge, except those matters therein stated, to be on information and belief, and as to those matters she believes the same to be true.

ISABELLA ADAMSON.

Sworn before me, this 23rd day of July, 1851,  
ROBERT LANSING, Co. Judge, Jeff. Co.

**Queries.**

A. B. residing and holding several public appointments (within thirty miles of London), is serving under articles of clerkship to C. D. The latter takes out his certificate as practising both in town and country; but the practice in the country arises entirely from the connection of A. B. who advises with clients, and receives instructions. His name is on the office door, as also that of C. D. The latter in fact resides in London, and has no house or place of residence in the country; but whenever it is prudent that the professional business should be superintended by the principal, C. D. presents himself, and of course the proceedings, of whatever description, are conducted solely in his name.

Is not this a colourable serving of the articles under the terms of the Act, and such as ought to be objected to on A. B. applying to pass his examination? Or, should he be allowed to pass his examination, and then application to be made to the Court to strike him off the roll?

Perhaps some of your correspondents will be so good as to enlighten the solicitors in the neighbourhood referred to, who think they ought to interfere and endeavour to prevent what they consider to be a flagrant evasion of the Act.

**THE NEW CHANCERY ACT.**—The new Act (14 & 15 Vict. c. 83) to improve the administration of justice in the Court of Chancery, and in the Judicial Committee of the Privy Council, has just been issued. There are twenty-four sections in the Act. Her Majesty is now empowered to appoint two persons to be judges of the Court of Appeal in Chancery, each of whom is to appoint a secretary, usher, and trainbearer. From the 1st of October next the Court of Appeal is to have the jurisdiction now exercised by the Lord Chancellor. Any statutory jurisdiction exercised by the Lord Chancellor as a judge in Chancery may be exercised by the Court of Appeal. The jurisdiction of the Vice-Chancellor in bankruptcy is by this Act transferred to the Court of Appeal. The common law judges may sit at the request of the Lord Chancellor, and the decision of the majority is to be binding. An appeal is, however, given to the House of Lords. One judge appointed under this Act sitting with the Lord Chancellor, or both judges sitting, to form the Court of Appeal. When the Lord Chancellor sits alone he is to have co-ordinate jurisdiction with the Court of Appeal. One of the judges of the Court of Appeal may sit for the Master of the Rolls or one of



the Vice-Chancellors. The judges of the Court of Appeal, if they are Privy Counsellors, are to be of the Judicial Committee. No matter is to be heard by the Judicial Committee unless three members are present, exclusive of the Lord President. From the 11th of October the salary of the Lord Chancellor is to be 10,000*l.* including the salary as Speaker of the House of Lords. The Master of the Rolls is to have the reduced salary of 6,000*l.* The judges of the Court of Appeal are each to have a salary of 6,000*l.* out of the Suits' Fund. Her Majesty may grant them an annuity on resignation. The Lord Chancellor is empowered, if he should think fit, to appoint an additional registrar, whose salary is to be paid out of the Suits' Fee Fund. Such is an outline of the New Chancery Act under which arrangements are being made for sitting at the end of the present vacation.

**STATISTICS OF LITIGATION.**—Some curious returns are given in the first report of the Common Law Commissioners, just printed, of litigation in the common law courts of Westminster. In the four years, 1846, 1847, 1848, and 1849, the three courts issued 403,313 writs. The appearances entered were 212,777. The rules to plead were 156,629, and in that period the judgments signed were 11,964. The commissioners remark that:—"It appears that one half of the cases in which writs are issued begin and end with the first step, the writ of summons—and that before the time for pleading has expired, which varies from twelve to sixteen days, more than one-fourth of the actions in which appearances have been entered are settled; the probability is, that all of these are for clear and undisputed demands." The commissioners recommend that the appearances to be entered and the rules to plead shall be abolished, and that with the startling facts disclosed by the statistical information that the proceedings in actions should be shortened. The number of rules to plead indicate the number of cases in which declarations have been delivered, and in which the plaintiffs have taken the step to force the defendants to plead or submit to judgment.

**LANDLORD AND TENANT.**—According to a new Act the tenant of a farm may remove the buildings and fixtures erected by him on farms, unless the landlord should elect to take them. The growing crops seized and sold under an execution for debt are, nevertheless, to be liable for the accruing rent.

## THE MERCANTILE LAWYER.

### SUMMARY.

THE only case of interest for review contained in our last number is that of *The Wave*, 17 Law T. 285. The question there raised was the liability of the owners of a ship (damaged by tempestuous weather) under a bottomry bond given by the master at the close of the ship's repairs, the repairs having been commenced on mere personal credit, and no notice given to the owners of the intention of the parties who ordered the repair of the ship that they intended to take such a bond. A correspondence between the parties had been carried on from the time when the vessel put into port for repairs until the bond was given, but it was found to contain no intimation that a bond would be taken until the repairs were nearly complete and the vessel on the point of sailing. The Court held that under such circumstances the bond could not be enforced, the repairs having been in the first instance undertaken on personal credit, and there having been no notice given that a bond would be required. This is a point worthy of noting in *Abbott on Shipping*, *Smith's Mercantile Law*, and any other work treating questions of this nature.

## THE LAW AND THE LAWYERS.

(From the Morning Chronicle.)

THE Chancery Commissioners have put forth a series of interrogatories on the subject of Evidence. The document is a quaint one, and has been drawn up in strict conformity with the rules recognised by the ablest equity draftsmen for the extraction of truth. The point on which the Commissioners require to be enlightened is simply, whether the system of oral examination which prevails in Courts of Law can advantageously supersede the system of written interrogatories with which Courts of Equity are familiar; but feeling, as they professionally do, that all witnesses are either fools or rogues, unable to comprehend a plain question, or unwilling to give a plain answer, they have framed their heads of inquiry in such a way as to meet every possible difficulty, whether arising from ignorance or hostility, and have

expanded one simple query into fifteen complicated interrogatories. Now, this is what we like—whether the object be to point out the merits or demerits of a particular commodity or system, there is no method so effectual as that of furnishing a *sample*; and we only hope that the Commissioners, with the view of more effectually developing this sound principle, have taken care that their "heads of inquiry" should be accompanied by a circular to the following effect:—"Have or hath not you, or either and which of you, any and what opinion, belief, knowledge, or information of, or respecting any and which question or questions asked, noticed, referred to, or hinted at, in the paper writing now produced and shewn to you at this time, and marked with a title or heading containing the words 'Chancery Commission'?" If yes, set forth a full, true, and particular account of all such opinion, belief, knowledge, and information respectively, according to the best and utmost of your ability, with your respective reason or reasons for the same opinion or belief, fully and at large."

We do not ourselves profess to have been applied to by the Commissioners for assistance in this matter; but still, as the subject which they have under their consideration is one of paramount importance to the interests of justice, we shall perhaps be excused by those learned gentlemen if we venture, albeit unasked, to hazard an opinion concerning it. And we do so the more readily because, although the Commissioners appear to have sought for information solely among the members of the Chancery Bar, we cannot help fancying that the public have some right to be heard respecting a matter in which, as suitors, they are so deeply concerned.

In order, then, to ascertain "whether any and what alteration, or alterations," are required in the practice of taking evidence in Chancery, let us consider for a moment what that practice is. The first step in the proceedings is taken by the solicitor, who instructs counsel to "advise upon evidence, and to draw interrogatories accordingly." Now, it frequently happens that the counsel is not informed what witnesses are proposed to be called; and even if he knows their names, he is not acquainted with their characters or capacities. The only course, therefore, which he can safely adopt is to frame a set of technical questions, which ring the changes respecting the facts to be proved in every variety of expression, so as best to guard against the possible prevarication of one witness, or the stupidity of another. Indeed a respectable writer on the law of evidence as administered in Courts of Equity does not hesitate to assert that "the prolixity of a technical interrogatory, with its numerous variations, often verging on tautology, is absolutely necessary; and we learn from the late Vice-Chancellor of England—that we can readily believe that 'the preparation of interrogatories is the most difficult thing which an equity counsel has to do.'" The questions, however, being at length framed and duly engrossed on parchment—for without calfskin no judicial notice can be taken of them—the second step is to file them in the proper office for the use of the gentleman who is to examine the witnesses. This functionary, who is either an examiner of the Court or a commissioner specially appointed, according as the witnesses reside at a less or greater distance than twenty miles from town, next proceeds to discharge his duty; and the witnesses being summoned before him, he examines each separately and in secret, reading over the interrogatories in succession, and taking down the answers in the first person. If, as frequently happens, the witness cannot be made to comprehend the legal jargon with which the draftsman has contrived to conceal his meaning, the examiner may translate, if he can, the technical phraseology into popular language. But he has no power to do more than this; and therefore, if an interrogatory be framed in too vague or too definite a manner, so as not to admit of a satisfactory answer, or if an important question be by accident omitted, he cannot vary the one, or supply the other, but the defect can only be cured by a special application to the Court.

As soon as the examination in chief is closed, the cross-examination, which is conducted by means of cross-interrogatories prepared beforehand, theoretically commences. We say "theoretically," because in practice there is no such thing as cross-examination in equity proceedings—counsel having long since discovered that, unless they were gifted with the spirit of prophecy, it would be utterly impracticable for them to draw up any set of cross-questions which could be of the slightest service in eliciting truth, inasmuch as they have no means of knowing either what the witness will say, or even what he will be asked, in his examination in chief. "I have never," said Mr. Bell, when questioned by the former Chancery Commissioners on this subject, "ventured, in my later practice, to cross-examine a witness, unless he was a witness whom I would otherwise have examined in chief, or to extract some fact to shew that he was interested." The testimony of this eminent counsel was remarkably confirmed a few months back by Vice-Chancellor Knight Bruce, who avowed, in open court, that, "according to all

experience, the faculty of cross-examination in proceedings in equity is a faculty almost worthless to possess, and one the exercise of which seldom assists the person who seeks to avail himself of it." Mr. Plumer, also—who, being himself an examiner of the Court, is entitled to speak *ex cathedra*—gives striking evidence to the same effect; and, after observing that the most glaring defect in the system of taking evidence in Chancery is the total exclusion of anything like an effective cross-examination, he adds, "The most experienced practitioners, I believe, recommend it only in cases where the witness is one whom it would be necessary or prudent to have examined in chief; and the result of almost every cross-examination which I have seen ventured upon has confirmed the wisdom of that advice." He then makes a remark, the practical wisdom of which must be recognised by every sensible man. "The magnitude of such a defect as this," he says, "needs no comment. It leaves the examination in Chancery a mere *ex parte* proceeding, and little better than evidence by affidavit."

To the sketch above given we need only add the following facts:—First, that it is the duty of the examiner, after all the interrogatories have been gone through, to read over the entire deposition to the witness; secondly, that the witness is then at liberty to correct any inconsistencies which may appear between different parts of his evidence; thirdly, that the depositions, when finally completed, are, like the interrogatories, engrossed on skins of parchment by clerks sworn to secrecy; fourthly, that any mistake in the formal heading of the interrogatories will render the whole utterly inoperative; and lastly, that the examiner is bound by oath not to divulge to any of the parties the contents of the depositions, until the evidence is closed on both sides, and publication, as it is termed, has duly passed. The public will now have a tolerable idea of the method of taking evidence which prevails in Courts of Equity; and, unless we are greatly mistaken, they will not be slow to recognise the soundness of Lord Erskine's opinion, who long ago denounced the whole system as "a frail and imperfect mode of examining into facts." We shall take an early opportunity of reverting to this subject, and of pointing out in what manner these grievous defects may be most effectually remedied.

## LEGAL INTELLIGENCE.

**THE NEW ROLLS OFFICE.**—Great inconvenience having arisen from the limited space afforded to the preservation of the Rolls of Court in the present building, a new one, under the sanction of Parliament, has been resolved upon, in the space behind the Rolls Court in Chancery-lane, and running back to Fetter-lane. The foundations of the new building have already been partially laid down. The new Record Office will be, we are informed, in keeping, with respect to the style of architecture, with the Judges' Chambers, immediately behind which it is to be constructed. The new building is not to come out flush with the present frontage of the houses in Fetter-lane, as room will be left to make the present inconvenient and crooked appearance and formation of that thoroughfare more seemly in its aspect, and more adapted for facilitating passenger and other traffic. When the new building is completed, it will be a great improvement exteriorly, and will give, in its interior arrangements, facilities which have not been possessed before for the inspection of old manuscripts and rare but instructive documents.—*Globe*.

**RAILWAY LOANS AND THE STAMP LAWS.**—The recent alterations in the stamp laws now enable railway companies to receive loans as low as 100*l.*, at which rate many are now taking them. Formerly they could not do so in sums of less than 400*l.* or 500*l.*

**MONEY ORDERS.**—GENERAL POST-OFFICE, AUGUST, 1851.—The undermentioned offices will be opened as minor money-order offices on the following days, viz.:—On the 1st September, Leyburn, Yorkshire; 8th September, Farningham, Kent; Princes Risborough, Buckinghamshire; Theale, Berkshire; Wye, Kent.—N.B. Thorp Arch, Yorkshire, inserted in the list for July last (Instructions No. 23, 1851), should be designated as Boston Spa, Yorkshire.

**THE REGISTRATION.**—On Saturday the lists of claims and objections to borough and county voters were published. In the metropolitan boroughs there are not more than fifty claimants and objections. The claims and objections for the county are very numerous. In the city of London, there are on the livery list 214 objections, and only two claims. In the parish lists the claims and objections are also numerous.

**REGISTRATION OF VOTERS.**—The revision of the lists of voters for the next session cannot commence before the 15th instant, and must be concluded by the 31st of October. In the late session an Act was passed to exempt burgesses and freemen in certain cases from the operation of an Act for the better assessing and collecting of the poor-rates and high-

**SCOTCH APPEALS BEFORE THE HOUSE OF LORDS.**—Some few days previous to the end of the session, the Lord Chancellor intimated that he would set apart a day for judgments in the appeal cases that had been argued before him during the session. This day of judgments turned out to be the last day of the sitting of Parliament, and as the House of Lords had to be swept and garnished for the Queen's reception at noon, nine o'clock on Friday morning last was the hour appointed by his lordship as giving ample room and margin to set the litigious bosoms of suitors at rest. Accordingly, at peep o' day, many Queen's counsel and staff gowns, with a phalanx of reporters and interested parties, swarmed in the gaudy purlieus of the house. As it had been the fashion of his lordship throughout the session to go on hearing case after case argued without ever pronouncing a judgment, it was, of course, innocently expected that he would cleanse the Augean stable on the occasion, and thus do a feat the memory of which would not be obliterated by the succeeding pageant itself. There had been about fifteen cases in all, eight of which were Scotch, and on one only of the latter had judgment been given; the residue including the Poor-law cases, the Linlithgow case, and others of great importance. The first case bespoke was one under the Winding-up Act, and half an hour was spent in telling the House that, as the case was one of great importance, and the judges were out of town, no decision he could give would be satisfactory, and therefore he would move its postponement. Three other English cases were singled out for judgment, and the House adjourned at eleven o'clock. Of Scotch cases there were none, and no notice was taken of their existence. The numerous litigants, including all the able-bodied paupers of Scotland, will thus have the satisfaction of sleeping over their wrongs till the beginning of next campaign in February or March, when they may again wake, and find themselves once more famous in Chancery.—*Glasgow Constitutional.*

**APPOINTMENT TO GOVERNMENT OFFICES.**—By an Act passed in the late session, an alteration is effected in the appointment to offices held at the pleasure of the Crown. From Henry VIII. warrants of appointment were necessary to be passed under the Great Seal; they are by this Act dispensed with, and the offices of the Clerks to the Signet and Privy Seal are abolished, with compensation to the holders. The duty of the Signet Office remaining is to be performed by the Secretary of State. The Treasury may regulate the Privy Seal Office, and fix the salaries. The Act will take effect on the 31st of December next.

**THE NEW HOUSE DUTY.**—At Michaelmas the first half-year's duty under the new Act will become payable of 6d. in the pound on the annual value of 20s. and upwards on shops, warehouses, &c., and of 9d. on dwelling-houses not used as shops, &c. way-rates in respect of small tenements. Under the Reform Act burgesses and freemen had a reserved right of voting, including liverymen of the City of London; and by another Act, 13 & 14 Vict. c. 99, such persons were only to retain the right while qualified on the ground of rates. It is provided by the present Act (14 & 15 Vict. c. 39) that the right of voting reserved by the provisions of the 2 & 3 Wm. 4, c. 45, to persons then entitled is not to be affected by the change of rating under the 13 & 14 Vict. c. 99. Under the word "tenement" an apartment may be included.

**WALTHAM AND EPPING FORESTS.**—According to a late Act (14 & 15 Vict. c. 43), the Forest of Hainault, which is a part of Waltham Forest, is to be disafforested, and public roads may be made. The Act is not to extend to Epping Forest. Certain poor widows are entitled to a load of timber once a year, on Easter Monday, or to 8s. when they cannot procure a team to carry it away. By the Act their rights are to be ascertained and the amount invested, so that at the end of every year the dividends are to be expended in fuel for the widows, and the same distributed at Christmas. The Act is to be enforced by commissioners to be appointed.

**INCLOSURE COMMISSION.**—The special report of the commissioners has been presented to both Houses of Parliament. It appears that since the presentation of the annual report on this subject the necessary consents have been received to twelve proposed inclosures in the several counties of Essex, York, Devon, Sarrey, Hereford, Lincoln, Sussex, Southampton, Suffolk, Kent, and Middlesex.

**THE NEW FOREST AT SOUTHAMPTON.**—An Act of Parliament was passed on the 7th ult. to extinguish the right of the Crown to deer in the New Forest, and to give compensation in lieu thereof. Among the provisions is the following—"That it shall be lawful for her Majesty, her heirs and successors, by warrant under the royal sign manual, to give and grant licences to any person or persons to hunt, hawk, fish, and fowl upon and over the said forest." Persons who claim the right of common are to deliver their claims to the verderers, who are to hold a meeting for the purpose. The claims may

be objected to, and are to be decided by the judge of the County Court of Southampton. A part of the forest is to be inclosed, and public roads are to be formed. The Act is the 14 & 15 Vict. c. 76.

**ACCIDENTS TO STEAM-BOATS.**—According to the late Act on steam navigation (14 & 15 Vict. c. 79), all accidents caused by steam-boats, or to the vessel or the machinery, are to be reported to the Board of Trade within twenty-four hours of the same, under a penalty of 50l.

**CONVICTS UNDER TRANSPORTATION.**—A Parliamentary paper was issued on Wednesday containing a resolution of certain magistrates in Ireland, protesting against the liberation of certain criminals sentenced to transportation, who were again let loose on society. They state that several of the criminals, who were discharged because they behaved well in prison, have since committed offences and some have been convicted.

## THE GAZETTES.

### Bankrupts.

*Gazette, Sept. 3.*

**BOWNET, DUMAS**, wine merchant, Mark-lane, City, and Golden-square, St. James's, Westminster, Sept. 13, at one, Oct. 24, at eleven, Basinghall-st. Off. as Cannan. Sol. Lewis, Albany-court-yard, Piccadilly. Petition, Aug. 27.

**LUCKINS, WILLIAM HERO**, coach-maker, Kennington-row, Kennington, Sept. 8 and Oct. 17, at two, Basinghall-st. Off. as Whitmore. Sols. Cates and Son, Fenchurch-st. Petition, Sept. 1.

**MIDGLEY, JOHN**, carpenter, Kingston-upon-Hull, Sept. 17 and Oct. 15, at twelve, Kingston-upon-Hull. Off. as Carrick. Sol. Saxelby, Hull. Petition, Aug. 23.

**NEWMAR, HENRY ADAMS**, clothier, Jewry-st. Aldgate, and Church-st. Shoreditch, Sept. 8, at eleven, Oct. 17, at twelve, Basinghall-st. Off. as Cannan. Sols. Reed and Co. Friday-st. Cheapside; and Sale and Co. Manchester. Petition, Aug. 27.

**PATTISON, MATTHEW**, ironmonger, South Shields, Sept. 16 and Oct. 17, at one, Newcastle-upon-Tyne. Off. as Baker. Sols. Crosby and Compton, Church-court, Old Jewry; and Hoyle, Newcastle-upon-Tyne. Petition, Aug. 25.

**PAYMAR, WILLIAM JAMES and CATHERINE**, silk dyers, Hare-st. Bethnal-green, Sept. 13, at eleven, Oct. 11, at two, Basinghall-st. Off. as Pennell. Sols. Crosby and Compton, Church-court, Old Jewry. Petition, Aug. 29.

**PHILLIPS, JOHN**, grocer, Longton, Staffordshire, Sept. 16 and Oct. 7, at eleven, Birmingham. Off. as Valpy. Sols. Evans and Son, Liverpool, and Smith, Birmingham. Petition, Aug. 21.

**STRANGE, WILLIAM**, jun. bookseller, Paternoster-row, Sept. 8, at half-past eleven, Oct. 17, at eleven, Basinghall-st. Off. as Whitmore. Sol. Gidley, Crosby-hall-chambers, Bishopsgate-st. Petition, Aug. 29.

**THORPE, ROBERT**, last manufacturer, Stafford, Sept. 16 and Oct. 7, at half-past eleven, Birmingham. Off. as Whitmore. Sol. Smith, Birmingham. Petition, Aug. 26.

**WALL, JOHN and WALL, THOMAS YOUNG**, brewers, Chatham, Sept. 8, at half-past one, and Oct. 17, at one, Basinghall-st. Off. as Whitmore. Sols. Wright and Bonner, London-st. Fenchurch-st. Petition, Aug. 23.

**WESS, THOMAS**, clothier, Stourbridge, Worcestershire, Sept. 16 and Oct. 7, at half-past eleven, Birmingham. Off. as Christie. Sols. Smith, Birmingham; and Price, Stourbridge. Petition, Aug. 23.

*Gazette, Sept. 5.*

**BRUDENELL, JOHN**, brewer, Windsor, Sept. 13, at half-past twelve, Oct. 24, at twelve, Basinghall-st. Com. Fane. Off. as Cannan. Sols. Lawrence, Fane, and Boyer, Old Jewry-chambers; Bunney and Son, Newbury. Petition, Aug. 16.

**FORMAN, JOHN and FROW, ROBERT**, joiners and builders, Kingston-upon-Hull, Sept. 24 and Oct. 23, at half-past twelve, Leeds. Com. West. Off. as Carrick. Sols. Thorney and Son, and Lightfoot, Barnshaw, and Franklin, Kingston-upon-Hull. Petition, Sept. 1.

**FOSSETT, ROBERT NILSON**, victualler, Birmingham, Sept. 16, at half-past eleven, Oct. 6, at half-past ten, Birmingham. Com. Balguy. Off. as Valpy. Sol. Bartlett, Waterloo-st. Birmingham. Petition, Aug. 29.

**MUMFORD, JOHN LEWIS**, miller, Stoke Gabriel, Devonshire, Sept. 17 and Oct. 8, at one, Exeter. Com. Here. Off. as Herniman. Sols. Windeatt, Totnes; and Terrell, St. Martin's-lane, Exeter. Petition, Aug. 28.

**NEWSTED, THOMAS EDWARD**, draper, St. Andrew's-plain, Norwich, Sept. 13, at one, Oct. 18, at eleven, Basinghall-st. Com. Goulburn. Off. as Pennell. Sols. Hardwick, Davis, and Bradbury, Weavers'-hall, Basinghall-st. Petition, Aug. 23.

**VALENTINE, JOHN**, tea dealer and grocer, Northampton, Sept. 13, at half-past one, Oct. 24, at one, Basinghall-st. Com. Fane. Off. as Whitmore. Sols. Miller and Carr, Rastcheap. Petition, Sept. 3.

**WENTLE, FREDERICK and SHAW, HENRY MORETON**, drapers and milliners, Liverpool, Sept. 10 and Oct. 7, at eleven, Liverpool. Com. Perry. Off. as Morgan. Sols. Avison and Pritt, Cook-street, Liverpool, and Mason, Moira-chambers, 17, Ironmonger-lane. Petition, Aug. 25.

### BANKRUPTCIES ANNULLED.

*Gazette, Sept. 2.*

**Macduff, J.** auctioneer, Brynmawr, Brecknockshire, Aug. 29.

*Gazette, Sept. 5.*

**Haigh, W. H.** flour and malt factor, Wakefield, Aug. 29.  
—**Fry, A. R.** chemist, Mile-end-road, Sept. 6.—**Hages, H.** tailor, Regent-st. Sept. 3.—**Brown, J.** grocer, Deal, Kent, Sept. 3.

### Assignments for the Benefit of Creditors.

*Gazette, Aug. 28.*

**Gardner, J.** ironmonger (retired from business), St. Helier's, Jersey, July 24. Trust. J. Gardner, gent.

**Rugeley.** Sols. F. Cress, Rugeley, G. R. Evans, Jerny, and C. Cutler, Bell-yard, Doctors'-commons.—**Wardley, L.** licensed victualler, Tipton, Staffordshire, Aug. 2. Trusts. G. England and G. J. England, common brewers, Dudley. Sol. J. Bolton, Dudley.—**Wright, J. L.** wine dealer, Manchester, July 29. Trust. J. L. Wright, Manchester.—**Sol. E. Bont, Manchester.**—**Blanco, G. and Elliott, G.** millwrights and engineers, 10, Great Grimby, Lincolnshire, Aug. 15. Trust. H. L. May, iron merchant, Kingston-upon-Hull, and R. O. May, Great Grimby. Sol. G. Babb, Great Grimby.—**Wright, W.** publican and farmer, Luton, Deverham, Aug. 1. Trusts. J. Grettton, common brewer, Burton-upon-Trent, and S. Higgott, farmer, Newhall-park, Stapleford, Aug. 1. Trusts. Burton-upon-Trent.—**Wright, C. J. and T. C. Jones** twisters, Huddersfield, Aug. 8. Trusts. T. Kewley, cotton-spinner, Bolton-le-Moors, W. Motterill, spinster, Manchester, and M. Hague, machine maker, Walsall mill, near Holdham. Sols. J. C. Laroock, Holdham, and J. Greenhalgh, of Bolton-le-Moors.

*Gazette, Aug. 28.*

**Bowden, T.** printer, bookseller, and stationer, Racombe, Devonshire, Aug. 1. Trusts. A. Dru, writer, Ilfracombe, E. Bowden, yeoman, Lee, Buryraker, and H. K. Bowden, yeoman, Combarstall. Sol. J. Knight, Barnstaple.—**Edwards, W.** builder, Hastings, Aug. 2. Trusts. J. A. Vidler, merchant, Rye, C. Allen, ironmonger, and B. Breeds, merchant, Hastings, Oct. 1. Breeds, Hastings.—**Hewitt, T.** joiner and builder, Lady Ash, West Derby, Lancashire, Aug. 20. Trust. W. Henderson, nurseryman, Birkenhead, and S. F. McGee, book-keeper, Knotty Ash. Sol. E. W. Ford, London.—**Jackson, J.** innkeeper, Bentley, Yorkshire, Aug. 2. Trust. J. Johnson, wine and spirit merchant, Walsingham, Darnley. Sols. Mason and Wright, Doncaster.—**Lady, J. F.** wine and spirit merchant, Kent, Aug. 2. Trust. J. Board, distiller, Bartholomew-close, Smithfield. Sol. P. S. Brieley, Pancras-lane, Chapside.—**Tam, D. R. and Kelly, W.** linen drapers, Haberdashers'-hall, London, Aug. 8. Trusts. W. M. Westall, warehouseman, Leamington, Aldermanbury, and D. Smith, gent., Walsall. Sol. Burr and Gribble, Lombard-st.—**Tomlinson, G. and Heath, J.** drapers, Birmingham, Aug. 16. Trust. H. M. munde, banker, Birmingham, W. Butterfield, warehouseman, Manchester, and F. Dement, warehouseman, Aldermanbury. Sols. Sole and Turner, Aldermanbury.—**Wol, J. and Clark, G.** grocers and provision dealer, Walsall, Bath, Aug. 9. Trust. J. Baily, wholesale grocer, Bristol. Sol. W. Bevan, Bristol.

### Partnerships Dissolved.

*Gazette, Aug. 28.*

**Anderson, J. H. and Bullen, C.** plumbers, 42, Truett, Oct. 1. Debts paid by Bullen.—**Brown, E. and Orin, J. B.** line masters, Rushall, Aug. 23. Debts paid by Brown.—**Clarke, W. L. and O. S. attorneys**, Bristol, Jan. 2. Crocker, J. B. and Co. straw bonnet and hat manufacturers, Coventry.—**Edgworth and Hen, corn merchants**, Preston, July 24. Debts paid by Edgworth.—**Foster, H. Hepple, J. and Foster, H.** wholesale grocers and agents, Fenchurch-st. Aug. 10.—**Grafton, Coleman, and G. G. Grafton, T. C. and Co.** The Handloom and Coal Company, merchants, coal merchants, and manufacturers of coal, London and Norwich, York and Co. coal merchants and manufacturers of coke, Boulogne, as regards Ward, Sept. 11, 1880; as regards Goldsmith, Sept. 18, 1880; as regards York, Feb. 1; as regards Gregory, July 26. Debts paid by Grafton and Gibson; at Boulogne, by York.—**Howe, G. and J. J. builders**, Tring, Aug. 2. Debts paid by Mr. W. Howe, surveyor, Tring.—**Good, Bird, and Piffers**, lace manufacturers, Loughborough, as regards Bird, Aug. 1. Debts paid by Good and Piffers.—**Price, W. E.**—**Price, C. and apothecaries**, Leeds, Aug. 15.—**Price, C. and Young, J.** commission agents, Sunderland, Sept. 1.—**Deville and Bulman**, surgeons and apothecaries, Sunderland, May 21.—**Stansfield and Buckley**, cotton waste dealers, Austerlands, within Saddleworth, Aug. 21.—**Truett and Bulstone**, merchants and tailors, St. Agnes, Aug. 2.—**Ward and Barrett**, surgeons, 40, Spoon and End, Jan. 2.

*Gazette, Aug. 28.*

**Bailey, C. and Jury, W.** hotel and tavern keeper, Kingston-upon-Thames, Aug. 28. Debts paid by Bailey.—**Best and Sheard**, tea dealers, Huddersfield, Aug. 2. Debts paid by Sheard.—**Campbell, C. and Co.** wine and spirit merchants, Shury-st. Pimlico, Oct. 23. Debts paid by Campbell.—**Clough, W. and T. W.** attorneys and solicitors, Pontefract and Huddersfield, Aug. 14.—**Cole, J. and Pemberton, T. L.** lime, corn, and provision merchants, Sedgley, Aug. 23. Debts paid by Pemberton.—**Dobell, J. and E.** watchmakers and jewellers, Canterbury, Aug. 2. Debts paid by J. Dobell.—**Eldridge, Groves, and Co.** ironmongers, Fore-st. Aug. 27.—**Bylly, Broderick, and share brokers**, Change-alley, Cornhill, as regards J. Bylly, Aug. 23.—**Farrar and Halsey**, stock merchants, Pudsey, Aug. 25. Debts paid by Farrar.—**Gill and Pigg**, wholesale druggists, Nottingham and elsewhere, Aug. 2. Debts paid by Gill.—**Gladstone, J.** jun. and Co. founders and ship smiths, Liverpool, Aug. 28.—**Harris, C. Swell, C. B. and Cleveland, W. F.** surgeons and apothecaries, Fenchurch-st. as regards Cleveland, Aug. 28.—**Hays, T. and P.** stone-masons and quarrymen, Thatcham, Epsom, May 1. Debts paid by T. Hays.—**Hogarth, C. Colyer**, attorneys and solicitors, Darford, Aug. 28.—**Hogarth, C. Colyer, and Co.** merchants, Fenchurch-st. Aug. 2.—**Lee, J. and T. and Cooper, W.** general smiths and ironworkers, Nottingham, Aug. 1.—**Lord, E. and Whithead, J.** lace waste spinners, Rakewood, near Rotherham, March 12.—**Martin, J. A. and E. and Naylor, J.** silver cutlers, 1, St. Field, as regards J. A. Martin, Aug. 28. Debts paid by J. Martin and J. Naylor.—**Nixon, W. and Burton, B.** manufacturers, Radford, Aug. 27.—**Proctor and Proctor, W. H.** attorneys, Newcastle, July 1.—**Roper, H. and Pater, W. H.** damask manufacturers, Halifax, Aug. 7. Debts paid by Roper.—**Round, B. and Jackson, W.** carriers and agents, Netherland, Oradley, and Kingtonwinford, Aug. 7. Debts paid by Round.—**Thomson and Pickles**, damask makers and vest-makers, Wharfedale, near Halifax, Aug. 2. Debts paid by Thomson.—**Thorne and Co.** wholesale tea and coffee dealers, London and York, as regards R. Thorne, Dec. 2.—**Watkins and Vasey**, brick manufacturers, Cardiff, May 1.—**Wells, B. and Co.** ironfounders, Bradford, as regards Glover, Aug. 21. Debts paid by B. and J. Wells.

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## To Readers and Correspondents.

- "A. B. Z." London.—*The query forwarded is for advice on a point of criminal law, which should be submitted to counsel, and, as such, comes within our rule of exclusion.*
- "J. B. T." Temple.—*The communication never reached our hands. It was to another correspondent we alluded last week.*
- "W. T." Howden.—*We fear we should give offence without intending it, were we to make the distinction suggested.*
- "E. C. L." Ely.—*We have no means of obtaining, though we should be glad to receive, reports from Consistorial Courts in the provinces. Unless the cases alluded to be reported in the local journals, we are unable to advise our correspondent where he can obtain it.*

## SCALE OF CHARGES FOR ADVERTISEMENTS.

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## THE LAW TIMES.

SATURDAY, SEPTEMBER 13, 1851.

## LAW CHANGES IN THE NEXT SESSION.

It will be seen by the list of notices of motions standing on the journals of the House of Commons for next session, that ample work in amendment of the law awaits the attention of Parliament during the next year. To the subjects there enumerated we may add the Registration of Assurances and the Charitable Trusts Bills,—rejected by the Commons, because, at the late period of the session when they came for consideration, it was impossible to give them that deliberate attention which their importance required, and the Patent Law Amendment Bill and County Courts further Extension Bill for the same reasons thrown aside by the House of Lords. These alone, if carried through, would be no contemptible result for the labour of one session, and when we add that to our knowledge it is fully intended to push to a successful issue the Bill for the Compulsory Enfranchisement of Copyholds, we shall see that more work awaits Parliament in the simple matter of amendment of statutes, effecting material changes in the law interesting to the Profession, than is likely to be accomplished—particularly when we bear in mind the fact, that next session the great battle will be fought for the extension of the suffrage, that there will be further contention upon the

subject of the Income Tax, and that the discussion will probably be revived upon the Jew Bill. To more than one of the measures in contemplation, as given in the published list, do we wish success. The practical mind of Mr. MULLINGS suggests three statutes, the carrying of which cannot fail to be equally acceptable both to the Profession and the public. The first he proposes is a Bill to amend the Stamp Duties Act, passed in session 1850, so far as relates to the denoting stamp required on duplicate deeds, and the *ad valorem* duty on assignments of judgments in Ireland. A yet more useful measure is that which he promises to move in the form of a "Bill to make Policies of Assurance assignable at Law, and to make other Provisions in respect thereof." This, if carried, will be a most serviceable measure; for the inconvenience and expense entailed by the present difficulties are intolerable. The first part of his third motion is somewhat obscure, and we do not quite understand it; but the latter part seems a useful suggestion. The Bill he proposes to bring in is entitled "A Bill for further remedying a Defect in the Titles of Land purchased for Charitable Purposes, and for obviating Difficulties as to Copyhold or Customary Lands conveyed for such Purposes." As to Lord ROBERT GROSVENOR's Bill to repeal the Attorneys' Certificate Duty, we last week expressed our opinion as to the course we think the Profession ought to pursue, and need not recur to the subject now. Colonel SIBTHORP proposes a Bill for repealing the Duties on Fire Insurance, to which we wish well; but there is, we apprehend, not a shadow of hope that he will carry it. A most valuable change in the Stamp Duties is proposed by Mr. HEADLAM. He will move next session "that the stamp duties imposed upon receipts ought to be remitted." We think we may reasonably say, that this measure will meet with the concurrence of every person conversant with business, except, perhaps, a few who, for the purposes of revenue, and on the ground that the money it returns cannot be well spared, may endeavour to uphold it. The inconvenience and the not unfrequent hardships this impost occasions ought no longer to be endured by a great commercial country such as this. We have enjoyed the privilege of penny postage, and do not despair that the convenience and security attaching to the taking a receipt upon a bill or other unstamped paper will, ere long, also be vouchsafed to us.

THE ADVOCATE:  
HIS TRAINING, PRACTICE, RIGHTS, AND  
DUTIES. (a)  
FIFTY-FOURTH ARTICLE.

CROSS-EXAMINATION (*continued*).  
THE recent alteration in the Law of Evidence, not only permitting, but compelling the examination of the parties to a suit, calls for some observations before we conclude the subject of cross-examination, for it will probably require of the Advocate a special direction of his faculties.

This wise measure was for a long time successfully resisted on the plea that, so great was the interest of parties, and such, therefore, the temptation to falsehood, no reliance could be placed upon their testimony. To this the answer was, that the security of judges and juries in the reception of evidence was not so much dependent on the oath taken by the witness to speak the truth as upon the sifting to which the evidence was subjected by cross-examination; that it was unjust to exclude *all* parties to suits, because some might not be trustworthy, and that the same persons who were deemed competent to try the value of all other testimony were equally competent to try that of the parties, whom, because of their interest, they

would necessarily watch with the greater strictness, and receive with the more caution.

This argument at length prevailed, and the witness-box is open to all, leaving it to the sagacity of counsel and the discretion of the Court to determine, from the demeanour of the witness, the intrinsic probability of his story, the manner in which he endures a cross-examination, and the other tests by which truth is distinguished from falsehood, whether he is worthy of credit, and to what extent. Thus will a new duty devolve upon the Advocate for the future in the examination and cross-examination of the parties.

In the examination-in-chief you will require to observe no difference of conduct towards a party and another witness, excepting, perhaps, a little care to rein him in if he should appear to be too eager, or inclined to pass the strict boundary of truth. But in cross-examination you must take into your account the fact that he has a strong bias of interest which may tempt him to tell a deliberate lie, but which is much more likely to colour his impressions, and produce self-deception, so that he may have the most confident belief in the truth of that which he is stating, and yet it may be false in fact. Therefore, in almost all cases, where a party to the suit is a witness, it will be your duty to subject him to the most rigid cross-examination, for the purpose of testing his accuracy. The manner of doing this will be somewhat different from that which has been suggested as applicable to other classes of witnesses.

You may assume the existence of a strong prejudice and bias, but not therefore necessarily of an *intention* to deceive. Great caution will consequently be required in dealing with him. You will have occasion to employ by turns all the tests of truth that have been already described. You will soon discover, from the manner of the witness, if he means well, if he is scrupulous, or if he is blinded by his feelings, or deliberately determined, at any cost of veracity, to advance his own cause. His countenance, his tone, his manner of answering the questions put to him, will sufficiently reveal his character.

If he is manifestly desirous of speaking the truth, your course is clear. Let him see that such is your opinion of him. Encourage his honest intents by frank acknowledgment. If the examination-in-chief has brought out only a portion of the facts, it will be your business to supply the deficiencies, and elicit the whole story. No ingenuity will be required for this with such a witness. You may advance directly to your object. He will give straightforward answers to your questions, and the more plain they are, the more ready and full will be his reply. But remember, that such a witness is the most dangerous one to you. The same honesty which enables you to obtain a ready answer to your questions and to elicit every circumstance connected with the transaction, will carry conviction to the jury also, and his testimony will be received with unhesitating confidence. If, therefore, you do not expect to obtain from him some facts or explanations which may weaken the case on the other side, it would be more prudent not to cross-examine him at all, or only to put a few questions that have no bearing on the case, merely that you may not appear to have abandoned your cause. The more truthful he is, the more likely it is that every answer you will obtain will make his case the stronger, and damage you more and more. Before you begin your cross-examination, ascertain from your attorney if there is really any chance of *explaining away* the facts proved by the witness. If that is hopeless, your wisest course will be to take the chance of *omissions* in the examination in chief, which are always more or less to be found by reason of the fear which a cautious counsel has of putting questions that may elicit unfavourable replies, and so to trust to your ingenuity to make the most of them in your address to the

(a) By EDWARD W. COX, Esq. Barrister-at-Law.

jury. At all events, a cross-examination is more likely to injure than to help you.

But if you see that the witness is *biased by his feelings and interest*, you must approach him after another fashion. Your ingenuity will now be called into play. You must employ some artifice. Direct questions will not suffice. You must approach him with caution, and indirectly. Begin by giving him also credit for *good intentions*. Do not appear to mistrust him. Flatter him even with the assurance that you believe he desires to tell the whole truth. It is a great point to have him well pleased with himself, for your purpose is, not only to unveil him to others, but to strip from his own eyes the veil of *self-deception*, so that his vanity will be enlisted against you, and it will be prudent to start with conciliating as much as possible that formidable antagonist to the Advocate. Remind him by your first question that he is a party to the cause, and has the strongest interest in the result. This will operate as a useful caution. Follow it with the assurance of your own confidence that, in spite of this bias, he desires to tell the whole truth. But, although he has no intent to deceive, the truth is not as he has stated; blinded by his feelings or his interest he has seen it only partially, or distorted, or falsely coloured. Your duty is either to elicit the very truth as it was, or to shew that, being thus self-deceived, his testimony is not to be relied upon. How may you best do this?

Remember the position of the witness. He has impressions upon his mind which he believes to be true. He therefore unhesitatingly swears to them as facts. It is obvious that direct questioning will fail to disturb them, for to a mere repetition of the question as to what he saw or heard, the same answer as before will be as promptly and distinctly given. Again, he tells you what was his impression of the fact, and it is all that he can tell you; it is all, in truth, which any of us can tell, for with every man knowledge is only of the impressions of his own mind, and not of the *very fact itself*, which may present itself to many minds in many different aspects. The only means, then, of shaking such testimony is to shew it to be inconsistent with other facts, or with those strong probabilities arising out of the usual order of things, the ready perception of which constitutes what is called *common sense*. It is in eliciting this inconsistency either with the rest of the story, or with the common sense of mankind, of which a jury is generally a pretty fair representative, that the skill and ingenuity, aided by experience, of the Advocate is demanded. Many hints for this purpose have been already given, which are no less applicable to the case now under consideration, and to which the reader is again referred for instructions as to the best manner of attaining the object now sought. There is no difference in this respect in the cross examination of a witness having the interest of a party, and that of a witness biased by any other interest. In all, the process will be the same, to approach them by *indirect*, and *not* by direct, questions, and to employ all your efforts to elicit contradictions and inconsistencies between the facts positively asserted by the witness and other undoubted facts, or between the testimony and probability and common sense from which you may, in argument to the jury, successfully shew that no reliance can be placed upon the evidence, not because the witness has been guilty of perjury, or intent to deceive, but because he has fallen into the error, to which the very best of us is liable, of having our senses and our memory imposed upon by our interest, our wishes, and our feelings. And this is a line of argument which rarely fails to carry with it the convictions of the jury, and the approval of the judge, because it is in accordance with their experience, and is infinitely more effective than the more frequent one which imputes every mistake or misstatement to deliberate perjury.

It would be but an impertinent repetition of that which has been already minutely examined to detail here how you may obtain from a biased witness satisfactory proof of the distortion of his mind by reason of that bias. The present purpose is only to suggest so much of the *new duties* of an Advocate, as would appear to be imposed upon him by reason of the *new law* that places the *parties to a suit* in the witness-box.

The third class of party-witnesses, those who come into the box with deliberate design to promote their own cause, without regard for truth, must be reserved for consideration in another article, which, with two or three other cautions and hints that may be serviceable to the young practitioner, will conclude the subject of cross-examination. It has occupied a much larger space than we had anticipated, but, perhaps, not more than its great importance to the success of an Advocate has properly demanded for it.

#### REGISTRATION AND ELECTION LAW.

MR. COX'S new Edition (the 6th) of "The Law and Practice of Registration, and of Elections," will be ready on Monday, and may be ordered forthwith. This book, containing all the Cases and New Statutes down to the present time, with full instructions to Agents in the Management of an Election, appears very opportunely just now, and will be found very serviceable in the Registration, and in preparing the reader for the tactics of an election, which, in the ordinary course, must take place next year.

#### THE LEGISLATOR.

##### PARLIAMENTARY PAPERS.

**PUBLIC COMMITTEES.**—In continuation of the Parliamentary Paper on this subject issued at the close of the session of 1850, there has just been printed a return of the number of public committees appointed in 1851. Of these, it seems, there have been forty-three, each providing employment for some dozen honourable members, and each lasting for a period of from one to twenty-nine days. The arrangement is alphabetical, and, as the result, we have a question of law amendment first recorded as having been the subject of investigation. Mr. Baines was the chairman of this committee; the Attorney-General, the Attorney-General for Ireland, Sir F. Theiger, and Mr. Henley are four of the gentlemen of whom it was composed. It sat five days, and Mr. Baines presided on all; "0" is given as the number of the Attorney-General's attendances; three for the Attorney-General for Ireland; three also for Mr. Henley; and but one for Sir F. Theiger. In the committee on the Enfranchisement of Copyholds Bill, which sits eighteen days, Mr. Aglionby is chairman, and each day sees him at his post. Lord R. Grosvenor comes next in punctuality; he is present on sixteen occasions; Mr. Tufnell appears on five; Sir E. Buxton and the Earl of Arundel and Surrey on "0." The Income and Property Tax committee is of eleven days' duration, and the attendances are pretty regular. Mr. Hume is chairman, and present ten times, his place being once supplied by Mr. Henley, who himself also is reported as having missed one day; Mr. Cobden, Mr. Vesey, Colonel Romilly, and Lord H. Vane appear all to have attended eleven times; the Chancellor of the Exchequer comes eight; Mr. T. Baring ten; Mr. Disraeli also comes ten; Mr. Roebuck only twice; and Mr. Forbes Mackenzie, next to Mr. Roebuck, only four times. There is a smaller standing committee on the kitchen and refreshment rooms, of which Lord Marcus Hill is chairman; but in this case no register of attendance has been kept, nor in that of another standing committee on the library of the House, which is similarly deficient as to any authentic record of its labours. The names of Mr. Gladstone, Mr. Disraeli, Lord Mahon, and Mr. M. Milnes are upon the list of members of this latter committee, which list includes also those of the Speaker and of the Prime Minister. The committee on public libraries sits but once, and even then several, indeed the majority, of its members are not present; Mr. Ewart is the chairman. That on public petitions is not so easily brought to a conclusion; seventy-two days it assembles, on fifty five of which Mr. Thorneley, the chairman, makes his appearance; Mr. Brotherton, the most regular of all the members, attends sixty-seven times; Mr. Duncan, the

next, fifty-seven; Sir R. H. Inglis and Mr. Beakam Carter, both thirty-seven. Mr. Wilson Fatten, whose lot it is to belong to several committees, is chairman of those on selection and standing orders, and attends pretty regularly in both—thirty-two days out of thirty-seven in the former case, twenty-four out of twenty-six in the latter. The committee on steam communication with India, &c. is well attended; its chairman, Viscount Jocelyn, never missing one day out of the whole twenty-four, and Mr. Divett being similarly punctual; then we have Messrs. Henry Currie and H. Berkeley present at twenty-two meetings, Messrs. Cowper and Fenden at twenty-one, and the rest of the members at no great distance behind. The Sunday Trading Prevention Bill brings Lord R. Grosvenor down only three times; Mr. W. Williams (chairman), Mr. Baring Wall, Mr. Masterman, and Mr. Kershaw, five: the committee sat only five. The Passengers Act committee sits sixteen days; Mr. Sidney Herbert (chairman) and Admiral Bowles are present on sixteen; Mr. Sergeant Murphy on "0." The committee on newspaper stamp states the same number of sittings, and there were present every day Mr. Milner Gibson (its chairman), Mr. Cobden, and Sir Joshua Walsley; Sir W. Molesworth, Mr. Ker Seymour, and Colonel Mure never attend at all; Mr. Rich and Mr. Ewart each miss one day; Mr. Tufnell appears on eleven. The committee on the Lodging-houses Bill and Common Lodging-houses Bill sits, under the regular chairmanship of Lord Ashley, for three days; Mr. Stansel's attendances were two. The committee on the Kaiti tries its sixteen times, Colonel Estcourt and Sir J. Walsley being present throughout. The Gasworks Stairs (Liverpool) Exemption Repeal Bill committee has five sittings; Admiral Berkeley is its chairman; and Mr. W. Fatten one of its members; both are regular in attendance. The County Rates and Expenditure Bill committee sits nineteen days, of which Mr. Baines (the chairman) and Mr. Milner Gibson lose none; Mr. Kershaw, Sir J. Duckworth, and Mr. R. Palmer are present on eighteen; Sir J. Pakington on sixteen; Sir J. Graham and Mr. Wilson Fatten on thirteen. The committee on church rates occupies the same time as this last; Mr. Trevelyan, the chairman, is at his post all nineteen days; Sir R. H. Inglis on eighteen; Mr. Bright only thrice, and Mr. Horsman but six times; Mr. A. B. Hope's attendances are eleven; Mr. Hardcastle's sixteen. There have been other committees held, but on subjects less generally interesting to the public. The principal ones are all given above.

**MILITARY PRISONS.**—A Parliamentary paper has just been issued, containing a report on the discipline and management of the military prisons last year. There are nine military prisons in the United Kingdom, and eight abroad, making seventeen prisons, capable of accommodating from 1,200 to 1,300 prisoners. In the prisons at home in 1847, 3,850 were admitted; in 1848, 4,009; in 1849, 3,553; and last year, 3,565. The commitments for desertion and absence without leave, taken together, were precisely the same in 1850 as in 1849, but whilst the minor offences of absence had increased, the grave crime of desertion had materially decreased. The commitments for drunkenness had increased in the last year. The Inspector-General (Colonel Jebb), in his report to the Secretary at War, makes the following observations:—"It is a subject of regret that there is an increase of re-commitments, the number committed to some of the military prisons being 1,011, whilst those committed in 1850 amount to 1,268, being in the latter year more than one-third of the whole admissions. The number, however, re-committed to the same military prisons are 578 in 1849, and 575 in 1850. A different result might have been anticipated, arising from the fact that a large portion of the worst characters in the army had been got rid of in the late reductions. It is, however, understood that many of these being perfectly fit for service, have obtained re-admission into the ranks. But for this circumstance it becomes a question for serious consideration, now that the character of the service has been so greatly raised by the improvements made in the condition of the soldier, whether the suggestion made in 1849 for relieving regiments of habitual drunkards and incorrigible soldiers should not be adopted. Some means might also be devised for marking men so as to prevent their return to the service."

**THE CENSUS IN IRELAND.**—On Monday a corrected Parliamentary paper of the census in Ireland was printed. The decrease is 20 per cent. between 1841 and 1851. In 1841 the total number of persons was 8,175,124, and on the 31st of March last 6,515,794, being a decrease of 1,659,330, or 20 per cent.

**REVISING THE LISTS OF VOTERS.**—By a Parliamentary paper just issued an account of the expenses to each county in revising the lists of voters is given. Last year the expense to the county of Middlesex in printing the lists, &c. was 409l. 11s. 8d. There were 14,097 voters on the lists.



## NEW STATUTES.

14 &amp; 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 224.)

## CAP. LXII.

An Act to alter certain Duties of Customs, and to enable the Treasury to regulate the Mode of keeping the Account between the Receiver General of Customs and the Bank of England.

(August 7, 1851.)

## CAP. LXIII.

An Act for the Settlement of the Boundaries between the Provinces of Canada and New Brunswick.

(August 7, 1851.)

## CAP. LXIV.

An Act to repeal the Act for constituting Commissioners of Railways.

(August 7, 1851.)

We give this statute entire.

9 & 10 Vict. c. 105.—Whereas an Act was passed in the session holden in the ninth and tenth years of her Majesty (chapter one hundred and five), for constituting commissioners of railways: And whereas it is expedient that the said Act should be repealed, and provision be made for the exercise and performance of the powers and duties which since the passing of the said Act have been vested in or imposed on the said commissioners: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Recited Act repealed, and powers, &c. of commissioners of railways under subsequent Acts transferred to Board of Trade.*—From and after the tenth of October, one thousand eight hundred and fifty-one, the said Act shall be repealed, and all powers, rights, authorities, and duties vested in or exercised or performed by the commissioners of railways under any Act passed since the passing of the said recited Act, or which may be passed during the present session of Parliament, shall be transferred to and vested in and performed by the lords of the Committee of her Majesty's Privy Council for Trade and Foreign Plantations as if they had been named in such Acts instead of the said commissioners; and all proceedings pending before the said commissioners on the said tenth of October, or carried on under their authority, shall be continued and carried on by and before the lords of the said committee, who shall have, exercise, and perform the same powers, rights, authorities, and duties in respect of all such proceedings as might have been exercised or performed by such commissioners in case this Act had not been passed.

2. *Power to continue officers appointed by commissioners of railways.*—It shall be lawful for the lords of the said committee, with the approval of the Commissioners of her Majesty's Treasury, to continue, for the transaction of the business transferred to the lords of the said committee under this Act, all or any of the officers and servants appointed by the said commissioners of railways, and from time to time, with such approval, to remove such officers and servants, or any of them.

3. *Appointments, orders, &c. of the Board of Trade how to be signified.*—Where by any Act relating to railways or to any railway the Commissioners of Railways or the lords of the said committee are empowered or required to make or issue any appointment, authority, determination, order, requisition, regulation, certificate, or notice, or to do any other act, the lords of the said committee may, after the said tenth of October, signify such appointment, authority, determination, order, requisition, regulation, certificate, notice, or other act by a written or printed document, signed by one of the joint secretaries of the lords of the said committee, or by some assistant secretary, or other officer appointed by them to sign documents relating to railways; and every appointment, authority, determination, order, requisition, regulation, certificate, notice, or other act signified by a written or printed document purporting to be so signed as aforesaid, shall be deemed to have been duly made, issued, or done by the lords of the said committee; and every such document shall be received in evidence in all courts and before all justices and others, without proof of the authority or signature of such secretary or other officer, or other proof whatsoever, until it be shewn that such document was not signed by the authority of the lords of the said committee.

## CAP. LXV.

An Act to continue certain temporary Provisions relating to the Collection of Grand Jury Cess in Ireland; and also to provide for the due Annexation of an isolated District, formerly of the County of Dublin, to a Barony of the County of

Wicklow, for the Purposes of Grand Jury Cess and other Purposes.

(August 7, 1851.)

## CAP. LXVI.

An Act for rebuilding the Bridge over the River Ness at the Town of Inverness, and improving the Approaches thereto; and for amending the Acts relating to Highland Roads and Bridges.

(August 7, 1851.)

## CAP. LXVII.

An Act to repeal so much of an Act of the Twelfth Year of King George the Third, relating to the making, keeping, and carriage of Gunpowder, as exempts therefrom certain Gunpowder Magazines and Stores near Liverpool, and to make certain temporary Provisions with regard to the said Magazines and Stores.

(August 7, 1851.)

## CAP. LXVIII.

An Act to provide for the better Distribution, Support, and Management of Medical Charities in Ireland; and to amend an Act of the Eleventh Year of Her Majesty, to provide for the Execution of the Laws for the Relief of the Poor in Ireland.

(August 7, 1851.)

## CAP. LXIX.

An Act to continue an Act of the Twelfth Year of Her present Majesty, to prevent the spreading of contagious or infectious Disorders among Sheep, Cattle, and other Animals.

(August 7, 1851.)

## CAP. LXX.

An Act to alter and amend certain provisions of the Lands Clauses Consolidation Act, 1845, so far as relates to Ireland.

(Aug. 7, 1851.)

We give an abstract only of this statute.

1. Short title.  
2. Act to apply to Railways in Ireland authorised in this session, &c. and to those heretofore authorised, except 13 and 14 Vict. c. xxix; 13 & 14 Vict. c. xlv.; 13 & 14 Vict. c. lxxvi.; 13 & 14 Vict. c. lxxviii.; 14 & 15 Vict. c. cx.; 14 & 15 Vict. c. cii.

3. Certain Provisions of 8 & 9 Vict. c. 18, not to apply to this Act.

4. Company to deliver maps, schedules, and estimates at the office of Commissioners of Public Works, and deposit copies with clerks of the peace and clerks of unions.

5. Commissioners of Public Works to appoint an arbitrator, on application of company.

6. Arbitrator may call for documents and administer oaths.

7. Arbitrator to make and subscribe declaration.

8. Maps, &c. deposited with Commissioners of Public Works to be delivered to arbitrator. Notice of appointment of arbitrator, &c. to be published.

9. Arbitrator to adjudicate upon compensation to be paid for lands and upon accommodation works.

10. Separate awards may be made as to lands in the several parishes or otherwise.

11. Clerks of the peace and clerks of unions required to take charge of documents deposited, as provided by 7 Wm. 4, and 1 Vict. c. 83.

12. Expenses of the arbitrator to be borne by the company.

13. Costs of parties.

14. Certificates of amount of compensation to be delivered by company.

15. Amount mentioned in certificates to be paid to parties, on demand, &c.

16. When amount mentioned in certificates is paid to parties, company may take possession.

17. Receipts duly stamped to operate as a conveyance.

18. Payment of moneys where parties making claims deemed not entitled, or are under disability, or title not satisfactorily deduced.

19. Where no claim made, or parties refuse to accept sum certified, money to be paid into the bank.

20. Nothing to prevent company requiring further evidence of title, at their costs.

21. Delivery of certificate may be enforced by Court of Chancery.

22. After deposit of draft award, company may, upon deposit of such amount as arbitrator may think fit, enter upon lands—Company to pay interest from time of entry.

23. Mode of deposit.

24. Deposit to remain as a security, and to be applied under the direction of the Court.

25. Company may deposit money by way of security while the office of the Accountant-general is closed.

26. Parties dissatisfied with award may enter a traverse at Assizes.

27. Verdict on traverse to have effect of judgment.

28. Act to apply to the purchase of lands for extra-ordinary purposes.

29. Provisions of 8 & 9 Vict. c. 18, incorporated with this Act.

30. Meaning of "the company."

31. Act to extend to Ireland only.

32. Continuance of Act, five years.

## CAP. LXXI.

An Act to repeal certain Statutes relating to the Irish Branch of the United Church of England and Ireland.

(August 7, 1851.)

## CAP. LXXII.

An Act to consolidate and amend the Laws relating to the Erection and Endowment of Churches and Chapels and Perpetual Curacies in Ireland.

(August 7, 1851.)

## CAP. LXXIII.

An Act to consolidate and amend the Laws relating to Ecclesiastical Residences in Ireland.

(August 7, 1851.)

## CAP. LXXIV.

An Act to amend an Act of the Eleventh and Twelfth Years of Her Majesty, relating to Poor Rate Poundage and the Valuation of Ecclesiastical Property in Ireland; and to provide for the Renewal of Leases of Lands disappropriated from Bishopsrics.

(August 7, 1851.)

## CAP. LXXV.

An Act to amend and continue the Metropolitan Sewers Acts.

(August 7, 1851.)

We give this statute entire.

11 & 12 Vict. c. 112—12 & 13 Vict. c. 93.—Whereas an Act was passed in the session holden in the eleventh and twelfth years of her Majesty, "to consolidate and continue in force for two years, and to the end of the then next Session of Parliament, the Metropolitan Commissions of Sewers," and the said Act was limited to continue in force for two years next after the passing thereof, and thence to the end of the then next Session of Parliament, and such Act has been amended by an Act passed in the session holden in the twelfth and thirteenth years of her Majesty, chapter ninety-three: And whereas it is expedient to continue the said Acts for such period as herein mentioned, and to amend the same as herein provided: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Appointment of a chairman and deputy-chairman of Commissioners of Sewers.*—It shall be lawful for her Majesty, by warrant under her royal sign manual, to appoint one of the Metropolitan Commissioners of Sewers for the time being to be the chairman, and one other of such commissioners to be deputy-chairman of such commissioners, and upon every vacancy in the office of such chairman or deputy-chairman, to appoint in like manner some other person to such office; and every such chairman and deputy-chairman shall hold his office during her Majesty's pleasure.

2. *Salary of chairman.*—It shall be lawful for the Commissioners of her Majesty's Treasury to direct a salary not exceeding one thousand pounds by the year to be paid to the chairman for the time being of the said commissioners; and such salary shall be paid out of the moneys applicable to the payment of the general expenses of the said commissioners.

3. *The chairman or deputy-chairman to preside at Courts of Sewers.*—The chairman for the time being appointed under this Act shall be the chairman at every Court of Sewers to be holden under the said Acts at which he is present, and in his absence the deputy-chairman for the time being appointed under this Act shall be such chairman, and the person presiding as chairman shall have a second or casting vote, as provided by the said firstly-mentioned Act.

4. *Two commissioners (one being the chairman or deputy chairman) to be a quorum (except as after mentioned).*—Such of the said commissioners as shall be present at any court of sewers, the chairman or deputy chairman being one of the commissioners present, and the number of commissioners present being not less than two, may exercise and perform all the powers, authorities, and duties vested in the commissioners, except as hereinafter provided; and if two of such commissioners, or such chairman or deputy chairman, be not present within one hour after the time appointed for holding any court of sewers, such court may be adjourned in manner provided by the said firstly-mentioned Act in case six commissioners be not so present; and where under the said Acts the signatures of six of the commissioners are required to any rate, warrant, or other matter, except as hereinafter provided, it shall not be requisite for the same to be signed by more than two of the commissioners under this Act, but the chairman or deputy chairman shall be one of the commissioners by whom the same shall be signed.

5. *Rates to be made and mortgages authorised by no less than six commissioners (the chairman being one).*—Provided always, that no district or special sewers-rate shall be made except at a court at which not less than six commissioners shall be present, of whom the chairman shall be one, and shall be signed by not less than six commissioners, of whom the chairman shall be one: provided also, that no rate

or rates amounting to more than threepence in the pound shall be made by the said commissioners; and no money shall be borrowed, nor shall any mortgage be made or annuity granted, by the said commissioners, except in pursuance of an order of a court of which not less than six commissioners shall be present, of whom the chairman shall be one.

6. *Metropolitan Sewers Acts* (11 & 12 Vict. c. 112, 12 & 13 Vict. c. 93) to continue in force for one year.—The said firstly-mentioned Act, and so much of the said secondly-mentioned Act as would expire at the end of the present Session of Parliament, as amended by this Act, and this Act shall continue in force for one year next after the passing of this Act, in like manner as if the time so limited had been the time originally limited by the said firstly-mentioned Act for the continuance thereof.

## CAP. LXXVI.

An Act to extinguish the Right of the Crown to Deer in the New Forest, and to give Compensation in lieu thereof; and for other Purposes relating to the said Forest. (Aug. 7, 1851.)

## CAP. LXXVII.

An Act to alter and extend the Powers of an Act of the Ninth and Tenth Years of Her Majesty's Reign, intitled "An Act to empower the Commissioners of Her Majesty's Woods to form a Royal Park in Battersea Fields in the County of Surrey." (Aug. 7, 1851.)

## CAP. LXXVIII.

An Act to continue and amend an Act for establishing an Office for the Benefit of the Coalwhippers of the Port of London. (Aug. 7, 1851.)

## CAP. LXXIX.

An Act to consolidate and amend the Laws relating to the Regulation of Steam Navigation, and to the Boats and Lights to be carried by Sea-going Vessels. (Aug. 7, 1851.)

We give an abstract only of this statute.

1. 9 & 10 Vict. c. 100, and 11 & 12 Vict. c. 81, repealed from the time this Act comes into operation, except, &c. Existing certificates to continue in force.

2. The naval department of the Board of Trade to assist in the execution of this Act.

*Survey of Steam Vessels and number of Passengers.*

3. Steam vessels to be surveyed, and owners to transmit declarations to Board of Trade twice a year.

4. Times appointed for the surveys.

5. Board of Trade to grant certificates and transmit lists, to be put up at custom-houses.

6. Board of Trade may cancel certificates, and require fresh declarations.

7. How long certificates to continue in force—Proviso.

8. Fees to be paid for certificates—Application of fees and forfeitures.

9. Forgery of declaration or certificate to be a misdemeanor, or subject person summarily convicted to fine or imprisonment.

10. Copy of certificate to be placed in conspicuous part of vessel.

11. Vessel not to proceed on her voyage without certificate.—No officer of the customs to clear out, &c. any steam vessels, but upon production of certificate.—Penalty on owners and masters of vessels proceeding without certificate.

12. Penalty on owner, &c. for carrying more passengers than specified in certificate.

13. Penalty on persons forcing their way on board when vessels are full.

14. Penalty on persons refusing to pay their fares or to quit the vessel.

15. Penalty on offenders refusing to give their name and address.

16. Power for Board of Trade to appoint and remove shipwright surveyors, &c. and fix rates of remuneration.

17. The surveyors to make returns of the build, &c. of vessels and owners, &c. to give information for that purpose.

18. Surveyors to act under direction of the Board of Trade: to be allowed to go on board steam vessels to inspect, &c.

19. Penalty on surveyors demanding or receiving fees unlawfully.

*Build of Iron Steamers.*

20. Iron steamers to be divided by water-tight partitions.—Officers of customs not to grant certificates, except so divided.—Penalty on owner for neglect.

*Safety valves.*

21. Steam vessels to carry safety valves out of control of engineer, and to be deemed a necessary part of machinery.

*Boats, &c. in sea-going vessels.*

22. Sea-going vessels to be provided with the number of boats and of the dimensions herein mentioned.—Enactments with respect to boats and life

buoys in sec. 9 of 12 & 13 Vict. c. 33, not to be affected.

23. No steamer to proceed to sea without being provided a hose and signals.

24. Penalties on masters, &c. neglecting to provide boats, equipments, &c.

25. Officers of customs not to clear out vessels not complying with the above provisions.

*Lights and provisions against accidents from collision.*

26. Admiralty to make regulations as to lights. Penalty on owners and masters failing to obey them. Existing regulations to continue in force till revoked.

27. Rules to be observed by vessels passing each other.

28. Owners not entitled to compensation in certain cases of collision, but the master to be liable to penalty.

29. Accidents to be reported to Board of Trade.

30. Notice to be given of apprehended loss of steam vessels.

*Inspection of steam vessels.*

31. Board of Trade may send inspectors on board vessels whenever necessary.

32. Powers of inspectors.—Proviso for expenses of witnesses.

33. Penalty for obstructing inspectors.

*Legal Proceedings.*

34. Misdemeanors or offences to be prosecuted by information or indictment.—11 & 12 Vict. c. 43.

35. Sheriffs in Scotland authorised to exercise jurisdiction under 11 Geo. 4 & 1 Wm. 4, c. 69, to have same powers, &c. as justices exercise under this Act.

36. Jurisdiction to be where the offence is committed, and wherever offender is.

37. Service to be good if made personally, or at abode, or on board ship, &c.

38. Proof of issue and transmission of certificates.

39. Burden of proof that a ship is exempted.

40. Application of penalties.

41. Indictments to be preferred by direction of the Board of Trade or of Commissioners of Customs.

42. Penalties to be sued for within six months.

43. No proceeding to be void for informality or removed by *certiorari*.

44. Distress not unlawful for want of form.

45. Parties aggrieved may appeal to Quarter Sessions on giving security.

46. Court to make such order as they think reasonable.

*Miscellaneous.*

47. Not to affect 12 & 13 Vict. c. 33.

48. Not to extend to ships of war or foreign vessels.

49. Nothing to affect privileges of Corporation of London.

50. Copy of this Act, &c. to be kept on board. Penalty for neglect.

51. Commencement of Act.—Short title.

## CAP. LXXX.

An Act for confirming a certain Provisional Order of the General Board of Health for applying the Public Health Act, 1848, to the borough of Great Yarmouth, in the county of Norfolk. (Aug. 7, 1851.)

## CAP. LXXXI.

An Act to authorise the Removal from India of Insane Persons charged with Offences, and to give better Effect to Inquisitions of Lunacy taken in India. (Aug. 7, 1851.)

## CAP. LXXXII.

An Act to simplify the Forms of Appointments to certain Offices, and the manner of passing Grants under the Great Seal. (Aug. 7, 1851.)

## THE MAGISTRATE, AND PAROCHIAL AND MUNICIPAL LAWYER.

*Summary.*

By the Public Health Act, 11 & 12 Vict. c. 63, it was provided, for the purpose of raising the necessary funds for carrying the provisions of that eminently useful statute into effect, that "the occupier of any land used as arable, meadow, or pasture ground only shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof;" and as under this Act, tithes, tithe rent-charges, and some other payments issuing out of land, were, by reason of their omission in the statute and the want of a general description therein sufficient to include them, not assessable at the rate which they ought to pay under the Public Health Act, it was thought desirable to legislate specially on this subject, and accordingly "An Act to

amend the Public Health Act," 14 & 15 Vict. c. 50 (17 Law T. 211), was passed at the close of last Session. This statute therefore enacts, that in future "tithes, tithe rent-charges, moduses, compositions real, and other payments in lieu of tithes," shall be assessed under 3 & 4 Wm. 4, c. 90 (Act for lighting and watching parishes in England and Wales), as and in the same proportion of their annual value as land, and under 11 & 12 Vict. c. 63 (cited *supra*), as and in the same proportion of their annual value as land used as arable, meadow, or pasture ground only.

It may be well, also, to notify in this place the passing of an Act for the Inclosure of Lands in pursuance of the recommendation of the Inclosure Commissioners, by which authority is given to inclose waste lands in thirteen English counties (14 & 15 Vict. c. 54; 17 Law T. 224). A schedule to the Act specifies the names of the inclosures and the counties, but does not give the acreage, which it should have done.

The letter of Mr. DICKINSON on "Criminal Lunatics," which we inserted last week, has not been without effect, as will be seen by the following transcript.

## STATE OF CRIMINAL LUNATICS.

We are rejoiced to perceive that public attention is being directed to this most important subject. The present mode of treating criminal lunatics is disgraceful to a civilized and Christian community. We do not wish to express any maudlin sympathy for crime or criminals, but if a man, after going through the ordeal of a trial for the violation of the laws of his country, is acquitted on the ground that he was not a responsible agent; that he could not distinguish between right and wrong; that he was insane, or in plainer words, that he, at the time the offence was committed, laboured under the effects of diseased brain disordering his mental faculties; then we say such a man is entitled to our warmest sympathies, and ought invariably to be treated with great kindness and consideration. The law, in its wisdom, declares that the insane ought not to be subjected to punishment, and yet as soon as a prisoner is acquitted on the plea of insanity, he is consigned for life to the cheerless, desolate, and heart-breaking atmosphere of a public asylum, and thus subjected to the worst description of human punishment. The man in whose behalf no such plea is urged is, in many instances, in a much more favorable position. He is accused of committing an act termed criminal. He is tried and found guilty, and perhaps either transported for a term of years, or confined in one of the county prisons for a short period; whilst the poor lunatic is incarcerated at her Majesty's pleasure—that is, for life—in a lunatic asylum, and compelled to herd day and night with the maniac. It is a monstrous perversion of language to deny that this treatment is no punishment. It is punishment, and that too of a severe kind! It will be admitted that there is a certain class of criminal lunatics who require to be carefully watched, and to be under surveillance for the remainder of their lives; but other cases occur in which crime is committed during a temporary paroxysm of insanity, and where recovery—complete, undeniable restoration to health—occurs either immediately after the case is perpetrated, or after a short period of confinement. But, taking the more extreme kind of case, we maintain that the law never contemplated the subjection of the criminal lunatic to the severe and protracted punishment now inflicted upon him. Insanity is considered to be a disease rendering the party irresponsible. The criminal placed, on this ground, beyond the pale of the law, is supposed to have self-control completely destroyed; to be as incapable of preventing himself from committing a breach of the law as a patient is to arrest the act of vomiting after the administration of a potent emetic. What would be said if we subjected the poor man, with an irritable stomach, to corporeal punishment? And yet such treatment would not be more irrational and unscientific than to punish with great severity, or even at all, the unhappy lunatic guilty of criminal conduct.

We are now talking of positive and undeniable insanity, not that pseudo-morbid condition of mind in which the person has sufficient capacity to distinguish right from wrong, and is to all intents and purposes a responsible agent.

The reader may be under the impression that in some cases Government would be disposed, under the peculiar circumstances, to relax the severity of the system, and release, when it is proved that it could be done with safety, some of the criminal inmates of Bethlem and other asylums, after their having been subjected to a long, painful, and protracted

confinement. But such, alas! is not the fact. At the recent meeting of the Association of Medical Officers of Hospitals for the Insane, Dr. Forbes Winslow, when speaking of the necessity of effecting some alteration in the treatment of criminal lunatics, quoted, among other illustrations of the present conduct of the Government, the following case:—

Dr. Winslow was consulted by the wife of Captain Johnson, who was tried for the murder of the crew of the *Troy*, and acquitted (without medical evidence) on the ground of insanity. He was accordingly sent to Bethlem. It appeared by the evidence that the murderous act was committed during a paroxysm of *delirium tremens*. As the medical authorities of Bethlem Hospital assured Mrs. Johnson that her husband, whatever might have been his previous state, was then perfectly sane, she presented a petition to Government for his liberation, and offered, in the event of his being released, to provide an ample and sufficient guarantee that Captain Johnson should be taken out of the country into a far-distant land, and that he never should set foot on English soil again. The petition was rejected, and the poor broken-hearted wife informed that there was no chance of her husband ever gazing on the blue sky of heaven, beyond the gloomy courts of the asylum into which he was transferred after his acquittal on the plea of mental derangement.

Without entering into the merits of this particular case, it may be asked, is this justice?—Is this common humanity? Do the authorities at the Home office consider it a part of their creed that patients never recover from attacks of homicidal insanity; and if evidence clear and undoubted of recovery presents itself, that no relaxation is to take place in the treatment of the unhappy prisoners? If this be their doctrine, the sooner its hollowness, its absurdity, its cruelty, are exposed, the better for the credit of a Christian community and a Christian government. The criminal lunatic, we again maintain, is in many instances in a worse condition than the felon consigned to one of the model prisons, or even to the hulks or penal settlements. The men confined in Pentonville or Reading prison have advantages and enjoyments which Mr. Naughten, Oxford, Tuckitt, Johnson, and others, confined in Bethlem, are strangers to. The felon transported to one of the penal settlements can, if he is well conducted, obtain, after a short term of punishment, a ticket of leave, which amounts almost to entire liberation. He may then enter the service of the colonists, and perhaps ultimately obtain a free pardon; but, alas! what hope is held out to the lunatic, who, in a moment of transient madness and irresponsibility, under the affliction of disease, commits an offence against the state, be it murder, manslaughter, theft, or arson? Well might the words said by Dante to be written at the entrance of the infernal regions be inscribed over the portals of that portion of Bethlem Hospital appropriated to the poor criminal lunatic—

“Voi che entrate lasciate ogni speranza.”

It is to be hoped that the day is not far distant when the Government will take more enlightened views on these and kindred topics, and that the opinions of men of experience, judgment, and knowledge, connected with our own profession, will exercise a right influence on the discussions of those into whose hands are intrusted grave and heavy responsibilities. As to the necessity of having separate asylums for the reception of criminal lunatics there cannot be a doubt, and asylums too in which the poor unhappy inmates will have within their reach more of the comforts and enjoyments of life. Some change must soon take place. Let us hope that a brighter and a happier morn will soon dawn upon the poor, wretched, criminal lunatics at present confined within the iron gratings of Bethlem and other public lunatic asylums; and that if the patients are not fitted for entire liberation, their relatives will be permitted to transfer them to a private establishment where greater comfort and relaxation, with the same degree of security, are to be obtained.—*The Lancet*.

#### LAW OF SETTLEMENT.

The following are the practical results to which the Committee on the Law of Settlement have come at the conclusion of their report:—

“We have examined the origin, progress, and bearing of this law, paradoxically called a Law of Settlement, which denies to every man a settlement in 15,534 parishes, where it makes him an alien, and affects to settle him, whether he will or not, in a single one, making it the interest of himself to escape, and of the whole parish to expel him, even from that.”

“We have seen that this law originated unexpectedly, was recommended on false pretences, was carried by a local interest, and without discussion.”

“That it has never operated to the satisfaction of the so-called parish interests, by which it has been alone supported, and has always operated adversely to that of the general population.”

“That it has always impeded the labourer, and never afforded him an advantage, still less an equivalent, for the restraint on his liberty and prosperity.”

“That it has always encumbered the agriculture, the production, and the trade of the less progressive parishes, by the idleness it enforced and encouraged, the pauperism it created and made stagnant.”

“That it has always prevented the supply of a respectable population to the places where fresh hands were wanted, and has allowed them to increase chiefly or only by the addition of the outcast people from other places. It has deteriorated the towns, and made them the less fit to receive a decent population.”

“That it has made the parish of the settlement a prison and every other parish a hostile fortress. It has encouraged the refusal, the restriction, or the destruction of habitations where it pretended to give the legal home, and it has denied a home every where else, and has often led to no alternative but sordid, compulsory, and unprosperous settlement or a vagrant life, for which last it has provided the most specious justifications.”

“That it has, by destroying the field of the Englishman's employment, allured the Irish, and even afforded them bounties to supply his place where he was wanted.”

“That it has accumulated the unsettled population in undefended places, which have become filthy nests of wretchedness, pauperism, and crime.”

“That it has isolated the interests of every parish, made inter-parochial war their normal state.”

“That it has never benefited one parish, but by the more than equal injury of another, with the addition of injury to the settler.”

“That it has, contrary to the main object of law to remove occasions of dispute, created the occasion for the greatest mass of dispute and litigation ever witnessed in any nation for any equal period of time.”

“We have seen incessant attempts made at amendment. The law has traversed from the one extreme of universal removability of the poor man only likely to be chargeable,—persevered in till it was as unendurable to other classes as the poor,—to the nearly opposite result, the prohibition of all removal except of unsettled poor, chargeable, who have not been resident for a defined time or under defined circumstances; a provision which, under the controlling influence of the continuing settlement law, is rapidly producing mischiefs both to parishes and the poor as virulent as the worst of the effects of that fatal system. We have seen nothing but failure in attempts at partial amendments, or, more frequently, the introduction of new and unexpected mischiefs.”

“On the other hand we have seen instances of pure abolition or extensive excision of the larger members of this body of law, such as the abolition of the power of removal of all unchargeable people, and the entire abolition of heads of settlement, and we have seen in all such cases that the destruction has been free from mischief, even when frustrated of some of its good effects by the remaining portions of the law of removal.”

“The apprehended dangers of the entire abolition of the law of removal have been examined in detail, and none will stand the investigation.”

“Some amendments, proposed with the view to lessen the admitted mischiefs of the law, are shewn to involve preponderating mischiefs of their own, and to be less effective for their proposed end than simple and absolute abolition.”

“We come, then, to the conclusion, that the only course consistent with the public welfare is, to repeal the power of removal by warrant.”

“This, for reasons shewn, should extend to Scotch, Irish, the islanders, and vagrants.”

“It is unnecessary to provide expressly for ‘settlement,’ the provisions as to this and as to legal and other proceedings all become inoperative for present purposes by the abolition of ‘removal,’ and, as they are mixed up with other matters, they should be left in operation as to them until they have been more carefully examined, or can be appropriately provided for in detail.”

“As the right of free settlement may operate to the disadvantage of some of the more accessible places, and as moreover it would of itself be beneficial that every union should become to all intents and purposes one parish,—but as this, if effected at once, would involve a sudden and violent increase of burden in many of the smaller parishes without equivalent advantage to any,—it is desirable so to introduce equality of rating as to render the approximation, if possible, more rapid than the receipt of benefits from the change of the law; and, so as not to interfere unnecessarily with the value of property or the just expectations of its present owners or existing expectants, it seems desirable that—

“Every union be on and after the day of an union for rating, according to the provisions of the Poor-law Amendment Act, dispensing with the consent of the guardians.”

“That all the expenditure be provided for by a common fund.”

“That this common fund be raised for the first (say twenty-seven) years by rates made in each parish, approximating to an equal union rate by (say one-tenth) of their differences every three years.”

“That in the year (say 1878) and thenceforth the common fund shall be raised by an equal union rate.”

“It may be expected that a perfect freedom of settlement will sooner or later produce a greater approach to equality in the supply and remuneration of labour throughout the country; that it will enable every locality and every kind of property to enjoy the full benefit of its natural advantages for the employment of labour; and that, while it proportions the supply of labour to the demand, it will increase its aggregate rewards by allowing it readily to avail itself of every occasion for its more profitable employment.”

“Circumstances are at present the most favourable that have been enjoyed for many years for effecting the change. Large alterations have been recently made in the prospects of the profitable cultivation of different soils and different districts, requiring for the benefit both of districts in which human labour should be diminished and of those in which it should be increased, and in a view to the general advantage of the community, that the transfer of labourers should be effected with the least possible difficulty. The same or similar changes in the law have made it almost a certainty that manufacturing and trading towns and districts will require a large accession of fresh hands for the purpose of increasing production and commerce. Add to these inducements the rapidly increased and increasing mechanical facilities of locomotion, and it becomes apparent that to retain the impediment of settlement at this time is to forego one of the most favourable opportunities ever presented to a community for abandoning without danger or inconvenience an absurd and mischievous error.”

“One consequence would be certain, the relief of our statute books and the law library, and the administration of justice, of the great incumbrance of the settlement law, and the local and the central administration of the poor laws of a worse than useless but most engrossing portion of their duties, and that a great saving would not only be made of the trouble and costs of removal and litigation, but in those, often left out of calculation, but not less serious, of the inquiries and trouble incurred in cases where neither removal nor dispute eventually take place.”

“Be these advantages great or small, whether new or unforeseen evils spring from the repeal or not, one other advantage is certain, that if new legislation in the domain and for the purposes of settlement should ever be again judged necessary, the present repeal would clear it from its main difficulty by discharging it of the existing mass of incongruous, conflicting, and mostly obsolete and effect provisions.”

#### JOINT-STOCK COMPANIES' LAW JOURNAL.

##### Summary.

No point of interest has arisen for review in this department of our Journal. Business, now that we have nearly reached the middle of the vacation, is almost entirely suspended.

The only matter moving in winding up has been that of the National Land Scheme, for which a special Act of Parliament, authorising the winding up of the affair, was passed last session. A sitting of five hours appears to have been devoted to the hearing recommendations of candidates for the official management without any decision being made by the Master.

FRANCIS O'CONNOR'S LAND SCHEME.—On Thursday, Sept. 11, Master Humphrey proceeded to hear the claims of the different candidates for the office of official manager. They amounted to twelve, viz. Messrs. Grey, Quilter, Turquand, Goodchap, Earnest, Price, Croydill, Norris, Harding, Fellows, Hutton, and Ainger. The candidates were represented by counsel, and the proceedings occupied nearly five hours, as each learned counsel read voluminous documents in the shape of testimonials as to the efficiency, ability, and integrity of his client. A recommendation in favour of Mr. Ainger was handed in, signed by 2,100 shareholders; but it was discovered by the Master that many of the names were in the same handwriting, while a few had made the sign of the cross. This gave rise to considerable conversation, and ultimately the case was adjourned till next Tuesday week, the Master observing that if in the meantime any affidavits were to be sent in explanatory of the signatures, they must be filed on or before next Tuesday.

## REAL PROPERTY LAWYER AND CONVEYANCER.

### Summary.

Two or three cases worthy of note in this department of our journal are reported in our last number. In *Nowlan v. Walsh*, 17 Law T. 292, a question arose upon the construction of a will, whether a life interest and power of disposal was given or property absolutely. A testator bequeathed to his wife "the interest arising from his property, which it was his will and wish should be collected in as soon after his decease as convenient, and placed in the public funds; the income therefrom it was his will and wish that his wife should have and enjoy during her natural life, as well as the income arising from any other property he should die possessed of." After giving the furniture to his wife, and bequeathing certain pecuniary legacies, he left the remainder of his property at the disposal of his wife, if she remained a widow; but if she married again, he gave her an annuity for life, and directed that the remainder of his property should be divided amongst certain other persons. The widow did not marry again, and died intestate. Vice-Chancellor KNIGHT BRUCE held, that by the true construction of this devise the representative of the widow was entitled to the general residue of the testator's property. "There is nothing," said his Honour, in delivering judgment, "in the word *disposal*, which in my opinion necessarily points to power more than to property. Here I can see several reasons why it should mean property. He meant his wife to have everything, subject only to the legacies and the contingency of marrying again. A case interesting to trustees is that of *Bensusan v. Nehemias*, 17 Law T. 292. In this we cannot do better than simply transcribe the marginal note. In 1822 a sum of stock was vested in A., B. and C. upon the trusts of the marriage-settlement of D. (the daughter of A.) In 1831 A., B. and C. transferred 2,000*l.* to E. the husband, who sold it out. In 1841 B. became bankrupt; and in November, 1847, C. and E. who were partners, became bankrupt. In October, 1847, A. died, having by his will, dated in 1844, directed a sum of 6,000*l.* stock to be placed in the names of the trustees of D.'s settlement, and G., whom he appointed his executor: and further, that none of his legacies should be paid until six months after his decease, and that his debts should be paid. In one part of his will A. thus expressed himself, "forgiving my dear daughter D. her legacy of the above-mentioned 6,000*l.*" &c. The Court held, that the legacy of 6,000*l.* stock was in satisfaction of the 2,000*l.* stock due in respect of the breach of trust.

## COUNTY COURTS.

### Summary.

In the last number of the *County Courts Chronicle* there was given at some length the judgment of Mr. Amos, the judge of the Marylebone County Court in the cause of *Alder v. Yeoman*, out of which arose a charge against him of corrupt practices in his office of judge, which was, however, ignored by the Court of Q. B. Notwithstanding the sneers thrown out in the course of that judgment against the Bar and the Press, whose duty and office it is to expose incompetency and put an end to arbitrary and capricious conduct in courts of justice wherever it is found, we abstained from making any comment on the case, not because we believed that the learned judge had made insinuations against the Bar and the Press to which they were fairly open, but because on his statement, that the plaintiff in that cause had sent him a message of contrition, in which he avowed that "he was led into the proceedings by the advice of 'CARTER, his

counsel' (as the judgment courteously has it), otherwise he would not have thought of any steps of the kind," we did not feel justified, in giving expression to the suspicions we entertained. Nevertheless, it was quite evident, to our mind, and we freely heard it remarked by others, that ALDER's contrition was not genuine, but simulated in order to make favourable terms for the payment of costs. We are not the apologists of ALDER; his conduct is before the public, and they will not draw from it an erroneous conclusion. But though we regarded the entire transaction with distrust, and thought ill of the taste which could make a parade of generosity in a matter where a man's poverty had pleaded for consideration, we confess we were not prepared for a disclosure such as that contained in a letter by Mr. CARTER to *The Times* on this subject, enclosing a communication addressed to him from ALDER, which unfolds the manoeuvre by which the "message of contrition," as Mr. AMOS complacently terms it, was obtained, and exposes as gross a breach of faith (if ALDER is to be believed) as ever came before the public. We give the correspondence entire; further comment is unnecessary:—

### MARYLEBONE COUNTY COURT.

#### TO THE EDITOR OF THE TIMES.

SIR,—In your paper of the 26th inst. appeared, under the above heading some observations on the recent case of the *Queen v. Amos* (followed by a letter from the complainant, Alder). As the tenor of those remarks is not only injurious to me personally, but highly unjust and manifestly untrue, I ask for the insertion of the following correspondence as a debt which, I assume, the conductors of *The Times* will be most willing and even anxious to discharge when brought to their cognisance. From the commencement of the article it would appear as if the comments prefixed to the letter emanated from the editor of *The Times*, and were not communicated; but, upon consideration, I arrived at the conclusion that it must be the work of a correspondent, assuming that form for greater effect, and with an obvious purpose, or that, at all events, the information contained in it must have been conveyed to you probably in a more enlarged and copious form, and from which materials you had selected the data upon which were grounded the substance of the observations. Now I infer this, first, because the facts could not have been drawn from the letter inserted, and which by no means justified the prefatory remarks. For instance, there is no counsel named in the letter, the word "contrition" is not used in it, and the difference is obvious at once between acting "under the advice of counsel," and "being led by the instigation of his counsel;" the one expressing the usual and well-understood practice when a client consults his legal adviser, the other indicating an animus on the part of counsel, as if he had private motives of personal rancour, which he made the prosecutor the means of gratifying. It is for these and other reasons that I assume the composition is not your own; for while you, I apprehend, could have no motive to make the commentary stronger than the text warranted, it would be very different on the part of one who has deemed it worth his while to sacrifice 20*l.* of costs, offered to be paid him, for the purpose of obtaining such an acknowledgment as that contained in the annexed letter, and respecting which the unfortunate writer of it might truly say with Romeo's apothecary:—"It is my poverty, and not my will, consents."

How far this will improve the position of the person who could resort to so transparent a trick I may safely leave you and the public to decide, after considering the full and explicit contradiction and exposure contained in the following letter, communicated to me before I had an opportunity of complaining, as you may judge from the dates, and distance at which I am.

Even if the concurrence of both prosecutor and defendant in the apparent statement had been complete, it would only have borne the aspect of a palpable conspiracy (in my judgment) to put forward matter which must be untrue, unless the prosecutor was prepared to admit that he had committed gross perjury in the affidavits which were the necessary foundation of his application.

To attempt to remove a supposed stigma by such means renders it an imperative question with the authorities how far any one who is guilty of, or connives at it, can be a fit person to fill a high judicial office; and whether the inference of so acting (or, at all events, in a highly reprehensible manner) is not irresistible, from an impartial consideration of the

subjoined document, I leave to the judgment of those who may take the trouble to consider the question.

I beg to remain, Sir,

Your obedient servant,

SAMUEL CARTER.

Rockview-house, Tavistock, Aug. 29.

P.S. I ought not to pass over one other gross misrepresentation—namely, that Mr. Amos's personal expenses were double the amount taxed! What? 53*l.* 12*s.* for simply shewing cause by one junior counsel, with three affidavits, against a rule nisi! It would make any honest man's blood boil to read the items and consider the amount of the bill of costs sent in and claimed of the prosecutor on behalf of the defendant, amounting to several pounds above thirty, and which it seems have been taxed off to 26*l.* 16*s.* and in which for the business done I should have considered 15*l.* an ample remuneration. It ought to be printed at length for the benefit of mankind.

"27, Redman's-row, Mile-end, Aug. 26.

"Sir—I was surprised beyond measure on seeing my name in the *Times* of this day, affixed to a letter with some prefatory remarks upon the proceedings taken by me against Mr. Amos in the Queen's Bench, arising out of my action against Yeoman in the Marylebone County Court, because such publication was wholly unauthorised by me, and contrary to a distinct understanding existing between a Mr. Maloy, Mr. Amos's agent, and my solicitor, Mr. Fisher; and your name being mentioned I have determined, in justice to you, to make the following communication of facts, which I authorise you to make any use of you may think proper, having this day made application, through my solicitor, to Mr. Maloy, at the Marylebone County Court, for the author of such communication, but which he said he was unable to give, and expressed his surprise at the publication.

"A few days ago I made a proposal to Mr. Amos, through my solicitor, to settle the costs due to him in payments at 2*l.* per month (2*l.* down), when I received a communication from Mr. Fisher, requesting me to meet Mr. Maloy at his office, when the matter would be arranged. I accordingly met Mr. Maloy, he first undertaking that no steps should be taken against me during the negotiation (as you will see by the enclosed letter); but his first act was to serve me with the proceedings necessary to issuing an attachment against me for the amount of costs, and obtaining my address. He then asked me if I should have any objection to any amount that I might recover in my suit against Yeoman being paid towards the costs, and the balance at 2*l.* per month, stating that he would not say the verdict was in my favour, but giving me to understand that such might be the case. To this I consented; and these are the only proposals I ever made to Mr. Amos.

"I heard no more of the matter till Sunday, the 17th inst. when I received a communication from Mr. Fisher requesting that I would call on him, as Mr. Amos had made a proposal to him, which I did. He then told me that upon payment of 5*l.* he could settle the matter if I would consent to write a letter to Mr. Amos, of which he handed me a copy enclosed, stating that Mr. Amos wanted your name inserted. I objected to write the letter, as it was entirely against the facts of the case; but my solicitor, wishing to conciliate Mr. Amos (and from the fact of my having made repeated applications to the Marylebone County Court for information as to in whose favour the verdict had been given in the cause out of which the proceedings against Mr. Amos had arisen, but without being able to obtain any information, although nine months had elapsed since I commenced the suit), advised me to write the letter as it appeared in the *Times* of to-day, he being positive he could make no alterations in the terms, and the letter be as a matter of very little moment, as he had a distinct understanding with Mr. Amos's agent, Mr. Maloy, that the same should not be published under any circumstances whatever; and being not only anxious, of course, to save myself from the attachment, but to secure the most favourable decision as against Yeoman, was the reason of my consenting.

"You will therefore see that I had no other alternative but to affix my name to the letter in question. "In conclusion, allow me to inform you that I have this day, for the first time, obtained the positive information that Mr. Amos's decision is in my favour to the amount of 7*l.* 7*s.* but without costs, thereby saddling me with my own expenses, amounting to 17*l.* although the verdict in my favour admits that I had a just cause of action.

"I am, Sir, your most obedient servant,

"FREDERICK W. A. ALDER.

"Samuel Carter, esq."



SUPERIOR COURTS OF COMMON LAW.

FIRST REPORT.

(Continued from page 229.)

In actions for unliquidated damages, when judgment is suffered to go by default for want of a plea, a writ of inquiry to assess the damages is necessary. Such inquiry is attended with considerable expense; and there are many cases which do not come within the class of actions in which we consider that final judgment ought to be signed at once, but are in fact cases in which the damages are almost matter of calculation, such as an action for damages for the non-repair of a house, and the like. We propose, therefore, that in all cases where the amount to be recovered is substantially a matter of calculation, the Court or a judge should have the power of directing the assessment of damages to be made by the Master.

We think, however, that in cases where actions are brought against persons residing abroad, there should in all cases be an inquiry before the Master as to the reality and amount of demand.

As a consequence of the abolition of the forms of action in debt and *assumpsit*, we also propose, that whenever the plaintiff recovers a sum of money, the amount should be awarded to him without any distinction as to whether the sum recovered is claimed as a debt or as damages. The reasons for this alteration arise from the present form of judgment varying according to the nature of the action. In the action of debt the judgment is, that the plaintiff do recover the debt, with damages (which are generally merely nominal), for the detention of the debt and costs. In other actions on contract the judgment is for damages and costs only.

In the former case, when judgment is obtained by default, it is signed for the whole amount mentioned in the declaration, which is invariably a much larger sum than is really due, and the execution, which must follow (that is, agree with) the judgment, issues for the same amount; but the sheriff by a memorandum on the writ of execution, is directed to levy only the sum really due. The judgment, however, for the whole sum is recorded against the defendant, which may affect the credit of persons in trade who may have judgments signed against them for a much larger sum than is really due. Difficulties also of a technical nature arise as to the mode of entering the verdict and judgment in cases where a set-off is pleaded to an action of debt, and a small sum only is recovered beyond the set-off; in which event the judgment must be for the whole debt stated in the declaration, a practice not only inconvenient but not in accordance with the truth. In other actions on contract the judgment is only signed for the sum which is found to be due and ultimately recoverable, and no such inconsistency or injustice arises. The effect of our suggestion is to assimilate the form of the judgment in all cases where money is recovered.

We do not intend to interfere with the right which a plaintiff now has under the statute 8 & 9 Wm. 3, c. 11, to sign judgment for the penalty of a bond within the provisions of that Act, as a security for further damages. That right depends upon the provisions of the statute, and is not necessarily connected with the particular form of action.

The pleadings, as we have already pointed out, proceed until an issue or issues of law or fact are joined between the parties. The issues in law are stated in what are called paper books, containing the relevant parts of the pleadings, and copies of those books are furnished to the judges, who, after argument, determine the questions of law thus presented to them. If there be issues in fact, the next step is for the party who is desirous to have them tried by a jury, to make a correct copy of the pleadings, adding at the end a statement that the sheriff is directed to summon a jury, and to deliver it to the opposite party. That copy is called the issue, and it is generally accompanied by notice of trial. We do not think it necessary to suggest any alteration of the practice as to the preparation of the issues in law or fact, though we may observe, that with regard to the former it would be desirable to enforce more rigidly the rules of court which prohibit the insertion of any but the relevant parts of the pleadings.

With respect to notice of trial, as it is very desirable that there should be uniformity of proceedings, we recommend that there should be the same period for notice of trial in all cases. At present there are as many as four different periods, besides what is called short notice, and of course such a variety frequently occasions mistake.

The Nisi Prius record is a copy on parchment of the issue. It is useful at the trial as an authentic record of the pleadings, and therefore we think that it should be retained. It is lodged with the officer of the Nisi Prius Court in which the cause is to be tried, and must be both sealed and passed, and if the cause be made a remanet the record must be resealed. This sealing and passing, and re-sealing, are idle forms, and ought to be abolished. They originated in the theory that the Nisi Prius record comes from the office of the Court, and consequently ought to bear its seal. In fact, it is prepared by the attor-

ney, and the sealing is a form only, which is attended with expense, and no advantage whatever.

The present jury process for trials at Nisi Prius, viz. the *venire* and the *distingas* or *habeas corpora*, are open to the same remark; they are forms useless and expensive, and a source of irregularities which sometimes defeat justice. The party desirous of having the cause tried prepares two writs, by one of which, the *venire*, the sheriff is directed to summon a jury to Westminster by a certain day; this, however, it is not intended he should do: the other writ, viz. the *distingas* or *habeas corpora*, supposes that he has done so, and that the jurors have made default, and commands the sheriff to distrain their goods or take their bodies so as to have them at Westminster, unless before that day the chief justice or judge of assize come to a certain place where the cause is to be tried; it is to this place the jury are summoned. In practice, the sheriff, without reference to any particular writ or cause, summons a sufficient number of persons to serve as jurors in all causes to be tried, and has their names inserted in a printed panel. A copy of this panel is annexed to each of the writs above mentioned, and the sheriff makes a return, stating that he has obeyed the writ. It is manifest that these writs are useless, and have no operation, and that such a panel might as well be attached to the record as to the writs; yet within a recent period a plaintiff who had recovered a verdict lost the benefit of it because the panel was not annexed, and no return had been made to one of these writs. We propose, therefore, the abolition of these mischievous forms, but that the useful part of the present proceeding, namely, the panel, should be retained.

With regard to special juries, it appears to us that great inconvenience arises from the present practice of appointing a separate special jury for every cause. At present each special jury costs about 24*l.* about one half of which goes to the jury, the residue in the expenses of obtaining it. Again, for each special jury cause twenty-four jurymen are summoned; and making allowance for those who are summoned in more than one cause and those who are absent from home and not summoned, perhaps twenty are summoned for each cause, and liable to a fine if they do not attend. Now, at some towns, as Guildford, it is not uncommon to have ten special jury cases, therefore 200 jurymen are summoned. It is not known in what order the cases will be taken, and those who attend are detained there probably on four successive days of the assize week, and after all perhaps some of the cases remain untried. The practical consequence is, that in general not above half attend; and it sometimes happens that there are only two or three out of twenty-four in one case, while in the next more than twelve are present. In the first case the parties lose their special jury, in the others special juries have lost their time. Supposing that one half of the 200 were to attend, it would obviously be cheaper and better to have had a panel of forty-eight only.

We therefore propose, that in all the counties, except London and Middlesex, a precept shall be issued to the sheriffs, directing them to summon a number of special jurymen,—say forty-eight in large counties, where many special jury causes are tried, and a smaller number in the other counties,—and that the persons so summoned shall be the jury for trying all the special jury causes at the assizes. We had intended to propose the same system in Middlesex and London, but we have been informed by several persons of great experience and information upon the subject that it would be extremely inconvenient to men of business in London to be kept for a whole week together absent from their ordinary calling. In deference to this expression of opinion, we propose, in the first instance, to limit the alteration to juries in the country, and it may afterwards be extended to Middlesex and London if found expedient.

We have received a suggestion, entitled to the greatest respect and attention, viz. that there should be no distinct class of special jurors, but that special jurymen and common jurymen should all be on one general list, and that the juries for trial of all cases, civil and criminal, should be selected from one and the same general panel. We think, however, that there are many civil causes which from their character require a special jury, with as little admixture as possible of common jurors: upon the other branch of the suggestion, relating to the constitution of juries in criminal matters, it is not within our province to offer any opinion.

For the purpose of meeting some cases of an extraordinary character, where local prejudice is allowed to operate, a power ought to be given to the Court or a judge to direct that the jury may be struck according to the present practice.

The present mode of obtaining a special jury is by a side-bar rule, which is a matter of right to which, subject to certain restrictions as to time affecting defendants in all actions and plaintiffs in replevin, all litigants are entitled. This rule is attended with some expense, and is unnecessary. A simple notice would answer every purpose. We therefore propose

that the mode of obtaining a special jury by a plaintiff, except in replevin, be by his giving a notice to the defendant of his intention that his cause shall be tried by a special jury, which notice shall be given at such time as would be necessary for a notice of trial; and that the mode of the defendant or a plaintiff in replevin obtaining a special jury shall be by giving a notice within the time now limited for a defendant or a plaintiff in replevin obtaining a special jury; provided that a judge may, on summons, at any time order that a cause shall be tried by a special jury.

It is well known to be a frequent practice for defendants who wish for delay, to obtain a rule for a special jury, which practically, in London and Middlesex, has the effect of postponing the trial. There is very great difficulty in getting rid of the effect of such a rule, even when obviously resorted to for the sake of delay, in consequence of the stringent terms of the Jury Act. To remedy this, we propose that the Court or a judge shall have power, if satisfied that notice of intention to try by a special jury is given for delay, to order that the cause be tried by a common jury, or to make such other order as to the trial of the cause as they or he may think fit.

We also propose certain alterations as to obtaining a view, and as to the entry of the verdict on the record, which alterations are calculated to diminish expense, but do not require particular notice in our report.

At this stage of the cause, viz. after issue joined, and before trial, admissions of such written documents as it is proposed to adduce in evidence are applied for. We propose an alteration in the present mode of obtaining such admissions.

The practice we propose to alter has existed for about seventeen years; it had its origin in the report of the former commissioners; it is supported by arguments apparently unanswerable; nothing on the face of it can be more reasonable than the present rule, and yet we believe it has been productive of very great and unnecessary expense.

By the practice in question a party is compelled to give his adversary notice of such documents as he proposes to give in evidence; the party to whom notice is given may inspect and admit or refuse to admit them at his pleasure. If no such notice is given, no costs of proof are allowed; if it is, and admission is refused, and the judge holds the required admission reasonable, the party refusing pays the costs of proof if the document is proved. As we have said, nothing can seem more reasonable, but what is the consequence? Take by far the most common case which occurs in practice, viz. an action on a bill of exchange against the acceptor who denies the acceptance. The attorney for the plaintiff prepares a notice to admit, serves it, takes out a summons to admit, then a second summons, then procures an order that the defendant for not admitting shall pay the costs of proof if the document is proved, and then serves the order. Here are six different items of charge; perhaps the action is settled without trial; it is so in more than half the cases where these steps are taken; even if not, it is by no means unlikely, nay it is more than probable, that a witness who is in Court for another purpose could have proved the mere writing, which is very rarely, perhaps not once in one hundred cases, the question in dispute. In all these cases, therefore, the expense is wasted, and even where it is not—that is, where the admission is made, and the attendance of a witness saved—in nineteen cases out of twenty more expense is incurred in the six steps we have adverted to than in subpoenaing a witness to prove handwriting. This will appear from the following items of costs:—

Drawing and engrossing notice, and £ s. d.	
service thereof .....	0 10 0
Attending to give inspection .....	0 6 8
Summons to admit .....	0 5 0
Attending .....	0 3 4
Second summons .....	0 5 0
Attending before judge, order made .....	0 6 8
Order, copy, and service .....	0 6 0
Copy for judge .....	0 2 0

£2 4 8

It will be said we have taken a case where there is a single document and a single witness; but this is so in by far the most numerous class of cases, except indeed that there is commonly notice to admit a letter from the attorney, or to admit a notice to produce, and the clerk who could prove it is as commonly in court. It may be said that when there are many documents the rule is beneficial. This may be so; but a case has occurred in practice in which a correspondence between the plaintiff and defendant was required to be admitted. The whole, no doubt, could have been proved by a single witness from the office of the plaintiff. The following charges were made in the bill:—

Drawing notice to admit 2,394 £ s. d.	
documents .....	29 5 0
Two copies (the defendants severed in pleading) .....	19 10 0
One copy for the judge .....	9 5 0

£58 10 0

If the case had gone on to trial two more copies would have been claimed for counsel, making 781, for what really might have been proved by one clerk from the plaintiff's office for 10s. 6d. 1,398 of these documents were letters from the plaintiff to the defendants, and the rest, with one exception, a notice to produce, were letters from the defendants to the plaintiff; so that in the notice to admit the words "the like" and "ditto" were copied no less than 2,391 times. It might have been urged by the plaintiff that the rule is compulsory, and so it has been decided (*Rutter v. Chapman*, 8 M. & W. 388), and that he was not bound to incur any costs himself which would not have been allowed on taxation, and if this notice to admit had not been given he would have lost the costs of proving the documents. This is true. We propose, therefore, that in future parties at all events should have the option of not burdening the opposite party with such a heavy expense, and that the notice to admit shall have the same effect as the order of the judge, that is, that either party may call on the other by notice to admit, and in case of refusal or neglect, the cost of proving the document shall be paid by the party neglecting or refusing, whatever may be the result of the cause, unless on the trial the judge shall certify that the admission required was unreasonable, and no cost of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the Master, a saving of expense. What we have recommended will get rid of some needless machinery in all cases, viz. the summonses and orders to admit or pay costs, and place the decision of whether the request to admit is unreasonable with the judge at the trial, who certainly can best determine that question.

In order to meet an objection which has been raised by a very learned personage, that when the admission is made it would still be necessary to prove the admission, which now is done by the production of the order of the judge, we propose that this may be done by affidavit, if necessary, so that if the admission be made either in town or country, and the cause be tried at a distance, the production of an affidavit by the attorney or his clerk of the handwriting of the admission annexed to the affidavit would be sufficient. If no admission be so made, the notice to admit served need not be proved at all at the trial. The costs would then be thus:—

Notice to admit .....	£0 10 0
Attending to give inspection ....	0 6 8
Affidavit of execution .....	0 6 0

£1 2 8

When no admission is made the expense would be 10s. only.

If the cause is tried in the same place where the admission is made no affidavit would be necessary, as the attorney himself or his clerk could supply the proof.

Whilst on this subject it seems to us most convenient to mention another evil, of constant occurrence, which may be remedied by the application of the same principle.

There is scarcely a case that goes to trial in which a notice to produce is not given. If the service of such notice be not admitted, it is necessary for the purpose of making secondary evidence of documents admissible, in case of their non-production at the trial, that a witness should be in court formally to prove the service, which may have been effected in London when the trial is in York. We think there would be no objection, in order to save the expense frequently incurred by both parties, to allow an affidavit of the service of the notice, and the time when served, with a copy of the notice annexed, to be in such cases sufficient evidence of the notice to produce. A variance between the copy and original, if served, would at once be detected by production of the original. As the proof is merely formal, the proposed innovation cannot be reasonably objected to.

The next stage in the cause is the trial at Nisi Prius, the consideration of which subject involves questions of such importance and difficulty (amongst others the subject of the law of evidence and the admissibility of the parties to the cause as witnesses), that we reserve it for a separate report.

Upon the verdict found at the trial follows the judgment in favour of the party for whom the verdict has been found, except where the judgment is arrested, or judgment entered *non obstante veredicto* for defect of law appearing upon the pleadings—matters with which we shall deal presently.

(To be continued.)

## THE LAWYER.

### Summary.

By statute 14 & 15 Vict. c. 53, (17 Law T. 223), the Copyhold Commissioners, the Tithe Commissioners, and the Inclosure Commissioners, are consolidated into one Board, with power to carry on the several proceedings of the

former Boards, under the same style and seal as were originally adopted and used by the separate Boards. Matters commenced under the Tithe Commission are to be completed by this Board, whose existence, however, and the duration of the Act, are limited to two years. Chapter 50 of the new statutes, 17 Law T. 224, authorises for the future the service by post of notices relative to the proceedings of "incorporated and other charitable institutions in England;" and chapter 60 is the memorable Ecclesiastical Titles Bill, whose purpose and provisions are so well known as to render needless a recapitulation of them here.

**EQUITY PRACTICE.**—In *Gilpin v. Magee*, 17 Law T. 293, it was ruled by Lord CRANWORTH, that a residuary legatee who seeks an account against executors for the administration of an estate, and also at the hearing wishes for inquiries before the Master, touching the effect of certain of the trusts in the testator's will, as to whether they were or were not created for "superstitious uses," should not proceed by "claim." A dictum was also given in the same case that, where accounts are denied which can only be directed after evidence taken in the usual way, it is necessary a bill should be filed for that purpose. A point worthy of note, as to parties, was decided by Vice-Chancellor TURNER in *Wilkinson v. Fowkes*, 17 Law T. 293. In that case an objection for want of parties had been allowed at the hearing, and the party decreed to be necessary was made a party by a supplemental bill; the Court, however, held that the supplemental bill was defective, because the defendant in the original suit was not a party to the supplemental suit.

**COMMON LAW.**—An important question as to costs was decided on error from the Exchequer, in the Exchequer Chamber last Term. (*Partridge v. Gardner*, 17 Law T. 294.) The point was, whether, in a case where a plaintiff succeeds on all of several issues of fact, and fails on an issue in law (the defendant having judgment on demurrer), the plaintiff is entitled to the costs of the issues found for him, under 4 & 5 Anne, c. 16, s. 5. The Court, affirming the judgment below, held that the plaintiff was not entitled under this statute to the costs of the issues found for him, no issue of fact having been found for the defendant. We may remark that, in the case of *Callender v. Howard*, in the Common Pleas, 16 Law T. 412, the decision of the Court of Exchequer in this case was expressly overruled. This circumstance probably occasioned the carrying of the case into error. An interesting decision at Nisi Prius, on the subject of privileged communications between attorney and client occurs in *Cleave v. Jones*, 17 Law T. 288. In this case the defendant, executrix of P. J. in 1840 gave the plaintiff a promissory note for 330l. the amount of a debt due from the testator. The plaintiff, being also the defendant's attorney, applied in 1846 to the defendant for a statement of account, shewing her position with reference to the testator's estate, in order to prepare a case for the opinion of counsel on a question relating to the right of the defendant as executrix, and in accordance with that request a statement of account was sent to the plaintiff, in which the defendant debited herself with the interest on the promissory note. ERLE, J. held, that in an action on the note, the plaintiff could not make use of the account to take the note out of the Statute of Limitations, such account being a privileged communication.

We invite attention to the series of questions issued by the Chancery Commission for the opinion of the Profession as to the best method of taking evidence in proceedings in Chancery. The questions will be found below.

## IMPROVEMENTS IN THE MODE OF TAKING EVIDENCE IN CHANCERY.

THE following questions have recently been issued by the Chancery Commissioners for the consideration and opinion of the Profession on the question of improvement in the method of taking evidence in Chancery:—

1. Can the mode of taking evidence by the oral examination of witnesses in the presence of the parties, their solicitors or counsel, be beneficially introduced into the system of administering justice in the Court of Chancery?

2. If so, should the whole evidence be taken orally, and whether before the judge who hears the case, or before a Master, examiner, or other officer appointed for the purpose?

3. Assuming that the whole evidence cannot be taken orally before the judge who hears the case, should the judge have power to direct the oral examination of witnesses before him?

4. If so, should the power be exercised at the sole discretion of the judge, or should the parties have the right; and if so, subject to any and what restrictions to require the witnesses to be examined in court?

5. Should the witnesses be examined orally in court in cases only when the judge feels a doubt on the effect of the written evidence, or when the evidence is conflicting, or with any and what other limitations or restrictions, or in particular classes of cases, such as questions involving sanity or insanity, legitimacy, or others, when issues are now ordinarily directed?

6. It has been suggested, that if, at the hearing, the Court had power to direct oral examination of witnesses before itself, it might be able to dispense with issues, and, in many cases, with references to the Master.

7. Should the oral examination of witnesses in court be considered as an adjournment of the hearing, or a distinct proceeding, founded on an order of the Court, subject to appeal in like manner as orders now made directing issues or references to the Master?

8. Should not the Court in such cases find the facts distinctly and separately, in the nature of a finding by a jury or a Master?

9. Should the oral examination of witnesses in court be confined to the hearing of the case, or extend to interlocutory application generally, or to those of any and what particular class?

10. Should the decision of the Court upon the evidence, taken orally, so far as the facts are involved, be final, or subject to appeal; and what provisions would be necessary with respect to new trials?

11. Should the power of taking evidence orally be extended to a court of appeal?

12. Assuming that preliminary evidence will in general be adduced, should such preliminary evidence be by affidavit, by depositions on written interrogations, or by depositions taken orally?

13. It has been suggested that in all cases evidence by affidavit might be allowed to be adduced by the parties, as in the Master's office, subject to the right of either party, at the peril of costs, to require the witnesses to be produced before an examiner for oral examination and cross-examination.

14. It has been suggested that the mode in which evidence is taken for the courts of common law, of witnesses abroad or about to leave the country, would afford a good precedent for the examination of witnesses in equity.

15. Is there any sufficient ground for the jealousy with which courts of equity seek to preserve the secrecy of the evidence given until publication?

### Queries.

IN answer to the query of "C. D. H." contained in the LAW TIMES, No. 439, I venture to submit that the equity of redemption is still subsisting in the devisees of the mortgagor. If the mortgagor had himself been admitted on the forfeited conditional surrender, this clearly would not have barred the equity of redemption. And the same by the lord can make no difference in this respect. For in the first place, if entitled to seize, he could, I presume, only seize *quod suum*—i. e. until the person entitled came in to be admitted. In the next place, the devise being only tenant for life, any seizure by the lord could not affect the rights or interests of the remainder-man; so that whatever title the heir acquired under the grant, the right to redeem would still remain in the devisees of the mortgagor up to the limit prescribed by the statute 3 & 4 Wm. 4, c. 27. Chelmsford, Sept. 5, 1851. CLERKE.

THE NEW CHURCH-BUILDING ACT.—On the 7th inst. the Act to amend the Church-building Acts received the Royal assent. This Act was passed to amend eighteen Church-building Acts, from the

sign of Geo. 3 to the present time. There are thirty clauses in the Act. Among other things it is declared that where a permanent provision, satisfactory to the Church-building Commissioners, is secured in lieu of pew rents, the commissioners, with the consent of the bishop, may direct the pew rents to cease. With regard to select vestries it is enacted, "From and after the passing of this Act no select vestry shall be formed under the provisions of the Church-building Acts, and every such select vestry already formed under such provisions shall be and is hereby declared to be abolished; and all the powers and provisions therein enacted relative to such select vestries shall henceforth cease and determine, provided that all matters and things done by any such select vestry, in pursuance of any powers given them by such Acts, or any of them, shall be and remain as valid as if such select vestry had not been abolished." The Act has clauses in reference to church patronage, to fees, and new regulations for district chapelries.

**CHARITABLE INSTITUTIONS.**—According to a late Act of Parliament (14 & 15 Vict. cap. 56) all notice to governors, subscribers, or members of charitable institutions, whether incorporated or not, may be sent through the post; and such notices are to be deemed good service, anything in any charter, statutes, laws, or rules notwithstanding.

## THE MERCANTILE LAWYER.

### Summary.

A CASE under the Statute of Limitations, which it may be well to note in *Selwyn* and in *Chitty*, is reported as having been decided by ERLE, J. at Nisi Prius—*Cleave v. Jones*, 17 Law T. 288. It seems that in that case a letter was written by the defendant, directing the appropriation of certain moneys that were to come to the hands of the plaintiff, who was an attorney, for her as executrix, and stating that if a certain creditor did not press for payment "the following debts" were to be paid, and amongst them was 100*l.* to the plaintiff, without specifying whether on account (they had a running account) or otherwise. The learned judge held, that the letter did not amount to an unequivocal admission of the debt claimed, and of the appropriation of the 100*l.* as part payment, so as to take it out of the operation of the Statute of Limitations.

Another Nisi Prius case, in which the question was, whether one promissory note was satisfied by giving, under peculiar circumstances, another, is given in our last number, *Snead v. Smith*, 17 Law T. 289. In that case, C. as security for B. joined him in a promissory note to A. payable two months after date. On the note becoming due, B. was unable to take it up, and applied to A. to allow a renewal; A. consented, and received the discount for a further period of two months. On B.'s saying he would procure the new note as soon as he could see the surety, A. observed that it did not signify—it might stand over, as it would save the stamp. C. declined to agree to this, and a new note was prepared and repeatedly tendered to A. who, however, did not take it, alleging that he had not got the old note with him, and that he was busy, and consequently B. retained the new note, and A. continued to hold the old one. The Court held, that if A. agreed with B. that the old note was satisfied by the payment of the discount and a renewed note, and if the old note was held by A. for B., and B. held the new note for A. the old note could not be pleaded by way of set-off to an action by C. against A., and that on the above facts there was evidence for the jury that the old note was so satisfied.

## ASSURANCE CHRONICLE.

[The great interest and importance of this subject to Solicitors, who transact the greater portion of the Assurance business of the United Kingdom, suggests the utility of a brief record of the doings of the various candidates for their favours. The proceedings of every office will be impartially given, if sent.]

### RAILWAY PASSENGERS' ASSURANCE COMPANY.

THE fourth half-yearly meeting of this company was held yesterday at their offices in Old Broad-street; John Dean Paul, esq. in the chair.

THE SECRETARY (Mr. Beattie) read the report, from which it appears that "the receipts for the half-year amount to 3,155*l.* 15*s.* 9*d.* and exhibit a growing progress when compared with those of any previous six months since the formation of the company. The tickets of the company may now be obtained at the principal stations on fifty railways, and the number of agents at stations and in towns amounted to 874 on the 30th June last. 2,068*l.* 8*s.* 6*d.* have been paid as compensation during the last six months, and the entire number of claims adjusted from the period of the commencement of the company up to this date is 2 fatal cases, and 99 cases of personal injury. The gross receipts for the weeks since 30th June, as compared with the corresponding weeks of last year, shew an extraordinary increase, which is most strikingly evinced in the issue of single journey tickets. Thus, for the week ending August 17th last the gross receipts were 131*l.* 7*s.* 7*d.* against 74*l.* 5*s.* 10*d.*; whilst the issue of single journey tickets amounted to 76*l.* 15*s.* 1*d.* against 21*l.* 0*s.* 10*d.* With one leading company, the Lancashire and Yorkshire, the company has just concluded an arrangement for the insurance of 1,355 of their men, and there are other companies now in communication with the directors on the same subject. The terms on which these insurances have been effected are as follows:—Class 1. Engine drivers, 26*s.* 6*d.* per annum to insure 60*l.* Class 2. Guards, stokers, breaksmen, &c. 19*s.* 6*d.* per annum to insure 50*l.* Class 3. Porters, policemen, gatekeepers, &c. 5*s.* 3*d.* per annum to insure 40*l.* in case of fatal accident, with a weekly allowance in each case for personal injury. The business has been so much extended during the past six months as to render it necessary to make a call of 5*s.* per share on the proprietors. The reasons for this call have been stated in the circular announcing it, and the directors have only to say that they do not anticipate any necessity for a further call being made hereafter. In the statement of the half-year's accounts it was mentioned that the whole amount, viz. 2,068*l.* 8*s.* 6*d.* paid as compensation during the last half-year, had been charged to revenue, and that of this sum 1,425*l.* was on account of accidents to the Post-office and railway services, which hazardous description of business had been undertaken before the experience of the company had enabled the directors to frame calculations of a more correct nature than the imperfect statistical data of the reports of the Board of Trade had suggested; and as such risks (at the rates previously charged) terminate with the current policies, this degree of loss cannot occur again. The directors therefore leave it to the proprietors to say whether the sum of 1,425*l.* should be charged to the preliminary expenses in the capital account, and scattered like those expenses over a period of years, instead of being charged on the revenue of the last six months alone. If this is done, the charges for working expenses and compensation for the last six months will be 2,438*l.* 7*s.* 2*d.* leaving a balance over the gross receipts of 717*l.* 8*s.* 7*d.*

## THE LAW AND THE LAWYERS.

(From the Morning Chronicle.)

A FEW days ago we drew attention to the "Heads of Inquiry on Evidence" which have been recently issued by the Chancery Commission; and, with the view of enabling the public to judge for themselves how far it is advisable to abolish the system of written interrogatories which prevails in equity procedure, we explained that system somewhat in detail, and exposed a few of its leading defects. The point on which we principally dwelt was the total absence of any efficient power to cross-examine the witnesses, and we contended that this was in itself an evil of the first magnitude. That we were right in so characterising it, will probably be admitted on all hands; for not only have all philosophical writers on the subject of evidence agreed in regarding cross-examination as one of the most efficacious tests which have ever been devised for the discovery of truth, but no reflective person can have attended a trial at Nisi Prius without attaching extreme importance to the exercise of this right. By means of it, the motives, the interests, the prejudices, the means of knowledge, the memory, the character, and the capacity of the witness are all fully investigated and ascertained; and, however artful he may be in concealing truth or in fabricating falsehood, it is no easy matter for him, when subjected to a skilful cross-examination, to impose upon the Court. A system which practically excludes this test may, notwithstanding, be right; but assuredly the odds are against its being so; and unless it can be proved to possess some striking and peculiar advantages of its own, it must of necessity meet with instant condemnation as soon as it is properly understood. But that the system in question presents a single advantage over that of taking evidence *viâ* voce, we utterly deny, and we shall have no difficulty in shewing that, besides excluding the

test of cross-examination, it is open to many other most serious objections.

In the first place, it entails upon the suitors an absolutely ruinous expense; partly because, the preparation of interrogatories being a task which confessedly demands much skill, the draftsman requires to be paid at a proportionally high rate; partly because the rule which enforces secrecy until publication gives rise to endless repetitions of evidence; partly because it is necessary for the litigants to have authentic copies of the depositions, which can only be obtained at an extortionate price; but principally because so much time is consumed in examining the witnesses, and the suitors are consequently called upon to pay enormous sums to the commissioner. What will the public think of a system which permits, if it does not necessitate, the consumption of one hundred and ninety-nine days in the mere taking of evidence in a single cause? Yet this was the time actually charged and paid for in the notorious case of *Small v. Atwood*. We forget the exact amount of the commissioner's fees in that suit—but, calculated upon the present rate of charge, which is five guineas a day, they could not have been less than a thousand guineas, independently of all claims for travelling expenses. It may be said that that was a remarkable case. True; but still we are perfectly certain that, had the facts been investigated in open court, and the witnesses subjected to oral examination, the trial could not have lasted a fortnight, and would probably have been disposed of in less than a week. If we only bear in mind that the average quantity of depositions which a commissioner will get through in a fair day's work does not exceed thirty folios, or 2,160 words, we shall readily understand how it happens that evidence can be taken at Nisi Prius in about the twentieth part of the time that would be employed were the witnesses examined upon interrogatories.

Another grave objection to the Chancery system of taking evidence arises from the fact that the witness is entitled, before signing his deposition, to have the whole read over to him, and to make such alterations in it as he deems necessary. An opportunity is thus afforded to him for reconciling contradictions and fortifying improbabilities; and it is idle to imagine that dishonest witnesses do not employ this privilege as a ready instrument of fraud. The observations made on this subject by Mr. Plumer, when he was explaining to the late Chancery Commissioners the duties of an examiner, deserve serious consideration. "Shuffle and prevaricate," he says, "as a witness may in the course of the examination, he can correct all the inconsistencies between one part of his evidence and another; and his testimony, as finally presented to the Court in the office copy, will read as fluently as that of the most honest, plain-spoken witness that was ever examined." If, in order to remedy the defect here pointed out, an order were made that witnesses should no longer be permitted to amend the depositions before signing them, an opposite evil would spring up; for real errors cannot fail to occur from time to time, either from the witness misunderstanding the question, or from the examiner misunderstanding the answer; and in either event it would be obviously most unfair not to allow the mistake to be rectified.

The limited, but withal the ill-defined, discretion which examiners and commissioners are permitted to exercise in rejecting evidence, occasions another inconvenience of no trifling extent; for, as they are naturally unwilling to act upon a power which they do not feel sure that they possess, the result is, as Lord Eldon once complained, that "depositions are seldom brought into court without much trash in them which is not evidence." Moreover, as the commissioners are paid by the day, they have no very great anxiety to reduce the testimony into the smallest compass; and we much fear that the ancient order which directs them to restrain a witness from running into extravagancies and into matters not pertinent to the question, "thereby wasting paper for their own profit," is not, and never will be, duly attended to.

The jealousy with which Courts of Equity seek to preserve the secrecy of the evidence given, until publication, is also productive of much mischief; for, by preventing the parties from knowing what has been proved as the examination proceeds, it compels them either to call a multitude of witnesses to the same facts, or else to run the risk of defeat because a treacherous or stupid witness has failed to prove some material circumstance, which, had the failure been known in time, might have been established conclusively by other evidence. Of course, those who advocate the continuance of the rule contend that it affords a valuable check to the pernicious practice of strengthening the weak points of a case by false testimony; but this argument supposes that the suitors are prepared to commit subornation of perjury—a supposition which, we submit, is seldom warranted by experience—and at any rate it sounds strangely in the mouths of gentlemen who allow witnesses, as we have shewn above, to reconcile the contradictions in their evidence by after-thoughts.

We now come to the master evil of the whole system. Those who are acquainted with the mode of taking evidence at Common Law will readily understand that we allude to the fact that, in Courts of Equity, the judge has no opportunity afforded him for observing the demeanour of the witness while he is giving his testimony. If truth is the object to be attained, the wit of man cannot invent a surer method for its discovery than that of bringing the witness and the judge face to face; for, as Lord Lyndhurst once finely observed, "It is impossible to transfer the blush of perjury to paper." Nature stamps "rogue" on a man's brow in unmistakable characters—fear of detection makes him hesitate, or effrontery makes him swagger; but reduce his story to writing, and it will read as glibly as if it had been told by Aristides. Courts of Equity may discover truth by the means which they employ, but, if they do, it is a miracle, and a very costly miracle into the bargain. The only effectual mode of discriminating between a false and a true narrative is by subjecting the witness to a *ried voce* examination in open Court, before the judge who is to decide upon the question in dispute. Nothing short of this will effect the object in view—nothing short of this will satisfy the requirements of the age. Of course, if the witness be out of the jurisdiction, ill, infirm, or otherwise incapable of appearing in person, recourse must be had in Courts of Equity—as is the case now in Courts of Law—to a commission; but this mode of proceeding should be regarded, not in the light of a *substitute* for oral examination, but as a species of *secondary* evidence, which is only admitted because the party has no power of adducing primary proof.

## CORRESPONDENCE.

## TAXATION OF ATTORNEYS' BILLS.

TO THE EDITOR OF THE LAW TIMES.

SIR,—The current of Law Reform has set in, and it is equally the interest, as well as the duty, of every member of the Profession to render assistance in order that the work may be effectually done.

As a solicitor of some standing, and of considerable experience, I beg to make a suggestion, which, though somewhat startling at first sight, would, I am convinced, if carried out, be of incalculable benefit both to the client and the practitioner, and add very materially to the comfort and independence of the latter.

At present to tax an attorney's bill is to incur his heaviest displeasure, and to cause an irreparable breach between him and his client; and it is, no doubt, most painful for the client to go to the attorney and suggest that his charges are excessive, and thereby seek to reduce them.

In order to remedy this evil in practice, I propose that no person shall pay, and that no attorney shall sue for or receive payment of, any bill until it has been taxed without incurring a penalty; but nevertheless, considering the heavy disbursements the attorney is in some cases called upon to pay in the progress of a business, making proper provision for allowing the payment of money on account.

To accomplish my object I propose that every bill of costs of attorneys and solicitors shall be delivered in the manner prescribed by the 6 & 7 Vict. c. 73, and that when it has been so delivered at least one calendar month, a copy of such bill shall be lodged, as to country practitioners, with the clerk of the County Court, and as to London practitioners, with the proper officer there: that an appointment to proceed with the taxation shall thereupon be obtained, and notice thereof sent by the post to the party charged with such bill at least one week before the time so appointed: that the officer shall at the time fixed hear all parties attending, and, having completed the taxation, shall certify the amount at which such bill has been taxed and settled by him, which certificate (unless set aside or altered by order, decree, or rule of Court), shall be final and conclusive as to amount.

I am, Sir, yours, &amp;c.

Sept. 5, 1851.

W. H.

## ETIQUETTE.

TO THE EDITOR OF THE LAW TIMES.

SIR,—Will you allow me to correct "A Country Attorney," who dates from Worcester, August 3rd, by stating first, that a Queen's counsel can and often does conduct a defendant's cause without the assistance of a junior; and, secondly, that the etiquette of the Bar does not insist that on every appeal (however paltry), at Quarter Sessions, two counsel at least must be employed on each side; the fact being, that the employment of more than one Barrister on an appeal (on each side) is the *rule*, and "A Country Attorney's" supposed grievance the *exception*. I am, Sir, yours, &c.

Liverpool, Sept 5, 1851.

A BARRISTER.

## LAW REFORM.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I have read with more satisfaction than I can well express the letter of "An Attorney at York" on "Law Reform," and I must be allowed to say, that if the entire Profession in the country were canvassed, such would be the almost unanimous answer. The report of the commissioners now in course of publication in your journal does not seem to grapple with, or attempt to get rid of, the main abuses that now, for so long, have entailed odium and disgrace on the practice of the law. I refer to that great curse, special pleading; and it is evident, from the proposed amendments, that the annoying, vexatious, and harassing system of demurrers, and other quibbles and quirks, is to be kept up. Look at and compare the clear, simple, and plain rules of practice, &c. issued by the five County Court judges with the proposed suggestions and amendments of pleading, &c.!

I agree, also, with "An Attorney" that the judges should go through the country every three months, and so dispose of actions at once. What would be so likely to put an end to the abominable and harassing system of new trials and motions for new trials, now only adopted to cause delay? No, no, Mr. Editor, a puny, paltry, half-sort of reform, or amendment of the present system, will not suffice; and the lawyers, if they would speak out, are as sick of it as the public. If the superior judges cannot be got to do the work, then increase the number of County Court judges, and so as to let in the adjustment of equitable points and claims. The reduction of the Certificate Duty will assist us very little if no other alterations are to be made.

I am, Sir, yours, &amp;c.

J. E. R.

## LEGAL INTELLIGENCE.

THE FORTHCOMING REGISTRATION.—A new Act for the registration of voters, passed in the late session, will come into practical operation in the forthcoming revision of the lists of voters, commencing from Monday next. The new law is entitled "An Act to amend the Law for the Registration of certain Persons commonly known as 'Compound Householders,' and to facilitate the exercise by such Persons of their Rights to vote in the Election of Borough Members to serve in Parliament." By the Reform Act it was lawful for the occupier of a house of the required value in a city or borough, to claim to be rated to the relief of the poor in respect of premises, whether the landlord was or was not liable to be rated, and such occupier paying or tendering the rate payable was to be put upon the list of voters. "And whereas it is often inconvenient and impracticable for such persons to make continual claim in respect of each rate, and many persons are consequently deprived of the franchise," it is, therefore, enacted that no person so claiming to be rated, and paying or tendering on or before the 20th of July the rates due on the 5th of January preceding, shall be required to make any further claim in regard to any future rate upon the premises in respect to which his vote in any such election shall arise, but shall be entitled to be put on the list and to be registered as a voter, provided he has occupied the premises and paid the rates and taxes required. By attending to this Act on the ensuing revision, compound householders will save themselves a good deal of trouble, and possess the franchise without renewing their claims.

We have reason to believe that the announcement in a morning contemporary, of the legal appointments under the new Act, authorising the creation of two additional judges of the Court of Chancery, is premature.—*Globe*.

ADVERTISEMENT DUTIES.—It will be learned through the public channels of information that there has been a careful and lengthened investigation by a committee of the House of Commons respecting the stamp duty on newspapers. In the evidence taken on this interesting subject there appears to have been some curious information furnished by the manager of *The Times*. He mentioned that *The Times* proprietary had paid 66,000*l.* last year, the average circulation of the paper per day being 39,000 copies; and that the supplement attached to this large number was actually too great to pay. He goes on to say—"The value of the supplement consists of advertisements, and those advertisements pay a certain sum, of course, to the proprietors; that sum is fixed; it is the same on a small impression as it would be on 100,000. As the sum which is paid for paper, printing, and so on, fluctuates, and is increased by the amount of circulation, of course there is a certain point at which the two sums balance each other. Suppose that the value of the advertisements in the supplement was 200*l.* you would know that you could publish as many papers as would cost 200*l.* to manufacture in paper, stamps, and printing, and that if you go beyond that you publish at a

loss; that is, of course, obvious. The greater the circulation the greater the loss, beyond a certain limit." It was asked, "Do you not mean that the profit is less?" To which the manager replied, "No; the greater the absolute loss from a circulation beyond a point at which the expenditure and the receipts balance each other." He repeated, "An absolute loss;" and he made the point clear, beyond all possibility of mistake, by taking the instance of the very day before he gave his evidence—namely, May 27—when the value of the advertisements in the supplement precisely balanced the expenditure on the paper, and the printing of further copies was stopped. The Government charges paid that day by *The Times* in the shape of direct taxation, for that one publication, amounted to 35*l.*! Again, he says, "I have no doubt in the world that, if there were no considerations beyond a mere desire to circulate the paper, it would double itself within a couple of years;" and at present from ten to twelve columns of advertisements are excluded daily from *The Times* for want of room, notwithstanding the supplement.—*Chambers's Journal*.

## BIRTHS, MARRIAGES, AND DEATHS.

## BIRTHS.

FLUKER.—On the 2nd inst. at 15, Arundel-square, Islington, the wife of Mr. Fluker, solicitor, of a son.  
FRANCIS.—On the 8th inst. at 55, Brompton-crescent, the wife of George Francis, esq. barrister-at-law, of a daughter, still-born.  
LEES.—On the 7th ult. at Nassau, New Providence, the lady of the Hon. J. C. Lees, Chief Justice and President of the Council of the Bahamas, of a son.  
LLOYD.—On the 6th inst. the wife of Morgan Lloyd, esq. barrister-at-law, of a son.

## MARRIAGES.

THOMPSON, William Hamilton, esq. Edinburgh, advocate, to Elizabeth Agnes, eldest daughter of Samuel Hemming, esq. of Merrywood-hall, Bristol, on the 4th inst. at St. Mary Redcliffe, Bristol.  
BRADBURY, Augustus, esq. of Weaver's-hall, London, solicitor, second son of John Bradbury, esq. of Bedford-house, Streatham, and Aldermanbury, London, to Ellen, fourth daughter of George Drew, esq. of Guildford and Streatham, Surrey, on the 4th inst. at St. Andrew's-Guildford.  
LORDES, R. L. esq. of the Inner Temple, second son of Sir R. Lopes, bart. of Maristow, M.P. for South Devon, to Elizabeth, third daughter of S. T. Eborwick, esq. of Peamore, on the 4th inst. at Exminster.  
GALT, Charles James, esq. barrister-at-law, to Emma, youngest daughter of James Hoskins, esq. of Abingdon-street, Gosport, on the 8th inst. at Abingdon Church.  
POWLES, John Endell, esq. solicitor, Newnouth, to Mary Anne, third daughter of the Rev. James Lister Dighton, vicar of Dighton, Monmouthshire, on the 8th inst. at Dighton Church.

## DEATHS.

LESLIE, S. esq. rear admiral, and J. P. county Down, at Rosebank, Donagadee, on the 3rd inst.  
MACQUEEN, George, of the Middle Temple, esq. barrister-at-law, on the 3rd inst. aged 41.  
TENNANT, Elizabeth, wife of Henry Tennant, esq. of New-square, Lincoln's-inn, on the 8th inst.

## JOURNAL OF PROPERTY.

## Public Sales.

By Messrs. FARMER & Co. at Garraway's.  
Freehold property, sold under an order of the Court of Chancery, made in causes Carter v. Targart.  
A freehold estate at Chislehurst, Kent, consisting of a mansion-house with 30 acres of land & 4,120*l.*  
A freehold residence, with cottages and garden, at Chislehurst Common, let on lease for 60*l.* per annum—1,120*l.*  
A freehold public house, called the White Horse, with cottages and enclosures of building land, containing about three acres, situated on the Greenwich-road, one mile from Chislehurst—1,820*l.*  
A quantity of freehold property, situated at Sydenham, Kent, and consisting of two mansions and offices, with several houses, messuages, and premises, let on lease, now producing 200*l.* per annum, with the reversionary interest thereon—sold in lots for 8,174*l.*  
Several fee-farm rents secured upon freehold estates in Wiltshire and Gloucestershire, producing 50*l.* 13*s.* 4*d.* per annum, subject to an annual deduction of 12*l.* 13*s.* 4*d.* for land-tax and other charges—570*l.*  
Two hundred shares of 50*l.* each in the Rock Life Assurance Company—1,240*l.*  
One hundred-pound share in the Imperial Assurance Company—316*l.*

By Mr. MARSH, at the Mart.

A policy for 200*l.* in the Rock Life Assurance, with bonuses, amounting to 256*l.*; annual premium 5*l.* 2*s.* 6*d.* 73 years of age—310*l.*  
A policy of 500*l.* in the Imperial Office, with bonus of 60*l.* 19*s.*; annual premium, 20*l.* 0*s.* 10*d.* his age 60 years of age—210*l.*

By Mr. PATE, at Garraway's.

Freehold estate, comprising a dwelling-house, 11 York-street, St. James's-square, and two houses with shops, Nos. 98 and 99, Jermyn-street, let upon lease for 20*l.* per annum—4,550*l.*  
A freehold house, No. 15, Old Bowwell-court, St. Clement Danes, let for 30*l.*—465*l.*  
Two leasehold houses, Nos. 9 and 10, Wells-street, Gray's-inn-road, annual value 95*l.*; held for 99 years unexpired, at a peppercorn—780*l.*



A freehold house, No. 22, Hyde-place, Hoxton, let for 24. per annum, land-tax redeemed—335s.  
Leasehold house, Norway-place, Hackney-road, let for 30. held for 74 years from 1810, at 6s.—218s.

By Mr. F. CHIFFOCK, at the Mart.  
Leasehold house with coffee-shop, No. 23, New Church-street West, Lisson Grove, let for 52. 10s. per annum, held for 70 years unexpired at 10s. ground-rent—480s.

Leasehold house, No. 25, New Church-street, let and held on similar terms as foregoing—480s.  
Leasehold house and shop, No. 36, New Church-street, let for 42. held as foregoing—480s.

The Windsor Castle public house, Hardington-street, Edgeware-road, producing an improved rental of 63s. per annum for 70 years unexpired—1,617s.

Leasehold house, No. 41, New Church-street, let for 47. 5s. per annum, held for 70 years at 9s. per annum—630s.

A house, No. 42, adjoining, let for 52. 10s. held for the same term at 11s. 9s.—630s.

Two freehold houses, Surbiton Hill, Near Kingston New Town, producing 28s. per annum—430s.

# MONEY MARKET.

ENGLISH FUNDS.	Sat.	Mon.	Tues.	Wed.	Thurs.	Fri.
Bank Stock	215 1/2	216	216	216 1/2	215 1/2	215 1/2
3 1/2 Cent. Reduced Annuities	97 1/2	97 1/2	97 1/2	97 1/2	98 1/2	98 1/2
3 1/2 Cent. Consols Annuities	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
Consols for Account	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2	96 1/2
New 3 1/2 Cent. Annuities	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2
Long Annu. (exp. Jan. 5, 1860)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Oct. 10, 1859)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
Do. 30 yrs. (exp. Jan. 5, 1860)	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2	7 1/2
India Stock	262	262	262	260	260	260
India Bonds (1,000l.)	52	52	52	52	52	52
Do. do. (under 1,000l.)	52	52	52	52	52	52
South Sea Stock	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2
Do. do. New Annuities	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2	95 1/2
Exchequer Bills, 1,000l.	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2
Do. do. 500l.	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2
Do. do. Small	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2
Do. Advertised	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2	48 1/2

\* Premium.

# THE GAZETTES.

## Bankrupts.

Gazette, Sept. 9.

FORMAN, JOHN, and FROW, ROBERT, joiners, Kingston-upon-Hull, Sept. 24 and Oct. 22, at twelve, Kingston-upon-Hull. Off. as Carrick. Sols. Thorne and Son, and Lightfoot and Co. Kingston-upon-Hull. Petition, Sept. 1.  
HARRISON, THOMAS, trimming manufacturer, Adde-st. City, Sept. 19, at half-past eleven, Oct. 24, at two, Basinghall-st. Off. as Cannan. Sols. Watson and Roscoe, Worship-st. Fishbury. Petition, Sept. 6.  
HOLT, JAMES CARLISLE, innkeeper, Halifax, Yorkshire, Sept. 28 and Oct. 20, at eleven, Leeds. Off. as Young. Sols. Higham, Brighouse, and Bond and Barwick, Leeds. Petition, Aug. 27.  
LAW, JOHN, tailor, High-st. Marylebone, Sept. 19, at eleven, and Oct. 25, at two, Basinghall-st. Off. as Pennell. Sol. Cox, Finner's-hall, Old Broad-st. Petition, Sept. 8.  
LILLY, JOHN, and ASHALL, ALFRED, merchants, Liverpool, Sept. 17 and Oct. 10, at eleven, Liverpool. Off. as Bird. Sols. Brady and Son, Staple-inn, City, and Carson and Ellis, Liverpool. Petition, Sept. 2.  
MANZAVINO, GEORGE NICHOLAS, merchant, Manchester, Sept. 22 and Nov. 5, at twelve, Manchester. Off. as Pott. Sols. Sale and Co. Manchester. Petition, Sept. 3.  
MILWARD, THOMAS, miller, Gower-street, Sept. 17 and Oct. 16, at one, Exeter. Off. as Herriman. Sol. Terrell, Exeter. Petition, Sept. 5.  
OSBORNE, WILLIAM HENRY, merchant, Ebury-street, Piccadilly, Sept. 13, at half-past one, Nov. 1, at twelve, Basinghall-st. Off. as Pennell. Sol. Bolder, Craven-st. Strand. Petition, Aug. 26.  
ROBINSON, GEORGE DANFORTH, coach builder, Manchester, Sept. 24 and Nov. 11, at twelve, Manchester. Off. as Fraser. Sols. De Larc and Fogg, Manchester. Petition, Sept. 2.  
SHEFFIELD, EDMUND, builder, Tomlin-terrace, Poplar, Sept. 19, at one, Oct. 26, at two, Basinghall-st. Off. as Nicholson. Sols. Baker and Co. Lime-st. City. Petition, Aug. 26.  
TAYLOR, JOHN ROBERT, stationer, Chancery-lane and Red Lion-square, and Cannon-row, Westminster, Sept. 20, at half-past twelve, Oct. 25, at eleven, Basinghall-st. Off. as Nicholson. Sols. Church and Son, Bedford-row. Petition, Sept. 4.  
WATSON, JOHN, linendraper, Skipton, Yorkshire, Sept. 26 and Oct. 20, at eleven, Leeds. Off. as Freeman. Sols. Jones, Sise-lane, and Blackburn, Leeds. Petition, Aug. 30.  
WOOLCOTT, HENRY GEORGE, trimming manufacturer, Everitt-st. Russell-square, Sept. 19, at two, Oct. 25, at one, Basinghall-st. Off. as Nicholson. Sols. Baylis and Drewe, Red Cross-st. Petition, Aug. 29.

Gazette, Sept. 13.

BEACH, JOHN, apothecary, Bradford, York, Sept. 25 and Oct. 20, at eleven, Leeds. Com. West. Off. as Young. Sols. Terry and Watson, Bradford; Bond and Barwick, Leeds. Petition, Sept. 8.  
CANNOCK, SAMUEL, tobacconist, Kent-terrace, Great College-st. Camden-town, Sept. 20, at two, Oct. 23, at eleven, Basinghall-st. Com. Goulburn. Off. as Nicholson. Sols. Rogerson and Ford, 50, Lincoln's-inn-fields, and Carter, Gloucester. Petition, Sept. 8.  
FRENCH, DAVID, and SANDS, ARCHIBALD, coal factors and coal merchants, Coal Exchange, London, and Chatham, Oct. 2, at one, Nov. 8, at eleven, Basinghall-st. Com. Goulburn. Off. as Nicholson. Sols. Lawrence, Plews, and Boyer, 14, Old Jewry-chambers. Petition, Sept. 10.

HURST, THOMAS, printer, stationer, and bookbinder, Bankey-st. Warrington, Sept. 22 and Nov. 4, at twelve, Manchester. Off. as Fraser. Sols. Cobbett, Cooper-st. Manchester; Ford, 50, Lincoln's-inn-fields. Petition, Sept. 3.

LACRY, EDWARD, glass dealer and looking-glass manufacturer, Birmingham, Sept. 25 and Oct. 14, at half-past eleven, Birmingham. Com. Daniell. Off. as Valpy. Sol. J. Hayward, Birmingham. Petition, Sept. 5.

LISTER, MATTHEW, clothier, Paiswick, Gloucester, Sept. 25 and Oct. 28, at eleven, Bristol. Com. Hill. Off. as Acraman. Sol. Kearsley, Stroud, Gloucestershire. Petition, Sept. 6.

WALKER, SAMUEL, dyer, Little Lever, Lancashire, Sept. 26 and Nov. 3, at twelve, Manchester. Off. as Pott. Sols. Messrs. Sale, Worthington, and Shipman, Fountain-st. Manchester. Petition, Sept. 8.

## BANKRUPTCY ANNULLED.

Harrison, H. G. wheelwright, King's-road, Hoxton Old Town, Sept. 9.

## Dividends.

BANKRUPT ESTATES.

Official Assignees are given, to whom apply for the Dividends.

Ashworth, J. woollen manufacturer, 3s. 1d. and 63-64ths of a 1d. Mackenzie, Manchester.

INSOLVENT ESTATES.

Daw, J. M. clothier and tailor, 3s. 5 1/2d. Apply to P. Pearce, St. George's Hall, East Stonehouse.—Pawlyn, R. coach-builder, 6 1/2d. Apply to P. Pearce, St. George's Hall, East Stonehouse.—Standbridge, W. T. lieutenant, n.s. first, 2s. 6 1/2d. Apply to P. Pearce, St. George's Hall, East Stonehouse.

ASSIGNMENT DIVIDEND.

Farnall, B. victualler, 4s. 6d. Apply to B. H. Smallwood, solicitor, Newport.

## Assignments for the Benefit of Creditors.

Gazette, Sept. 2.

Hiron, S. manufacturer, Birmingham, Aug. 25. Trust. J. Percival, accountant, Edgbaston, Birmingham. Sol. H. Southall, Edgbaston, Birmingham.—Jackson, J. farmer, Cadogan, Wrexham, Denbighshire, Aug. 7. Trusts. H. Morris, farmer, Havoddybwoch, and E. Hughes, draper, Wrexham. Sols. R. H. Jones and E. Fugh, Wrexham.—Kitching, W. grocer, Louth, Lincolnshire, Aug. 21. Trusts. W. Potter and W. Tate, grocers, Louth. Sols. Fye, Waite, and Newbold, Louth.

Gazette, Sept. 5.

Footer, H. soap manufacturer, Birkenhead, Sept. 1. Trusts. W. Jackson, esq. Cloughton, Birkenhead, and J. Meek, esq. Middlethorpe-lodge, near York. Sols. Richardson and Gutch, York.—Gully, J. and P. ironmongers, Bath, Aug. 30. Trusts. S. Smith, factor, Birmingham, and A. Jack, iron merchant, Bristol. Sols. B. Cheshire, Birmingham, and W. Pritt, Liverpool.

## Partnerships Dissolved.

Gazette, Sept. 2.

Atkinson, H. and Eldrid, T. whipmakers, Regent-st. Aug. 27.—Coventry and Glover, brokers and commission agents, Liverpool, Aug. 30. Debts paid by Coventry.—Easterbrook, J., Scotchard, W. and Ellis, T. machinists and tool makers, Sheffield, Aug. 29. Debts paid by Easterbrook and Scotchard.—Hardham, Norton, and Co. button and trimming dealers, Gresham-st. Aug. 8.—Harris and Clarke, attorneys and Solicitors, Leeds, Aug. 28. Debts paid by Clarke.—Lings and King, wholesale cheesemongers, Whitecross-st. Southwark, and King, G. and Co. retail cheesemongers, High-st. Southwark, Aug. 30.—Longstaff, W. J. and Co. grocers and food dealers, Sunderland, Aug. 27.—Maclean, J. and Co. ship carpenters, Liverpool, as regards Smith, Aug. 19.—Marshall, J. and Brother, calico printers, Stockport and Manchester, June 30.—Pender, J. and Co. merchants and commission agents, Manchester, as regards Smyth, Dec. 31. Debts paid by Pender and Cowan.—Porteus, Macartney, and Co. trimming manufacturer, Manchester, Aug. 25. Debts paid by Macartney and Fitts Gerald.—Stallman and Elliott, merchants and commission agents, Manchester, Aug. 29. Debts paid by Elliott.—Troughton and Co. wool staplers, Kirby Stephen, June 3. Debts paid by Troughton.—Wheatley, H. and Co. boarding and lodging-house keepers, Swan-chambers, Gresham-st. Sept. 1.—Whitaker and Crother, dyers, Basingthorpe, Aug. 30.

Gazette, Sept. 5.

Abrahams and Slinn, engineers and machinists, Sheffield, Aug. 20.—Cheeman, G. sen. G. jun. and T. surveyors, builders, and cement manufacturers, Brighton, as regards T. Cheeman, Dec. 31.—Cheeman and Fielden, linen-drappers, Rochdale, Aug. 23.—Cotton, J. and R. spindle and fly makers, Salford, Sept. 3. Debts paid by R. Cotton.—Craven and Blackwell, stone merchants, Green Moor, Hunsley, Sept. 3. Debts paid by Blackwell.—Dowson, J. Earle, W. and J. and Jones, E. timber merchants, Prince's-wharf, Commercial-road, Lambeth, as regards Dowson, Aug. 28. Debts paid by remaining partners.—Evans, W. and Dickins, E. chair and cabinet makers, Salford, Aug. 26. Debts paid by Evans.—Fielding, J. and Son, cotton manufacturers, Blackburn, Sept. 3. Debts paid by J. Fielding.—Forbes and Knibb, booksellers, stationers, and printers, Southampton, Aug. 30.—Francis, J. and Hodges, E. wine and spirit merchants, Dorchester and Weymouth, Sept. 2. Debts paid by J. F. Hodges.—Hartley and Starkey, grocers and tea dealers, Colne, Aug. 25.—Kegg and Mellor, coal merchants and coal agents, Liverpool, Aug. 24.—Molyneux and Travis, booksellers and stationers, Liverpool, Aug. 26. Debts paid by Travis.—Moryon, J. and Brooks, W. J. money lenders and bill discounters, Manchester, June 30. Debts paid by Brooks.—Oldenbury, G. and W. merchants, Leeds, Aug. 1.—Roe, F. and Hanson, W. Strand, and Sumner-st. Southwark, Sept. 2. Debts by J. Pike, esq. of Old Burlington-st.—Smith, J. and Lord, W. ironmongers and bellhangers, Huddersfield, Sept. 2.—Snowball, J. C. Grafton, J. G. Gibson, T. C. Ward, R. Gregory, J. F. and Goldsmith, E. E. and N. D. Gas-works, Lenwarden Holland, July 31. Debts paid by Grafton and Gibson.—Story, G. and Story, P. hop, seed, and wine merchants, John-st. Crutched-friars, Sept. 1.—Ward, S. and J. brewers and maltsters, Kingston-upon-Hull, Sept. 2.

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Burgesses and Freemen's Parliamentary Franchise Act.  
Chief Justices' Salaries Act.  
Woods, Forests, &c. Act.  
Stock in Trade Act.  
Local Acts (Preliminary Inquiries) Act.  
Tithe Rent-charge Assessment Act.  
Arrest of Absconding Debtors Act.  
Copyhold, Inclosure, and Tithe Commissions Act.  
Commons Inclosure (No. 2) Act.  
Expenses of Prosecutions Act.  
Charitable Institutions Notices Act.  
Soap Duties Act.  
Ecclesiastical Titles Assumption Act.  
Smithfield Market Removal Act.  
Customs Act.  
Commissioners of Railways Act Repeal Act.  
Metropolitan Sewers Act.  
Coal Whippers (Port of London) Act.  
Steam Navigation Act.  
Appointments to Offices, &c. Act.  
Court of Chancery and Judicial Committee Act.  
Attorneys and Solicitors' Regulation Act Amendment Act.  
Metropolitan Interment Act.  
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## THE LAW TIMES.

SATURDAY, SEPTEMBER 20, 1851.

## UNION OF EQUITY AND LAW.

It was necessary, on opening this subject, to guard against a misunderstanding, which at first induced our own mind as doubtless it has prejudiced others, to reject as visionary the proposal for the union of law and equity, and it may be as well to repeat the caution.

We propose, then, to substitute for the present division of the civil tribunals the more rational division into *judicial* and *ministerial* courts, the former administering justice according to law, the latter performing the functions of the Masters' offices, and managing property and persons whom the law has taken in charge. Administrative courts will be required in subordination to the Superior Courts, and the Masters' offices would be the nucleus of such courts.

Every application to a Court of Law or of Equity is either to enforce a right, to redress a wrong, or to obtain assistance in the management of person or of property.

But there is nothing in the nature of these objects to demand distinct tribunals, and differing principles of judgment. Justice is the same everywhere, and at all times. If a court of justice, whatever its name, is unable to dispense complete justice, it does not prove a necessity for another court, having larger powers, but only that the court in question is deficient in power, and the obvious remedy is to give to it the further powers it needs.

An instance of the absurdity of the contrary course of proceeding was shewn in the practice of *discovery*. Until the beneficent Act of last Session, a Court of Law had not power to compel the production of documents. As this would have been a practical denial of justice in many cases, some remedy was required. The obvious one was, to empower the

Courts of Common Law to compel the production of the documents requisite to the administration of justice. But, instead of doing this, the round-about expedient was adopted of sending the party requiring an inspection to the Court of Chancery, there to file a bill of discovery, and thus to attain, at an enormous cost, and after ruinous delay, an end which might have been equally secured by simply giving the judges of the court in which the action is brought the power to order the production of necessary documents. That is now done. But why was it not done a century ago? and why was such a manifest absurdity permitted to linger on so long, until public indignation was roused, and the discredit attaching to the abuses of the law was permitted to grow into that hostility to the law and the lawyers, of which we are now witnessing the effects?

The enforcement of rights and the redress of wrongs must be substantially effected by the same process, whatever the tribunal resorted to, or, at least, there is but one way of properly effecting those objects, and a Court that is unable to accomplish them, of its own power, is inefficient for the purposes of its existence, and should either be reformed or abolished.

Now what is it that a Court of Justice has to do for the accomplishment of its objects? To ascertain the facts, to apply the law to those facts, and to enforce obedience to its decrees. All its functions, its process, its machinery, however seemingly various, resolve themselves into these three duties. Whether it be a Court of Equity or of Law, whatever the name given to it, it must do these three things, or it is imperfect, and it must do no more, or it is an usurpation of some other authority. If, then, the Courts are to effect the same objects, why should there be two different methods of attaining them? And if one manner of doing it will suffice, why should there be two different tribunals?

We have shewn that the same end is sought, in fact, in Equity and at Law,—namely, the entertaining of the facts of a case, the application of the law to those facts, and the enforcement of the judgment of the Court. But it may be said that it is necessary to have different means of attaining this end, and that to meet the complication of human affairs special tribunals are required for certain cases which the regular tribunals are unable to meet. Thus Equity does justice in cases which Law cannot reach.

That is precisely the objection to the existing system. The Common Law Courts ought to have all requisite powers to administer justice in every case, and so also should the Equity Courts. Why make two imperfect tribunals, to effect that which should be done by one perfect tribunal? Substantially, although not in form, the process must be the same with both. Both must ascertain the facts. These can only be obtained by evidence. Both, therefore, must inspect documents and examine witnesses. They differ now, it is true, in their manner of doing this; but why should they differ? There are not two right ways of collecting evidence; if two are adopted, one of them must be better than the other; wherefore, then, should not that better mode be employed by both?

So it is with the application of the law. There are not two different laws to be expounded, but one law, one rule of right. Nor ought there to be two ways of expounding it. To talk of equity and law as opposed one to the other, is an absurdity, which, if it really existed, would not be law at all, but anarchy. The law exists apart from the Courts, whose province it is only to apply and enforce it. Nor is it otherwise with the enforcement of the law. Every Court should have sufficient power to enforce its judgments, and no portion of these powers should be given to one which is not given to the rest.

Thus it will be seen, that one law and one procedure is all that can be required for the proper purposes for which civil tribunals are established, namely, the enforcement of justice in disputes between man and man. Nevertheless, we have now two procedures to accomplish this end, and instead of vesting in one tribunal all necessary powers for the administration of justice, we have ingeniously distributed them among two in such manner that the most skilful lawyer is often perplexed to determine to which of them resort must be had for redress; and continually it happens that neither is sufficient of itself, but each is obliged to call in the aid of the other.

Is it wonderful that such a system should be ruinous to the suitor; that it should be productive of infinite delay; that it should make the law itself unpopular; that it should bring the lawyers into disrepute; that it should induce men rather to submit to wrong than to incur the cost and anxiety of seeking to be righted, and that thus it should be a source of incalculable loss to the lawyers, who are falsely supposed by the public to be gainers by the system?

In truth, it is our worst enemy, and its abolition would be the greatest boon that could be conferred upon us, and nothing would so much tend to revive the Profession as the union of law and equity.

## LETTERS TO LORD CAMPBELL.

BY THE EDITOR OF THE LAW TIMES.

## FOURTH LETTER.

MY LORD,—In my former letters I have sought to shew how costs may be diminished and uncertainty obviated. I now proceed to state what are the delays of which the Profession and the public complain, and how they may be avoided.

Already some of these have been considered under one or the other of the previous divisions of my subject, for delay is almost necessarily the cause of cost. But, nevertheless, I will repeat them briefly, lest the sketch should appear to be incomplete.

Procedure is sufficiently speedy, perhaps it would be found to be almost too speedy, where pleadings are abbreviated, and only two or three stages intervene between the plaintiff and the trial. Practically the effect of allowing so short a time for appearance or for pleading is even now to compel one application, at least, and often several, for further time, each application being attended with considerable costs. If the appearance and the pleading of the defendant be, as I have proposed, simultaneously, or rather, if the plea be substituted for the appearance, a longer period than the four and eight days now permitted should be given, still reserving to a Judge in Chambers the power to allow further time, not as a matter of course, but on good cause shewn. Fourteen days would not be too long a period to allow to a defendant to determine what course he will pursue, to enable him to settle, if he should so desire, or to prepare his written defence if he should resolve to resist the claim. Eight days would amply suffice to the plaintiff to reply or to join issue, and six days' notice of trial might complete the preliminary proceedings, which might thus be perfected in twenty-nine days, and in no case should exceed six weeks—a period not longer than will properly suffice to enable the parties to make due preparation for that which is the end and purpose of the proceedings—the trial.

But now, my lord, comes the greatest of the many grave defects in our Common Law Courts. Forty-two days must, and twenty-eight days may, suffice for all procedure preliminary to the trial: the parties are prepared; the cause is ready for hearing—but there it must remain for weeks and months undried. There are but two Assizes in the year, and then at the unequal intervals of eight months and four months! In vain shall we curtail pleading and speed process, if trial cannot follow more quickly. Even if the courts over which your lordship presides be made so inexpensive as to be preferable to the County Courts, in all other respects it would be of no avail for the restoration of the business that is flying from them, so long as trials may be deferred for eight months. It is for their speed at least as much as for their cheapness that the County Courts have found favour with the public. No reform in the practice of your lordship's court will be of any worth that is not

accompanied with ample provision for securing a more speedy trial; and wanting that, all the rest, however excellent in themselves, would be but a delusion and a mockery.

My Lord, upon this point I express myself with the more earnestness because I have learned from every quarter of the country that this unfrequency of the Assizes is, of all others, the greatest impediment to justice, and that which, more than aught besides, has driven suitors to the County Courts, even at the cost of abandoning large portions of their claims, so as to bring them within the lesser jurisdiction. I am also aware that, urgent as is the demand for new arrangements in this respect, it will be the most difficult reform to be attained. It will be opposed by many interests, public and private. I fear that very great reluctance will be felt by many of the judges to the other alterations which this needful change will involve. A considerable portion of the Bar will be hostile to it, because it will undoubtedly interfere with some existing advantages, and impose new arrangements that will materially invade the profits of a few, and inflict much personal inconvenience upon others. It will not be favourably received by the House of Commons, because it will threaten the existence of Quarter Sessions, or at least compel the more frequent attendance of the grand and special juries. Nevertheless, my lord, *it must be done*, if the Superior Courts are to be saved from annihilation. It is impossible to avoid dealing with this question as the most necessary part of any reform of the Common Law Courts, and equally impossible to suggest any lesser change than that which I am now about to submit to your lordship, with the approval of almost the entire body of attorneys in the country, who have learned the present evil from experience, and who know what is the remedy required.

Nothing less than an entire redistribution of the legal year, of the circuits, of the Bar, and of the Bench, will accomplish the desired object; and the plan that I propose involves this. I have tried all other arrangements, and found them to be impracticable. I have invited suggestions of less startling changes, but I have received none from my correspondents, usually so fruitful of hints. Should your lordship come to the conclusion that trial ought to be more speedy, I am confident of your assent, after due examination, to the following scheme, as *the least* change by which that object can be effected.

It will, in the first place, be necessary to redistribute the legal year, so as to admit of more frequent circuits. I would not trespass upon the Vacation, so necessary to the health and vigour of all whose lives are passed in the unwholesome atmosphere of a court. Let the legal year still begin, as now, on the 2nd of November.

To meet the requirements of the country, there must be *four* circuits in the year, held at equal distances of time. I propose that they should take place in the months of November, February, May, and August, and that the sittings *in banco* at Westminster should immediately succeed the circuits, with the exception of the August circuit, which should be followed by the vacation. Thus there will be *three* instead of *four terms* in the year, and these being longer than the present terms, will amply suffice for the transaction of all the business.

But it will be necessary also to alter the arrangement of the circuits, unless additional judges are created, which it is not probable that Parliament would sanction. Therefore I propose entirely to reconstruct the circuits, dividing the country into *twelve districts*, grouping the counties as nearly as possible in proportion to *population*. A *single judge* should then be sent upon *each circuit*.

In order to diminish his labours as much as possible, his criminal jurisdiction should be limited to cases punishable with *transportation*. All lesser offences should be tried at the Quarter Sessions, or if, as I shall presently propose, these be abolished, by the judge of the County Court.

Thus we shall have *twelve judges* engaged upon the circuits, and *three* will remain in town. I propose, further, that they should be thus employed. One judge should sit daily in the Bail Court to dispose of all business requiring immediate attention and matters of practice, for which a single judge suffices.

I then further suggest that all the district at present comprised within the Central Criminal Court be formed into a *Court of Assize for the Metropolis*, and that, during the circuits, two judges should sit at Nisi Prius and in the Central Criminal Court, to dispose of the civil business, and of the same class of criminal business as on the circuits,

transferring the lesser offences to be tried by the recorder and the chairman of sessions,—in fact, to treat the metropolitan district precisely as if it were one of the circuits, only giving to it *two judges*, instead of one.

By these arrangements all that is desired may be accomplished with the least possible disturbance and inconvenience. But they *ought* to be accompanied with the abolition of Quarter Sessions, a tribunal which, as your lordship must be aware, is now practically worthless as a civil court, and might well be dispensed with as a criminal one. But I cannot conceal from myself the immense difficulties that would be thrown in the way of such a proposition by the Legislature, a large proportion of whose members suppose that their personal importance is associated with the existence of Quarter Sessions. If, therefore, that most desirable arrangement be impracticable, and they must be retained, the times for holding them should be altered, and appointed by law for the week immediately preceding the Assizes, so that the Bar may not be put to the cost of two journeys, and I think I shall have your lordship's cordial concurrence in the propriety of having these courts protected by the presence of a Bar. Indeed, I am inclined to think that the Quarter Sessions and the Assizes might be held simultaneously, in the same town—a great convenience to all parties, suitors, juries, and the Profession.

I will now, my lord, in tabular form, place before you a summary of the proposal I have submitted.

The legal year will be thus arranged:—

November—Circuits and Court of Assize.  
December and January—Sittings *in banco*.  
February—Circuits and Court of Assize.  
March and April—Sittings *in banco*.  
May—Circuits and Court of Assize.  
June and July—Sittings *in banco*.  
August—Circuits and Court of Assize.  
September and October—Vacation.

Of course six weeks or even more might, if necessary, be allotted to the circuits. The Judges would thus be occupied:—

12 Judges on twelve circuits.  
2 Judges in Court of Assize and Central Criminal Court.  
1 Judge in Bail Court.

The commission should, as now, include Queen's counsel, serjeants, and perhaps two or three others, so that assistance may be had, if required, and for such assistance payment should be made.

But at this point I must pause again, subscribing myself

Your lordship's very faithful servant,

THE EDITOR OF THE LAW TIMES.

September 10, 1851.

#### THE ADVOCATE:

#### HIS TRAINING, PRACTICE, RIGHTS, AND DUTIES.(a)

#### FIFTY-FIFTH ARTICLE.

#### CROSS-EXAMINATION (continued).

WHEN the party to the suit is, under the provisions of the new statute, called as a witness, and from his manner of answering the questions put to him by his own counsel you have just cause to suspect that he has placed himself in the box with premeditated purpose to make out his own case at any sacrifice of truth, your first duty in dealing with him will be to assure yourself that your suspicions are well founded; for unless you are really convinced of this you will have no right to charge him with perjury, or to conduct your cross-examination as if you believed him to be lying. The best mode of trying him will be to put to him some plain question bearing directly upon the case, the answer to which, if truly given, will tell against him, and which, if falsely given, he must know to be false. Your ingenuity will, without difficulty, discover in your brief some facts contradictory of his statements which will serve for this purpose, and if he denies those facts, as in consistency with his own story he must, you will know that he is wilfully lying, and will proceed to deal with him accordingly.

Already, in an earlier part of this chapter, we have endeavoured to shew how the cross-examination of a perjured witness may be

conducted so as to make his perjury apparent to the jury. In dealing with a party to the suit you will have this further advantage, that the jury will be more inclined to look with suspicion upon his testimony, will watch it with more strictness, and subject it to a severer scrutiny than would be given to the evidence of an unbiassed witness. Now, there is but one method of defeating falsehood in the witness-box, and that is by involving it in a maze of contradictions, which it is almost impossible for the most skilful liar to avoid, because the quickest mind cannot in a moment calculate the effect of its present answer upon the past, or anticipate the bearing of the reply it is about to give upon the questions that are to follow. Hence it is that cross-examination has been always deemed the surest test of truth, and a better security than the oath.

The witness has already echoed the questions of his own counsel, and proved his own case, and being well prepared with that, he will of course repeat the lesson he has learned without alteration or hesitation, and the more positively the more you press him; therefore it is a waste of time and helping him more than yourself to repeat those selfsame questions. Yet how often is this done by Advocates not wanting in experience, and it is the almost universal fault of beginners. With a slight alteration of phrase and an attempt to be stern in tone and eye, they persist in repeating the very question which the witness has already distinctly answered. "Do you mean to tell the jury upon your oath that you heard him say so?" "Will you swear you saw Smith strike him?" and such like; to which the answer is, "I have said so already." "I have sworn it." No other answer could be expected. The witness had come prepared to prove these very facts, and it is not likely that he would forget them so soon; and although false, having once sworn to them, he could not do otherwise than swear to them again, however frequently the question may be repeated. This manner of proceeding is, therefore, worse than worthless, and you will at once direct your efforts to the eliciting of contradictions—by which we do not mean trifling differences of phrase, or discrepancies in small matters, which the witness is not likely to have observed very accurately, and on which therefore his story might vary upon every repetition, without any intentional falsehood, or any substantial error; but downright unquestionable contradictions of statement so obvious that the witness *could* not have believed both to be true. If he is lying, no presence of mind or ingenuity will enable him to escape from your pursuit, provided you conduct it with proper skill, giving him no time for reflection, and so engaging his attention that he shall not have leisure to digest his answers, or to see how they square with the story he has already told.

The principle of this manner of cross-examination is, that truth is always consistent with itself. If the witness is telling the truth his answers will be in substantial accordance with the story he has already told, and with any questions that may be put to him. He has no need to consider their bearing, and therefore his reply is as prompt as memory. On the contrary, the witness who is telling a false story cannot so construct it that it shall be consistent not merely in itself, for that is not difficult, but with other associated circumstances which it is impossible to anticipate.

Hence it is that you must try him by questions on matters which only bear indirectly upon the point in issue. As, for instance, if he have sworn that on a certain day a certain person made to him a certain statement. You cannot directly shake the fact thus sworn to, for the witness has but to adhere to his assertion and he will baffle any amount of direct interrogation. But it is not at all likely that he has prepared himself with all the accompanying particulars; therefore you address to him such as these. Where was the conversa-

(a) By EDWARD W. COX, Esq. Barrister-at-Law.



tion held? At what time of the day? Who was present? Were they sitting or standing? How did he come to the place? Whom did he meet on the way? How was he dressed—and the other party? Did they speak loud or low? Did they eat or drink together, and what? Did any body come in while they were talking? How long were they together? When they parted which way did each take? Whom did he meet afterwards? At what time did he reach his home? And so forth, as the particular circumstances of the case may suggest, but always, if possible, preferring facts spoken to by other witnesses, so that you may expose him, not only by his self-contradictions, but by the testimony of others. When questions of this kind are rapidly put, they deprive the false witness of opportunity to fit them to his previous story. You should also carefully avoid putting them in any natural sequence of time or place, for that is to suggest to him a story which he will form quite as rapidly as you can construct your questions. Dislocate them as much as possible. Take now one part of the story, then another. Dodge him backwards and forwards, from one object to the other, so that it shall be impossible for him to be prepared by one question for the next, or that one answer shall be the prompter of its successor. The difficulty of doing this well is very great, and therefore, perhaps, it is that it is so rarely seen to be well done; but it is an accomplishment wanting which the Advocate is not a master of his art, for in none of his many duties is the consummate skill of a great artist so usefully employed and so signally shewn as in the exposure by cross-examination of a lying witness, and this art will be more in request than ever now that all persons, whatever their interest, are admitted to the witness-box, and the law, instead of vainly attempting to determine credibility by an abstract rule, has wisely left it to the discretion of the Court and the jury, under the protection of cross-examination, to determine in each particular instance whether the individual witness is or is not worthy of credit.

But there is one kind of testimony which will sometimes baffle your utmost skill, and we name it that you may be prepared for it when it comes, or it may throw you into an awkward perplexity. It is the case of a witness who swears positively to some single fact, occurring when no other person was present than one now dead or far distant, and whom, therefore, it is impossible to contradict, and equally difficult to involve in self-contradiction, because all the circumstances may be true except the one which he has been called to prove. An instance will make this more intelligible. In order to prove a link in the chain of a pedigree, a witness swears to a conversation with one of the family now dead, in which an ancestor of the claimant was alleged to have been recognised as a relative. It is very probable that the witness did at some time hold some conversation with the deceased in the manner and place described. He has only *added* to it the one false assertion that such a statement was then made. Now it is obvious that in this case all the usual methods of detecting falsehood will fail. The witness can neither be contradicted, nor will he contradict himself, for all that he has told is true, save the few added words, and you will not shake him by an examination as to the circumstances, for they also would be truly stated. Your difficulty is the greater, inasmuch that, so far from aiding yourself by a protracted and skillful cross-examination, you will be likely only to damage yourself, for you will shew him to be perfectly truthful in all other parts of his story, and therefore the jury will be inclined the more implicitly to credit him in that which most materially affects you. In such a case, the most baffling to the Advocate, the most difficult of any that you will encounter in practice, there remains for you only an appeal to the jury to look with suspicion upon evidence so

easily forged, so impossible to be disproved, and entreat them to try its worth by its intrinsic probabilities, and shewing them then, if you can, how improbable it is that such a statement should have been so made, or such a fact have occurred.

In concluding these remarks on *cross-examination*, the rarest, the most useful, and the most difficult to be acquired of the accomplishments of the Advocate, we would again urge upon your attention the importance of calm discretion. In addressing a jury you may sometimes talk without having any thing to say, and no harm will come of it. But in cross-examination every question that does not advance your case injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist in knowing *when to sit down*, that of an Advocate may be described as knowing *when to keep his seat*. Very little experience in our courts will teach you this lesson, for every day will shew to your observant eye instances of self-destruction brought about by imprudent cross-examinations. Fear not that your discreet reserve will be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers who know well the value of discretion in an Advocate, and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognised in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring. The issue of a cause rarely depends upon a speech, and is but seldom even affected by it; *but there is never a cause contested the result of which is not mainly dependent upon the skill with which the Advocate conducts his cross-examinations.*

#### NEW PRACTICE OF THE COUNTY COURTS.

THE 4th edition of *Cox and Lloyd's Practice of the County Courts* will be ready on Monday, and may be ordered forthwith. The work contains separate divisions allotted to the Courts, their Constitution, and Management—The Officers, their Rights, Powers, and Duties—The Jurisdiction—Appeal to the Superior Courts—The Practice—Replevin—Recovery of Tenements—Proceedings for Penalties—Fees and Costs—and, lastly, the New Statute for Arrest of Absconding Debtors; with full practical Notes, and an Appendix, containing all the Statutes relating to the County Courts, the New Law Amendment Act, the new Rules of Practice, with a copious Index and Table of the Fees to be taken in the Courts.

#### THE LEGISLATOR.

##### PARLIAMENTARY PAPERS.

**DIVISIONS OF THE HOUSE OF COMMONS.**—A return, moved for by Mr. Brotherton, has just been issued, giving the divisions of the House of Commons during the last session, from which it appears that the number of divisions on public matters before midnight was 187, after midnight 47; and on private bills, all before midnight, 8; making a total of 234 on public, and 8 on private bills. From the return it further appears that the largest aggregate number of members of the House present on any division was on Mr. Disraeli's motion on the distress of owners and occupiers of land, when 269 voted for the motion, and 283 against it, making a total including the Speaker of 553. The second largest division was also on a motion of Mr. Disraeli on assessed taxes, when the numbers were, for the motion 265, noes 252; total, including the Speaker, 518. On the Ecclesiastical Titles Bill there were no fewer than 47 divisions, the aggregate number of members present, including the Speaker or the

chairman of committee, ranging from 128 to 538. The smallest aggregate number of members present on a division was 35, which was on Mr. Hume's motion that the minutes of evidence of the Income and Property-tax Committee be laid before the House. On the division the numbers were equal, viz. 17 for and 17 against the motion. The Speaker was the thirty-fifth member. As there were not 40 members present, the number necessary to constitute a house, the motion fell to the ground, but was brought forward on the following day by Mr. Wakley, when it was defeated by 64 to 52.

**THE WOODS AND FORESTS.**—In the late session an Act was passed, to which reference was made by her Majesty on the prorogation, for the better management of the Woods and Forests. By this Act the Woods and Forests will be separated from the Public Works and Buildings. On the 10th of October the new law will take effect, from which day the First Commissioner of the Public Works will be the First Commissioner of the Public Works and Buildings, at a salary of 2,000*l.* a-year, and he may be a member of the House of Commons. It is further provided that the other Commissioners of the Woods may hold their appointment, and their salaries are to be provided for by Parliament; they are not to sit in the House of Commons. Provision is made for the appointment of other officers and the regulation of the departments. From the commencement of the Act the management of the Royal parks will vest in the Commissioners of Public Works and not in the Commissioners of Woods and Forests. Both departments are to be provided for by Parliament. The Chief Commissioner of Public Works will be an Inclosure Commissioner, a commissioner of Greenwich Hospital, a commissioner for Building New Churches and President of the Board of Health. It is expected that the separation made by the Act will be beneficial to both departments.

**BIBLES AND PRAYER-BOOKS.**—A Parliamentary paper, obtained by Mr. Hume, has just been printed, containing a copy of the letters patent under which the Queen's printers, Messrs. Eyre and Spottiswoode, exercise their privilege of printing Bibles and Prayer-books, &c. as also an extract from a charter of the 11 Charles 1, by which the University of Oxford claims the right of printing Bibles and Prayer-books. No return had been received from the University of Cambridge. It appears that George 4 granted letters patent to Andrew Strahan, George Eyre, and Andrew Spottiswoode, and their executors, &c. as Royal printers, from the 21st of January, 1830, for and during the term of thirty years. The University of Oxford claims the right of printing Bibles and Prayer-books under several charters, and more especially under the one mentioned. The right is stated not to be barred or limited, or affected by any letters patent since granted according to several decisions in Chancery and in the House of Lords, in all of which the right was distinctly recognised.

**PRIVATE BILLS IN PARLIAMENT.**—Yesterday a parliamentary return was printed, from which it appears that in the late session 217 private bills were introduced; the number brought from the Lords was 28. Of the bills 179 received the Royal Assent. There were 128 treated as opposed, or classified in groups by the committee of selection. The number of private bills referred to the chairman of the committee of ways and means by the committee of selection was 82. Of the bills which received the Royal Assent 61 related to railways, 26 to roads and bridges, 7 to waterworks, 5 to ports, piers, harbours, and docks; 3 to canals and navigation, 3 to churches, chapels, and burying-grounds; 22 to paving, lighting, and markets; 2 to inclosure and drainage, 1 to letters patent, and 27 were Lords' bills.

#### NEW STATUTES.

14 & 15 VICTORIA, A.D. 1851.

[In this record of Legislation only the Statutes of practical utility are given at length. Of the others an abstract or the titles only are presented.]

(Continued from page 238.)

CAP. LXXXIII.

An Act to improve the Administration of Justice in the Court of Chancery and in the Judicial Committee of the Privy Council. (Aug 7, 1851.)

We give this statute entire:—

Whereas it is expedient that further provision should be made for the administration of justice in the High Court of Chancery and in the Judicial Committee of the Privy Council: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Power to her Majesty to appoint two persons to be judges of the Court of Appeal in Chancery.*—It shall be lawful for her Majesty, from time to time, by letters patent under the great seal of the United Kingdom, to appoint two persons, being or

having been respectively barristers-at-law of fifteen years standing, to be judges of the Court of Appeal in Chancery, and every judge so appointed shall hold his office during good behaviour; provided always, that it shall be lawful for her Majesty to remove any such judge from his office upon an address of both Houses of Parliament; and the Lord Chancellor, together with such two judges, for the time being appointed as aforesaid, shall form the Court of Appeal in Chancery.

2. *Power to appoint secretary, usher, and train-bearer for each judge.*—It shall be lawful for her Majesty, in and by such letters patent as aforesaid, or by any other letters patent under the great seal of the United Kingdom, to direct that each of the judges to be appointed in pursuance of this Act shall have a secretary, usher, and trainbearer, to be from time to time appointed and removed by such judge at his pleasure; and the secretaries, registrars, and other officers appointed to attend the Lord Chancellor shall attend the said Court of Appeal and the respective judges thereof as circumstances shall require, and the Lord Chancellor shall direct.

3. *Precedence of judges of Court of Appeal.*—The said judges shall be styled Lords Justices of the Court of Appeal in Chancery, and shall have rank and precedence next after the Lord Chief Baron of the Court of Exchequer, and as between themselves shall have rank and precedence according to the order and time of their appointment.

4. *Judges of Court of Appeal to take the following oath.*—Every judge so appointed shall, previous to his executing any of the duties of his office, take the following oath, which the Lord Chancellor or the Master of the Rolls for the time being is hereby respectively authorised and required to administer:

"I, do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of Lord Justice of the Court of Appeal in Chancery.

"So help me God."

5. *Court of Appeal to have the jurisdiction now exercised by the Lord Chancellor.*—From and after the first day of October one thousand eight hundred and fifty-one, all the jurisdiction of the High Court of Chancery in England which is now possessed and exercised by the Lord Chancellor in the said Court of Chancery, and all powers, authorities and duties, as well ministerial as judicial, incident to such jurisdiction, now exercised and performed by the Lord Chancellor, shall and may be had, exercised, and performed by the said Court of Appeal.

6. *Statutory jurisdiction now exercised by the Lord Chancellor as a judge in Chancery may be exercised by the Court of Appeal.*—Where under any Act of Parliament any jurisdiction is vested in the Lord Chancellor, or any power, authority, or duty is to be exercised or performed by the Lord Chancellor, and under the directions of any Act or by the usage in this behalf such power, authority, or duty is or ought to be exercised or performed by the Lord Chancellor acting judicially in the said Court of Chancery, all such jurisdiction, power, authority, and duty, and the ministerial powers and authorities incident thereto or consequent thereupon, which are now exercised and performed by the Lord Chancellor, shall from and after the said first day of October one thousand eight hundred and fifty-one be had, exercised, and performed by the said Court of Appeal.

7. *Jurisdiction of Vice-Chancellor in bankruptcy transferred to the Court of Appeal.*—From and after the first day of October one thousand eight hundred and fifty-one, all the powers, authorities, and jurisdiction, original and appellate, given and granted to the Vice-Chancellors of the said Court of Chancery, or any of them, under the Bankrupt Law Consolidation Act, made and passed in one thousand eight hundred and forty-nine, or otherwise had, possessed, or exercised by the said Vice-Chancellors, or any of them, in matters of bankruptcy, shall be granted to, vested in, exercised, and possessed by the said Court of Appeal; and all the provisions of the said Act in relation to such appeals to such Vice-Chancellor shall be construed accordingly: Provided always, that there shall not be any appeal from the decision of the said Court of Appeal to the Lord Chancellor, anything in the said Bankrupt Law Consolidation Act to the contrary notwithstanding.

8. *Common law judges may sit on request of Lord Chancellor.*—It shall be lawful to the said Court of Appeal and the Master of the Rolls, and the Vice-Chancellors, and for each of the said jurisdictions, to sit, with the assistance of any judge of either of her Majesty's Courts of Common Law at Westminster, upon the request of the Lord Chancellor, if any such common law judge shall find it convenient to attend upon such request.

9. *Decision of majority to be binding; if Court equally divided the decree, &c. appealed from to be affirmed.*—The decision of the majority of the judges of the Court of Appeal shall be taken and deemed to be the decision of the said Court; and if the judges of the Court be equally divided in opinion on any cause or matter brought before the Court by way of appeal, the decree or order ap-

pealed from shall be taken and deemed to be affirmed by the Court of Appeal.

10. *Decrees, &c. of the said Court of Appeal may be appealed from to the House of Lords.*—All decisions, decrees, or orders of the Court of Appeal, including decisions in matters of bankruptcy, shall be subject to appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, decrees, or orders of the Lord Chancellor would have been subject to such appeal if this Act had not been passed; but the appeal to the House of Lords in matters of bankruptcy shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the judges of the Court of Appeal hereby constituted, whose determination on the settlement of such case shall be final and conclusive.

11. *One judge appointed under this Act sitting with the Lord Chancellor, or both judges sitting apart from him, to form the Court of Appeal.*—Lord Chancellor sitting alone to have co-ordinate jurisdiction with the Court of Appeal.—All the jurisdiction, powers, and authorities of the said Court of Appeal may be exercised either by one only of the judges for the time being appointed under this Act and the Lord Chancellor sitting together as such Court of Appeal, or by both of the judges so appointed sitting as such Court apart from the Lord Chancellor, either in his absence from the said Court of Chancery, or during the same time as he is sitting in such court: Provided always, that the Lord Chancellor shall and may also while sitting alone or apart from such two judges have and exercise the like jurisdiction, powers, and authorities, as well as all such other jurisdiction, powers, and authorities as might have been exercised by the Lord Chancellor if this Act had not been passed.

12. *Lord Chancellor to regulate sittings and business of Court of Appeal.*—The Lord Chancellor shall fix the times at which the two judges of the said Court of Appeal appointed under this Act, or either of them, shall sit with the Lord Chancellor, and at which such two judges shall sit apart from him as such Court of Appeal, and also what appeals and matters now usually heard and determined by the Lord Chancellor, and hereby made subject to the jurisdiction of the said Court of Appeal, shall be heard and determined by such Court when the Lord Chancellor is sitting with the said Judges to be appointed under this Act, or one of them, and by such judges when sitting apart from such Lord Chancellor, and by such Lord Chancellor when sitting alone, respectively, and generally may make such alterations as to him may seem proper for dividing and regulating the business of the said Court of Appeal, and for the attendance of a registrar of the said Court of Chancery at the sittings of the said Court of Appeal.

13. *Saving of the ministerial and certain other powers of the Lord Chancellor.*—Nothing herein contained shall affect any of the powers, duties, or authorities attached to the office of Lord Chancellor, or exercised by the Lord Chancellor as Keeper of the Great Seal, except the powers, authorities, and duties which are exercised and performed by him acting as a judge in the said Court of Chancery, either by virtue of his ordinary jurisdiction or of any statute, and the ministerial powers and authorities incident thereto respectively, or affect the powers, authorities, and duties of the Lord Chancellor, under and by virtue of any appointment under the sign manual of the Crown, as having the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, or in relation to letters patent, grants, or writings passed or to be passed under the Great Seal of the United Kingdom, or the revocation of such letters patent, grants, or writings, or the powers and authorities of the Lord Chancellor in right or on behalf of her Majesty as visitor of any charity or other foundation, or the powers of the Lord Chancellor of appointment to or removal from or otherwise in relation to offices in the Court of Chancery, or other offices, save as herein specially provided, or the powers of the Lord Chancellor to direct and regulate the sittings and duties of the Vice-Chancellors, or any powers of the Lord Chancellor (whether to be exercised by the Lord Chancellor alone, or with the concurrence or advice or consent of the Master of the Rolls, or of the Master of the Rolls and the Vice-Chancellors, or otherwise), to make rules or orders for regulating the practice, proceedings, and business of the Court of Chancery, or the business or duties of any of the offices or officers of such Court; and in all cases where the concurrence, advice, or consent of the Master of the Rolls and of one of the Vice-Chancellors, or of either of them, shall be requisite for the making of such rules or orders, the concurrence, advice, or consent of one of the judges appointed by virtue of this Act may be substituted for that of the Master of the Rolls or of such Vice-Chancellor.

14. *One of the judges of the Court of Appeal may sit for Master of Rolls or Vice-Chancellor during his temporary absence.*—In case the Master of the Rolls or any Vice-Chancellor of the High Court of

Chancery shall be prevented by illness or otherwise from sitting at any time when, according to ordinary course his Court would be open, the Lord Chancellor may, by writing under his hand, from time to time, so often as occasion may require, authorise one of the judges of the said Court of Appeal to sit for the hearing and determining of causes and matters in lieu of the Master of the Rolls or such Vice-Chancellor, and the judge sitting under such authority as aforesaid may, for the purpose of disposing of any cause or matter which has been partly heard by him, continue such his sittings, notwithstanding the Master of the Rolls or Vice-Chancellor in whose stead he has partly heard such cause or matter may also be sitting for the hearing of other causes or matters; and all decrees and orders made by such judge in pursuance of such authority shall be of the same effect and validity and subject to revision and appeal, in the same manner in all respects as if made by the Master of the Rolls or Vice-Chancellor, as the case may be: Provided always, that such judge shall not sit as a judge of the said Court of Appeal upon any appeal from any decree or order made by himself.

15. *Judges of Court of Appeal, if privy councillors, to be of the judicial committee.*—Every person holding or who has held the office of a judge of the Court of Appeal in Chancery shall, if a member of her Majesty's Privy Council, be a member of the Judicial Committee of the Privy Council.

16. *No matter to be heard, &c. by Judicial Committee unless three members are present, exclusive of Lord President.*—So much of the Act of the session holden in the third and fourth years of King William the Fourth, chapter forty-one, as provides that no matter shall be heard, nor shall any order, report, or recommendation be made, by the Judicial Committee of the Privy Council, in pursuance of that Act, unless in the presence of at least four members of the said committee, shall be repealed; and no matter shall be heard, nor shall any order, report, or recommendation be made, by the said Judicial Committee, in pursuance of the said Act or any other Act, unless in the presence of at least three members of the said committee, exclusive of the Lord President of her Majesty's Privy Council for the time being.

17. *Provision as to Lord Chancellor's salary.* 2 & 3 Wm. 4, c. 122.—From and after the eleventh day of October, one thousand eight hundred and fifty-one, the salary of the Lord Chancellor shall be the net yearly sum of ten thousand pounds; and there shall be deducted from the yearly sum payable to the Lord Chancellor under the Act of the session holden in the second and third years of King William the Fourth, chapter one hundred and twenty-two, the amount of any salary or sum which for the time being may be payable to the Lord Chancellor as Speaker of the House of Lords, so that such yearly sum only shall be paid by the Governor and Company of the Bank of England, to the Lord Chancellor, under and according to the provisions of the said Act, as with the salary or sum certified (as hereinafter mentioned) to be payable to the Lord Chancellor as such Speaker shall be sufficient to make up the net yearly sum of ten thousand pounds; and the clerk assistant of the Parliaments shall on or before the eleventh day of October, one thousand eight hundred and fifty-one, and from time to time, so often as the salary or sum payable to the Lord Chancellor as such Speaker is altered, certified in writing under the hand of such clerk assistant, to the said Governor and Company, the amount of the salary or sum for the time being payable to the Lord Chancellor as such Speaker.

18. *Salary of the Master of the Rolls reduced to 6,000l.* 7 Wm. 4 & 1 Vict. c. 46.—From and after the eleventh day of October, one thousand eight hundred and fifty-one, in lieu of the salary payable to the Master of the Rolls under the Act of the session holden in the seventh year of King William the Fourth, and the first year of her Majesty, chapter forty-six, there shall be paid, for the salary of the Master of the Rolls for the time being, out of the fund, on the days, and according to the provisions mentioned and contained in the said Act, the annual sum of six thousand pounds, free and clear from all taxes and deductions.

19. *Salary of 6,000l. to be paid to each of the judges of the Court of Appeal appointed under this Act out of the interest and dividends arising from suitors' fund.*—Out of the interest and dividends that have arisen or may hereafter arise from the Government or Parliamentary securities now or hereafter to be placed in the name of the Accountant-General of the Court of Chancery to the two accounts, intitled "Account of Moneys placed out for the Benefit and better Security of the Estates of the High Court of Chancery," and "Account of Securities purchased with surplus Interest arising from Securities carried to an account of moneys placed out for the benefit and further Security of the Sutors of the high Court of Chancery," or either of them, there shall be paid (but subject and without prejudice to the payment of all salaries or sums of money by any former Act or Acts now in force di-

rected or authorised to be paid thereout), by the Governor and Company of the Bank of England, by virtue of any order or orders of the Lord Chancellor to be made from time to time for that purpose, without any draft from the Accountant-General, the net yearly salary of six thousand pounds to each of the judges of the said Court of Appeal for the time being appointed under this Act, the net yearly salary of four hundred pounds to his secretary, the net yearly salary of two hundred and fifty pounds to his usher, the net yearly salary of one hundred pounds to his trainbearer; and also a sum of forty pounds per annum to each of the persons appointed or to be appointed under the Act of the session holden in the fifth year of the reign of King George the Third, chapter one hundred and sixty-four, and under the Act of the session holden in the fifth year of her Majesty, chapter five, to keep order in the courts therein mentioned, and in addition to the salary of forty pounds thereby provided; all such payments to be made respectively on the days and according to the provisions as to proportionate parts thereof respectively and otherwise mentioned and contained in the said last-mentioned Act in relation to the salaries of the Vice-Chancellors and officers appointed under such Act.

20. *Power to her Majesty to grant an annuity to each of such judges on his resignation.*—It shall be lawful for her Majesty, by letters patent under the Great Seal of the United Kingdom, to grant to any person appointed to and executing the office of a judge of the said Court of Appeal in pursuance of this Act, an annuity not exceeding three thousand seven hundred and fifty pounds, to commence and take effect immediately after the period when the person to whom such annuity is granted resigns his office, and to continue from thenceforth during the natural life of such person; and such annuity shall be issued and payable out of and charged upon the consolidated fund of the United Kingdom, after paying or reserving sufficient to pay all such sums of money as by any Acts of Parliament now in force have been directed to be paid thereout, but with precedence to all other payments which shall hereafter be charged thereupon; and such annuity shall be paid on the days and according to the provisions mentioned and contained in the said Act of the fifth year of her Majesty, in relation to the annuities granted on resignation of office to the Vice-Chancellors appointed under that Act: Provided always, that it shall be lawful for her Majesty to limit the duration of such annuity or any part thereof to such periods of time during the natural life of such person as he shall not exercise any office of profit under her Majesty, so that such annuity, together with the profits of such office, shall together not exceed the said sum of three thousand seven hundred and fifty pounds: Provided also, that no annuity granted to any person having executed the said office of a judge of the said Court of Appeal shall be valid unless such person have held such office for the period of fifteen years, or have held such office, and any of the offices of Master of the Rolls, Vice-Chancellor, or judge of one of her Majesty's Superior Courts of Common Law at Westminster, for periods amounting together to fifteen years, or be affected with some permanent infirmity disabling him from the due execution of his office, which shall be distinctly recited in the said grant.

21. *Lord Chancellor empowered, if he think it necessary, to appoint an additional registrar.*—It shall be lawful for the Lord Chancellor (in case it shall hereafter appear to be necessary) by writing under his hand to appoint one additional registrar of the Court of Chancery, and from time to time to fill up any vacancy in the said office; and the person to be appointed such additional registrar shall be the senior of the clerks to the registrars of the said Court for the time being, to whom no sufficient objection to the satisfaction of the Lord Chancellor shall be made; and such additional registrar shall rank next after the junior of the registrars for the time being appointed under the Act of the fifth year of the reign of her present Majesty, chapter five, and shall personally do and perform all the duties and have and enjoy all the rights and privileges belonging to the office of registrar, and shall be subject to the several provisions and penalties contained in the said Act relating to the registrars of the said Court, and be entitled, in case of permanent infirmity or after continuance in office for forty years, to the like annuity as if he had been appointed registrar in and by the said Act: provided always, that the acceptance of the office of additional registrar by such senior clerk for the time being shall be without prejudice to all his rights of succession to the office of registrar under the said Act.

22. *Salary of such registrar to be paid out of suitors' fund.*—Out of the fund placed to the credit of the accountant-general of the said Court, intituled "The Suitors' Fee Fund Account," or the other funds charged with and made liable for the payment of the salaries of the present registrars, there shall be paid to such additional registrar from the date of his appointment the salary or net yearly sum of one thousand two hundred and fifty pounds,

and also, so long as he shall be liable for the expenses of writing and copying the decrees and orders, and the minutes of the decrees and orders of the said Court, the yearly sum of one hundred pounds, on the days and in the manner provided by the said Act of the fifth year of the reign of her present Majesty, chapter five, with respect to the payment of the salaries of the present registrars.

23. *Additional salary to eleventh clerk to the registrars.*—In the event of the appointment of such additional registrar there shall be paid to the eleventh clerk to the registrars for the time being, from the date of such appointment, out of the said fund, intituled "The Suitors' Fee Fund," or such other funds as aforesaid, the same salary or yearly sum, and on the same days and in the same manner as by the said Act of the fifth year of the reign of her present Majesty, chapter five, is appointed and directed to be paid to the seventh, eighth, ninth, and tenth clerks to the registrars.

24. *Interpretation of term "Lord Chancellor."*—In the construction of this Act, unless such meaning be repugnant to or inconsistent with the context, the expression "Lord Chancellor" shall mean and include the Lord High Chancellor of Great Britain, and the Lord Keeper or Lords Commissioners of the Great Seal of the United Kingdom, for the time being.

## CAP. LXXXIV.

An Act to alter and amend an Act empowering the Canterbury Association to dispose of certain Lands in New Zealand. (Aug. 7, 1851.)

## CAP. LXXXV.

An Act further to amend an Act of the Sixth Year of King William the Fourth, to consolidate and amend the Laws relating to the Constabulary Force in Ireland. (Aug. 7, 1851.)

## CAP. LXXXVI.

An Act to regulate the Affairs of certain Settlements established by the New Zealand Company in New Zealand. (Aug. 7, 1851.)

## CAP. LXXXVII.

An Act to regulate certain Proceedings in relation to the Elections of Representative Peers for Scotland. (Aug. 7, 1851.)

## CAP. LXXXVIII.

An Act for amending the several Acts for the Regulation of Attorneys and Solicitors. (Aug. 7, 1851.)

We give this statute entire.

1 & 2 Geo. 4, c. 48—3 Geo. 4, c. 16—8 & 9 Vict. c. 66.—Whereas by an Act passed in the session of Parliament held in the first and second years of the reign of his late Majesty king George the Fourth, intituled "An Act to amend the several Acts for the Regulation of Attorneys and Solicitors," and which was afterwards amended by an Act passed in the third year of the reign of his said late Majesty king George the Fourth, intituled "An Act to amend an Act made in the last Session of Parliament, for amending the several Acts for the Regulation of Attorneys and Solicitors," provision was made for facilitating the admission of graduates of the Universities of Oxford, Cambridge, and Dublin, and the pupils of practising barristers and of certificated special pleaders, as attorneys and solicitors of the Courts of Law and Equity, in manner and upon the conditions in the said Acts mentioned: and whereas by an Act of the sixth and seventh years of her present Majesty's reign, chapter seventy-three, the said recited Acts have been repealed, except so far as the attorneys and solicitors of Ireland are affected thereby, but the same are still in force as regards Ireland and the attorneys and solicitors of Ireland: and whereas since the passing of the said recited Acts the Queen's Colleges of Belfast, Cork, and Galway have been founded by letters patent of her Majesty Queen Victoria, under the Great Seal of Ireland, under the authority of an Act passed in a session of Parliament held in the eighth and ninth years of the reign of her Majesty Queen Victoria, intituled "An Act to enable her Majesty to endow new Colleges for the Advancement of Learning in Ireland:" and whereas by the said letters patent a faculty of law has been established in each of the said Queen's Colleges: and whereas since the passing of the last-mentioned Act, a body politic and corporate has been constituted by the royal charter of her Majesty Queen Victoria, under and by the name of "The Queen's University in Ireland:" and whereas it is expedient that certain of the provisions now in force of the said two first-recited Acts should be extended to students who have obtained, or shall hereafter obtain, the degree of Bachelor of Arts or the degree of Bachelor of Laws in the said Queen's University in Ireland, and to students of the University of Dublin, or of the said Queen's Colleges who have attended, and who shall attend, the lectures of the professors of the faculty of law in the said University of Dublin, or any of the said Queen's Colleges: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present

Parliament assembled, and by the authority of the same,

1. *Provisions of recited Acts relating to the admission and enrolment as attorneys of Bachelors of Arts or Laws at Dublin, extended to degree of Bachelor of Arts and of Laws in Queen's University in Ireland.*—That from and after the passing of this Act all the provisions, regulations, conditions, and restrictions of the said two first-recited Acts now in force (as regards that part of the United Kingdom of Great Britain and Ireland, and the attorneys or solicitors of Ireland), for or relating to the admission and enrolment as attorneys and solicitors of persons who have taken or shall hereafter take the degree of Bachelor of Arts or Bachelor of Laws in the University of Dublin, shall extend and be applicable to the admission and enrolment as attorneys and solicitors of all persons who have taken or shall hereafter take the degree of Bachelor of Arts or the degree of Bachelor of Laws in the said Queen's University in Ireland, as fully and effectually as if the said body politic and corporate called "The Queen's University in Ireland" had been constituted and founded at the time of the passing of the said Acts, and had been therein named, together with the said University of Dublin, and as if the degree of Bachelor of Arts and the degree of Bachelor of Laws of the said Queen's University had been in the said Acts named together with the degrees of Bachelor of Arts and Bachelor of Laws of the said University of Dublin.

2. *Certain provisions of former Acts as to persons bound for five years, &c. extended to students of Queen's Colleges attending lectures and passing examinations in faculty of law during two collegiate years.*—That every person who, as a matriculated or as a non-matriculated student of the University of Dublin or of any of the said Queen's Colleges, shall have attended or shall attend any prescribed lectures, and shall have passed or shall pass any prescribed examinations of the professors of the faculty of law in the said University of Dublin or in any of the said Queen's Colleges for a period of two collegiate years, and who shall have duly served as an apprentice or clerk, by contract in writing, duly stamped at or before the signing thereof, or within six months after, for the term of four years, in like manner as by the provisions now in force of the said two herein-before first-recited Acts is directed respecting the service for the term of five years, shall, at any time after the expiration of five years from the commencement of such attendance on lectures, or of such period of service, which shall first happen, be qualified to be sworn and to be admitted as an attorney or solicitor respectively, according to the nature of his service, of the several and respective Superior Courts of Law or Equity in Ireland, as fully and effectually to all intents and purposes as any person having been bound and having served five years is qualified to be sworn and to be admitted or enrolled an attorney or solicitor under or by virtue of any Act or Acts now in force for the regulation of attorneys or solicitors in Ireland, anything in the said Acts or any of them to the contrary in anywise notwithstanding.

3. *Privileges given by recited Act to Bachelors of Arts or of Laws in universities of Oxford, Cambridge, Dublin, &c. as to attorneys' admission in England, extended to Bachelors of Arts or Laws in the Queen's University.*—And whereas, under the provisions of the said recited Act of the sixth and seventh years of her present Majesty, certain privileges were granted to any person seeking to be admitted and enrolled as an attorney or solicitor in England or Wales, and who shall have taken or who shall take the degree of Bachelor of Arts within six years after his matriculation, or the degree of Bachelor of Laws within eight years after his matriculation, in the University of Oxford, or of Cambridge, or of Dublin, or of Durham, or of London, and who shall in manner therein mentioned be bound by contract in writing to serve as a clerk to a practising attorney or solicitor in England or Wales, and shall have continued in such service, and have been employed as in the said Act respectively mentioned, and been examined and sworn as in the said Act directed: be it enacted, that the like privileges, subject to the like regulations, conditions, and restrictions, shall be extended to persons who shall have taken the degree of Bachelor of Arts or Bachelor of Laws in the said Queen's University, as if the said Queen's University, and the degree of Bachelor of Arts and the degree of Bachelor of Laws of the said Queen's University, had been in the said Act named together with the said Universities of Oxford, Cambridge, Dublin, and Durham, and London, and with the degrees of Bachelor of Arts and Bachelor of Laws in the said Universities of Oxford, Cambridge, Dublin, Durham, or London.

4. *Certificate of Vice-Chancellor of Dublin University, &c. of dean of faculty, to be sufficient evidence.*—Provided always, that the Court or other sufficient authority in Ireland to whom any such student shall apply to be admitted as an attorney or solicitor shall receive the certificate of the Vice-Chancellor of the University of Dublin, or such other

certificate as shall be appointed by the board of senior fellows of the said university, or of the dean of the faculty of law for the time being of any of the said Queen's colleges, as sufficient evidence of the student named in such certificate having duly attended the prescribed lectures, and passed the prescribed examinations of the professors of the faculty of law in such college for the said period of two collegiate years, and of the time of the commencement of the attendance of such student upon such lectures.

## CAP. LXXXIX.

An Act to amend the Metropolitan Interment Act, 1850, and to authorise the advance of Public Money to a limited Amount for the Purposes of the said Act. (Aug. 7, 1851.)

## CAP. XC.

An Act for the better Collection of Fines, Penalties, Issues, Amerciaments, and forfeited Recognisances in Ireland. (Aug. 7, 1851.)

## CAP. XCI.

An Act to authorise the Application of Advances (out of Money now authorised to be advanced for the Improvement of Landed Property) to facilitate Emigration from certain distressed Districts of Scotland. (Aug. 7, 1851.)

## CAP. XCII.

An Act to consolidate and amend the Acts relating to certain Offences and other Matters as to which Justices of the Peace exercise Summary Jurisdiction in Ireland. (Aug. 7, 1851.)

## CAP. XCIII.

An Act to consolidate and amend the Acts regulating the Proceedings at Petty Sessions, and the Duties of Justices of the Peace out of Quarter Sessions, in Ireland. (Aug. 7, 1851.)

## CAP. XCIV.

An Act to define and amend the Mineral Customs of certain Parts of the Hundred of High Peak, in the County of Derby, Part of the Possessions of her Majesty's Duchy of Lancaster; to make Provision for the better Administration of Justice in the Barmote Courts therein; and to improve the Practice and Proceedings of the said Court. (Aug. 7, 1851.)

## CAP. XCV.

An Act for transferring the Duties of paving, lighting, watering, and cleansing Parts of the Crown Estate in the District of the Regent's Park and certain Streets and Places in Westminster from the Commissioners acting under several Acts of their late Majesties King George the Fourth and King William the Fourth to the Parishes; and for transferring the Jurisdiction of the said Commissioners over certain other Places in Westminster to the Commissioners of Her Majesty's Works and Public Buildings; and for other Purposes. (Aug. 7, 1851.)

## THE MAGISTRATE,

AND PAROCHIAL AND MUNICIPAL LAWYER.

## SUMMARY.

An abstract of a useful statute to amend the laws relating to the regulation of steam navigation, and to the boats and lights to be carried by sea-going vessels, appears in our last number, 17 Law T. 236 (outside). Owing to its extreme length, and the limited interest which it affects, we did not insert it entire. Some very important alterations in the law are nevertheless made, with reference to the survey and build of steam-vessels, the regulation of the number and control of passengers, the provision of boats, and the use of lights to prevent collisions. Misdemeanors or offences are to proceed by information or indictment before a magistrate, by direction of the Commissioners of Customs or of the Board of Trade. An appeal is given to the Quarter Sessions, and there is provision that proceedings shall not be void because of informality, neither shall any case be removable by *certiorari*. Altogether this promises to be a statute which will prove eminently serviceable in its operation. By chapter 55 of the New Statutes, 17 Law T. 235 (outside), the Metropolitan Sewers Act, the Act of 1849, is extended and to continue in force for one year. New powers are also therein taken for the appointment of a chairman, with a salary of 1,000*l.* per annum, and a deputy chairman, with regulations as to the constitution of a quorum of the board.

## THE LAW RELATING TO LICENCES FOR MUSIC AND DANCING.

On June 6th of last year, the magistrates of Middlesex, in consequence of a great deal of public attention having been drawn to the subject of licences for music and dancing, and the existence amongst them of a great diversity of opinion as to the precise state of the law in relation thereto, appointed a committee of twelve magistrates to take the matter into consideration, to obtain the opinions of eminent counsel if necessary, and to report to the Court the conclusions at which they arrived. After extending their deliberations over a period of sixteen months, the committee have made their report, and the Court has adopted it, and passed resolutions in accordance with its recommendations. The report, which will shortly be circulated, is as follows:—

"Your committee have to report that the powers possessed by the Court in the matter referred to are derived from the Act of 25 Geo. 2, c. 36, the provisions of which are, however, to some extent restricted by subsequent enactments. The 2nd section of the Act provides that any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence from the Court of Quarter Sessions (who are thereby authorised and empowered to grant such licences as they in their discretion shall think proper), shall be deemed a disorderly house or place, and renders the keeper thereof subject to a penalty of 100*l.* as well as otherwise punishable as the law directs in the case of disorderly houses. The same section further empowers a constable, or other person being thereto authorised by a warrant of a justice of the peace, to enter such houses and places, and to seize every person who may be found therein, that they may be dealt with according to law. The fifth and several subsequent sections of the Act contain provisions for encouraging and facilitating prosecutions against persons keeping disorderly houses; and the twelfth section empowers two or more justices to deal in a summary way with the parties brought before them under the second section already mentioned. Upon considering the effect of the above provisions your committee found that doubts were entertained by different members of the bench upon three points, viz. first, whether the Court is legally authorised on the grant of a licence under this Act, to limit it to one particular sort of entertainment, as to music only, or dancing only, or whether a licence, if granted at all, must not extend to every kind of entertainment within the purview of the Act. Secondly, whether assuming that the words 'other public entertainments of the like kind' include scenic public entertainments, the power of the Court to grant licences for such purposes is not taken away by the Act of 6 & 7 Vict. c. 68, for regulating theatres. Thirdly, whether the power given to the justices by the Act of Geo. 2, to grant warrants for the apprehension of persons found in unlicensed (i. e. disorderly) houses is not repealed by the Act of 5th Geo. 4, c. 83, respecting the punishment of idle and disorderly persons. The great practical importance of the above questions, and the difficulty felt by many members of the bench in dealing with them, rendered it (your committee thought) desirable to take the opinion of counsel upon them; they, therefore, gave directions that a case should be drawn up and submitted to Sir Frederick Theisiger and Mr. Crompton, which was accordingly done, and the case, with the opinion of those gentlemen upon it, is annexed by way of appendix to this report. It will be seen that the opinion is decidedly in favour of the power of the Court to grant partial licences; that according to the same opinion the Court of Quarter Sessions has no longer the power (if it really ever had it) to grant licences under 25 Geo. 2, for the performance of scenic entertainments, and that the counsel think that the justices retain the power of issuing warrants for the apprehension of persons found in disorderly houses, although they appear to doubt whether that power can be exercised with much practical benefit. Upon the first of these points your committee have no hesitation in adopting the construction now put upon the statute, which they believe may be acted upon by the Court with perfect safety. If the Court concurs in this view it has power at once, without any further legislative enactment, to carry into effect one of the recommendations made by the assistant judge, in his printed letter of last year, by restricting within narrower bounds the granting of licences for public dancing and allowing a wider scope to entertainments confined to music, particularly when not held at taverns. Your committee think the suggestion to be entitled at the least to serious consideration. But, whatever may be done in this respect, your committee think that some alteration is requisite, both in the form of the notices for applications for licences and in the form of the licences themselves and in the endorsement thereon. Your committee think that every sort of entertainment for which the applicant wishes to obtain a licence, or for which the Court intends to

grant one, ought to be distinctly expressed on the face of the notice or of the licence, in order, on the one hand, that the Court may be able to judge of the legality as well as propriety of what the applicant wants; and, on the other hand, that the latter may be free from all doubt respecting the extent of the privilege conceded to him. The general expression, 'other entertainments of the like kind,' introduced into the Act of 25 Geo. 2, was intended, your committee believe, to enable the Court to judge whether any entertainment (other than music or dancing) for which a licence may be applied for was or was not within the scope of the Act. By inserting the phrase in the licence, the Court, however, throws upon the licence the task and responsibility of determining what it is that the Act contemplates, instead of deciding the question itself. Upon the second and third points referred to counsel, your committee see no reason to doubt the accuracy of the opinion given. They think, therefore, that all licences granted under the 25 Geo. 2, ought to be so expressed as to preclude any reasonable intendment of their authorising the exhibition of scenic entertainments. With respect to the subject generally, your committee agree in the opinion expressed by the assistant judge in the printed letter already referred to, that additional regulations are wanted for the supervision and control of places of public entertainment, and for the summary punishment of misconduct on the part either of the managers or frequenters of such places. They further agree with the assistant judge in thinking that some of the restrictions now imposed by law on those places are not well adapted to the existing condition of society. But these topics are so fully discussed in the letter of the assistant judge as to enable the court, without any further assistance from your committee, to determine upon the course which it may be proper to adopt. Your committee does not appear to be authorised by the terms of the present reference to take any steps towards obtaining an alteration of the law, either by an application to Government or by a direct appeal to the Legislature."

In the case laid before counsel the provisions of the statutes (25 Geo. 2, and 6 & 7 Vict. c. 68) were set forth, and the following questions submitted: First, whether the Middlesex justices are at liberty to grant licences under the 25 Geo. 2, for any one sort of entertainment of the nature specified or referred to in that Act exclusive of all others, viz. for "public dancing and music" or for "public music only," or whether the justices' powers are confined to the grant of licences for "public dancing, music, or other public entertainment of the like kind" collectively. Secondly, whether the statute 6 & 7 Vict. c. 68, does or does not indirectly repeal the statute 25 Geo. 2, c. 37, so far as relates to "other public entertainments of the like kind," and whether persons who under colour of the licences granted under the 25 Geo. 2, suffer scenic representations to be performed in their houses, are not liable to the penalty given by the 6 & 7 Vict. Thirdly, whether the enactment of the 5 Geo. 4, c. 83, takes away the power given to justices of the peace by the 25 Geo. 2, to issue their warrants to constables to enter the houses or places therein mentioned (and which by the last-mentioned Act are to be deemed disorderly houses or places), and to seize the persons found therein.

## OPINION.

"1. We are of opinion that the Middlesex justices are not compelled to grant licences for public dancing, music, or other public entertainment of the like kind' collectively, but that they may, at their discretion, grant the licence for music only, or for dancing only, or for music and dancing, nor can we entertain any doubt on this point when we observe the words of the Act to be in the disjunctive, which seems to leave no ground for any other construction.

"2. We should have thought, if the question had been open to us, that the 25 Geo. 2 did not apply to scenic representations at all, but the words 'or other public entertainments of the like kind' have been so long treated or acted upon as including scenic representations, that we are precluded from expressing our own independent opinion upon the point, and are compelled to accept the interpretation which has been put upon them, and from which it necessarily follows that the 6 & 7 Vict. c. 68, does indirectly repeal this portion of the 25 Geo. 2, and that parties would be liable to the penalties of the latter Act for suffering scenic representations to be performed in their houses.

"3. We are of opinion that the 5 Geo. 4 does not repeal the 25 Geo. 2, as to the power given in the last-named statute for justices to issue their warrants to constables to enter disorderly houses. We find some difficulty in understanding what the Act intended should be done with the persons, and the keepers of the houses, who may be seized, 'in order that they may be dealt with according to law.' Provision is made for punishing the keepers of disorderly houses, but nothing is said as to what is to be done with the persons found in them.—(Signed) F. THEISIGER, CHARLES CROMPTON."

Under the recommendations contained in this re-



port, an important alteration has been determined upon as to the forms of the licences to be granted at the approaching Michaelmas session, not only to new applicants, but to applicants for renewals. "The court will not, in future, insert in the licences to be granted under the Act 25 Geo. 2, c. 36, the words 'or other public entertainments of the like kind,' but will in all cases specify the particular entertainment which may be given." A notice to this effect will be forwarded to all parties at present licensed, and advertised for the information of those who intend to apply for licences at the Michaelmas session. At the next meeting of Middlesex magistrates a proposition will be made to alter the standing orders, in accordance with these new regulations; and that, in future, applicants give fourteen days' notice, instead of seven as heretofore, to the clerk of the peace, and to the clerks of petty sessions, of their intention to apply.

THE following petition from the Chairman of the visiting magistrates of the Somersetshire Lunatic Asylum, praying the provision of a place of confinement for criminal lunatics other than a common gaol, was presented to the House of Lords last session by the Earl of Shaftesbury. We give place to it in the hope that as a form it will be adopted by the visiting justices of other counties who may concur in its prayer:—

*To the Right Honourable the Lords, &c. The humble petition of the undersigned Chairman of the Visiting Magistrates of the Lunatic Asylum for the County of Somerset,*

Sheweth,—That your petitioner has been requested by the aforesaid visiting justices to represent to your Right Honourable House the great importance of providing a separate place of detention for criminal lunatics, and other persons confined for the purposes of justice. That the visiting justices consider that it is most important to keep the separation distinct between a lunatic asylum and a prison. That greater liberty is both possible and expedient for persons confined with a view to their cure than could be afforded to those whose detention is demanded by justice; inasmuch as with the former their sense of responsibility is strengthened by partial liberty, and on this sense of their responsibility most of the hopes of their cure depend. That the detention in asylums of persons acquitted on the grounds of insanity (many of whom are no longer insane, but must still be detained in a hopeless perpetual imprisonment), operates most unfavourably by driving them to desperation, and to acts most injurious to those confined with them as well as to the discipline of the establishment while the presence of such persons and conversations with them on the subject of their trials, naturally supply to the other classes of lunatics who look forward to their release, an argument for their security hereafter, most prejudicial to public morals and their own good, inasmuch as they see clearly that whatever crimes they may commit they will be sure in consequence of their previous lunacy, of a verdict of acquittal on the plea of insanity. That the visiting justices have been informed that a separate place of detention has been provided for such persons in Ireland. Your petitioner, therefore, prays that your Right Honourable House will take this deeply important subject into its consideration, and make such a provision for a remedy as to your consideration and wisdom may seem meet.

And your petitioner will ever pray.

Signed by the chairman of the meeting.

**PAUPERISM IN ST. PANCRA'S.**—The number of poor at present in the St. Pancras Workhouse is 1,098; the number at the same period last year was 1,178. The out-door poor on the parish books is 4,132; for the corresponding time last year the number was 4,747. The cost of each pauper per week is estimated at 2s. 11½d.; last year the cost did not exceed 2s. 7d. The increase is accounted for by the inmates receiving additional comforts and being better cared for now than they ever were before.

**MILITARY PRISONS.**—A parliamentary paper has just been issued containing a report on the discipline and management of the military prisons last year. There are nine military prisons in the United Kingdom and eight abroad, making seventeen prisons, capable of accommodating from 1,200 to 1,300 prisoners. In the prisons at home in 1847, 3,850 were admitted; in 1848, 4,009; in 1849, 3,533; and last year, 3,565. The commitments for desertion and absence without leave, taken together, were precisely the same in 1850 as in 1849, but whilst the minor offence of absence had increased, the grave crime of desertion had materially decreased. The commitments for drunkenness had increased in the last year. The Inspector-General (Colonel Jebb), in his report to the Secretary at War, makes the following observations:—"It is a subject of regret that there is an increase of recommissions, the number committed to some of the military prisons being 1,011, whilst those committed in 1850 amount to 1,268, being in

the latter year more than one-third of the whole admissions. The number, however, recommitted to the same military prisons are 578 in 1849, and 575 in 1850. A different result might have been anticipated, arising from the fact that a large portion of the worst characters in the army had been got rid of in the late reductions. It is, however, understood that many of these being perfectly fit for service, have obtained readmission into the ranks. But for this circumstance it becomes a question for serious consideration, now that the character of the service has been so greatly raised by the improvements made in the condition of the soldier, whether the suggestions made in 1849 for relieving regiments of habitual drunkards and incorrigible soldiers should not be adopted. Some means might also be devised for marking men so as to prevent their return to service."

This *Gazette* contains notices that the following places have been duly registered for the solemnization of marriages therein:—The Roman Catholic Chapel, Wellington, Shropshire; the Independent Chapel, Warkworth, Northumberland.

**PAUPER EMIGRATION FROM THE HOLBORN UNION.**—At a recent meeting of the board of guardians of the Holborn Union, at the Board-room, Gray's-inn-lane, Mr. Horne in the chair, the Rev. Dr. Worthington, the incumbent of St. Trinity, had an interview with the board, for the purpose of bringing before their notice an opportunity which he had of sending out labourers to Western Australia in the course of a few weeks, at most reasonable rates, and he had the guarantee of the governor of that colony, that 500 labourers would receive employment immediately on landing, at the rate of 7s. a day. If the board would avail themselves of the opportunity of sending out some of their able-bodied poor, he would co-operate with them for the purpose. In answer to inquiries, the rev. gentleman stated that they would be well provided for on the passage, and the high wages which were paid arose from the scarcity of labourers, not the high price of provisions; for meat, bread, and all the necessities of life were to be procured at very reasonable prices. He could not then state the cost at which they would be taken, but would obtain and supply the board with further particulars, if they were disposed to entertain the subject. Mr. James, the clerk of the union, stated the sum allowed by Government was 6l. for each passenger. A member of the board said that the question of expense was an important consideration, and they should like to be furnished with further particulars. The question was then adjourned for the purpose of obtaining the particulars of cost.

**AN EXECUTION UNDER SINGULAR CIRCUMSTANCES.**—Some years ago a man was apprehended in Hampshire, charged with a capital offence (sheep stealing, I believe). After being examined before a justice of the peace, he was committed to the county gaol at Winchester for trial at the ensuing Assizes. The evidence against the man was too strong to admit of any doubt of his guilt; he was consequently convicted, and sentence of death (rigidly enforced for this crime at the period alluded to) pronounced. Months and years passed away, but no warrant for his execution arrived. In the interval a marked improvement in the man's conduct and bearing became apparent. His natural abilities were good, his temper mild, and his general desire to please attracted the attention and engaged the confidence of the governor of the prison, who at length employed him as a domestic servant; and such was his reliance on his integrity, that he even employed him in executing commissions, not only in the city, but to places at a great distance from it. After a considerable lapse of time, however, the awful instrument, which had been inadvertently concealed among other papers, was discovered, and at once forwarded to the high sheriff, and by the proper authority to the unfortunate delinquent himself. My purpose is brief relation only; suffice it to say the unhappy man is stated under these affecting circumstances to have suffered the last penalty of the law.

—*Notes and Queries.*

**ABOLITION OF THE TITHE OFFICE.**—We have just heard a piece of news which the public will, no doubt, receive with pleasure. The Tithe Office, at Somerset House is to be abolished. Ten clerks were discharged last month, and twenty more will be in the course of the present one. This arises from, we are informed, there being no more business now to do, the tithes throughout England being nearly wholly commuted, and thus an end will be put to a very ancient but obnoxious impost—"tithes in kind." We regret that among the individuals discharged and to be discharged, are several who have served the Government at very moderate salaries from fourteen to twenty years, and are to be dismissed without any pension, with only a gratuity of one year's salary, many of them, of course, being advanced in years. We have yet to learn on what terms the commissioners are to retire; no doubt with good heavy pensions.

## JOINT-STOCK COMPANIES' LAW JOURNAL.

### Summary.

A CASE of some interest to railway companies (though the action was against a contractor under, and not against a company), was reported at Nisi Prius last week,—*Davis v. Myers*, 17 Law T. 304. That was an action of trespass against a contractor for blocking up access to the plaintiff's house, nailing planks across his door, and throwing up earth against it, in the course of constructing a railway bridge. The defendant justified under the Railway Clauses Act, 8 Vict. c. 20. The plaintiff replied, admitting the justification in all respects but one,—the nailing boards across the door, on which defendant had suffered judgment to go by default. Lord CAMPBELL said,—“We have laid it down as a general rule, that an action may be maintained for any injury which is not justified by statute; but that for any thing so justified, compensation only can be claimed. It is quite clear the plaintiff is not entitled to recover damages in this action for any thing which has been done under an Act of Parliament.”

Another case affecting railway companies—*Marshall v. The York, Newcastle, and Berwick Railway Company*, is reviewed under title “Mercantile Lawyer,” because it is equally important to common carriers. One of a class of cases now not infrequent, in which a railway company, contemplating a diverging line (which was afterwards abandoned), agreed to purchase an estate from its owner, “and to perform all such acts as might be necessary to enable him to sell,” afterwards refused to complete the contract, was reported last week,—*Hawker v. The Eastern Counties Railway Company*, 17 Law T. 301. We refer the reader to the case for the facts. The Court decreed a specific performance of the agreement. In *Russell v. The East Anglian Railway Company*, 17 Law T. 298, a bond creditor of a railway company, under the circumstances of the case, was held to have no lien upon the company's effects, and it was held that such effects were liable to be taken in execution at the suit of a judgment creditor, notwithstanding a receiver had been appointed on bill filed by a bond creditor to enforce an alleged equitable lien.

### WINDING UP.

Two great questions, besides a host of minor ones, yet remain to be determined by the House of Lords. The first and greatest is, whether any of the so-called companies, not being completely registered, are within the Winding-up Acts at all; and the other, for how much of the expenses a provisional committee-man can be called upon.

Should the first be decided in the negative, there is an end to all the rest, and it seems to us that there can scarcely be a rational doubt as to what that decision should be. In fact, the Lords have already settled it, for having determined in the allottee cases, that a provisionally registered company is *not a company*, but only a project for a company—a proposal for an association, and not an association actually formed—a mere casual coming together of a number of persons for the purpose of trying to constitute themselves into a society (which purpose they are unable to effect, and consequently abandon),—such, we repeat, being the deliberate decision of the House of Lords as to the true character of these so-called companies, it appears to us to follow as a necessary conclusion that they are neither companies nor associations within the meaning of either of those terms in the Winding-up Acts, and that the House of Lords must, in consistency with itself, reverse the inconsiderate and unfortunate judgment of Lord COTTENHAM, who first held them to be within the Act, because he treated them as companies, and all concerned in them as partners, which they are now decided, by a higher authority, not to be. And if any doubt be still felt as to the meaning of the term in the Act, it will be removed by an examination of the provisions of the Acts, which are all based upon the assumption that the concern to which they are to be applied are those in which there are a great number

of members partners, having definite rights, interests, and liabilities, easily ascertained, and not such as those in the class of cases under consideration, where it is difficult to discover who are and who are not concerned, and impossible to ascertain the limit of each man's liability. If any proof of this be wanting, it will be found in the fact that, practically, it is impossible to apply the provisions of the statute to such indefinite societies. Even if any sagacity on the part of the Master could discover the precise moment at which the liability of each individual began and ended, no amount of calculation could enable him to allot to each his precise portion of call, seeing that it varied with every new-comer upon the scene. In fact, the Winding-up Acts are utterly inapplicable to any cases in which there is not a partnership, so that each is liable for his equal proportion with all the rest for all expenses incurred during the period of his partnership, and that is the case with all companies completely registered. Hence it is that the Winding-up Acts have proved so thoroughly efficient for the purposes properly within their scope and design, and so utterly impracticable when sought to be applied to objects for which they were not designed. The House of Lords has not yet formally considered this great preliminary question, whether the bubble companies are within the Act. Since it was first hastily decided that they were so, the whole question of the nature of those societies has been discussed and determined, and therefore it is properly open to a more rational and practical conclusion. Infinite difficulties surround these cases, if they are preceded with. It would not only be in accordance with their recent decisions, but the most prudent course for the Lords to put an end at once to a mass of ruinous legislation that will last for a generation, by deciding, that provisionally-registered companies are *not* within the Act. Such we understand to be, in fact, the opinion of a considerable majority of the Judges and of all the Law Lords; and if it would be attended with some inconveniences, they would be less than those which will flow from the indefinite protraction of the present iniquitous proceedings.

### REAL PROPERTY LAWYER AND CONVEYANCER.

#### Summary.

A QUESTION of the validity of an appointment under a power in a deed of settlement was decided in *Re Simpson's Settlement*, 17 Law T. 302. In that case by a settlement made on the marriage of H. S. and M. D. real estate was conveyed to trustees upon trust for the benefit of H. S. for life, and after his decease for M. D. for life, and after the decease of the survivor, for such one or more of the children of the marriage as H. S. and M. D. should jointly appoint; and in case of the death of H. S. in the lifetime of M. D. before any such appointment should be made, as M. D. should appoint. H. S. and M. D. exercised the joint power of appointment to two-fourths of the estate, and H. S. died, leaving M. D. surviving. M. D. afterwards appointed the remaining two-fourths. The Vice-Chancellor held, that the latter appointments made by M. D. were valid.

In *Lock v. De Burgh*, 17 Law T. 302, a point worthy of note as regards apportionment was settled. By indentures dated in 1828, lands were settled to the use of A. B. for life, with a power of leasing. After the passing of the 3 & 4 Wm. 4, c. 22, A. B. granted certain leases, and he died in 1847. On question raised, the Court held, that A. B.'s personal representatives were entitled to a proportion of the rents between the last periods of payment and his death.

### COUNTY COURTS.

#### Summary.

A CASE which may be serviceable as a precedent of insolvency in the County Court was reported in our last, *Re William Mingage*, 17 Law T. 238. The insolvent was a post-captain on half-pay. Upon his refusal to go before

the commissioner for a hearing, the Court, nevertheless, granted an application to set apart a portion of his half-pay for the benefit of creditors pursuant to the provisions of 1 & 2 Vict. c. 110, s. 56. And in another case, *Re Richard Tolson*, 17 Law T. 303, upon the refusal of the insolvent (who was a major in the army, and had been in prison twelve years on detainers amounting to only 245*l.*) to file a schedule, upon the presentation of a creditor's petition, the Court, notwithstanding, proceeded to set aside a portion of his half-pay for the benefit of his creditors.

### SUPERIOR COURTS OF COMMON LAW.

#### FIRST REPORT.

(Continued from page 240.)

#### JUDGMENT AFTER VERDICT AND EXECUTION.

In general, judgment cannot be signed, nor consequently execution be had, till four days after the return of the jury process, which must be returnable in Term; so that if a cause be tried on the 13th of June (when Trinity Term ends on the 12th), the plaintiff cannot, as a matter of right, have execution till the 6th of November; though, had it been tried two days sooner, he might have had execution on the 17th of June. To this rule, however, an exception has been introduced by a modern statute, namely, that the judge who tries the cause may allow execution to issue at such time as he thinks fit. The practice herein is different with different judges; many judges seem to think it necessary that there should be a special ground for allowing speedy execution; most refuse it in a suit which is really contested: some grant it wherever the law is clearly with the plaintiff, however hard the case, holding that speedy execution is a right consequent on the plaintiff's establishing his title to recover; others refuse it where more than five per cent. interest has been taken; and others delay it for several weeks, for various reasons. We think these differences in practice objectionable, and we are struck by the inconsistency that a plaintiff whose cause is tried in Term can obtain judgment and issue execution in a few days as a matter of course; whereas, if the cause be tried out of Term, he is compelled to wait until the fifth day of the ensuing Term, which may be four months. We propose to establish a uniformity of practice in cases tried out of Term, by a general rule that execution shall follow in a certain time after verdict. We have named fourteen days. As, however, cases may occur in which, from the circumstances, this period ought to be further abridged, as where there is danger that a party may abscond or make away with his property, and others in which it ought to be prolonged, as where the judge entertains substantial doubt whether the verdict will stand, we propose that the judge shall have power to order execution to issue at an earlier period, or to stay it until such other period as he shall think proper.

We think, also, that a good result would follow from the adoption of this recommendation, in the diminution of motions for new trials, many of which are now made for the purpose of delay only.

We next propose that an alteration be made, which ought to have been effected long since, viz. the abolition of the ground writs.

A great number of the more important, and the immense majority of undefended actions on bonds, mortgages, bills of exchange, and promissory notes are tried in London or at Westminster, although the defendants may live and have property which is liable to be taken in execution out of London or Middlesex; and if the venue be laid in London or Middlesex a writ of execution against either the person or goods of the defendant must first issue into London or Middlesex directed to the sheriffs, and this writ must be returned with a statement that the defendant cannot be found, or that the goods can be found, before a similar writ can regularly issue into any other county. This is the theory, but in practice the writ into any other county issues at once, and if the defendant should complain of the irregularity, leave is given, generally as of course, to issue and return the ground writ, making the dates suit the technical rule. Sometimes, however, as for instance where bankruptcy has intervened, and the assignees have acquired an interest, this leave cannot be given, and much expense and vexation ensue.

We have also to advert to a grievance which exists respecting writs of execution and other writs issued from the Superior Courts of Law at Westminster to be executed in the counties palatine: such writs cannot at present regularly be directed to the sheriff of the county, but must proceed, in the first instance, to the Chancellor, who then directs the sheriff. This occasions delay and expense, and is much and justly complained of. We propose that all such writs shall be issued to the sheriffs of the counties palatine in the same manner as to other sheriffs.

With respect to the expenses of execution, at present

plaintiffs are entitled, on certain executions, to levy the expenses besides the amount of the judgment. We see no reason why there should be any distinction made in this respect between plaintiffs and defendants, or between one sort of execution and another. We propose that all execution creditors, whether plaintiffs or defendants, shall, under every kind of execution, be entitled to levy expenses.

At present, writs of execution remain in force until executed, and great mischief follows therefrom in several ways. A writ is operative from the time at which it is lodged with the sheriff. A sheriff, if he acts under a subsequent writ against the goods of the debtor, and not under the first writ, is liable to the earlier creditor; if under a writ to take the debtor's body issued to-day he takes him, and upon satisfaction of the debt inadvertently lets him go, he is liable to a creditor on a writ lodged ten years before, and of which nothing has been heard in the interim. Now, in Middlesex and some other counties, the number of writs issued is very large. The sheriffs, for their own safety, take great care, and keep books in which all writs are entered. When they have to execute a writ their first care is to see if there is any other writ against the same person. There may be many on which the claims have been satisfied, and no notice given to the sheriff; this has to be ascertained, in each case, to the great trouble and inconvenience of the sheriff, and the delay of the creditor, and frequently to the great hardship of the debtor, who could get rid of the operative execution at once by satisfying it. And where the debtor's name is a common one the mischief is much increased, as he may be any one of the persons of the same name. This is not all. A creditor may have lodged the writ years ago and taken no further trouble, and some other creditor, more alert, finds out the debtor's goods and lodges his writ with the sheriff, telling him where the goods are to be found; the first creditor reaps the benefit. Again, a claim may be satisfied, and the evidence of the transaction be lost; the writ remains apparently unexecuted, and the debtor is made to pay again.

The only remedy for these evils is to limit the duration of the writs, and a year seems a reasonable time. As, however, this might operate unfairly on a person entitled to priority, we have suggested a mode by which a writ may be renewed, without being taken from the sheriff's hands.

We recommend also that the attorney in the cause shall have authority to discharge the opposite party out of execution upon a *capias ad satisfaciendum*, unless the client give notice to the contrary to the sheriff or person in whose custody the party may be. This is to meet a case of frequent occurrence. The duty of the sheriff under a writ of execution against a debtor's body is to take him. He cannot let him go on any terms; nor can the attorney for the creditor, unless the debt is paid to him. It follows that the sheriff is never safe in setting a debtor at liberty on any authority except that of the creditor himself, who may be abroad, but may have left authority to his attorney to act for him, and the attorney may have arranged with the debtor beneficially for all parties. In such a case the debtor must be kept in prison, unless the sheriff will trust to the honour of the parties concerned. We propose to remedy this; but as a discharge by the creditor's authority from custody on a writ of execution is a satisfaction of the debt, we think the authority should only be binding so far as the sheriff is concerned, leaving it to the parties to contest the right of the attorney to give the discharge.

We propose that the present mode of charging in execution a party already in the prison of the Court should be altered. It is now effected by issuing a writ of *habeas corpus ad satisfaciendum*, under which the prisoner is brought into court or before a judge. The expense amounts to more than 7*l.* which is entirely lost. The alteration we propose is, that this should be effected by order of a judge, on the affidavit of the party that the judgment has been signed and not satisfied, and that the service of such order on the keeper of the prison should have the effect of a detainer.

#### SCIRE FACIAS.

In case a writ of execution be not issued within a year and a day after the judgment is obtained, the judgment is presumed to have been satisfied, and it becomes necessary to revive it, which is done by a writ called a *scire facias quare executionem non*, directed to the sheriff of the county in which the venue in the action is laid, commanding him to make known to the defendant that he appear and shew cause why execution should not issue; notice is given to the defendant, either by summons from the sheriff, if the defendant be resident in his county, or by notice from the plaintiff, if he be resident elsewhere. Upon the return of the writ, if the defendant appears, proceedings similar to those in ordinary actions take place, for the purpose of determining whether or not the defendant remains liable upon the judgment; if the defendant do not appear, judgment may be signed, upon its being established that the defendant

has been summoned or had notice, or that proper exertions have been used for that purpose. The same proceeding must be resorted to where between judgment and execution there has been a change by death or otherwise of the parties by or against whom execution is to be issued.

It has been suggested that this proceeding may be dispensed with, and a more speedy mode of obtaining execution upon judgments substituted by application to the Court or a judge, as in the case of executions under the Joint Stock Companies Act, 7 & 8 Vict. c. 110, s. 68. It cannot be denied that the present is a tedious form of procedure, and that it must be resorted to in many cases where the fact to be established is of so simple a character that it might well be adjudged upon without the expense and delay of a regular action, which the proceeding by *scire facias* is. The objection to the proceeding is, that the writ is directed to the sheriff of the county in which the venue in the action was laid, instead of to the party whose appearance is required, and this whether the party be actually resident in such county or not, and though the sheriff has really nothing to do with the execution of the writ; a course the bare statement of which is sufficient to condemn it. Another and more serious objection is the delay which arises in consequence of the necessity that the writ should bear teste and be returnable in Term time; so that, for instance, if a judgment-creditor were to die on the 16th of June, his representative would not be able to compel the judgment-debtor to answer a *scire facias* to revive the judgment before the following month of November, although the only fact to be established to entitle such representative to execution should be probate of the will or letters of administration of the effect of the deceased, documents the validity of which is exclusively within the jurisdiction of the Ecclesiastical Courts, and which prove themselves by mere production at a trial in any other court. It is true that the personal representative of the judgment-creditor might in the case supposed bring an action of debt upon the judgment, and proceed therein with the same rapidity as in ordinary actions; but it is no answer to the complaint, which we consider well founded, against the proceeding by *scire facias*, that there is another mode of proceeding less open to objection; and there are many cases in which in our opinion a summary proceeding more speedy than an action might be allowed to a judgment-creditor or his representative. Such are most of the cases in which by reason of the lapse of the prescribed time without issuing execution, or of the death of parties, a revival of the judgment is at present necessary.

We do not, however, propose the abolition of the writ of *scire facias quare executionem non altogeter*; because, although in many cases the effect of that writ may be obtained by an action of debt upon the judgment, there are others in which the proceeding by *scire facias* is more beneficial, where it is sought either during the judgment-debtor's lifetime, or after his death as against his heir and terre-tenants, to extend freehold land of which he was seised at the date of the judgment, an object which could not be effected in an ordinary action upon the judgment.

The writ of *scire facias* for this purpose during the lifetime of the judgment debtor is in the ordinary form, and that must be retained, or some other proceeding having the same effect substituted. We think that the form of the present process, besides being less open to error and misapprehension in practice than a mode entirely new, will, with the improvements which we are about to suggest, be practically unobjectionable.

We propose that during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without revival of the judgment. The present limitation of a year and a day is not in our opinion founded on good reason. Many states of circumstances may be conceived in which by reason of the absence or poverty of the debtor it would be a waste of expense for the execution creditor to issue execution within a year and a day after the judgment; and we recommend that, by analogy to the statute of limitations in the case of simple contract debts, six years should be the period within which the execution may issue upon a judgment without revival.

In cases where it becomes necessary, by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, we propose that the party alleging himself to be entitled to execution should be allowed, either as at present, to resort to a *scire facias*, or to apply to the Court or a judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the Court that he is entitled to execution of the judgment, and to issue execution thereupon, such leave to be granted by the Court or a judge upon rule to show cause, or summons, to be served as at present, or in such other manner as may be directed by such Court or judge; and that upon such application, in

case it manifestly appears that the party making the same is entitled to execution, the Court or judge shall allow such suggestion to be entered, and execution to issue, and order whether or not the costs of the application shall be paid to the applicant, and in case it does not manifestly so appear, shall discharge the rule, or dismiss the summons, with or without costs; and that the party applying shall in such case, nevertheless, be at liberty to proceed by *scire facias* or action upon the judgment.

We further propose that the writ of *scire facias* should be directed to the party called upon to shew cause why execution should not be awarded; that it should bear teste on the day of its issuing, and should call upon the party to whom it is directed to appear within eight days in the Court out of which it issues, to shew cause, &c.; and that it should be served in any county, and otherwise proceeded upon in the same manner as a writ of summons in an ordinary action.

The name of *scire facias* will, strictly speaking, be inapplicable to the altered form of process, which will not contain the words from which that name was taken; but probably the writ will still be called by the same name; or, if that be considered objectionable, it may be called a writ of revivor.

Forms of the rule or summons, suggestion, and writ of *scire facias* or revivor, will be given in the Appendix.

#### OBJECTION AFTER VERDICT FOR DEFECT APPARENT ON THE PLEADINGS.

We have now traced the steps of the cause where it proceeds in the ordinary course to execution, and we proceed to consider those cases where, in consequence of some defect in point of law apparent upon the face of the pleadings, the effect of the verdict is defeated by a rule to arrest the judgment, or for judgment *non obstante veredicto*, or by a writ of error. In our observations on the subject of pleading we have pointed out as one of the objections taken against the existing practice, that a party observing a defect in his adversary's statement may, instead of pointing it out, proceed to trial on the facts, and, being defeated on the trial, may nevertheless afterwards raise the objection in point of law, by the proceedings to which we have above referred.

#### ARREST OF JUDGMENT, JUDGMENT NON OBSTANTE VEREDICTO, AND ERROR.

According to the general principle of pleading, every person suing another, or defending himself, must state a legal cause of action or ground of defence. It is obvious that in every system of jurisprudence the adversary must be entitled to question two things; the truth of the statement in point of fact, and its sufficiency in point of law. No man should be bound to admit the legal sufficiency of a claim, or its truth, when he contends that neither exists. By the English law he can now deny both, but under this disadvantage, that he cannot as a right first take the opinion of the Court as to the sufficiency of the claim or defence in point of law, and then contest the facts. If he demurs, he cannot insist as of right upon the truth of the facts being tried, if the judgment on the law be against him; but a party may of right deny the truth of his adversary's statement, and should its truth be established he may by motion in arrest of judgment, or for judgment *non obstante veredicto*, or by writ of error, question its legal sufficiency as a claim or defence. Upon this general statement such a right seems reasonable and proper; but there is no doubt that mischievous consequences follow from it. For instance, through inadvertence a party omits a material averment in a declaration, as, e. g. in an action against the drawer of a bill of exchange the averment of the notice of dishonour. The defendant observes the omission, but keeps his objection secret, and pleads over, as it is called, traversing the other averments of the declaration. The cause is tried, and a verdict found for the plaintiff, and the defendant then takes his objection by motion in arrest of judgment. The objection when taken at that stage is fatal, because no amendment is allowed after trial; whereas if the defect had been pointed out at an earlier period, the omitted fact, if capable of proof, might have been supplied by amendment, and if it were not capable of proof the costs of the trial might have been saved.

But this is not the greatest evil. A plaintiff may have apparently passed the ordeal of all objections to his pleading, and arrived at issue; he may have obtained a verdict on the merits, and have successfully opposed an application for a new trial which has delayed his judgment for a considerable period; when on the eve of issuing execution he may be met by a writ of error on a point which might have been raised on demurrer, or on motion in arrest of judgment, and which, although possibly a sound objection in point of law, would, if raised before, have been amended as a matter of course. This certainly is a great scandal, and demands reform.

We consider it would be improper to abolish entirely the motions in arrest of judgment, and for judgment *non obstante veredicto*. One reason for retaining them is, that it is a fundamental principle

of the law, and we think a sound one, that the statement of facts on the record would shew a good cause of action or a good ground of defence.

The former commissioners entered very fully into this subject. Their recommendations were in effect to preserve the present practice of moving in arrest of judgment and for judgment *non obstante veredicto*; but that in all such cases the motion should "be allowed only upon terms of paying all the costs, including those of trial incurred since the pleading to which the party takes exception; the previous costs and the costs of the motion to depend on the result of such motion." (a) They also suggested this very important alteration, that no error in law should be assigned, except upon a judgment actually given either on demurrer, or special verdict, or motion in arrest of judgment, or to set the judgment aside, or for judgment *non obstante veredicto*: but this regulation was not to apply to cases where bills of exceptions were tendered. One of the principal objects of those recommendations was no doubt to meet the evil arising in such a case as that which we have last stated, namely, of a party lying by until after judgment before taking any objection to the pleading, and also to do away with the anomaly of bringing a writ of error upon a judgment which in fact had not been actually pronounced by the Court.

We entirely concur in the view taken by the former commissioners. We propose, that the practice recommended by them should be in substance adopted, with some additional provisions for aiding defective pleadings by an extensive power of amendment, and a power of suggesting facts on the record and ascertaining the truth thereof, which we consider will, after a cause has been tried on its merits, effectually prevent a failure of justice.

We therefore propose, that a party may, after the trial of an issue in fact, or judgment by default, move in arrest of judgment or for judgment *non obstante veredicto*, or, where there has been no opportunity of so doing, move on the like grounds to set aside the judgment, but that no such motion shall be allowed except upon the terms of payment by the party moving of all the costs occasioned by the trial of the issue or other proceeding arising out of the defective pleading, and that the Court shall make all such amendments as appear, either by the judge's notes of the trial or other satisfactory proof, to be justified by the facts of the case. And that upon such motion, founded on the non-avertment of some alleged material fact or facts, or material allegation, the party whose pleading is said or adjudged to be defective shall be at liberty to shew that such facts were proved or admitted at the trial; or, may be allowed by the Court to suggest the truth of the omitted fact or facts. That such suggestion, if denied by the opposite party, shall be tried, and if it be found to be true the party suggesting shall be entitled to such judgment and costs as he would have been entitled to if the omitted fact or facts had been originally stated in the pleading, together with the costs of and occasioned by the suggestion; if it be not found to be so, the opposite party of course will be entitled to the latter costs. We think it right to add, that the principle of our proposal in this recommendation is not novel. The principle of permitting the omitted fact to be suggested is sanctioned by the statute 21 Jac. 1, c. 13, s. 2.

We propose that no error shall be assigned, except on a judgment of the Court actually given either on demurrer or motion to arrest or set aside the verdict, or for judgment *non obstante veredicto*, as we are of opinion that ample time and opportunity are afforded to a party to object to his adversary's pleading, by demurrer or motion in arrest of judgment, or judgment *non obstante veredicto*. If either by inadvertence or design he allows these opportunities to pass by he ought not to be allowed to delay the successful party and add to the expense of the suit by resorting to a Court of Error. It is hardly necessary to point out that this regulation ought not to extend to the case of error on bills of exceptions.

#### PROCEEDINGS IN ERROR.

We think very considerable improvement may be effected in the proceedings in error.

At present, error is brought by a writ issued out of the Court of Chancery, which is in the nature of a new proceeding. We think it ought to be a step in the cause. The writ of error is in one unvarying form; so also are the assignment of error in law and joinder in error. They may, therefore, be dispensed with. We propose that the party alleging error in law shall deliver to the Master a memorandum alleging error; that the Master shall deliver to him a note of its receipt; and he shall serve the same on his adversary, with a statement of some substantial ground of error intended to be argued; the service of which note shall have the same effect as the service of the notice of allowance of the writ of error now has.

As to error in fact, which is a proceeding to defeat the effect of the judgment on the ground of some error in fact not appearing on the record; for instance, because the unsuccessful party was an infant

(a) Third Report, p. 28.

who appeared by attorney, or a married woman who was sued without her husband, or that a person against whom judgment of outlawry has been pronounced was abroad at the time when the exigent was issued, the same mode of instituting the proceedings should be adopted; but the errors in fact must be assigned and pleaded to, as at present.

The proceeding by way of error in fact being sometimes resorted to for the purpose of delay, we think that the party resorting to it should in all cases verify the alleged fact by affidavit, in like manner as pleas in abatement are now required to be verified.

We think the transcript of the roll now required quite unnecessary, and that it will be sufficient to cause a memorandum of error being alleged to be made on the roll, which should be brought into the Court of Ex. Ch. when the case is to be argued, and be the warrant for the jurisdiction of the Court of Error.

The substance of the present practice will be thus retained, while the proceedings will be simplified and cheapened.

We think the time for bringing error may be materially shortened. Six years would be amply sufficient; at present it is twenty years. This, although formerly, for reasons which no longer exist, not unreasonable, has now manifestly become so. It is not now necessary to treat error otherwise than as a step in the cause.

We further propose that every Court of Error shall have power to give such judgment and award such process as the Court below ought to have done, without regard to which party alleges error. This will get rid of a defect now existing, viz. that in some cases a Court of Error can only reverse the judgment of the Court below, and not give the right judgment. It ought to have power to do so where the materials are present before it.

(To be continued.)

## THE LAWYER.

### Summary.

**EQUITY PRACTICE.**—A rule of practice was acted on in the case of *Wright v. Woodham*, 17 Law T. 293, which is not generally understood as existing, and is therefore worthy of note. That was a motion for leave to set down for hearing a special case. In support it was stated that all parties *sui juris* consented, and that the guardian to an infant party duly appointed according to the form of stat. 13 & 14 Vict. c. 35, also consented. Vice-Chancellor TURNER, however, held, that though the parties may appear by the same solicitor, the interests of the infant must be protected by separate counsel. A case in which costs of appointment of a receiver were, under the circumstances, ordered to be paid out of fund in court, is *Anderson v. Guichard*, 17 Law T. 293. There a claim was filed for the appointment of a receiver, there being two wills of the testator, one made in England and the other abroad, and the right to probate being in dispute before the Ecclesiastical Court. The Vice-Chancellor, at the hearing, ordered the costs to be taxed and paid out of the fund in court, the receiver to be continued. Worthy of note, also, is a case in the Court of Chancery, Ireland—*Murphy v. Keller*, 17 Law T. 297, the point of which may be thus stated: If a submission to arbitration be made a rule of Court, under the provisions of the 9 & 10 Wm. 3, c. 15, the court where the rule is made is the proper place to apply to set aside the award, if it be obtained by partiality or corruption. But, if the award be on the face of it a nullity, the Court will treat it as if no award had been made; and on a bill or petition (13 & 14 Vict. c. 89, Ir.) to take the partnership accounts, will exercise its jurisdiction, notwithstanding that the submission has been made a rule of a Court of Law, and will direct a reference to take the accounts accordingly.

### Queries.

SIR,—In "Noy's Maxims," Bythewood's, 9th edition, 1821, p. 148, speaking "of sealing" (deeds), is the following passage:—"And if it were sufficiently sealed, yet if the print of the seal be utterly defaced, the deed is insufficient; it is not my deed." There is no authority for this, and the editor does not make any remark on the passage. Will any of your correspondents let me know how far this would be law

at this period? It is well known that in a few years if the deeds have been much handled, the wax becomes quite smooth, and the impression worn off. Sept. 17, 1851. A. C. S.

## THE MERCANTILE LAWYER.

### Summary.

A *Nisi Prius* case, interesting to common carriers and railway companies, was tried before JERVIS, C.J. at the sittings at Westminster after last Term. *Marshall v. The York, Newcastle, and Berwick Railway Company*, 17 Law T. 304. That was a case in which a nobleman travelling on a railway with his servants, paid the fare and expenses for himself and servants, with their luggage. During the journey a portmanteau belonging to one of the servants was lost. The Court was of opinion that as the contract had been made with the master, and not with the servant, the latter could not maintain an action to recover the value of the lost goods. In *Ex parte Hollingworth*, 17 Law T. 303, a question arose as to the right of a bankrupt in respect of his certificate. The case and question were these:—A trader became a bankrupt in 1833, his estate paying 3s. 6d. in the pound. In 1835 he made a composition with his creditors. In 1846 he made another composition with them, paying 5s. in the pound. In June, 1849, he placed in his solicitor's hands a declaration of insolvency, and subsequently incurred several debts. In June, 1850, he again became a bankrupt. The commissioner refused him his certificate. On appeal the Vice-Chancellor held that the bankrupt was not entitled to be placed in a more favourable position as regards his certificate than he would have been under the 6 Geo. 4, c. 16, s. 127. His Honour thought that justice would be done by imposing a delay of three months before granting the certificate. The certificate to be then granted would only be of the second class, and merely protect the bankrupt's person from arrest. The case of *Ex parte Bird, re Bourne*, 17 Law T. 303, may be referred to as a case in which the appeal judge in bankruptcy, on a certain state of facts, thought proof of a debt had been wrongly admitted, but it decides, in fact, nothing material, the matter being referred back to the commissioner, with liberty to take from either side additional evidence.

## CORRESPONDENCE.

### AYCKBOURN'S CHANCERY PRACTICE.

TO THE EDITOR OF THE LAW TIMES.

SIR,—I have observed in the LAW TIMES frequent recommendations of this work, but it appears to me that its value is much diminished, because the third and last edition does not contain either Mr. Turner's Chancery Act or the General Orders in Chancery of the 22nd April, 1850, neither does it contain other recent Chancery Orders. I should state that I am now speaking from the following dates. From an advertisement it appears that the third edition of Ayckbourn's Practice was published in October, 1849; Mr. Turner's Act was passed on the 15th July, 1850, and the General Orders I have mentioned were issued on the 22nd April, 1850.

Ayckbourn's is no doubt a good work, but to sustain its previous reputation I think the editor should publish another edition, as Chancery Practice has been much changed since the last edition was published.

It is, perhaps, due to your readers to be made acquainted with the above facts, since the work has been often recommended in your columns.

Yours, &c.

J. L.

Sept. 12, 1851.

### TRANSFER OF A CHOSE IN ACTION.

TO THE EDITOR OF THE LAW TIMES.

SIR,—There is one point in law reform which appears to me deserving of attention, but hitherto overlooked, namely, the refusal of the law to recognise the transfer of a "chose in action," so as to invest the transferee with the power to sue in his own name, instead of that of the transferor. At the best it is but a round-about mode of procedure,

were there no other inconvenience attending this course, but there is this further disadvantage in case of there being also an original debt, to the transferee, that he is compelled to bring two actions separately, instead of being allowed to combine the two into one. The case which has more especially directed my attention to the subject, is the assignment to a sub-lessee of the rent which had accrued due before the sale. Why not in case of rent accruing due subsequently to the assignment, allow the transferee to sue for both causes of action at the same time, instead of putting him to the trouble and expense of bringing an action in the name of one who is no party to, or at least has no interest in the suit.

Confining this permission to join more than one cause of action within the same limits which are now assigned, I cannot see that any injury would arise from the abolition of a rule which, however reasonable it may appear in theory, works no good, and confers no benefit in practice.

It may be that this is a point which you deem of no importance, as one that you have previously touched upon; in either case my ignorance must be my sufficient excuse for troubling you with these remarks.

I am, sir, yours, &c.

C. W. C.

## LEGAL INTELLIGENCE.

### THE PUBLIC RECORDS.

WE are about to turn over a new leaf. The Master of the Rolls has given an answer to the memorial presented to him by Lord Mahon and various literary men, praying for the admission of historical writers to the free use of the records. It is an extremely important answer. It is not a pert answer, as too many official answers are, coming out as if from the hose of a fire-engine, and overwhelming the recipient with astonishment. It is not a soft answer, trickling forth slimly, as if it were honey, or after the fashion of what Burnet terms Peas's "luscious way" of talking. It is not a cold answer, freezing you up, gratitude and all, and rendering it impossible for you to say out heartily, "thank you," like a man. Nor is it a formal answer like a clerk's "Amen," or an echo, or an address in answer to a Queen's speech, or a child's cuckoo-toy, or anything else that is merely mechanical and meaningless. It is none of these. It is substantially a kind answer. It reads as if the Master of the Rolls, if he had not been Master of the Rolls, would have signed the memorial, and have become a petitioner himself. He seems to shake hands with the memorialists all round, saying all the time, "I quite agree with you." A few difficulties are interjected. That is of course. They tell us of the necessity of watching the dear tender old parchments, and how friable they are, and how difficult to match in forms and sizes, and how anxious the keepers are to impress them with an office-stamp, though, after working hard for twelve years past, they have not been able to do so as yet. All this comes of course. The best of public officers are but public officers after all. But the beginning and the end of the answer, which contain the *gist* of the matter, the plain English of it, are most satisfactory.

"After consulting with Sir Francis Palgrave, and carefully considering your memorial, with an anxious desire of meeting your wishes as far as practicable, consistently with the proper protection of the records under the existing circumstances of the Record establishment, I propose to comply with your request to some extent at once, with a view to the ultimate compliance with it entirely, if the measure with which I propose to commence shall be found to work satisfactorily. For the present, therefore, I will assent to the following regulation. I will authorise Sir Francis Palgrave, the Deputy-Keeper of Records, to grant any literary inquirer permission to search for, examine, and inspect, and to make notes, extracts, or copies in pencil, without payment of fees, of all such calendars or indexes of records and all record papers and documents, or classes thereof, as in his judgment can properly be opened gratis to the literary inquirer, on his, the inquirer, explaining to the satisfaction of Sir Francis Palgrave that the application is for a *bona fide* literary purpose, upon his doing which an explanation will be given to the applicant of the extent and nature of the assistance which the officers of the establishment can render, and Sir Francis Palgrave will give the necessary directions to the assistant-keepers accordingly."

And then, after some sentences enumerating what are officially termed "difficulties," Sir John Roskill concludes thus:—

"I have stated these matters to explain why, with regret, I feel that it is not possible at present to do more than make the limited compliance with your request I have above stated; when, however, the new Record buildings shall be sufficiently completed, these regulations shall be reconsidered with



a view to granting every possible facility and encouragement to literary inquirers, and I shall direct Sir Francis Palgrave and the assistant-keepers to construe the permission I propose to grant as liberally as they possibly can consistently with their duty."

We think this an honest, satisfactory answer. It admits the principle. It promises reconsideration and more complete compliance hereafter. And the condition imposed is one which no literary man need scruple to comply with.

The remission of fees, be it remembered, is made to literature—not generally, not to law, not to professional agents of any kind, but to literature alone. In order to establish a right to take advantage of the remission, literature must be proved. The indicated mode of proof is, in our judgment, one of the easiest and most satisfactory that could have been devised. Sir Francis Palgrave is not only a competent judge in subjects of literature, but a public officer responsible for his decisions in record matters to the Master of the Rolls himself.

We congratulate the memorialists on what they have attained, and join with them in opinion that the Master of the Rolls is entitled "to the gratitude of all men of letters." He has set an admirable example in the careful pains-taking consideration which he has evidently bestowed upon the subject. Literature is not accustomed in this country to receive such treatment at official hands.

There is another point of view in which this matter is most important. The concession throws a vast amount of new responsibility upon literary men. Henceforth the guess-work, the mere romance-writing, which we have been too long accustomed to suppose to be history, will be without excuse. Writers who neglect to take advantage of record evidence on all subjects to which it is applicable, will lay themselves open to the sharpest and justest, critical censure. Our history may now be put upon the strong foundation, not of borrowed evidence, but of the records themselves. If literary men neglect this opportunity, the Government will be no longer to blame. The Master of the Rolls has cleared his conscience, and that of the State. But we have no fear that such will be the result. Wise and liberal concession, like that of the Master of the Rolls, must tell with honourable effect both upon our literary men and upon our national character.—*Examiner*.

**EXTENSIVE FORGERIES BY A SOLICITOR IN MANCHESTER.**—A rumour having become prevalent in this town, during the last few days, that there was reason for believing that forgeries to a serious amount had some time since been committed by a respectable solicitor since deceased, we have made inquiries respecting the matter, and regret to state that the rumour is correct. A few months ago, we recorded the decease of Mr. Henry Edward Ridgway, solicitor, Norfolk-street, a gentleman of long and extensive practice, highly respected, and in whom great confidence has evidently been reposed by his numerous clients. Events have transpired within the last ten days which have led to the belief (legal proof has not yet been produced) that he had, for about two years prior to his death, availed himself of the circumstance of the deeds of his clients being left in his safe and possession for security from fire, &c., and employed those deeds as a means of realising money. We are informed that it is now ascertained, that he had forged mortgage deeds for various sums, and, unknown of course to his principals, had handed over their documents, which had for years been left in his custody. Having received the money on the mortgages thus effected, he paid the interest himself; consequently, during his lifetime the fraud was not discovered. The interest in one case recently falling due, and not being paid as heretofore, the principal was applied to, and he, surprised of course at the application, denied that he had ever effected such a mortgage, or was at all cognisant of it,—the signature of the mortgage deed was forged. Other discoveries have been made; and it is feared there are some still undiscovered. Already the sums thus obtained on mortgage are believed to exceed 10,000*l.*, which must entail a serious loss to the parties who have advanced the money. Legal proof of the forgeries, of course, has yet to be adduced.—*Manchester Examiner*.

**SALE OF THE OLD HOUSE OF COMMONS.**—On Wednesday the sale of the materials of this edifice was commenced. The *Globe* of the same day says:—"The materials of the old House of Commons have this day been put up to auction. The seats on which Canning, Copley, Brougham, Peel, Russell, Stanley, and Graham—the seats upon which sat all these distinguished men, have this day been exposed for sale to builders as old rubbish. Who could have supposed that in so short a period of time the seat from which one statesman enunciated his toleration Act of 1829, and his free-trade measure of a later period; from which Lord John Russell fomented the great principles of reform, which he so successfully carried into practical operation; and Palmerston spoke the language, not of the

cabinet alone, but of the country, with respect to our foreign relations, should be consigned to the hammer of Messrs. Eversfield and Horne? The Speaker's chair has been removed; the auctioneers have taken the place of the sergeant-at-arms; and Mr. Richardson, in a green baize seat, has taken possession of the seat of the clerk of the house; while speculative builders and eager jobbers in old materials occupy the seats of the members. A little before twelve o'clock the sale commenced. The attendance was not so numerous as had been anticipated. A considerable time before the beginning of the sale, several tradesmen connected with the building trade visited the house and examined the lots marked out for sale. As the hour for commencing business approached, the crowd increased; but the attendance evidently disappointed the expectations of the auctioneers. In front of the premises to be sold a hoarding is in course of construction, which will be left up until the old materials are removed, when it is to be raised to a greater height, for the purpose of preventing the public from interfering with or delaying the workmen who are to execute the screen which is to cover in the new House of Lords.

**THE GOVERNMENT DUTY ON RAILWAYS.**—A Bill is to be brought into Parliament early next session, which has for its object the abolition or modification of the present very oppressive passenger-tax levied on railways. Many companies which at present pay no dividend, and indeed should they ever be so successful, are not likely for many years to come, are obliged to pay large sums annually for passengers duty to the Government, which the shareholders naturally consider a great hardship, and as it can hardly be urged by any person in the House that a number of gentlemen are to invest their capital solely for the purpose of increasing the revenue of the country, there is very little doubt but that the Bill will pass.

#### CRIMINAL JUSTICE IN FRANCE.

THE *Moniteur* publishes a report from the Minister of Justice to the President of the Republic on the administration of criminal justice in 1849. The principal points of it are as follow:—The Courts of Assizes tried 4,910 criminal cases, being 278 more than in 1848, and 947 less than in 1847. The 4,910 cases consisted of 2,015 crimes against the person, and 2,895 against property. In no year previous were cases of the former class so numerous, of the latter so few. The number of accused in the 4,910 cases was 6,983, of whom 2,943 were concerned in crimes against the person, 4,040 in crimes against property. Among the 6,983 accused were 337 for political crimes, 238 for riot, 75 false swearing and subornation, 260 rapes, 478 criminal assaults on children, 19 parricides, 35 poisonings, 324 attempts at murder, 203 infanticides, 329 murders, 516 cutting and wounding, 120 other crimes against the person, 121 coining, 508 forgeries, 2,750 robberies, 143 highway robberies, 117 fraudulent bankruptcies, 239 arson, 59 pillage of properties, 103 other crimes against property. The crimes in which the greatest increase took place, compared to 1848 and 1847, were political, murder, infanticide, cutting and wounding, rapes, and especially criminal assaults on children. The 6,983 accused give for the total population 1 for every 5,070 inhabitants; in 1848 the proportion was 1 for every 4,815, and in 1847, 1 for every 4,007. The number of accused in proportion to the population varied in different departments, as did also the nature of the crimes; thus, in some departments, there was 1 accused for every 3,000 inhabitants; in others only 1 in 10,000; in some departments, from 61 to 95 out of every 100 accused were charged with crimes against the person; in others the number is only from 19 to 25 per cent. It was in Corsica that the greatest number of crimes against the person were committed. The number of women was as usual greater inferior to that of the men; out of the 6,983 accused only 1,064 were women. Out of 100 accused of crimes against the person, 87 were men, and 13 women; of crimes against property, 83 men, and 17 women. Crimes of which women were mostly guilty were infanticide and abortion. Of the 6,983 accused 56 were under 16 years of age; 1,039 aged from 16 to 21, 1,039 from 21 to 25, 1,086 from 25 to 30, 1,012 from 30 to 35, 833 from 35 to 40, 629 from 40 to 45, 508 from 45 to 50, 342 from 50 to 55, 169 from 55 to 60, 139 from 60 to 65, 86 from 65 to 70, 45 upwards of 70. In addition to the accused of less than 16, 350 of the same age were tried by the Tribunal of Correctional Police. Out of the 6,983 accused, 3,747 were unmarried. The professions of the accused were—2,681 agricultural labourers, &c., 1,479 artisans, 243 bakers, butchers, and millers, 418 tailors, hatters, and hairdressers, 446 tradesmen and clerks, 281 boatmen, carters, and commissionnaires, 131 inn, lodging-house, and coffee-house keepers, 452 domestic servants, 508 liberal professions, 344 vagabonds. The number of accused who could neither read nor write was 3,355; who could read and write imperfectly or read only, 2,304; who could

read and write well, 998; who possessed a certain education, 326. Of the total number of accused, 2,774 were acquitted, and the others were condemned—39 to death, 196 hard labour at the hulks for life, 835 hard labour at the hulks for different periods, 708 imprisonment with hard labour, 5 transportation, 2,394 imprisonment, 8 fine. In 1848 the condemnations amounted to 4,304. The juries admitted in their verdicts extenuating circumstances in about 70 cases out of 100. The number of cases submitted to the tribunals of Correctional Police was 164,057, and of accused, 216,744. In 1848 the cases were 159,756, and the accused 216,819. Of the 216,744 accused, 189,722 were condemned to different periods of imprisonment or to fines, 24,221 were acquitted, and the others being of tender years, were either given up to their friends or sent to the House of Correction. The High Court of Justice assembled twice in 1849, and tried 87 accused persons.

#### NOTICES OF NEW LAW BOOKS.

*The Law Magazine and Quarterly Review of Jurisprudence.* August, 1851. London: Butterworth.

AN unusually excellent and attractive number of this, the oldest of the *law quarterlies*, is the present. In addition to the usual "Short Notes of new Books," "Events of the Quarter," and "Notes on Leading Cases," we are presented with not fewer than nine articles of varying length and interest. The first devotes twenty pages to the great innovation,—"The Registration of Assurances Bill," which, though it was announced with all the prestige of a Royal recommendation in the speech from the Throne, nevertheless miscarried in its course through Parliament. The writer ably dissects the proposed Act, states the effect of the clauses, and points out several defects and inconsistencies; but on the whole he gives it his approval. He then ventures to anticipate its working, and suggests one or two points of improvement. Next follows a disquisition on "The Equitable Doctrine of Apportionment, or *Cy pres*," which evidences great research and no small degree of acumen in its writer. The second edition of Mr. May's very useful and complete book on Practice in Parliament is then noticed at very great length, and in terms of high approval. Then comes an article entitled "The New Law Statutes of the Session," which we expected would be a review of all the Acts interesting to the Profession which were matured during the past year. But the writer, under this general title, has limited his remarks to the 14 & 15 Vict. c. 11, "An Act for the Protection of Apprentices or Servants," &c.; and the 14 & 15 Vict. c. 19, "An Act for the better Prevention of Offences," &c. Article 5 is upon "The New Royal University Commission," which has created so violent an animosity against the Government in both our academical seats of learning, and has met with great opposition and some contempt at the hands of those who have been called to an account under it. The writer discusses the vexed question whether the Crown has authority to issue under the Great Seal or Sign Manual a commission of this description with manifest earnestness and ability. The conclusion he arrives at is that such a commission is illegal. "The Charitable Trusts Bill" is very satisfactorily handled in a review of some fourteen pages, which will well repay perusal. The inadequacy of the Bill for the better administration of justice in the Court of Chancery, and in the Judicial Committee of the Privy Council, is very clearly pointed out in a shrewdly written article; and the number concludes with a very minute and clever analysis of the suggestions of the commissioners for Law Reform, and the new rules framed by the County Court judges, and recently promulgated for regulating the practice in the courts constituted under the Small Debts Acts.

*A Practical Application of the Joint-Stock Companies Acts to the Registration and Government of Assurance Societies. A Guide to the Formation and Management of Friendly Societies, for Assurance, Investment, and Emigration, under the Act 13 & 14 Vict. c. 135.* By J. H. JAMES, Consulting Actuary. London, 1851. Simpkin, Marshall, and Co.

THE law of joint-stocks, as connected with our gigantic railway and other commercial companies, becomes every day more important, as well in a judicial as a popular view, and when taken in relation to assurance societies, to which the safe-keeping of millions of money, and the promotion of

Two leasehold houses, Calthorp-street, Gray's-inn-road.

**COLLINS, JOHN**, provision dealer, draper, and tea dealer  
Clitheroe, Lancashire, Oct. 1 and Nov. 11, at twelve

Sept. 10. Debts paid by Peirson.

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S.	Scotland.
I.	Ireland.
E. & I.	England and Ireland
G. B.	Great Britain.
G. B. and I.	Great Britain and Ireland.
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